A HISTORY OF WATER LAW, WATER RIGHTS & WATER DEVELOPMENT IN WYOMING

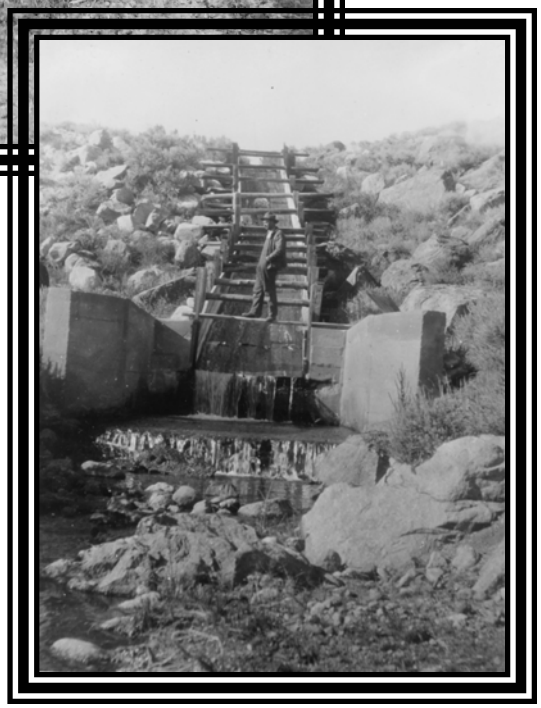

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Table of Contents

Preface 4

Foreword by Pat Tyrrell……7

Part I. The Territorial Years..... 9
The 1869 Laws 10
The 1876 Laws 11
The 1886 Laws 12
The 1887 Laws 14
The 1888 Laws 15
The 1889 Constitutional Convention 17
The 1890 Territorial Laws.....19

Part II. Early Statehood, 1890-1900
The 1890-91 State Laws.....22
The Period Between 1890 and 1900.....28
The 1895 Laws 28
Litigation 1890-1896.....30
The 1899 Laws 31

Part III. The Development Years, 1900-1930
The Period Between 1900 and 1907.....32
The 1907 Laws 36
Litigation 1900-1910.....37
The 1909-1910 Laws.....39
The 1911 Laws 40
The 1913 Laws 42
The 1915 Laws 43
The 1917 Laws 44
Litigation 1910-1920.....45
The Period Between 1920 and 1930.....47
The 1921 Laws 48
The 1923 Laws 50
The 1925 Laws 50
Litigation 1920-1930.....50

Part IV. Protectionism, 1930-1970
The Period Between 1930 and 1940.....53
Interstate Court Decrees, 1930's 56
Interstate Compacts, 1930's 57
The 1935 Laws 60
Litigation 1930-1940.....60
The Period Between 1940 to 1950 62

The 1941 Laws 62
The 1945 Laws 64
The 1947 Laws 64
Litigation 1930-1940 66
The Period Between 1950 and 1960.....67
The 1951 Laws 69
The 1955 Laws 70
The 1957 Laws 71
The 1959 Laws 73
Litigation 1950-1960 74
The Period Between 1960 and 1970.....75
The 1965 and 1967 Laws 75
The 1969 Laws 77
Litigation 1960-1970 78

Part V. Years of Challenge, 1970-2000
The Period Between 1970 and 1980.....80
The 1973 Laws 81
The 1975, 1977 and 1979 Laws 82
Litigation 1970-1980 84
The Period Between 1980 and 1990.....86
The 1985 and 1986 Laws 87
Litigation 1980-1990 88
The Period Between 1990 and 2000.....91
The 1991 Laws 92
Litigation 1990-2000 93

Part VI. Conclusion.....96

REFERENCES 97

APPENDICES…… 103
A. Appropriation, Allotment and Duty of Water……104
B. Water Commissioners……108
C. State Board of Control ……..112
D. Instream Flows …… 118

LIST OF MAPS
Organization of Wyoming Territory, 1868……20
The Five Counties and Major Waterways of Wyoming Territory, 1868.....21
The Four Water Divisions Created by the Wyoming Constitution...……23
Significant Reservoirs of Wyoming, Constructed 1879-2002..……52
Wyoming Rivers Contribution to Major River Basins of the U.S……59

PREFACE

Wyoming's water laws have often been an example to other western states for their ability to keep order in the use of all the varied water supplies within her borders. Although somewhat of a latecomer among the western states to have her water supplies undergo widespread development, Wyoming was a frontrunner in pioneering concepts for the innovative handling of the complex process of bestowing the use of her water to her citizens. From the time of the initial creation in 1868 of the separate western territory now called Wyoming, her streams and rivers have been the lifeblood of her economy and growth. Indeed, the progression of water laws enacted first by territorial legislatures and then by the state legislature for using and allocating her waters can reflect the history and development of the State itself. The names of individuals found on Wyoming water right documents comprise a fascinating "who's who" of the founding figures in the State's progress from territorial times to the present.

Water is often looked at as a "free" resource, responsible for man's continued presence on earth, and consequently the inherent property of every living thing. Still, the history of mankind shows it to be one of the commodities over which wars for its control have been fought. Such contention has engendered, at least in the American west, the vesting of water control and distribution in responsible, neutral and knowledgeable quarters authorized to manipulate its use for the good of all. In Wyoming, that responsibility has been shared by the citizens of the state, through the legislature and offices of territorial and state government, employing, either intentionally or accidentally, many of the greatest water minds in the country.

Numerous individuals are responsible for the existence today of a water use system that meets the present needs of Wyoming residents and provides confidence in adequacy of supplies for the future. In *The Conquest of Arid America* published in 1899, William E. Smythe, journalist and chairman of the National Irrigation Congress, observed "Wyoming's place as the [water] lawgiver of the arid region is due neither to geographical location or to superior natural resources; certainly it is not due to large population. It owes its commanding position solely to the character and ability of a few public men who happen to have found in this line of work their best opportunity for usefulness." That comment is just as prudent today, over 100 years after its writing, as the list of those "few public men" has lengthened with the passage of time.

Documentation of the historic work of these individuals is carefully protected in various locations, and for a completely thorough investigation of their contributions to Wyoming's water history, there is no substitute for study of those documents in their entirety. Dozens of reports, articles, collections, pamphlets, and other writings have been prepared through the years, addressing various issues and aspects of water use in terms of contemporary thought and evolution of the laws. Such concepts as "appropriation," "duty of water," "beneficial use," "adjudication," "surplus," and others have been discussed and revisited regularly in Wyoming's history, and can only really be understood today when recognized in their historic context. An understanding of the sequence of development of the State's water laws and the context of the political climate

in which they were enacted can often provide a background for why things are done the way they are done today. It is the intent of this presentation to provide assistance for that understanding in a single location and in a chronological and understandable format. To attempt to remain chronologically pure, many events are referenced more than once; the first time when the concept first appears in Wyoming history and then again at later times when it resurfaces. For example, the *Wyoming v. Colorado* lawsuit was first filed in the Supreme Court in 1911, but a decree was not entered until 1922. That suit is first mentioned in the part of this history discussing the 1911 time period, but results of the court decree are not discussed until the discussion of events in the 1920s. Thus, if a topic of interest seems slighted in its first mention, the reader is encouraged to read on, as the additional information will likely be found in the time period in which further activity on that topic occurred in history.

Four topics were found to have more history than would fit the format of the remaining text, and, to allow them full discussion, were placed in separate appendices at the end of the document. The mention of those topics at various locations in the text generally contains a reference to the appendices either parenthetically or by footnote.

Summaries of the laws explained herein come from the texts of the statutes themselves as annotated and revised through the years, hopefully paraphrased accurately for briefer versions of sometimes complicated language. Not every mention of water in every legislative session in Wyoming's history is addressed, as some machinations of the legislature provide little more than necessary housekeeping of concepts already included. Nonetheless, a conscious attempt has been made to include in adequate detail all the salient concepts from which water administration and use today have evolved.

General historic Wyoming background referenced herein is derived primarily from the extensive published history of the exceptionally authoritative Dr. T. A. Larson. Dr. Larson's *History of Wyoming* is properly recognized as the definitive history of all aspects of the growth of the present state from prehistoric times, and is required reading for placing events in the history of Wyoming water in their full political context. Similarly, the histories of C. G. Coutant, Frances Birkhead Beard, Velma Linford, and Bill Bragg all provide insight into conditions in Wyoming at any chosen historic time, and were drawn upon for that background. However, for a progression of water-related events through the history of the State in one- and two-year increments, there is no chronicle equal to the Reports of the Territorial and State Engineers. The knowledge, foresight, and professionalism of each of those individuals and the agency they commanded as exhibited through their reports is incredible. Those reports were relied on heavily in preparation of this text, but they also contain countless other historic facts of importance not included here because of time and space limitations, but which must be consulted for a full understanding of the history of that critical office.

In attempting to describe the important concepts that resulted from the various water lawsuits in Wyoming's history, it is critical to recognize that the one- or two-sentence summaries of those cases included herein capture in no way the complex entirety of those contests. The brief descriptions of those cases are taken primarily from Wyoming Digest

summaries and from the text of the cases themselves. The complete texts of the pertinent court opinions provide backgrounds, peculiar facts, and rationale for the decisions rendered, and must be consulted for the full understanding of any case discussed. Similarly, the records and decisions of the State Engineer and Board of Control in matters that have come before those historic bodies are available in their offices and should be consulted for a more full understanding of any of their actions referenced in this history.

Other information in this history is gleaned from various published and unpublished sources, the State Archives, Wyoming State Library, State Engineer's Library, the University of Wyoming American Heritage Center, Wyoming Water Development Commission materials, water rights documents, permits, certificates, orders and tabulation books, and from the author having served on the State Board of Control for 21 years. A list of pertinent documents, files, etc., most of which were read, studied or consulted for preparation of this history, is included. The photos are all courtesy of the University of Wyoming American Heritage Center, the Wyoming State Archives, the Wyoming State Museum, and Loren Jost at the Riverton Museum in Riverton. The map of Significant Reservoirs and the dates they were permitted and/or built is courtesy of Catherine Cooper. The preparation of this history was requested by the Wyoming Water Development Commission as part of the Snake/Salt River Basin Planning process for Water Division Four and includes the period from 1868 to 2002.

FOREWORD

When I started as Wyoming State Engineer in January of 2001, it did not take very long to realize that Craig Cooper knew the history of Wyoming water law very, very well. At that time, he was the senior member of the Board of Control, having attended his first Board meeting as Superintendent of Water Division III in January of 1981. If you do the math, this means Craig sat as a deliberative member of that body for 87 quarterly meetings before his retirement after the third quarterly meeting in 2002. If you do more math, that amounts to over 30 percent of all the Board of Control meetings ever held up to his departure. Perhaps only Mr. L. C. Bishop, who was first Superintendent of Water Division I for 16 years, and then served as State Engineer for 18 years, and Mr. John Teichert in Division IV who served for 30 years, have a longer Board of Control tenure in all of Wyoming history. Craig sat on the Board 10 years *longer* than Elwood Mead served as Wyoming Territorial and State Engineer combined.

In my comparatively short tenure presiding over Board of Control meetings, one thing is clear: these meetings offer more of the richest debates and thorough descriptions of our water laws than any other venue. Often, I've said (only partly joking) that I learn more about Wyoming water laws during those week-long quarterly meetings than in the two and three-quarters months in between. It was in this environment, where the Board deliberates on its issues in a setting permeated with law, practice, interpretation, ideological arguments, and history that Craig was in his element. During his tenure, the State of Wyoming saw water battles associated with *Nebraska v. Wyoming* lawsuits, the Big Horn General Adjudication, energy development, struggles with and ultimate passage of our instream flow statutes, and numerous other important water topics. There likely was no paragraph in all of Title 41 that wasn't cussed and discussed during his years. To put this all in a nutshell, there are few people better equipped to write the history you are about to read.

Experience is one thing, desire is another. Craig's love and respect for the history of our water administration system (which really is a history of Wyoming's development and evolution, if you think about it) runs deep. He is not only knowledgeable about Wyoming's water history, but is pretty salty when it comes to our history in general. Ask him about the Johnson County cattle war, Tom Horn, or the fur trade, and you'll see what I mean. In other words, the history herein is multi-dimensional and was written by an individual who really wanted to do it and do it right. It is a reflection of the author's own love of his home state and his willingness to not just read a statute or a court case but delve into its history and reason for being. The facts are sprinkled lightly with personal observations, which serve to set them in historical or practical context without editorializing. It is a long overdue piece of work, and any person with an interest in Wyoming's water will find it indispensable.

Pat Tyrrell, Wyoming State Engineer
May, 2004

A HISTORY OF WATER LAW, WATER RIGHTS AND WATER DEVELOPMENT IN WYOMING 1868 TO 2002

Part I—The Territorial Years

On July 25, 1868 the Territory of Wyoming was created by the U.S. Congress partitioning off a 110,000 square mile rectangle at the southwestern edge of the huge Dakota Territory, together with some land segregated out of Nebraska, Idaho and Utah territories (see map page 20). The new Wyoming Territory was said to be rich in gold, silver, copper, iron, coal and pasture, and it was different enough in vegetative aspect, and the farmers in the eastern part of Dakota Territory had little enough in common with it, that they believed it a good idea to sever it from Dakota's political jurisdiction. The Wyoming population of 8,014 citizens was primarily distributed in the boom towns of Cheyenne, Laramie City, Rawlins Springs, Green River, Rock Springs and Evanston, along the nearly-completed transcontinental railroad, with army forts, telegraph stations, and mining fields across the territory holding a smattering of residents as well. A few squatters under the Pre-Emption Act of 1841, the Mining Act of July 26, 1866 and the Homestead Act of 1868 also lived out along some of the streams of the territory. The Shoshone Indian Reservation, established by treaty signed three weeks earlier on July 3, 1868 at Fort Bridger, was located near the center of Wyoming Territory.

Upon their arrival, early citizens of the new territory found a network of streams and rivers carrying life-giving water in all directions off the mountains that formed the continental divide—a divide which separated the waters of the territory into separate river basins contributing ultimately to the oceans on both the east and west coasts of North America. The headwater streams and rivers tumbled rapidly out of the steep terrain of the Wyoming high country and then slowed to meandering green-vegetated threads across the vast brown and yellow open flats of the prairies and plains. Most already had names, courtesy of the Indians, fur trappers and explorers who had been using them for years. The Platte River, Laramie's Fork, Powder River, Green River, Stinking River, Clark's Fork, Big Horn, Little Big Horn, Popo Azia, Sweetwater, Big Sandy, Fontenelle Creek, LaBarge Creek, Wind River, Snake River and dozens of other names were already found to be in common and recognized use at the time the territory was established. The organization of five counties by late 1869 (see map, page 21) created a county government political system with district courts and county officials to conduct the local business and maintain order among the tide of immigrants.

Delegates from all parts of the territory gathered in Cheyenne as the first Wyoming Territorial Legislature on October 12, 1869, and, as part of that assembly, Wyoming's first water laws were drafted. Early settlers were present in the territory mostly as a result of federal land disposal acts, and the territorial government considered water to be attendant to the land disposed, and its ownership, therefore, to not necessarily be under territorial jurisdiction. Under the Mining Act of July 26, 1866, Congress had recognized the right of settlers to possess water rights by prior appropriation on federal lands, and recognized their ditch and canal rights-of-way across unoccupied federal lands as vested for serving water to settled lands. Early Wyoming government thus refrained from enacting restrictive encumbrances on a Wyoming citizen's inherent right to appropriate and use the waters of the territory.

The 1869 Laws

The water laws that came out of that first legislature dealt exclusively with the recognition of a need to direct water appropriators as to considerations in the construction of ditches for taking water out of the streams and rivers of the territory. There was no proscription in those laws, or for many years after, as to amounts of water allowed for the various uses, or as to any specific procedure for getting permission to build a ditch, or any definition of what uses were recognized as legitimate. Nor was there any identification or appointment of authority figures to oversee or monitor water use. Free river (unregulated) conditions existed universally across the Territory. The recognition was that one who wanted or needed to use water out of Wyoming's streams was free to build a ditch and begin diverting—to appropriate—without notice or oversight. If three or more persons chose to associate for the purpose of building a ditch to serve the needs of each of them, however, they were required to file a certificate of incorporation with territorial officials describing various details about the line (size and path) of the ditch and its stream source. This requirement appears to have been more for keeping records on Wyoming corporations than for anything to do with water.

The considerations imposed on the sparse population of water users by those first territorial laws were that a ditch builder could not direct the water of any stream from its original channel to the detriment of anyone who had a "priority of right," and that there must "at all times be left sufficient water for the use of miners and agriculturists who may have a prior right to such water along said stream." Additionally, ditch owners were required to keep their ditches in good condition so that water could not escape the ditch to the injury of any party, and anyone who damaged or interfered with any of the facilities of a ditch company could be convicted in any court of competent jurisdiction.

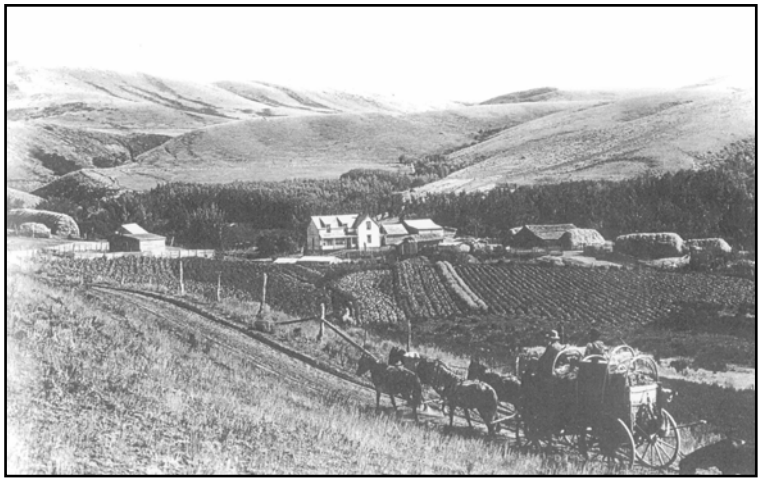
Thus the rudiments of a sound water rights system were recognized and taking shape, particularly the recognition of the value of priority of appropriation, and the necessity for stewardship of appropriated[1] water. Those two concepts have never been out of favor since that first legislation and both continue to be cornerstones of the system yet today. The 1869 laws were a specific rejection of the concepts of riparian water law, which in its simplest form, is a system of water allocation entitling only those individuals living along the banks of a stream a right to make use of the stream. A key distinction of that doctrine is that the right of the streamside landowner exists whether or not the water is used, i.e. no showing of beneficial use is required for the right to be retained.

[1]It may be useful at this point to briefly discuss the term "appropriation." Early water users just built a ditch and took for their own use, without constraint, whatever water from the territorial streams was necessary for their purposes and to the capacity of their self-designed delivery systems. Territorial government accepted that the amount of water those users took in that manner had been properly claimed and was their appropriation. In that context, the amount of water appropriated included the amount needed to fulfill the use for which it was diverted, plus the amount it took to convey that water to the place of use to offset seepage, evaporation, and other losses. Thus, one's "appropriation" has often been understood to mean the full amount of water he or she has historically taken from the stream source to fulfill the chosen use, as distinguished from one's "allotment," which is generally a more finite quantity described in his or her water right documents, and is used for allocation during times of shortage. This is further discussed elsewhere in this history, and in much greater detail in Appendix A.

The 1876 Laws

By the early 1870's, the open-range cattle business had distributed a human population to all parts of the Territory of Wyoming. The U.S. government offered free grass and the unpatented range was relatively uninterrupted from border to border. Thousands, and then hundreds of thousands, of cattle ranged unconfined across the territory, drifting constantly to new grass and ahead of the weather, with their caretakers selecting strategic home ranch settlements on the streams and rivers. Numerous private ditches had been constructed, and more were constantly being constructed to irrigate small acreages of creek-bottom pasture and native hayland to enhance feed production for small confined herds of cattle and horses, and to provide domestic water and raise garden produce for the homesteads popping up along those drainages. Gristmills were showing up on streams in the more populated areas of the territory, and towns were beginning to use water for municipal purposes. Sluice mining operations and the powerful railroads were also making prominent use of territorial water. Except for the parcels continually being specifically privatized by the various federal land disposal acts, the U.S. Government claimed ownership of the unoccupied land in the territory.

The 1875 Territorial Legislature enacted the first legislation actually described as an Irrigation Act, and although it consisted of only three pages of statutes, additional concepts still embodied in the law today were included. Section 8 of those statutes, for example, regarding the obligation of ditch owners to maintain their embankments, is still found word-for-word in W.S. 41-5-101 of today's statutes, 127 years later. Similarly, the language of Section 12, regarding the bridging of ditches crossing public roads, is unchanged in today's version found in W.S. 41-5-104. All persons living in the neighborhood of a stream were entitled to appropriate irrigation water "to the full extent of the soil," inferring perhaps the first reference to the well-recognized concept of beneficial use in allowing the soil to accept all the water it could hold but maybe no more.



One important part of those 1876 laws that has since disappeared was a provision in Section 2 entitling a person not living along the stream to a right-of-way for ditch construction through the property of the landowner(s) between him and the stream. Numerous ditches were built in Wyoming while that right-of-way provision was in effect, and the loss of that provision may be the root of difficulties between neighboring landowners today in disputes over the historic locations of some of those ditches.

The other provision of note in those 1876 laws was the first ever attempt at empowering selected individuals with the authority to apportion water in times of scarcity among different localities along a given stream where the volume was not sufficient "to supply the continual wants of the entire country through which it passes." It is noteworthy that assigning a specific diversion amount to the users was carefully avoided, and that these precursors to the present office of water commissioner were to apportion the available water on a rotational basis, rather than by priority date or amount appropriated. Embodied in the 1876 laws was the philosophy of the Territory of Wyoming that her streams were to necessarily provide water "for the continual wants of the entire country" through which they passed, and it was only when the volume of water in a stream could not do so that these "commissioners" were to take action to rotate the supply.

Although the bulk of irrigation across the territory was being accomplished by small private ditches or ditch companies, in the late 1870's the first large-scale canal project, the Pioneer Canal out of the Big Laramie River, was instituted by the Pioneer Canal Company. That project included the first use of a reservoir, the Pioneer Reservoir built in 1879, as a necessary component of the irrigation development. In 1883 several of the well-known territorial cattlemen, including Joseph Carey, Horace Plunkett, William Irvine, and Francis E. Warren, organized as the Wyoming Development Company and began construction of a second sizable irrigation project out of the same river system, the Wyoming Development Company Canal at the Wheatland Colony.

The 1886 Laws

By 1886, the Territory of Wyoming had 17 years of independent government under its belt and was focusing on seeking statehood. Its population stood near 50,000 people, around half of which were still in the towns along the Union Pacific railroad, with the other half scattered about the remainder of the state, mostly in connection with the powerful open range cattle industry, mines and military outposts. Large ranches controlling thousands of acres and employing dozens of cowboys supported the small towns springing up in all parts of the territory. Since 1880, approximately 4,850 claims for private acquisition of federal lands in Wyoming had been filed under the Pre-Emption Act of 1841, Homestead Act of 1868, Timber Culture Act of 1873, and Desert Land Act of 1877, and more were being filed. To obtain a patent under these acts required, among other things, occupation of the lands and some use of water from the streams to prove habitation.

The irrigation laws grew from twelve statutes in 1876 to 30 statutes in 1886 and a comprehensive territorial water code was taking shape. The 1886 session laws contained several new provisions, including statutory designation of eight areas called "irrigation districts," with a corresponding provision for appointment of a water commissioner in each district to attempt to keep order over increasing water use. Appendix B discusses at length the water commissioner system that developed from this provision.

Water commissioners were appointed for two-year terms by the territorial governor on recommendation of the county commissioners. Although obligated to be constantly on

standby, the law provided that they "shall not begin their work until they shall be called on . . . by application in writing." When called to work, the commissioners' duty was to "divide the water of the natural stream or streams of their districts among the ditches taking water . . . according to the prior rights of each . . ." but they "shall not continue performing services after the necessity therefore shall cease." A statute providing penalties for willfully interfering with the settings made by the water commissioners also first appears in the 1886 laws, and these laws exist in substantially the same form today.

The term, "beneficial purposes" first shows up in the 1886 laws as well, in the context of being a label for acceptable uses for which appropriation and adjudication of water might be made, but not as a basis, measure or limit of a water right. Use of the term may have been intended to give the territorial courts a measure by which to deny an appropriation if such was found desirable for whatever reason.

Although there was no standard rate of water duty[2] or individual allotment yet employed, further legislation was enacted which obligated the water commissioners to "prevent unnecessary waste of water" in their districts. The law allowed the water commissioners to manipulate headgates to deliver no more water than was required and would be used for the purposes of the appropriation. Thus, beneficial purpose and priority date were the only restrictions on the water an appropriator could divert. In other words, the water commissioners, when called to work, were not required to measure specific amounts of water out to the appropriators, but were instead to use the relative priority dates to deliver whatever amount of water could be used without unnecessary waste.

Unfortunately for the water commissioners, no tabulations of those relative priority dates had yet been prepared, and the only way to establish them was prescribed by another new provision in the law. Section 10 of the 1886 laws required all appropriators claiming water in the territory to file a statement of claim to their ditch and appropriation with the local district court by September of 1886, which was within six months of the passage of the act. Those claim statements were to include, among other things, the capacity of the ditch, an amount of water claimed, and the "date of appropriation of water by original construction." Then, Section 15 invited those persons who desired a determination of priorities of the rights in the various ditches and ownerships on their streams, to petition the district court for a decree establishing them. The court decree was required to fix the priority date of each appropriation and "identify the amount of water which shall be held to have been appropriated." This amount was to be determined using ditch dimensions and capacity and from testimony of the appropriator. Unappropriated water was declared to be property of the public.

The 1886 Act was the first time Wyoming law provided recognition that her water use system would necessarily have to be based not only on priority date of an appropriation,

[2]The term "water duty" refers to the area of crop that can be matured with a given volume of water. Later Wyoming statutes fixed the statewide water duty as the area of crop that could be matured with one (1) cfs of water, but actual water duty is highly variable across Wyoming depending on soil type, elevation, crop type, season of the year, whether or not conveyance loss is included, etc.

but also on a fixed amount of water that would be recognized and recorded as attaching to that particular use. Still, the law was reluctant to fix that amount universally as a function of government, and was instead content to accept and record the word of the individual appropriators as the guide for how much water had been appropriated. Those amounts obviously varied from ditch to ditch and area to area based on information provided in claims submitted.

It was also the first time that written notice was required to show intent to appropriate. Section 13 of the 1886 laws required that thereafter, every person intending to appropriate must file a statement with the county clerk, and from the time of filing any such statement, that water would be deemed to be appropriated. This notice requirement paved the way for the later cornerstone of Wyoming law found in the filing of an application for permit to appropriate with the State Engineer. It was now clear that water users in Wyoming were going to have to get used to paperwork. However, the act of allowing the appropriator to make a statement defining his own appropriation in terms of ditch capacity, at a time when water measurement and knowledge of water amounts were little understood, invited difficulty in the ensuing court decrees.

