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## Water Law - The State Engineer's Authority with Reference to Change of Use, Place of Use, Point of Diversion, and Means of Conveyance of Water Embraced by Water Permits - Green River Development Company v. FMC Corporation

Patrick J. Crank

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## CASE NOTES

**WATER LAW—The State Engineer's Authority with Reference to Change of Use, Place of Use, Point of Diversion, and Means of Conveyance of Water Embraced by Water Permits. *Green River Development Company v. FMC Corporation*, 660 P.2d 339 (Wyo. 1983).**

Ranchers in Sublette County initiated agricultural development of certain arid lands by obtaining water permits in 1908, 1910, 1920 and 1921 to approximately 10,100 acres.<sup>1</sup> The Green River Development Company acquired the permits in 1948. At the time the petitioner, Green River Development Company, filed for amendment of the water permits, 7,410 acres had actually been developed according to the initial development plan. However, the federal government had denied desert land entries on part of the land upon its determination that the land was not irrigable.<sup>2</sup>

Pacific Power and Light Company arranged to purchase Green River Development Company's interest in the original permit water which had not previously been beneficially utilized.<sup>3</sup> In 1977, Green River Development Company filed a petition with the State Engineer requesting the transfer of the unused permits:

1. to Pacific Power and Light Company;
2. changing the use from agricultural to industrial;
3. changing the use of 131.22 cfs of permit water during the irrigation season to 20.18 cfs year-round for industrial purposes;
4. changing the point of diversion from upper Sublette County to central Sweetwater County;
5. changing the place of use from ranch land in Sublette County, to a power plant in Sweetwater County, some 134 miles away; and,
6. changing the means of conveyance from ditch to pipeline

while retaining the earlier appropriation priority dates, 1908, 1910, 1920 and 1921.<sup>4</sup> Several ranchers and other industrial appropriators contested the transfers.

The State Engineer invoked section 41-4-514(a) of the Wyoming Statutes, which states that the State Engineer is authorized "to amend any permits . . . for the purpose of correcting errors or otherwise, when in his judgment such amendment appears desirable or necessary. . . ."<sup>5</sup> The State Engineer, after extensive hearings on the transfer of these particular water permits, calculated that 2,000 acre feet per year would be appropriate. After his determination that a "25% conveyance loss" would

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1. *Green River Dev. Co. v. FMC Corp.*, 660 P.2d 339, 342 (Wyo. 1983).

2. *Id.*

3. *Id.*

4. *Id.* at 340-341.

5. WYO. STAT. § 41-4-514(a) (Supp. 1983) states in part:

The State Engineer is hereby authorized, upon written petition of the owner, to amend any permit to appropriate water prior to adjudication by the State board of control for the purpose of correcting errors or otherwise, when in his judgment such amendment appears desirable or necessary. The total area of lands may not exceed the area described in the original permit.

also be appropriate, the State Engineer authorized all of the requested changes for 1,500 acre feet per annum providing, however, that the water must be diverted only during the 92 days between May 1st and July 31st of each year.<sup>6</sup>

The contesting appropriators appealed the Engineer's decision to the State Board of Control. The petitioner, Green River Development Company, appealed the decision to the district court in Sweetwater County. The Board of Control reversed the State Engineer's decision and the State Engineer appealed to the district court. The district court consolidated the cases and affirmed the Board of Control. The decision was appealed to the Wyoming Supreme Court.<sup>7</sup> The Wyoming Supreme Court held that section 41-4-514(a) did not authorize the Wyoming State Engineer to amend water permits with respect to change of use, place of use, point of diversion, or means of conveyance. Further, the court held that the only way such transfers could be made according to Wyoming Statutes is through utilization of the statutes<sup>8</sup> which deal with transfers of fully adjudicated water rights.<sup>9</sup>

#### THE STATE ENGINEER'S AUTHORITY OVER WATER PERMITS

At this point in the article it is useful to differentiate between a "water right" and a "water permit." In the case of a "water right," the water has actually been beneficially applied to the land in question.<sup>10</sup> The water embraced by a "water permit" has never been beneficially applied.<sup>11</sup>

Wyoming's statutory requirements with regard to water permits are covered by sections 41-4-501 through 41-4-517.<sup>12</sup> Of particular importance to the *Green River* case was section 41-4-514(a)<sup>13</sup> of the Wyoming Statutes.

