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Paper Clouds over the Waters: Shelf Filings and Hyperextended Permits in Wyoming

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The prior appropriation system of water law in most Western states relies on a permit system for acquisition of a water right. Western water codes typically anticipate prompt issuance of a permit upon proper application, followed by the permittee's due diligence in pursuing the beneficial use of the appropriation. In Wyoming, however, applications have not always been promptly processed, and due diligence has not always been observed. To the author, this departure from the statutory scheme raises problems for development of both water and water policy. In this article the author explores the ramifications of current administrative practices, and suggests both administrative and legislative reforms to improve the current process.

When I first started teaching water law in Wyoming, I learned that Wyoming's system for appropriation of water followed the established general standards and procedures for initiation and perfection of water rights in the West.[1] Indeed, Wyoming was the first state to establish an administrative system for appropriation of water, and ours became the forerunner for the permitting systems eventually adopted by most other Western states.[2] The system described in our statutes is logical, simple and, seemingly, quite workable.

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1. *See* D. GETCHES, WATER LAW IN A NUTSHELL 146-54 (1984); 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 312-43 (1971).

2. By now, only Colorado among the Western states still has judicial adjudication of water rights.

A water right can only be initiated by application for a permit to the state engineer. This has been the rule for surface water since 1890; for ground water since 1958.[3] Any application made in proper form must be approved if it demonstrates that the water will be applied to a beneficial use, that existing rights will not be impaired, that there is unappropriated water available, and that the proposed use will not be detrimental to the public interest.[4] If the application meets these criteria, then a permit will be issued specifying times for commencement of construction of necessary diversion and storage facilities, completion of such construction (within no more than five years), application of the water to a beneficial use, and submission of proof of appropriation.[5] These time limits for development and perfection of a water right may only be extended upon a showing of "good cause" to the state engineer.[6] Failure to meet any of the permit deadlines, without obtaining an extension, will cause a forfeiture of the water right, authorizing the state engineer to cancel the permit.[7] On the other hand, if the water is developed within the required time limits, and pursuant to the other terms of the permit, then, upon proof of such compliance, the permittee is entitled to a certificate of appropriation which evidences a perfected water right with a priority date relating back to the date of application for the underlying permit.[8]

In essence, Wyoming statutes seem to establish a simple, straightforward system promoting the efficient, beneficial development and use of water in the state. This is the system and message that I teach to my students. Recently, however, I have begun to pick up a few disconcerting hints that, in actual practice, water development in Wyoming might not always proceed in this expeditious, systematic fashion.

INSTANCES OF ADMINISTRATIVE DISCREPANCIES SURFACE

My first suspicion that water rights were not always administered according to a literal reading of the statutes came when I read an article by one of my predecessors at the University of Wyoming, Michael McIntire, who was an assistant professor of law in 1970.[9] Among several of Professor McIntire's revelations was the following:

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3. *See* WYO. STAT. ANN. §§ 41-4-501, -3-930 (1977).

4. These are the criteria set out in *id.* § 41-4-503 for issuances of a surface water permit. To obtain a groundwater permit, one must make a similar showing, including satisfaction of a public interest standard. *See id.* § 41-3-931 (1977), -932(c) (1977 & Supp. 1986).

5. *See id.* § 41-4-506 (1977). The times specified in this section are for development of surface water, and the required deadlines for application to beneficial use and proof of appropriation do not expressly apply to development of *storage* water. Section 41-3-934 specifies an even shorter time frame for development of groundwater: commencement of construction within one year, and completion of construction and application to beneficial use within no more than three years. *Id.* § 41-3-934.

6. *Id.* § 41-4-506 (1977).

7. *Id.*

8. *Id.* §§ 41-4-511 (1977 & Supp. 1986), -512 (1977). Even after such perfection of a water right, it may be lost if the water is not used for the beneficial purposes for which it was appropriated for five successive years.

9. I hope that his short tenure at the University of Wyoming, College of Law is no indication of what comes of those who criticize our water law administration.

> Another aspect of the problem . . . is the substantial number of permits for unconstructed projects remaining on the records affecting all areas of the state. In the North Platte River Basin, in which the acreage having adjudicated water rights already exceeds the actual irrigated acreage by over 220,000 acres, there are an additional 260,605 acres of land covered by such conditional permits still in good standing. On the Laramie River in southeastern Wyoming, as of 1950, there were ten outstanding permits for water rights for the Wheatland Irrigation Project alone, with priorities going back as far as 1904. . . . The danger in this situation is that, when the diversion and conveyance work is finally completed and the water applied to beneficial use, the priority date of the water rights so used relates back to the date of the original application so long as the permit remains in good standing.[10]

I wondered how this situation could exist compatibly with the good cause requirement for extensions of permits.[11]

Green River

The next jolt came when I read the facts in *Green River Development Co. v. Pacific Power & Light Co.*[12] This was the case in which the Wyoming State Engineer had authorized changes for some 2,000 acre feet of water under permit from irrigation use in Sublette County to industrial use at Pacific Power and Light's Jim Bridger Power Plant in Sweetwater County some one-hundred thirty-four miles away. This necessitated several minor changes in four permits: (1) change in use (from irrigation to industrial), (2) change in place of use (one-hundred thirty-four miles), (3) change in point of diversion, (4) change in means of conveyance. The state engineer approved all of these changes under the only statutory authority then even arguably allowing alteration of permit terms. Section 41-4-514 of the Wyoming Statutes authorized the state engineer "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 judgement such amendment appears desirable or necessary . . . ."[13] The statutory provisions expressly authorizing changes in use and place of use[14] and point of diversion[15] would hardly have been helpful, for several reasons. In the first place, these sections only applied on their face to perfected water "rights." Secondly, they only allowed transfer of the amount of water historically consumptively used—which here was zero. Finally, under both of these statutes no injury could be inflicted upon other intervening appropriators—who here seemed to be many, as evidenced by the number of parties who opposed the proposed changes. Not too sur-

10. McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns: I Wonder Where the Water Went?* V LAND & WATER L. REV. 23, 29-30 (1970).
11. WYO. STAT. ANN. § 41-4-506 (1977).
12. 660 P.2d 339 (Wyo. 1983).
13. WYO. STAT. ANN. § 41-4-514 (1977 & Supp. 1986).
14. *Id.* § 41-3-104 (1977).
15. *Id.* § 41-3-114 (1977 & Supp. 1986).

prisingly, the Wyoming Supreme Court held that no then existing statutory authority allowed a change in use, place of use, or point of diversion for waters embraced only by an unperfected permit. Section 41-4-514(a), as then written,[16] was construed by the court to allow the state engineer only to correct errors in a permit to the extent that the terms of the permit did not reflect the intent of the applicant and/or that of the state engineer when it was issued. Section 41-4-514 and other corresponding provisions elsewhere in our water code have since been amended to give the state engineer greater, but still limited, authority to allow substantive changes in permits that will facilitate transfers.[17] These amendments, however, still do not sanction changes of the magnitude attempted in the *Green River* case.[18]

Like most attorneys, I thought that the court's decision in *Green River* was correct. I also agreed thought that the legislature was correct to amend the statutes to allow limited changes in permit terms that will facilitate transfers.[19] What shocked me most in the case, though, were the *facts*—specifically that the four permits for which the changes were sought in 1981 carried priority dates of 1908, 1910, 1920, and 1921—and that the water under permit for which these changes were sought had never been diverted or used! The lands covered in the petition for changes had never been irrigated, farmed, or ranched. No beneficial application had ever been made of the water covered by those portions of the permits for which the transfers were sought.[20] It was amazing to me, in my naivety, that these permits in their entirety had remained viable for sixty years or more, even to the extent that they embraced proposed uses of water never undertaken and, as recited by the Wyoming Supreme Court, that Green River Development Co. and its predecessors in interest had successfully obtained repeated extensions of time for construction that extended over sixty years. I wondered how they had showed good cause so often and so long, and what sort of interpretations had been given to this phrase by so many different state engineers.

Middle Fork

Last year some unusual facts were brought to my attention concerning the proposed Middle Fork Reservoir, a near-sixty-thousand-acre-foot

16. *Id.* § 41-4-514(a) (1977) (amended 1985 Wyo. Sess. Laws ch. 108, § 1).

17. *See* WYO. STAT. ANN. §§ 41-4-502, -511 and -514 (Supp. 1986).

18. *See id.* §§ 41-4-514, -3-114, -3-329 (Supp. 1986) (as amended by the legislature in 1985, 1985 Wyo. Sess. Laws chs. 108, 99, 85 (respectively)).

19. In fact, so long as no injury would be done to an intervening appropriator, permittee, or applicant, I see no reason not to go further and allow changes in use and project concept, and to allow the place of use and point of diversion to be altered so as to be completely outside the originally-specified area.

