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CASE NOTES

WATER LAW—Importation Doctrine Applied to Water Transfers Within a River System: A Step Too Far. *Thayer v. City of Rawlins*, 594 P.2d 951 (Wyo. 1979).

The City of Rawlins imports all of its water from Sage Creek and the North Platte River. For many years the city's raw sewage effluent has been discharged into Sugar Creek, where it has been appropriated for irrigation, stock water, and drilling purposes.¹ Federal² and state³ laws now prohibit the continued discharge of raw sewage. The treatment plan considered by the city involved diverting effluent into a lagoon system; this plan required construction of holding dams and changing the point of discharge for city effluent to a point lower on Sugar Creek, thus depriving some Sugar Creek appropriators of the use of that effluent. The city brought an action in district court, seeking a declaratory judgment that these appropriators were not entitled to compensation for loss of the city's effluent even though their appropriations had been initiated by permits from the state engineer.

At trial, the main issue was whether Sugar Creek is a natural stream. Two decisions depended on the resolution of that issue: whether the state engineer had jurisdiction over the changes contemplated by the city, and whether the defendants had a valid appropriation of city effluent on which to base their claims.

The defendants contended that the treatment plan contemplated by the city required the approval of the state engineer and the state board of control. Jurisdiction was said to flow from article VIII of the Wyoming Constitution,⁴ giving the board of control authority to regulate the waters of the state; from Section 41-3-104 of the Wyoming Stat-

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1. Brief for Appellants at 8, *Thayer v. City of Rawlins*, 594 P.2d 951 (Wyo. 1979).
2. Clean Water Act of 1977, 91 Stat. 1566 (1977), 33 U.S.C. 1251 et seq. For an analysis of state water rights under national water quality controls, see Muys, *Quality v. Quantity: The Federal Water Pollution Control Act's Quiet Revolution in Western Water Rights Administration*, 23 ROCKY MT. MIN. L. INST. 1013 (1977).
3. WYO. STAT. §§ 35-11-301 and 35-11-302 (1977).
4. WYO. CONST. art. 8, § 2.

utes,⁵ giving the board of control authority to approve or deny changes in the use or place of use of water; from Section 41-3-305 of the Wyoming Statutes,⁶ giving the state engineer and the state board of control authority over storage of natural flows of surface streams; and from Section 41-3-615 of the Wyoming Statutes,⁷ giving the state engineer authority over the construction of diversion dams exceeding a certain height.

The district court found that Sugar Creek is not a natural stream; it therefore concluded that the state engineer had no jurisdiction over the changes proposed by the city, and that defendants' appropriations of city effluent water were invalid. The court held that defendants were not entitled to compensation for loss of water, and that the city was not estopped from recapturing its waste water.

The Wyoming Supreme Court affirmed the district court's judgment, but based its decision on the importation doctrine. It held that as to the defendants, the city had the unrestricted right to reuse, successively use, and dispose of imported water, and that the city's effluent was not subject to abandonment.⁸ Finally, the court held that the state engineer and the board of control had no jurisdiction over the controversy.⁹

THE COURT'S RATIONALE

The court's analysis in *Thayer* centered on the legal distinctions between waste water¹⁰ derived from water imported from another drainage basin, and that derived from water which never left its natural drainage basin.

Imported water's special status stemmed from the court's desire to reward the efforts of an importer, who by

5. WYO. STAT. § 41-3-104 (1977).

6. WYO. STAT. § 41-3-305 (1977).

7. WYO. STAT. § 41-3-615 (1977).

8. *Thayer v. City of Rawlins*, 594 P.2d 951, 955, 956 (Wyo. 1977). [hereinafter cited in text as *Thayer*].

9. *Id.* at 957, 958.

10. Waste water, as the term is used in this case note, includes municipal effluent and water which has left the control of the initial appropriator. For a discussion of the various terms commonly used to describe water which has escaped from an appropriator, see HUTCHINS, 2 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 568 (1974).

his work and expense has brought water to one drainage basin from another.¹¹ This policy of rewarding importers by giving them extra-ordinary dominion over imported water was reconciled with the rules of prior appropriation by restricting priorities to those relating to the natural flow of a stream at the time of appropriation.¹²

In the court's thinking, the finding that the city imported its entire water supply was dispositive of all other issues in *Thayer*.¹³ Relying on a recent Colorado case, *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*,¹⁴ the court held that, as to the defendants, the city had the unrestricted right to reuse, successively use, and make disposition of imported water.¹⁵ These terms were defined in *Fulton*:

"Re-use" means a subsequent use of imported water for the same purpose as the original use

"Successive use" means subsequent use by the water importer for a different purpose

"Right of disposition" means the right to sell, lease, exchange or otherwise dispose of effluent containing foreign water¹⁶

The Wyoming Supreme Court felt that granting the city unrestricted rights to its imported water necessarily meant that the city could not abandon any of these rights to the defendants.¹⁷ The court felt that such a holding was consistent with the fact that the defendants could not compel the city to continue importing water: if the city could not be forced to continue importing, it could not logically be forced to continue discharging its effluent to the defendants.¹⁸ The same reasoning led the court to reject the defendants' contention that they were entitled to compensa-

11. *Thayer v. City of Rawlins*, *supra* note 8, at 955.

12. *Id.*

13. *Thayer v. City of Rawlins*, *supra* note 8.

14. *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*, 179 Colo. 47, 506 P.2d 144 (1972) [hereinafter cited in text as *Fulton*].

15. *Thayer v. City of Rawlins*, *supra* note 8.

16. *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*, *supra* note 14, at 146, 147.

17. *Thayer v. City of Rawlins*, *supra* note 8.

18. *Id.*

tion for the loss of water occasioned by the city's change in its point of discharge.¹⁹

Because it had granted the city unrestricted rights to its imported water, the court rejected the assertion that the state engineer and board of control had jurisdiction over this dispute.²⁰ Given that the city's control of its water left no room for control by state agencies, the court felt that the statute governing change in use or place of use of water²¹ contained impermissible restrictions.²² As to the statute concerning storage of direct-flow rights,²³ the court found no indication of legislative intent to include effluent derived from imported water.²⁴ Finally, the court disposed of the statute concerning construction of diversion dams²⁵ by pointing out that the city's plan did not meet the technical requirements necessary to bring it within the statute.²⁶

BACKGROUND

In deciding the correlative rights of the parties to the effluent discharged by the city, the Wyoming Supreme Court was dealing in what had already been called the most confused area of prior appropriation law.²⁷ To place *Thayer* in perspective, it is helpful to briefly examine the historical development of several aspects of a senior appropriator's rights to his waste water, to note any different treatment of waste water derived from intra-basin water, and to point out those instances where different rules have been fashioned for municipalities.

Article VIII, section 1 of the Wyoming Constitution provides that the state owns the natural waters of the state.²⁸ Article VIII, sections 2²⁹ and 5³⁰ give the board of

19. *Id.*

20. *Id.* at 957.

21. WYO. STAT. § 41-3-104 (1977).

22. *Thayer v. City of Rawlins*, *supra* note 8, at 957, 958.

23. WYO. STAT. § 41-3-305 (1977).

24. *Thayer v. City of Rawlins*, *supra* note 8 at 958.

25. WYO. STAT. § 41-3-615 (1977).

26. *Thayer v. City of Rawlins*, *supra* note 8, at 958.

27. Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, 469 (1960).

28. WYO. CONST. art. 8, § 1 provides: Water is state property.—The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

control and the state engineer the authority to supervise the waters of the state, particularly with reference to their appropriation, distribution, and diversion.³¹ The Wyoming Supreme Court has construed these constitutional provisions as restricting valid stream appropriations to the waters of natural streams,³² and has laid down guidelines for defining a natural stream:

[T]he essential characteristics of a water course are: a channel, consisting of a well-defined bed and banks, and a current of water. Some exceptions have been made, the definition has not been applied in all cases, and it may be difficult to give one that is universally applicable . . . [citation omitted]. Too much stress ought not, perhaps, be placed upon any one of the elements mentioned, and all should be given due consideration.³³

One early result of restricting appropriations to natural waters of the state was that waste water discharged into a dry gulch could not be validly appropriated before it reached a stream,³⁴ while waste water discharged into a natural stream became appropriable.³⁵ In this latter instance, the fact that the waste water discharged into a natural stream was municipal effluent did not affect the rule that, as between one appropriating the waste water under state law and one claiming the same water under a grant from the person discharging it into the stream, the right of use went to the prior appropriator under state law.³⁶

29. WYO. CONST. art. 8, § 2 provides: Board of Control.—There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.

30. WYO. CONST. art. 8, § 5 provides, in part: There shall be a state engineer. . . . He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.

