Land & Water Law Review

Volume 10 | Issue 2 Article 4

1975

Changing Manner and Place of Use of Water Rights in Wyoming

Dan B. Riggs

CHANGING MANNER AND PLACE OF USE OF WATER RIGHTS IN WYOMING*

INTRODUCTION

The doctrine of prior appropriation finds its basis in the rule that the first user of water has the better right as against a person who initiates a new use. A water right, based on prior appropriation, is a usufructuary right which has been called an hereditament appurtenant to the land.[1] This right of use is a property right, entitled to protection to the same extent as other forms of property.[2] The question thus arises as to the extent and nature of this property right and concomitantly what uses will receive protection and what uses the law will disallow or condition. In this connection, the ability of one to change the manner of use, or place of use, of his water right comes into question. This article will examine the ability of water users in Wyoming to change the manner in which they use their water right as well as their ability to change the place in which they exercise their usufructuary right. The Legislature has recently enacted statutes bearing on rights to change place and manner of use. The effect of this legislation will be examined, beginning with a brief historical prespective of the recent legislation, and concluding with some comments on the scope of the legislation as well as problems that may arise with its application.

When considering the question of the ability of a water user to transfer his right to another as well as to effect a change in use or place of use, the fact that a water right is property, generally considered to be real property,[3] provides a partial answer—the appropriative right is a saleable price of property, which new users can buy from the prior owner.[4] Water rights, however, are not as freely alienable as are other forms of property, for in all western states there are

*This comment was Financed by the Water Resources Research Institute of the University of Wyoming.

1. Bear Lake & River Waterworks & Irr. Co. v. Ogden, 8 Utah 494, 33 P. 135 (1893).
2. W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 27 (1942).
3. *Id.* at 28.
4. Trelease & Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1 (1966).

some restrictions on transfers, most of which are designed to tie the water to the land.[5] Yet the ability of the owners of water rights to change the manner in which their usufructuary right is employed, and otherwise freely alienate their property rights, will dictate the type of economic growth and stability Wyoming and the West are destined to enjoy. Leading commentators have stated the problem as follows:

> If the West is to continue to gain and is to consolidate its past gains, its water law must allow and encourage water to be shifted to more efficient uses, and to be used more efficiently in present uses.[6]

This merely states the importance of the subject to be considered and emphasizes the need for a resolution of the problem in a manner which will allow individual decision-makers to employ their water rights for maximum benefit.

HISTORICAL PERSPECTIVE OF THE "NO-CHANGE" RULE AND ITS EXCEPTIONS

It has long been the general rule, in the absence of any legislative restriction to the contrary, that an appropriator may change the point of his diversion of water from the stream, or may change the place of use or even the purpose of his use of the water, so long as the rights of others are not impaired.[7] Other courts have said that "the right to sell [the water right] is as essential and sacred as the right to possess and use,"[8] and that the right to make a change in place of use is a vested right, an "incident of ownership."[9] The Wyoming Supreme Court long ago decided that a water right was appurtenant to the land on which it was used and could be conveyed by a mortgage of the land.[10] Shortly after the turn of the century, the Wyoming Supreme Court decided the case of *Johnston v. Little Horse Creek Irrigation Co.*,[11] approving the sale of part of an appropriator's right, saying:

5. *Id.* at 2.
6. *Id.* at 3.
7. W. HUTCHINS, *supra* note 2, at 378, *citing* Elgin v. Weatherstone, 123 Wash. 428, 212 P. 562 (1923).
8. City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151, 153 (1952).
9. Hallenbeck v. Granby Ditch & Reservoir Co., 420 P.2d 419 (Colo. 1966).
10. Frank v. Hicks, 4 Wyo. 502, 35 P. 475 (1894).
11. 13 Wyo. 208, 79 P. 22 (1904).

> The water in the stream is not his property, but his right to use that water, based upon his prior appropriation for beneficial purposes, is a property right, and, as such, is capable of transfer. The only limitation upon the right of sale of a water right separate from the land to which it was first applied, and to which it has become appurtenant, laid down by any of the authorities, is that it shall not injuriously affect the rights of other appropriators.[12]

That Mr. Justice Potter correctly stated the law in *Johnston* with reference to the sale and change of water rights can hardly be the subject of debate.[13] The continued application of these rules to Wyoming water rights was severely curtailed by the 1909 Legislature when it enacted a statute providing that, "Water rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority."[14] The statute was a radical departure from the common law and has been termed "a direct legislative reversal of the *Johnston* case."[15]

Thus since 1909 Wyoming has imposed a significant barrier to the shift of water uses as well as to changes in the place where the water right is exercised. The statutory barrier to shifts in uses dictated by matters of economy is now popularly called the "no-change" statute. The basic terms of the statute, the terms which present the most significant obstacle to movement of water rights with the economic forces, have not been significantly altered since they were placed on the statute books over 66 years ago. The statute now provides in pertinent part:

12. *Id.* at 227-28, 79 P. at 24.

13. *See* a discussion of Johnston v. Little Horse Creek Irrigation Co., 13 Wyo. 208, 79 P. 22 (1904), Trelease & Lee, *supra* note 4, at 7-10. The Wyoming Supreme Court has referred to the rules there announced on numerous occasions in the cases of Groo v. Sights, 22 Wyo. 19, 29, 134 P. 269, 272 (1913); Holt v. City of Cheyenne, 22 Wyo. 212, 232, 137 P. 876, 880 (1914); Ramsay v. Gottsche, 51 Wyo. 516, 530-31, 69 P.2d 535, 540 (1937); State v. Laramie Rivers Co., 59 Wyo. 9, 38-39, 136 P.2d 487, 496 (1943); Hunziker v. Knowlton, 78 Wyo. 241, 249-50, 322 P.2d 141, 144 (1958); White v. Wheatland Irrigation Dist., 413 P.2d 252, 259 (Wyo. 1966), as well as the United States District Court in Hughes v. Lincoln Land Co., 27 F. Supp. 972, 973 (D. Wyo. 1939).