6. 660 P.2d at 342.

7. *Id.* at 342-343.

8. WYO. STAT. §§ 41-3-104 and 41-3-114(a) (1977).

9. 660 P.2d at 355. Although the *Green River* court stated that water permits are not transferable in Wyoming, it is evident that water permits are freely transferable in Wyoming as long as they are sold with the land they are appurtenant to. If water permits have been properly transferred, they will retain their original appropriation dates. This broad language of the decision must be limited to situations in which an appropriator attempts to transfer water permits without transferring the land the water permits are appurtenant to. Although Justice Thomas agrees with the majority decision, he compares article 8, section 2 and article 8, section 5 of the Wyoming Constitution and proposes that the State Engineer is not vested with any discretionary power in the administration of the waters of the State of Wyoming. He concludes that all of the discretionary power in administration of waters is vested with the Board of Control. From this proposition, it could be argued that the Board of Control has the power to modify water permits in the way in which the State Engineer did in the *Green River* case; however, this discussion is beyond the scope of this case note and will not be pursued further. *Id.* at 355 (Thomas, J., specially concurring).

10. Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 P. 764, 770 (1925).

11. Green River Dev. Co. v. FMC Corp., 660 P.2d 339, 348 (Wyo. 1983). See *infra* text accompanying note 51.

12. WYO. STAT. §§ 41-4-501 to -517 (1977). These statutes outline the necessary procedures in applying for and receiving a water permit in Wyoming. For a brief discussion of the statutes, see 660 P.2d at 349-350.

13. WYO. STAT. § 41-4-514(a) (Supp. 1983). See *supra* note 5 for the text of the relevant section.

The predecessor statute was originally passed by the Wyoming State Legislature in 1913 and it provided only for the correction of errors in land descriptions.<sup>14</sup> The 1913 statute authorized the State Engineer upon the written application of the owner of any water permit, to *amend* such permit by changing the description of land therein and to *correct* any misdescriptions or erroneous descriptions in such permits.<sup>15</sup> The statute was further amended in 1929,<sup>16</sup> 1931,<sup>17</sup> and reached its present form in 1945.<sup>18</sup>

The Wyoming Supreme Court has interpreted section 41-4-514(a) or its predecessor statutes on two occasions.<sup>19</sup> *Scherck v. Nichols*<sup>20</sup> considered whether the 1929 statute would give the State Engineer authority to amend a water permit by correcting a land description. Noting that the 1913 law explicitly mentioned the correction of land descriptions, the court stated that the amendment merely broadened the scope of correction.<sup>21</sup>

The best interpretation of section 41-4-514 prior to the *Green River* case is contained in *John Meier and Son, Inc. v. Horse Creek Conservation District of Goshen County*.<sup>22</sup> The Hawk Springs Conservation District, in order to clarify rights it held under both fully adjudicated water rights and water permits (some of the water had not yet been beneficially applied), filed a petition seeking a change and amendment of its permits and certificates to set out the right to store water pumped from its wells as an incident of their use.<sup>23</sup> The District alleged that the phrase, "as supplemental water," contained in the certificates and permits was ambiguous and therefore that the State Engineer and Board of Control had power to amend the certificates and permits.<sup>24</sup>

The State Board of Control found that the permit was ambiguous in that the permit did not explicitly allow the petitioner to store water in a nearby reservoir, and amended the permits and certificates to reflect the intent of the petitioner and the State Engineer at the time the original permits were issued. The intention of these parties was established by parole evidence.<sup>25</sup>

The Wyoming Supreme Court affirmed the lower court holding that it was within the scope of authority granted to the State Engineer and Board of Control under section 41-4-514 to correct ambiguities or mistakes found in water permits.<sup>26</sup>

Discussing section 41-4-514, the *Horse Creek* court said that: "This statute is self-limiting and narrow in its application. It cannot be broadened

14. 1913 WYO. SESS. LAWS ch. 123, § 1.