31. See note 29, *supra*.

32. State v. Hiber, 48 Wyo. 172, 44 P.2d 1005, 1008 (1935).

33. *Id.* at 1009.

34. *Id.* at 1010.

35. Wyoming Hereford Ranch v. Hammond Packing Company, 33 Wyo. 14, 236 P. 764, 773 (1925) [hereinafter cited in text as *Wyoming Hereford*].

36. *Id.*

Later, it became possible to appropriate waste water³⁷ which did not originally constitute a natural stream, when the court found in *Binning v. Miller*³⁸ that irrigation seepage flowing in a gulch for 30 years became a "regular, natural stream" subject to appropriation. The court felt that "seepage water which, if not intercepted, would reach a stream, is just as much a part of the stream as the waters of any tributaries."³⁹

This trend was carried to its logical conclusion in *Bower v. Big Horn Canal Association*,⁴⁰ when the court allowed the interception and appropriation of seepage water lost from a canal and flowing toward a natural stream, even though the seepage did not form a channel.

The general rule with respect to changes in stream conditions has long been that an appropriator is entitled to maintenance of stream conditions as they were at the time of his appropriation.⁴¹ In Colorado, this entitlement is spoken of as a vested right.⁴² In Wyoming, this concern for an appropriator's interest in unchanged stream conditions has been codified in Section 41-3-104 of the Wyoming Statutes,⁴³ setting out procedures and standards which must be adhered to by any appropriator wishing to change the use or place of use of his water right. However, the general rule has been riddled with exceptions;⁴⁴ as the following paragraphs show, it is now largely honored in the breach.

Two Wyoming cases illustrate the proposition that any appropriator may stop discharging waste water simply by ceasing to divert from a stream. In *Bower*,⁴⁵ it was presumed that

37. See generally, Clark, *Background and Trends in Water Salvage Law*, 15 ROCKY MT. MIN. L. INST. 421 (1969).

38. *Binning v. Miller*, 55 Wyo. 451, 102 P.2d 54, 63 (1940) [hereinafter cited in text as *Binning*].

39. *Id.* at 61.

40. *Bower v. Big Horn Canal Association*, 77 Wyo. 80, 307 P.2d 593, 602 (1957) [hereinafter cited in text as *Bower*].

41. *Farmers Highline Canal and Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629, 631 (1954).

42. *Id.*

43. WYO. STAT. § 41-3-104 (1977).

44. See generally, CLARK, 5 WATERS AND WATER RIGHTS 129-133 (1972).

45. *Bower v. Big Horn Canal Association*, *supra* note 40, at 601.

a person using water on his land may abandon his irrigation altogether and return his lands to a non-irrigated use if he desires to do so. As was said in the *Binning* case,⁴⁶ there is no rule which will require a man to continue irrigating when he does not so choose.

And a Colorado case can be cited to the same effect: "We know of no law which compels a party to use his water right"⁴⁷

An appropriator generally has the right to capture and reuse his waste water⁴⁸ so long as he intercepts it before it leaves his land and reuses it for the same purpose on the same lands. Reuse can be initiated at any time.⁴⁹ This right of reuse was extended to water imported by an irrigation district in *Stevens v. Oakdale Irr. Dist.*,⁵⁰ and by a municipality in *Fulton*.⁵¹

The general rule is that an appropriator may change his point of diversion so long as he does not injure others on the stream.⁵² This rule was extended to a municipality in *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir and Irrigation Company*.⁵³

In contrast to the necessity for an appropriator to avoid injury to other appropriators on the stream when he proposes to make a change in his point of diversion, at least one court has said that an appropriator need answer to no one for changing the point at which he discharges his waste water. A recent Colorado case involving municipal discharge of intra-basin water recited older cases which denied users of waste water any right to have the waste continued; the

46. *Binning v. Miller*, *supra* note 38, at 60.

47. *Tongue Creek Orchard Company v. Town of Orchard City*, 131 Colo. 177, 280 P.2d 426, 429 (1955).

48. See generally, Note, *Rights of the Original Appropriator to Recapture Water Used in Irrigation*, 11 WYO. L. J. 39 (1956).

49. *Binning v. Miller*, *supra* note 38, at 62.

50. *Stevens v. Oakdale Irr. Dist.*, 13 Cal. 2d 343, 90 P.2d 58, 62 (1939) [hereinafter cited in text as *Stevens*].