14. Ch. 68, § 1 [1909] Wyo. Sess. Laws 112 (now WYO STAT. § 41-2 (1957)).

15. Trelease & Lee, *supra* note 4, at 10.

> Water rights for the direct use of the natural unstored flow of any stream cannot be detached from the lands, place or purpose for which they are acquired . . . .[16]

Perhaps the impetus for this legislative restriction on the transfer of water rights was the experience of other states. Professors Trelease and Lee tell us that Wyoming's first State Engineer, Elwood Mead, who had considerable experience with Colorado water appropriations, felt that appropriators exaggerated their needs for water and then were able to sell off part of their unneeded rights.[17] Mead explained what had occurred in Colorado, saying:

> In every instance investigated the real purpose has been to make money out of excess appropriations. The parties who have acquired surplus rights are unable to use the water themselves, and seek to sell it to someone who can. The primary object is not economy, although this sometimes results. The usual result is to take as much water away from one user as is supplied to another.[18]

Perhaps the legislators also anticipated a "Pandora's box" of problems in connection with the change in use or in place of use of water rights. Not feeling certain as to how the judiciary might handle these problems,[19] they may have reasoned that any difficulties could be avoided by tying water to the land. Some of the problems which do exist with a change in the use and place of use to which water is put were outlined by the National Water Commission:

> Since appropriation water rights are always acquired in connection with some specific place of use, whether the place be the land irrigated, the mining

16. WYO. STAT. § 41-2 (1957). The original statute stated, "Water rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority" ch. 68, § 1 [1909] Wyo. Sess. Laws 112. An amendment in 1941, ch. 25, § 1 [1941] Wyo. Sess. Laws 23, dropped the phrase "without loss of priority".

17. Trelease & Lee, *supra* note 4, at 9-10.

18. E. MEAD, IRRIGATION INSTITUTIONS 174 (1903).

19. The Wyoming court was presented with one significant case prior to the 1909 enactment. In 1904, the Wyoming Supreme Court in Johnston v. Little Horse Creek Irrigation Co., 13 Wyo. 208, 79 P. 22 (1904) approved the sale of one half of a ditch company's water right where after the sale no greater burden was put on the right.

> property being worked, or the site of an industrial facility, it is apparent that a change to a new place of use could alter streamflow patterns. The most common problem is one of return flow. Most water uses are only partially consumptive, so that water diverted for use but not consumed reaches the stream again and becomes part of the watercourse to satisfy downstream rights. If a change in place of use were to be made so that the new place of use would be outside the watershed, so that the prior return flow no longer would reach the stream, the place cannot be approved, unless the water for the new place of use is reduced by an amount appropriate to account for the return flow under the prior use.[20]

The problems mentioned above constitute major and frequently encountered difficulties with making a change, but as one might surmise they only expose a small portion of the plethora of problems one can expect to encounter.

Regardless of the reasons for the original enactment in 1909, the Legislature has seen fit to leave it alone for a good many years, notwithstanding the urging of commentators that the statute is antiquated and fails to adequately serve the needs of the state.[21] Although the legislative sessions of 1973 and 1974 did not expressly repeal the no-change provision,[22] both sessions enacted statutes which, at the very least, significantly altered the procedure for making a change when otherwise expressly allowed, and arguably repealed the original no-change statute.[23]

The rule embodied in the basic 1909 act[24] should probably be called the "no-change, except" rule because it does allow water rights to be detached from the place or purpose for

20. NATIONAL WATER COMMISSION, A SUMMARY-DIGEST OF STATE WATER LAWS 37 (1973).
21. Trelease & Lee, *supra* note 4, at 67 *et seq.*
22. WYO. STAT. § 41-2 (1957).
23. Ch. 170, § 1 [1973] Wyo. Sess. Laws 221 (now WYO. STAT. § 41-4.1 (Supp. 1973)) and ch. 23, § 1 [1974] Wyo. Sess. Laws 91 (now WYO. STAT. § 41-4.1 (Interim Supp. 1974)).
24. It should be noted that an amendment in 1941, (ch. 25, § 1 [1941] Wyo. Sess. Laws 23 (now WYO. STAT. § 41-2 (1957)), deleted the phrase "without loss of priority". This probably leaves the abandonent statutes (WYO. STAT. §§ 41-47.1, -47.2 (Supp. 1973)) and criminal penalties for unlawful use of water (WYO. STAT. §§ 41-64, -201 (1957)) as the sanctions for illegally changing place or manner of use of a water right.

which they were acquired as provided in Wyo. Stat. §§ 41-3, 41-4 and 41-213 (1957). The scope of the exceptions cannot be underestimated. That the exceptions to the rule are so numerous as to have nearly swallowed the basic rule was noted by Professors Trelease and Lee when they pointed out, "the Legislature has made so many inroads on this principle, and has engrafted so many exceptions to it, that it can scarcely be said that given the proper circumstances there is any water right that cannot be transferred in Wyoming today."[25] Indeed the authors explain in detail ten possible exceptions to the rule.[26]

The exceptions are many and range from changes to higher preferred uses to changes for recreational purposes. This list of exceptions begins in the same year that the basic statute was enacted. The Legislature which passed the 1909 statute also provided for condemnation of any water right to supply domestic and transportation needs.[27] Water users may also rotate the use of the supply to which they may be collectively entitled, without running afoul of the no-change statute.[28] Because the use of water in a reservoir will almost by definition result in a change in the place and purpose of use, the 1921 Legislature enacted legislation legalizing the use of reservoir water.[29] Some changes may be had through the correction of errors in permits, provided that the total area of the lands to which water is to be applied does not exceed the total area described in the original permit.[30] The