15. *Id.* (emphasis supplied).

16. 1929 WYO. SESS. LAWS ch. 102, § 1.

17. WYO. REV. STAT. § 122-415 (1931).

18. 1945 WYO. SESS. LAWS ch. 118, § 1.

19. *John Meier and Son, Inc. v. Horse Creek Conservation Dist. of Goshen County*, 603 P.2d 1283 (Wyo. 1979); *Scherck v. Nichols*, 55 Wyo. 4, 95 P.2d 74 (1939).

20. 55 Wyo. 4, 95 P.2d 74 (1939).

21. 95 P.2d at 80.

22. 603 P.2d 1283 (Wyo. 1979).

23. *Id.* at 1284.

24. *Id.*

25. *Id.* at 1285-6.

26. *Id.* at 1289-90.

and other elements added or injected [into it] . . .”<sup>27</sup> The statute also required that the Board of Control or State Engineer make an initial determination of whether there was an *error* or *otherwise* and if an amendment was either *desirable* or *necessary*.<sup>28</sup>

Addressing the power of the Board of Control and the State Engineer under this statute, the court stated that:

Both the State Engineer and the Board of Control have broad powers generally, and this particular statute [section] grants both the State Engineer and the State Board of Control broad discretion upon its face when it provides if the ‘amendment appears *desirable* or *necessary*’; and in both cases submitting it to their respective judgment.<sup>29</sup>

The determination of the State Engineer and the Board of what use will better utilize the water and insure its beneficial use *must* be respected by this court, because the Board and the State Engineer are better equipped to dispose of such matters.<sup>30</sup>

In short, the court held that ambiguities were within the scope of correction authorized by section 41-4-514 and that the State Engineer and State Board of control had broad powers when correcting these ambiguities or errors in water appropriations or water permits.

Historically, however, the Wyoming courts had looked at section 41-4-514 only in the context that the title of the statute suggests—the “[c]orrection of errors in permits . . . .” The court had held that ambiguities<sup>31</sup> and faulty land descriptions<sup>32</sup> were the type of errors the legislature had authorized to be corrected.

The change sought in the *Green River* case, however, did not purport to correct an error. The question submitted was: can the State Engineer amend permits to change the use, place of use, point of diversion, and means of conveyance under the authority granted to him by section 41-4-514(a)?<sup>33</sup> Rephrased somewhat, the genuine issue of the *Green River* case was whether or not a recently formed plan for appropriating water could obtain an early priority date (and thereby defeat junior appropriators) by purchasing an old, unused water permit.

Although this question was one of first impression with the Wyoming court, commentators had suggested that one possible construction of section 41-4-514 would give the State Engineer authority to transfer water rights embraced by a bare water permit from one piece of land to another, i.e., change the place of use.<sup>34</sup>

27. *Id.* at 1286.

28. *Id.* at 1287 (emphasis supplied).

29. *Id.* at 1289-90 (emphasis supplied).

30. *Id.* at 1288 (emphasis supplied).

31. *Id.* at 1290.

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

33. 660 P.2d at 343.

34. Trelease and Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 14 (1966). In discussing the 1945 statute, Trelease and Lee felt that under a reasonable construction of the statute, the permit or certificate for any water right could have been amended by changing the land description to other lands if it appeared *desirable* or *necessary* to the State Engineer, i.e., the water permit could be transferred to another piece of land in the absence of errors in the original permit.

## ANALYSIS OF THE DECISION IN THE GREEN RIVER CASE

For purposes of analysis, it is useful to break the case down into two parts: 1) the portion of the case dealing with the State Engineer's authority to amend water permits; and 2) the portion of the case dealing with the nature of water permits and their transferability in Wyoming.