51. *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*, *supra* note 14, at 146.

52. *Johnston v. Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 79 P. 22, 25 (1904).

53. *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir and Irrigation Company*, 179 Colo. 36, 499 P.2d 1190, 1193 (1972) [hereinafter cited in text as *Metro*].

court felt these cases provided a logical basis for holding that “[c]hanges of points of return of waste water are not governed by the same rules as changes of points of diversion.”⁵⁴ Downstream appropriators were therefore held to have no vested right to maintenance of the same point of discharge of either irrigation waste water or municipal effluent.⁵⁵

Until recently, reuse of waste water was confined to the same use on the same lands.⁵⁶ However, in 1972 a Colorado case involving the rights of a municipality in its imported water granted importers⁵⁷ the right to successively use imported water.⁵⁸ This right appears to extend to importers other than municipalities,⁵⁹ but the language of the Colorado Supreme Court suggests that it had in mind water imported across the Continental Divide by a transmountain diversion.⁶⁰

Generally, an appropriator of intra-basin water has not been allowed to dispose of his waste water to third parties if another appropriator would be injured.⁶¹ In an early Colorado case, a municipality using intra-basin water was prevented from selling its purified effluent and was forced to return it to the stream.⁶² The city contended that its right to sell the water necessarily followed from its right to dispose of it by evaporation.⁶³ The court countered:

It would seem that, according to the established public policy of this state, this right to destroy the water by evaporation can exist only when there is no other practicable method of disposing of the sewage;⁶⁴

54. *Id.*

55. *Id.*

56. *Binning v. Miller*, *supra* note 38, at 61.

57. *See*, Note, *Rights of Importers and Developers of Waters*, 9 LAND & WATER L. REV. 543 (1974).

58. *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*, *supra* note 14, at 146.

59. *Id.* at 148.

60. *Id.*

61. *See* text accompanying notes 48 and 49, *supra*.

62. *Pulaski Irr. Ditch Co. v. City of Trinidad*, 70 Colo. 565, 203 P. 681, 682 (1922).

63. *Id.* at 683.

64. *Id.*

The Wyoming rule with respect to disposition of municipal effluent has developed along different lines. In *Wyoming Hereford Ranch v. Hammond Packing Company*,⁶⁵ the City of Cheyenne was allowed to sell its untreated sewage, and deliver it directly to the lands of the buyer, over the objections of downstream appropriators that waste water was not subject to disposition by the city after it had been used by the city and started on its way back to the stream.⁶⁶

The Wyoming Supreme Court felt that cities should be allowed great latitude in disposing of sewage;⁶⁷ the court fashioned a special rule for sewage effluent when it stated that cities should not be restricted by a requirement that sewage always come under the rules for waste water.⁶⁸ In an often quoted passage, the court said:

Even in this state, where the conservation of water for irrigation is so important, we would not care to hold that in disposing of sewage the city could not adopt some means that would completely consume it. It might, we think, be diverted to waste places, or to any chosen place where it would not become a nuisance, without any consideration of the demands of water users who might be benefited by its disposition in some other manner.⁶⁹

However, the court did stop short of giving the city complete dominion over its effluent: once sewage had been discharged into the stream from which the water had been taken, the city had no further right of disposition and the effluent was state property, subject to appropriation.⁷⁰

Generally abandonment of a right to recapture waste water⁷¹ has required a concurrence of intent and relinquishment of possession.⁷² But mere relinquishment of specific particles of waste water has been held not to constitute

65. *Wyoming Hereford Ranch v. Hammond Packing Company*, *supra* note 35.

66. *Id.* at 772. Also see text accompanying note 39, *supra*.

67. For an analysis of total containment water quality control systems, see Comment, *Cessation of Return Flow as a Means of Complying with Pollution Control Laws*, 12 LAND & WATER L. REV. 431 (1977).

68. *Wyoming Hereford Ranch v. Hammond Packing Company*, *supra* note 35, at 772.

69. *Id.*

70. *Id.* at 773.