25. Trelease & Lee, *supra* note 4, at 11.
26. *Id.* at 11-19. The reader would be well advised to read these pages as they set out in considerable detail the exceptions and the manner in which they arose.
27. Ch. 68, § 2 [1909] Wyo. Sess. Laws 113 (now WYO. STAT. § 41-3 (1957)). Such uses include, *inter alia*, steam power plants, municipal uses, drinking water and water for industrial uses. The act, however, denies the right of condemnation to the preferred uses of steam power plants and industrial purposes.
28. WYO. STAT. § 41-70 (1957). The right of rotation has been judicially recognized in some cases as a mere exercise of the appropriation, and not a change in place of use. *See*, Muir v. Allison, 33 Idaho 146, 191 P. 206 (1920); McCoy v. Huntley, 60 Ore. 372, 119 P. 481 (1911); Pouchoulou v. Heath, 326 P.2d 656 (Colo. 1958).
29. Ch. 161, § 1 [1921] Wyo. Sess. Laws 267 (now WYO STAT. § 41-2 (1957)) amended the law to apply only to "water rights for direct use of the natural unstored flow . . ." and ch. 141 § 2 [1921] Wyo. Sess. Laws 216 (now WYO STAT. § 41-37 (1957)) was enacted to allow the owner of reservoir rights to use the water for beneficial purposes.
30. WYO. STAT. § 31-213 (Supp. 1973). The history and effect of this provision is outlined in Trelease & Lee, *supra* note 4, at 13-15.

statute also authorizes exchange agreements among various appropriators.[31] Appropriators owning lands along river bottoms which become submerged by reservoirs are allowed, under stated conditions, to use their water rights elsewhere.[32] Since water is sometimes needed in the construction of highways, the Legislature has given the state highway commission authority to acquire temporary water rights for a period not to exceed two years.[33] Perhaps the exception having the greatest potential for vitiating the no-change rule is the special powers given the Wyoming Game and Fish Commission,[34] irrigation districts,[35] water conservancy districts,[36] water and sewer districts,[37] and watershed improvement districts[38] to purchase water rights for their purposes. Although the statutes authorizing these entities to acquire water rights do not expressly exempt them from the basic no-change rule, it has been argued that all these powers were granted by legislation subsequent to the 1909 no-change statute and if they are to be given any meaning at all, must operate as still further exceptions to the no-change rule.[39]

Water rights acquired before 1909 constitute another, and possibly very large, exception to the no-change rule. This exception, assuming its viability, potentially affects thousands of water rights, as evidenced by leafing through the *Tables of Adjudications of Water Rights in Wyoming,* where it will be noticed that a great number of rights were acquired even before the turn of the century. The law regarding an appropriator's right to change his point of diversion or manner of use before the 1909 statute was set forth by the Wyoming

31. WYO. STAT. §§ 41-5 to -8 (1957). These statutes were quoted by the court in *In re* Owl Creek Irrigation Dist., 17 Wyo. 30, 253 P.2d 867, 258 P.2d 220 (1953). Water exchange agreements have been held invalid "only if they clearly infringe upon the rights of other water users". Almo Water Co. v. Darrington, 95 Idaho 16, 501 P.2d 700 (1972), and Thompson v. Harvey, 519 P.2d 963 (Mont. 1974).
32. WYO. STAT. § 41-9 (Supp. 1973).
33. WYO. STAT. § 41-10.1 (Supp. 1973).
34. WYO. STAT. § 23-15(b) (1957).
35. WYO. STAT. § 41-282(g) (1957) pertains to common irrigation districts. WYO. STAT. §§ 41-330(2), -325(3) (1957), pertains to public irrigation districts and public irrigation and power districts.
36. WYO. STAT. § 41-91(b) (1957).
37. WYO. STAT. § 41-479.13(10) (Supp. 1973).
38. WYO. STAT. §§ 41-354.2, -354.13 (Supp. 1973).
39. Trelease, *Transfer of Water Rights—Errata and Addenda—Sales for Recreational Purposes and to Districts,* 2 LAND & WATER L. REV. 321 (1967).

Supreme Court in *Frank v. Hicks*[40] and *Johnston v. Little Horse Creek Irrigation Co.*[41] The case which makes the strongest argument that water rights acquired prior to 1909 are freely transferable, uninhibited by the no-change statute, is the United States District Court decision of *Hughes v. Lincoln Land Co.*[42] There an appropriator changed the use of his pre-1909 water right from irrigating one 90 acre tract to a different tract of the same size without injuring any other appropriator's water right. The judge approved the change, and when the 1909 statute was cited to him, replied:

> [I]n Johnston v. Little Horse Creek Irrigation Co., supra, it is held that the right to the use of water based upon a prior appropriation for beneficial purposes is a property right, it would seem that *no statute which the State might subsequently pass could abridge that property right or reduce its value without intrenching upon the constitutional right of its owner.*[43]

The constitutional provision to which the judge refers is undoubtedly the 14th amendment to the United States Constitution, which provides that no state may deprive any person of his property without due process of law.[44] The Wyoming Supreme Court has, however, avoided the constitutional issue. Several years after the 1909 statute was passed, the court had before it a case involving appropriations bearing the dates of 1888 and 1907, and made this comment:

> In this case it may be assumed, without so deciding, that the place of an appropriator's diversion may be changed if it can be done without injury to the rights of others.[45]

The very next year the court decided the case of *Holt v. City of Cheyenne*[46] which involved a municipality, one of the several entities excepted from the operation of the no-change

