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CASE NOTES

WATER LAW—Reusing Irrigation Waste Water on Different Lands: A Warning to Get a New Permit. *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980).

John Fuss farmed two adjacent tracts of land in the Goshen Irrigation District (G.I.D.)—one of which he leased from Myrtice Baumgartner, the other owned by himself. These two adjacent tracts were joined on the north by lands leased and farmed by William Franks. The Fuss and Baumgartner land received water directly from the G.I.D. canal which ran along the south edge of their property. The Fuss and Baumgartner land¹ irrigated from south to north and therefore the water from these lands flowed toward the Franks land.

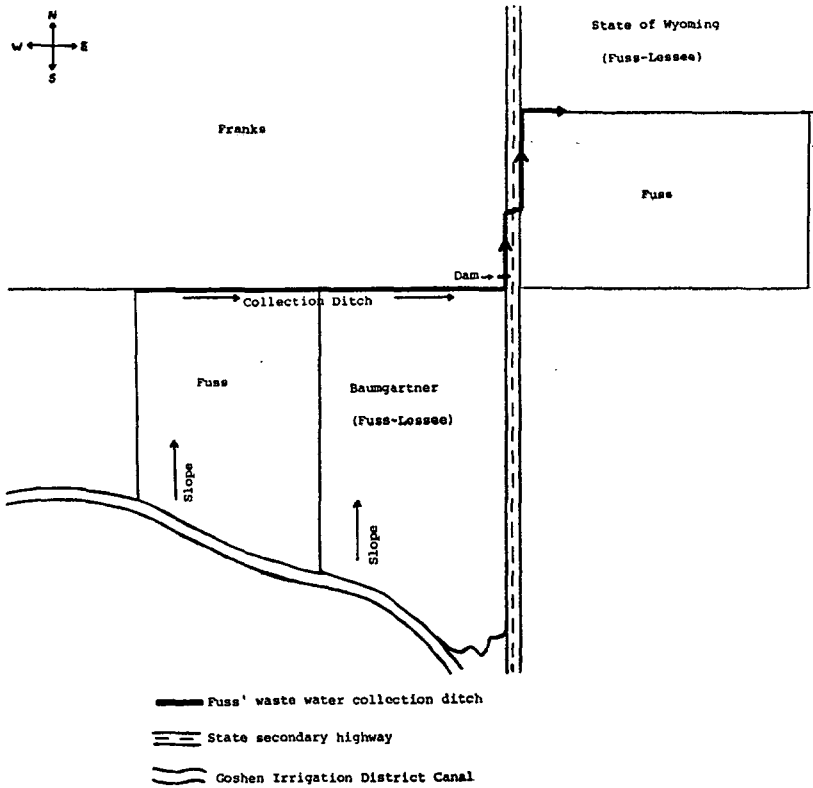
A secondary highway ran north and south to the east of these three tracts and bordered the Baumgartner and Franks properties. There was a borrow pit along the west side of the highway in the right-of-way. Fuss constructed a waste water collection ditch along the north edge of his land to collect excess irrigation water from his fields. This waste water² was directed easterly through the ditch into the highway borrow pit where it traveled north for a short distance along the edge of Franks' land before it again flowed east under the highway via an underground pipe constructed by the G.I.D.

In addition to the aforementioned tracts of land farmed by Fuss, he also farmed on state-lease land which was located to the north and east across the highway. For over fifteen years, Fuss used this collected waste water for irrigating his state-lease land.³

In 1977, Franks applied to the state engineer's office for a permit for a supplemental supply of water, the source being the highway borrow pit. The dispute arose when the

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1. Fuss' land, as used hereafter, refers to both his own property and that leased by him from Baumgartner.
2. Waste water, as the term is used in this note, refers to excess water flowing from irrigated lands, either on the surface or seeping under it. For purposes of this note, the terms waste water and seepage water are closely related and will be used interchangeably. 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) [Hereinafter cited as *Hutchins*].
3. Record, vol. 1, at 42, *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980).



permit was approved in 1979, at which time Franks constructed a dam in the borrow pit and diverted the waste water to irrigate his land. Fuss brought action to prevent Franks from diverting this water and to enjoin further interference with the use of the water on Fuss' state-lease land.

The district court, holding that the water from the highway borrow pit was lawfully appropriated by Franks under a valid permit, granted Franks' motion to dismiss for failure to state a claim upon which relief could be granted. The Wyoming Supreme Court affirmed the district court's finding that the appropriation was lawful by holding that the state engineer had the authority to approve the permit to appropriate this water.⁴

4. *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980). [Hereinafter cited in the text as *Fuss*].