*I. The State Engineer's Authority to Amend Water Permits*

In deciding whether the authority that the State Engineer claimed was given to him by section 41-4-514(a) existed, the *Green River* court first looked at the statutes pertaining to the change in use and point of diversion of a water right.<sup>36</sup> Sections 41-3-104 and 41-3-114(a) of the Wyoming Statutes<sup>36</sup> are the legislative enactments which contemplate changing the use, place of use, point of diversion, and the means of conveying the waters of Wyoming. Although these statutes pertain to water rights, the court looked to these statutes and the decisions interpreting them<sup>37</sup> to ascertain the public water policy of the state of Wyoming.<sup>38</sup>

Because sections 41-3-104 and 41-3-114(a) both limit the amount of water that can be transferred to the amount of water that has been historically beneficially applied,<sup>39</sup> the court concluded that the public water policy is that "beneficial use shall be the basis, the measure, and the limit of the right to use water *at all times*."<sup>40</sup> Therefore, even though section 41-4-514(a) gives the State Engineer power to modify water permits "when it appears desirable or necessary,"<sup>41</sup> the State Engineer's authority under section 41-4-514(a) cannot be exercised outside the parameter of Wyoming's beneficial use policy.<sup>42</sup>

Since the permits Green River Development Company was attempting to transfer had never been adjudicated by the Board of Control (i.e., the water authorized for diversion by the permits had never been put to beneficial use)<sup>43</sup> and the amendment sought by the State Engineer was not for the correction of any errors in the original permits, the State Engineer had no authority under section 41-4-514(a) to change the permit, let alone authority to change the use, place of use, point of divergence, and means of conveyance of Green River Development's water permits.<sup>44</sup>

The *Green River* court also interpreted section 41-4-514(a) by employing a doctrine of statutory construction labeled *ejusdem generis*.<sup>45</sup> The court had previously recognized the rule of statutory construction in *People*

35. 660 P.2d at 345.

36. WYO. STAT. §§ 41-3-104 and 41-3-114(a) (1977).

37. Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557 (Wyo. 1978).

38. 660 P.2d at 347.

39. Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 563 (Wyo. 1978).

40. 660 P.2d at 346 (emphasis added). The *Green River* court labeled this statute the "statutorily proclaimed water policy" in Wyoming. 660 P.2d at 346. This policy is consistent with other cases in which water appropriators tried to transfer their water rights. See *infra* text accompanying notes 68-73.

41. WYO. STAT. § 41-4-514(a) (Supp. 1983). See *supra* note 5 for the full text of section 41-4-514(a).

42. 660 P.2d at 347.

43. *Id.* at 345.

44. *Id.* at 355.

45. *Id.* at 353.

*ex rel. School Dist. No. 3 v. Dolan*<sup>46</sup> enunciating it as follows: "When a specific enumeration concludes with a general term, it is held to be limited to things of the same kind. It is restricted to the same genus as the things enumerated."<sup>47</sup> The court then applied this rule of statutory construction to the word "otherwise" contained in section 41-4-514(a) and concluded that the word "otherwise" had to be of the same genus as the specific enumeration immediately preceding it "for the purpose of correcting errors." Therefore, the word "otherwise" merely described other types of error correction.<sup>48</sup>

## II. The Nature of Water Rights and Their Transferability in Wyoming

To decide whether water permits were transferable in Wyoming, the *Green River* court asked, "what is a water permit?"<sup>49</sup> By looking at the statutes relating to the application and issuance of water permits,<sup>50</sup> along with prior decisions, the court asserted that a water permit is the authority "to pursue a water right—a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired."<sup>51</sup>

The court also included a brief outline of the statutes which deal with water permits.<sup>52</sup> After noting that none of these statutes made any provision for the transfer of water permits,<sup>53</sup> nor did any other Wyoming statute explicitly allow the transfer of water permits,<sup>54</sup> the court concluded that there was no statutory authority to transfer such interest in the waters of the State of Wyoming as are secured by a water permit.<sup>55</sup>

In reaching this decision, the court also noted that it was "vividly clear" by looking at the statutes relating to water permits that the legislature had taken "extraordinary precautions" to assign the permit waters to specific locations and to provide notice to all concerned as to how much water is to be utilized, how much will be taken from the water course and when and where the water course will be deprived of water.<sup>56</sup> All of the court's analyses led to the conclusion that the Wyoming State Legislature never intended that water permits should be transferable and the court so held.<sup>57</sup>

### ANALYSIS OF THE GREEN RIVER DECISION

At first reading, the decision in the *Green River* case appears simple and straight forward. The State Engineer under authority assumed from

46. 5 Wyo. 245, 39 P. 752 (1895).