40. 4 Wyo. 502, 35 P. 475 (1894).
41. 13 Wyo. 208, 79 P. 22 (1904).
42. 27 F. Supp. 972 (D. Wyo. 1939).
43. *Id.* at 973 (emphasis supplied).
44. Trelease & Lee, *supra* note 4, at 12.
45. Groo v. Sights, 22 Wyo. 19, 29, 134 P. 269, 272 (1913).
46. 22 Wyo. 212, 137 P. 876 (1914).

rule.[47] However, the court chose to refer to its decision in *Johnston v. Little Horse Creek* for the proposition that:

> The change of the headgate from its original place is a right which has been recognized by this court, provided such change does not injure other appropriators from the same source of supply.[48]

The question of the applicability of the 1909 statute to water rights acquired before its enactment was again raised in *State v. Laramie Rivers Co.*,[49] but the court chose not to decide the point. More recently the court had before it the question of the effect of land conveyances made in 1907 and 1908, wherein the instruments purported to reserve the water rights.[50] In upholding the legality of these transfers with their reservation of water rights, the court made the following comment, after which it cited *Frank v. Hicks* and *Johnston v. Little Horse Creek:*

> Wyoming at that time had no statute preventing the reservation of water right or the sale of it separate from the land. Accordingly, we have no alternative but to look to the views of the court at that time for the guiding principle on the subject.[51]

The question of the status of water rights acquired before 1909 is far from clear and certainly has not seen a final resolution in the courts. Professors Trelease and Lee note, however, that four Wyoming Attorneys General have ruled that the 1909 statute can not apply to rights acquired before its enactment and the Board of Control has so applied these rulings in two cases, thus establishing an administrative practice with some force as precedent.[52] Thus, the constitutional problems[53] attendant to the application of the 1909 statute to rights ac-

47. WYO. STAT. § 41-3 (1957).
48. Holt v. City of Cheyenne, 22 Wyo. 212, 232, 137 P. 876, 880 (1914).
49. 59 Wyo. 9, 136 P.2d 487 (1943).
50. Hunziker v. Knowlton, 78 Wyo. 241, 322 P.2d 141 (1958).
51. *Id.* at 249-50, 322 P.2d at 141.
52. Trelease & Lee, *supra* note 4, at 12.
53. In addition to the taking of private property without due process of law, raised by the 14th Amendment to the United States Constitution, if parties had contracted to change the use or point of diversion of a pre-1909 water right, one might be able to fashion a respectable argument based on U.S. CONST. art. I, § 10 as interpreted in The Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 514 (1819).

quired before its enactment have not been finally settled, although the presence of many water rights antedating the statute provides ample opportunity for a judicial determination of the quesion.

As can be seen, the exceptions to the no-change rule are many and significant. Ad hoc exceptions to the no-change statute have been made whenever the Legislature has clearly seen that the statute would interfere with optimum use.[54] Because, as a practical matter, most changes in the place or manner of use can be managed under the statutes, the following section focuses on the manner in which one effects such a change.

EFFECTING A CHANGE UNDER PRESENT WYOMING LAW

The legislative sessions of 1973[55] and 1974[56] altered significantly the method of changing the use or place of use of water rights as well as the substantive right to effect such a change. Prior to these legislative enactments the old statute[57] provided that if an appropriator could show the Board of Control he was entitled to the proposed change under Wyo. Stat. §§ 41-2 to 41-4 (1957), there was to be a public notice and if necessary a hearing was to be held on the matter. Recent legislation has arguably been substituted for this provision and in its stead is Wyo. Stat. § 41-4.1 (1974 Interim Supp.).[58]

54. Trelease & Lee, *supra* note 4, at 68.

55. Ch. 170, § 1 [1973] Wyo Sess. Laws 221 (now WYO. STAT. § 41-4.1 (Supp. 1973)).

56. Ch. 23, § 1 [1974] Wyo. Sess. Laws 91 (now WYO. STAT. § 41-4.1 (Interim Supp. 1974)).

57. WYO. STAT. § 41-4 (1957).

58. WYO. STAT. § 41-4.1 (Interim Supp. 1974) provides:

> Procedure to change use or place of use.—(a) when an owner of a water right wishes to change a water right from its present use to another use, or from the place of use under the existing right to a new place of use, he shall file a petition requesting permission to make such a change. The petition shall set forth all pertinent facts about the existing use and the proposed change in use, or, where a change in place of use is requested, all pertinent information about the existing place of use and proposed place of use. The board may require that an advertised public hearing or hearings be held at the petitioner's expense. The petitioner shall provide a transcript of the public hearing to the board. The change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under

It is difficult to ascertain with any degree of certainty what the Legislature has done to an appropriator's ability to change the use or place of use of his water right. Professor Trelease, commenting on the 1973 amendment,[59] has said that it materially changed the state's substantive law of water rights and its administrative procedures[60] Moreover, he feels that Wyoming has abandoned the no-change rule.[61] In a brief analysis of the law, he states:

> The new law . . . recognizes that the exceptions had practically swallowed the rule and permits all changes of water rights to new uses or places of use that do not injure other appropriators or increase the historic use of water in quantity, rate of diversion or amount of consumption.[62]

It will be noted that the new statute, Wyo. Stat. § 41-4.1 (1974 Interim Supp.), does not refer to the no-change statutes,[63] nor does it refer to the statute on preferred uses,[64] and, significantly, does not condition the right to make a change on compliance with the rules of those statutes. The first sentence of the new statute refers to a situation wherein the owner of a water right "wishes" to effect a desired change and then lists a procedure whereby that wish may be granted.