20. Green River Development Co. did not own any of the land under the permits. The federal government owned ninety percent of it, and had denied desert land entries to these lands under its determination that they were not irrigable. About half the land covered by the permits was being irrigated, but the changes sought did not apply to the water that *was* being used. Green River Development Co. v. Pacific Power & Light Co., 660 P. 2d 339, 341 (Wyo. 1983).

storage project on the Middle Fork of the Powder River near Kaycee.[21] Last year when the Wyoming Water Development Commission (WWDC) was asking the legislature for authority to expend funds to acquire the reservoir permits from the private owner, Powder River Reservoir Corporation, and to construct a reservoir, the project was opposed by quite a variety of interests, including fishermen, archaeologists, irrigators, and some tight-fisted taxpayers. When a student in my seminar last year, who apparently fell into one or more of these categories, investigated the issues surrounding the proposed project, one part of her report struck me as particularly odd. The two storage permits under which the reservoir would be constructed had priority dates of 1940 (for some seventy percent of the water) and 1970 (for over ten percent of the water).[22] But neither of these permits had been issued until October of 1973.

By this time I was not surprised that a permit issued in 1973 would still be active in 1986 without any construction having been commenced. What really shocked me, however, was that the application filed in 1940 had not even been acted upon for thirty-three years.[23] Two questions most intrigued me. Why was the 1940 application for the reservoir right allowed to lie dormant until 1973? Were other such ancient applications still lying undisturbed in the state engineer's office?

Deer Creek

Within the past year another interesting Wyoming water controversy has come to my attention. This one involves the state engineer's recent attempt to address the problem of dormant permit applications with somewhat greater formality and rigor. The case is now pending before the Wyoming Supreme Court, styled *Wyoming Water, Inc. v. Christopolus.*[24] On February 9, 1973, Wyoming Water, Inc., filed with the state

21. The information related herein concerning the Middle Fork Reservoir project came from discussions with personnel in the Wyoming State Engineer's and Attorney General's Offices and from a report prepared by Hazra Engineering Co. for the Middle Fork Powder River Dam and Reservoir Project. Synopsis Report, Middle Fork Dam and Reservoir Project (Jan. 1985) (on file in the Land & Water Law Review office).

22. A little over 10,000 acre-feet of water stored in the reservoir was to be designated as a conservation pool with a current priority date. *Id.* at 1.

23. The thirty-three-year delay between application and permitting for the bulk of the water, and the legal effect of this fact, turn out to be very relevant to the viability of the project. In a nutshell, under the Yellowstone River Compact (apportioning the waters of the Yellowstone River and its tributaries, including the Middle Fork of the Powder River, among Montana, North Dakota, and Wyoming), if the Middle Fork Reservoir were treated as based on "appropriative rights existing" when the Compact was created in 1950, then its demands upon the river would not count toward Wyoming's Compact share. *See* WYO. STAT. ANN. § 41-12-601 (1977). But if this water were treated as "unused and unappropriated" in 1950 (which seems to be a likely conclusion), then the reservoir water would have to come out of Wyoming's Compact share—which would seem to require cutting off the water used by intervening (post-1940) irrigators. Also, if this latter construction prevailed, the transbasin diversion that is proposed for the water would then require the consent of North Dakota and Montana—which Wyoming would be quite unlikely to obtain.

24. No. 86-177 (Wyo. filed Sept. 15, 1986). The information related herein concerning the Deer Creek Reservoir dispute came from the parties' briefs in the appeal before the Wyoming Supreme Court, *see* Brief of Appellants at 2, *Wyoming Water, Inc.* [hereinafter WWI Brief]; Brief of Respondent, George L. Christopolus, State Engineer at 3-4, *Wyoming Water,*

engineer an application for a permit to construct a reservoir of 65,785 acre-foot capacity on Deer Creek, a tributary of the North Platte River, some twenty-five miles downstream from Casper. The Deer Creek Reservoir was conceived as one of three storage facilities on tributaries of the North Platte, by which Wyoming Water, Inc., hoped to provide water for industrial uses, primarily synfuels projects near Gillette. This was in the midst of the Arab oil embargo, when many people foresaw an energy boom in the northern great plains and sought to capitalize on it—in this case by obtaining water rights which could be marketed in the boom climate.

Wyoming Water, Inc., never itself possessed capital even approaching that necessary to construct a project of this size.[25] Their plans were to finance construction of the project by selling bonds after specific customers had been found and contractual commitments secured for purchase of the water. Unfortunately, the energy boom came and went without Wyoming Water, Inc.'s ever securing such customers or contractual commitments. After the corporation's initial filing, it apparently had resources sufficient to pay for a preliminary engineering study and an initial appraisal report. The only other efforts which it seems to have undertaken after 1975 were ones involving attempts to locate customers—although, even in this regard, its efforts were severely constrained by its budget. It was unable to acquire a necessary Bureau of Land Management right-of-way permit for the Deer Creek Reservoir. By the mid-1980s, it had not acquired any lands necessary for any part of the project. A decade had passed without any further engineering, planning, permitting, or design efforts having been undertaken.

Nevertheless, despite the virtual absence of activity on the contemplated project after 1975, no action was taken by the state engineer against Wyoming Water, Inc.'s application until not long after the state had filed an application for an identical reservoir on the same site to use the same water. The state had had its eye on the Deer Creek site for a reservoir for some time, at least since 1970.[26] The state, however, was not so quick to file. With passage of state water development program legislation in 1982, the state's interest in the Deer Creek project progressed, with legislative approval, through the WWDC's feasibility and conceptual design phases. At this same time, the City of Casper and other communities in the area were advocating the state's development of the Deer Creek project to meet their anticipated municipal water needs. As a result of this increased activity and interest in a state project, the Department

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Inc. [hereinafter Engineer's Brief]; Brief of Respondent, DEPAD at 5, *Wyoming Water, Inc.* [hereinafter DEPAD Brief], and from the opinion letter of George Christopolous, State Engineer, of December 3, 1985, rejecting the permit application filed by Wyoming Water, Inc. Letter Opinion of the Wyoming State Engineer, Dec. 3, 1985 [hereinafter Letter Opinion].

25. In 1973, the estimated cost of its whole North Platte project was $118 million; the Deer Creek Reservoir alone was estimated to cost over $15 million.

26. Indeed, indications are that Wyoming Water, Inc.'s interest was sparked by the state's plans.

of Economic Planning and Development (DEPAD)[27] filed its application for the reservoir project with the state engineer on February 10, 1983. In 1985, the Wyoming legislature appropriated forty-five million dollars for construction of the Deer Creek project, specifically in order to meet the anticipated needs of municipalities in the area.[28] Since then, WWDC has proceeded with design studies, initiated land acquisition, and begun the process for acquiring other state and federal permits necessary for the project. By 1985, the state had spent over one-million dollars on the project.

Standing in the state's way was Wyoming Water, Inc.'s 1973 filing for the same water. Conveniently enough, however, in February, 1985, the state engineer had promulgated a rule, establishing a procedure whereby he could clear the substantial backlog of filings which had been made during the energy boom of the late 1960s and early 1970s.[29] In March, 1985, DEPAD petitioned the state engineer to utilize this new procedure to reject Wyoming Water, Inc.'s application. Upon Wyoming Water, Inc.'s subsequent request, a hearing was held in August, 1985, before the state engineer. The only substantive issue considered at the hearing was whether sufficient public interest in Wyoming Water, Inc.'s application existed in light of its apparent inability to pursue the project with diligence. Following the hearing, the state engineer rendered a decision, essentially based on facts found as I have described them, rejecting Wyoming Water, Inc.'s permit application "in the public interest." The state engineer's decision was affirmed by the board of control and is now on appeal before the Wyoming Supreme Court.[30]

This Deer Creek case seemed to indicate that the state engineer's office was now taking steps to clear away accumulated inactive applications. I wondered, however, if this was not an exceptional step taken only to advance a state water project. I wondered how many other decade-or-more-old applications like Wyoming Water, Inc.'s were on the shelves in the state engineer's office. And I wondered if the office was moving just as resolutely against those other old applications and holding them to the same standards of proof of readiness to proceed as it had applied to Wyoming Water, Inc.

THE VIEW OF THE WATER LAW PRACTITIONER

I was concerned about the practices that I had seen in these cases and controversies, but I did not want to be accused of tilting at windmills from solely an ivory tower perspective. So I began to talk to water

27. DEPAD was the immediate predecessor to the present Economic Development and Stabilization Board (EDSBD). *See* WYO. STAT. ANN. §§ 9-2-201 to -211 (1977) and -1402 to -1409 (Supp. 1986).

28. 1985 Wyo. Sess. Laws ch. 89.

29. Regulations and Instructions, State Engineer's Office, State of Wyoming, Part V: Surface and Groundwater Applications in Progress—Procedure for Approval or Rejection of All Temporary Filings (Feb. 1985) [hereinafter State Engineer's Part V].

30. On appeal to the Wyoming Supreme Court; the primary issues are procedural ones. *See, e.g,* DEPAD Brief *supra* note 24, at 1.

lawyers in the state about prevailing practices concerning long-pending applications and repeatedly-extended permits. I wanted to find out, first, if in fact these practices were perceived to be widespread and, second, if they were considered to be problems. On both scores, I found virtual unanimity from practitioners of water law:[31] these practices are pervasive, and they do present potentially serious problems.