BACKGROUND

In determining the relative rights of the parties to the waste water in question, a brief examination of the historical development of waste water appropriation is helpful. The Wyoming Constitution declares that (1) the natural waters within the boundaries of the state are owned by the state,⁵ and (2) the authority to supervise the waters of the state, particularly in regard to their appropriation, distribution, and diversion, is vested in the board of control⁶ and the state engineer.⁷ The Wyoming Legislature has not attempted to go beyond the terms of the state constitution by making any provisions for the appropriation of waters other than the natural waters mentioned in article VIII, section 1 of the Wyoming Constitution.⁸ These constitutional provisions have been interpreted to mean that only waters of natural streams are subject to appropriation.⁹ A natural stream is basically defined as “[a] channel, consisting of a well defined bed and banks, and a current of water.”¹⁰

An early result of restricting appropriations to waters of a natural stream was that run-off water intermittently discharged into an otherwise dry gulch could not be validly appropriated before it reached a stream,¹¹ but once waste water returned to a stream, it became property of the state and subject to appropriation.¹²

5. 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.

6. 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.

7. 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 this position.

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

9. *Id.*

10. *Id.* at 1009 quoting 1 KINNEY ON IRRIGATION § 303 (1912).

11. *Id.* at 1010.

12. *Wyoming Hereford Ranch v. Hammond Packing Company*, 33 Wyo. 14, 236 P. 764, 773 (1925).

Later, in the case of *Binning v. Miller*,¹³ it was decided that waste water could be appropriated. A qualifying requirement for this appropriation is that the seepage water would, if uninterrupted, flow into a natural stream.¹⁴ The court's rationale for this rule was that "seepage water which, if not intercepted, would naturally reach the stream, is just as much a part of the stream as the waters of any tributaries."¹⁵

The case of *Bower v. Big Horn Canal Association*¹⁶ further illustrated this idea when the court allowed Bower to intercept and appropriate seepage water flowing on his land which had been lost from defendant's canal. The seepage water in question did not form a channel, but was flowing toward a natural stream.¹⁷

However, both *Binning*¹³ and *Bower*¹⁹ state that a seepage water appropriation is subject to the right of the owner of the land from which the seepage arose to use the water for beneficial purposes upon the land for which the water was originally appropriated. In other words, the lower land owner who appropriates waste water does not thereby secure a permanent right to continue to receive the water, he merely takes his chances that the supply will be kept up.²⁰ If the senior appropriator uses a different method of irrigation thereby utilizing his water so that he ceases wasting water, no other appropriator can complain.²¹ The senior appropriator cannot, however, use the water for a purpose different than for which it was acquired.²² If the water was appropriated for irrigation uses, then it can only be used for that purpose unless the statutory procedure for change of use is followed.²³ Wyoming's current status of the

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

14. *Id.* at 61.

15. *Id.*

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

17. *Id.* at 602.

18. *Binning v. Miller*, *supra* note 13, at 61.

19. *Bower v. Big Horn Canal Association*, *supra* note 16, at 600.

20. *Id.* at 601.

21. *Id.*

22. WYO. STAT. § 41-3-101 (1977).

23. WYO. STAT. § 41-3-103 (1977).

law in the area of waste water recapture and appropriation rights appears to be in harmony with the general trend of other western states.²⁴

THE COURT'S ANALYSIS

The Wyoming Supreme Court, relying on *Bower*,²⁵ stated that:

[T]he owner of land upon which seepage or waste water rises has the right to use and reuse—capture and recapture—such waste waters for use only “upon the land for which the water forming the seepage was originally appropriated.” When the water leaves the land for which it was appropriated and would, if left to flow uninterrupted, reach a natural stream, it becomes eligible to other and separate appropriation for other and different uses.²⁶

Applying this rule to the facts in *Fuss*, the court found that once the water in the collection ditch ran into the highway borrow pit it must be regarded as having escaped the land to which it was appropriated, and, since there was testimony that the water would, if uninterrupted, flow into a natural stream, it becomes eligible for appropriation.²⁷ Franks' permit to appropriate this water was, therefore, held to be valid since Fuss had no superior right to the water after it left his property.²⁸

EFFECTS OF THE DECISION

As a result of the court's decision, Fuss could no longer use this collected waste water on his land east of the highway since Franks now had a right to the water that entered the borrow pit. One might be tempted to argue that this holding is unfavorable from a policy standpoint because it does not allow an appropriator to reuse his waste water in the most beneficial way, and thereby does not encourage full utiliza-

24. See generally HUTCHINS, *supra* note 2, at 568-579.

25. *Bower v. Big Horn Canal Association*, *supra* note 16, at 600.

