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WATER RIGHTS—Impairment of Existing Water Rights Under the Wyoming Watershed Act. *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 656 P.2d 1144 (Wyo. 1983).

The Toltec Watershed Improvement District (Toltec) was organized on January 18, 1968, for the proposed construction of a multi-purpose reservoir near Garrett, Wyoming.¹ Toltec was created under the authority of the Watershed Protection and Flood Prevention Act² and the Wyoming Watershed Improvement District Act.³ In 1970, plaintiff, Associated Enterprises, Inc., began a series of actions against Toltec and related parties in an effort to prevent the condemnation of its land and water rights⁴ for the proposed reservoir site.⁵ The District Court of Albany County granted condemnation for the construction of the reservoir and determined just compensation for the land taken.⁶

On appeal to the Wyoming Supreme Court, Associated Enterprises argued for reversal on the basis of section 41-8-126 of the Wyoming Statutes,⁷ which provides: "Nothing in this Act . . . shall be so construed as to in any manner impair existing water rights, appropriations, or priorities."⁸ Associated Enterprises argued that where existing water rights would be affected this provision was a per se restriction on a watershed improvement district's eminent domain powers.⁹ Toltec, on the other hand, argued that a strict interpretation would contravene the purpose of the entire Watershed Act.¹⁰ The court held that the "no impairment" provision did not prohibit condemnation of existing water rights under the

1. *Johnston v. Davis*, 500 F. Supp. 1323, 1325 (D. Wyo. 1980). The reservoir project will change 136 acres of irrigated land and 259 acres of rangeland to reservoir, dam, roads, and recreation facilities. *Id.*
2. Pub. L. No. 83-566, 68 Stat. 666 (1954) (codified as amended at 16 U.S.C. §§ 1001 to -08 (1982)).
3. WYO. STAT. §§ 41-8-101 to -26 (1977).
4. The project would require utilization of 388 acres owned by Associated Enterprises, 264 of which had existing water rights, appropriations and priorities. Brief for Appellant at 5-6, *Associated Enter., Inc. v. Toltec Watershed Improvement Dist.*, 656 P.2d 1144 (Wyo. 1983).
5. Initially, Plaintiff sought a judgment denying entry upon his ranchlands to carry out studies for the damsite. He argued that the Wyoming statute creating watershed improvement districts was in violation of the "one man, one vote" concept of equal protection under the Wyoming and United States Constitutions, as voting powers were weighted in relation to the amount of acreage owned in the district. *Associated Enter., Inc. v. Toltec Watershed Improvement Dist.*, 490 P.2d 1069 (Wyo. 1971). The U.S. Supreme Court affirmed the Wyoming Supreme Court in holding that there was no denial of equal protection. *Associated Enter., Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973). See also *Associated Enter., Inc. v. Toltec Improvement Dist.*, 578 P.2d 1359 (Wyo. 1978) (where the court held that the state engineer was justified in granting an extension of time within which to construct the reservoir); and *Johnston v. Davis*, 698 F.2d 1088 (10th Cir. 1983); *Johnston v. Davis*, 500 F. Supp. 1323 (D. Wyo. 1980) (holding that the Environmental Impact Statement (E.I.S.) was in compliance with the National Environmental Policy Act (42 U.S.C. § 4321 (1977))).
6. *Associated Enter., Inc. v. Toltec Watershed Improvement Dist.*, 656 P.2d 1144, 1146 (Wyo. 1983).
7. WYO. STAT. § 41-8-126 (1977).
8. *Id.*
9. Brief for Appellant, *supra* note 4, at 6. WYO. STAT. § 41-8-113(a) (iii) (1977), confers upon watershed improvement districts the power of eminent domain "in the manner provided by law for the condemnation of private property for public use."
10. Brief for Appellee at 7, *Associated Enter., Inc. v. Toltec Watershed Improvement Dist.*, 656 P.2d 1144 (Wyo. 1983).

Watershed Act if just compensation was awarded to the condemnee.¹¹ This Note explores the supreme court's decision in favor of condemnation of Associated Enterprise's existing water rights, despite a statutory provision purportedly barring any impairment of such rights.