Provision was also made in the 1886 laws to use the beds of streams as carriers for reservoir water previously appropriated, making "due allowance for evaporation and seepage" in delivery of that water, as determined by the water commissioner. This provision continues to be present in the law today. Reservoir construction was prohibited "in or across the channel of any natural or running stream," i.e. off-channel reservoirs were the only ones authorized by law. Reservoir owners were also made liable for any damage created by their reservoirs.

Additional 1886 legislation required the installation of fish barriers at the diversion points of ditches to keep fish out of ditches, and prohibited water users from allowing any part of their water or wastewater to "overflow . . . or damage any established road or highway." Both of these provisions are still present in similar statutes yet today. Also enacted was a requirement that county surveyors make accurate measurements of and record the carrying capacities of every ditch in their county, filing a certificate attesting to the same with the Territorial Court, "as prima facie evidence of the carrying capacity of the ditch." Another portion of a law enacted in 1886 established a preferred or superior status for municipal water, stating ". . . no priority of water right shall take from any city or town the water required for the use of the residents thereof." This single exemption from strict adherence to chronological priority dates lasted in the law only a few years, and is the only time in the history of Wyoming surface water rights that any one use could eclipse priority dates of other uses, until the decreeing of reserved water rights for the Wind River Indian Reservation in 1988.

The 1887 Laws

In 1887, the unrepealed Compiled Laws and Session Laws from all previous years were reorganized into new titles, chapters and sections and published as Revised Statutes of Wyoming. Little substantive change was made at this time to the comprehensive and

ambitious water legislation that came out of the 1886 session, and it seems apparent those 1886 provisions pertaining to water, particularly the requirement for recording claims and securing court decrees allocating water rights, were still in the process of being fully implemented in the distant offices of the county clerks.

The disastrous winter of 1886-87 was still raging at the time the legislature met, thus its effect on the water laws and the irrigation practices of territorial citizens was yet unrecognized. Wind, bitter cold, and incessant accumulation of snow that winter killed thousands of unprotected cattle, forever changing the open-range cattle business, and being responsible in part for a new approach to irrigation in Wyoming. Reuben Mullins, in his *Recollections of a Cowboy on the Wyoming Range, 1884-1889*, suggested that particular winter revealed to any cattleman whose herd wasn't devastated to the extent of bankruptcy, and who had enough capital left to continue in the business, that irrigating forage to produce winter feed would now have to be a critical part of a successful cattle business. Such a revelation generated a much keener interest in water rights and land patents among cattlemen than had previously been expressed, and claim statements took on a more urgent and serious importance, some to the extent that it has been suggested they may have had a part in such matters as the lynching of Jim Averell and Ella (Cattle Kate) Watson a year and a half later in 1889 (see *Sweetwater Sunset* by Daniel Y. Meschter).

The 1888 Laws

The tenth legislative assembly in early 1888 acted on the growing need for appointment of a territorial official with singular and consummate authority over use of the territorial waters. Drawing on past experiences in neighboring Colorado and adopting a bill proposed by J. A. Johnston of Wheatland, the 1888 legislature created the first office of Territorial Engineer, a position to be held by an individual "known to have such theoretical knowledge and practical skill and experience, as shall fit him for the position." The Territorial Engineer was to be appointed by the governor and serve for a term of two years. One of his duties was, for the first time, to have supervision over the work of the county water commissioners.

Previous legislation, particularly the 1886 requirement for filing statements of claim to water and then having the district court adjudicate the priorities and amounts for those claims, was found to be creating situations on certain streams in which some citizens were favored with water and others were injured. Primarily due to district court judges' lack of knowledge about water volumes and measuring techniques, the court decrees often bestowed outrageous water volumes to the claimants who appeared, so that in some cases only one or two ditches on a stream were authorized to take all the water the stream could generate. Those volumes were invariably in excess of what the appropriator could place to beneficial use, so that his neighbors found good reason to seek redress. The 1888 legislature was aware of this mischief, and passed Representative Johnston's bill aimed at bringing professional engineering expertise to the administration of territorial waters.

The statutes that accompanied the one creating the office of Territorial Engineer required an ambitious and unenviable set of tasks for the new engineer to accomplish. Reportedly, there were around 3,000 individual ditches diverting water from streams across the territory, only a handful of which had been adjudicated through the court process established in 1886. The 1888 statutes required the Territorial Engineer first to secure careful measurements, in cubic feet per second (cfs), of the flows of each stream in the territory from which water was taken for irrigation. Secondly, he was required to measure ditches when so requested, and provide the party making the request a certificate of the size and carrying capacity of the ditch measured. The law required that the information in these certificates then be filed in the office of the Territorial Engineer and received in all the territorial courts as "prima facie evidence of the facts therein set forth" as a tool to assist in more realistic court decrees.

Although there was still no uniform water volume assigned to appropriations established by the claim process, the 1888 statutes were the first to fix the cubic foot per second (cfs) as the legal standard of measurement for the territory. They were also first to require an appropriator to install a measuring device "at or as near the head of his ditch as is practicable" to assist the water commissioner in delivery of water to the respective priorities on the stream. To give the water commissioner some guidance as to how much water to allow through the measuring devices, the statutes fixed a limit on water appropriations as "so much thereof as may be necessarily used and appropriated for irrigation or other beneficial purposes, irrespective of the carrying capacity of the ditch," and any amount in the ditch greater than that was to be considered unappropriated water and be returned to the stream source. This provision contributed to disagreement in the upcoming Constitutional Convention over the definition of the word "appropriated."

The 1888 laws also contained the first admonition for appropriators to continually place their water to beneficial purposes or risk such negligence being interpreted as abandonment after two years of non-use. It was also the first time the term "surplus water" appeared in Wyoming law, such water being described as water in a ditch which was surplus to an appropriator's needs. The statutes did not prohibit surplus water from being in a ditch, but prescribed instructions as to how the appropriator could furnish that water to other landowners "at reasonable rates."

Expanding on the concept of preferred use first implemented in the 1886 laws, the 1888 laws identified domestic use as being able to preferentially supersede earlier priority dates for all other uses during times of water shortage, and agriculture uses to be preferred to manufacturing uses. Additionally, Wyoming's first environmental water

laws were part of the 1888 enactments, being fairly detailed and comprehensive directives aimed at allowing fish unobstructed passage up and down the streams and rivers of the territory, and keeping them out of irrigation systems, as well as prohibiting pollutants from being introduced into the "waters of any such fish."

In March of 1888, right after the close of the legislative session, Territorial Governor Thomas Moonlight appointed Elwood Mead, a professor at Colorado Agricultural College in Fort Collins, as Wyoming's first Territorial Engineer.

The 1889 Constitutional Convention

By mid-1889 the Territory of Wyoming was working hard to soon be included as one of the United States and by September was ready to hold a Constitutional Convention for the purpose of creating a State Constitution to propose to the U.S. Congress. That assembly convened in Cheyenne on September 2nd, and adjourned on September 30, 1889 with a State Constitution drafted to propose to Congress for ratification. Territorial Engineer Mead, a few months over a year in office, provided the delegates to the convention with abundant information regarding the condition of irrigation and water use in Wyoming and was in a position to propose improvements in the existing water laws based on his observation of how such laws had been found to be working in his tenure. The Journal and Debates of that convention provides absolutely fascinating reading as to the discussions leading to the water references ultimately included in the State Constitution.

The Convention assigned irrigation and water matters to "Committee Number 8," composed of seven delegates from across the territory, to prepare such provisions as were deemed worthy of constitutional inclusion, and that committee spent much of the month of September in that duty. In the end, although numerous issues were considered during the deliberations of the committee, only eight provisions were considered to be of such consequence that they deserved inclusion in the State Constitution, with the idea that the other important issues could be instituted statutorily by the legislature. The included provisions were placed within Article 1—DECLARATION OF RIGHTS, Article 8—IRRIGATION AND WATER RIGHTS, and Article 13—MUNICIPAL CORPORATIONS and read as follows:

"Article I—DECLARATION OF RIGHTS

> **Section 31. Control of Water**. Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.
>
> **Section 32**. **Eminent Domain.** Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agriculture, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.

Article VIII—IRRIGATION AND WATER RIGHTS

Section 1. Water is state property. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

Section 2. Board of Control. There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state, and of their appropriation, distribution and diversion, and of the officers connected therewith. Its decisions to be subject to review by the courts of the State.

Section 3. Priority of appropriation. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

Section 4. Water divisions. The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof.

Section 5. State Engineer. There shall be a state engineer who shall be appointed by the governor of the state and confirmed by the senate; he shall hold his office for the term of six (6) years or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.

Article XIII—MUNICIPAL CORPORATIONS

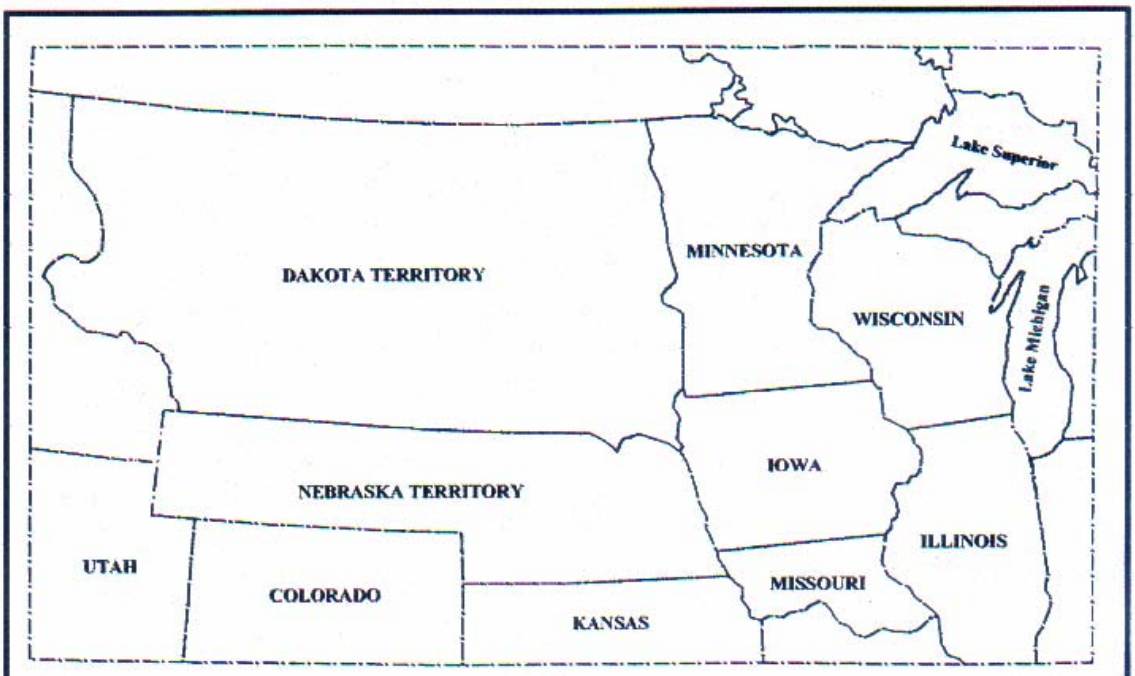
Section 5. Acquisition of water rights. Municipal corporations shall have the same right as individuals to acquire rights by prior appropriation and otherwise to the use of water for domestic and municipal purposes, and the legislature shall provide by law for the exercise upon the part of incorporated cities, towns and villages of the right of eminent domain for the purpose of acquiring from prior appropriators upon the payment of just compensation, such water as may be necessary for the well being thereof and for domestic uses."

These cornerstone provisions encompassed the results of days of debate, and left for upcoming state legislative action the details of implementing their terms in day-to-day water administration.

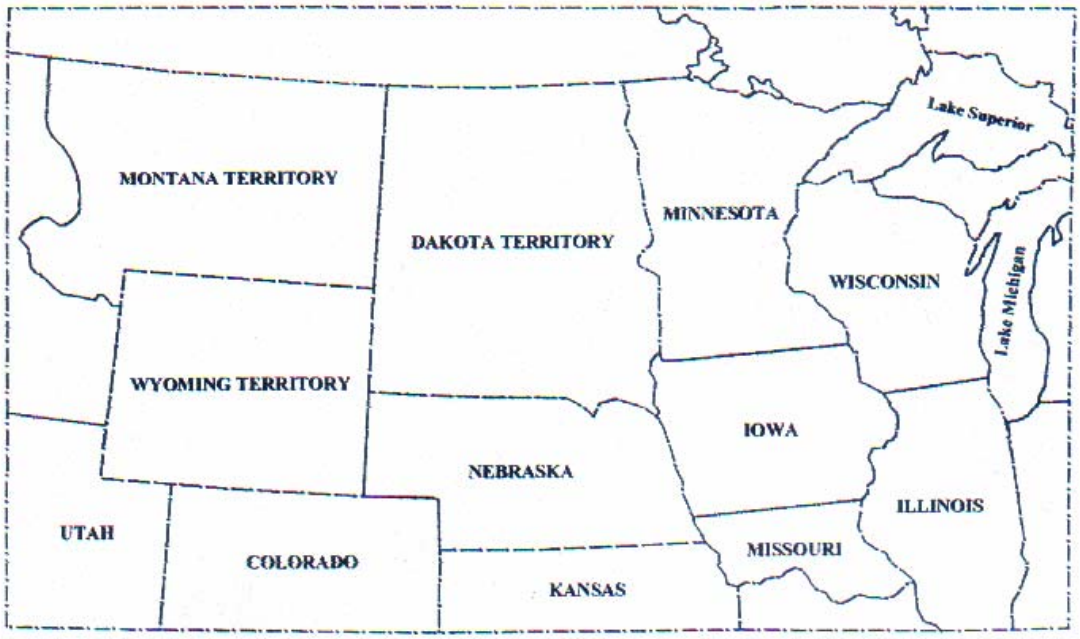
The State Constitution that grew out of the landmark convention was ratified by the people of the territory at the general election on November 5, 1889, and became effective with the Act of Admission to the Union in Congress, eight months later on July 10, 1890. Dr. T. A. Larson, discussing the admission to statehood and adoption of the constitution in his *History of Wyoming*, states "What little originality there is in Wyoming's constitution is mainly concentrated in Article VIII (Irrigation and Water Rights)," a comment that reinforces the common and widespread understanding that Wyoming's water laws were innovative, timely, and prepared to meet the prospect of western growth.

The 1890 Territorial Laws

The territorial legislature met one more time in early 1890, continuing the direction it had started through the years of territorial government, but realizing that with statehood imminent, a new state legislature would soon meet and possibly completely revise the direction those territorial laws had taken. Certain concepts in the law were being seriously questioned by some citizens while other citizens girded to fight for the historic manner of water use with which they had become comfortable. The 1890 territorial session created an act authorizing cities and towns to provide a system of waterworks for their residents, specifying such matters as how to finance such works, how to acquire water rights, etc. It also revisited the fish provisions spelled out in 1888, and redescribed the eight "irrigation districts" into a new total of nine such districts being oriented much more along county boundary lines than originally drawn. The new irrigation district descriptions corresponded more closely to district court jurisdictional boundaries to supposedly allow better success in preparation of court adjudication of the water rights awaiting such action. In retrospect, they need not have bothered with this amendment (in fact, would have been better off without it), as the state legislature, meeting for the first time ten months later, removed adjudication duties from the courts and vested them in the newly-created Board of Control. Appendix C details how unique and functional and in all manner good, the transfer of this duty to a body equipped to deal with it on a full time basis came to be.



1861

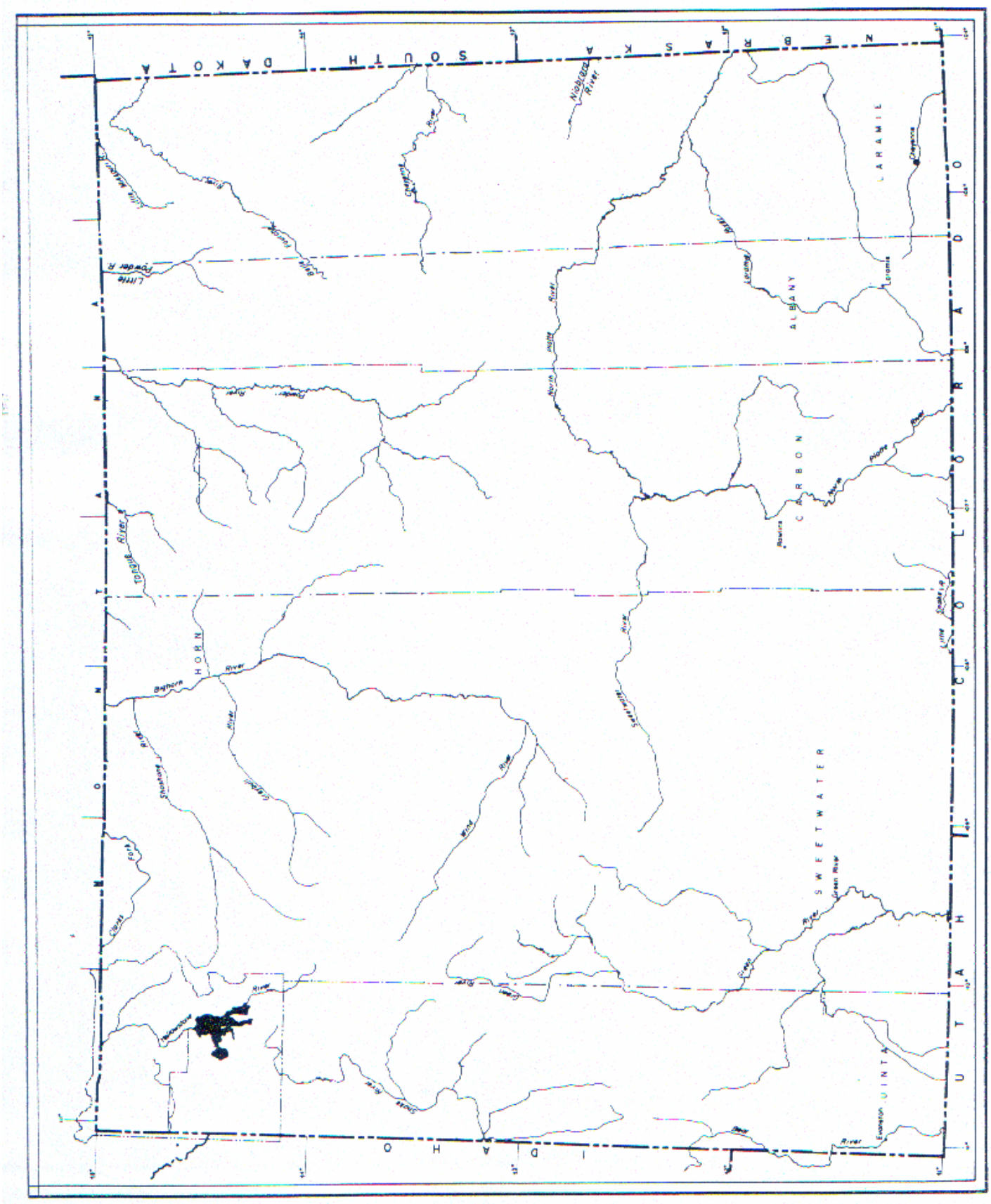


1868

SUNRISE ENGINEERING, INC.
CONSULTING ENGINEERS & LAND SURVEYORS
47 EAST 4TH AVE., AFTON, WY.

SUNRISE ENGINEERING INC.

Organization of Wyoming Territory out of Dakota, Nebraska, Utah and Idaho Territories



The Five Counties and Major Waterways of Wyoming Territory, 1869

Part II—Early Statehood, 1890 to 1900

The 1890-91 State Laws

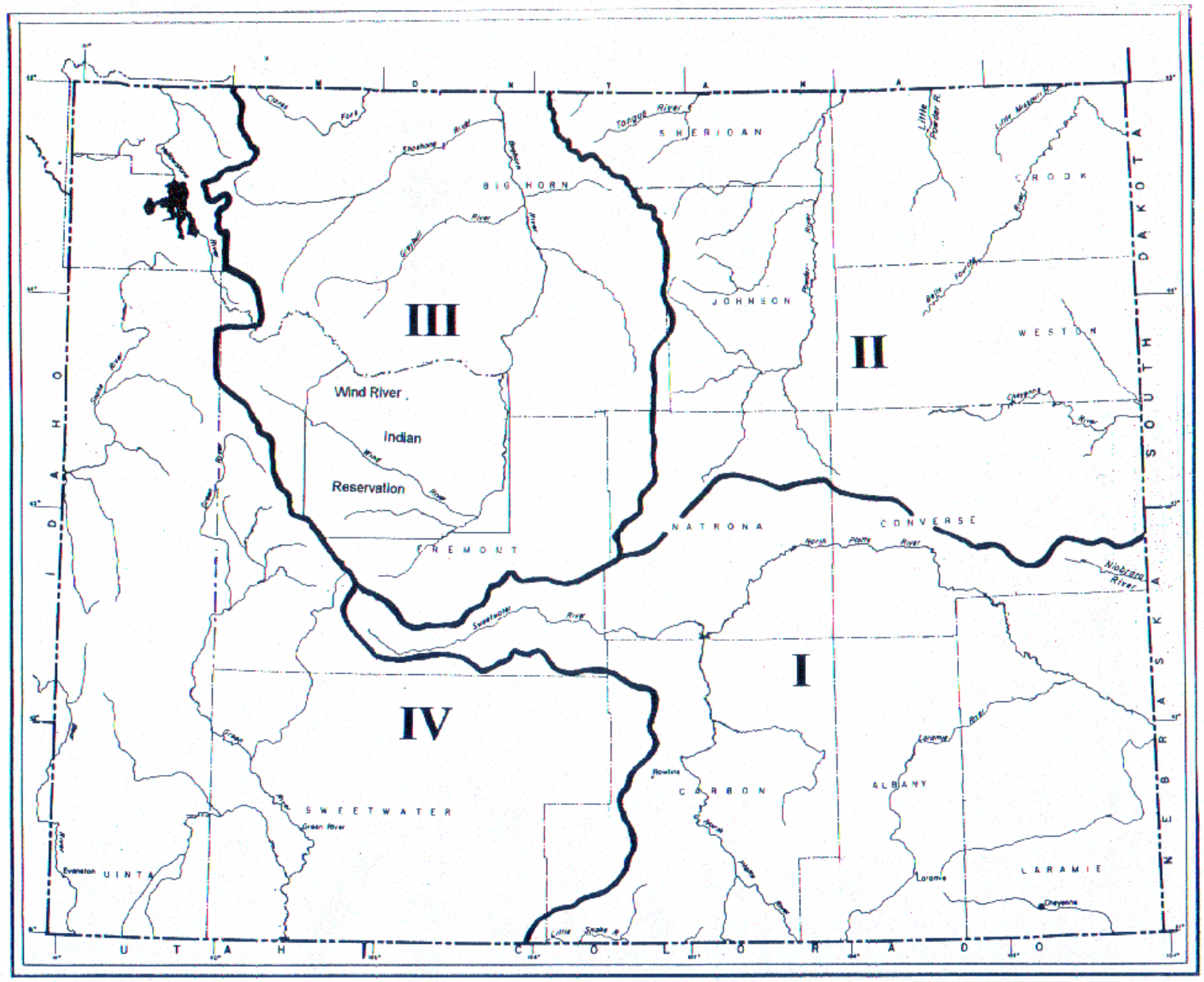
Four months after the close of the 1890 territorial legislature, on July 10, 1890, Wyoming terminated her political status as a territory, and, by the Act of Admission, became the State of Wyoming. Her constitution had been ratified by Wyoming popular vote in the last November general election, and now by the U.S. Congress, and its provisions went immediately into effect. The governor went about appointing the Territorial Engineer, Elwood Mead, into the office of State Engineer and he began the exhaustive work of perfecting the premier water use system that he prosecuted diligently for the next 8½ years.[3]

The first Wyoming State Legislature convened late in the year, and by December 22, 1890, had drafted and approved the first State water laws. Those laws started out by creating provisions to enact and comply with the constitutional requirements to divide the state into four water divisions and have appointed a superintendent for each division. While the most recent territorial laws were heavily drawn upon for their value as the last step in the evolution of territorial water law, there were new provisions in the new laws, some based on the ambitious on-the-ground experimentation done by Engineer Mead in the previous two years. Other provisions just clarified some of the concepts in the existing law, and the result was a clean and readable fifteen-page act combining the acceptable attributes of the past thirty years of trial and error in the use of Wyoming's streams with the emerging science of irrigation.

Water Divisions

As directed by the new State constitution, the first state legislature divided the State into the water divisions which had been discussed at length by the delegates to the Constitutional Convention. The creation of the four water divisions to coincide with the drainage basin boundaries of the four major river systems in Wyoming made a convenient and coincidentally equitable division of the state into four quarters of nearly equal size. Division One occupied the southeast portion of the State and contained the North Platte, Laramie and Little Snake Rivers and all their tributaries; Division Two, the northeast portion, contained the Cheyenne, Belle Fourche, Little Missouri, Powder and Tongue Rivers and all their tributaries; Division Three, the northwest portion, contained the Wind-Bighorn and Clark's Fork Rivers and all their tributaries; and Division Four, the southwest portion, contained the Green, Bear and Snake Rivers and all their tributaries (see map page 23).

[3] Recognized throughout the west as a giant in the field of water rights and irrigation, the remarkable Mead left Wyoming in 1899 to become head of irrigation investigations in the Department of Agriculture in Washington, D.C., where he continued to advance the causes of reclamation in Wyoming and other western states. He became U. S. Commissioner of Reclamation in 1924 and in that capacity directed the construction of Boulder Dam on the Colorado River near Las Vegas, Nevada. The reservoir behind that dam, Lake Mead, bears his name in honor of his contributions to the reclamation of the arid lands of the American west. His writings, and the writings of others about him, provide essential reading for the student of the history of Wyoming water rights, land reclamation, and water use.



Wyoming in 1890, showing the Four Water Divisions created by the State Constitution

Division Superintendents

Once the four water divisions were created, the governor appointed a resident of each division to serve at the governor's pleasure in the office of Water Division Superintendent, as also prescribed by the Constitution. The State Engineer was thus relieved of immediate supervision of the county water commissioners, since the new statutes placed that duty with the Water Division Superintendents. That provision created a much more local hierarchy in administration of the local streams and gave the State Engineer a much-needed trustworthy assistant in each quarter of the State.

Also according to the Constitution, the four Superintendents, along with the State Engineer as President, would comprise the State Board of Control. In that capacity they were statutorily required to meet twice a year, specifically starting their meetings on the second Wednesday of March and the first Wednesday of August. The superintendents of the four water divisions sat together with the State Engineer as the State Board of Control for the first time in March of 1891, and one of their items of business was to comply with the new statute directing them to divide the State into water commissioner districts. These commissioner districts replaced in both concept and area the old "irrigation districts" created under territorial law. As the district courts were now removed from the initial water rights adjudication process, the necessity for having water administration boundaries line up with district court jurisdiction boundaries disappeared as well. Instead, the new water commissioner district boundaries could be drainage basin-oriented, so that a single water administration official could generally have authority over all the water rights on an entire stream from its headwaters to its mouth. Since the water commissioners were county employees, however, an exception still existed in some locations where the stream crossed from one county into another (see also Appendix B).