26. *Fuss v. Franks*, *supra* note 4, at 20.

27. *Id.* at 21.

28. *Id.*

tion of irrigation water. To the contrary, both *Bower*²⁹ and *Fuss*³⁰ were decided with the idea of increasing the use of irrigation water. In *Bower* the court stated:

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.³¹

Legal Protection for Waste Water Users

Appropriation of waste water is encouraged by giving legal protection to those who collect and reuse waste water. A protection is afforded in two primary regards. First, as noted before, a prior appropriator who catches excess irrigation water on his land has a superior right to reuse that water upon that same land.³² No other appropriator can compel him to release this water while it is on his land and he is beneficially using it for further irrigation purposes.³³ In fact, a prior appropriator can at anytime, utilize irrigation methods that are totally consumptive, such as pumping the collected waste water back to the top of the field or installing a sprinkler system, thereby eliminating all waste of water.³⁴

Secondly, a person seeking to use his own waste water upon other lands, can receive an appropriation permit to do so, thereby securing his right to continue using it in that manner. The *Fuss*³⁵ case does not say that an appropriator cannot use waste water upon lands other than those for which the water was originally appropriated, it merely says that to do so he must receive a permit. The court recognized this in *Bower* when they said:

29. *Bower v. Big Horn Canal Association*, *supra* note 16.

30. *Fuss v. Franks*, *supra* note 4.

31. *Bower v. Big Horn Canal Association*, *supra* note 16, at 602.

32. *Fuss v. Franks*, *supra* note 4, at 20, *see also* text accompanying note 19, *supra*.

33. *Bower v. Big Horn Canal Association*, *supra* note 16, at 601.

34. *Id.*

35. *Fuss v. Franks*, *supra* note 4, at 20.

Additionally, it is equitable, in accordance with the constitutional provisions of this State, and in line with our previous holdings, that we here decree seepage water arising on Bower's land to be subject to appropriation by him (subject to prescribed procedures) for lands *other than those upon which the seepage arises*.³⁶ (Emphasis supplied).

"The 'prescribed procedures' referred to are the application requirements for a water permit under the statutes."³⁷ The court in *Fuss* stated that the rationale for this rule lies in the historical doctrine that waters become appurtenant to the lands for which they are acquired and, unless the statutes³⁸ are followed with respect to change of use or place of use, the waters cannot be detached and assigned to other land without the loss of priority.³⁹

It is submitted that even under the change of use statute,⁴⁰ an appropriator cannot extend his appropriation to new lands in addition to the land already covered by the original appropriation. To change the use or place of use and thereby retain the same priority date as the original use,⁴¹ an appropriator will have to give up part of the current use since the statute provides that the change shall not "increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow. . . ."⁴² If an appropriator wants to use waste water on new lands in addition to first using it on the original land, as *Fuss* wanted to do, he will, therefore, have to get a new appropriation for the new lands since the change of use statutes do not apply to this situation.⁴³

If *Fuss* would have obtained an appropriation permit to use this water on his land across the highway, he would have been legally protected to continue doing so as against

36. *Bower v. Big Horn Canal Association*, *supra* note 16, at 602.

37. *Fuss v. Franks*, *supra* note 4, at 20.

38. WYO. STAT. §§ 41-3-103 and 41-3-104 (1977).

39. *Scherk v. Nichols*, 55 Wyo. 4, 95 P.2d 74 (1939).

40. WYO. STAT. § 41-3-104 (1977).

41. WYO. STAT. § 41-3-108(b) (1977).

42. WYO. STAT. § 41-3-104 (1977).

43. The advantage of effecting a statutory change of use is that the land covered in the change will retain the same priority as the original land, whereas a new appropriation will receive a new priority date. See WYO. STAT. § 41-3-108(b) (1977).

Franks or any other subsequent appropriator. This legal protection was available to Fuss, but unfortunately he failed to invoke it by not applying to the state engineer for a permit to appropriate the water. Fuss still has the right to reuse this water upon the land for which it was originally appropriated, but if he allows the water to leave that land, Franks is now legally entitled to divert and use it.

Salvaged Waters

Fuss claimed that except for the conservation measures taken by him, the water would not have left his land to eventually reach a stream, and therefore, would have been lost to further beneficial use.⁴⁴ In essence, Fuss asserted that the water in question was salvaged by his conservation practices, and therefore, he was entitled to some greater protection—namely, a superior right to use the water on other lands.