HISTORY

A. *The Appropriative Water Right*

In western states, water law is based upon the doctrine of prior appropriation—first in time is first in right.¹² The right to use water under this system is not based upon the ownership of land but upon putting water to a beneficial use.¹³ The state “owns” all of the water,¹⁴ but the appropriator acquires a vested property interest in the amount of water which he beneficially uses.¹⁵ Therefore, an appropriator has a distinct property right.¹⁶ However, unlike an interest in real property, which is a private right subject to public restrictions, a water right is a public right subject to private restrictions.¹⁷

In the early 1900's, Wyoming water appropriation law was strongly influenced by Elwood Mead, Wyoming's first state engineer, who maintained that water rights were intimately tied to the land.¹⁸ This led the Wyoming Legislature to adopt a provision which stated: “Water rights cannot be detached from the land, place or purpose for which they are acquired, without loss of priority.”¹⁹ In 1941, the phrase “without loss of priority” was dropped by the legislature, leaving the rest of the statute intact.²⁰

Frank Trelease, a noted expert in the field of western appropriation law, suggests that this statute triggered the general view among Wyoming irrigators that water rights were appurtenant to the land, a property interest inextricably intertwined with their ownership of a particular piece of property.²¹ However, contrary to this belief, throughout the years many exceptions have eroded the 1909 statute.²² Among these was a statute

11. 656 P.2d at 1147. The value of the water rights were taken into consideration by valuing that portion of the land as irrigated land. The supreme court also held that Toltec was authorized to condemn land for recreation purposes, the reservoir would provide benefits to the public, and, that the jury award of just compensation was supported by competent evidence and Associated Enterprises did receive proper interest on their award. *Id.* at 1147-52.

12. Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917, 918 (1977).

13. *Id.* at 918.

14. WYO. STAT. § 41-3-101 (Supp. 1983).

15. Green River Dev. Co. v. FMC Corp., 660 P.2d 339, 347 (Wyo. 1983). “[B]eneficial use is the ultimate foundation of every water right under the priority of appropriation system prevailing in the arid states.” (quoting Lincoln Land Co. v. Davis, 27 F. Supp. 1006, 1008 (Wyo. 1939)). *Id.*

16. Robie, *supra* note 12, at 923.

17. *Id.*

18. Trelease, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 10 (1966).

19. 1909 WYO. SESS. LAWS Ch. 68., § 1.

20. 1941 WYO. SESS. LAWS Ch. 25., § 1.

21. Trelease, *supra* note 18, at 11.

22. *Id.* For a detailed description of the many exceptions to the 1909 statute, see Trelease, *supra* note 18, at 11-19. See also Comment, *Changing Manner and Place of Use of Water Rights in Wyoming*, 10 LAND & WATER L. REV. 455 (1975).

passed in 1947 which allowed for the change in the point of diversion and means of conveyance for irrigated lands, *without loss of priority*.²³ This exception developed in conjunction with the Bureau of Reclamation post-war reservoir construction project.²⁴ Despite the 1909 "no-change"²⁵ statute, individuals whose lands were condemned for the reservoirs could retain their water rights by simply diverting them to other portions of their property.²⁶ Alternatively, they could sell or convey the lands to be submerged with a provision in the deed that "the water rights appurtenant thereto could be detached and transferred"²⁷ by the subsequent owner.

Another exception to the provisions of the 1909 "no-change" statute allowed a change to a preferred use, e.g., domestic use.²⁸ Land could be condemned for a preferred use through the power of eminent domain on the premise that it promoted the best use of the water available.²⁹

B. The Eminent Domain Power

The Wyoming Legislature's liberal grant of the eminent domain power was another link in the chain of exceptions to the no-change statute.³⁰ Throughout its history, the Wyoming Legislature has frequently provided eminent domain³¹ power to various entities including irrigation³² and drainage districts.³³ In fact, the Wyoming Constitution³⁴ specifically provides for eminent domain in these contexts if just compensation is awarded.