---

the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the amount consumptively under the existing use, nor decrease the historic amount of return flow, nor in any other manner injure other existing lawful appropriators. The board of control shall consider all facts it believes pertinent to the transfer which may include the following:

(i) The economic loss to the community and the state if the use from which the right is transferred is discontinued;
(ii) The extent to which said economic loss will be offset by the new use;
(iii) Whether other sources of water are available for the new use.

(b) In all cases where the matter of compensation is in dispute, the question of compensation shall be submitted to the proper district court for determination.

The changes from the 1973 statute made by the 1974 Legislature substituted the word "may" for the word "shall", and "appropriators" for appropriations" in the fifth sentence and added the entire sixth sentence of sub-section (a).

59. Ch. 170, § 1 [1973] Wyo. Sess. Laws 221 (now WYO. STAT. § 41-4.1 (Supp. 1973).
60. *Report of Water Resources Committee*, 6 NATURAL RESOURCES LAW 469 (1973).
61. *Id* at 470.
62. *Id.*
63. WYO. STAT. § 41.2 (1957).
64. WYO. STAT. § 41-3 (1957).

Such wording gives the appearance of granting a right to the appropriator to change the use or place of use of his water. Moreover, the restrictions on the exercise of that right basically restate judicially-recognized rules limiting the right to make a change in use or point of diversion.[65] The Wyoming Supreme Court might well be disposed to construing the recent legislation as granting a substantive right to the appropriator to change the use or place of use of his water right. The court said in *Groo v. Sights,*[66] with reference to the 1909 statute as it related to the "well-settled rule" of *Johnston v. Little Horse Creek:*

> It would seem, therefore that a legislative intention to change the rule thus settled should be clearly expressed, and it may be doubted whether the statute is sufficiently clear in that respect. Under the rule permitting the point of diversion to be changed, it cannot be done when the change will injure others, and this protects subsequent as well as prior appropriators. 1 Wiel, W. R., (3rd Ed.) § 505.[67]

Thus if there was some doubt as to the operation of the 1909 no-change statute, it appears that at the very least the recent legislative enactments reinforce such doubts and may well reaffirm the "well-settled rule" that the right to change one's use or point of diversion is an inherent part of the appropriative right itself.[68] Moreover, by a rule of statutory construction, the meaning of statutes is to be determined in the light of the common law.[69] For Wyoming statutes to be read consonant with the common law, Wyo. Stat. § 41-4.1 (1974 Interim Supp.) would have to be read as allowing a change so long as none of its several provisos are violated.

---

65. Johnston v. Little Horse Creek Irrigation Co., 13 Wyo. 208, 79 P. 22 (1904). For other cases restating the rules *see* Broughton v. Stricklin, 146 Ore. 259, 28 P.2d 219 (1933), *aff'd on rehearing*, 30 P.2d 322 (1934); Fritsche v. Hudspeth, 76 Ariz. 202, 262 P.2d 243 (1953); Farmer's Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954).
66. 22 Wyo. 19, 134 P. 269 (1913).
67. *Id.* at 30, 134 P. at 272.
68. City of Colorado Springs v. Yust, 125 Colo. 289, 249 P.2d 151 (1952); Hallenbeck v. Granby Ditch & Reservoir Co., 420 P.2d 419 (Colo. 1966).
69. Goldsmith v. Cheney, 468 P.2d 813, 816 (Wyo. 1970). 82 C.J.S. *Statutes* § 363 (1953), cited in Goldsmith v. Cheney, *supra* at 816, contains references to numerous cases relying on the same rule of statutory construction.

Another significant guidepost pointing to a substantive change embodied in the new statute is the lack of reference to the no-change statute. The new statute begins by saying that whenever an appropriator wishes to make a desired change he shall comply with certain requirements. The predecessor of the 1974 statute expressly limited its operation to situations where Wyo. Stat. §§ 41-2 and 41-3 (1957) allowed the proposed change.[70] The present statute, Wyo. Stat. § 41-4.1 (1974 Interim Supp.), contains no such limitation. This is significant because of the rule of statutory construction that when a statute is amended by deleting certain language therefrom, it will be presumed that a substantial change was intended.[71] It therefore seems that at the very least the enactments of 1973 and 1974 create a substantial question as to whether the no-change statute is still operative, and whether it may be construed to permit all changes that comply with its terms.[72]

Should the question arise as to whether a substantive or procedural matter is treated in Wyo. Stat. § 41-4.1 (1974 Interim Supp.), opponents of the proposed change will surely argue that a mere procedural statute was intended and that the Legislature in no wise intended to eliminate the strictures of the old no-change statute. Supporters of this view would first point to the fact that Wyo. Stat. § 41-2 (1957) has never been repealed and thus the no-change law is still on the books. Furthermore, the original no-change statute still says that one may detach direct flow water rights from the place or purpose of use only as allowed in Wyo. Stat. § 41-3 (1957) (relating to preferred uses) and Wyo. Stat. § 41-4.1 (1974 Interim Supp.) (relating only to the procedure to make the allowed changed).[73] It would furthermore be argued that the legislative enactments of 1973 and 1974 only relate to the "procedure to change use or place of

70. WYO. STAT § 41-4 (1957), supplanted by ch. 170, § 1 [1973] Wyo. Sess. Laws 221, provided a procedure for change of use, "[w]here it can be shown to the board of control under the provisions hereof [§§ 41-2 to 41-4], that a preferred use is to be made . . . ."
71. *In re* Kosmicki, 468 P.2d 818, 821 (Wyo. 1970); Stolldorf v. Stolldorf, 384 P.2d 969, 972 (Wyo. 1963).
72. *Report of Water Resources Committee*, 6 NATURAL RESOURCES LAW 469 (1973).
73. WYO. STAT. § 41-2 (1957).