71. See Note, *supra* note 48.

72. See HUTCHINS, *supra* note 10, at 262.

abandonment of the right to use future waste water.⁷³ Mere passage of time has also been held not to prevent an appropriator from recapturing his waste water; even when water had run to waste for 35 years, the Wyoming Supreme Court refused to find an abandonment of the right of recapture.⁷⁴ The court pointed out that the wasted water is always different from year to year.⁷⁵

EFFECT OF THAYER

The effect of the *Thayer* decision is to extend to Wyoming the rule of the Colorado Supreme Court in *Fulton* that a water importer has the right to reuse, successively use, and make disposition of his waste water.⁷⁶ The Wyoming Supreme Court used the *Fulton* result to justify the right of an importer to change the point at which he discharges his waste water.⁷⁷ The court was thus able to reach the same conclusion as in *Metro*,⁷⁸ but relied exclusively on the imported water concepts elaborated in *Fulton*, thus restricting its application to waste water derived from imported water.⁷⁹ The court noted the *Metro* rule that changes in points of discharge of waste water are not governed by the same rules as changes in points of diversion, but also pointed out that it had been severely criticized.⁸⁰ The court's route to its decision clearly suggests that it did not yet wish to adopt the *Metro* rule for waste water derived from intra-basin water.

In one respect the Wyoming Supreme Court went beyond the *Fulton* decision, on which it had relied so heavily. In *Fulton*, the issue of Denver's possible abandonment of waste water derived from imported water was raised but not decided.⁸¹ In *Thayer*, the court decided that imported

73. *Stevens v. Oakdale Irr. Dist.*, *supra* note 50.

74. *Binning v. Miller*, *supra* note 38, at 62.

75. *Id.*

76. *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*, *supra* note 14, at 146.

77. *Thayer v. City of Rawlins*, *supra* note 8.

78. See text accompanying note 54, *supra*.

79. *Thayer v. City of Rawlins*, *supra* note 8, at 957, 958.

80. *Id.* at 957.

81. *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*, *supra* note 14, at 150.

water was not subject to abandonment, but restricted its holding to the defendants.⁸²

DIFFICULTIES IMPLICIT IN THAYER

Although the court said in *Thayer* that its discussion and disposition of the case were narrowly drawn,⁸³ the decision still raises a number of difficulties which may return to haunt the court. These problems have to do with abandonment of the right to successively use or dispose of waste water, the rights of North Platte appropriators, and the jurisdiction of the state engineer and board of control over such matters as total confinement of municipal effluent and transfers of water rights.

Abandonment of Imported Water

In *Thayer*, the court's holding that the city could not abandon its imported water was restricted to the Sugar Creek defendants.⁸⁴ In its disposition of *Fulton*, the Colorado Supreme Court noted in passing two aspects of the abandonment question. First, the court quoted from *Stevens* the ruling that an appropriator loses his property interest in imported water when he discharges it without intention to recapture, but that any abandonment is restricted to the particles of water and does not extend to the water right itself. However, the *Fulton* court neither accepted nor rejected the proposition.⁸⁵

But the *Fulton* court did note that Denver had made quite a good record to the effect that it never intended to abandon any imported water and that it intended future reuse, successive use, and disposition after use of the imported water since it first began to import.⁸⁶ Thus, the court seemed to leave open the possibility that intent to abandon could go beyond the mere relinquishment of a certain corpus of water, and might extend to the right of successive use and disposition after use.

82. *Thayer v. City of Rawlins*, *supra* note 8.

83. *Id.* at 955.

84. *Id.* at 956.

85. *City and County of Denver Board of Water Commissioners v. Fulton Irrigating Ditch Company*, *supra* note 14, at 150.

86. *Id.*

In deciding the abandonment issue in *Thayer*, the Wyoming Supreme Court stated that the *Fulton* rule conferred on the city the right, as to the defendant Sugar Creek appropriators, to change its point of discharge.⁸⁷ The court concluded that this city right to change its point of discharge was not subject to abandonment; it cited *Binning* as authority for the proposition that a senior appropriator has the right to recapture waste and seepage water, even after a lapse of 35 years, and cited *Stevens* to the same effect.⁸⁸

But both *Stevens*⁸⁹ and *Binning*⁹⁰ allowed a senior appropriator of water to decrease or even stop the flow of discharge water so that he could reuse it. They did not address the question of any right to change the point of discharge itself. In *Thayer* the court felt that such a right was implicit in the city's unrestricted right of successive use and disposition, and in the city's right to stop importing.⁹¹ And in an apparent recognition that the matter of intent might have some bearing on the issue of abandonment of imported water, the court suggested that a 1922 conveyance by deed of some of the city's effluent placed the city in a stronger position to resist allegations of abandonment.⁹²

A different approach to the question of abandonment is suggested by two Federal cases. In *Ramshorn Ditch Co. v. United States*,⁹³ the Eighth Circuit Court of Appeals said that while a prior appropriator has the right to reuse seepage and waste water, such water has been abandoned when it has been allowed to return to its natural channel with no intent to recapture it. The court made it plain that it meant an abandonment of more than the mere corpus of water discharged, as discussed in *Stevens*. Rather, an appropriation by another of the water abandoned would prevent

87. *Thayer v. City of Rawlins*, *supra* note 8, at 955.