Where the eminent domain power has conflicted with non-transferable existing water rights, the Wyoming Supreme court has ruled in favor of condemnation and just compensation in certain limited circumstances.³⁵

23. WYO. STAT. § 41-3-107 (Supp. 1983) (emphasis added).

24. Trelease, *supra* note 18, at 16.

25. *Id.* at 7. Trelease uses this term to refer to the 1909 statute. See *supra* text accompanying note 19.

26. Trelease, *supra* note 18, at 17.

27. WYO. STAT. § 41-3-107(c) (Supp. 1983).

28. 1909 WYO. SESS. LAWS Ch. 68., § 2. Since its initial enactment, water for steam power plants and industrial uses has been added to the preference list in the statute. WYO. STAT. § 41-3-102 (1977).

29. Trelease, *supra* note 18, at 4-5.

30. Trelease, *Transfer of Water Rights—Errata and Addenda—Sales for Recreational Purposes and to Districts*, 2 LAND & WATER L. REV. 321, 324 (1967).

31. In *Grover Irrigation and Land Co., v. Lovella Ditch, Reservoir and Irrigation Co.*, 21 Wyo. 204, 240, 131 P. 43, 53 (1913), eminent domain was described by the court as a power which "by the authority of the state and for the public good, the property of the individual is taken, without his consent . . . either by the state itself or by a corporation, public or private, or by a private citizen."

32. WYO. STAT. § 41-7-808 (1977).

33. WYO. STAT. § 41-9-202 (Supp. 1983).

34. WYO. CONST. art. I., § 32 provides in part:

"Private property shall not be taken for private use unless by consent of owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches . . . nor in any case without due compensation." (emphasis added).

WYO. CONST. art. I., § 33 provides:

"Private Property shall not be taken or damaged for public or private use without just compensation."

35. *Edwards v. City of Cheyenne*, 19 Wyo. 110, 114 P. 677 (1911), *reh'g denied*, 19 Wyo. 110, 122 P. 900 (1912). In *Edwards*, the city moved to condemn lands for a damsite to accumulate and store water. The city's central purpose in the condemnation of land with appurtenant water rights was to benefit the municipality. The court allowed the condemnation without question, and determined just compensation for the land with all its appurtenances, including the water rights, taken into consideration. *Id.*

The aridity of the state as well as the geographical barriers between limited water sources, justified an interest in the fair allocation of water available.³⁶

C. Creation of the Watershed Act

The Watershed Protection and Flood Prevention Act³⁷ was a federal initiative designed to encourage the creation of state watershed improvement districts.³⁸ These districts would promote, among other things, the development, conservation, storage, and more efficient utilization of water resources throughout the country.³⁹ The federal government, through the Department of Agriculture, planned to provide technical and financial assistance for the small watershed programs.⁴⁰

The Wyoming Watershed Act was passed in 1957 in response to the federal act.⁴¹ Potential districts are composed of a group of private landowners who desire to make an improvement in their particular area.⁴² The landowners then petition before the board of supervisors of the soil and water conservation district in their particular area.⁴³ An approved district obtains the status of a governmental subdivision of the state with the power to levy and collect taxes, acquire property, *exercise the power of eminent domain*, construct improvements, borrow money, and, through cooperation, receive financial assistance from the federal government.⁴⁴

ASSOCIATED ENTER., INC. v. TOLTEC WATERSHED IMPROVEMENT DISTRICT

In *Associated Enterprises*, the Wyoming Supreme Court affirmed the district court's holding condemning Associated Enterprise's property for the construction of a reservoir and awarding just compensation for the land taken.⁴⁵ *Associated Enterprises* is significant because, despite a statutory provision purporting to bar impairment of *any* existing water rights,⁴⁶ appropriations or priorities, the supreme court allowed Toltec to condemn land with appurtenant, non-transferable water rights.⁴⁷

36. Grover Irrigation and Land Co. v. Lovella Ditch, Reservoir and Irrigation Co., 21 Wyo. 204, 250, 131 P. 43, 57 (1913).