use", as indicated by the statute's title. It is generally held that in the case of an ambiguity the title of an act may be resorted to as an aid to ascertainment of legislative intent.[74] In this case since the Legislature entitled Wyo. Stat. § 41-4.1 (1974 Interim Supp.) as a "procedural statute", it could be argued that the intention was to allow a change in place or purpose of use of water rights only when otherwise allowed by law. Moreover supporters of the view that the 1973 and 1974 enactments relate to a mere procedure and do not confer any substantive rights would find comfort in the rule of statutory construction which says that repeal of statutes by implication is not favored and courts will not arrive at such a result if there is another reasonable construction to which the statutes are susceptible.[75]

It thus appears that the courts will have to finally resolve the question as to whether the recent legislation has done away with the old no-change rule. If sound public policy is to have a place in the court's decision on this point, it is suggested that the view that the Legislature intended to allow changes in use or place of use, whenever third parties are not harmed, be adopted. An economist has commented on the virtues of allowing free transferability of water rights with these words:

> To the extent that water rights are allowed to become real and personal property and to the extent they are transferable, it would be possible to rely on the market and individual decision-making to allocate water resources to 'their highest use'.[76]

Whatever public policy the original 1909 statute was intended to foster does not appear to be applicable today. The 1974 statute provides ample protection to appropriators both junior and senior to the one seeking a change in manner or

74. McFarland v. City of Cheyenne, 48 Wyo. 86, 42 P.2d 413 (1935). *See also* 82 C.J.S. *Statutes* § 350 (1953) citing numerous cases applying this rule.

75. Brugneaux v. Dankowski, 51 Wyo. 103, 63 P.2d 800 (1937); State v. Cantrell, 64 Wyo. 132, 186 P.2d 539 (1947); Blumenthal v. City of Cheyenne, 64 Wyo. 75, 186 P.2d 556 (1947). *See also* 82 C.J.S. *Statutes* § 228 (1953) citing numerous cases applying this rule of statutory construction.

76. Milliman, *Water Law and Private Decision-Making: A Critique*, 2 J. L. & ECON. 41, 45 (1959).

place of use, as well as gives recognition to the "public interest" of the community and state. Thus it is suggested that no sound public policy is served by allowing the 1909 statute to inhibit the optimum use of a resource very valuable in Wyoming.

PROBLEMS THAT MAY OCCUR IN EFFECTING A CHANGE

Assuming that the recent legislation allows an appropriator to make a change in use or place of use of his water rights, or that the factual situation falls within the numerous exceptions to the no-change statute, there remain a host of problems which may be encountered in actually effecting the change. The common law recognized the appropriator's right to effect a desired change as a right to which the law attached a condition, to-wit, that the change result in no injury to others. The present Wyoming law maintains this basic condition, but provides legal recognition to "injuries" which heretofore had not imposed significant limitations on the appropriator's right to effect a desired change.

The injury that may result to the rights of other appropriators from a change in the character of use of water usually appears in cases in which it is proposed to change a nonconsumptive use to a consumptive one.[77] Such an alteration would, for example, occur in a change of use from hydroelectric power generation to irrigation,[78] and the proposed change will be denied when the right of other appropriators are injuriously affected. Sometimes a change in character of use has been approved upon the condition that the amount of water consumed after the changes would not exceed the amount which would have been consumed had no change been made.[79] This kind of conditional permit to change the character of use appears to be clearly sanctioned by the new Wyoming statute, as it allows a change of that amount of

77. W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 383 (1942).

78. Broughton v. Stricklin, 146 Ore. 259, 28 P.2d 219 (1933), *aff'd on rehearing*, 30 P.2d 322 (1934).

79. East Bench Irrigation Co. v. Desert Irrigation Co., 2 Utah 2d 170, 271 P.2d 449 (1954).

water not exceeding the amount historically consumed by the existing use.[80]

The statute now limits the quantity of water, the use or place of use of which may be changed, to the amount historically diverted under the existing use.[81] Other courts have imposed this limitation as well, saying that while the right to change the use or place of use is a property right, it is limited to the extent of the former actual usage.[82] This problem can occur when a municipality or industry acquires water rights which theretofore had been used for agricultural purposes. The difficulty arises because the new use would require a continuous flow, whereas the former use only required the water for the growing season. In cases where a city has attempted to enlarge its use to the full extent of the decreed rights of its grantor, courts have held that such a change would necessarily increase the ultimate consumption from the stream to the detriment of other appropriators and have therefore only allowed a partial change.[83]

A claim by those protesting proposed change in point of diversion or character of use that the proposal will result in increased use because additional lands will be irrigated has generally been recognized as a valid ground of protest.[84] In one case the protestant argued that an extended and enlarged use would result from a change in point of diversion to a place above it when the original appropriation was diverted below its property.[85] The argument was made on the basis that the appropriations were from a losing stream. The argument advanced by the protestant was that since there is more water available at the new place of diversion than the old, the appropriator was really obtaining a new appropriation with the old priority date. The court found that this argument lacked merit because the appropriator could take no more water at the new point of diversion than was adjudicated to it at the former point of diversion. Again the court granted a condi-

80. WYO. STAT. § 41-4.1 (Interim Supp. 1974).
81. WYO. STAT. § 41-4.1 (Interim Supp. 1974).
82. *E.g.*, Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).
83. City of Westminster v. Church, 445 P.2d 52 (Colo. 1968).
84. Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co., 120 Colo. 423, 210 P.2d 982 (1949).
85. W. S. Ranch Co. v. Kaiser Steel Corp., 79 N.M. 65, 439 P.2d 714 (1968).

tional change, saying "that changing the place of diversions cannot enlarge or expand the water right at the expense of other appropriators or the state."[86] If a court could be persuaded that the protestant's argument was sound it might be effectively used by those in Wyoming who are below the proposed point of diversion on a losing stream.