47. *Id.* at 755.

48. 660 P.2d at 353.

49. *Id.* at 348.

50. WYO. STAT. §§ 41-4-501 to -512 (1977).

51. 660 P.2d at 348.

52. *Id.* at 349.

53. *Id.* at 350.

54. *Id.* at 345.

55. *Id.* at 355.

56. *Id.* at 350.

57. *Id.* at 355. *But, see supra* note 9.

section 41-4-514(a) allowed the permits to be transferred to Pacific Power and Light for changed uses some 134 miles away from the original appropriation site. The Wyoming Supreme Court held that: 1) the State Engineer had no authority to change the permit; 2) water permits were not transferable in Wyoming; and 3) all corrections must be within the original intention of the permit.<sup>58</sup> Also, the court implicitly held that if the original intention of the appropriation was essentially changed, then a new, current priority permit would have to be obtained. The Wyoming Supreme Court employed sound legal theories and rules of statutory construction to reach its decision.

To realize the importance of the *Green River* decision, one must consider the consequences had the court ruled that section 41-4-514(a) granted the State Engineer power to change water permits. Such a decision would have given the State Engineer unlimited power, contrary to article 1, section 7 of the Wyoming Constitution which provides that "[a]bsolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."<sup>59</sup> He would be able to amend water permits by changing the use, place of use, point of diversion, and means of conveyance, entirely at his own discretion. He would have had no legislative guidelines to control him as are present in the statutes relating to transfer of a water right.<sup>60</sup> The water embraced by a water permit would have been transferable and would retain the original appropriation date. As the *Green River* court stated, the

permit phase of water right acquisition [would] be a kind of never-never land in which the authority of the State Engineer is indefinable, indiscernible and indescribable. It would be as though we were to say that this authority may be exercised absent the burden of inhibiting standards or protective restrictions, and with respect to which the State Engineer is possessed of all such leeway in these matters as will allow him to do whatever pleases him.<sup>61</sup>

As section 41-3-101 of the Wyoming Statutes states: "[B]eneficial use shall be the basis, the measure and limit of the right to use water at all times. . . ."<sup>62</sup> In fact, "beneficial use is the ultimate foundation of every water right under the priority of appropriation system prevailing in the arid states."<sup>63</sup> The court's prior decisions also demonstrate that beneficial use is the ultimate concern when courts are faced with a water-related decision.<sup>64</sup>

The State Engineer, however, issued an order authorizing the change of use, place of use, point of divergence, and means of conveyance of water permits where the water had never been beneficially applied. The State Engineer proceeded to amend the permits under a statute whose title reads

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58. *Id.* at 344-55.

59. WYO. CONST. art. 1, § 7.

60. WYO. STAT. §§ 41-3-104 and 41-3-114 (1977).

61. 660 P.2d at 348.

62. WYO. STAT. § 41-3-101 (1977).

63. *Lincoln Land Co. v. Davis*, 27 F. Supp. 1006, 1008 (D. Wyo. 1939).