Section 14 of chapter 8 of those first state statutes gave the superintendents the duty to execute the laws relative to the distribution of water, and Section 15 gave each the authority to "make such other regulations to secure the equal and fair distribution of water . . . as may, in his judgment, be needed . . ." as long as those regulations weren't in violation of any other Wyoming law. Anyone who considered himself injured by the action of a superintendent could appeal such action to the State Engineer for suspension, amendment, or confirmation of "the order complained of." Those statutes, duties and authorities remain relatively unchanged in today's law and are carried out regularly.

Board of Control; Adjudication

Another duty required of those division superintendents in sitting as the first Board of Control was to begin the process of adjudicating priority dates and amounts of the existing claims for appropriation across the State, beginning on "the streams most used for irrigation," and continuing until all claims on record were adjudicated. County clerks were required by Section 31 of those first state laws to transmit all the claim forms they had been collecting in conformance to the 1888 law to the State Engineer for inclusion in the Board of Control's adjudication efforts, and clerks of court were required to do the same with the county surveyor ditch measurement certificates they had been collecting.

A process outlining exactly how the adjudication process was to be completed was well spelled out in the 1890-91 law. It consisted of several steps, beginning with a public notice to appropriators on the selected stream that on a specified future date, the State Engineer would begin measuring the stream and the ditches diverting from it. The notice also specified a date when the superintendent would begin taking testimony from appropriators as to their claims to water, and provided a form (now called a "proof") for the appropriators to fill out. That form, completed under oath, was to state the nature of the use, the dates the survey of the facility began, the date commencement of construction began, the date completion of construction occurred, and the date when water was first used. If for irrigation, the acreage of land irrigated was required as well.

On the specified date, the superintendent then took the completed form and any additional testimony from any respondents who appeared at the appointed time and place to advance their claim. When that was finished, he issued notice of a date when all the pertinent evidence of water right claims on that drainage would be held open for public inspection, to afford anyone claiming an interest in the stream the opportunity to refute or protest any appropriator's claim. If a protest was lodged, the superintendent was required to hold an additional hearing to collect evidence on that matter. Whether protested or not, at the completion of this information-gathering phase, the superintendent transmitted all the evidence and testimony to the state office of the Board of Control in Cheyenne to be processed for inclusion on the agenda for the next meeting, when he, his fellow superintendents, and the State Engineer would deliberate the evidence and issue an order determining priorities.

Concurrent with this activity by the superintendent, the State Engineer or his assistants were required to examine the same stream, its diversion works, ditches, irrigated lands, and lands susceptible to irrigation, and prepare a plat map of the stream showing these features. This map and information was also made available to the Board of Control as additional evidence for completing the adjudication of prior water rights on the stream.

The next step in the process was for the Board of Control to enter an order determining and establishing the priorities, amounts and descriptions of the water rights adjudicated, based partly on the "amount of water which shall have been applied for beneficial purposes." In fixing the amount that the appropriator could take from the stream, the law required that the appropriator "shall at no time be entitled to the use of more water than he can make a beneficial application of on the land." Based on the historic practice of free river use, the amount of water used beneficially varied from time to time and place to place. In fixing the amount of water that the Board of Control could allot by certificate to the appropriator for equal footing and regulation purposes, it provided that "no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made."[4] (Later court cases clarified that "beneficial use" and the one cfs per 70 acres certificate allotment are not necessarily the same thing). By dividing the total acreage approved in the certificate by 70, the Board of Control then determined the cfs allotment to be entered on each order. These "order records" were meticulously completed and preserved in secure volumes in the office of the Board of Control, and,

[4] See also Appendix A

together with the plat maps, are still accessible and used today for the same purposes as when they were first issued.

The final step in awarding individual water rights to appropriators who had made claims was the issuance of a certificate of appropriation, recording all the attributes of that particular claim which had been adjudicated by the Board of Control. The certificate was entered into the "certificate records" of the Board of Control, with a duplicate transmitted to the county clerk of the county in which the water right existed, who, following recordation in county records, forwarded the certificate to the appropriator. The statutes also provided for an appeal process to the district court if a party felt aggrieved by the Board of Control adjudication, and a requirement that the court advance any such appeal to the head of its docket and give it precedence.

Tabulation of Adjudicated Rights

Although the entire process at first must have seemed colossal, the Board of Control proceeded with admirable diligence to clean up all the territorial claims that had been languishing since they were first filed, and within a relatively few years, had eradicated the backlog. To assist the water administrators and general public across the State in accessing the information generated by the order records for each stream, the Board of Control published a listing for each water division containing all water rights adjudicated from each stream in order of their priority date. The successor to that document, the *Tabulation of Adjudicated Water Rights* continues to be the "bible" of water rights in each water division today and is updated regularly to include newly adjudicated water rights on each stream in chronological order together with the very first ones filed.

Permit Process

In addition to providing a mechanism for disposing of existing territorial claims, the new 1890-91 statutes also provided a process for acquiring new water rights in the future. That process rigidly required the filing of an application for a permit to appropriate. Based on the experience with the territorial claims, requiring a permit at the beginning of the appropriation process was determined by the legislature to be much preferable to allowing ditch construction and water application to occur first and then trying to make record of it after the fact. Wyoming was the first state to require a permit to appropriate.

The permit process began with filling out an application form with all pertinent information about the proposed new use, and filing it with the State Engineer. Upon receipt of the application in his office, the State Engineer was to diligently record the date and time of its receipt. That critical recordation time became the priority date of the new water right—the date which would forever mark that water right's place on the list of competing priorities for that stream. All water rights on that stream with earlier priority dates would have a better right, and all those that came to be permitted after that date would always be junior in their right to take water from the same stream. Applications were accepted for original supplies for all water uses employed in the State, for reservoir construction, and for enlargements of existing facilities. Recognizing that some projects would take years to complete, the State adopted the "doctrine of relation back" under which the priority date of water rights attached to project lands would all relate back to

the date the permit application was received in the office of the State Engineer. Even if it took 50 years before the first water was applied to beneficial use on part of the project lands, as long as the project as a whole was being completed with due diligence, the priority date of water applied to newly cultivated land would relate back to the original priority date that the permit application was accepted by the State Engineer.

The permit application also asked the permittee to advise the State Engineer as to the times required to commence construction, complete construction, and place the water to beneficial use. Upon examination of the completed application, if the State Engineer found it to be in compliance with the law, found there to be unappropriated water in the named source of supply, and found the application not to be detrimental to the public welfare or public interests, he endorsed it as approved, and authorized the applicant to proceed with the proposed water development. If any of those conditions were not met, he had the authority to refuse the application, modify it for less water, or grant a shorter time period for perfection of the appropriation. The statutes required the applicant to also file a plat map of the proposed facilities, which would perpetually remain on record in the State Engineer's Office for reference as to the physical intent and attributes of the appropriation. Those maps continue to be an indispensable resource in water right study yet today. The statutes gave the Board of Control the duty to hear appeals from anyone who felt aggrieved by a permit endorsement of the State Engineer.

Implicit in the permit process was the concept that the "terms of the permit" were inviolable; i.e. when an applicant asked for the right to do a certain thing with the State's water, the State Engineer granted only what the applicant asked for, no more and no less. An applicant who asked for the right to make a certain use of water at a certain place was bound by the terms of the permitted use and would be in violation of his permit if he attempted to make a different use than permitted, or at a different location than permitted. This condition continues to be rigidly adhered to in water right permitting today.

Upon completion of the construction and application of water to the permitted beneficial use, the permittee notified the State Engineer, and the adjudication process began with the filing of a proof as described above, following the same process on through to issuance of a certificate.

Other 1891 laws included a special legislative appropriation for the State's first stream gaging station to be constructed under Elwood Mead's direction on Clear Creek near Buffalo in Johnson County, and an Act concerning "fast driving over county bridges." The latter Act provided that "no one shall drive or ride over a county bridge faster than a walk," and authorized the county commissioners to put up a sign using those words at each end of any county bridge. Speeders convicted were susceptible to a $10 fine or imprisonment for "not less than ten nor more than thirty days," or both.

The comprehensiveness of the 1890-91 statutes demonstrate the extensive thought and consideration given to creating a solid process for making the transition from a territory to a responsible state of the union. The statutes enacted by that first state legislature established a body of water laws that have remained essentially the same in the years

between then and today, although regular modifications to that body continue to keep the law modern and flexible to meet changing times in Wyoming.

The Period Between 1890 and 1900

After the monumental water legislation events of the first years of statehood, attention turned to using and carrying out the enacted laws. With a sound organization in place to provide order, intensified effort was made to bring the vast irrigable acreage across the state into agricultural production. Reports were that millions of acres lay out in the State waiting for irrigation water, while the rivers of the state flowed on. In T. A. Larson's words, "Governor William A. Richards told the 1895 legislature of 'this vast wealth of land and water lying idle, side by side, awaiting only the magic touch of labor and capital, intelligently combined, to be coined into wealth.'"

The United States of America,

To all to whom these presents shall come, Greeting:

Homestead Certificate No. [illegible]
Application [illegible]

WHEREAS, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the Register of the Land Office at Lander, Wyoming, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of

FRED SCHOETTLIN

has been established and duly consummated, in conformity to law, for the east half of the southwest quarter and the northwest quarter of the southeast quarter of Section thirty and the northeast quarter of the northwest quarter of Section thirty-one in Township thirty-three north of Range ninety-three west of the Sixth Principal Meridian, Wyoming, containing one hundred sixty acres,

according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said Fred Schoettlin the tract of land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said Fred Schoettlin and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twenty-fourth day of August, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

By the President: Theodore Roosevelt
By [illegible], Secretary.
[illegible]
Recorder of the General Land Office.

Recorded, Vol. 639, Page [illegible].

Up to this point, the ditches in Wyoming were small, short, and stayed within the narrow flood plains of the stream and river valleys, irrigating relatively small acreages in the bottomlands. Horse pastures, cow pastures, gardens, orchards, mill races, stockwater troughs through corrals, and small crop fields were served by hand-built ditches hugging the bottoms of the first-level terraces following the meander of the streams downhill. To cultivate the higher elevation bench lands further from the water sources would require construction and reclamation efforts on a massive scale, and similar securing of finances, but state officials saw prosperity in the promise and embarked on the journey with fervor.

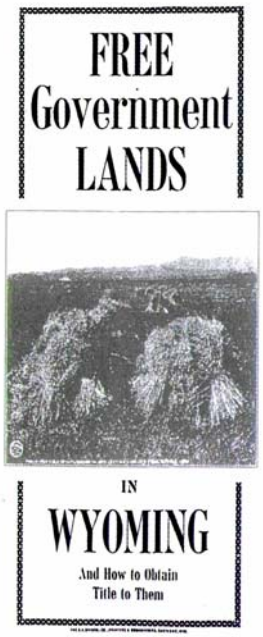
The 1894 Carey Act

In recognizing the need for capital and land to develop the State, cattleman and U.S. Senator from Wyoming, Joseph M. Carey in 1894, successfully sponsored a bill in Congress to have the federal government donate up to one million acres of unoccupied federal domain to each of the western states for irrigation development when such existed within their borders. The States' obligation in return was to cause the lands to be reclaimed for irrigation and settled by homesteaders on farm-sized tracts. Called the Carey Act, this was the first attempt at widespread water development in Wyoming, and the 1895 legislature appointed the offices of the State Engineer and Board of Land Commissioners as a sort of combined land and water administration agency to apply its provisions to Wyoming land.

The 1895 Laws

The major accomplishment of the 1895 legislature in respect to the water laws was to prescribe procedures for implementing the Carey Act to irrigable lands across the State. The federal act gave the states ten years to irrigate and reclaim the lands proposed for

development, and Wyoming promptly set about promulgating its rules, giving the state Board of Land Commissioners the duty to select, manage and dispose of the land. Persons, companies or organizations wishing to take advantage of the act were to file an application with the State Board of Land Commissioners for the land, and with the State Engineer for the water rights to irrigate it. It was expected that moneyed interests would associate to provide the capital necessary to undertake the large construction projects, and form development companies which would then contract with the settlers for delivery of water to the lands selected for segregation. Lands proposed by the State for disposal from the federal government were essentially patented (segregated) to the State, became "state lands" in the context of local disposal, and then further sold on contract to the homesteaders, who were generally under contract with their respective development company for providing a water supply.



In a move that was atypical for a state that had placed so much recognition on the proprietary right of a landowner to appropriate his own water right, the legislature provided that development companies who could build canals under the provisions of the Carey Act could become water right "brokers" for the settlers intending to locate within a Carey Act project. Potential settlers could then contract with the development company to buy "perpetual water rights" for the land they reclaimed, which would also entitle them to a proportionate interest in the canal and other irrigation works of the delivery system. They would pay the State around 50 cents an acre for the land, and the development company somewhere in the neighborhood of $20 an acre for the water rights. The development company would then issue a "water right deed" as proof the deal was complete.

No sooner than the guidelines and requirements were in place, an organization called the Shoshone Irrigation Company in August of 1895 filed for water rights and applied for the first Carey Act project in Wyoming, the Cody Canal, to divert from the South Fork of the Shoshone River upstream from the Town of Cody. In December of 1896, the Big Horn Basin Development Company filed for Carey Act application to the Bench Canal Project out of the Greybull River upstream from the Town of Burlington. On the Laramie River, the Wyoming Development Company continued toward completion of its project with construction of Wheatland No. 1 Reservoir in 1897 and Wheatland No. 2 Reservoir in 1898. In 1900, the Big Horn Basin Colonization Company made Carey Act application to develop considerable acreage under what they called the Sidon Canal, diverting from the Shoshone River near the Town of Lovell. And in 1902, following the success of their Bench Canal Project, the Big Horn Basin Development Company filed again for Carey Act support of a new project they called the Wiley Canal, to take water out of the South Fork of the Shoshone River several miles upstream from the diversion point of the Cody Canal.

Litigation 1890-1896

By the time the legislature met in 1899, it was known that the State of Wyoming's water laws, as thoughtful and well-intentioned as they were, were not going to go unchallenged in the courts. At least three lawsuits between competing appropriators had occurred in the decade of the 1890's and, while the law had stood the test, it was clear that the legislators hadn't thought of everything in their statutory enactments. The first lawsuit, *Frank v. Hicks*, had occurred in 1893 as a contest to determine whether a Wyoming water right, and the ditch to carry it, passed in a conveyance of the realty even if there was no mention of the ditch in the transaction. The Wyoming Supreme Court determined that, since it was accepted in Wyoming that water rights attach to the land rather than the ditch or landowner, they indeed pass with the realty, even without mention. The second case, also in 1893, entitled *McPhail v. Forney*, discussed the importance of providing for a means of conveying water to a tract with water rights. The third, *Moyer v. Preston*, decided in 1896, clarified exactly what was, and what was not, an "appropriation" in Wyoming. In that case, the court adopted the prevailing philosophy that certain elements were necessary to identify a water use as an appropriation—an intent to appropriate, physical demonstration of the intent to divert with reasonable diligence, and application within a reasonable time to a beneficial use. That case also documented a specific rejection of the doctrine of riparian rights in Wyoming.

Although it was not a Wyoming court case, *Howell v. Graham*, first decided in 1894 in Montana federal district court, involved a Wyoming homesteader who had appropriated water from Sage Creek in 1890, and a Montana homesteader who had appropriated upstream on the same creek in 1893. Immediately upon possession of his homestead, the junior Montana appropriator (Graham) diverted the waters of Sage Creek to the extent that not enough water came across the state line into Wyoming for the senior Howell appropriation. The Wyoming appropriator complained in federal district court in Montana and, based on the doctrine of prior appropriation, was decreed a "prior" right, with damages assessed against the Montana junior appropriator. Although he won the case, Howell was back in the same court two years later in 1896 with evidence that Graham was violating the decree by depriving Howell of water altogether. This time, the Montana appropriator was found guilty of contempt and fined. A year later, another suit was filed with the same results, and yet another with the same results in 1903. The junior Montana appropriator knew that Wyoming water administrators had no jurisdiction across the state line in Montana, and that Montana officials would not take water from its own appropriators to send to Wyoming, and he thus continued to irrigate his crops while the lawsuits accumulated.

By 1903, a neighboring senior Wyoming appropriator and another junior Montana appropriator had joined the fray. *Morris v. Bean* was a continuation of the same lawsuit on Sage Creek, and resulted in the same judgment from the federal district court. Appealed to the Ninth Circuit Court of Appeals, the prior judgments that priority dates must be honored across state lines were upheld and the Montana appropriators ordered to send the water to Wyoming. Still unconvinced after five judgments against them, the Montana appropriators, in *Bean v. Morris*, appealed to the U.S. Supreme Court which, in 1911, upheld the lower court decrees. To this day, over 90 years and a Supreme Court

decree later, the State of Montana has never honored or delivered water to the downstream senior Wyoming water right on Sage Creek.

The 1899 Laws

The 1899 legislature reiterated the 1887 duty of the water commissioners to regulate headgates to prevent waste of water, and reinforced their duty to divide the waters of the streams according to relative priority, closing headgates when necessary in times of water scarcity. They continued to have the power of arrest and the authority to employ suitable assistants when necessary that had been given them by the 1890 state laws.

The 1888 provision requiring the county commissioners to establish rates for the sale of surplus water was still in effect in the 1899 laws, as was the 1887 provision for the entitlement of a ditch right of way through the lands of any owner or owners whose lands lay between the stream and the fields of a landowner needing access to that stream. Those provisions have since disappeared.

Partnership ditches also received attention in the 1899 statutes. The law provided for the district court, upon request of the ditch users, to appoint a "suitable person" to take charge of any partnership ditch in which there was disagreement over division or distribution of water, whose duty it would be to make a proper distribution of the water among the co-users of that ditch. Although water commissioners were in place over much of the State, their jurisdiction to divide the waters was restricted to headgates out of stream sources, and they were prohibited from entering within the boundaries of ditch companies or partnerships to divide water between or among co-owners of such ditch. The new law regarding partnership ditches also provided a lien mechanism for recovery of costs when one or more co-owners failed to do their proportionate share of the maintenance necessary for the proper upkeep of the ditch. This law continues to be an important provision in the operation of joint-user ditches today.

Also, although the requirement that reservoirs all had to be constructed off-channel was no longer in the law (opening the way for the widespread dam construction on-channel as well as off), the liability of reservoir owners for any damages caused by their reservoirs continued to be paramount to owning a reservoir.

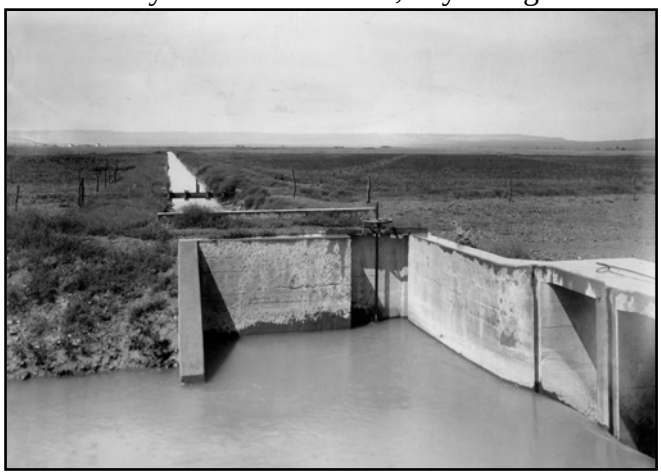
The close of the 19th century saw Wyoming as a state full of promise, with considerable historic irrigation in place, a premier system of water administration in operation (thanks to Elwood Mead), and with extensive irrigation projects and their attendant economic development on the horizon statewide.

Part III—The Development Years, 1900 to 1930

The Period Between 1900 and 1907

The period between 1899 and 1907 saw tremendous development activity in the State (the 1900 census showed 92,531 residents), with a commensurate growth in the statutory guidance over water development. The 1901 legislature enacted provisions for permitting the industry of floating railroad ties and logs on the streams and rivers of the State, requiring that such activity be done with the least interference or injury to any irrigating ditch existing along that stream. Two years later, the 1903 legislature gave attention to statutory guidance for construction of reservoirs, as it was apparent that the success of all the large private, Carey Act, and later, Reclamation Act, canal projects would be dependent to varying degrees on spring runoff waters being caught and stored in reservoirs for late season water supply. Those statutes, and their 1907 expanded versions, specified the procedures for securing reservoir permits, and required the filing of what were called secondary permits to describe the uses and places of use to which the reservoir water in the primary (reservoir) permit would attach. Adjudication of the secondary permit would occur when beneficial use of the water stored in the reservoir was proven.

By 1900, the annual pattern of runoff in Wyoming's streams was well-recognized by developers and settlers. In an area of slight rainfall, as compared to humid states from which many settlers had come, Wyoming's natural water supply depended (and continues to depend) almost entirely on snowpack during the winter months. While the mountains accumulated water in the form of snow between the months of October and April, the growing season months of May through September received only slight natural moisture--nowhere near enough to mature crops without irrigation. Additionally, the climate pattern consisted of rapidly warming temperatures in May and June, usually to the extent that the snowpack all melted and ran off in those months. The snowmelt filled



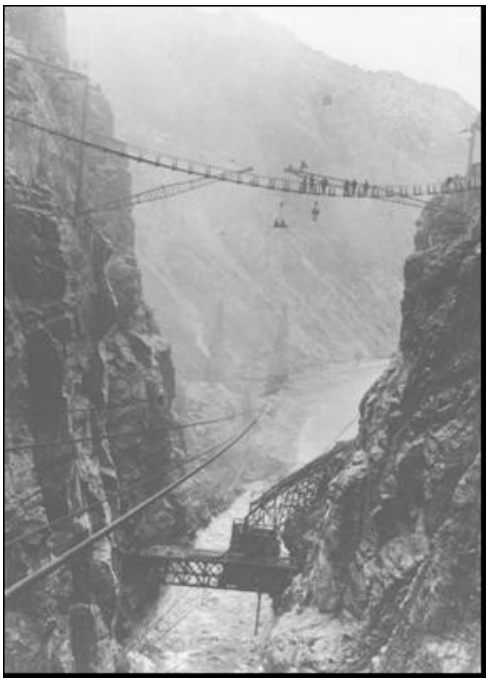
Shoshone Reclamation Project

the streams and rivers to overflowing for that short period of time, raced down the channels and was gone, leaving a relative trickle in most locations by early August.

As successful crop production requires adequate water all through the growing season into late August and September, the need was great for a way to catch and hold some of those flood flows so they could be parceled out at a later date when natural moisture and streamflows were minimal. The construction of reservoirs fulfilled that need. By directing substantial amounts of those rushing flood flows into a holding basin, water could instantly be saved from downstream loss, and later made available by operating the outlet gates to release stored water back to the channel at times when the natural flow was not able to meet the needs downstream.

The early 1900's saw reservoir-building activity all over the State (see map page 52). In Water Division One, Lake Owen Reservoir was permitted in 1900, Granite Reservoir in 1901, Pathfinder Reservoir in 1904, LaPrele Reservoir in 1905, Crystal Reservoir in 1906, Lake Hattie and Hawk Springs Reservoirs in 1908, and Bump Sullivan Reservoir in 1911. In Water Division Two, Dome Lake received its permit in 1905, Kearney Lake Reservoir in 1906, Lake DeSmet in 1907, and Big Horn and Park Reservoirs in 1908. In Water Division Three, Okie Reservoir had been authorized in 1895, and Newton Reservoir in 1898, Paint Creek Reservoir in 1902, Luce Reservoir in 1905, Shoshone (Buffalo Bill) Reservoir in 1905, Blake-Denton Reservoir in 1906,

Lake Hattie Dam Construction



Shoshone Dam 1908

Wales Reservoir in 1908, the Lost Cabin Waterworks Reservoirs in 1908, Thompson No. 1 Reservoir in 1909, Adelaide Reservoir in 1910, and Shell Reservoir in 1911. In Water Division Four, Church Buttes Reservoir was permitted in 1901, Erickson Reservoir in 1902, New Fork Lake in 1903, Eden Reservoir in 1905, and Eden No.2 (Big Sandy) Reservoir, Jackson Lake Dam and Elkhorn Reservoir in 1906. These facilities, and many others, have provided the State with untold benefits in numerous ways in the 100 years since their construction, and are testaments to the foresight of the settlers who built them, or had them

Jackson Lake Dam

built. They provide water for all beneficial uses recognized in the State, and provide considerable flexibility both in time and amount as to how Wyoming's water supplies are used for the benefit of all her citizens. While use of water from those reservoirs is specifically tied to the uses described in their permits, and the ownership of the storage is tied to those appropriators who expended the capital to have them built, there can be no argument that in an arid state, the ability of those reservoirs to manipulate the runoff period has been of inestimable value to all citizens.

Carey Act

By 1903, several development companies were working on projects seeking segregation under the Carey Act all across the state. The Big Horn Canal and Hanover Canal Companies at Worland, the Lovell Irrigation Company at Lovell, the Cody and Salisbury Canal Company at Cody, the Boulder Lake Canal Company near Pinedale, the North Platte Canal and Colonization Company near Torrington, the Fitzsimmons and John Scott Ditches in Converse County, and the Uinta County Canal No. 2 in Uinta County all got their starts under the auspices of the Carey Act. However, the necessary size of the projects required huge capital investments, some to the extent that the development companies struggled to complete the canals. The settlers enticed to the openings of the projects were not always able to meet their financial commitments and assessments, so the projects themselves didn't launch into immediate success, and in fact, some launched into failure. In his 1915-16 biennial report, the Wyoming State Land Commissioner advised "One of the greatest difficulties in developing Carey Act projects seems to be the question of colonization. Many settlers taking up Carey Act lands have either not had the means to proceed with the proper cultivation of their entries or have not realized the amount of expense and labor that would be required to place raw land under cultivation and irrigation."

Reclamation Act of 1902

Difficulties with the Carey Act had been recognized as early as 1900, and there was widespread concern with finding a way to keep the projects solvent. Wyoming Senator Frank Mondell and State Engineer Fred Bond had both written for the Wyoming Industrial Journal in 1901 urging that the State should attempt to obtain U.S. Government

aid in financing irrigation development. They based their rationale on the idea that many of the "arid state" lands were still in the hands of the federal government anyway, and the fact that the amount of capital necessary for the large-scale development of those lands was only available in the "National Government." They were not alone around the west, and although there was vocal resistance about using federal moneys for the good of the western settlers, from what they called the "humid states," Congress responded in 1902 by passing the Newlands Act, better known as the Reclamation Act of 1902. This Act created a new Department of Interior agency, the U.S. Reclamation Service, whose duty was to facilitate engineering, surveying, financing, and construction of reservoirs and other irrigation works for the storage, diversion, development, and transporting of water for the arid lands. According to State Engineer Bond, implicit in Wyoming's input into the passage of this act was the requirement that the federal government, even in its capacity of financier of extensive irrigation projects, was no different than any other Wyoming appropriator, in the respect that it was (and still is) required to secure a water right permit from the State Engineer before proceeding in any manner.

Within a short time, several stalled Carey Act projects were converted to Reclamation Service projects and revitalized under federal funding. In Wyoming, the first of those was the project of the Cody and Salisbury Canal Company, which became the Shoshone project in 1904; second was the North Platte Canal and Colonization Company project in 1905; and the third Reclamation Service project was the dam at Jackson Lake in 1906.