Sometimes those protesting a change in point of diversion have contended that such change would deprive them of seepage water.[87] Such a complaint would probably not be made with success in Wyoming because of our rules concerning seepage water.[88] Other courts have ruled that loss of water by seepage or evaporation is not an injury of which one may complain, at least where the loss is between ditch cotenants.[89] However, one court has ruled to the contrary and held that changing the place of use of a certain water right would cause other lands to bear the whole burden of seepage and evaporation, resulting in a great waste of water and constituting an infringement on the rights of others.[90] Sometimes a change of use from an early season direct flow use to storage for irrigation later in the season will cause increased evaporation and transpiration because the water will be used at a hotter and drier time of the season. At least one court has held that such a change would result in no legally recognizable injury to the vested rights of other appropriators.[91] In some cases increased evaporation may raise the content of salt, or other minerals, in the water. Oftentimes this situation will present a problem of proof, as increased salinity may not be detectable or rise to an injurious level for some period of time. But where a protesting appropriator can prove that the proposed change will increase the salinity of the

86. *Id.* 439 P.2d at 718.

87. Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co., 120 Colo. 423, 210 P.2d 982 (1929).

88. *See* Bower v. Big Horn Canal Ass'n, 77 Wyo. 80, 307 P.2d 593 (1957) where the court allowed a landowner to capture and use seepage from a canal but said that the defendant could "abandon its canal, relocate it, or line it with an impervious substance so that seepage ceases."

89. *E.g.*, Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 116 (1951).

90. Kent v. Smith, 62 Nev. 30, 140 P.2d 357 (1943).

91. American Fork Irrigation Co. v. Linke, 121 Utah 90, 239 P.2d 188 (1951).

water so that the raising of crops would be materially affected, the change may be denied.[92]

The present Wyoming statute denies the right to make any change which will "in any manner injure other existing lawful appropriators."[93] The word "appropriators" was substituted for the word "appropriations" used in the 1973 enactment.[94] Thus a question arises as to what kind of injury may be compained of—any injury to the pocketbook of an appropriator or any injury to his vested water rights? In one Utah case it was argued by the protestants that the change in place of use would decrease the tax base in the districts from which the right was removed, but the court held that the transfer should be allowed, recognizing no injury which would prevent the change.[95] Colorado will, however, apparently protect mutual ditch companies and irrigation districts from loss of revenues when the change is from irrigation to municipal uses and would cause a loss of assessments on the water.[96] A related problem was faced in Montana, but the court said that the fact that the remaining appropriators would have to share in the expenses of a water commissioner was not sufficient to establish a burden on them as water users.[97] It would seem that such an injury could be considered by the board of control in Wyoming because the statute refers to changes which "in any manner" result in an injury to an "appropriator", as well as the broad discretionary powers lodged with the board to consider the economic impact of the proposed change.[98]

In addition to those appropriators obviously affected by a proposed change, an issue arises as to whose complaint may

92. Gillespie Land & Irrigation Co. v. Narramore, 93 Ariz. 67, 378 P.2d 745 (1963) (junior appropriator failed to carry his burden of proof); Heine v. Reynolds, 69 N.M. 398, 367 P.2d 708 (1962) (increased salinity is an impairment of existing rights).

93. WYO. STAT. § 41-1.1 (Interim Supp. 1974).

94. WYO. STAT. § 41-4.1 (Supp. 1973).

95. *In re* Robinson, 61 Idaho 462, 103 P.2d 693 (1940). One might question the applicability of this case to Wyoming because of the provision in WYO. STAT. § 41-4.1 (Interim Supp. 1974) which directs the board of control to consider the economic loss to the community if a particular use is discontinued.

96. Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 116 (1951).

97. McIntosh v. Gravely, 495 P.2d 186 (Mont. 1972).

98. WYO. STAT. § 41-4.1 (Interim Supp. 1974).

be heard when a change is contested. Certainly both junior and senior appropriators may voice their complaints. In one case a tax district's complaint that the area's economic base would be eroded was held to be of no weight.[99] As mentioned above, this holding would probably not be followed in Wyoming because of broad powers given to the board of control to consider the economic impact of the change. In an Arizona case the court held that water users below the appropriator who lined his ditch and sought to apply the water thus saved to his other lands, could voice their complaints, though the court never explained in what manner the lower users were injured.[100] Even one who has a permit but has not completed his appropriation may protest a change in point of diversion.[101] This result obtains because if the permittee prosecutes his work with due diligence and applies the water to a beneficial use, the doctrine of relation back gives him an appropriation as of the date the permit was granted.[102] A nonprofit corporation, which had no water rights but whose members consisted of groundwater users in a particular basin, has been allowed to challenge a change in point of diversion.[103] These cases would apply in Wyoming because the board of control is directed to consider all facts it believes pertinent to the transfer, including factors of economics affecting the community and state.[104]

Agreement between appropriators to exchange some or all of their water rights[105] may constitute changes in points of diversion to which Wyo. Stat. § 41-4.1 (1974 Interim Supp.) would apply. When such exchanges involve changes in points of diversion they will be approved if no damage to other ap-

99. *In re* Robinson, 61 Idaho 462, 103 P.2d 693 (1940).

100. Salt River Valley Water Users' Ass'n v. Kovacovivch, 3 Ariz. App. 28, 411 P.2d 201 (1966), holding that the water saved could not be used on other lands becaduse the water was appurtenant to the lands originally irrigated. The lower water users successfully protested, but the court does not say how they were injured.