Hyperextended Permits

The prevailing perception of practicing water lawyers is that permit extensions are granted by the Wyoming State Engineer's office as a matter of course—and that only minimal, at best, showings of good cause are required. When, ninety days before their expiration dates, permit holders are notified that they must show cause for an extension,[32] many respond with letters which say little more than "We continue to look for financing;" yet their requests for extensions are routinely approved. Attorneys who were in the Attorney General's office during a period spanning the energy boom confirm that the routine granting of extensions did not begin with the boom and consequent speculation on large water projects, but was standard practice in the state engineer's office decades earlier, for large and small projects alike.[33]

A common impression is that the main reason the diligence standard has been stretched so thin in Wyoming is because it would be "too much trouble" for the state engineer's office to require a meaningful showing. That could, at least initially, result in no small number of contested cases, if not judicial challenges; and, in any event, serious review of the hundreds of permits expiring every year would require more man-hours than the office might easily be able to spare.[34] I have not found a Wyoming water lawyer who accepts the proposition that a lenient due diligence standard promotes development. Serious large-scale developers can make a meaningful and credible showing of good cause for extension of time. A lax standard only serves to tie up water and frustrate later-filing interests that might otherwise be ready to move forward—but not with a raft of inactive permits ahead of them that can be held for ransom. Besides concerns about the obstacles to serious development, most practicing attorneys also see the prevailing permitting practices as creating inequities

31. The water lawyers with whom I have spoken include quite a few who, at one time or another, have represented the state engineer and/or board of control while serving in the state attorney general's office.

32. One attorney who has spent several years working closely with the state engineer says that the ninety-day notices, which are required for cancellation of permits, *now* may be sent to "relatively recent" permit holders. He claims, however, to know of some holders of very old permits who "haven't received a letter from the state engineer in thirty years."

33. This picture of unused permits held even by small farmers and ranchers throughout the state is supported by conversations and correspondence with Terrence Dolan, Special Master in the pending Big Horn River adjudication, who has had the job of weeding the used from the unused permits for water in the Big Horn River system.

34. Also, according to one attorney, it would "piss some people off"—and that is always politically risky.

and unjustified windfalls to permittees who might have invested little beyond their filing fees and costs of periodic letters of excuse.[35]

Shelf Filings

The traditional inactivity on some pending permit applications is widely seen as an even more serious problem, not only by the attorneys with whom I have spoken but by the governor's office (at least during the Herschler administration) and some in the legislature.

The perception among the practicing water lawyers in the state is that, perhaps until very recently, the state engineer's office has been content simply to let applications sit "on the shelf" so long as the applicants do not push them forward. Such "shelf filings"are in a category apart from serious filings by people who have projects on which they are ready to proceed. In the words of one attorney, "There's speculation and then there's *speculation.*" Legitimate speculation is engaged in by someone with a specific project in mind who only needs to firm up his customers and financing in order to move ahead—efforts that could satisfy a "due diligence" standard if a permit had been issued. An entirely different sort of speculation is engaged in by persons who are only speculating in the filing itself, hoping that some day, somebody will have to buy them out in order to proceed with a project.

This sort of speculation does not appear to have been unique to the energy boom of the late 1960s and early 1970s, which prompted a deluge of such filings for storage water. In fact, when the energy boom applications came in, many old dormant filings—typically for irrigation, and going back as far as the 1930s—were already there ahead of them to be contended with. Indeed, indications are that the practice of shelf filings had been "standard operating procedure" in the state engineer's office for years before the boom hit. The practice apparently evolved as a way to avoid even the most minimal due diligence requirements, and as a way to open-endedly extend the statutory five-year period for completion of construction.[36] As one attorney put it, "The last thing some applicants want is a permit." Historically, if an applicant has not been ready for a decision on his permit application, one has not been forced upon him. In this sense, the Deer Creek cancellation was very much on the frontier.

The question of who benefits from the practice of allowing applications to remain dormant is easily answered: those who have become accustomed to taking advantage of it, speculating on the investment of a

35. One attorney who is particularly concerned about these casual practices believes that the problem extends beyond encouragement of speculation at the expense of development. In our conversations on the subject, he has voiced the opinion that, without expressly-promulgated standards, serious problems of unpredictability, if not outright arbitrariness, are raised. According to him, not *every* request for extension is treated leniently; most are, but some are not—raising the possibility of favoritism and discrimination. Another attorney, however, who has worked closely with the state engineer, told me that, as far as cancellation of *surface water* permits goes, he doesn't know of *any* cancelled in recent history other than those who have acquiesced in cancellation of their permits. This attorney's view could be supported only by defining "acquiesence" to include submission by permittees to the inevitability of cancellation brought home to them by the state engineer.

36. Which runs from the date of application approval. WYO. STAT. ANN. § 41-4-506 (1977).

twenty-five dollar filing fee.[37] The question not so readily answerable is why successive state engineers have perpetuated the practice of shelf filings. My belief, consistent with that of Wyoming water lawyers with whom I have spoken, is that it has simply been a way to avoid making tough decisions on the merits of superficial applications and ruffling feathers.[38]

In no reasonable sense could tolerance of shelf filings be defended as a practice that encourages development. Quite to the contrary, the practice discourages development by allowing applications to stack up ahead of serious projects, which can then proceed only by buying off the prior nuisance speculators—an even more serious problem than "hyperextended permits." Unfortunately, both practices are viewed by water law practitioners as part of the same philosophy that has long prevailed in administration of surface water by the Wyoming State Engineer's office.[39] My inclination, though, would be to characterize that philosophy as more lax then *laissez faire.* I have yet to meet a knowledgeable Wyoming advocate for simply allowing these shelf filings to be held for transfer to the highest bidder and best use.[40] Such a "free market" would not function without a very steep price being paid to the holders of the earlier applications, and it is difficult to see any advantage in inflating the price of water development in order to give windfalls to those whose investments are so small.[41]

THE POSITION OF THE STATE ENGINEER'S OFFICE

When I raised these concerns with George Christopolus and others in authority in the previous administration of the state engineer's office, they were extremely forthcoming with information and explanations of their operating practices and procedures. I was given a chart which showed that, as of August 20, 1986, surface water applications were pending for sixty-nine "major reservoirs" (most of which seemed to involve applications for several permits).[42] Capacity specified for these sixty-nine major reservoirs ranged from ninety-nine to 690,000 acre-feet, with most in the

37. Also, attorneys have told me that there are hundreds of farmers and ranchers in the state holding applications for water they will never use. These people hang on to these filings in the hope that some day they will be worth something.

38. On the other hand, one attorney with whom I talked saw more conscious design in this practice. He believes that successive state engineers have perpetuated a loose system without any clear standards as to what is necessary for an adequate application in order to exercise arbitrary control and, occasionally, make preferential decisions. "Not every permit is allowed to sit on the shelf."

39. On the other hand, I found no evidence or accusations that shelf filings for *ground* water had ever been tolerated to the point of creating a problem.

40. *But see* Williams, *The Requirement of Beneficial Use as a Cause of Waste in Water Resource Development,* 23 NAT. RESOURCES J. 7 (1983).

41. One attorney with experience in seeking water for industrial development said that, with the number of applications and permits and honest appropriations outstanding at this time on most Wyoming streams, one doesn't just obtain a new permit and then challenge every earlier application and permit. "That's far too expensive, time-consuming, and uncertain. Instead, you just have to go in and acquire the earliest rights you can afford."

42. Major Reservoirs—Pending Applications (Aug. 1986) (internal agency document prepared by the Wyoming State Engineer's office on file in Land & Water Law Review office) [hereinafter State Engineer's Memo].

30,000 to 150,000 acre-foot range.[43] Last summer, when these figures were compiled, more than fifty of these sixty-nine reservoir applications were over three years old, and half of them were over five years old. Also, the more recent applications reflected in the tables tended to be the ones for smaller amounts of water, often less than one-hundred acre-feet.[44]

By the time that I met with the state engineer and his staff members on this issue in January, 1987, they had "cleared" about a dozen of these sixty-nine reservoir applications; but, in every case, the ones cleared were the recent applications for the smaller amounts of water.[45] In January, the state engineer also gave me some other figures, the scope of which I am unsure. He said that, of two-hundred fifty-eight recently pending surface water applications, eighty-nine had been rejected thus far, leaving one-hundred sixty-nine outstanding. Of these remaining applications, nearly one-hundred were either connected with Cheyenne Stage III development or were on the North Platte River.

The situation for pending groundwater applications looks somewhat better. The state engineer's figures show one-hundred twenty-one pending "major" groundwater applications as of January 23, 1987; however, all but one of them filed by either the state or one of two private concerns.[46] The state engineer's office also furnished a two-page list of "major ground water applications rejected 1982-1986" which reflected the rejection of three-hundred eighty-four applications during this time period.[47]

As to permit extensions, a preliminary count by a student research assistant indicates that roughly one-hundred extensions per year recently have been granted for surface water permits. In comparison, around six permits have been cancelled each year,[48] mostly for stock ponds.[49]

In my conversations with George Christopolus, the immediate past state engineer, and his staff, they vehemently maintained that no problems such as those imagined by the water lawyers with whom I had spoken

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43. The amount of water required just to fill every one of these reservoirs for which applications are pending (over 4.3 million acre-feet) is approximately equal to the estimated total annual consumption of water within the state for all purposes.