64. *Basin Elec. Power Coop. v. State Board of Control*, 578 P.2d 557 (Wyo. 1978); *Scherck v. Nichols*, 55 Wyo. 4, 95 P.2d 74 (1939).



in part, "Correction of Errors in Permits," and the owner of the permits had never alleged that there were errors in the original permit.<sup>65</sup>

The State Engineer acted in blatant disregard of legislative enactments and the public water policy of Wyoming. In fact, even the State Engineer's manual of regulations and instructions recognizes that section 41-4-514 of the Wyoming Statutes is solely for the correction of errors in water permits.<sup>66</sup>

Allowing changes in the use of a bare water permit would definitely give rise to speculation in the waters of Wyoming. A person could acquire a water permit with a comparatively early priority date and as long as he was successful in persuading the State Engineer to extend the period for completion of the water works and application to beneficial use,<sup>67</sup> the permittee could save the priority to sell whenever an enterprise with sufficient wealth to pay his price came forward. He would never have to beneficially apply the water to the lands of Wyoming. This is what Green River Development Company apparently undertook to do.

If water permit holders were allowed to change the use of their water permits, permits with early priority dates would become more valuable than gold. These permits would, in fact, be more valuable than a fully adjudicated water permit. A brief discussion of *Basin Electric Power Corp. v. State Board of Control*<sup>68</sup> illustrates the point.

In *Basin Electric*, the owner of an adjudicated water right was attempting to change the use of his water right from agricultural use to a preferred industrial use to service its steam power generation

65. 660 P.2d at 345.

66. Manual of Regulations and Instructions, Wyoming State Engineer's Office, revised January 1974.

Part I, Chapter IX, Section 5 of the manual is titled "Petition to Correct Errors and Misdescriptions." The section includes many references to errors in permits including: 1) Section 5(a): the petition "must be accompanied by conclusive evidence to show that the change desired was caused by an error or misdescription"; 2) Section 5(a)(5): the petition must "describe the portion of the permit, as originally filed, in error"; 3) Section 5(a)(6): Petitioner must "describe the desired correction"; 4) Section 5(a)(7): Petitioner must "state how the error occurred if this information is available." *Id.* at 80-81.

Part I, Chapter IX, Section 6 of the manual entitled, "Petition for Amendment of Description of Land," also shows that section 41-4-514(a) only gave the State Engineer authority to correct errors rather than change the permits entirely. After setting out statute 41-213(A) (this statute preceded section 41-4-514), the section summarizes what needs to be included in the petition for correction of water permits. Section 6(a)(9) provides that, "[t]he accompanying map should show accurately the location of the ditch, the stream, the location and extent of the lands proposed to be excluded from the permit, and the location and extent of the lands to be substituted in lieu thereof. Section 6(a)(7) provides petitioner must "[d]escribe the lands which are substituted in lieu of the lands being excluded. The total area of the substituted lands cannot exceed the total area of the lands proposed to be excluded from the permit." (emphasis supplied). *Id.* at 84-85.

From Section 6(a)(7) and 6(a)(9) it can be argued that the regulations do not allow for a change of use. Since both Section 6(a)(7) and 6(a)(9) talk about changing the water permit from one piece of land to another, the State Engineer had no power to change the use of the water embraced by Green River Development's water permits.

67. Beneficial application of the water must be completed within five years or a shorter period set by the State Engineer. However, for good cause shown, the State Engineer may at any time, or from time to time, before the date of expiration, extend any or all of these periods. WYO. STAT. § 41-4-506 (1977).

68. 578 P.2d 557 (Wyo. 1978).

requirements at its Laramie River Station near Wheatland, Wyoming. Application was made to transfer the total amount of water which had been historically used in irrigation.<sup>69</sup> Part of the historical agricultural use had, however, provided no return flow irrigation,<sup>70</sup> and the water which was not actually consumed in crop irrigation ran into a basin where it eventually evaporated. That water never returned to the Laramie River system for use by other appropriators.<sup>71</sup>

The supreme court limited the amount of water which could be transferred to the amount of *beneficial consumptive* use.<sup>72</sup> Even though the water had for years been running into the Long Lake Basin, where no other appropriators could use the water, and where the water would eventually evaporate and be wasted, the court held that the water had not been *beneficially consumptively used*, and it could not be transferred to a different use.<sup>73</sup>

If a holder of a water permit could change the use of his permit, however, he could then transfer the total amount of water that was initially authorized under his permit application<sup>74</sup> without regard for return flows or the amount of his historic beneficial consumptive use. In light of the decision of the Wyoming Supreme Court in *Basin Electric*, this constitutes an anomalous result. Holders of water permits would be able to transfer and change substantially greater volumes of water than persons holding fully adjudicated water rights.