37. 16 U.S.C. §§ 1001 to -08 (1982).

38. *Id.* at § 1001.

39. *Id.*

40. 4 R. CLARK, WATER AND WATER RIGHTS § 320.2 (1970). Sections 320 to 326.9 provide an extensive review of the structure and purpose of the federal Watershed Protection and Flood Prevention Act. See *supra* notes 37 and 38.

41. WYO. STAT. §§ 41-8-101 to -26 (1977 & Supp. 1983). Section 41-8-102 states in part:

The purposes of this act are to provide for the prevention and control of erosion, flood water and sediment damages, for agricultural uses, and the storage, conservation development, utilization and disposal of water, and thereby to preserve and protect land and water resources, and protect and promote the health, safety and general welfare of the people of this state.

42. WYO. STAT. § 41-8-105 (1977).

43. WYO. STAT. § 41-8-107 (1977). The provision also notes that any land within the petition found not to be benefited by its inclusion, shall be excluded from the proposed district.

44. WYO. STAT. § 41-8-113 (1977) (emphasis added).

45. 656 P.2d at 1147.

46. WYO. STAT. § 41-8-126 (1977). See *supra* text accompanying notes 7 and 8 where the "no-impairment" statute is set out in full.

47. 656 P.2d at 1147.

In construing the "no-impairment" provision contained in the Watershed Act, the supreme court relied almost exclusively on a previous decision handed down in 1978 between the same parties.⁴⁸ The court emphasized that Associated Enterprise's strongest argument for reversal was a belief that the "no impairment" provision constituted a statutory limitation on Toltec's eminent domain power.⁴⁹ The court then referred, however, to its 1978 decision to reject this premise.⁵⁰

In 1978, the court noted two major reasons for denying Associated Enterprise's contention that a reservoir permit may not be granted where senior water rights are affected. First, the court cited the Wyoming Constitution, article I, sections 32 and 33⁵¹ which allow the condemnation of lands for reservoirs if just compensation is awarded.⁵² The court then noted that watershed improvement districts are expressly granted the power of eminent domain.⁵³ The court stated that Associated Enterprises would be compensated for irrigated land unless it was shown that the water right could be sold or transferred.⁵⁴ The court also noted that section 41-3-107 of the Wyoming Statutes⁵⁵ allows for water rights appurtenant to land submerged by a reservoir to be sold to a third party or transferred to other lands *without loss of priority*.⁵⁶ The court reasoned that this process did not contemplate impairment of water rights as no priority was lost in the transfer.⁵⁷ The court was, therefore, not construing the word "impairment" to mean simply affecting a water right, but to mean the act of leaving an individual with less than that with which he started.⁵⁸

The court then compared the policy of the transfer statute⁵⁹ with its decision to allow the condemnation of Associated Enterprise's water rights.⁶⁰ Since Associated Enterprises could not sell or transfer the water rights, the court held that an adequate alternative was to allow the condemnation if just compensation was awarded.⁶¹ The court reasoned that this satisfied the Wyoming constitutional requirement of just compensation,⁶² and thus did not "impair" a water right.⁶³

48. Associated Enter., Inc. v. Toltec Watershed Improvement Dist., 578 P.2d 1359 (1978). See *supra* note 5. The case primarily involved the state engineer's discretion in granting Toltec an extension of time within which to construct the reservoir. However, the court's opinion did include an extensive discussion of the "no-impairment" provision in the Watershed Act. *Id.* at 1362.

49. 656 P.2d at 1146.

50. *Id.*

51. WYO. CONST. art. I, § 32; WYO. CONST. art. I, § 33. See *supra* note 34.

52. 578 P.2d at 1362.

53. WYO. STAT. § 41-8-113(a) (iii) (1977). See *supra* note 9.

54. 578 P.2d at 1363. Associated Enterprises could not transfer their water rights as they had no land available downstream. They investigated the possibility of selling their rights as a preferred use to the municipality. However, after the change in place of use and point of diversion had been calculated, the water right was not significant enough to warrant a purchase. Telephone interview with George Burgess, attorney for Associated Enterprises, (Aug. 29, 1983). See also WYO. STAT. §§ 41-3-102 to -04 (1977), concerning preferred use.