44. It is clear that these figures compiled by the state engineer's office were not complete. The earliest application date listed is August 23, 1955, whereas I have often heard mention of much older outstanding applications; and a notation on the chart states "Last entry checked: 26 5/65." State Engineer's Memo *supra* note 42.

45. Because the chart that I was shown only includes applications pending on August 20, 1986, it does not reflect the applications which the state engineer's office had cancelled through its recently-intensified efforts before that date. State Engineer's Memo *supra* note 42.

46. *See* Major Pending Groundwater Applications (Jan. 23, 1987) (data supplied by Richard Stockdale, Goundwater Geologist, Wyoming State Engineer, on file in Land & Water Law Review office). This data also showed 702 applications filed by Tigress Exploration, Inc., in December, 1986, apparently for the proposed purpose of supplying water to the City of Rawlins, a very speculative prospect.

47. Major Ground Water Applications Rejected 1982-86 (internal agency document prepared by the Wyoming State Engineer's office on file in Land & Water Law Review office).

48. Not counting "pollution control" permits.

49. Because of the office's record-keeping system and the consequent information-retrieval time involved, we were not able to determine the age of the permits extended or how many times particular permits have been extended.

exist, and that their figures did not indicate otherwise. The attorneys' position is that applications should be granted quickly and routinely if minimal requirements as to form are met, but that then, once the permits have issued, due diligence standards should be stringently applied in order to weed out the speculative permit holders from the serious ones. This is literally what the statutory scheme seems to contemplate.[50] On the other hand, successive state engineers in Wyoming have created quite a different approach. Their approach apparently has been not to be in any hurry to act on applications, on the theory that the most speculative, least feasible ones will eventually lose interest, and that then a little gentle prodding will be sufficient to cause most of these less serious applicants to acquiesce in rejections.[51]

Perhaps the raft of more aggressive speculators filing during the energy boom, coupled with pressure generated by the boom to turn up the heat on those who would cling tenaciously to their dreams of a major water project, has caused the state engineer's office in recent years to have resorted to two other means of weeding out the less serious and less feasible projects at the application stage. First, the state engineer and his staff have recently begun requiring greater specificity in the applications than they had previously—both in insisting that specific uses be designated for the water[52] and in requiring that maps and plans be filed that are based upon on-the-ground surveys and engineering studies. Their theory is that the speculative filers will not find it easy to furnish such detail, and that the cost of such on-the-ground surveys and engineering plans will not be incurred by those who are not committed to their projects.[53] This step toward greater specificity in the applications has enabled the state engineer's office to encourage a significant number of applicants to withdraw their applications or "acquiesce" in rejection.

Even more recently, the state engineer, perhaps with some prodding from the governor's office and the legislature, has resorted to a second tightening of the screws on applicants—through the promulgation of Part V to the state engineer's rules on February 26, 1985.[54] Under the procedure set up by this new rule, the state engineer, on his own motion or upon request of an affected holder of a water right, may undertake a review of the merits of a permit application in order to determine whether a permit should be issued or the application denied based upon the statutory criteria—especially the requirement that issuance not be "detrimental to

50. *See supra* notes 3-8 and accompanying text.

51. This approach, of course, assumes good faith in the applicant—something that lawyers seem to be unwilling to assume.

52. A problem still remains in attempting to require specificity of applicants who would develop industrial water to sell to unknown future customers.

53. Until recently, the state engineer sometimes allowed the statutory requirement for "maps and plats" to be met by hastily-drawn plans on U.S. Geological Survey (USGS) topographic maps. *But cf.* the express requirements for surveys, maps, and plans in Regulations and Instructions, State Engineer's Office, State of Wyoming, Part I, Surface Water, ch. I, §§ 2a-b; ch. III, § 2 i; ch. V, §§ 1a-b, §§ 4a-b; ch. VII, ch. VIII (Jan. 1974).

54. This rule is applicable to both surface water and groundwater permit applications. *See* State Engineer's Part V *supra* note 29.

the public interest."[55] If a public hearing is requested by the applicant, one will be held which approaches a "contested case" hearing in formality and in protection afforded.[56] With or without a hearing, the state engineer will then make a decision on the application based upon the information before him. Particularly emphasized in the new rule as affecting the state engineer's evaluation of the "public interest" are: (1) a "discussion of the project," (2) "a showing that an applicant has pursued the application and development of the project with diligence," and (3) "that the applicant has a present intent and ability to develop the water project."

Obviously, under this new rule—both on its face and as explained by the state engineer's office—the administrators contemplate applying a "due diligence" standard in their discretion at the permitting stage. This seems to virtually recognize that applications accepted as facially sufficient in form, and given "temporary filing numbers," have the status elsewhere accorded to permits. Further, the approval/rejection decision is almost equated with a "due diligence" test similar to that applied elsewhere to evaluate applications for extensions of permits. Having treated the permitting decision so seriously and, hopefully, weeded out many applications in this manner, the state engineer's office then may well be justified in treating the "good cause" showing necessary for *extensions of permits* more lightly. In our conversations, officials in the state engineer's office do readily admit that they do not apply the "Colorado" standard for due diligence.[57] They deny, however, that extensions are granted "as a matter of course."

The permit extension/cancellation procedure described by the state engineer's office is as follows. Statutorily-required notices go out ninety days before expiration of any permit term—for example, the date set for completion of construction. The notified permittees must then respond in writing, demonstrating their diligence during the permit term. No affidavits are required. No hearings are held unless a protestant so requests. Typically, the office routinely grants extensions based upon what may be very brief explanations in letters and without making any independent investigation or further inquiry.[58] They maintain, however, that, if the permit has been long outstanding and has been granted several previous extensions and/or they have reason to doubt a conclusory claim of diligence,

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55. *See* WYO. STAT. ANN. §§ 41-4-503 (1977) (governing surface water), -3-931 (1977) and -3-932 (1977 & Supp. 1986) (governing groundwater).

56. The most serious issue for the Wyoming Supreme Court on appeal of the Deer Creek case is whether the full panoply of protections afforded by the contested case provisions of the Wyoming Administrative Procedure Act (WYO. STAT. ANN. §§ 16-3-107 to -112 (1977 & Supp. 1986)) must be provided in a hearing on a permit application. *See supra* note 24, WWI Brief at 1; Engineer's Brief at 1; and DEPAD Brief at 1.

57. George Christopolus asserted in conversation that Wyoming is stricter in passing on applications for permits than is Colorado in granting its equivalent "conditional decrees;" but my view of Colorado cases and practices has not led me to this conclusion. Interview with George Christopolus, Richard Stockdale, and Frank Trelease, Jr., Wyoming State Engineer's office, in Cheyenne, Wyoming (Jan. 23, 1987) [hereinafter State Interview].

58. In one discussion with members of the state engineer's office, they told of granting an extension to one old rancher whose reason given in his letter was that he needed one "due to the condition of my circumstances." *Id.*

they will inquire further. This, however, appears to be the exception rather than the rule. If no sufficient request for an extension and showing of good cause is received prior to expiration of the permit, the surface water section of the office (but apparently not the groundwater section) will give the permittee one last chance in the form of a second notice allowing thirty more days in which to file an affidavit demonstrating diligence during the permit term. If a satisfactory affidavit is received, they will then "reinstate" and extend the permit; otherwise, they will cancel it.

I should emphasize that, while Part V of the rules and state engineer's explanation of it, and the office's criteria for acting on an application, are cast in terms of judging the "public interest" in a project, the Wyoming State Engineer's office has no history of ever really engaging in "public interest review" in the sense done in some states—in terms of either protecting environmental values or weighing the economic and social merits of one project against another.[59] Although George Christopolus speaks eloquently and sincerely about public interest review, it remains virtually virgin territory in Wyoming. To the extent that it has been used at all, it has been used to insure that applicants have serious intent, commitment, and financial resources and that the proposed project is feasible.

As of this writing, only in the Deer Creek case has the state engineer met any opposition to his efforts to use the new Part V of his rules to reject permit applications. Then again, the office obviously has not been pushing those applicants who have not simply acquiesced to the threats in their letters (as some apparently have). Perhaps, once the Wyoming Supreme Court rules on what procedures are required, the state engineer will be willing to move ahead with more confidence in rejecting applications.

The state engineer's office maintains that by now their only concern is a big block of filings that flooded the office during the energy boom of the late 1960's and the 1970's, and that they have this "housecleaning" well underway.[60] They say that the other big block of filings, those that came in the 1930s, apparently largely in anticipation of being selected for Workers Project Administration projects, were substantially cleared by informal agency measures during the 1960s and 1970s, under pressure from energy filings.