There are situations, however, in which the State Engineer, or the Board of Control, do need power to amend water permits beyond what is now permitted under section 41-4-514. A few hypotheticals will illustrate such areas.

*Hypothetical 1:* B is the owner of Blackacre. In 1982 he applied for and received a water permit entitling him to 20 acre feet of water per year for the irrigation of Blackacre. Although the water has not been applied to beneficial use, the permit is in good standing. The point of diversion in the original permit was in the dead center of Blackacre and the water was to be pumped from Moose Skull Creek into a pipeline and up to the irrigated land on Blackacre. The return flow from the irrigated land reenters Moose Skull Creek at the downstream end of Blackacre.

If, because of engineering or economic realities, it is not feasible to irrigate Blackacre by pumping water from Moose Skull Creek, B should be

69. *Id.* at 560-61.

70. *Id.* "[T]he irrigation return flow enters the Long Lake Basin, a geological enclosure which precludes the return of any waters to the Laramie River for use by other appropriators."

71. *Id.*

72. *Id.* at 569-70.

73. *Id.* at 570.

74. Applications must be examined by the State Engineer to ascertain that they contain all of the necessary information to show the location, nature and *amount* of the proposed beneficial use. WYO. STAT. § 41-4-502 (1977). Presumably, the determination of the amount of water needed to irrigate the total acreage included under the permit would be the amount of water that could be transferred if the State Engineer granted a change of use and a change of place of use to the holder of a water permit.

permitted to change the point of diversion to an upstream site, to utilize a gravity type system. Note that this would also change the means of conveyance.

Either the State Engineer or the Board of Control should have the power to amend B's water permit while allowing B to retain the appropriation date of his original water permit. It would be a waste of economic resources and time to require B to construct the pipeline, buy and operate pumps, in order to apply the water to beneficial use, so that he could later petition the Board of Control for a change in point of diversion and means of conveyance of his water right.<sup>75</sup> All of B's expenditures would be wasted as soon as B initiated the gravity system upon amendment of his adjudicated water right. However, in any situation where an amendment is granted, the State Engineer, or the Board of Control, must be extremely careful not to injure the rights of other appropriators who draw their water from the same source as B.

It might be argued that B's "error" in submitting application for pumped water is the character of "error" which section 41-4-514 authorizes the State Engineer to correct in as much as the ultimate intention of the applicant and the State Engineer are not altered, and the essential project authorized by the permit is not changed. However this argument will probably fail because the *Green River* decision held that the

State Engineer's error-correcting discretion must be limited to the correction of such errors as are contained in the original permit as those errors are established by proof that the permit was not originally—or by any valid extension—issued in conformity with the intent of the applicant and/or the State Engineer.<sup>76</sup>

B's permits were issued exactly as he and the State Engineer intended them to be issued, and therefore, the State Engineer would have no authority to amend the permits.

*Hypothetical 2:* W is the owner of Whiteacre, a forty-five acre tract of land in central Wyoming. In 1982, W applied for and received a water permit to irrigate forty acres of Whiteacre (W planned to build a roping arena on the remaining five acres). Although the waters have not yet been beneficially applied, the permit is in good standing.

In 1983, W obtained a soil analysis which showed that out of the forty acres he originally intended to irrigate, five acres are so alkaline that it is highly unlikely that anything will ever grow there. However, the five acres in which W planned to build the roping arena are prime agricultural land. W wishes to transfer the water permit from the salty five acres to the five acres where the roping arena was to be built.

Under *Green River*, W probably could not substitute the fertile five acres for the saline acres because the irrigation of the fertile land was not within the original contemplation of any party. Neither the Board of Con-

75. WYO. STAT. §§ 41-3-104 and 41-3-114(a) (1977).

76. 660 P.2d at 345 (emphasis supplied).

trol nor the State Engineer would have the authority to authorize the substitution. The "error" was not in the permit or the application of any of the permit's enabling provisions. Rather, it was an error in the capability of the diversion scheme itself.