The 1905 Act (Second McLaughlin Agreement)

From the time of the creation of the Shoshone or Wind River Indian Reservation in 1868, (see page 9) small private ditches were being constructed at a steady pace for the irrigation of Indian farms and acreages along the Little and Big Wind Rivers and their tributaries. The majority of these developments were south of the Big Wind River with only a few scattered in the northern portion. In 1905, the U.S. Indian Service, on behalf of the Indians, filed for water rights for over 80 of those ditches with the Wyoming State Engineer. Under the 1905 Act, the Indians of the Wind River Reservation relinquished to the United States all their right, title and interest to the large portion of the reservation lying primarily north of the Big Wind River, for disposal to non-Indian settlers under the Homestead Act, townsite act, coal and mineral land laws, and public auction sale for cash. Proceeds from the sale of the lands to homesteaders would go into the United States Treasury for disbursement to the tribes as payment for the lands relinquished.

The State Engineer in 1906 accepted bids from interested land development companies for construction of canals and reservoirs for the relinquished, or "ceded," lands so that the homesteads being concurrently filed with the U.S. Land Commissioner could be irrigated. The contract was ultimately awarded to a group of Chicago investors, the Wyoming Central Irrigation Company, and that company immediately filed for state water rights for around 330,000 acres, portions of which would eventually be irrigated by the Wyoming Number 2 (Riverton Valley) canal, the LeClair-Riverton Number 2 canal, and the Wyoming (Midvale) canal. Also filed on as part of the project were a number of reservoirs on various upper Wind River tributaries, with anticipated and permitted storage volumes totaling some 326,000 acre feet. Although it was not originally a Carey Act

project, financial difficulties within Wyoming Central Irrigation Company a few years later led to congressional approval for Carey Act application to the Midvale portion of the project by 1910. However, the project never did proceed under that approval.

Wyoming Central Irrigation Company Canal

The 1907 Laws

Irrigation Districts

Canal and reservoir construction under both the Carey Act and the Reclamation Act across the State by 1907, although not as widespread as planned, had still reached a stage of development that required a serious local political structure to provide for continued operation and maintenance of the canals, laterals, drop structures and other facilities that were part of the works. To meet that need, the 1907 legislature enacted the State's first Irrigation District Laws. Irrigation districts would be formed as a child of the district court, but were not to be confused with the "irrigation districts" formerly authorized under the territorial laws which became "water commissioner districts." The newly authorized irrigation districts were to be organized by petition to the county commissioners, and operated by a board of directors elected by the qualified electors being freeholders of land irrigated by a ditch, canal, and/or reservoir. The board of directors had the power to define the district boundaries; include or exclude lands; hire ditch riders and other employees; establish equitable rules and regulations for distribution and use of water within the district; acquire rights-of-way; sell bonds; levy assessments; incur debt; and use their judgment to operate the district to the benefit of its patrons. These powers resulted in a much more formal organization than any that had previously been employed for supplying water to the settlers under a ditch or canal.

Following the legislation, irrigation districts were formed in all parts of the State, and new ones are still being formed today under the historic provisions of the 1907 laws as amended through the years. Lands within the State's irrigation districts are today among the most desirable country properties because of the equitable district structure as a public water distributor.

The 1907 laws also spelled out detailed procedures for condemnation of public ways of necessity for "reservoirs, drains, flumes, ditches, canals, or electric power transmission lines on or across the lands of others for agricultural, mining, milling, domestic, electric power transmission, municipal, or sanitary purposes."

Water Administration

Other inclusions of the landmark 1907 laws which are still in effect today were the requirement that an applicant for the position of Water Division Superintendent successfully pass a written test to qualify him for the position, and the allowance that water commissioners could be appointed for an indefinite term, rather than just the two years stipulated in earlier statutes. They also gave the water commissioners the authority, but not the duty, to regulate the distribution of water within a partnership ditch. This provision was apparently in response to the failure of the 1899 law that left such work to a "suitable person" appointed by the district court, and which had been hotly contested in the 1903 Wyoming Supreme Court case of *Stoner v. Mau*. Water commissioners were now also required to attach a written notice to any headgates or diversion facilities they regulated, and the County and Prosecuting Attorneys were charged with defending any superintendents or water commissioners who were made defendants in carrying out their prescribed duties, and all of whom continued to serve at the pleasure of the governor.

The statutory period that tolled water rights abandonment for non-use was extended from two years to five years in the 1907 laws, and the 1888 and 1899 statute that recognized any ditch as a common carrier, when it carried surplus water for furnishing to users other than the recognized ditchowner(s), was retained. The 1907 laws also, for the first time, made it a misdemeanor to take water without a permit, and provided that "possession or use of water" without such a permit would "be prima facie evidence of the guilt of the person using it." This enforcement provision remains in the law, and is a deterrent to unauthorized diversion yet today, although the present penalty is regarded by water administration officials as inadequate.

The other substantial change to a historic statute was the elimination of the requirement that measuring devices be "as near the head of such ditch as is practicable," substituting instead a provision that measuring devices now be installed "at such points along such ditch as may be necessary for the purpose of assisting the water commissioner in determining the amount of water that is to be diverted into such ditch from the stream, or taken from it by the various users." Such a modification from the original language appears to be in response to Elwood Mead's desire stated in 1903 (*Irrigation Institutions*) for "the establishment of an approximate standard duty of water when measured at the heads of canals," while at his job with the USDA in Washington D.C.

Litigation, 1900-1910

Between 1900 and 1910 another handful of water lawsuits were decided in the Wyoming Supreme Court. *Farm Investment Company v. Carpenter* in 1900, established that an appropriation is complete upon the diversion of water and its application to a beneficial use, and that the State Board of Control, as an administrative rather than a judicial body, has the supervisory powers for appropriation, distribution, and diversion of the State's waters. Another, *Whalon v. North Platte Canal and Colonization Company*, decided in 1902, clarified that the priority of a water right dates from the filing of the application in the office of the State Engineer, rather than from the dates of the survey and/or partial construction of the ditch, and that a ditch built without authority obtains no rights.

In *Stoner v. Mau*, decided in 1903, the court held that when one enlarges another's ditch, he does not obtain any right to the water of the original appropriator, and instead, must appropriate his own water and is bound by any internal contract he makes with the original owner as to relative ownership of the ditch. Another 1903 case, *Willey v. Decker*, dealt with the diversion of water in Montana into a ditch that crossed the State line into Wyoming and the ramifications of such "interstate" problems. Justice Charles Potter observed, in talking about that case a year later, "In my opinion, it will eventually be found necessary to resort to compacts between the interested State governments" to remedy such cases. That case also clarified that the public's right in water must recognize, and is subject to, the right of appropriation.

In still another 1903 case, *Ladd v. Redle*, the Court held that an appropriator has the right to work in the stream channel even on the lands of his neighbor to do what is necessary to get the water to flow to his headgate as long as he doesn't injure any other appropriator. The concept of a "futile call" was litigated in 1904 in the case of *Ryan v. Tutty* where the court required that junior rights on tributaries must be regulated for a calling senior on the mainstem, unless it can be shown that the water taken from the junior, because of channel loss, will not reach and benefit the senior. That case also clarified that the actions of water commissioners and superintendents are executive and not judicial.

Although territorial and early State law implied that a valid appropriation was tied to a specific point of diversion from the stream, in 1904 the court in *Johnston v. Little Horse Creek Irrigating Company*, found there was nothing in the law to prevent a change in the point of diversion if it could be accomplished without injury to other appropriators. Additionally, the court found that an agreement between two appropriators to alternate the use of their water (rotate) was acceptable as long as no other appropriator was injured thereby, and that an appropriator is entitled by his water rights only to the amount of water he can beneficially use. All of these concepts later were incorporated into statutory law.

In 1905, the court determined that the owner of a ditch would be found liable for damages caused to another party by negligence or unskillfulness in construction of his ditch, (*Howell v. Big Horn Colonization Company*). And in 1906, in *Mau v. Stoner*, the court required that when one appropriator contends that a water administrator is in collusion with another appropriator, the burden is on the complainant to prove his allegation.

Although it was not a Wyoming case, a 1908 Colorado case had implications for Wyoming as well. In *Windsor Reservoir and Canal Company v. Lake Supply Ditch Company*, the Colorado Supreme Court ruled that a reservoir owner had the right to fill his reservoir from the permitted source of supply only once during any given year. Although Wyoming didn't have a judicial declaration that the same "rule" applied in Wyoming until the 1970 case of *Wheatland Irrigation District v. Pioneer Canal Company*, the Wyoming Board of Control subsequently recognized that "one-fill" rule in its rules and regulations.

At the United States Supreme Court level, a 1908 case also had implications for Wyoming's future. In *Winters v. United States* that court determined that a treaty between the U.S. government and Montana Indian tribes establishing a reservation homeland for the tribes implicitly reserved from appropriation under state law an amount of water sufficient for the irrigation purposes of the tribes.

The 1909-1910 Laws

The 1909 legislature, in continuing to refine and perfect its system of statutory water law, defined that "beneficial use shall be the basis, the measure, and the limit of the right to use water at all times," and provided the first definition of a water right and its attributes in the following language:

"**Water right defined.** A water right is the right to use the water of the state, when such use has been acquired by the beneficial application of water under the laws of the state relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding in any case, the statutory limit of volume. Water always being the property of the state, rights to its use shall attach to the land for irrigation, or to such other purpose or object for which acquired in accordance with the beneficial use made and for which the right receives public recognition, under the law and the administration provided thereby. Water rights cannot be detached from the lands, place or purpose, for which they are acquired, without loss of priority." (Chapter 58, Section 724, Compiled Statutes 1910).

Further, following 20 years of discussion about whether or not, under a strict priority system, water for man and beast carried any sort of preferential status over other uses, the 1909 legislature defined a pecking order of preferred uses and their relationship to non-preferred uses as follows:

"Preferred uses defined. Water rights are hereby defined as follows according to use: Preferred uses shall include rights for domestic and transportation purposes; existing rights not preferred may be condemned to supply water for such preferred uses in accordance with the provisions of the law relating to condemnation of property for public and semi-public purposes. Such domestic and transportation purposes shall include the following: First—Water for drinking purposes for both man and beast. Second—Water for municipal purposes. Third—Water for the use of steam engines and for general railway use. Fourth—Water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), and for steam and hot water heating plants. The use of water for irrigation shall be superior and preferred to any use where turbine or impulse water wheels are installed for power purposes." (Chapter 58, Section 725, Compiled Statutes 1910).

This was the first time the legislature listed the types of uses for which water had been or could be appropriated, and it made clear that strict priority gave the better right in Wyoming, but that preferred uses could acquire the water and earlier priority of non-

preferred uses by condemnation and change of use. A companion statute then gave the board of control its first obligation to deal with a matter other than adjudication and permitting, in designating it as the body that would decide changes to preferred use.

Perhaps the oldest complete concept in Wyoming water law was codified in 1909 with the enactment of a statute authorizing rotation of water rights. The 1876 territorial laws provided for the sharing of water among appropriators during times of shortage and the 1909 codification finally set terms, conditions, and requirements of such rotation "to bring about a more economical use of the available water supply." Requirements of the new law were that all water users intending to enter a rotation had to have proper water rights that were in priority at the time of the intended rotation, and that such rotation be under the approval and direction of the local water commissioner.

Additionally in 1910, the legislature changed the meeting dates for the Board of Control meetings, by requiring them to begin henceforth on the "second Wednesday in April and the third Wednesday in November" of each year.

The 1911 Laws

Frank J. Trelease, in his *Water Law Casebook* (2nd Edition) observes that "every irrigation project eventually becomes a drainage project." By 1911 irrigators across Wyoming had been artificially applying water to the land for around 40 years in some locations and for up to 15 years under some of the large canals. In accordance with common irrigation practice, application of water on the soil surface was intermittent, charging a field with water and then shutting it off to let the crop consume the water out of the saturated soil profile over the next few weeks. When the surface of the soil dried out and the crop roots were no longer able to extract additional water from the root zone, another irrigation was carried out to replenish the crop demand. (Appendix A describes Elwood Mead's adoption of this practice). One hidden component of this process was a portion of the applied water that escaped and became unavailable to the crop by migrating below the root zone through what is commonly called "deep percolation."

Deep percolated water, being disconnected from the soil surface and thus not susceptible to evaporation or crop consumption dried or dissipated more slowly or not at all; and over time with continued application of subsequent irrigations could accumulate, creating a saturated zone at a deeper level than had previously existed. If these soils were underlain by a layer of sandstone, tight clay, or some other impediment to downward flow, deep percolated water would be stopped from migrating any deeper and would accumulate on top of the impervious layer, beginning to build back up toward the root zone with each succeeding irrigation. Taken to the extreme, if an irrigator was not watchful, in areas of abundant water, he could build water completely back to the surface and create boggy conditions on his land. Topsoils in some locations of the State lie over the top of sand or gravel beds that are naturally well-drained, and deep percolated water moves through the deeper zones and back to the stream source rapidly without buildup of a water table. However, in other locations, movement of deep percolated water out of the saturated zone is so slow that soil may take years to dry out without artificial drainage. By incising

a drain ditch deep into the saturated zone, or by burying a perforated pipeline on top of the impermeable barrier, a conduit of lower pressure can be created by which deep percolated water will flow out of the soil into the drain and be carried away, thus lowering the water table and drying out the crop root zone.

It obviously follows that any activity which results in the obstruction of a drain undesirably reverses the drainage process, forcing water back into the deeper soil profile and causing soil saturation with resultant land degradation. The Board of Control has consistently disallowed obstruction of drains when such a matter has arisen in front of that body (see Randy Stevens' *Appeal from the Endorsement of the State Engineer*, Board of Control docket I-2000-3-5).

The 1911 laws provided for the formation of assessment districts for drainage, much like the irrigation districts authorized by the 1907 laws, except where irrigation districts were formed to bring water onto the land, the drainage districts were to take it off after it had been applied to its beneficial use. Drainage district officials had authority to establish boundaries, contract for engineering and layout of drains, construct drains, assess damages and benefits, employ agents and laborers, borrow money, levy assessments for benefits, enter the lands of the district, and have the power of eminent domain, all for the promotion of the public good and welfare by reclaiming wet or overflowed lands. The law specified that, when practicable, "The drains herein provided for shall be laid out and constructed on the side of public highways," and required that railway companies were obligated to open their yards and rights-of-way to allow drains to cross their railroads when necessary.

In addition to deep percolation, water applied to the soil surface that cannot all be consumed by the crop often runs off the end of the field as residual, runoff or "waste" water. Sometimes alleged to be the result of the appropriator "over-irrigating," this water is more often that which is necessary to carry the consumptive use portion of applied water to the crop. On even moderate slopes, for example, irrigation water applied to a field often rushes past each plant so quickly that the plant and the soil are unable to capture it efficiently, thus it takes more water running for a longer period of time to saturate the root zone. While that saturation process is occurring, the residual runoff water leaves the end of the field in moderate to copious amounts, and must be directed to a proper wasteway for return to the stream source, without creating injury to lower landowners. This practice has historically been recognized as a legitimate component of surface irrigation in Wyoming, and because water is held up in the soil and works its way over time back to the stream of origin, it has, since territorial times, been critical in providing water at downstream locations later in the season.

Of the value of this lag time for return flows, L. C. Bishop, Superintendent of Water Division One, said in his 1934 biennial report to the State Engineer "One condition which was brought forcefully to my attention this past dry season was the fact that on many of our tributary streams, the water lasted only a short time. If the time ever comes when all are regulated strictly to their appropriation, during this short period, their ranches will entirely dry up. It is my contention that heavy flooding of these areas along our tributary

streams should be encouraged, as the ground reservoir is thus replenished, and the return flow keeps the stream alive for both irrigation and stock use below for a much longer period than is the case when this water is allowed or required to run off at flood time." Mr. Bishop, in 1939, was appointed State Engineer and served in that position with the second longest tenure of any Wyoming State Engineer.

The 1913 Laws

Abandonment

In 1913, the legislature took a more aggressive stance on the seriousness of an appropriator allowing his water right to lie idle for a lengthy period. In a water right system predicated on beneficial use being the basis of the right to use water, there was little tolerance for an appropriator tying up an appropriation by following the prescribed process to obtain it, and then failing to put it to use. The legislature had earlier recognized that there are circumstances that can preclude the use of water by an appropriator for varying periods of time when in 1907 it increased the allowable time of non-use from two to five years. However, by 1913 it was deemed that even under legitimate circumstances, five years was enough time to overcome whatever facts were causing non-use of water and failure to do so could result in loss of the water right. The law stated that anyone who failed to use his water during any five successive years would be considered as "having abandoned the same" and would "forfeit all water rights, easements and privileges, appurtenant thereto."

The action for abandonment, according to the law, could only be brought about by any other water user "who might be affected" by such a declaration. That affected water user was required to bring his case in writing to the Board of Control for disposition, giving that board one more duty outside its original obligation to adjudicate permit applications. The Board, if the facts so justified, would refer the matter to the superintendent in whose water division the abandonment was said to have occurred, and he would hold a public hearing to find the facts of the allegation. Upon completion of the hearing process, the secretary of the Board would set a day for a final hearing in front of the full Board of Control, and after that hearing, the Board would enter an order declaring the right abandoned, or decline to do so, "as the facts presented to the board may justify." If the right was declared abandoned, the water defined by the right was severed from its original owner's land or use and returned to being subject to appropriation again, "the same as if such ditch, canal or reservoir had never been constructed." The order of the Board in an abandonment action was appealable to the district court and further to the Supreme Court if desired.

It is important to note that a water right that has been abandoned is never "won" by the water user filing the petition against the unused right—it simply once again becomes waters of the State to be divided among all the remaining lawful appropriators in the routine administration of that stream.

The abandonment procedure has been used regularly in Wyoming history and such terms as "might be affected" and "five successive years" have been fertile ground for litigation.

Correction of Permits

The 1913 laws also gave the State Engineer the authority to amend ditch permits, upon written application of the permittee, by changing land descriptions or misdescriptions to conform to the lands actually planned for irrigation. Until this time, most corrections in permits had to come about as the filing of a duplicate or completely new permit since no authority existed for the State Engineer to change the "property" represented by an applicant's permit document. Under the new law, the corrections could only be made if the permit had not yet been adjudicated, and they could not result in an increase in the number of acres originally permitted. The State Engineer was authorized to make his corrections on the face of the original permit, and to provide rules and regulations to assist permittees in "proceeding under this act." Later legislation authorized the Board of Control to do the same with water rights after adjudication, creating a distinct line between the jurisdictions of the two offices—the State Engineer could only deal with unadjudicated permits, while the Board of Control could only deal with adjudicated rights in actions to keep the attributes of water right documents accurate and current.

Other 1913 legislation dealt with the rights of owners of shares of stock in a ditch or reservoir company, and the relative carrying capacities and maintenance duties as represented by their proportionate interest as determined by stock ownership.

On-the-ground water administration was recognized as woefully inadequate through those years, though not for lack of trying. Nearly every annual report of a Division Superintendent decried the poor compensation and poor political setup of attempting to supervise county employees by a state-compensated superintendent, yet each report also complimented those water commissioners for carrying out their duties the best they could in the face of such inadequacies. Although it would not be required by legislation for another 40 years, the Board of Control in 1914 began printing tabulation books listing appropriator names, ditch names, priority dates and amounts of appropriation for the use of the water commissioners. Still, the Water Division Superintendent for Division Three commented in his annual report for 1914, "I have found that much time is lost and many [water delivery] mistakes made by reason of the inability of the water commissioners to identify headgates [as to ditch name and appropriator]." Clearly, though great strides had been made, the legislature and State government were still a long ways from the desired goal of sophisticated and complete water administration in the hinterlands of the State.

The 1915 Laws

In a "light" session as far as water law was concerned, the 1915 legislature enacted only a few new laws, but their substance was telling as to the vexations they were designed to remedy. One law required that proceeds from "forfeited bonds, pledges, or other forfeitures of whatsoever kind in connection with the operations under the …Carey Act," were to be paid into the Arid Land Fund. That fund was established by the 1905 legislature to be the depository for all moneys collected by the Commissioner of Public Lands from the sale of Carey Act lands, and was to be used "only for the reclamation of other arid lands," whenever the legislature so appropriated them. A second statute provided a mechanism by which heirs could succeed to property "[w]here an entryman

upon Carey Act lands, who has made valid final proof thereon, dies before the State has issued patent therefore…."

In an attempt to keep spirits from sagging over the spectacle of failed Carey Act projects, and to keep development continuing, the 1915 legislature appropriated $10,000 from the Arid Land Fund to be used for examinations and surveys to determine the feasibility of future reclamation of as-yet undeveloped arid lands. Satisfaction with the U.S. Reclamation Service's activities in the State was also muted—in his 1913-14 biennial report, State Engineer Parshall disdained the imposition of federal law, particularly the Warren Act, into his jurisdiction. Recognizing that accepting the federal government's money for reclamation development meant dealing also with federal inattention to state's rights, he commented "[O]ur laws state water can't be sold. The Warren Act provides for the sale and transfer of 'surplus water'. . .in direct conflict with our state laws." It would not be the last time that the federal government, who in territorial times had acquiesced all ownership and control of water to the State, later enacted water legislation to conflict with prior state law. By 1920, State Engineer Emerson was requesting the Wyoming legislature to create a State Reclamation Service, presumably to minimize the U.S. Reclamation presence, but his request did not bear fruit.

Water administration

As evidence of the difficulty still being found in the attempted application of the statutory contemplation of one cfs for each 70 acres of irrigated land to comport to actual historic practice of free river diversion, State Engineer James True, in seeking a common-sense amendment, reported to the governor in 1916, "Dr. Elwood Mead, the founder of our irrigation laws, joins us in urging the passage of the following law: 'The rate at which water can be used for irrigation purposes shall not exceed one cfs for each 30 acres of land irrigated. The total amount of water actually applied to the land shall not exceed 2½ acre feet per acre. . .." Either this proposal never got introduced, or it didn't succeed in the legislature, as there is no evidence it ever became law. Nonetheless, it makes obvious the historic water use practices at the time and foreshadows the necessary amount of water finally recognized by enactment of the surplus water law some 40 years later.

The 1917 Laws

By 1917, the body of statutory law that the State would need in the future to process water rights and accomplish their regulation and administration was nearly complete. The 1917 laws specified the time periods the State Engineer would allow for construction and completion of the works described in a permit, provided for extensions of time "for good cause shown," and prescribed the penalty of permit forfeiture for failure of an applicant to meet prescribed deadlines.

In what was a rudimentary precursor to the present Safety of Dams Law, the 1917 laws also allowed the State Engineer to prohibit the further use of irrigation works found by an inspection to be a menace to life or property. Such an inspection could be requested by persons owning land or residing in the neighborhood and who had concerns about safety if they would put down a deposit for the cost of the inspection. It is interesting to

remember that at the time, the State government budget was minimal. State employees were few, and the State's relationship to its citizens was "pay as you go." If a resident of the State required government services, he or she was required to post a deposit to pay the expenses of the requested action, unless the action was specifically spelled out in the law as a duty of that official.

The 1917 legislation also expanded the 1910 statute regarding the Board of Examining Engineers, by specifying what work could be done by surveyors, junior engineers, and senior engineers, and prescribing a penalty for practicing engineering without a license.

Additionally, penalties were prescribed for removing or destroying bridges or flumes which crossed any ditch, canal, or other irrigation works; and a process was authorized whereby builders or other workers on ditch, canal, or reservoir projects could secure a lien against the owner's land, water rights, ditch rights, or rights-of-way for payment of their expenses when necessary.

Finally, the 1917 laws were the first to implement a process allowing exchanges of stored reservoir water for direct flow. The process was available when water stored in a reservoir could be used as replacement water downstream for water taken out of priority in another location. The statute required the filing of a map and secondary permit to effectuate the exchange, describing the lands where the exchanged water would be used, and stating that "the source of the appropriation is the natural flow of the stream in lieu of an equal amount of stored water." It was the duty of the water commissioner to administer the exchange, and it had to be accomplished without injury to any other party.

The late teens were years of serious drought in most of Wyoming. With limited capital and struggling irrigation development, irrigators could little afford to be drought-stricken as well. Water commissioners were constantly "under the gun" for delivery of more water than existed. In relating the continuing difficulties with securing and keeping good water commissioners, the superintendent of Water Division One in 1918 remarked "This year, three [of our] water commissioners left for service in the Army or Navy." It might be speculated from that glum remark that facing the Germans at Chateau-Thierry was preferable to continuing to face competing water users in the seemingly continual Wyoming drought.

Litigation 1910-1920

With land and water development projects in full swing at the beginning of the 1910-1920 decade, and as the State, the development companies, and the settlers worked their ways through the steps prescribed by the Carey and Reclamation Acts to complete their land and water development projects, the shortcomings of the processes began to appear. Problems with rights-of-way, contract disputes, financial breakdowns, state-federal jurisdictional difficulties, and less-than-optimal farmland all created considerable agitation for all the parties. Two cases, one in 1911 (*Wyoming Central Irrigation Company v. Burroughs*) and one in 1914 (*Hanover Canal Company v. Wilson*), tested some of the procedures used in Carey Act projects. Still, for the most part, there was not widespread litigation over Reclamation or Carey Act issues, and instead the bulk of the

lawsuits through the period continued to seek clarification of the application and/or interpretation of the water administration statutes. In 1911, for example, in *Hamp v. State*, the Supreme Court again clarified that indeed, State water administrators were legitimate officers and could exert the powers of State law over water users in Wyoming without invading their property rights. Implicit in that decision was the right of water commissioners to have access to headgates and water measuring devices on private lands without fear of being subject to trespass.

In another 1911 case, *Chicago B & Q Railroad Company v. McPhillamey*, it was held that where an irrigation ditch was constructed in 1889 over and across unoccupied federal lands and had been used continuously since then for irrigation, the right of way for the ditch accrued and became a vested right, so that a railroad company was not in a position to dispute its right to be there. This case is still regularly referred to today in matters where private ditches across public land are questioned. In 1912, two cases also made clear the limitations on the authority of the Board of Control over real property disputes. The first, *Collett v. Morgan*, held that the Board of Control had no power or authority to determine the ownership or right to use a ditch between the parties sharing its use. The second, *Laughlin v. Board of Control*, held that such civil law matters as title to land for a reservoir site, and the right of way for the reservoir supply ditch, were not within the State Engineer's or Board of Control's jurisdiction. Also in 1912, in *Gustin v. Harting*, the court clarified that water rights do, indeed, attach to land and were not lost when the land to which they were attached went into foreclosure. In that same case, the court said that necessary water conveyance facilities such as a flume were protected against obliteration where they crossed a neighboring property, even when a new owner of that property did not want those facilities on his land.

In 1913 in *Nichols v. Hufford*, the Supreme Court determined that even though all the water of a stream may have been allowed to flow onto the land of one appropriator at certain times, that fact alone did not prove an appropriation for that full amount. An appropriator is only entitled to so much water as is reasonably required for proper cultivation of his lands, and the statute limiting irrigation allocations to 1 cfs for each 70 acres would be followed where a different duty of water was not established in territorial times. Much of the difficulty in dealing with such matters at the time was inadvertently explained by State Engineer James B. True in his 1913-14 biennial report where he observed that, as of 1914, "At least two-thirds of the water used in Wyoming is not measured out to the consumer, and scarcely any is measured at all accurately."