Although a search of Wyoming case law reveals no cases dealing specifically with salvaged water, a number of other western states have recognized the concept of salvaged water and the rights incident thereto.⁴⁵ Salvaged waters have been defined as:

[P]arts of a particular stream or other water supply that have been lost, as far as any beneficial use is concerned, to any of the established users, but are saved from further loss from the supply by artificial means and so are made available for use.⁴⁶

Generally, the right to use salvaged water belongs to the person who makes that water available,⁴⁷ and the salvagers rights are superior to all others.⁴⁸ "This rule is based upon the general equity concept that the one who invests time and funds in such a project is entitled to receive the fruits of his

44. Reply Brief for Appellants at 3, *Fuss v. Franks*, *supra* note 4.

45. See generally *HUTCHINS*, *supra* note 2, at 565-67.

46. *Id.* at 565.

47. *Id.* at 565-66. But see *S.E. Colo. Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1975).

48. *Basinger v. Taylor*, 36 Ida. 591, 211 P. 1085, 1085-86 (1922).

labor.”⁴⁹ A limitation on the use of salvaged water is that its use must not injure a prior appropriator.⁵⁰

The burden of proof to show that he has, in fact, effected a savings, is placed upon the party claiming to have salvaged water.⁵¹ In other words, the claimant must demonstrate that the water salvaged was, prior to the institution of the conservation measures, not otherwise available for appropriation, nor would it have become a part of any stream or appropriable aquifer.⁵²

If Fuss could have proved that the waste water in question would not have eventually flowed to a stream,⁵³ by neither surface flow nor seepage to the stream bed, except for his conservation measures, then he should have been allowed to use this water on new lands without having to seek a new permit. This result is supported by the implication in *Bower*⁵⁴ that water that would not eventually reach a stream (such as salvaged water) is not governed by the appropriation system and therefore becomes property of the person who captures and puts it to use.

To encourage conservation of water, truly salvaged waters should be awarded to the one saving that water, and the application of those waters to new lands should be allowed if the claimant can show that he will not injure any prior rights. This would give an incentive for water saving measures by rewarding those who institute conservation practices.

If Fuss could have shown that he was truly salvaging the waste water, then a superior legal right to that water might have been granted. However, the court found that this

49. See HUTCHINS, *supra* note 2, at 566. See also *Santa Cruz Reservoir Company v. Rameriz*, 16 Ariz. 64, 70-71, 141 P. 120 (1914).

50. *Hill v. Green*, 47 Ida. 157, 274 P. 110, 110-111 (1928).

51. HUTCHINS, *supra* note 2 at 566.

52. Comment, *Water Saved or Water Lost: The Consequences of Individual Conservation Measures in the Appropriation States*, 11 LAND & WATER L. REV. 435, 443-444 (1976).

53. An example would be where the water accumulated on the lower end of his fields and evaporated or was lost to the stream system by deep percolation into underlying bedrock. For a discussion on burden of proof in salvaged water cases, see Comment, *supra* note 52, at 435, 443-445.

54. *Bower v. Big Horn Canal Association*, *supra* note 16.

waste water was subject to appropriation because there was testimony that it would have reached a natural stream. Therefore, Fuss had no superior right to it once it left the land for which it was appropriated.⁵⁵ Since Fuss failed to get a permit to use this water on new lands, he lost that rights to a later appropriator (Franks) who did obtain a permit to appropriate the water.

Jurisdiction

In addition to encouraging full and efficient use of water, a favorable policy result of declaring waste water to be subject to appropriation is that it gives the state engineer and the state board of control jurisdiction and authority over the appropriation of these waters. The board of control was created to supervise the water of the State⁵⁶ for the purpose of securing its beneficial use.⁵⁷ Since the board of control and the state engineer have the necessary expertise and experience in water matters, they are better equipped to supervise the appropriation and distribution of waste waters.⁵⁸ Allowing these agencies jurisdiction over waste water, as well as other natural waters of the state, enhances a more uniform regulation and accurate public record of water rights in the state.

Adverse Possession and Use of Water

In *Fuss*, the Wyoming Supreme Court declined to consider the question of adverse use because the issue was not presented to the trial court.⁵⁹ If a water right can arise by adverse use in Wyoming, Fuss would appear to have had a good argument that he had acquired a prescriptive right to use the water since he had been doing so openly and continuously for fifteen years.⁶⁰ Of course, he would still have the burden of providing all of the necessary elements

55. *Fuss v. Franks*, *supra* note 4, at 21.