88. *Id.*

89. *Stevens v. Oakdale Irr. Dist.*, *supra* note 50.

90. *Binning v. Miller*, *supra* note 38, at 60.

91. *Thayer v. City of Rawlins*, *supra* note 8.

92. *Id.* at 956.

93. *Ramshorn Ditch Co. v. United States*, 269 F. 80 (8th Cir. 1920).

the one abandoning the water from raising any future claim to it, if he had waited beyond a reasonable time.

In *United States v. Haga*,⁹⁴ an appropriation of waste water from a canal was upheld when it was shown that the canal company allowed the waste and gave no indication of intent to recapture it. The right to recapture was held to have been abandoned, and the canal company was prevented from disposing of this water to its customers.

If, as the court points out in *Thayer*, an importer is given the right of successive use, disposition, and change in point of discharge because he should be given the benefits of his own efforts in bringing a new supply of water to a stream,⁹⁵ it does not follow that those rights cannot be abandoned. The reason for extending these rights to the importer is to allow him to recover his costs and to encourage development of water resources. If an importer does not use these rights it is a clear indication that he sees no present advantage in doing so.

But *Thayer* throws up an obstacle to any use of the importer's waste water; the case clearly warns a prospective appropriator who might be willing to rely on the high probability of continued importation that he cannot rely on continued abandonment by the importer. The inevitable result will be a reluctance to put the waste water to use for fear of losing a large investment. Therefore, the water will tend to run to waste in the foreign drainage.

The same objectives of rewarding and promoting water development through importation could be accomplished, and the prospective appropriator of waste water derived from imported water could be placed in a more secure position, if the importer were required to assert his rights at the outset. If, within a reasonable time, an importer could find another use for his waste water, or if he could find a buyer for it, he should be allowed to assert his rights in that waste water. If, however, the importer allowed the waste water to escape his control for an un-

94. *United States v. Haga*, 276 F. 41 (S.D.Idaho 1921).

95. *Thayer v. City of Rawlins*, *supra* note 8, at 955.

reasonable time, thus suggesting he had no better use for it, he would have abandoned it to any subsequent appropriator. This principle could be codified in a statute requiring the importer to make a timely application to the state engineer for a permit to make successive use or disposition of waste water.

Again, these suggested rules need not displace the right of a prior appropriator to reuse his return flows for the same purpose, beginning at any time, even if such reuse is totally consumptive. For example, a flood irrigator could either recycle waste water by pumping it to the top of the field, or install a sprinkler on the field, thus avoiding any waste of water. In this respect, *Binning* and *Bower* would remain intact. This right of reuse is justified by the principle that a prior appropriator should be able to make the maximum use of his water without answering to junior appropriators, so long as the reuse is for the same purpose on the same lands. In this respect, a subsequent appropriator of foreign return flows would simply be placed in the same position as if the flows were from an in-basin source.⁹⁶

Rights of North Platte Appropriators

Two Wyoming cases, *Binning* and *Bower*, serve to illustrate another difficulty caused by the *Thayer* rules. In *Bower*, the court allowed Bower to appropriate seepage from the Big Horn Canal and invested him with rights superior to subsequent appropriators on the Big Horn River, toward which the seepage flowed until Bower intercepted it.⁹⁷ Bower's right was subject to the right of the canal company to stop the seepage,⁹⁸ a situation analogous to the right of a prior appropriator to intercept waste water for reuse as in *Binning*.⁹⁹

In both *Binning*¹⁰⁰ and *Bower*,¹⁰¹ the court held that water which if not intercepted would naturally reach a stream is appropriable. The court's rationale was as follows:

96. See text accompanying note 48, *supra*.

97. *Bower v. Big Horn Canal Association*, *supra* note 40.

98. *Id.* at 601.

99. *Binning v. Miller*, *supra* note 38, at 62.

100. *Id.* at 61.