55. WYO. STAT. § 41-3-107 (Supp. 1983).

56. 578 P.2d at 1363.

57. *Id.*

58. *Id.*

59. WYO. STAT. § 41-3-107 (Supp 1983).

60. 578 P.2d at 1363.

61. *Id.*

62. WYO. CONST. art. I, § 32; WYO. CONST. art. I, § 33. See *supra* notes 34 and 51.

63. 578 P.2d at 1363.

The court's second ground in justifying the condemnation involved examining the "no impairment" provision in light of its effect upon the Watershed Act.⁶⁴ The court observed that to interpret the "no impairment" provision as an absolute restriction on Toltec's condemnation power would render the entire Watershed Act meaningless.⁶⁵ The court noted that the already excessive appropriation of Wyoming's streams and rivers would make it almost impossible to initiate an improvement without coming up against an existing water right which could not be sold or transferred.⁶⁶ In support of its conclusion, the court then cited the case of *DeHerrera v. Herrera*, which held that the legislature would not be presumed to intend futile acts.⁶⁷

Associated Enterprises contended that the 1978 court's eminent domain discussion was dictum and not precedent,⁶⁸ but the court stated that, although the principle issues were different in each case, the earlier conclusions were sound and applied to the case at hand.⁶⁹ The court then adopted the reasoning set out in the 1978 decision and concluded that the purpose of the Watershed Act could not be accomplished under a literal reading of the "no-impairment" provision.⁷⁰

The court also cited Trelease as pinpointing the problem of interference with an appropriative right.⁷¹ Trelease noted that Wyoming ranchers feel that water is their heritage and birthright; therefore, no monetary award can compensate them for their loss.⁷² The court sympathized with such feelings, but concluded that the Watershed Act must be construed to enable farmers and ranchers to improve the efficiency of their existing water resources.⁷³ The court held that the "no-impairment" provision was not a restriction on Toltec's condemnation powers if just compensation was awarded.⁷⁴ Finally, the court noted that their holding was consistent with general condemnation law even though such law did not contain anything similar to the "no-impairment" provision in section 41-8-126 of the Watershed Act.⁷⁵

ANALYSIS OF THE COURT'S DECISION

In *Associated Enterprises* the condemned water rights could not be sold or transferred.⁷⁶ If these options had been available, the litigation surrounding the "no-impairment" provision most likely would not have ensued. As it was, the Wyoming Supreme Court was squarely confronted

64. *Id.*

65. *Id.*

66. *Id.*

67. *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977).

68. *Associated Enter., Inc. v. Toltec Watershed Improvement Dist.*, 656 P.2d 1144, 1147 (1983).

69. *Id.*

70. *Id.*

71. *Id.* See *supra* text accompanying note 21 for a summary of the Trelease position.

72. Trelease, *supra* note 18, at 23.

73. 656 P.2d at 1147.

74. *Id.*

75. *Id.*

76. 578 P.2d at 1359. See *supra* note 54.

with a provision which purported to deny a watershed district's ability to affect or alter existing water rights.⁷⁷

The court had two choices in construing the "no-impairment" provision contained within the Watershed Act. It could construe the provision strictly in line with the rationale of the "no change" rule and virtually nullify the potential effectiveness of the Act, or interpret it broadly and allow the Act to accomplish its goals. In choosing the latter course, the court made the only possible decision in light of all historical, factual, and policy considerations.