56. WYO. CONST. art. 8, § 2, *supra* note 6.

57. *Thayer v. City of Rawlins*, 594 P.2d 951, 958-959 (Wyo. 1979) (dissenting opinion).

58. *Id.* at 958-959 (dissenting opinion).

59. *Fuss v. Franks*, *supra* note 4, at 21. The court stated that "the issue of adverse use of either the ditch or water was not presented to the trial court and we will, therefore, not consider the issue here."

60. *Record*, vol. 1 at 42, *Fuss v. Franks*, *supra* note 4.

of adverse use.⁶¹ The question that needs to be considered is whether a water right can even arise by an adverse use in Wyoming.

A number of western states have statutory provisions or reported court decisions that deal directly with the issue of whether prescriptive water rights can be acquired by adverse possession.⁶² Wyoming, however, does not have a statute regarding adverse use of water, nor has the supreme court directly answered the question of whether prescriptive title to water can be obtained.

In *Campbell v. Wyoming Development Company*⁶³ the court discussed the elements necessary for a prescriptive title to water. A prescriptive right was denied because the evidence failed to show that plaintiff's possession was "actual, open, hostile, exclusive and continuous for the period prescribed by the statute."⁶⁴ The court then said:

We do not mean to intimate, or seem to concur in the view, that a prescriptive title to water may be acquired in this state, particularly since 1890, when the legislature enacted a law requiring the initiation of all water rights to be pursuant to a permit from the State Engineer. We do not need to enter into that question in this case.⁶⁵

In denying petition for rehearing in the *Campbell* case, the court indicated that mere use of water, however long continued, did not give rise to a title by prescription; claimants must also show a substantial invasion of the lawful owner's rights and its extent during a continuous prescriptive period.⁶⁶ The court declined to add anything further to its original opinion concerning the refusal to grant the prescriptive right in view of the facts of the case, but did

61. *Campbell v. Wyoming Development Company*, 55 Wyo. 347, 100 P.2d 124, 139 (1940), reh. denied, 102 P.2d 745 (1940).

62. HURCHINS, *supra* note 2 at 381-382 and 404 n. 776. In addition to those statutes and court decisions, legislation or court decisions in some states have specifically limited the acquisition of prescription as against water or water rights held by the state, United States, or other public entities.

63. *Campbell v. Wyoming Development Company*, *supra* note 61. [Hereinafter cited in text as *Campbell*].

64. *Id.* at 139.

65. *Id.*

66. *Id.* at reh. denied 102 P.2d 745 (Wyo. 1940).

state, "[t]he only possible question . . . as to prescription . . . [is] if a prescriptive title may be obtained at all in this state, which we refused to decide."⁶⁷

The issue arose in a subsequent case,⁶⁸ but again the question was not settled, as the court did not discuss whether a precriptive right could be acquired after the enactment of the 1890 water rights statute.⁶⁹ The court merely said that use of water, standing alone, does not give rise to a title by prescription.⁷⁰

If the issue had been presented at a full trial on the merits, and Fuss' use satisfied the elements necessary for a precriptive right, it seems doubtful that a prescriptive title to the water would have been allowed in light of the fact that one has never been obtained in this state since the enactment of the 1890 water rights statute. However, until the legislature or the court directly decides the issue, it remains an open question.

CONCLUSION

Recaptured waste water provides a significant source of water for further irrigation purposes since nearly every irrigation project eventually becomes a drainage project.⁷¹ Waste water can be a valuable supplement to an individual's existing water supply. Reuse of this water is of increasing importance as streams become fully appropriated.⁷²

The *Fuss* decision emphasizes the strong support given to the appropriation system by not allowing it to become eroded by exceptions. Moreover, this case stands as a warning to appropriators who collect waste water and use it on other land without seeking a new appropriation permit. Using recaptured waste water on new land requires the appropriator to get a new permit or risk losing that use to

67. *Id.*

68. *Hunziker v. Knowlton*, 78 Wyo. 241, 322 P.2d 141 (1958).

69. WYO. STAT. §§ 41-4-501 through 41-4-506 and 41-4-517 (1977).

70. *Hunziker v. Knowlton*, *supra* note 68, at 145.

71. *TRELEASE, WATER LAW 240* (3rd ed. 1979).

72. *Trelease, Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, 469-470 (1960).

a later appropriator. Here, as could happen in many other instances, a waste water use enjoyed for many years was lost as a result of a failure to apply for a permit to appropriate.

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