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59. In the near-hundred-year history of the state engineer's office, I have discovered only a very few instances of anything approaching utilization of a "public interest" standard for rejecting or conditioning a permit. In Big Horn Power Co. v. State, 23 Wyo. 271, 283, 148 P. 1110, 1112 (1915), the court's opinion reports that the state engineer refused, citing the public interest, to issue a permit for a dam unless the applicant reduced its height so as not to interfere with the use of the canyon for a railroad bed. I have been told that once when L.C. Bishop was state engineer he refused to grant a permit for a transbasin diversion on public interest grounds (and that he took a lot of heat for it). In the Deer Creek case, the state (DEPAD) *urged* George Christopolus to consider the greater merit of *its* reservoir application as grounds for rejecting Wyoming Water, Inc.'s application; but Mr. Christopolus did not in fact rest his decision against Wyoming Water, Inc., on such comparative public interest grounds, but on diligence grounds alone. *See* Letter Opinion *supra* note 24, rejecting the application of Wyoming Water, Inc., to construct a reservoir on Deer Creek.

60. I am not so certain that their figures support their confidence.

In groundwater permitting, the office seems to have had stricter filing requirements for some time. At least since the 1970s they have required that an applicant for a groundwater permit show no well interference or other injury to other appropriators before they would issue a permit. Also, the groundwater division appears to be stingier with its extensions, typically only giving them for one year at a time.[61] In any event, the problem of speculation and locking in of early priority dates is currently far less serious with groundwater than with surface water. Because few groundwater basins in Wyoming are near full development, little need exists to lock in a priority date.

When I related to Mr. Christopolus the fears of some attorneys that his office's informal practices might lead to arbitrariness and favoritism, he said that such a charge was "sheer nonsense," and that any "conspiracy theory" regarding operations in his office was "way off base." According to him and other members of the office with whom I spoke, the state engineer's office could not afford to play favorites, even when the *state's* filings were concerned.[62] Those in the state engineer's office take very seriously the constitutional and statutory independence of their office.[63]

In summary, the state engineer's office believes that its prevailing practices are preferable to a system whereby a permit is issued as a matter of course if correct as to form but then is canceled upon expiration of the original permit term without development unless a stringent due diligence test is met in order to obtain an extension. The prevailing office policy has been that it is better to have stricter standards for obtaining a permit than for keeping it in force once it has been issued. Their reasons for this position are several. First, substantial reliance interests build up once a permit has been issued.[64] Second, it is unreasonable to expect a diligence showing to be made by one who was not required to demonstrate the seriousness of his intent and ability to develop the water in the first place. Third, as more and more competition develops for less and less

61. WYO. STAT. ANN. § 41-3-934 (1977) specifies that the original terms of groundwater permits require commencement of construction within one year and completion of construction within three years from date of approval.

62. For example, George Christopolus told of a number of filings for large storage projects on the Green River that were made by the predecessor to the Wyoming Water Development Commission back when Governor Hathaway was concerned that the Central Arizona Project threatened our share of upper Colorado River water. At Governor Hathaway's insistence, the state quickly whipped up a number of filings for these large reservoirs by simply using USGS topo maps. As it turned out, these filings were unnecessary and served no useful purpose, so no further steps were ever taken toward any such projects. Several years later, Mr. Christopolus wrote DEPAD one floor below inquiring as to the state's plans for development under these applications, and warning of the impending possibility of rejecting the applications. When the state made no showing of any intent to proceed, he rejected all of these Green River filings. At the same time, he rejected other such filings by Union Pacific. In this situation, he could hardly have afforded to treat the state any more favorably than he did Union Pacific. State Interview *supra* note 57.

63. *See* WYO. CONST. art. 8, § 5; WYO. STAT. ANN. §§ 9-1-901, -902 (1977). *But see* WYO. STAT. ANN. § 9-1-202 (as amended by 1987 Wyo. Sess. Laws ch. 175).

64. As evidence of how attached persons become to their permits once they have been issued, George Christopolus cited the many judicial challenges that have been made to cancellation of conditional decrees in Colorado, where stricter scrutiny is applied to extensions of conditional decrees than to initial applications. State Interview *supra* note 57.

water, the state engineer's office envisions that the public interest criterion will be used to evaluate the relative merits of applications for water on the same stream; and, once a permit has been granted, the agency loses the opportunity to engage in such public interest balancing. Finally, they are skeptical that a marketplace for permits would often operate to channel them into hands that would best serve the public interest and that, even if occasionally it did, the cost would be unjustifiably inflated.[65]

When asked if his office could operate effectively with a statutorily-imposed one-year time limit for consideration of applications, George Christopolus responded that such a proposal was "simplistic and unrealistic." Such a time limit might work during periods of normal activity and for small, uncontroversial projects. But, according to him, during the deluge of applications that they received during the energy boom, it would have made meaningful consideration impossible; and, at any time, assessment of the feasibility and impacts of a major reservoir project might take well over one year.[66]

Obviously, our Wyoming state engineers have consistently felt that it is better to trust their judgment and discretion than rigid timetables and strict rules of law. Just as obviously, however, many outside the state engineer's office feel otherwise.

Despite the state engineer's justifications for the prevailing practices, the water attorneys with whom I have spoken clearly would be more comfortable with a more rigorous, more openly-stated system, which would limit the state engineer's discretion and bind his office to conformance with set standards, procedures, and timetables. Attorneys who have suggested legislative or rulemaking solutions to me have emphasized three desirable ingredients: (1) established (or presumptive) time limits for the state engineer's action on applications, (2) increased stringency in construction and application of the good cause standard for extensions,[67] and (3) mandatory outside time limits on completion of construction and application of the water to beneficial use beyond which extensions cannot be granted.

STATUTORY PROVISIONS IN OTHER ROCKY MOUNTAIN STATES

Upon looking to see if other states in the Rocky Mountain region had statutory permitting schemes that addressed the concerns that had surfaced in my research, I found that quite a few did. Perhaps Wyoming, which was on the frontier in creating an administrative system for permitting, has been surpassed by the more comprehensive systems of other

65. Obviously, this position taken by the state engineer's office assumes the invalidity of charges that speculative permits are now granted anyway, and that the only way to clear them or previously-filed applications is to *buy* them.

66. State Interview *supra* note 57.

67. Also, some attorneys have suggested a statutory provision that would tighten the standard of judicial review beyond the very deferential view which the Wyoming Supreme Court appears to give the state engineer's findings of good cause. *See* Denius v. T R Twelve, Inc., 589 P.2d 374 (Wyo. 1979); Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 578 P.2d 1359 (Wyo. 1978).

Western states for which we furnished the initial administrative model. In any event, my inspection of the water codes of Montana, Nevada, New Mexico, Idaho, Utah, Arizona, and Colorado revealed that most contained at least some ingredients that provided more protection than does Wyoming's against the sort of problems raised in my inquiry.

Two states, Montana and Nevada, have fixed time limits for the state engineer's[68] action on permit applications. Montana provides that an application for a permit to appropriate water must be granted, denied, or conditioned within one-hundred twenty days of publication of notice of the application, or one-hundred eighty days of notice publication[69] if a hearing is held or objections have been received.[70] This apparent stringency, however, is relieved by the state engineer's authority to extend the time for decision "upon agreement of the applicant."[71] Nevada statutes similarly require its state engineer to either approve or reject an application within one year of the last date for filing of protests,[72] and then go on to allow the state engineer to postpone action upon agreement by the applicant.[73] In Nevada, however, such an agreed postponement of action appears to be available when someone protests an application only if the protestant also agrees to the postponement.[74] Given the escape valves in the Montana and Nevada time requirements, it seems that the timetables scattered throughout the statutes governing Colorado's adjudicative system result in the most stringent requirements for prompt action on an application for a water right.[75] The Colorado statutory scheme would seem to result in a "referee's" ruling on an application within one-hundred twenty days of filing[76] or, if the application is referred or taken by protest to court, a decision by a water judge within a year.[77] No other Rocky Mountain state's statutes embody a time limit for action on permit applications.

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68. Not every Western state surveyed has a state engineer in whom permitting authority lies. Some place the power in a "department of water resources" or other such designated agency. For consistency and clarity, however, I will treat every state's permitting authority as a "state engineer."

69. MONT. CODE ANN. § 85-2-307(1)(a) (1985) requires that notice of a water permit application be published for two consecutive weeks. Assuming that notice is published as soon as possible after an application has been received (which the statute seems to require), action on an application should come within approximately one-hundred forty days of filing, or two-hundred days if there is a protest, hearing, or both.

70. These time limits are specified in *id.* § 85-2-310(1).

71. *Id.* This same section also provides that "in those cases where an environmental impact statement must be prepared or in other extraordinary cases," the time for action on the permit application may be extended up to sixty days.

72. The last date for filing of protest is thirty days after the date of last publication of notice of application. NEV. REV. STAT. § 533.365 (1986). The last date of publication is four weeks after the first publication, which must be within thirty days of filing of an application. *Id.* § 533.360. Therefore, presumptively the state engineer's action will come within approximately one year and ninety days.

73. *See id.* § 533.370.

74. The same section continues on to allow postponement also "[i]n areas where water supply studies are being made or where court actions are pending . . . ." *Id.*

75. In Colorado's adjudicative system, the equivalent of a permit is a "conditional decree" from a water judge. *See* COLO. REV. STAT. § 37-92-103 (Supp. 1986).

76. *See id.* §§ 37-92-302(1)(c), -303(1) (1973 & Supp. 1986).