Municipal water was dealt with in the Supreme Court for the first time in 1913, in the case of *Holt v. City of Cheyenne*. In that case the court found that a municipality was not limited in the amount of its appropriation to the needs of its citizens at the time, but was entitled to appropriate sufficient water for the probable future demands of its population. It was also held that a junior user could not acquire any part of the municipality's appropriation by adverse possession, and that the municipality could change its point of diversion on the stream so long as the change did not injure any other appropriator.

Change in point of diversion was also considered in *Groo v. Sights* the same year (1913). In that case, the court held that a change in point of diversion could not be allowed in situations where the change would injure another appropriator. Injury in that case was shown when a downstream senior moved his point of diversion upstream to the same area as a junior appropriator. Because tributary springs between the old point of diversion and the new one had historically contributed to the senior's supply, the senior's move of his headgate upstream leapfrogged the springs, so that to divert the same amount of water he had historically diverted would mean taking more water from the stream, thus shorting the stream for other appropriators. That case also established that consent of affected ditchowners is necessary in change in point of diversion actions.

In *Parshall v. Cowper* (1914), the court clarified the duties of water commissioners, particularly holding that the water commissioner is obligated to deliver at the headgate the amount of water shown in the appropriator's certificate, if in priority. Even if the water commissioner knows not all the land is being irrigated, the court held his action of denying water, based on knowledge of idle land, is construed as determining abandonment has occurred, and the water commissioner does not have that authority.

In 1911, in the unusual role of being a downstream state, Wyoming filed suit in the United States Supreme Court against the State of Colorado (*Wyoming v. Colorado*) for interstate allocation of the flows of the Big Laramie River. It would take 11 years to get a decree in that case.

The remainder of the decade was reasonably quiet in the courts, and the fact that the statutes after 1917 were fairly complete left the next ten to fifteen years perhaps the quietest in the history of Wyoming water law. An increasing presence of the federal government through the U.S Reclamation Service, and demands of neighboring states downstream on Wyoming's rivers changed the focus of State water officials and appropriators to be more on guarding water supplies and less on regulating them. T. A. Larson, in his *History of Wyoming*, wrote that State Engineer A. J. Parshall in his 1914 annual report to the governor "accused the Reclamation Service of ignoring state law, riding roughshod over the rights of individuals, and looting the state of its water supply for the benefit of other states." Larson also quotes Clarence T. Johnston, State Engineer in 1910 as grumbling "The Interior Department with its endless rules and regulations and its army of employees must have its own way."

The Period Between 1920 and 1930

The drought continued into 1920 with the heightened concerns that always attend a series of dry years. In 1920 the Superintendent of Water Division Three reported, "1919 was one of unusual drought conditions . . . causing heavy crop losses all over the country . . . Numerous arrests were made for unlawfully taking water. On one stream there were perhaps fifteen such arrests, and only one conviction, though the evidence in the cases was not questioned. The juries, however, seemed to feel that it was no crime to take water belonging to another to save a man's own crop." From those comments, it appears the water users' respect for State water officials and their administration system, on that

drainage, at least, was still not complete. Nonetheless, with the recognition that drought was characteristic of the arid West, the State unwaveringly continued to build the system it had embarked upon at the outset, and able water officials patiently addressed every challenge with new and visionary adaptability, usually, but not always, with success. For example, although the State Engineer in 1920 expressed a desire for a change in the 1909 rotation statute to allow the water commissioners to have authority to "effect a rotation when same is deemed necessary," the change was not made, and rotations were left to be instituted by appropriator request only.

The 1921 Laws

The 1921 legislature acted on concerns, real or perceived, about Wyoming losing water out of State. In an expression of nervousness about the ability of the U.S. Reclamation Service to use its large mainstem reservoirs to manipulate water supplies to Wyoming's detriment, the legislature beefed up its reservoir statutes. While recognizing the rights of reservoir owners to sell or lease their right to impounded waters, the legislature required that "the water stored in any reservoir cannot be used outside the boundaries of the State without special permit from the State Engineer." Also enacted was a requirement that the reservoir owners annually provide the water commissioner with a list of parties entitled to use water from the reservoir and a description of the land to be irrigated.

Additionally, a process was created whereby a reservoir owner whose reservoir impounded more water than he could use beneficially, was required, upon application, to furnish such water at reasonable rates to other water users whose lands were capable of being irrigated from the reservoir. These new statutes applied both to reservoirs previously constructed as well as those "hereafter lawfully constructed," except those connected with Carey Act projects which were specifically exempted.

In a move perhaps justifying the State's growing concern with the federal government's Reclamation Service, the United States filed suit within a Wyoming Reclamation Service irrigation district, laying claim to waters arising in a natural channel within the boundaries of the district. In *U.S. v. Ide*, (1921) the U.S. circuit court determined that a historically dry drainage, when augmented with water from the federal project runoff, did not meet the meaning, in Article 8, Section 1 of the Wyoming constitution, of a "stream," and was thus not subject to appropriation under Wyoming law. A countersuit three years later in 1924, *Ide v. U.S.*, only reinforced the government's assertion that surface waters

occurring anywhere within their project were theirs to use until they chose to release them from their control.

As an example of the circumstances leading up to the Reclamation Service's increasing involvement in Wyoming projects, the Wyoming Canal (later Midvale) portion of the Wyoming Central irrigation company's massive endeavor on the ceded portion of the Wind River Indian Reservation finally got under construction in 1920. Two portions of that project, under the Wyoming Number 2 and LeClair-Riverton Number 2 canals, had been completed earlier. But with its water right permit having been filed in 1906, the third portion of the project (the Wyoming Canal) had failed under the Wyoming Central Irrigation Company, and had been authorized by Congress in 1910 to proceed under the Carey Act with a new development company, Talmadge and Bunton, who had been successfully operating on the Laramie Plains. That venture also failed, and in 1911 Governor Carey recommended that the State itself, through the Board of Land Commissioners, take direct responsibility for constructing the Wyoming Canal project with moneys from the Arid Land Fund. The legislature refused, however, and the project languished in the hands of the land commissioners until 1919, when the U.S. Reclamation Service agreed to take it on. Four years later in 1923, a diversion dam had been completed, and in 1925, nineteen years after the first homesteads on the project had been selected, water was first delivered through the canal.

Wyoming v. Colorado

Although Wyoming had dealt with the division of interstate waters back in 1903 in *Willey v. Decker*, the concept was new enough at the time, and the stream small enough, that widespread application of that decision had not occurred. In 1911 Wyoming had sued the State of Colorado in the United States Supreme Court to have limited the amount of water Colorado could divert from the Big Laramie River. In 1922 the Supreme Court finally ruled in that eleven year old case, apportioning the waters between the states based on priority of appropriation, holding that was equitable and proper since both states subscribed to that doctrine individually. The Court specified how much water Colorado could use based on priorities senior to Wyoming (39,750 acre feet annually), and required that the remainder of the dependable Big Laramie River flow (272,500 acre feet annually) must come across the state line into Wyoming.

Colorado River Compact

Supreme Court Justice Charles Potter's 1904 comment that it would eventually be "necessary to resort to compacts between interested State governments" for solution of "difficulties ensuing from the use of interstate waters" was heeded in 1922. With the knowledge from the *Wyoming v. Colorado* lawsuit that the Supreme Court would recognize priority dates under the appropriation doctrine as extending across state lines, Wyoming became concerned with potential difficulties with neighboring states. The 1921 legislature appointed State Engineer Frank C. Emerson to represent Wyoming in upcoming negotiation of a compact for the Colorado River, to divide the water between the "upper basin states" of Wyoming, Colorado, New Mexico, and Utah, and the "lower basin states" of Arizona, Nevada and California. Successful negotiations concluded in 1922 with agreement to Wyoming's first interstate compact. Its provisions divided the

upper basin from the lower basin at Lee Ferry on the Colorado River, just inside the northern boundary of Arizona. The compact primarily allocated 7.5 million acre feet of consumptive use annually between the two basins, but included a number of other allocation provisions as well. All states but Arizona approved the compact in 1922, and all state legislatures but Arizona's had ratified it by 1929. The Boulder Canyon Project Act of 1928 allowed the compact to become effective when ratified by six of the seven basin states thus rendering Arizona's holdout ineffective and moot.

The 1923 Laws

The State's first water pollution control laws were enacted by the 1923 legislature empowering the State Board of Health to make rules and regulations to prevent pollution and secure the sanitary protection of waters used for domestic purposes. That legislation prohibited sewage or industrial discharge from being released into waters of the State prior to being purified, under penalty of fine and/or imprisonment.

Water Administration

The biennial report of the State Engineer for the years 1923-24 depicted an office that was efficient, hard-working and attuned to water administration around the state. The Superintendent of Water Division One suggested in his section of that report that legislation was desired regarding supplemental supply (water from another source used to supplement an original water right). He identified the problem as being that some water users wanted to use such supplemental supply any time they desired, but that the office had determined it could only be used when the original supply was not available. It would be almost 40 years before statutory guidance was enacted for that issue.

The Board of Control in that same 1924 report wondered if perhaps the 1910 statute setting the meeting dates for their bi-annual meetings couldn't be amended as well. Their section of the report advised that the "work of the Board has become so heavy that under the present time of meeting the members are necessarily held in Cheyenne over Thanksgiving." By 1931, the starting date for the November meeting had been statutorily moved up from the third to the second Wednesday in November.

The 1925 Laws

Other significant water legislation in the 1920s was scant, but one notable enactment was the statutory authorization for formation of Joint Irrigation and Drainage Districts. The ability to combine powers and duties held by separate irrigation and drainage districts individually on the same lands into one joint operation allowed considerable efficiency in moving water into and out of a district, efficiency of operation and maintenance of facilities, and sharing of equipment and personnel.

Litigation 1920-1930

The first lawsuit dealing with the 1910 statutory procedures for a change to preferred use was heard in 1922. In *Town of Newcastle v. Smith*, the court held that the town's petition to the Board of Control for a change of use from irrigation to municipal use was

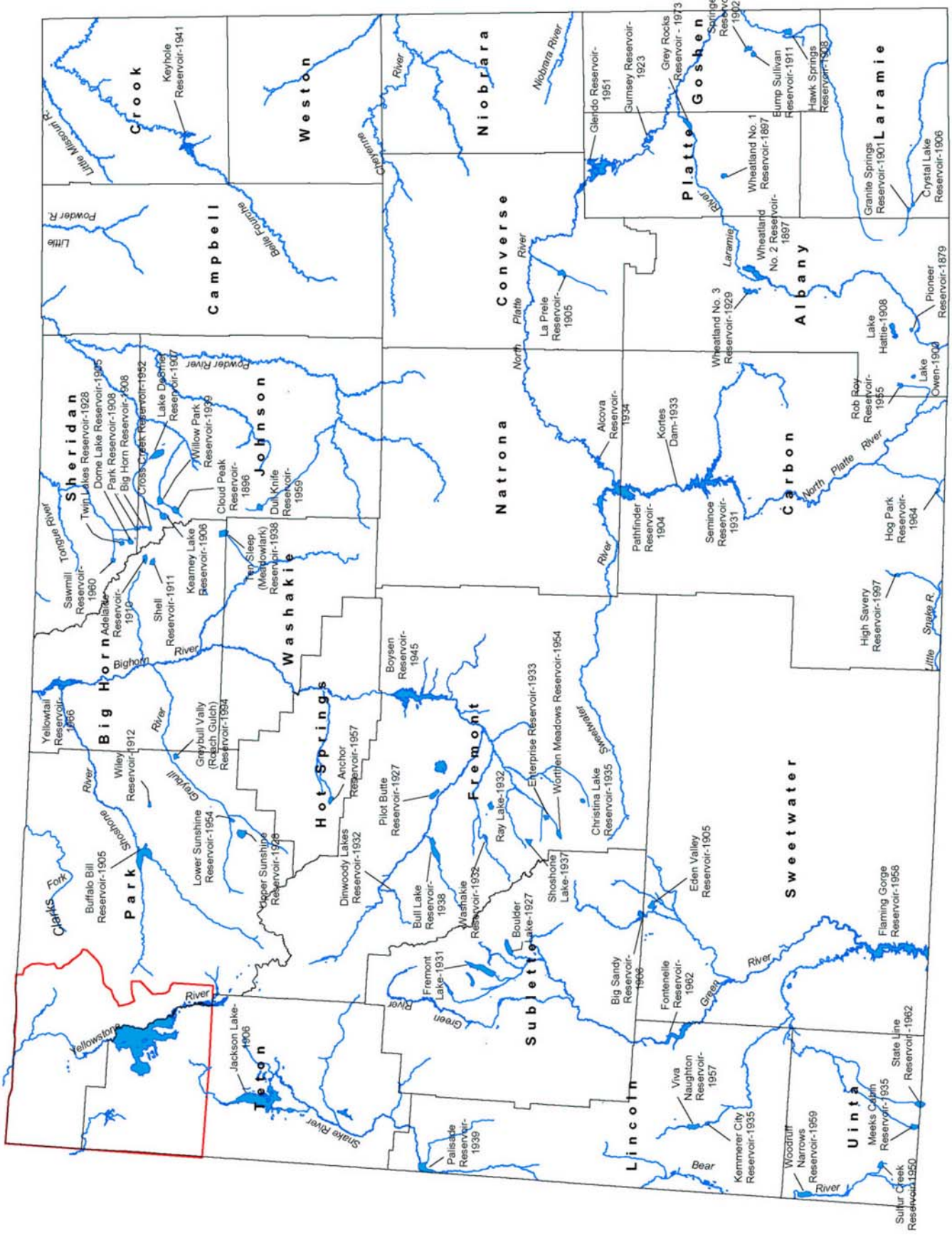
insufficient to accomplish a condemnation of the non-preferred irrigation use. Instead, the town was first required to institute condemnation proceedings under separate statutes created for that purpose, and then once it had acquired those water rights, the Board of Control could analyze the proposed change of use and issue its decision.

Also in 1922 the Wyoming Supreme Court, in *Bamforth v. Ihmsen*, determined that where ill feelings existed between irrigators on the same ditch, the district court had the power to order the construction of a concrete division box, and reiterated that the Board of Control had no authority to determine relative ditch rights. A case in 1923, *Sussex Land and Livestock Co. v. Midwest Refining Company*, resulted in a ruling by a federal court of appeals that a downstream senior appropriator had the right to expect livestock water in his stream to arrive unpolluted at his place of use, even if the oil company upstream who was responsible for an occurrence of pollution was careful in its operation and non-negligent. This case, however, resulted in no directive to the State Engineer to regulate streams on the basis of water quality, nor did the legislature enact any statutory direction to that effect.

In *Wyoming Hereford Ranch v. Hammond Packing Co.* in 1925, the court once again affirmed that a permit is required to "inaugurate" a water right, and that requirement is not inconsistent with the constitutional provision that priority of appropriation gives the better right. This was the first major case brought under the abandonment statutes and established that territorial rights were subject to abandonment the same as those acquired under State law after 1890. However, the mere fact that all lands in the appropriation were not being irrigated did not work an automatic abandonment of the idle lands—it takes a "plea of abandonment" in front of the Board of Control and a decision by that body to accomplish the official act of abandonment.

The next year in 1926, the court was required to determine the legality of various parts of the 1907 statutes enabling and authorizing Wyoming irrigation districts. In *Sullivan v. Blakesley*, it was held that the 1907 laws were not unconstitutional, and that irrigation districts formed and operating under those laws were proper public entities. In 1927 in *U.S. v. Parkins*, the federal district court for Wyoming ruled that an owner of irrigated land within a federal irrigation project on the Wind River Reservation was liable for operation and maintenance charges levied by the U.S. Bureau of Indian Affairs.

T. A. Larson reports in his *History of Wyoming* that the years of the 1920s were those in which the greatest amount of land in Wyoming history was turned from public to private ownership. Almost 10 million acres were patented under the homestead laws during that period, making private lands almost 40% of the State's total land area. Interestingly, only about one million of those acres patented were harvested cropland, with the remainder going into grazing use. Reclamation of lands under the various large projects was seriously stalled during the 1920s, as settlement had not occurred as expected, and enthusiasm among state and federal officials for widespread farm development was frustrated, though still determined as ever.



Significant Reservoirs of Wyoming, Constructed 1879-2003

Part IV—Protectionism, 1930 to 1970

The Period Between 1930 and 1940

Water-related activities in the 1930's continued in much the same vein as the 1920's only with drought added into the difficulties. While the search for settlers on the reclamation projects continued, construction and development toward completion of the large irrigation and reclamation projects moved forward to the extent possible, given depressed economic conditions nationwide. As 1930, 1931, 1933, 1934, 1935 and 1936 all were years of inadequate snowpacks in Wyoming's high country, the necessity for storage of the valuable spring runoff was widely evident across the State. In Water Division One, Seminoe, Kortes, and Alcova Reservoirs were all permitted in 1931, 1933, and 1934 respectively, and both Seminoe and Kortes were completed during the decade. Willow Park Reservoir in Water Division Two was permitted in 1939, and in Water Division Three, Enterprise Reservoir, Christina Lake Reservoir, Ten Sleep (Meadowlark) Reservoir, and Bull Lake Reservoir were all built and put to use in the 1930's. Fremont Lake Reservoir, in Water Division Four, was permitted for construction in the early 1930's; Meek's Cabin and the Kemmerer City Reservoir in 1935; and Palisades Reservoir in 1939 (see map page 52).

Seminoe Dam

Wyoming, like the rest of the country, struggled during the depression years. By the mid-1930s, federal programs to aid the states by providing work for needy citizens were tapped to help keep Wyoming's irrigation projects afloat. The Public Works Administration (PWA) accepted loan and grant applications from the Greybull Valley Irrigation District, the Washakie Needles Irrigation Project, the proposed Bear River Irrigation District, the Yoder Irrigation District, Owl Creek Irrigation District, the proposed Weston County Beaver Creek Irrigation District, the Fairview Irrigation District, Fort Bridger Irrigation District, proposed LaBarge Irrigation District, and others. Few of these applications were approved and several of the applicant districts eventually went by the wayside, but it was with PWA funds that the Upper Sunshine Reservoir and a few others were built, so some beneficence was realized by that program in the State.

Another 1930's federal program, the Work Projects Administration (WPA), provided jobs by funding a field party to survey potential reservoir sites in Water Divisions One

and Two, preparing maps and cost estimates of their findings, and drawing hydrographs covering the records of every stream gage in the State for which hydrographic data were available.

"Reclamation projects—out of favor in the 1920's—gained new support as job-giving public works" in the 1930's (Larson, *History of Wyoming*). The Shoshone Project, begun as a Carey Act project in 1904 but converted later to a Reclamation project, was well under irrigation by the 1930's with close to 60,000 acres irrigated, and another 10,000 acres under the Heart Mountain Canal portion ready for delivery of water in 1940. The large Riverton Project, unpopular with many in the State because of its reputation as both a Carey Act and political debacle, had gained a foothold as the Midvale Irrigation District and had almost 29,000 acres irrigated by 1939 (an increase of 21,500 acres since 1934), with projections of another 4,000 acres to be producing crops in 1940. The former Casper-Alcova Project, renamed the Kendrick Project in 1937 following destructive litigation over its priority date, had over 60 miles of main canal constructed, together with both Alcova and Seminoe Dams, and was seeking to begin irrigation deliveries in the early 1940's. Each of these projects employed a sizable local work force in labor and construction during years when jobs were scarce and times were difficult, and helped keep the State's population in a growth mode, at a rate greater than the national average through the decade.

Water Development

Although the Carey Act is generally considered the first water development program in Wyoming, the fact that it was a federal program for all the western states kept it from being exclusively for Wyoming water development. The Wyoming Arid Land Fund portion of Wyoming's legislation guiding use of the Carey Act was actually the first water development fund for in-state projects. In the 1930s, the State launched a program for investigating water development opportunities as a statewide effort. Prior to that time, most private reservoir construction and land reclamation was instigated and funded by the beneficiaries of the proposed storage, while the U.S. Reclamation Service did the same on the large mainstem river projects. The new Wyoming Planning Board was created and authorized to undertake feasibility investigations, one of which was to find a way to use more of the Snake River in Wyoming by trans-basin diversion to the Green River drainage. Additionally, the predecessor of today's Wyoming Water Association, the Wyoming Reclamation Association, was formed in the 1930's to provide local input to State efforts in protecting and preserving Wyoming's limited water supplies.

Restoration Orders

By the mid-1930's, the federal government began acting on its own complaints made in the 1920's that "there is no need of more reclamation projects until the present ones are put on a sound basis: one third of the projects are insolvent and one fourth of them should never have been built" (Secretary of the Interior Hubert Work, 1925, quoted by T. A. Larson). That attitude resulted in the Secretary of the Interior issuing orders to begin restoring unpatented lands under the homestead acts, the Carey Act, and some of the 1905 Act (Second McLaughlin Agreement) back to the public domain of the federal government. All lands disposed-of to private hands by patent under any of those acts were recognized and permanently segregated, but lands granted to the State that were never selected for disposal became the subject of the restorations. Although various restorations continued into the 1950's, nearly 11½ million acres of former federal domain had been patented in the State by the time the restorations began.

Water Administration

With much of the State's water supply fairly well committed to earlier water rights by the 1930's, the numbers of applications to the State Engineer for new permits dropped off considerably. Few streams in the State in those drought years contained enough unappropriated water to encourage new projects, and the few applications filed were generally for reservoirs to catch the springtime excess or for small enlargements of earlier priority original rights. For some municipalities, changes to preferred use under the 1909 statute were seen as a better way to acquire water than to make application for a present-day water right on streams that were already heavily appropriated.

Water use through the 1930's revealed to water administration officials that a comprehensive network of gage stations was necessary to monitor the State's water supplies. The State Engineer had been cooperating with the U.S. Geological Survey since 1896 in operating stream measurement stations, but increasing pressure from neighboring states, coupled with the local water commissioners' need for greater control over the water supplies in their districts, created a recognition that the network needed to be substantially expanded. Additional PWA funds were used to establish 13 new continuous recorder stations in 1934, and nine more in 1939, many of which are still in operation today.

Additional sophistication in administering water use was accomplished in 1935 by the instigation of a snow survey program used for forecasting streamflow. Although snow surveys had been conducted in the Jackson Hole country since 1919, the State Engineer cooperated with the U.S. Bureau of Agricultural Engineering to establish another 40 snow survey courses all across the State in 1935. That program also continues to be a critical component of water use and administration today as a cooperative venture with the USDA Natural Resource Conservation Service.

The need for professional water commissioner work had become increasingly obvious by the mid-1930's. Difficulties with neighboring states and water shortages in drainages with large numbers of territorial water rights and ditches were recognized as areas where water measurement and engineering hydrography was becoming more necessary. State

officers recognized the shortcomings of a system where funding for water commissioner services was required by law to be supplied by the counties wherein the work was carried out, but where supplemental funding had to be provided by the State when greater service was necessary. In the late 1930's, the State Engineer made a plea to the legislature for funding the hiring of a handful of skilled water commissioners as full-time State hydrographers. It was desired that such qualified hydrographer-commissioners would be able to keep continual vigilance over the water used out of the streams in their assigned areas by understanding and operating stream gaging stations, making physical measurements when necessary and compiling regular reports of the same. This was an offshoot of the failed desire that the Water Division Superintendents had expressed for many years to make all county water commissioners employees of the State rather than of the counties.

The State Engineer's biennial report for the years 1939-40 notes that one hydrographer of that description had been hired for the North Platte River system, and that requests from the appropriators on the Bighorn River in 1939 had resulted in the temporary employment of such a hydrographer on that river system, with the promise that a more permanent arrangement would be pursued as time and finances permitted. Still, the desire for widespread expertise on the ground to carry out the lofty Cheyenne-based vision of complete and precise water administration on the State's streams and rivers was not coming together as hoped.

INTERSTATE COURT DECREES, 1930's

Wyoming v. Colorado

Ever since the Supreme Court had handed down its decision in 1922 over the allocation of the flows of the Big Laramie River between the states of Colorado and Wyoming, it had been maintained by Wyoming officials that Colorado appropriators were not abiding by the court decree. Hydrographic information showed that Colorado was diverting more water on an annual basis than the 39,750 acre feet allocated to them, and attempts by Wyoming to have that practice stopped had fallen short. In the mid-1930's, Wyoming once again filed suit, this time to have the 1922 decree enforced, and in 1939 the U.S. Supreme Court issued an order restraining Colorado from diverting more water than was allotted them in the 1922 decree.

Nebraska v. Wyoming

Following failed attempts at negotiation of a compact on the North Platte River, the State of Nebraska in 1934 filed suit against Wyoming in the U.S. Supreme Court, alleging that early priority-date water rights out of the river in Nebraska were being injured because of diversions to later priority water rights upstream in the State of Wyoming. In a 1935 decision on a motion by Wyoming to dismiss the suit, the court noted the significant storage in Bureau of Reclamation reservoirs in Wyoming, and said Wyoming "and her officers are under the duty to administer these waters fairly and impartially, and to control appropriators whose rights arise under the law of Wyoming from encroaching upon the rights of Nebraska appropriators . . . This duty Wyoming officials have neglected and disregarded." Wyoming disagreed with the court's conclusions, but the court refused to dismiss the suit, and it continued with a special master being appointed to hear the arguments of the parties, and with Colorado being made an additional party. Interestingly, Crow Creek and other small southeastern Wyoming tributaries of the South Platte River were exempted from the suit, which was to apportion the flows of North Platte River only. It would be another ten years of litigation before the court would issue its final decree in the case.

Teton and South Leigh Creeks

On the western border of Wyoming in the mid-1930's, a group of Idaho appropriators filed suit in U.S. District Court over Wyoming's use of the interstate waters of Teton and South Leigh Creeks, and in January of 1938 a stipulation was entered in that matter, averting another protracted interstate litigation. A second stipulation was entered in 1940 and a court decree settling the dispute was issued in 1941 (see page 63).