The State Engineer would have no authority to amend the permit because he is restricted to correcting errors as found in the original permits under section 41-4-514(a).<sup>77</sup> The State Board of Control could not transfer the water to the fertile land until the permitted water has been beneficially applied to the land because "there exists no statutory authority to transfer such interest in the waters of the state of Wyoming as are contemplated by a water permit."<sup>78</sup>

Therefore, to save the priority date as to the saline five acres, W must proceed to irrigate the salty five acres, perfect the water right, and then transfer the water right under sections 41-3-104 and 41-3-114(a). Thereafter, if he fails to irrigate all of the acres included in the original water permit (i.e., W might irrigate 35 of the acres originally described in the water permit along with the five acres originally destined to become a roping arena), the water right on the five salty acres will be subject to abandonment.<sup>79</sup>

Once again, economic resources may be wasted unless either the State Engineer or the Board of Control have authority to amend water permits in certain limited circumstances. These amendments should only be allowed when the original intention of the appropriation project and the State Engineer remain unchanged, and no other appropriators will be injured by the amendment of the permit.

However, there is no reason at this time for the legislature to give either the State Engineer or the Board of Control power to change the *use* of a water permit. To allow a permittee to change the use of a water permit would most certainly give rise to speculation with the waters of Wyoming. Priority to large quantities of water could be reserved and later sold to competing entrepreneurs by speculators having little or nothing invested other than the permit application itself. Such speculation in the waters of Wyoming has always been contrary to the public water policies of Wyoming.<sup>80</sup>

The theory underlying western water law is that by allowing private individuals to carve private property rights out of the publicly owned water assets through investment of time and effort each person will honestly achieve the greatest possible benefit. The totality of these private benefits will tend to produce a maximum benefit for the state and nation. Early initiative is encouraged and rewarded, and even though a water right is granted in perpetuity it should be freely alienable and changeable so that it can move among productive uses in response to economic forces.<sup>81</sup>

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77. *Id.*

78. *Id.* at 355.

79. WYO. STAT. §§ 41-3-401 and 41-3-402 (1977).

80. Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 570 (Wyo. 1978).

81. Trelease and Lee, *supra* note 35, at 4.

In essence, Green River Development Company and the State Engineer were moving along the lines suggested by this theory, i.e., transferring agricultural water to industrial use in response to economic forces.

But the substantial investment of time and effort required to "prove up" the appropriation, the required application to beneficial use, was never invested. Green River Development had never completed the required prerequisites that Wyoming law demands, therefore, no substantial interest ever ripened to the point that a transfer or change would necessarily foster the underlying theory. Both the State Engineer and water appropriators must follow the rules and decisions which insure that the system functions correctly.

#### CONCLUSION

The beneficial use system of water appropriation is essential to the development of the West. A decision by the Wyoming Supreme Court allowing the State Engineer to transfer a water permit for water which never was beneficially applied would have wreaked havoc on the system and given rise to all manner of speculative ventures for which no substantial or honest investment was intended.

There are instances where the Board of Control or the State Engineer need authority to amend water permits in situations other than where errors occurred in the original permits. Still, the amendments should be limited to changes within the original development plan. Any substantial departure from the original development scheme should be deemed to be a different scheme with its own recent priority date. Also, other appropriators must be protected from injury caused by any amendment of water permits.

Legislative attention should be directed toward defining the types of errors which may be corrected by the State Engineer or Board of Control. There is a need to provide standards and guidelines for exercise of discretion in authorizing changes which appear reasonable or necessary but which do not depart from the original appropriation scheme in a water permit.

The substantial investment of labor, time, and capital on the part of an appropriator (i.e., the application of the water to beneficial use) should always be required to prove the honesty of purpose and to prevent speculation. Later schemes should not ordinarily be entitled to earlier priority. A substantial change in use of a permit should not be authorized.

PATRICK J. CRANK