77. *See id.* §§ 37-92-304(1), -(7) (1973 & Supp. 1986).

The Wyoming State Engineer's position, that he may reject applications not supported by sufficient evidence of intent and financial ability to proceed with development, would be bolstered if we had such express requirements for permit approval as are found in a few state statutes. In Utah, approval of an application is contingent upon the state engineer's finding, *inter alia*, that "the applicant has the financial ability to complete the proposed works," that the plan is "physically and economical feasible," and that "the application was filed in good faith and not for purposes of speculation or monopoly."[78] Similarly, the applicable Idaho statute authorizes the state to reject an application that is "not made in good faith" or that is made for "speculative purposes" or if "the applicant has not sufficient financial resources with which to complete the work involved therein."[79] The 1979 amendments to the Colorado water statutes erect specific bars to speculation in conditional decrees.[80] The definition of "appropriation" was changed so as to expressly provide that no conditional appropriation could occur when it would be "based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation."[81] Also, legislation was enacted specifying that a conditional right cannot be decreed unless it is established that the water "can and will be" captured and used and "that the project can and will be completed with diligence and within a reasonable time."[82] Similar authority can be inferred from New Mexico's requirement that a permit application be returned if it is defective "as to the showing of ability of the applicant to carry the construction to completion."[83]

The statutes of every Rocky Mountain state other than Wyoming and Arizona require that notices of permit applications be published,[84] opportunity for protests be provided, and hearings on contested applications be held.[85] Furnishing such notice and opportunity to be heard to other

78. UTAH CODE ANN. § 73-3-8(1) (Supp. 1986).

79. IDAHO CODE § 42-203A(5) (Supp. 1986).

80. "Conditional decrees" in Colorado's judicial adjudication system are the practical equivalent of permits in the other Western states.

81. COLO. REV. STAT. § 37-92-103(3)(a) (Supp. 1986). This paragraph goes on to state that such improper speculation will be evidenced by:

> (I) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation;
>
> (II) The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

Id. §§ 37-92-103(3)(a)(I) to (II).

82. *Id.* § 37-92-305(9)(b) (Supp. 1986).

83. N.M. STAT. ANN. § 72-5-3 (1985).

84. Besides newspaper publication, Montana and Colorado require that notice be mailed to any appropriator, applicant, permit holder, or landowner who might be affected by issuance of the proposed permit. *See* MONT. CODE. ANN. § 85-2-307 (1985); COLO. REV. STAT. § 37-92-302(3) (Supp. 1986).

85. *See* COLO. REV. STAT. §§ 37-92-302(1)(b), -302(3), -302(4), -303(2), -304 (1973 & Supp. 1986); MONT. CODE ANN. §§ 85-2-307 to -309 (1985); NEV. REV. STAT. §§ 533.360, .365 (1986); N.M. STAT. ANN. §§ 72-5-4, -5, -5.1 (1985); IDAHO CODE § 42-203A (Supp. 1986); UTAH CODE ANN. §§ 73-3-6, -7 (1953).

affected persons provides an additional means of bringing to the state's attention aspects of a project which might be contrary to the public interest.[86] Required hearings on contested applications also insure the applicants of a forum for their views.[87]

Although the benefits of notice to other affected persons and opportunity for protest and hearing would seem to be at least as great when extensions of permits are under consideration as in the case of initial applications, only Colorado[88] and Utah[89] expressly afford the same public participation protections in the extension context. In Utah's case, these requirements apply only when the proposed extension would carry the permit over fourteen years beyond its original date of issuance.

Statutes in most of the Rocky Mountain states, like in Wyoming,[90] require their state engineers initially to apply pressure toward expeditious development by specifying conditions when permits are issued which require that construction of the water projects be commenced, and the water applied to beneficial use, within set time periods. A majority of these states take the same approach as Wyoming toward the time for completion of construction: they authorize the state engineer to allow up to five years from the date of approval of the application.[91] Others give the state engineer discretion without statutorily setting an outside time limit.[92] As for the time for application of water to beneficial use, whereas Wyoming leaves it within the state engineer's discretion, most states in the area specify an outside limit to his discretion.[93] Only a minority of the states' statutes mention any time for commencement of construction. One specifies commencement within two years;[94] one requires construction of smaller projects to be started within one year;[95] and a third leaves the time period entirely up to the state engineer,[96] as does Wyoming. No other Rocky Mountain state follows Wyoming in requiring the state engineer

86. 1985 amendments to the New Mexico statutes expressly afford standing to file objections or protests to "those asserting legitimate concerns involving public welfare and conservation of water." N.M. STAT. ANN. §§ 72-5-5B, -5.1 (1985).

87. Only Colorado statutes, however, expressly guarantee an applicant a hearing if there is no outside opposition. *See* COLO. REV. STAT. §§ 37-92-303(2) to -304 (1973 & Supp. 1986).

88. *See id.* 37-92-302(1)(a) -(b), -302(3)-(4), -303(2), -304 (1973 & Supp. 1986).

89. *See* UTAH CODE ANN. § 73-3-12(1) (1953).

90. *See* WYO. STAT. ANN. § 41-4-506 (1977).

91. *See* ARIZ. REV. STAT. § 45-150 (Supp. 1980); IDAHO CODE § 42-204 (Supp. 1986); NEV. REV. STAT. § 533.380 (1986); N.M. STAT. ANN. § 72-5-6 (1985). Colorado's quadrennial proof requirement amounts to the same as a four-year initial term for completion. *See* COLO. REV. STAT. § 37-92-301(4) (1973).

92. *See* MONT. CODE ANN. § 85-2-312(2) (1985); UTAH CODE ANN. § 73-3-10 (1953).

93. *See* IDAHO CODE § 42-204 (Supp. 1986) (within five years of date of approval); COLO. REV. STAT. § 37-97-301(4) (1973) (proof of due diligence necessary every four years); NEV. REV. STAT. § 533.380 (1986) (within ten years of date of approval); N.M. STAT. ANN. § 72-5-6 (1985) (within four years of completion of construction). Utah and Montana allow the state engineer discretion in setting the time for application to beneficial use. *See* UTAH CODE ANN. § 73-3-10 (1953); MONT. CODE ANN. § 85-2-312(2) (1985).

94. *See* ARIZ. REV. STAT. § 45-150 (1985).

95. IDAHO CODE § 42-204 (Supp. 1986) requires commencement of construction of works to divert twenty-five cubic feet per second (cfs) or less within one year from permit issuance.

96. *See* MONT. CODE ANN. § 85-2-312(2) (1985).

to set a deadline for final proof of appropriation;[97] most simply require such proof to be submitted within the time set for application of the water to beneficial use.[98]

It seemed that the Wyoming State Engineer's apparent leniency in granting extensions beyond the initial permit terms might be checked by more precise statutory criteria than our only standard, "for good cause shown."[99] With this possibility in mind, I looked at the statutes of other Rocky Mountain states to see if they furnished more explicit guidance. I found that, as a general rule, Rocky Mountain states provide little or no elaboration beyond the typical language: "good faith," "reasonable diligence," "reasonable cause for delay," "due diligence," and "for good cause shown."[100] A few states, however, do provide somewhat more meaningful criteria to guide the state engineer's decision on extensions in special circumstances.

Idaho, for example, starts with a general "good cause" requirement, but goes on to furnish more guidance in some cases: (1) permittees who are prevented from proceeding by lack of required federal consent or approval or by litigation are entitled to extensions equal to the amount of time lost to such delays if they show that they are "proceeding diligently and in good faith;" (2) large irrigation projects are entitled to extensions upon "showing that additional time is needed on account of the time required for organizing, financing and constructing works of such large size" and upon showing that at least $100,000 has been spent on the project, (3) time limits for large reservoir projects may be extended upon meeting the usual "reasonable diligence" and "good cause" standards; and (4) permits held by the United States or the Idaho Water Resources Board may be extended upon showing that additional time is needed because of "the status of plans, authorization, construction fund appropriations, construction, or any arrangements which are found to be requisite to completion of the construction."[101] Idaho statutes also contain what may be the most precise and effective means of assuring diligent development: A procedure whereby any late permit holder may seek cancellation of a permit if the

97. In Wyoming, this is required only for direct flow appropriations. *See* WYO. STAT. ANN. § 41-4-506 (1977).

98. *See* IDAHO CODE § 42-217 (Supp. 1986); MONT. CODE ANN. § 85-2-315 (1985); NEV. REV. STAT. §§ 533.390, .400, .410, .425, .440 (1986); UTAH CODE ANN. § 73-3-16 (1953).

99. WYO. STAT. ANN. § 91-4-506 (1977).

100. *See* ARIZ. REV. STAT. § 45-150 (1985); COLO. REV. STAT. § 37-92-301(4) (1973); IDAHO CODE § 42-204 (Supp. 1986); MONT. CODE ANN. § 85-2-312 (1985); NEV. REV. STAT. §§ 533.380.3, 533.395 (1986); N.M. STAT. ANN. §§ 72-5-14, -8 (1985); UTAH CODE ANN. §§ 73-3-12(1), -13 (1953). Very likely, the courts of the states have elaborated upon this bare statutory language. For example, the Colorado Supreme Court has interpreted the statutory standard of "reasonable diligence" to require the water court to find that the water is being developed "in the most expedient and efficient fashion possible under the circumstances." Colorado River Water Conservation Dist. v. Denver, 640 P. 2d 1139, 1142 (Colo. 1982).