The court was admittedly uncomfortable with the "no-impairment" provision, and rightfully so. The significance of the provision seemed clear in light of its strong language: "Nothing in this act shall be so construed as to *in any manner* impair existing water rights, appropriations, or priorities."⁷⁸ Yet, the court openly ignored the language of the provision and proceeded to allow the condemnation.⁷⁹ In justifying this decision, the court recognized that the already excessive appropriation of Wyoming water would make it almost impossible to undergo construction without affecting an existing water right.⁸⁰ The court also noted that the Wyoming Constitution allows condemnation for reservoirs if just compensation is awarded.⁸¹ The court admitted, however, that general condemnation law did not contain anything like the "no-impairment" provision.⁸²

The court was forced to legislate to a degree in reaching its decision. Granted, this is not a favored approach, but it is the legislature's responsibility to revise outdated statutory language. There are methods for wording a "no-impairment" provision so that modern needs can be addressed. For example, Montana is another appropriation state which has passed a Watershed Act.⁸³ Montana's statute includes a provision which limits a district's condemnation powers with respect to water rights. It states: "Water rights as such shall not be subject to such taking but may be taken as an *incident* to the condemnation of land to which such rights are appurtenant, where the taking of the land is the *principal purpose* of the condemnation."⁸⁴ The Montana provision plainly outlines the conditions on the taking of a water right, whereas the Wyoming provision purports to deny such a taking completely. The court in *Associated Enterprises* was com-

77. WYO. STAT. § 41-8-126 (1977).

78. *Id.* (emphasis added).

79. 656 P.2d at 1147.

80. *Id.* at 1146.

81. *Id.*

82. 656 P.2d at 1147.

83. MONT. CODE ANN. § 85-9-409 (1981). Watershed improvement districts come under the title of conservancy districts.

84. MONT. CODE ANN. § 85-9-410 (1981) (emphasis added). Several other appropriation states have enacted improvement district statutes in accordance with the Federal Watershed Protection Act (16 U.S.C. §§ 1001 to -08 (1982)). Some states have granted these districts the general power of eminent domain, but make no mention of its effect upon water rights, e.g., N.M. STAT. ANN. § 73-20-13 (1977); IDAHO CODE § 42-3708(6) (Supp. 1983); KAN. STAT. ANN. § 24-1209 (1981); NEB. REV. STAT. § 2-3234 (1977); and NEV. REV. STAT. § 541.140(3) (1979). Two other states, Oregon and South Dakota, have granted improvement districts the power of eminent domain but clearly prohibit any interference with vested water rights. OR. REV. STAT. § 552-113(1), § 552.310 (1981); S.D. CODIFIED LAWS ANN. § 46-24-34, § 46-24-45 (1967).

pelled to allow the condemnation. If the legislature is going to adopt a comprehensive and progressive improvement statute it must include enough flexibility within the statute to achieve policy goals.

There is a limit to the court's decision in *Associated Enterprises*. Although the statute is unclear, the court implies that a district court cannot condemn existing water rights solely because of their value as water rights.⁸⁵ The court emphasized that the condemnation of *Associated Enterprises* land and its appurtenant water rights was directly necessary to allow construction of the improvement.⁸⁶ The land was the primary object of the taking; the water rights themselves will not directly benefit the other Toltec ranchers. The United States District Court for the District of Wyoming had noted in a previous case between the same parties that *Associated Enterprise's* land was the *only* land in the Toltec district which contained a natural reservoir site.⁸⁷ The district court explained that in the project area the streams primarily carry only the run-off which passes through the Toltec district in early spring.⁸⁸ To enable the ranchers to utilize this water year-round, they must develop late storage by constructing a reservoir, and *Associated Enterprise's* land was the only possible site.⁸⁹ *Associated Enterprise's* water rights were merely incidental to the taking. Therefore, similar to the provisions of the Montana statute,⁹⁰ a water right may only be taken if it is appurtenant to land condemned for the principle purpose of the improvement.⁹¹

In reaching its decision, the court continued the battle to achieve flexibility within the confines of the Wyoming appropriation system. The Wyoming water statutes as they now stand contain a contradictory policy—the “no-impairment” provision, like the “no change” provision purports to significantly restrict the transferability of water rights, whereas statutes like the Watershed Act directly encourage the flexibility of water rights to allow for the re-allocation of limited water supplies. The court's rejection of the “no-impairment” provision of the Watershed Act emphasizes that the “no-change” theory fails to meet the progressive needs of the state to maximize the efficiency of water resources. The divergence between the present “no-change” rule and the trend toward increased water efficiency will continue to grow. The “no-change” theory must clearly be abandoned, along with the “no-change” statute—the court can no longer make exceptions to a rule that serves no purpose in Wyoming water law.