INTERSTATE COMPACTS

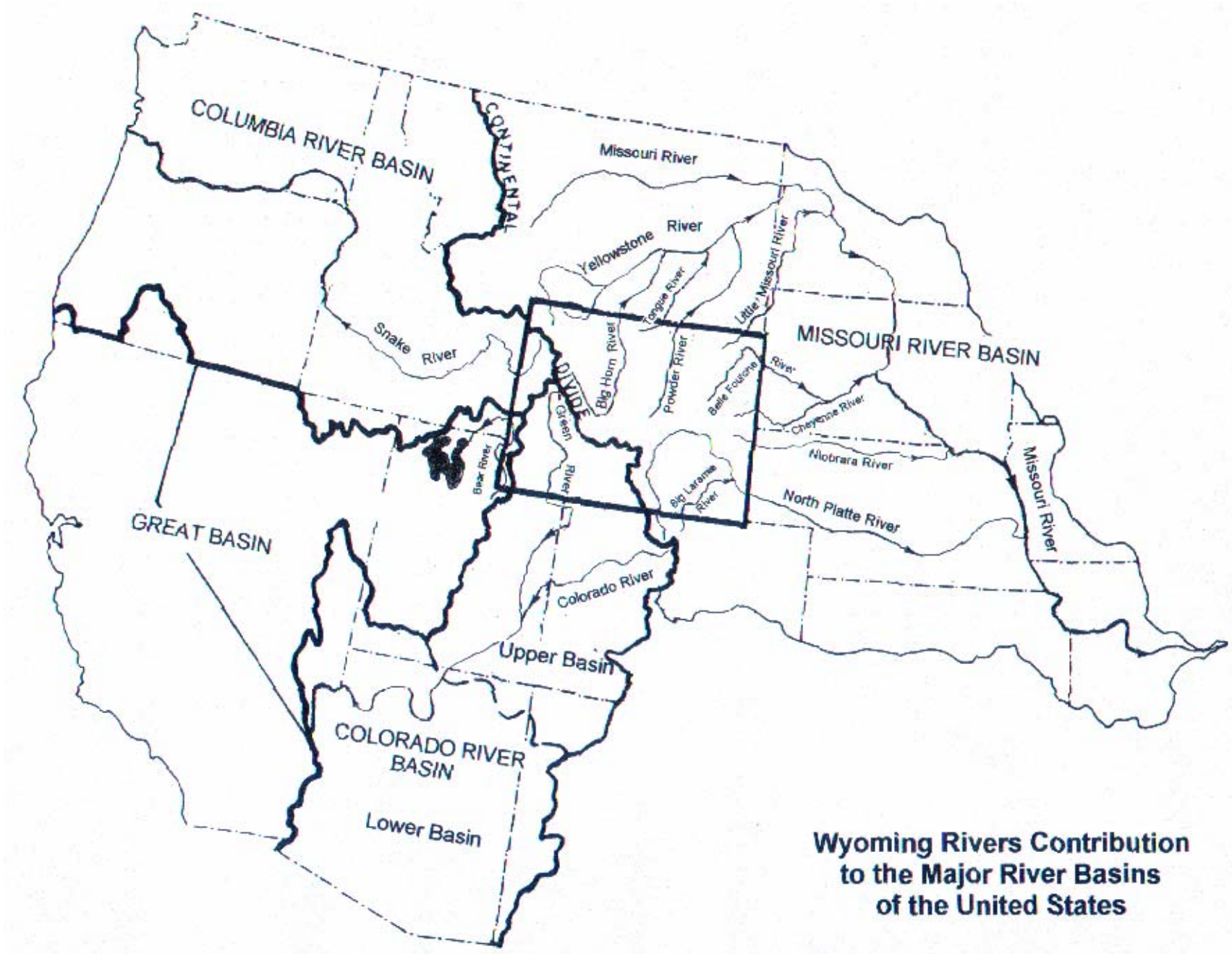
The physical location of the State of Wyoming sitting at high elevation on the continental divide makes it such that snow falling on and melting off her mountains has no direction to run but downhill to lower elevation states. Of the twelve major rivers that carry water out of Wyoming to downstream states, only four, the Clark's Fork, Bear, Laramie, and North Platte, actually arise in another state, enter Wyoming where they pick up substantial flow, and then continue downhill to neighboring lower elevation states. On average, about 16 million acre feet (maf) of water per year are generated by snowpacks in Wyoming and another 2 maf comes into the State from higher elevations in bordering states.

The 1930's were a time of recognition that downstream states with faster growing populations would constantly be looking upstream into Wyoming for more and more of the water being produced in her mountain snowpacks. The hardy souls that had settled in Wyoming since territorial times and fed off of her harsh climate and terrain in an attitude of isolationism were finding neighboring states to not be as content to live within their own borders as Wyoming's citizens were. The courts had shown a predilection for recognizing priority of development regardless of state lines (see the 1922 *Wyoming v. Colorado* decision) so rapid downstream development was indeed a bona fide threat. Concerns all across the State were expressed for finding a way to lay claim to unused

waters occurring within Wyoming's borders to protect them for the future development, growth, and needs of her citizens against loss downstream. Most western states were familiar with, and respectful of, the prior appropriation doctrine within their neighboring states, and recognized that application of water to a beneficial use generally protected it against attacks or raids from outside interests. However, with limited instantaneous ability to place voluminous amounts of water to some beneficial use, Wyoming recognized her vulnerability on interstate streams and worked to reserve as much of her water as possible for future use.

In 1936 State Engineer John Quinn reported that he had appointed advisors and initiated discussion with downstream states to seek negotiation of compacts on the Yellowstone River tributaries in Wyoming, and the Snake River and its tributaries. He had also held a conference with Colorado over use of the Little Snake River, and was guarding relations with Utah and Idaho over use of the Bear River. As large-scale dams were proposed and seeking development in Big Horn Canyon and on the Tongue River in Montana, the State of Wyoming felt it critical to have a Yellowstone River Compact in place prior to that construction. Additionally, the State had recognized that the Colorado River Compact, ratified among the upper basin and lower basin states back in 1922, deserved additional attention in that it had not previously allocated the waters of the Colorado River among the states within the upper basin as against each other. The desire for an Upper Colorado River Compact led to continuing discussions among the upper basin states involved during the late 1930's.

Under Section 10 of Article I of the United States Constitution, no state can enter into any compact with another state without the consent of the U.S. Congress, so federal participation in compact negotiations was sought as Wyoming and neighboring states began the process of allocating interstate waters.


COLUMBIA RIVER BASIN
CONTINENTAL DIVIDE
Missouri River
Yellowstone River
Tongue River
Little Missouri River
MISSOURI RIVER BASIN
Snake River
Big Horn River
Powder River
Belle Fourche River
Cheyenne River
Niobrara River
Missouri River
Bear River
Green River
Big Laramie River
North Platte River
GREAT BASIN
Colorado River
Upper Basin
COLORADO RIVER BASIN
Lower Basin
Wyoming Rivers Contribution
to the Major River Basins
of the United States

The 1935 Laws

Again, water legislation through the decade of the 1930s consisted mainly of revising or refining language in current statutes and finding ways to fund expanded activities of the State Engineer's Office. However, one enactment was of significance in codifying the historic practice of diversion of surplus water from Wyoming's streams. The language of the 1890 statute ordering the determination of priorities was expanded in 1935 by the legislature prescribing the method for dividing the waters in any stream which were "in excess of the total amount of all appropriations from said stream." According to the statute, those excess flows "shall be divided among the appropriators therefrom in proportion to the acreage covered by their respective permits, and . . . shall be beneficially used" (see also Appendix A.). With compact negotiations in several drainage basins on the horizon, and the knowledge that compact allocations to affected states would be based partly on showings of existing rights and historic beneficial use, the codification of the historic practice of diverting necessary surplus water would be used to accomplish protection of those flows for Wyoming's future. Frank Trelease observed that legislation regarding surplus flows was also "apparently to protect existing practices of heavy flooding of hay lands," (*Water Law Casebook, 2nd Ed.*).

Litigation 1930-1940

Activity in the courts during the 1930's reflected the general and almost sudden recognition that Wyoming's water supplies were not inexhaustible, and in fact that they were already developed to the point that appropriators were often in keen competition for what water was available. As the 1930's were a decade of almost entirely drought years, short water supplies led appropriators to try whatever means were at their disposal to secure as much water for their interests as possible. Abandonment actions were almost constantly being filed during the period as appropriators sought to gain a water supply advantage on their neighboring users, and many of the provisions and understandings of today's abandonment laws were developed as a result.

In *Ramsay v. Gottche* (1937), the court set two keystones of the law on water rights abandonment. In upholding the property rights nature of Wyoming water rights, the court pronounced that forfeitures are not favored in this State, and that an appropriator will not be found to have abandoned his water rights except upon clear and satisfactory evidence of an intentional or voluntary act of non-use. In addition, the court in that case held that non-use of water caused by factors beyond the appropriator's control, such as a flood washing out diversion facilities, would not be judged as abandonment. Another 1937 case, *Hagie v. Lincoln Land Company*, reinforced the concept that abandonment of ditches or points of diversion for the statutory non-use period of five years did not work an abandonment of the water right if the water was still somehow applied to its beneficial use during the period. That finding included an observation that sub- or seepage water that created more abundant crops was considered a beneficial use of the water right under attack, and an admonishment that to avoid abandonment, "all the available water supply should be used as far as that is possible."

In *Horse Creek Conservation District v. Lincoln Land Company* (1939), the court decided that the five-year period of non-use had to be five years immediately preceding the filing of the abandonment action, and that if the water right had lain dormant during an earlier time, but been reactivated prior to the filing of the contest, forfeiture would not occur. Additionally in that case, it held that only persons affected by an appropriator's failure to use his water right could attack the unused right, and that a formal declaration by "some one clothed by law" was required before the right would be lost. Also in 1939, in *Scherck v. Nichols*, the court made clear that the State will not allow speculation with its water, and prohibited permit applications being made for idle purposes just to keep others from getting that water, or for future speculative profit. In that case, the court reiterated its holding in *Ramsay v. Gottsche* that abandonment can't be found when failure to use appropriated water is caused by factors beyond the appropriator's control. In *Van Tassel Real Estate and Livestock Company v. City of Cheyenne* (1936), the court held that diverting water at a point other than what is of record is not a reason for a loss of water rights by forfeiture, as long as the water thus diverted was from the same source of supply and was still applied to the proper use and place of use. Additionally, such a change of point of diversion without loss of priority is not forbidden (and, in fact, is a property right), as long as no expansion of use or injury to other appropriators occurs.

In other cases, the Supreme Court in 1933 held that facilities described by the words "canal or ditch" also meant reservoirs in federal statutes authorizing or vesting a right of way for such facilities on public lands (*Johnson Irrigating Company v. Ivory*). And in *State v. Hiber* (1935), the court clarified the definition of the term "natural stream" found in Section 1 of Article 8 of the Wyoming Constitution. In that case, the court held that spring snowmelt in a particular grassy swale was not a "natural stream" in the constitutional context, and thus a permit from the State Engineer was not required before a landowner constructed a small dam in the swale. Considering the snowmelt in that instance to be "diffuse surface water," the court combined the common law principle that such water is the common enemy of mankind and the owner may dispose of it as he wishes, with the civil law principle that, in doing so, he can't injuriously discharge it on the owner of neighboring land.

In concert with the legislature's 1935 codification of the right of appropriators to excess water in the streams, the court in *Quinn v. John Whitaker Ranch Company* (1939), clarified that the statute referencing the allotment of irrigation water at one cfs for each 70 acres was not a legislative declaration that use of water in excess of that amount would necessarily be interpreted as constituting waste. This holding once again implied that under the free river (unregulated) conditions that occur in Wyoming streams nearly every year, irrigators are able to divert what water they can place to beneficial use without waste, using the one cfs per 70 acre allotment standard when necessary for "controlling allocation of a scarce resource." And in 1939, in the case of *Hughes v. Lincoln Land Company*, the U.S. District Court held that "under Wyoming law, the right to the use of water based upon a prior appropriation for beneficial purposes is a 'property right,' so that no statute which the state might subsequently pass can abridge that property right or reduce its value without infringing upon the constitutional right of the owner."

The Period from 1940 to 1950

In an arid state with naturally limited water supplies that are still somehow able to meet present water use needs, it is easy today to overlook or neglect the contributions made by Wyoming water officials during the 1930 to 1960 time period. The often unsung efforts of those astute individuals in interstate concerns are plainly responsible for the rights to the use of interstate waters that the State possesses today. Just as the name of Elwood Mead is revered for his outstanding work in the early days of Wyoming water, the names of L. C. Bishop and, to a lesser extent, Frank C. Emerson and Earl Lloyd, are giants in the critical field of interstate apportionment of Wyoming's water supplies. It was through their selfless visions of the long-term good of the State that Wyoming residents today are able to find that water for their desired uses is generally available when they need it.

Interstate stream matters continued to be the focus of greatest concern among state water officials into the 1940's and 50's. With litigation on-going on the North Platte and Laramie rivers, Wyoming continued to work at negotiation of compacts with downstream states on the other outflowing rivers. The State Engineer also continued to grant permits for the construction of large mainstem reservoirs to capture and hold spring runoff from snowmelt inside the State, in the permitting of Keyhole Reservoir on the Belle Fourche River (1941) and Boysen Reservoir on the Bighorn (1945).

The 1941 Laws

Legislation authorizing the formation of Soil and Water Conservation Districts was enacted in 1941. In Wyoming's arid environment, significant wind and precipitation events have immediate detrimental effects on dry and sparsely covered soils, moving them readily and creating erosion in a short time. The formation of local districts was seen as way to bring landholders together to address erosion and runoff concerns, and to promote good stewardship of soil and water. Cooperating with the USDA Soil Conservation Service for engineering and funding under various federal programs such as the Small Watersheds Project Act, the local Soil and Water Conservation Districts became a solid force in nearly every community in the State in promoting conservation and good agricultural practices. Those districts are still active and productive at the local level today.

The 1941 legislature also amended the language of the 1909 statute defining the term "water right." The 1941 amendment eliminated the language that "water rights cannot be detached from the lands place or purpose for which they are acquired without loss of priority." Henceforth, changes in use of water rights statutorily carried the priority date of the original right over to the new use.

In response to all the interstate concerns, the 1941 legislature provided for the appointment of an Interstate Streams Commissioner for Wyoming. That commissioner was to be appointed by the governor, was given the duty of representing the State in the negotiation of all compacts, and had full authority to undertake any investigations needed to establish a position for Wyoming in negotiating any compact with other states. The

State's first Interstate Streams Commissioner was the State Engineer, L. C. Bishop, and he shortly found himself involved in fulfilling that duty.

The Teton and South Leigh Creeks (Roxanna) Decree

Although it was not a compact, the 1941 Teton and South Leigh Creeks Stipulations and Decree terminated pending litigation filed in the mid-1930's, and reflected the results of cooperative discussion between the states of Wyoming and Idaho. That decree allowed the upstream Wyoming users "as much water from said stream[s] as they can apply to a beneficial use" each year until the total streamflow receded to a stipulated flow level (170 cfs), and then they would be regulated to "one cubic foot per second for each fifty (50) acres of land." When the streamflow kept dropping to an even lower stipulated flow volume (90 cfs), then the two states would split the remaining flow on a "fifty-fifty" basis. This preservation of Wyoming irrigation allotments at rates recognizing free river surplus, and at rates greater then the statutory one cfs per 70 acres was negotiated by Interstate Streams Commissioner and State Engineer L. C. Bishop. It reflected his philosophy of using Wyoming's surplus flows as described in his 1934 biennial report, (see page 41of this History), applied the 1935 "allocation of excess water" law, and presaged the enactment of the surplus water law four years later.

The Belle Fourche River Compact

In 1943, the states of Wyoming and South Dakota and the federal government ratified a compact on the Belle Fourche River in northeastern Wyoming. That compact recognized and left prior existing rights unimpaired in each state, and then allocated the unappropriated flow 90% to South Dakota and 10% to Wyoming, with Wyoming also having relatively unrestricted use of the waters of the basin for domestic and small stock uses. Additional provisions defined certain terminology and provided for future storage and diversion in the basin and their administration. The President of the United States signed the bill of Congressional consent to the compact in 1944.

The Rio Grande, Tijuana, and Colorado River Treaty

Also in 1944, the United States of America signed an international treaty with the United Mexican States (Mexico) over the use of the Colorado River, among others. As described earlier, the upper basin states of the Colorado River in the United States had negotiated a compact with the lower basin states in 1922. Wyoming's role in the 1944 international treaty was solely as an upper basin party to the 1922 compact who had to participate in delivering treaty amounts of water out of the upper basin for delivery to Mexico. One of the reasons for the timing of this treaty was a desire on the part of the United States to maintain an amicable relationship with Mexico to reduce political differences in case the United States needed a presence on Mexican soil. With the attack on Pearl Harbor still fresh in American minds, Japan was feared to attempt an invasion of Mexico (who was ill-prepared to withstand it) on their way to the United States. It was reasoned that U.S. troops may therefore have been needed in Mexico for protection against such an attack, and this treaty could facilitate permission for that presence.

The 1945 Laws

The 1945 Wyoming legislature enacted two pieces of legislation reflecting the State's continuing preoccupation and urgency with clarifying its rights and claims to interstate waters. One of these was the statute defining and providing for the use of "foreign waters." The legislature defined foreign waters as those waters in a natural channel flowing into Wyoming from another state, and additional legislation prescribed lengthy conditions on their application and use within Wyoming.

The other 1945 enactment was of great notoriety and far-reaching importance. The "surplus water law" established a quantitative limit on the historic practice of diverting surplus water which had been codified back in 1935. As discussed elsewhere, successful irrigation practice since territorial times was often dependent on the ability of appropriators to divert and apply excess water from the state's streams when it was available, generally during the spring runoff period. That practice, validated in Elwood Mead's description of his 1889 experimental work at Wheatland, and discussed in Appendix A of this History, has been acceptably employed throughout the State whenever "free river" (unregulated) conditions exist. The 1935 statute, while codifying all prior appropriators' historic right to a necessary share of surplus flows when they existed, had not made a specific adjudication of those flows.

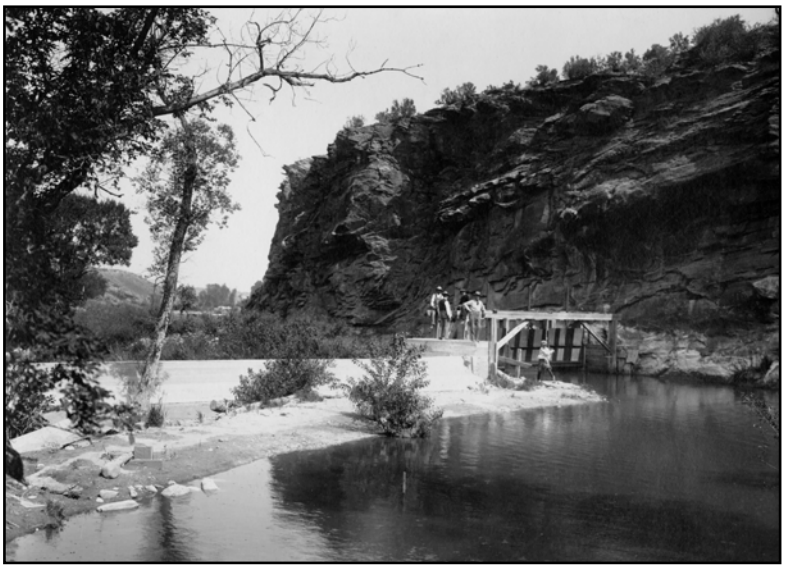
The 1945 law was much more specific. After allocating and defining surplus water as water in a stream in excess of that required to furnish existing appropriators with their certificated volume, the statute placed a volumetric limit to surplus flows during a call for regulation of one additional cfs per 70 acres on each original direct flow irrigation right with a priority date earlier than March 1, 1945. The law provided that anyone previously applying necessary surplus water to beneficial irrigation use was entitled to continue doing so, and that such use was "hereby declared to be an appropriation of water, entitled to a priority senior to any water right acquired after March 1, 1945." Adjudication in that manner eliminated the need for the individual filing of any sort of additional permit document, and doubled the amount of irrigation water previously allotted in all of Wyoming with the stroke of the governor's pen when he signed the bill into law. Direct flow rights with priority dates later than March 1, 1945 were not entitled to any water until all pre-1945 irrigation rights were satisfied with up to two cfs/70 acres if desired.

The 1947 Laws

In another landmark piece of legislation, the 1947 legislature enacted the State's first groundwater laws. Although the legislation was not extensive, it did for the first time require the owners of any groundwater wells drilled in the state prior to April 1, 1947 to register their wells by a "statement of claim" with the office of the State Engineer. It also required that any new well proposed to be drilled after that date (except those for stock or domestic uses) must also be registered, and thus began the application of the prior appropriation system to groundwater use in Wyoming. Well filings made under a statement of claim could receive their priority based on the claimed date of completion of the well, going back as far in time as could be justified, while registrations of wells after

April 1, 1947 would receive a priority as of the date their new filing was made with the State Engineer. A process for adjudication of wells was also included in the legislation.

Nebraska v. Wyoming



North Platte Irrigating Company Ditch

The lawsuit started by Nebraska in the drought years of the 1930's (see page 57) over waters of the North Platte River was finally completed and a decree of the United States Supreme Court entered in 1945, 10 years after the initial filing of the lawsuit. The 1945 decree limited Wyoming appropriators in the North Platte Basin to the irrigation of 168,000 acres from the mainstem river above Guernsey Reservoir and from the mainstem and its tributaries above Pathfinder reservoir. It also prohibited Wyoming from storing water in Pathfinder, Guernsey, Seminoe, and Alcova Reservoirs except as junior to Nebraska canals, and limited irrigation storage in smaller reservoirs above Pathfinder (excluding Seminoe) to 18,000 acre feet per year. Remaining natural flow of the North Platte River between Guernsey and Tri-State Dam near the Wyoming-Nebraska border was then apportioned 25% to Wyoming and 75% to Nebraska. Among other things in that extensive decree, the court observed that as far as the tributaries above Pathfinder were concerned, the "practical difficulties of applying restrictions which would reduce the amount of water used by the hundreds of small irrigators would seem to outweigh any slight benefit which senior appropriators might obtain." The decree also reiterated that riparian law is not in effect in Wyoming or Colorado.

Upper Colorado River Compact

In the years following the 1922 Colorado River Compact which divided the waters of the Colorado River between the upper basin states and the lower basin states, a need for a "compact within a compact" was recognized. In 1948 the upper basin states of Wyoming, Colorado, Utah, New Mexico, and a small part of Arizona entered a compact apportioning the upper basin allocation from the 1922 Compact among themselves. That apportionment, based partly on "all water necessary for the supply of any rights which now exist" in each state, resulted in Colorado being allowed 51.75% of the annual consumptive use occurring from the upper river, Utah 23%, Wyoming 14%, New Mexico 11.25%, and Arizona 50,000 acre feet of consumptive use per year. Already the master stroke of the Wyoming legislature enacting the 1945 surplus water law reaped benefits, in

that Wyoming's showing of "rights which now exist" included the additional one cfs per 70 acres adjudicated by that legislation.

Cheyenne River Compact

In February of 1949, the Wyoming legislature ratified a compact for allocation of the waters of the Cheyenne River between the states of Wyoming and South Dakota. As with the language of other contemporary compacts, the two states agreed that "[v]ested rights" and "beneficial uses" existing within each state "as of the date of this compact, are hereby recognized," and the remaining unappropriated flows of the Cheyenne River and all its tributaries were allocated 20% to Wyoming and 80% to South Dakota. Other provisions of the compact dealt with permitting and appropriating water in each other's state, maintaining stock water use, conservation of fish and wildlife values in the event of new reservoir construction, and administering the compact. Unfortunately, according to the biennial report of the State Engineer, the U. S. Congress considered the compact deficient because the word "allotted" was used when it should have been "allocated" and rejected ratification. Although the states tried again in 1951, Angostura Reservoir had been built on the Cheyenne River in South Dakota in the interim period, changing the physical hydrologic situation in the basin, and thus, an acceptable compact on the Cheyenne River has, to this day, never been ratified by both states.

Litigation 1930-1940

Owing perhaps to the large number of questions resolved by water litigation during the 1930's, the 1940's saw considerably fewer water cases in the Wyoming Supreme Court. However, the cases that did advance to the high court all brought issues forward that also needed resolution for the better overall clarification and use of the evolving body of Wyoming water law.

In *Binning v. Miller* (1940), a lower landowner used and attempted to appropriate waste water coming off an upper irrigator's property. When the upper irrigator changed his operation in a way that interrupted the flow of waste water, the lower user claimed injury. The court rejected the claim on the basis that seepage and waste water belong to the owner of the land on which they arise; thus a lower user of those waters takes a risk that they may be discontinued at any time, and obtains no protectable right to them. In *Campbell v. Wyoming Development Company*, also in 1940, the court specified that just using water, no matter how long continued, did not result in the vesting of a water right by prescription. That case also resulted in a ruling that appropriators may presume that state water administrators do their duty in distributing waters of the state.

In *Linck v. Brown* (1940), the court dealt with easements for construction, maintenance, and exclusive use of irrigation ditches, and found that such easements are an "interest in realty." In *State v. Laramie Rivers Company* (1943), it was held that a ditch company, as a common carrier, is only an agent for the individuals served by the ditch, and those individuals are the ones responsible for acquiring their own water rights and can't just expect the ditch company to do that for them. The 1903 statute requiring the filing of secondary permits to describe lands to be irrigated by the water stored under a primary reservoir permit was made permissive by the court's decision in *Anderson v. Wyoming*

Development Company (1945). In that case, the court held that lands to be irrigated from a reservoir did not need to be described at the time of permitting, and that water stored in a reservoir, when excess to the needs of the original contractors, could be contracted to others outside the concept of the original project.

In addition to decreeing what it called "equitable apportionment" on the North Platte River, the U. S. Supreme Court in *Nebraska v. Wyoming* (1945, discussed above), also made law on the subject of return flows from irrigation projects. The holding was that the owners of an irrigation project may retain control over the waters they bring into the project until those waters are intentionally released back to the stream source, at which time they once again become waters of the state, available for diversion by other appropriators. This concept was consistent with the historic Wyoming practice that once water has been put to the beneficial use specified in its permit and then released beyond the control of the original appropriator, the terms of the permit are said to have been satisfied and the holder of the permit no longer has any legitimate claim to the waters released.

In *Jacoby v. Town of Gillette* (1946), the court defined that, in order to be classified as an "Act of God," a flood had to be such an "extraordinary and unprecedented manifestation of nature" that it could not have been "reasonably anticipated," in assessing whether damage from a ditch overflow could be excused from liability. In *Laramie Rivers Company v. LeVasseur* (1949), the court determined that a certificate of appropriation should ordinarily be issued only for water that has been applied to a beneficial use even though a larger amount may have been permitted, and upheld the statutory requirement that obtaining a permit to appropriate is mandatory in Wyoming.

The Period from 1950 to 1960

As the decade of the 1950's arrived, reservoir construction and interstate allocation by compact continued with urgency. It was now obvious that even though reclamation reservoirs were constructed in Wyoming, the water stored in those reservoirs may not all be usable by Wyoming. Nonetheless, the obvious fact was recognized that the higher upstream that water can be stored in any drainage, the more flexibility is created for all downstream uses, and the State saw construction of additional storage as necessary insurance against future drought cycles such as those in the teens and 1930's. Additionally, hydroelectric power generated by reclamation dams was supplying much of the ever-increasing demand for electricity in the State, and the need for more was projected. The State Engineer approved the permit for Glendo Reservoir in 1951, Cross Creek Reservoir in 1952, Worthen Meadows and Lower Sunshine Reservoirs in 1954, Rob Roy Reservoir in 1955, Anchor, Healy, and Viva Naughton Reservoirs in 1957, Flaming Gorge in 1958, and Woodruff Narrows and Gray Reef Dams in 1959.