101. Rocky Mountain Power Co. v. White River Electric Ass'n 376 P.2d 158 (Colo. 1962).

102. *Id.*

103. Coldwater Cattle Co. v. Portales Valley Project, Inc., 78 N.M. 41, 428 P.2d 15 (1967).

104. WYO. STAT. § 41-4.1 (Interim Supp. 1974).

105. In Wyoming, exchange agreements are regulated by WYO. STAT. § 41-5 (Supp. 1973).

propriators is found,[106] but it is said that such exchanges are invalid if they infringe upon the rights of other water users,[107] and that the burden of proving such injury is on those who claim to be adversely affected.[108]

The new Wyoming statute does not explicitly assign the burden of proving that no injury to other appropriators will result from the proposed change.[109] However, nearly all the courts are in agreement that the burden of proof that no injury will result rests with the proponent of the change.[110] Some courts have limited this burden to meeting the grounds of injury asserted by the protesting party,[111] and one court has said that the burden of showing injury rested with those who claimed to be adversely affected.[112] This case, however, appears to be in the minority on this point. Although the Wyoming statute does not explicitly inform the applicant that he shoulders the burden of proving that his case falls within the statute, in light of the board's broad discretionary powers the prudent applicant ought to disprove any obligation that might be raised.[113]

The new statute gives the board of control broad powers to inquire into all possible ramifications of the proposed change, and directs the board to "consider all facts it believes pertinent to the transfer."[114] Among the factors the board may consider, in assessing the economic loss to the community and the state if the use from which the right is transferred is discontinued, is the extent to which such economic loss will be offset by the new use.[115] It is not alto-

106. United States v. Caldwell, 64 Utah 490, 231 P. 434 (1924).
107. Almo Water Co. v. Darrington, 95 Idaho 16, 501 P.2d 700 (1972).
108. Thompson v. Harvey, 519 P.2d 963 (Mont. 1974).
109. WYO. STAT. § 41-4.1 (Interim Supp. 1974).
110. American Fork Irrigation Co. v. Linke, 121 Utah 90, 239 P.2d 188 (1951) (company requesting change had burden of proving that vested rights will not be impaired); Heine v. Reynolds, 69 N.M. 398, 367 P.2d 708 (1962) (burden on applicant to show *no impairment* of existing rights); City of Roswell v. Reynolds, 86 N.M. 249, 522 P.2d 796 (1974) (burden on applicant to show its application would not impair existing rights).
111. City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151, 155 (1952); Hallenback v. Granby Ditch & Reservoir Co., 420 P.2d 419 (Colo. 1966).
112. Thompson v. Harvey, 519 P.2d 963 (Mont. 1974).
113. *Cf.* Application of Chicago & N.W. Ry Co., 79 Wyo. 343, 334 P.2d 519 (1959) (In proceeding before the Public Service Commission the burden of proof rests upon the complainants.)
114. WYO. STAT. 41-4.1 (Interim Supp. 1974).
115. WYO. STAT. § 41-4.1(a)(i) & (ii) (Interim Supp. 1974).

gether clear how the board is to consider such economic factors. If a person purchases an irrigation water right and seeks to use that right for industrial purposes, logically the new industrial use would be of greater economic benefit than the former agricultural use or the sale would never have been consummated. This is, when private decision-makers determine that a new use would be more profitable than the old, it would appear that their decision ought to be correct because it is their money which is at stake. Thus, if the board denies a proposed change on the basis of economic consequences to the community or state it would seem that its decision should be based on facts other than those offered by the proponent of the change.[116] It is of course true that the board may not simply conclude that the proposed change will result in an economic loss to the community or state, without finding the basic or primary facts supporting such a conclusion.[117]

The statute also authorizes the board to consider whether other sources of water are available for the new use.[118] What this means is not altogether clear. If there is another source of water available for the new use, may the board force the applicant to avail himself of the alternate source, even though it would be much more expensive to do so? Certainly the board is vested with a large measure of discretion, but it would seem that if the board forced the applicant to incur nearly prohibitive expenses to secure an alternate source of water, its order would border on the arbitrary and capricious.

CONCLUSION

While there are problems yet unanswered with Wyoming's new statute regulating changes in use or place of use

116. Johnson v. Schrader, 502 P.2d 371 (Wyo. 1972) (An administrative board must have before it sufficient information for finding of those facts on which it pretends to act, otherwise its action will be arbitrary.)

117. Fallon v. Wyoming State Bd. of Medical Examiners, 441 P.2d 322, *rehearing denied*, 443 P.2d 135 (Wyo. 1968); Pan American Petroleum Corp. v. Wyoming Oil & Gas Conservation Comm'n, 446 P.2d 550 (Wyo. 1968); Chicago & N.W. Ry. Co. v. Hillard, 502 P.2d 189 (Wyo. 1972); Johnson v. Schrader, 502 P.2d 371 (Wyo. 1972).

118. WYO. STAT. § 41-4.1(a)(iii) (Interim Supp. 1974).

of water rights, if the statute does give the appropriator the right to effectuate a desired change it is a step forward. Over the years the no-change statute has been pushed aside in favor of exceptions to it, so that today, given the proper circumstances, there are few water rights the use or place of use of which can not be changed. Perhaps the Legislature realized that the exceptions had swallowed the rule and sought to enact legislation which would be sure to protect those affected by a proposed change. If the Legislature did intend to allow changes when no third parties would suffer injury, in doing so it attempted to meet the ideal stated by an economist:

> Restrictions upon the transfer of water rights, just as those upon the transfer of any property, should be viewed with suspicion. As a general rule all transfers of water rights between individuals should be permitted except in cases where damage to third parties can be clearly demonstrated.[119]

DAN B. RIGGS

119. Milliman, *Water Law and Private Decision-Making: A Critique*, 2 J. L. & ECON. 41, 54 (1959).