We would certainly discourage development and retard the full and efficient use of our precious water supply were we now to say that persons who save return flows and seepage before they reach a stream and put the water to beneficial use have no protection in law, that latecomers who subsequently seek rights from the stream itself can take the water as against the persons who have put it to beneficial use for years.¹⁰²

But *Thayer* creates just this situation. As an illustration, consider the case of a Sugar Creek appropriator of Rawlins' effluent, who is senior to a North Platte appropriator situated below the point at which the effluent rejoins the North Platte.

As to the North Platte River, the city's waste water is not imported, having originally been taken from the North Platte. The junior North Platte appropriator is therefore entitled to stream conditions as they were at the time of his appropriation.¹⁰³ In the absence of a clear signal from the Wyoming Supreme Court that a municipality may totally consume its effluent water under *Wyoming Hereford*,¹⁰⁴ and assuming that the effluent ordinarily reaches the North Platte in usable quantities,¹⁰⁵ the city will not be able to cut off his rights.

Yet *Thayer* allows the city to cut off a Sugar Creek appropriator who is senior to the one on the North Platte, simply because as to him the city's effluent is imported. The application of importation doctrine in this case will lead to the plainly inconsistent result that a junior appropriator's rights are superior to those of a senior appropriator.

101. *Bower v. Big Horn Canal Association*, *supra* note 40.

102. *Id.*

103. See text accompanying note 41, *supra*.

104. See text accompanying note 69, *supra*.

105. If a tributary to a stream runs intermittently or does not deliver usable quantities to the appropriator's point of diversion on the main stream, priorities on the tributary may be administered separately. *Nebraska v. Wyoming*, 325 U. S. 589 (1945).

Jurisdictional Problems

1. Total Containment of Sewage

In *Thayer*, the court held that the state engineer and the state board of control have no authority over the appropriation of waste water derived from imported water.¹⁰⁶ The right of disposition which the court conferred on the City of Rawlins may cause problems if the city tries to assert a right to totally contain its effluent.

The Wyoming Supreme Court has so far avoided dealing with the issue of total containment of municipal effluent, whether derived from in-basin or imported water. The last apparent expression of the court on the subject came in *Wyoming Hereford*, where it was suggested that a city might totally consume its sewage under certain circumstances.¹⁰⁷

In *Thayer*, the court, citing significant factual differences, declined to apply or extend the suggestion of *Wyoming Hereford*.¹⁰⁸ In *State By and Through Christopoulos v. Husky Oil*,¹⁰⁹ where the issue was total containment of Cheyenne's effluent by an industrial buyer, the court deferred consideration of the question when it remanded the case to district court for joinder of the city and the board of control.

It would be inconsistent for the court to require the use of the state engineer and board of control in cases involving total containment of in-basin effluent and to forbid the use of the same agencies simply because the impounded effluent is imported. If the importer is to be allowed to put his waste water to another use or to sell it, surely that right is subject to the requirement that the new use be beneficial.¹¹⁰ And if in the case of the City of Rawlins, the state board of control has a right under Section 41-3-104 of the Wyoming Statutes,¹¹¹ to pass on the propriety of total contain-

106. *Thayer v. City of Rawlins*, *supra* note 8, at 957, 958.

107. See text accompanying note 69 *supra*, and Comment, *supra* note 67.

108. *Thayer v. City of Rawlins*, *supra* note 8, at 954.

109. *State By and Through Christopoulos v. Husky Oil*, 575 P.2d 262 (Wyo. 1978).

110. *Thayer v. City of Rawlins*, *supra* note 8, at 958 (dissenting opinion).

111. WYO. STAT. § 41-3-104 (1977).

ment insofar as it might affect a junior North Platte appropriator,¹¹² surely it is an odd doctrine which would deny the jurisdiction of the board of control to protect junior appropriators of the same water on Sugar Creek. The board should be allowed to fashion standards for both cases. To the extent that importation doctrine interferes with the jurisdiction of the board of control and the state engineer, the court should decline to apply importation doctrine.