Snake River Compact

After over a year of negotiation, the states of Wyoming and Idaho had signed and executed a compact in October of 1949 to allocate the waters of the Snake River. That compact was ratified by the Wyoming legislature in February of 1950. It provided for the

exclusion from allocation of all "established Wyoming rights" with priority dates earlier than July 1, 1949, and allocated the unappropriated flow of the Snake River as measured at the state line 4% to Wyoming and 96% to Idaho for "storage or direct diversion." It also allowed Wyoming unlimited future use for domestic and stock watering uses, as long as stock water reservoirs didn't exceed 20 acre feet in capacity. In the event a new reservoir would be constructed in either state, stock watering and conservation of fish and wildlife values in the other state, where applicable, were to be protected by a reservoir release of not more than five cfs.

Yellowstone River Compact

Wyoming's six tributaries to the Yellowstone River leave the State all along her northern border, and discussions about how to allocate those tributaries was started with the states of Montana and North Dakota in the late 1940's. By December of 1950 a compact was signed by the states and ready for presentation to their respective legislatures and the U.S. Congress, who all ratified it in 1951. The compact provided that all existing water rights with priority dates earlier than January 1, 1950 in all three states were considered previously appropriated and left unimpaired by the compact; and that existing and future domestic and stock water uses were excluded from administration by the compact (except stock reservoirs storing more than 20 acre feet). Unappropriated flows were then divided specifically by sub-basin contributing to the Yellowstone River. The Clark's Fork was allocated 60% to Wyoming and 40% to Montana; the Bighorn River (exclusive of the Little Bighorn) was allocated 80% to Wyoming and 20% to Montana; the Tongue River was allocated 40% to Wyoming and 60% to Montana; and the Powder River was allocated 42% to Wyoming and 58% to Montana. The Little Bighorn River and the rivers leaving Yellowstone National Park were exempted from the provisions of the compact, and a specific provision prohibited any adverse effect of the compact on any Indian rights to the waters of the Yellowstone River basin. Another specific provision prohibited out-of-basin diversions by any state without express consent of the other signatory states (as contrasted to the Colorado River Compact), and yet another specified water measurement stations to be used in administering the allocations.

Water Development

Although the Wyoming Planning Board created in the 1930's had continued to investigate and explore potentials statewide for maximizing the use and preservation of Wyoming water, little State money had been made available to aid in actual construction of facilities. In 1951, the legislature created the State Natural Resource Board in hopes of stimulating local development of identified in-state projects, and gave it the capability, through the State Farm Loan Board, of funding projects that it deemed beneficial to the state. One of its first activities was to review and approve the application of the Bureau of Reclamation for construction of Glendo Reservoir, and its funding was also used to complete Sulphur Creek Reservoir on the Bear River, Shell Reservoir on Shell Creek, and to enlarge Shoshone Reservoir on the North Fork of the Popo Agie River, all in 1957-58. Under Bureau of Reclamation operations, Big Sandy Dam was just recently completed, Palisades and Keyhole reservoirs were well under construction, pumping plants for new irrigation from the Bighorn River were either imminent or already

operating, and electricity generating powerplants were being put in operation on existing dams around the State.

Water Administration

In 1951, requests that the Water Division Superintendents had been lodging for many years to have additional state hydrographers appointed to critical water administration areas of the State were finally honored. Although there had been one single state hydrographer employed on a full time basis since the mid-1930's on the North Platte River, the remainder of the State had continued to operate its administration system with only part-time local water commissioners. Finally, in 1952, an additional hydrographer and three assistant hydrographers were appointed to full time work; the new hydrographer being assigned to the Big Horn River system, and the assistants all to the North Platte. Compensation for all water administrators continued to be dismal, with division superintendents earning $125 per month, and water commissioners receiving $5 per day for the days when they were called to work. Dissatisfaction with those figures was constantly reported by state engineers and the administrators themselves, with superintendents occasionally uncomplimentary about the quality of work water commissioners sometimes provided as a result of an uncaring compensation system. By 1958, one additional hydrographer had been appointed, this one to the Tongue and Powder Rivers; superintendent salaries had been raised to $225 per month, and water commissioner salaries raised to $12 per day employed. Water commissioners were still, as in territorial days, compensated by the counties, an arrangement that continued to cause jurisdictional dissatisfaction among their supervisors on the Board of Control.

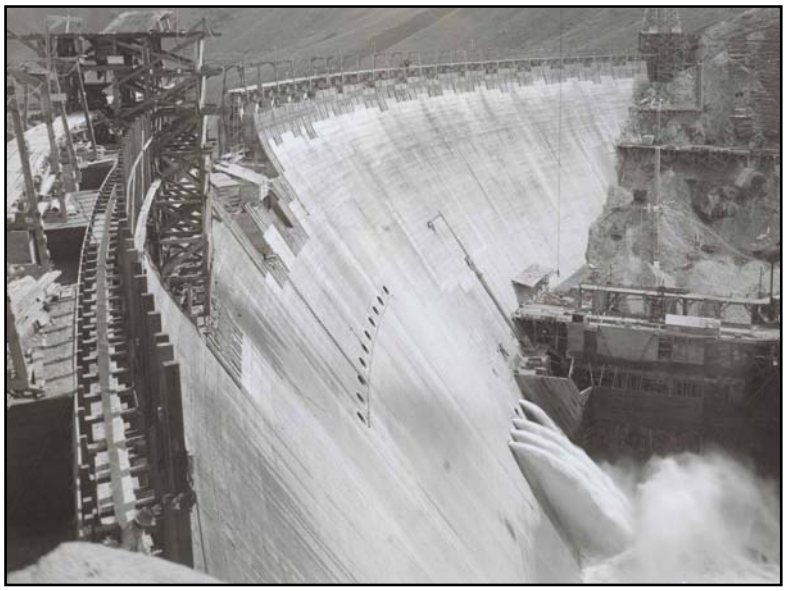
The mid-1950's were drought years on the same order as the 1930's with reported crop losses in some areas of the State, and with calls for regulation from free river diversion to "state allowance" fairly common. In a brief respite from continued drought, the snow-pack of 1956 actually delivered the runoff peak of historic record at several gauging stations, but by 1960 record drought conditions were again noted.

The 1951 Laws

In continuing to seek ways to lay claim to as much Wyoming water as possible, the 1951 legislature declared that the "State of Wyoming claims its sovereign right to the . . . moisture contained in the clouds and atmosphere within its sovereign State boundaries" in enacting legislation regarding weather modification. A State Weather Modification Board was created by that legislation, whose duty was to procure, compile, and evaluate information relative to weather modification experiments and activities in the State, and to receive and accept funds for administration of the act. The statutes required that anyone intending to engage in weather modification activities in the State must first secure a permit to do so from the State Engineer.

The 1951 legislature also made provisions for the salvaging of water rights from lands which were (or were going to be) inundated by the construction of "Glendo, Boysen, and Yellowtail Reservoirs . . . or any other reservoir . . . that may be constructed in the future." Such water rights were allowed to be moved from their original locations by

petition to the Board of Control for amended certificate and change in point of diversion, as long as the lands to which they were moved would still be irrigated from the same source of supply and not increase the amount of water historically used. The owner(s) of such inundated lands had five (5) years after completion of construction of the dam to accomplish the move or sale of those water rights. Failure to file the petition within that time would result in automatic abandonment and loss of any water rights lying below the high water line of the new reservoir. As the language of the statute automatically effectuated abandonment, no hearing was necessary, but the Board of Control was in all cases required to enter an order in its permanent records confirming that the action had been recorded.



Boysen Dam

The 1955 Laws

Although the Board of Control had for many years been routinely compiling and publishing a tabulation of adjudicated rights for each water division as time permitted, the 1955 legislature finally provided a budget and required the State Engineer to permanently employ competent assistants for the specific purpose of keeping the tabulations up to date. That legislation specified the number of copies of each tab book to be printed, and required their distribution to the State Library (five copies) and to the field water administrators, with several hundred copies to be held in the office of the Board of Control for public sale at a price of $2.00 each. The first employees hired under this provision were given the job title of Special Assistant on Tabulations, a position which later became known as Adjudications Officer in the mid-1960's. Another 1955 law authorized funding for, and declared it to be the policy of the state to cooperate with the U.S. Geological Survey in topographic mapping of the State of Wyoming. Still another statute expanded on the authority of the Wyoming Farm Loan Board to loan money for small water development projects in the State, requiring first mortgage or lien on dams, ditches, reservoirs, etc. constructed with the state loans.

In response to the passage in Congress of the Flood Control Act of 1944, the U.S. Army Corps of Engineers had been conducting flood control assessments across Wyoming since the late 1940s, reporting in 1952 that the towns of Buffalo, Wilson, Monarch, Dayton, Sheridan and Greybull were in need of flood control and protection.

Columbia Basin Compact

With Wyoming's Snake River being a substantial contributing tributary to the Columbia River in Washington, the states of Wyoming, Montana, Utah, Nevada and Idaho were desirous of a compact with Washington and Oregon over the flows of that river basin. State Engineer L. C. Bishop reported in his biennial report in 1952 that "[i]n this compact, we only ask for recognition of our Snake River Compact with Idaho and cooperation of the member states in securing our development program." The negotiating compact commissioners of all seven states signed the compact in December of 1956, but none of the state legislatures ratified it. Negotiations continued for a few years to attempt to satisfy the concerns of Oregon and Washington about an "action compact" and the issuance of revenue bonds, but ratification was still withheld.

Little Missouri River Compact

Also in 1956, deliberations were held concerning the negotiation of a compact on the Little Missouri River, a small drainage basin in the northeastern-most corner of Wyoming which, after leaving the State, continues through Montana and South Dakota before joining the mighty Missouri at what is now Lake Sakakawea in North Dakota. Discussions continued intermittently for several years, but no compact on this Wyoming river has ever been completed, and interstate relations over the use of the river have remained congenial and primarily noncontentious.

The 1957 Laws

In a major recodification, the 1957 legislature reorganized all the water laws to fit under a new heading, Title 41, of Wyoming Statutes. It is not unusual today to hear the entire body of Wyoming water law referred to simply as "Title 41" among those conversant with the State's water laws as a result of this action.

As far back as 1952, the State Engineer had reported that there was interest in strengthening the 1947 groundwater laws, but it wasn't until 1957 that the legislature responded by enacting a much more comprehensive code for handling underground water. Those laws provided that wells for domestic and stock uses would have preferred rights over other groundwater uses even though they were still exempt from filing requirements, and that all other wells would need to be permitted by the State Engineer before construction could commence. The appointment of a Division Advisory Committee on groundwater matters was required for each of the four historic water divisions, and the State Engineer was directed to establish aquifer districts and sub-districts within those water divisions. In districts or sub-districts where concerns for the condition of an aquifer existed, the laws provided for the designation of "critical areas" and the election of an advisory board to manage the concerns of that area.

The statutes further clarified that an underground water right does not include the right to have the water level in any well maintained at any elevation above that required for maximum beneficial use, and established a penalty for drilling without an approved permit. Additionally, the new law specified that groundwater rights were subject to the abandonment statutes the same as surface water rights, and that a change in location of a

well could similarly be accomplished by petition to the Board of Control. The State Engineer was given the authority to promulgate rules regarding minimum well construction standards upon advice and consent of the Board of Control, and to order the cessation of the flow of water from any well when necessary.

The 1957 statutes also provided for the formation of Water Conservancy Districts. Recent legislation at the federal level had provided funding for loans for the construction of water development projects to be disbursed through local level entities known as conservancy districts. In order to take advantage of those federal funds, such districts had to be created and enabled by the state legislature, and, in Wyoming, that legislation was extensive. Similar in organization to irrigation districts, these special districts were broader in overall scope, having the authority to develop water for sale to domestic, municipal, industrial, manufacturing, agricultural, power, recreational and other beneficial uses. They had the power of eminent domain, the authority to contract with the state and federal governments, could sell bonds, levy taxes and special assessments, and receive income from revenue.

Wyoming v. Colorado

Although the decree between the states of Wyoming and Colorado over the use of the Big Laramie River had been originally issued in 1922, and re-litigated in 1939, a final stipulation was entered between the two states in 1957. That stipulation required that the 39,750 acre feet per year allotted to Colorado by the original decree be increased to 49,375, with 19,875 acre feet allowed to be diverted out of the Laramie River basin in Colorado by trans-mountain diversion to the front range. Additionally, 29,500 acre feet of the decreed 49,375 could be diverted on lands in Colorado where return flows from irrigation would enter the Big Laramie River at such locations as to be available downstream to Wyoming users. The acreages in Colorado on which the 29,500 acre feet could be applied were shown on a map which was made part of the stipulation.

Bear River Compact

The Bear River on the western edge of the State presents unique problems in compact allocation. Arising in Utah, the river flows north into Wyoming, then exits Wyoming back into Utah, re-enters Wyoming, and then exits the State a second time, this time into Idaho where it makes a horseshoe loop and re-enters Utah, ultimately terminating in the Great Salt Lake. The three states began compact negotiations in the late 1940s and finally struggled to an extremely complicated compact, ratified in 1957. The compact divided the river into an Upper Division (from the headwaters in Utah downstream to several miles below where the river enters Wyoming the second time), a Central Division (from the end of the Upper Division downstream to near Montpelier, Idaho) and a Lower Division (from the lower end of the Central Division to the Great Salt Lake).

The compact established an interstate administrative agency called the Bear River Commission with representatives from the three states to enforce the compact, and set forth a table of interstate ditches, by priority date and acreage, for which interstate diversions were recognized. Water rights to direct flow of the Bear River and its tributaries were to be administered in each state according to the laws of that state, with

special provisions in a complicated distribution formula to be honored "when there is a water emergency." The compact required review of its own terms every twenty years.

Niobrara River Compact

Since at least 1956, the states of Wyoming, South Dakota, and Nebraska had attempted to reach agreement on division of the waters of the Niobrara River and its tributaries. By 1960, the compact had progressed to the point of a preliminary draft and was ready for submission to the respective state legislatures.

The 1959 Laws

Temporary Use

In 1958, State Engineer Earl Lloyd had encountered difficulties over the need for water by the State Highway Department in constructing "the new interstate highway system." That need and use of water was found to interfere with valid existing water rights, especially on smaller streams. In his 1958 biennial report, he suggested that "this appears to be a necessary public use and some legislation may be advisable to classify it as a temporary industrial use with preferred status so that prior appropriations can be legally compensated for loss of their appropriations." The 1959 legislature acted on his suggestion by enacting a temporary use statute which would allow any water right holder, upon application to the State Engineer, to sell, gift or lease his water right for "highway construction or repair, railroad roadbed construction or repair, drilling and producing operations, or other temporary purposes" for a period of not more than two years. The statute was specific that only the State Transportation Commission could acquire the right if for highway work, and delegating that acquisition to a highway contractor or third party was prohibited.

In keeping consistent with other changes in use, the statute required that only the historic consumptive portion of the water right was eligible for acquisition by the temporary user. For the purposes of the statute and to avoid drawn-out studies, historic consumptive use was presumed to be 50% of the water right amount, although the State Engineer was given the prerogative of determining a different number if the situation warranted. Thus, a temporary user would acquire the entire water right for the contract period, but only take 50% of it, leaving the other 50% in the stream to compensate the creek for return flows which would have existed if the land was still in irrigation. Other users on the stream were given the right to have the temporary use shut down if it was found to have affected their ability to exercise their valid water rights.

Water and Sewer Districts

The formation of yet another special assessment district was authorized by the 1959 legislature, this one to supply, treat, and distribute water for domestic purposes outside cities and towns, and to provide for sewage and/or storm drain systems outside cities and towns as well. Such districts are formed by petition to the district court, and cannot overlap the boundaries of other such districts. A board of five directors is elected to operate the business of the district, and the district has the power of eminent domain, may

contract with federal and state governments, may borrow money, incur debt, and issue assessment bonds.

Acquisition of space in the proposed Fontenelle Reservoir

The 1959 legislature also authorized the State Natural Resources Board to contract with the United States for the acquisition of storage space not to exceed 60,000 acre feet or a cost of $900,000 for industrial and municipal uses in the proposed Fontenelle Reservoir soon to be constructed on the Green River near LaBarge.

Litigation 1950-1960

Wyoming's introduction to litigation over water rights connected with the Wind River Indian Reservation occurred in *Merrill v. Bishop* (1951). In that case involving water rights from Owl Creek, which forms most of the northern boundary of the reservation, a successor to land formerly owned by an Indian claimed the state water commissioner could not close his headgate on the grounds that his acquisition of the Indian land carried with it a water right senior to those for whose benefit the water was regulated. The court disagreed. Another 1951 case, *Coumas v. Transcontinental Garage*, established that where a tract of land bounded by a stream is conveyed, it is assumed that the middle of the stream is the property line.

Abandonment of water rights was litigated once again in *Sturgeon v. Brooks* (1955). There the Supreme Court reiterated that re-activation of a water right after a period of non-use "cures" the forfeiture if it occurs before a contest is initiated, and held again that water rights appurtenant to lands in Wyoming pass to a new owner with conveyance of the land. The 1921 statute allowing a board of special commissioners to establish rates for the sale of water in a reservoir which was stored in excess of the needs of the reservoir owner was tested in 1956 in *Lake DeSmet Reservoir Company v. Kaufman*. The statute was held valid, but due notice and a proper hearing on the rate-setting was required before a proper order could be entered. In *Bower v. Big Horn Canal Association* (1957), the court held that seepage water arising on an irrigator's land is appropriable for new land under a permit from the State Engineer. However, if the seepage water is derived from a leaking canal through the irrigator's property and the canal stops leaking, there is no recourse to require the owners of the canal to provide continued seepage or replacement water. An appropriation of that seepage protects the appropriator only against subsequent filings on the same seepage water, but, the court held, there is no rule which will require a man to continue irrigating [or producing waste water] when he does not so choose.

And in *Condict v. Ryan* (1959), the court held that the 1939 version of the 1909 statute requiring the filing of secondary permits to enumerate the lands to be irrigated by a reservoir made such a filing permissive rather than mandatory. However, if a secondary permit was indeed used to attach reservoir water to certain lands, the attached right runs with the land, even without mention.

The Period from 1960 to 1970

Entrance to the decade of the 1960's was marked by the continuation of the drought of the late 1950's. However, the network of reservoirs all across the State was now providing enough water at necessary times to allow a sufficient supply for most of the uses required by the State population of 330,000 people. A few drainages where no storage had been constructed still felt the effects of drought, and investigations continued to seek water supply solutions for the citizens of those areas. Anchor Dam on Owl Creek was completed in the early 1960's, while Sawmill and Muddy Guard Reservoirs on the eastern slope of the Bighorn Mountains, Hog Park Reservoir in the Encampment River drainage, Fontenelle Reservoir on the Green River, and Yellowtail Reservoir on the Big Horn River all received their permits from the State Engineer during the early to mid-1960's. Meek's Cabin Dam on the Black's Fork of the Green River was constructed in the late 1960's and storing water in 1971. The words "minimum stream flows" first appear in the State Engineer's 1960 report, in connection with requests of the Fish and Wildlife Service to have them maintained below certain federal reclamation project reservoirs.

In 1961 the legislature authorized creation of another type of assessment district, the Watershed Improvement District, for the purpose of dealing with erosion, flood control, siltation, water shortage, water supply, etc. on a watershed-wide basis. These districts can be separate entities or may be sub-districts of existing Soil and Water Conservation Districts, but differ from those districts in that they have the abilities to incur debt, acquire property, levy charges or taxes, and have the power of eminent domain.

Upper Niobrara River Compact

In 1962, following negotiations that had been ongoing since the mid-1950s, the legislatures of the states of Wyoming and Nebraska approved a compact on the last of Wyoming's interstate drainages to be allocated. Wyoming's use of the Niobrara River was relatively unrestricted by the compact, allowing unlimited construction of stock reservoirs storing less than 20 acre feet of water, and unlimited use of the river and its tributaries west of the range line between ranges 61 and 62W. Because reservoir storage and underground water are so instrumental in water use in that river basin, the remainder of the compact dealt with allocation of water for storage in both states and laying a foundation for future apportionment of groundwater supplies.

The 1965 and 1967 Laws

As Wyoming's streams are subject to annual flooding with resultant headgate or diversion structure damage, and with pump technology advancing steadily, it has often been desirable to move a diversion structure to a new point on a stream. Although the courts through the years had generally validated upstream or downstream changes from the locations of the originally permitted points of diversion of various water rights, there had never been a statute in Wyoming law specifically authorizing such changes, or spelling out the procedures to be followed in accomplishing such a change. And while it

was desirable that such changes be recorded with the Board of Control, it had never been required.

The 1965 legislature finally enacted laws requiring petitions for such changes in point of diversion and/or means of conveyance to be filed with the State Engineer if the water right being changed was unadjudicated, and with the Board of Control if adjudicated. The statute required that any such change must occur without injury to any other appropriator, and that consent of the owner(s) of any diversions intervening between the original point of diversion and the new one must be obtained. If those consents were not obtainable or included with the petitions as filed with the State Engineer or Board of Control, a public hearing was required, to give non-consenters the opportunity to state their reasons for non-consent. Using information gained at the hearing, the State Engineer and Board of Control were then required to assess the impact of such a proposed change on the administration of the stream and issue an order accordingly.

Supplemental Supply

In codification of another historic practice that had never been included in the laws, the 1965 legislature enacted a statute to authorize the holders of original water rights from one source of supply to apply for waters from another source to supplement their original right in times of shortage. At least as early as 1923-24, the State Engineer had been granting water right permit applications for supplemental supply, but there had never been statutory recognition of the practice, nor were there specific guidelines as to the conditions that qualified one for a supplemental supply or procedures to be followed in permitting. The 1965 law specified that a supplemental supply was useable only when the water in the original source was inadequate to provide a user's full appropriation, and that the supplemental supply could only be used to the extent of what water was needed to satisfy the holder's full one cfs per 70 acre allocation. Thus, by its nature, a supplemental supply right might go unused for as long as the original source could provide an adequate water supply; but when drought conditions again struck, the theory was that the supplemental supply could be used to divert as insurance against crop loss or injury. Inherent in the concept was the standard that the availability of the supplemental supply depended on its priority date in relation to others on its own source.

Library of Water Resources

The 1965 legislature also required the establishment of a Library of Water Resources which "shall be kept in the office of the State Engineer." In recognizing that library materials relating to water were scattered in numerous locations about the state, the legislature created the library of water resources to attempt to coalesce all those materials in a single location in the State Engineer's Office. The statute required the State Engineer to collect and obtain all materials "presently in possession of the Wyoming State Library, University of Wyoming Library, and other state agencies" for inclusion in the library. The library is currently maintained and contains reference materials of great value for the study of Wyoming water, however funding constraints, lack of use, and lack of on-line search capabilities for the library may soon cause repeal of this 1965 law.

State Water Planning Fund

Following years of intermittent water planning efforts by the State, the 1967 legislature finally enacted an actual water planning program with intentions for a follow-up program of development. Given the historic difficulties of committing reliable state funding to the development of water resources, the number of reservoirs and other structures constructed by previous sporadic planning efforts in the State throughout the years is impressive, and is clear testament to the insightful knowledge of Wyoming hydrology by her settlers. The new water planning program authorized the State Engineer to enter contracts with the federal government and obtain federal funds for water and related land resource planning. The U.S. Congress, in 1965, had enacted the Water Resource Planning Act of 1965, making federal funding available for such planning, and this State legislation authorized participation in that program. Another 1967 statute authorized immediate planning studies to demonstrate "diligent intent of the state to fully utilize all of Wyoming's compact share of the Big Horn River and its tributaries, the Green River and its tributaries, and other tributaries of the Colorado River within the boundaries of the State of Wyoming." A section called the Wyoming Water Planning Program was created in the office of the State Engineer, and it set to work on planning the future uses of Wyoming water.

The 1969 Laws

DEPAD

The old Wyoming Natural Resource Board created in 1951 had apparently served its purpose as a water development agency, but outlived its usefulness by 1969. Legislation in 1969 created a new department called the State Department of Economic Planning and Development (DEPAD) which was described in the legislation as the "successor to the Wyoming Natural Resource Board, which is abolished as of July 1, 1969." The new DEPAD was a broader-scoped agency, including planning and development activities not only for water, but also for economic, industrial and mineral activities. The agency had an executive director appointed by the governor, and administrators of three divisions for water, industrial and mineral development. The legislation describing the duties, authorities and purposes of the agency was extensive and included authorities for contracting with the U.S. government for planning and construction of water development projects, compiling technical information and providing it to interested special districts and private individuals, setting water rates from its projects, and a number of other activities. Working together with the Wyoming Water Planning Program established two years earlier, intensive investigation of development potentials in the State began in earnest as a result of this legislation.

Adjudication of the Big Horn Hot Springs

The 1969 legislature also enacted a law declaring the uses of mineral water from the Hot Springs at Thermopolis for bathing, municipal, irrigation, and mineral terrace maintenance to be beneficial uses, and ordered the Board of Control to adjudicate a water right to that effect. That adjudication certificate was to be issued in the name of the State Board of Charities and Reform for the entire flow of the hot springs with a priority date of February 17, 1899, the original date of appropriation for those uses by the State. A

separate but related statute authorized the State Engineer to abolish, correct, discontinue or stop any activity that would interfere with the flow of any mineral spring on State land.

Amended Underground Water Laws

In continuing to refine the 1957 groundwater laws and address problems that had arisen, the 1969 legislature expanded the groundwater code substantially. Included was a provision that as of May 24, 1969, all groundwater wells, even previously exempted stock and domestic wells, required a permit from the State Engineer before drilling could be commenced. Domestic and stock water wells still had a preferred right over wells for other purposes, with the term "domestic" being well-described and conditioned. Subsequent to that legislation, any unregistered well was not considered to have a valid water right and could not expect to receive protection under the law.

Temporary Changes in Water Rights

Expanding on the 1959 statutes allowing temporary use of irrigation water rights for short-term construction purposes and the right of other users on the same drainage to complain, the 1969 legislature enacted a penalty for wrongfully causing a temporary use to be shut down. Under the legislation, it was deemed a misdemeanor for anyone to cause a temporary user to be shut down by the water commissioner on the grounds of injury, if, in fact, no such injury had actually occurred.

Litigation 1960-1970

The 1960's were not a period of extensive water litigation in Wyoming. What cases there were mostly sought clarifications of administrative practice. In *Ward v. Yoder* (1960), for example, the abandonment procedure regarding "intent to abandon" was examined, and the Supreme Court held that intent was not essential to forfeiture of a water right. This holding was almost opposite the court's holding in *Ramsay v. Gottche* (1937), where it made clear that abandonment required an intentional or voluntary act. In 1961, the court dealt with the question of the public's right to waters in a stream on private land. In *Day v. Armstrong*, the court held that the streambed of Wyoming's non-navigable rivers and streams belongs to the property owner(s) through which the stream flows, but that the Constitutional provision declaring the water to be property of the state creates a public right for recreational floating through the private property. Necessary disembarking activities incidental only to floating, such as walking or wading "upon submerged lands in order to pull, push or carry craft over or across shallows, riffles, rapids or obstructions" are included in the right to float, but otherwise using "the bed or channel of the river to wade or walk the stream remains an unlawful trespass." In its decision, the court did not give floaters any right or expectation of availability of certain flows to be present in a reach of stream for their floating convenience.