A large portion of the land in Wyoming remains in the hands of farming and ranching operations. Considering that a watershed improvement district may be created virtually anywhere,⁹² the decision in *Associated Enterprises* will have a significant impact upon those who possess existing water rights.

85. 656 P.2d at 1147.

86. *Id.*

87. *Johnston v. Davis*, 500 F. Supp. 1323, 1325 (D. Wyo. 1980) (emphasis added).

88. *Id.*

89. *Id.*

90. MONT. CODE ANN. § 85-9-409 (1981). See *supra* text accompanying note 84.

91. *Id.*

92. WYO. STAT. § 41-8-105 (1977). See *supra* text accompanying notes 42-44.

Ranchers may fear the ramifications of the decision in *Associated Enterprises*. They may feel that if one group of landowners can condemn land and water rights to construct a reservoir, nothing will prevent a rash of districts from forming which will threaten rights everywhere. It is true that after *Associated Enterprises* water rights have lost some stability. However, there is a check and balance system before the case need ever reach the court level.⁹³ The Watershed Act provides a comprehensive plan for the creation of districts and approval of their proposed improvements.⁹⁴ At each significant point in the decision making process, the landowners are involved.⁹⁵ If a landowner will not be specifically benefited by his inclusion in the district, he may petition the board⁹⁶ and subsequently be excluded.⁹⁷ Many problems and disputes can be resolved at this level, before the court need become involved. This should be encouraged as the individual landowners as well as their related soil and water conservation districts inevitably have the closest contact with the proposed district.

A commentator has pinpointed the trend in Western water law as a move towards maximizing the total benefit that can be achieved from a finite quantity of water.⁹⁸ In the beginning, laws on water use were formed mainly for the purpose of settling disputes between individuals, rather than concern for optimization of existing water resources.⁹⁹ Today, progressive legislation concentrates upon encouraging the more rational use of water.¹⁰⁰ The law is increasingly more concerned with protecting community, rather than individual interests, in their push toward maximization of water efficiency.¹⁰¹

CONCLUSION

Wyoming is moving away from a predominantly ranching and agricultural area to a more industrial state with an increasing population. The decision in *Associated Enterprises* emphasizes that as the trend toward optimum use and allocation of water resources continues, the courts will become increasingly hostile in their interpretation of statutes which purport to restrict the transferability of water rights. Clearly the court's rejection of the "no-impairment" provision represents a marked departure from the Wyoming rule that water rights cannot be detached from the land, place or purpose from which they were first acquired.¹⁰² Farmers and ranchers can no longer depend upon this "no-change" rule to protect their water rights, appropriations and priorities. The court's interpretation of

93. WYO. STAT. §§ 41-8-101 to -26 (1977 & Supp. 1983).

94. *Id.* See *supra* text accompanying notes 42-44. See also generally, WYO. STAT. §§ 41-8-101 to -26 (1977).

95. *Id.*

96. Referring to the board of the soil and water conservation district. WYO. STAT. § 41-8-111(b) (1977).

97. WYO. STAT. § 41-8-111(b) (1977).

98. CUNHA, MANAGEMENT AND LAW FOR WATER RESOURCES 19 (1977). See also NANDA, WATER NEEDS FOR THE FUTURE (1977). The book consolidates an excellent set of separate articles concerning various problems in Western appropriation law.

99. Cunha, *supra* note 98, at 256.

100. *Id.*

101. *Id.*

102. WYO. STAT. § 41-3-101 (Supp. 1983).

the Watershed Act's "no-impairment" provision makes this clear. However, until the "no-change" provision¹⁰³ is repealed and the "no-impairment" provision is amended, continued exceptions to the "no-change" theory will further embitter farmers and ranchers who fervently believe it is their right to keep and bequeath their water rights to the next generation.

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103. *Id.*