2. Water Rights Transfers

The Wyoming Supreme Court has recently furnished a good example of how far afield *Thayer's* application of the importation doctrine has taken it with respect to jurisdiction of the state engineer and board of control. In *Basin Electric Power Cooperative v. State Board of Control*,¹¹³ the court did not question the board's jurisdiction, but rather upheld its decision in denying a petition for change in use and change in place of use of water under Section 41-3-104 of the Wyoming Statutes.¹¹⁴

Three points stand out in the *Basin Electric* case. First, the water in question is taken from the Laramie River and enters the Long Lake Basin as waste water from irrigation. The Basin is entirely enclosed by the Laramie River watershed, so that no waste water escapes from it. Although it does not appear from the *Basin Electric* decision that the court felt it was dealing with imported water, the water which is brought into the Basin drainage is technically imported water, inasmuch as the efforts of the appropriator have added a new water supply from another drainage. Waste water from irrigation in the Basin does not make its way back into the Laramie River, so that unlike the situation in *Thayer*, this flow is lost to the system from which it is diverted. Yet the court allowed the board to retain jurisdiction over a proposed transfer of this waste water to a Laramie River buyer.¹¹⁵ The court is driven to make ex-

112. See text accompanying note 103, *supra*.

113. *Basin Electric Power Cooperative v. State Board of Control*, 578 P.2d 557 (Wyo. 1978) [hereinafter cited in text as *Basin Electric*].

114. WYO. STAT. § 41-3-104 (1977).

115. *Basin Electric Power Cooperative v. State Board of Control*, *supra* note 113.

ceedingly nice distinctions when it smiles on the board in *Basin Electric* but frowns in *Thayer*, even though the waste water may reach the North Platte, from which it was diverted originally.

A second interesting point in *Basin Electric* is that the court denied the importer there the right to dispose of his waste water by selling it to a user in the drainage system from which it was originally diverted.¹¹⁶ Yet in *Thayer*, the court gave the importer the unrestricted right to dispose of his waste water, at least as to Sugar Creek users, and left open the possibility that these flows could be sold to users on the North Platte, from which the water was originally diverted.¹¹⁷ Again, by applying importation rules in *Thayer*, the court is constrained to make uncomfortably fine distinctions.

Basin Electric furnishes yet a third jarring contrast with *Thayer*. The importer in *Basin Electric* used the water for irrigation, and in the process released waste water into the Long Lake Basin. The court found that he could not transfer this waste water because he had effectively abandoned it through misuse or failure to use.¹¹⁸ Yet in *Thayer*, the court granted an importer the unrestricted right to dispose of his waste water, and held that, as to the defendants in the case, such water was not subject to abandonment.¹¹⁹ It is difficult to see a principled reason for the divergent results in *Basin Electric* and *Thayer*.

CONCLUSION

The root of the difficulties and inconsistencies revealed in the *Thayer* decision is the court's disposition of the threshold question whether importation principles should be applied. In deciding to follow the importation doctrine in this case, the court followed the example set in the Colorado Supreme Court's treatment, in the *Fulton* case, of water imported to Denver by means of a transmountain diversion

116. *Id.* at 559.

117. *Thayer v. City of Rawlins*, *supra* note 8, at 957, 958.

118. *Basin Electric Power Cooperative v. State Board of Control*, *supra* note 113, at 564.

119. *Thayer v. City of Rawlins*, *supra* note 8.

which took it across the Continental Divide. There was no possibility that any of the imported water could return to the river system from which it had been diverted. In *Thayer*, waste water had for many years been discharged into a channel connecting with the stream from which it had been diverted; indeed, none of the imported water had ever left the North Platte system.

The Colorado Supreme Court has recognized that there is a "vast distinction" between transmountain diversions across the Continental Divide, and diversions between creeks in close proximity to each other, particularly when those creeks flow into the same stream at points only a few miles from each other.¹²⁰ *Thayer* fails to make this distinction.

The appropriation of imported water return flows could more profitably be applied in cases nearer to *Fulton* than to *Thayer*. As both the dissent in *Thayer* and the majority in *Basin Electric* pointed out, the complexities of water administration require the expertise of the state engineer and the board of control. That control should not be diluted by applying importation doctrine to transfers within a river system, thereby requiring different rules with respect to junior appropriators, depending on their location in the system. These conflicts could be minimized if importation doctrine were not applied to transfers within a river system which has been adjudicated as a unit, nor to transfers between river systems which have their confluence within the State.

The importation doctrine, even when applied to transfers between river systems, should not stand in the way of the board of control and the state engineer. In the interests of maximum beneficial use of the state's waters, these agencies should be able to treat the waters of the state as an integrated whole.

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120. *Benson v. Burgess*, Colo., 561 P.2d 11, 15 (1977).