101. IDAHO CODE § 42-204 (Supp. 1986). Also see the criteria contained in NEV. REV. STAT. § 533.380.4 (1986), when a request for extension of time is made by the holder of a permit issued for municipal or "quasi-municipal" use of water.

holder fails to complete one-fifth of the necessary construction work within one-half the time allowed.[102]

As for statutes embodying the desirability of an ultimate outside time for development of water under a permit, beyond which no extension would be available, only two Rocky Mountain states have such limits. Utah "limits" extensions to fifty years from date of application approval[103] and provides that a permit for which proof of appropriation is not submitted within fifty years "shall lapse and have no further force and effect."[104] Idaho is not nearly as generous in setting its outside time limit, but its statute does contain several significant exceptions. The general rule in Idaho is that only one extension of time, not exceeding five years, may be granted beyond the original maximum five-year period for both completion of construction and application of the water to full beneficial use.[105] This strict ten-year appropriation requirement, however, does not apply in several circumstances. Exempted outright are permits for reservoirs of more than 10,000 acre-feet capacity and permits held by the United States or the Idaho Water Resource Board.[106] If a permittee can show that he was prevented from proceeding with his work because of inability to obtain necessary approval or consent from the federal government or because of litigation, his permit can be extended (presumedly beyond the ten-year limit) by the amount of time attributable to such delays.[107] Finally, a permit for an irrigation project of 5,000 acres or more and involving the diversion of more than 25,000 acre feet in one irrigation season may be extended seven years beyond the initial maximum of five, for a total outside limit of twelve years for development.[108] Idaho's strict outside limits on extensions of time, when applicable, are backed up by even stricter requirements that proof of application of the water to beneficial use be filed within the permit term, or at least within sixty days of its expiration upon a showing of reasonable cause, on pain of lapse of the permit.[109]

In the 1985 Wyoming legislative session, a bill was introduced that would have taken Wyoming further toward mandatory time limits and elaboration of factors for consideration in determining good cause for permit extensions than any other state has gone.[110] House Bill 391 would have

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102. IDAHO CODE § 42-301 (1977). Similarly, in New Mexico for a permit to be extended more than ten years past the original date of issuance, at least one-forth of the actual construction work must have been completed. *See* N.M. STAT. ANN. § 72-5-14 (1985).

103. UTAH CODE ANN. § 73-3-12(1) (1953).

104. *Id.* This subsection contains the minor qualification that if the works have been constructed, the state engineer may grant additional time beyond the fifty year period in which to make proof of appropriation.

105. IDAHO CODE § 42-204 (Supp. 1986).

106. *Id.*

107. *Id.*

108. *Id.*

109. Or, if proof is filed more than sixty days late, but it demonstrates beneficial use during the permit term, then upon pain of loss of priority. *See id.* §§ 42-217, -218a (Supp. 1986).

110. H.B. 391, 47th Legis., Gen. Sess. (1985) (Legis. Serv. Office No. 85LSO-0531.01) [hereinafter H.B. 391].

amended section 41-4-503 of the Wyoming Statutes[111] to allow the state engineer no more than one year after the date of the filing of an application to either approve or reject it, unless it was involved in a proceeding to determine the public interest in the proposal. In that case, the state engineer was to act as promptly as possible.[112] Under the bill, section 41-4-506 of the Wyoming Statutes,[113] also would have been amended to make the maximum time which the state engineer initially could give for application of water to beneficial use the same as the time for completion of construction: no more than five years, except for permits held by the state, for which the maximum time allowed would be ten years.[114]

The biggest change House Bill 391 would have made was in its amendment of section 41-4-506 to provide that all extensions of time allowed for any permit, other than one issued for municipal purposes, must not exceed ten years beyond the date of original issuance, unless the permit is held by the state, when the ultimate outside limit would be fifteen years.[115] Within these maximum time periods, extensions could be granted, as under the present statute, "for good cause shown." By amendment, however, the state engineer would be expressly directed to consider certain factors in determining whether "good cause" existed, for example: whether necessary state, federal, and local permits and approvals have been obtained; whether financing for the project has been secured; whether agreements from the ultimate water users have been acquired; and the amount of funds spent toward the project thus far.[116] Had the state engineer's office not increased its efforts to clear old "shelf filings" about the time this bill was introduced, it might well have become law.

SUGGESTED CHANGES FOR WYOMING

I believe that the merits of the concerns voiced in this study must be recognized, as must the advantages of established timetables, standards, and procedures. On the other hand, I have seen nothing sinister, arbitrary, or negligently lax in the prevailing practices of the state engineer's office. A casual, discretionary, open-ended approach to permitting is, as practicing water lawyers assert, open to abuses; but, on close inspection, I have found no serious abuses and no evidence of preferential treatment of applicants and permittees. At least under the immediate past administration, this discretionary system may have worked as well as one governed by rules, timetables and explicit standards. Nevertheless, the present system may well give the *appearance* of arbitrariness; and it *would* be open to abuses by a state engineer and staff not so conscientious and unaffected by political influences.[117]

111. WYO. STAT. ANN. § 41-4-503 (1977).
112. H.B. 391, *supra* note 110, at § 1.
113. WYO. STAT. ANN. § 41-4-506 (1977).
114. H.B. 391, *supra* note 110, at § 1.
115. *Id.*
116. *Id.*
117. Every indication is that the newly-appointed state engineer, Jeff Fassett, is very much in the tradition of excellence and integrity that has characterized the office. But we should not rely exclusively on the quality of the appointments continuing indefinitely.

We no longer live in an age of exclusive reliance on men's wisdom and judgment. Ours is an era of due process and "sunlight" and law and bureaucracy—even in Wyoming. For better or worse, I think that it is time that the Wyoming State Engineer's office is dragged into the 1980s, if only for its own protection. I suggest, therefore, that the following changes be made in Wyoming law.

Time Limit for Action on Applications

I recommend that the approach of House Bill 391[118] be adopted: requiring the state engineer to approve or reject applications within one year of filing, unless he needs additional time for full consideration of complex or controversial decisions concerning the public interest, in which case he must act as promptly as possible. This should prevent a backlog of applications from building up on the shelves,[119] and it should eliminate the perceived problem of allowing shelf filings to unofficially extend the time for development. One year should be ample time in the vast majority of cases; for the exceptional ones, an escape valve is built in.

Initial Time Limits for Development

Some changes should be made in the somewhat incongruous scheme of timetables presently embodied in section 41-4-506, Wyoming Statutes. The present approach of leaving the time for commencement of construction entirely to the state engineer's discretion is satisfactory. The statutory requirement that construction be completed within no more than five years is also fine as it stands.[120] Beyond these two requirements, changes in the present statutory scheme are desirable.

As for the initial time for application of the water to beneficial use, I would make the change contained in House Bill 391, providing that, for *direct flow* permits, the water be put to beneficial use within the same five-year period specified for completion of construction.[121] For *reservoir* permits, however, it is desirable to give the state engineer discretion to allow up to five additional years beyond completion of construction in order to put the water to beneficial use. That much time could well be necessary to fill the reservoir and to find customers for the water.[122]

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118. H.B. 391, *supra* note 110, at § 1 and accompanying text.

119. I also recommend the means employed by House Bill 391 to encourage clearance of the existing backlog: giving the state engineer two years to act on any filings held by the office at the time of adoption of the new rule. *See* H.B. 391, *supra* note 110, at § 2.

120. Five years is the time for completion of construction required by the majority of Rocky Mountain states. *See supra* note 91. I see no reason to follow the House Bill's proposal to allow the *state* up to twice as much time as private projects, regardless of their size. H.B. 391, *supra* note 110, at § 1.

121. Here this would maintain the present differing statutory treatment of direct flow and reservoir permits, but it would eliminate the state engineer's discretion to extend the time for application to beneficial use as far as he wishes past completion of construction.

122. Such a five-year time for application to beneficial use would harmonize this permit term with the term for abandonment specified in WYO. STAT. ANN. § 41-3-401 (1977 & Supp. 1986).

The present statutory provision restricting specification of the time for proof of appropriation to direct flow rights is unjustifiable. The requirement should be broadened to encompass storage rights, and the time should be shortened to no more than two years[123] beyond the time set for application to beneficial use.[124]

Extensions of Time, Cancellations of Permits, and Mandatory Outside Time Limits

Several changes should be made to prevent hyperextended permits and their attendant problems. First, section 41-4-506 should be amended not to allow the time for submission of proof of appropriation, following application to beneficial use, to be extended alone. Second, the present ambiguity in the default/forfeiture/cancellation procedure should be eliminated. In its place, cancellation of a permit should be mandatory upon the missing of any permit deadline without submission of proof of "good cause" for an extension within such time.[125]

The most significant change that I suggest for our permitting system is to follow the general thrust of the Idaho scheme[126] and House Bill 391[127] by establishing mandatory outside limits on the time allowable, despite extensions, for completion of construction and application of water to beneficial use. For development of direct flow uses, no extensions should allow more than ten years from issuance of the permit. For reservoirs, the general rule should be a firm deadline of ten years for completion of construction, with five additional years available for application to beneficial use. The maximum time allowed for development of especially large storage projects should be longer. I suggest that extensions be available, if good cause is shown, that would allow reservoirs storing over 25,000 acre-feet of water up to twenty years for completion and five additional years for application to beneficial use.[128] As in House Bill 391,[129] the only exception that I would allow from these mandatory outside time limits would be for permits issued for municipal purposes. Even for such municipal use permits, however, there should be a requirement that good cause must be shown for any extension of time.[130]

123. The time presently provided by *id.* § 41-4-506 (1977) is five years, and it is applicable only to direct flow permits. This seems an unjustifiably long time. Indeed, much would seem to support the requirement in most other state statutes that final proof of appropriation be submitted within the time allowed for application to beneficial use. *See supra* note 98.

124. The time limits specified for groundwater development by WYO. STAT. ANN. § 41-3-934 (1977) appear to be fine as they stand: one year for commencement of construction, and no more than three years for completion of construction and application to beneficial use.

125. This could be accomplished simply by changing "may" to "shall" in the cancellation authority of the state engineer expressed in *id.* § 41-4-506.

126. *See supra* notes 105-109 and accompanying text.

127. H.B. 391, *supra* note 110, at § 1.

128. I see no justification for necessarily allowing *state* projects more time, as House Bill 391 would have done. *Id.*

129. *Id.*

130. Again, the approach taken by House Bill 391, giving permits existing on the effective date of these amendments some leeway, is desirable. *Id.* § 2. I recommend that they be given as much time from their filing dates as these amendments would provide or ten more years, whichever is greater—subject always to the necessity of showing good cause for any extensions.

The outside time limits for development of groundwater should be shorter. I suggest double the initial time allowed for permits by section 41-3-934,[131] yielding a final deadline of six years for both completion of construction and application to beneficial use. After all, if the state strongly feels that any particular project of substantial benefit to the state needs more time, the legislature can always respond with special exceptions.

Elaboration Upon the "Good Cause" Standard for Extensions and the Requirements for Application Approval

I recommend consideration of elaboration upon the showing of "good cause" that is required for extensions of the time specified in permits. If the desire is to overcome the leniency with which the standard traditionally has been applied by the state engineer, and the deference with which his extension decisions have been reviewed by the courts,[132] then greater statutory specificity may be in order. Perhaps it would help encourage stringency to require an agency determination that the water right was being developed "in the most expedient and efficient fashion possible under the circumstances"—the prevailing judicial expression in Colorado.[133] It might also be desirable to enumerate factors relevant to a determination of good cause. The considerations listed in House Bill 391 provided a good list:

> (i) Whether necessary state, federal and local permits and approvals have been obtained;
>
> (ii) Whether financing for the project has been obtained;
>
> (iii) Whether rights of way for the project have been acquired;
>
> (iv) Whether agreements from water users have been obtained;
>
> (v) The amount of funds spent towards the project by the time of application for an extension; and
>
> (vi) Any other factors that relate to the progress towards construction of the project as deemed relevant by the state engineer.[134]

A poor showing on such specific matters would make an extension hard for the state engineer to grant, and hard for a reviewing court to sustain if granted.

A similar approach might be taken to bolster the state engineer's position that permit applications may be denied as "detrimental to the public interest" if there is no showing of present intent and financial ability to develop the water project. Here the factors required by Utah for considera-

131. WYO. STAT. ANN. § 41-3-934 (1977).

132. *See* Denius v. T R Twelve, Inc., 589 P. 2d 374 (Wyo. 1979); Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 578 P. 2d 1359 (Wyo. 1978).

133. *See* Colorado River Water Conservation Dist. v. Denver, 640 P.2d 1139, 1142 (Colo. 1982).

134. H.B. 391, *supra* note 110, at § 1.

tion in the permitting decision might furnish a model. There, an application is to be rejected if it does not meet the following requirements, among others:

> The proposed use will not . . . interfere with the more beneficial use of the water;
>
> The proposed plan is physically and economically feasible . . .;
>
> The applicant has the financial ability to complete the proposed works; and
>
> The application was filed in good faith and not for purposes of speculation. . . .[135]

Perhaps instead of following the Utah model exactly, and requiring a showing of present financial ability to complete the project, Wyoming might allow an alternative showing of "reasonable probability of obtaining the financing necessary to complete the proposed works."

Requirement of Notice and Opportunity for Protest and Hearing on Initial Applications and Extensions

Both the applicant, prior to a denial or an imposition of a burdensome permit condition, and any potentially adversely affected person, prior to the granting of a permit, should be afforded full opportunity to participate in the permitting decision. The obvious means of protection employed in the other Rocky Mountain states,[136] therefore, should be adopted in Wyoming.

Either the applicant or the state should be required to publish a notice containing all facts pertinent to the application in a newspaper of general circulation in the area for two weeks. Also, service of the notice should be made by mail on any holder of another application, a permit, a perfected water right, or any real property which reasonably might be affected by issuance of a permit.[137] In addition, notice should be served on anyone asserting an environmental, conservation, or other such "public" interest who has requested notice of applications filed on a particular water course or segment thereof. The state engineer should receive written objections to the application for thirty days following last publication, and conduct a contested case hearing if requested by any protestant. Also, a contested case hearing should be held if the state proposes denial of the application or conditioning of its approval on any terms not acceptable to the applicant, if the applicant so requests. Standing to participate as a party to any hearing conducted should be afforded to anyone asserting any injury to his water rights or any interest within the broad reach of the public

135. UTAH CODE ANN. § 73-3-8(1) (1953).

136. *See supra* notes 84-86 and accompanying text.

137. Whether the applicant or the state is made responsible for publishing and mailing the notices, the applicant should bear the cost. When it is kept in mind that only those who have filed for a competing water right *after* the applicant has filed could, as a general proposition, be adversely affected by issuance of a permit to the applicant, it becomes apparent that those entitled to notice typically will not be large in number.

welfare.[138] Affording such full notice and opportunity to participate in the permitting decision would go a long way toward assisting the state engineer's office in performing its statutory duty of assessing the public interest.[139]

Further, the same sort of provisions for notice, receipt of protests, and opportunity for a hearing should be adopted for decisions on applications for extensions of time for development under permits. Not so many other states have extended notice and hearing protections into this context,[140] but the interests at stake and the needs for an outside check on administrative practice are just as great.

Making It Happen

I suggest that most of these reforms in our permitting system could be accomplished by administrative *rulemaking,*[141] and that rulemaking is preferable to legislation for several reasons. First, the changes can be made without waiting for the legislature to convene and be moved to address the problem. Second, avoiding the legislature means substantially avoiding the intrusion of special interest politics and interference by those who do not comprehend the issues involved. Third, rulemaking provides the state engineer's office with greater opportunity to tailor the regulations to the agency's own capabilities and limitations. Finally, it affords the office greater flexibility if it turns out that modification or fine turning is indicated by experience under the rules. The legal effect of substantive and procedural rules is virtually the same as that of statutes. Once promulgated, and until rescinded, both the agency and private parties are bound by them; and, the consequences of a violation may be just as severe as when a statute is violated.

I believe that the state engineer[142] would be acting well within his statutory authority to promulgate rules setting the time for action on applications, elaborating upon the standards for approval of applications and extensions of time, and establishing the procedures for notice and opportunity for protest and hearing (at both the permitting and extension stages). On the other hand, legislation clearly would be necessary to change the initial time limits for development from those specified in section 41-4-506 of the Wyoming Statutes.[143] Similarly, a statute would be required to establish the suggested absolute outside time limits beyond which extensions could not be granted. The legislature would also need

138. Certainly standing should be afforded to anyone asserting an environmental, recreational, conservation, or aesthetic interest in the water.

139. It should be noted that this suggestion of providing notice and opportunity for public input and hearing is essentially the same procedure as presently required for issuance of a groundwater permit in a controlled area. *See* WYO. STAT. ANN. § 41-3-932 (1977 & Supp. 1986)

140. *See supra* notes 88-89 and accompanying text.

141. Although I believe that promulgating such rules governing permitting standards and procedures is the prerogative of the state engineer, in an abundance of caution I would advise that the Wyoming State Board of Control should join in their issuance.

142. Joined, as suggested, by the board of control.

143. WYO. STAT. ANN. § 41-4-506 (1977).

to change the "may" in section 41-4-506 to a "shall" in order to clarify that cancellation of a permit is obligatory upon default. In the other areas mentioned, however, I would urge our new state engineer and our board of control to undertake these reforms themselves—rather than risk what the legislature might do once its interest is aroused.

With a new administration in office in Wyoming, now is the time for these changes. The present lull in our economy, and our reprieve from the energy boom, presents the perfect opportunity to clear the application backlog in the state engineer's office and to establish new standards and procedures to cope with the renewed demand for water that the next boom will bring—when it comes.