In dealing with insolvencies of an entryman on a reclamation irrigation project in 1963, a federal court held in *Smith v. U.S.*, that the Reclamation Act does not guarantee success to those who enter upon lands involved in an irrigation project. In *Arizona v. California*, also in 1963, the United States Supreme Court determined that the United States intended to reserve water when it created or expanded Indian reservations, and that the amount of water reserved in that manner should be measured by the number of practicably irrigable

acres (PIA) on the reservation, whether those acres were all currently in production or not. Although Wyoming appropriators were not a party to that case, its holdings had ramifications for Wyoming fourteen years later in a lawsuit involving the tribes of the Wind River Reservation.

In *White v. Wheatland Irrigation District* (1966), the court dealt with its first contest over the new 1965 statute requiring petitions for changes in point of diversion. The holding was that such a change had no effect on the priority date of the water right being changed, and that the Board of Control had full authority and power to make such changes, with their orders being "clothed with the dignity of decrees entered by the courts." And in *Yentzer v. Hemenway* (1968), the court held that a partial abandonment may be found as long as the order of the Board of Control clearly reflects what portion of the land in the appropriation is affected. That case also established that the provision in Wyoming statutes allowing court review by appeal of a Board of Control decision is not a mandate for review, i.e. there is no automatic court review of abandonment decisions, but instead such review, if desired, must be attained by formal appeal proceedings.

Water rights in intermittent streams (those that do not run water year around) were litigated in 1967 in the case of *Swartz v. Scott*. In that case, the court again recognized the diversion of more than one cfs per 70 acres as legitimate where irrigation systems were constructed to operate in flood flow conditions. Since water in the drainage of interest in this case was only present during precipitation events, permanent dikes across the channel of the creek (spreader dikes) were used to distribute the water to adjacent meadows when such an event occurred, in amounts that it took to make the dikes work adequately.

Part V—Years of Challenge, 1970-2000

The Period Between 1970 and 1980

Entering the decade of the 1970's, Wyoming was on the verge of another spurt of growth. The availability of extractive minerals in the State spawned numerous proposals for their development, and the need for water to facilitate fruition of many of those proposals became a high priority. For example, Grayrocks Dam, permitted in 1973 and constructed on the Big Laramie River, accompanied the construction and operation of the Basin Electric power plant as a water supply for that facility.

By early 1973, the Wyoming Water Planning Program was ready to distribute its Wyoming Framework Water Plan, a comprehensive report on the water supplies and the potentials for their use in every river basin of the State. The 240-page report integrated statewide demographic information with economic and growth projections, and identified areas in which state water supplies would be inadequate to meet the projected need, whether for municipal growth, domestic expansion, mineral production or other. Also identifying river basins having unappropriated water belonging to the State by provisions of the various compacts, the plan proposed various scenarios for transporting those surpluses to locations elsewhere in the State to meet the deficits, and thus maximize the beneficial use of the State's water supplies in a statewide masterplan.

However, while the State was gearing up to facilitate water development, the U. S. Congress was gearing up to impede it. With passage of the National Wild and Scenic Rivers Act of 1968, the National Environmental Policy Act of 1969 (NEPA), and the Federal Water Pollution Control Act of 1972 and its many provisions, including section 404 regarding federal permit requirements for dredge and fill activities, a huge federal presence was now involved in the water development process. In 1973, the Endangered Species Act (ESA) added more requirements, and in 1976, the Federal Land Management Policy Act (FLPMA) placed additional restrictions on the abilities of local citizens to maintain a state's rights attitude toward their local water supplies. Ostensibly leaving the allocation of water rights to continued state control, through such mechanisms as the Wallop Amendment to the Water Pollution Control Act, the provisions of these federal actions gave federal agencies the authorities to become involved in matters previously handled by the states. And, while these acts did not completely stop water development, their provisions significantly increased the costs in time and dollars of completing necessary projects. Had not Wyoming's territorial and state founding fathers been so diligent and adamant about securing in every way possible the water supplies within the State's borders prior to this federal onslaught, many of the reservoirs and other protections historically relied upon for municipal, agricultural, industrial, recreational, and other uses could never have occurred.

With the era of large dam building and land reclamation essentially over, a favorite pastime around the country was criticizing past federal expenditures for reclamation, and decrying "subsidies to agriculture" from water stored behind federal Bureau of

Reclamation dams. Dr. T. A. Larson provides an interesting discussion of that complaint in noting "Wyoming had a better claim to federal reclamation expenditures than other states in one respect. The major source of reclamation funds was federal income from the Oil and Gas Leasing Act of 1920. From 1920 through June 30, 1975, the reclamation fund received $1,355,034,329 under the 1920 act. Of this total, public lands in Wyoming yielded $544,839,166. No other state contributed nearly that much. Wyoming was the only state whose contributions in the form of royalty and lease payments exceeded Reclamation Service expenditures ($450,000,000). Thus, in one sense, Wyoming was in the unique position of having paid in full for its reclamation projects."

The 1973 Laws

Storage of Direct Flow Rights

The 1973 legislature was a fairly active one in terms of new water-related legislation. A process to store direct flow rights in a reservoir was created in that session, the intent apparently being to allow an appropriator holding direct flow irrigation rights to divert his irrigation water into a storage facility rather than using it for irrigation. The statute prohibited such storage if it would injure or affect any other appropriator, and required a request to be filed with the State Engineer and approved by the Board of Control before it could be accomplished. This process has rarely, if ever, been used.

State Engineer Abandonment

Although statutes providing for abandonment of unused water rights had been in Wyoming law since 1888, such an action had always been contemplated to come about by one affected appropriator attacking the water rights of another. In an attempt to act on the knowledge that certain water rights might lay idle for the statutory period, but that other affected appropriators were reluctant to attack that negligence of their neighbor, the 1973 legislature enacted a series of statutes to allow the State Engineer to file forfeiture actions to clean up such abandoned rights. The legislation in practice puts the State Engineer in the unenviable position of being the heavy hand of government attacking private property rights, a situation that has never sold well in Wyoming, but does indeed provide a mechanism for answering a problematic occurrence when conditions warrant.

By-Product Water

In seeking to deal with water developed as a by-product of some other non-water related activity in the State, the 1973 legislature enacted statutes to govern the appropriation and use of any water occurring as a result of the operation of oil well separator systems, dewatering of mines, etc. The statutes allow appropriation of such by-product water for any use in the same manner as other water rights, except that they require a written agreement between the producer or developer of the water and the end user, if that is someone other than the producer. To be appropriated, the water must be intercepted while it is readily identifiable as by-product water and before it has commingled with any other waters of the State.

Additional Supply

Another 1973 statute created a definition for underground water which can be drawn from a well and used on irrigated land which already has an appropriation from another source. The only limit on the amount of that water, termed "additional supply," is the amount applied to beneficial use, i.e. unlike surface water irrigation appropriations, there is no standard gallons-per-minute or cfs value assigned to the appropriation by statute. Also, unlike "supplemental supply" for surface water, there is no prohibition against using the additional supply when the original supply is fully available and in use, as long as all the water is placed to beneficial use.

The 1975, 1977 and 1979 Laws

Instream Stock Use

The use of water flowing in streams or rivers for watering livestock has been recognized as long as livestock have been present in Wyoming. However, although it may seem, and is a common misunderstanding, that such a use would be a natural right, and that livestock would have much the same access to open water as wildlife, the State determined early that water for livestock required a permit, the same as all other appropriative rights. The same elements required of other uses also applied to stock water appropriations—intent, diversion, diligence, and beneficial use—before the right could be adjudicated. Thus, the act of allowing livestock to have free access to creeks and streams did not, in and of itself, constitute an appropriation. Instead, the appropriator of livestock water had to construct some facility for providing that water to his stock, such as a pond, ditch, trough, tank, spring development, or other man-made installation in order to show his intent and diligence. Large numbers of livestock appropriations acquired in this manner exist all over the State, many of them being in irrigation ditches as adjuncts to the irrigation rights. Nonetheless, due to the threat to livestock health posed by a lack of water for even a short period of time, the 1975 legislature created a provision in the law whereby the State Engineer can require water to be provided to meet reasonable demands for instream stock use at his discretion. This authority may be enacted, for instance, when the flow of a stream may have gotten so low that its use for permitted diversions does less community good than the broader need for stock water left instream, or when reservoir filling has shut off the flow of a stream, yet livestock in pastures downstream from the dam require drinking water. It can also be used in the "consideration of any applications for permits."

Shoshone Irrigation Project

The 1977 legislature, in recognizing the continuing increase in the workload of the Board of Control, finally amended the 1891 law which required the Board to meet twice a year. The new law required quarterly meetings, "the dates to be set by the board." That amendment also authorized the State Engineer to call special meetings when it was deemed necessary.

Safety of Dams

A State Safety of Dams Law was enacted by the 1977 legislature, requiring, under penalty of law, construction standards and periodic inspection of reservoir dams which meet certain size criteria. Failures of dams, causing injury and loss of property and life in other parts of the west, inspired the State to establish this program in which the State Engineer or his appointed representative was required to inspect all dams, reservoirs or diversion systems in the State which qualify under the statute, at least once every five (5) years for protection against failure. Those inspections could result, if unsafe conditions warranted, in the engineer ordering the immediate breaching or draining of a dam to safeguard life and property.

Streamwide General Adjudications

The 1977 legislature also enacted a law authorizing the State of Wyoming to initiate court adjudication actions to determine the nature, extent, and relative priority of the water rights of all persons in any river system. Although the Board of Control had, since its creation in 1890, been the body charged with systematically adjudicating the individual water rights of Wyoming citizens, the creation of statutory authority to adjudicate all rights in a single river system in one giant action fell to the district courts by this legislation. The court conducting an adjudication was required to certify to the Board of Control any matters deemed appropriate; confirm any rights already adjudicated by previous court decrees or the Board of Control; determine the status of all unadjudicated permits in the selected river system; determine the extent and priority of any other interests in the use of water from the river system; and establish final tabulations of all the rights and their relative priority dates at the conclusion of the suit.

Wyoming Water Development Commission (WWDC)

In 1979 the legislature created the Wyoming Water Development Commission to plan, study, investigate, and fund future water development in Wyoming. Using a 1.5% excise tax on produced coal and a 0.167% severance tax on produced oil and gas, two water development accounts were ultimately created to fund water development projects and, eventually, to rehabilitate earlier-constructed ones. A nine-member commission was provided for, the members of which were to be selected equally from the four water divisions upon the governor's consultation with the Water Division Superintendents, and one member at large. The statutes set up a four-level system for proposed projects to move through—Level I, reconnaissance studies; Level II, feasibility studies; Level III, development plans; and Level IV, construction and operation plans. Each proposed project needed a local sponsor for the Wyoming Water Development Commission to work with, and each project had to move sequentially through the levels, depending on how close they were to construction. In the original legislation, DEPAD (see page 77)

was to have oversight over Level IV and some Level III work, while the WWDC had administrative responsibility for Levels I, II, and most of Level III. Although most projects seeking funding were annually submitted to the legislature by the WWDC in what was called the "omnibus water bill," the legislature also could provide special project-specific funding for projects introduced in separate individual project legislation.

Amended Bear River Compact

The complex Bear River Compact ratified among the states of Wyoming, Utah, and Idaho back in 1957, had as one of its provisions that its terms were to be reviewed every 20 years. In compliance with that requirement, review was initiated in 1977 and an amended compact reached in 1978. Minor amendments included combining the provisions of a couple of paragraphs in Article III, and changing the date at which water emergencies would terminate each year from October 15 to September 30 as described in Article IV. The major amendment consisted of the addition of a new Article V, creating limits on river depletions allowed Utah and Idaho subsequent to January 1, 1976. The amended Compact was signed by the participating states in December of 1978, and ratified by Congress in 1980.

Litigation 1970-1980

New case law that had an impact on the future of Wyoming water use was not abundant during the 1970's, but the concepts that were litigated certainly clarified what may have been grey areas in the statutes. In 1970 the court validated historic practice in Wyoming relating to the one-fill rule for reservoirs. In *Wheatland Irrigation District v. Pioneer Canal Company*, it held that a reservoir may be filled in priority only one time each year. Water carried over in a reservoir from the preceding year would be subtracted from the total volume of the reservoir, and the difference is the amount that could be stored in the new water year. That case also reiterated that Wyoming water rights will not be set aside in abandonment unless justified by clear and convincing evidence. In *King v. White* (1972), the court expounded on the property right nature of water rights in Wyoming, saying "a water right is a property right of high order with none of the characteristics of personal property, and is real property." In a 1974 case dealing with the seepage from a ditch causing a hillside slump, the court advised that the owner of a ditch is bound to exercise reasonable care and skill to prevent injury to other persons from his ditch, and will be liable for damages as a result of his negligence or unskillfulness in constructing, maintaining or operating the ditch (*Taylor Ditch Co., Inc. v. Carey*).

Clarification of the Surplus Water Law of 1945 was made in the 1975 case of *Budd v. Bishop*. There, the Supreme Court held that under the law, appropriators with a priority date senior to March 1, 1945 are entitled to two cfs for each seventy acres before appropriators with priority dates after or junior to that date are entitled to any water. Once pre-1945 water rights are satisfied with their two cfs per 70 acres, then post-1945 rights are entitled to their first cfs for each 70 acres. That decision also established that adjudicated water rights vest as real property rights as of the date the permit application was filed with the State Engineer. In *Basin Electric Power Cooperative v. State Board of Control* (1978), the court clarified that water rights attaching to lands which have effectively been abandoned cannot be included in a petition for change of use or change

in place of use, as the Board of Control can only allow such changes for active lands which have placed a recent demand on the stream source. That case also clarified that changes in use can only be allowed for the historic consumptive use portion of a water right that can be moved to a new point of use without creating an effect or injury to any other appropriator from the same source of supply, taking into account such factors as return flows, historic rate of diversion, conveyance losses, etc. Also in 1978, in a case captioned *Casper-Alcova Irrigation District v. Irving*, the court held that the commissioners of an irrigation district have the authority and power to fix a minimum assessment, different from its regular per-acre assessment, on lots in a homeowner's subdivision to help defray the increased cost of water delivery, bookkeeping, and administration to small parcels.

In *Thayer v. City of Rawlins* (1979), the court addressed the long-recognized principle of the appropriation doctrine that an appropriator is continually entitled to the flow of the stream as it existed at the time of his appropriation. Under that principle, one making a new appropriation must be aware of how many senior users are already present on that stream and how much water they have appropriated prior to his or her use, and must expect his or her use to always be subject to those conditions. However, that appropriator can also expect anyone later acquiring rights to the same stream to do so only in a way that leaves the stream at the senior's headgate in the same condition as it existed at the time of his or her appropriation. In *Thayer*, the court held that principle did not apply to introduced water brought in from an outside (trans-basin) source, and clarified that a water user who adds water to the natural flow of a stream is entitled to take that same "imported" water back out for his or her own use, even though a senior priority on the same stream may be left without water as a result.

The authority of the State Engineer and Board of Control to correct and amend original permits and certificates of appropriation to eliminate ambiguity was upheld in *John Meier and Son, Inc. v. Horse Creek Conservation District*, (1979), a case which also explained that the cornerstone concept of "beneficial use" in Wyoming depends on the particular circumstances of its application. And in *White v. State Board of Land Commissioners* (1979), the court determined that water rights, ditch rights, and ditches necessary to serve an appropriation made by a lessee on state land were appurtenant to the state land, and could not be considered to be property of the lessee when he no longer had the lease to the state parcel. Nonetheless, the court held that a new purchaser of the state parcel would be required to pay the former lessee the appraised value of the rights he had installed on the state parcel when he held the lease.

The Big Horn General Adjudication

Using the general adjudication statute enacted by the 1977 legislature, the State soon filed suit in the district court of Washakie County for the adjudication of all water rights in the Big Horn river system, (captioned *In re: The General Adjudication of all Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*). Primarily to have a priority date and amount of water quantified for the water rights of the Indian tribes of the Wind River Reservation, the suit, as required by the statute, also included all other state water right holders and the federal government as defendants. When the U.S.

Congress had ratified Wyoming's Constitution in 1890 (see page 22 of this History), the provision that all the water in the State was property of the State had been accepted by the United States, apparently without question or modification. Additionally, the 1905 Second McLaughlin Agreement (see page 35) resulted in the irrigable Indian lands on the reservation being covered with 1905 priority state water permits. However, by 1977, the tribes had notified the City of Riverton that groundwater wells the City was planning to drill would be attempting to appropriate water to which the tribes believed they had paramount reserved rights by claiming all waters arising upon, flowing through, bordering, lying under, artificially created or otherwise occurring on the reservation. Their claim included that the priority date of the reserved rights should be July 3, 1868, the date of the treaty between their tribes and the U. S. government which established the reservation as their permanent homeland. Such a claim, if valid, would pre-date all other water rights in Water Division Three. These claims relied on the U. S. Supreme Court's 1908 ruling in *Winters v. United States* (described briefly on page 39 of this history), wherein water of the Milk River in Montana was reserved from state appropriation in favor of several Indian tribes. With such conflicting claims implied by federal promises to both parties, Indian and white, it appeared to be time to resolve the question once and for all. A Special Master was appointed to hear evidence and a 27-year (so far) lawsuit began.

The Period Between 1980 and 1990

The decade of the 1980's brought additional challenges to the State, and new interpretations to historic ways of doing business. In 1982, the Special Master appointed to hear the evidence in the Big Horn General Adjudication issued his Report, after four years of hearings on the question of whether federal reserved rights existed on the Wind River Reservation, and, if so, what their attributes were. His determinations included that, indeed, the tribes of the Wind River Reservation had federally reserved water rights with a priority date of 1868 (the original treaty year), in an amount around 500,000 acre feet per year, as calculated using the practicably irrigable acreage (PIA) standard (see page 78). Following submission of his report to the district judge in Worland, a decree of that court was entered in May of 1983, upholding the reserved right award and priority date, and holding that, based on the history in evidence, the sole purpose of the reservation was agricultural. The judge held that municipal, domestic, commercial and livestock water uses were included within the award for agricultural purposes, but he specifically denied reserved rights for mineral, industrial, wildlife, aesthetics and instream flow purposes. He also determined that there was no reserved right to groundwater in favor of the tribes, that they could not export their reserved water for sale or lease off the reservation, and that the decree was to be administered by the Wyoming State Engineer. Appeals of the entire decision to both the Wyoming and United States supreme courts resulted in affirmation of those holdings in 1988.

The decree had the practical effect, for the first time since enactment of the 1886 Wyoming Territorial Laws (see page 14), of recognizing a select class of water right and allowing it to leapfrog its priority, and its opportunity to divert water, ahead of hundreds of other historically established water rights. In a state that had so much history of rigid

adherence to the sanctity of an appropriator's priority date being the basis for an orderly water allocation system, this result was devastating. It left former senior-priority state appropriators on the Big Horn River system, whose water rights had been relegated to a junior status behind 500,000 acre feet of new senior-priority water, wondering whether the rest of their hundred-year old water rights law was in jeopardy as well. They also had difficulty understanding why the State had sued its own appropriators, resulting in a decree adverse to their interests and shaking their trust in their historic water rights system and its administrators.

In *Green River Development Company v. FMC Corporation* (1983), the Wyoming Supreme Court made another change to historic practice. In that case, the State Engineer, under his historic authority to amend or modify permits prior to adjudication, endorsed certain permits as having changed in use, place of use, point of diversion and means of conveyance. He did so based on language in the statute allowing him to "amend any permit . . . for the purpose of correcting errors or otherwise . . ." The court found those actions he took in this case to be without authority, and greatly limited the State Engineer's ability to make those endorsements far beyond what it had historically been. The court held that where water right permittees had never applied their permitted water to beneficial use, they were possessed of nothing which qualified for transfer, and to allow such a transfer by permit endorsement was beyond the meaning of the word "otherwise." In 1985, as a result of this case, the language in the statute was changed to read that the "State Engineer may correct clerical errors . . ." and it prohibited him from making changes of use in the future, leaving all changes in use henceforth to be the province of the Board of Control.

Water Development Commission

By 1983, the Water Development Commission had nearly 50 projects proceeding through the four planning levels of development, and $114 million in the Water Development accounts. Project earmarks included over $3 million in grants to Wyoming municipalities for exploration and study of groundwater supplies, $47 million for raising the height of Buffalo Bill Dam 25 feet, $40 million for Stage II of the Cheyenne Water Project, and numerous appropriations from $25,000 to $500,000 for municipal pipelines, canal rehabilitation, dam rehabilitation, and investigations of numerous other kinds. The establishment of the commission was a huge accomplishment and success in terms of the State finally having a perpetual agency dealing in both money and water, and it was well into the process of meeting the continued needs of Wyoming citizens.

The 1985 and 1986 Laws

New legislation affecting water was fairly scant all through the decade of the 1980s, with the exception of fine tuning the structure, authorities and duties of the Water Development Commission, and making its funding appropriations each session. However, two other new statutory enactments, one in 1985 and one in 1986, were also historic in nature.

Excess Water Law

As a follow-up to the court's 1975 decision in Budd v. Bishop, the 1985 legislature enacted a law to benefit holders of water rights with priorities after March 1, 1945, but before March 1, 1985. The new law adjudicated an additional one cfs for each 70 acres of land for those post-1945 users to give them the same right to excess water as the surplus water law did for pre-1945 users. Thus, in times of administrative regulation under a call on the river, appropriators with priority dates later than March 1, 1985 must wait until pre-1945 rights are filled with two cfs per 70 acres, and then until rights between 1945 and 1985 are filled with two cfs per 70 acres, before they are entitled to divert any water under their right.

Instream Flows

Following years of extensive study on how to reconcile it with the foundations of the appropriation doctrine, the 1986 legislature in another vast departure from historic practice, enacted laws to allow the appropriation of water without a diversion, a physical demonstration of intent, or due diligence. In enacting the instream flow law (see Appendix D), the legislature recognized as a beneficial use water left instream for establishing or maintaining stream fisheries, and provided a mechanism for the State to file present-day priority water rights for unappropriated water in any drainage to provide such flows where possible. These new water rights, like all others, would take their place in the listing of priorities on each stream and would be able to be satisfied when all prior rights had received their legal entitlements. Water stored in reservoirs for the purpose of release into streams to create desired volumes of instream flow was also declared to be a beneficial use, and acquisition of existing water rights by transfer or gift from another appropriator was authorized by the legislation. Under the law, the State of Wyoming is the only entity that can legally acquire and hold instream flow water rights, through application by the Wyoming Water Development Commission on advice and recommendation of the Wyoming Game and Fish Commission. The Game and Fish Commission is required to construct any measuring devices the State Engineer considers necessary for the administration of instream flow water rights.

Instream flow water rights are considered to be a preferred use in terms of their preference status, so that changes in use from a non-preferred use to instream flow can occur. The statutes prohibit condemnation of existing water rights for instream flows and any impairment of the State's right to fully utilize her compact or court decreed apportionments. Additionally, it is implicit that the presence of an instream flow water right does not carry, or guarantee, any public access to the stream segment protected.

Litigation 1980-1990

As the development of new water supplies to meet increases in population and industrial development became more and more difficult, competition for existing water covered by historic water rights increased. In *Dechert v. Christopulos* (1980), the court dealt with competition for water among three separate canal holders of a single water right permit filed in 1906 by an early development company (Wyoming Central Irrigation Company--see page 35). In that case the court held that 1917 agreements made for the purpose of splitting the available water among the three permit co-holders were valid, and that the

statute requiring a measuring device on the line of the ditch did not require individual patrons of the district to have their own measuring devices when allocation of water was made to the canal project as a whole. In *Fuss v. Franks*, also in 1980, the Supreme Court reiterated the concept that water can be used and re-used, captured and re-captured on the land to which it is attached, but when it leaves that land and, if left to flow uninterrupted, would reach a natural stream, it is considered to be eligible for appropriation, even within the boundaries of an irrigation district. Such an appropriation may be made while the water is in a waste ditch, drain ditch, or highway barrow pit on its way to a natural stream, and requires a permit from the State Engineer.

In 1981, in *Wallis v. Luman*, the court held that a ditch used to serve water to a valid water right as adjudicated by the Board of Control was prima facie evidence of the right to continued use of the ditch. In the absence of written documentation of the right to use the ditch, continued historic use could create a ditch right by prescription. That such a prescriptive right extended only to the ditch right and not to the water right was clarified four years later in *Lewis v. State Board of Control* (1985). In that appeal of an abandonment action, the court held that water rights in Wyoming may not be acquired in any case by historic use through prescription or adverse possession, and that the only way to acquire such rights is by permit from the State Engineer. The court in that case also held that abandonment had not occurred where upstream juniors had not allowed senior water to pass by their headgates, in defiance of an order of water officials to do so.

Again due to the recognition of the difficulty of developing new water supplies, the frequency, contentiousness, and cost of abandonment actions, particularly in the North Platte River basin, intensified in the 1980's. Disagreements over the interpretation of certain phrases in the abandonment statutes led to extensive abandonment hearings before the Board of Control regarding burden of proof, standing, "affected" water user, etc. In *Wheatland Irrigation District v. Laramie Rivers Company* (1983), the Supreme Court reversed an order of the Board of Control denying abandonment on the basis of a demonstration that the party being attacked had spent extensive capital rehabilitating their dam facilities in preparation for water use. In upholding its 1960 reversal of its 1937 opinion in *Ramsay v. Gottche*, the Supreme Court instructed that only the actual use of water within the five-year statutory abandonment period could rescue an appropriation from the "gnashing teeth" of the abandonment statute, whether intent to abandon existed or not. In another appeal of a Board of Control order, the court in *Cremer v. State Board of Control* (1984) held that an "affected water user," as mentioned in the abandonment statutes, is one whose water rights are abridged by another user's actions. The benefit of making additional surplus water available to the one filing abandonment was not considered to be sufficient to confer standing as an affected water user in that case. The same year in *Platte County Grazing Association v. State Board of Control*, the court held that the Board of Control was without jurisdiction to have entertained a petition for abandonment where the petitioners had not proven that their water rights were injured by the failure of the party under attack to use its water during the five-year abandonment period. Such a failure of proof left the petitioners without standing to bring the abandonment action, and the Board of Control struggling to figure out how an affected

water user could ever make a case for abandonment under the results of the recent appeals of its orders.

Changes in use from irrigation to municipal use, and from irrigation to industrial use, became huge undertakings in the 1980's, sometimes seeking the transfer of water rights over distances of 200 to 300 miles along the North Platte River from the original ranches to the new places of use. Historic appropriators protested such changes as injurious in week-long hearings before the Board of Control, and the Board's resultant orders were rarely acceptable to all parties. In both the petitions of the City of Casper and Pacific Power and Light Company to transfer water rights from ranches in the Rock River and Saratoga areas to their points of use at Casper and Glenrock respectively, the Board of Control took extensive testimony from experts employed by both sides on the issues of conveyance loss, historic diversion amounts, historic consumptive amounts, historic return flows, and the other safeguards in the change of use statute. Orders of the Board on those petitions resulted in substantial diminutions in the amount of the historic water rights available at the new points of diversion and laid out the realities to be overcome in attempting changes over such distances without causing injury to any other user on the stream.

In addition to wrestling with statutory semantics and new approaches to historic actions, the court was also still able to deal with cornerstone concepts of Wyoming's water law in the 1980's. In *Belle Fourche Pipeline Company v. Elmore Livestock Company* (1983), beneficial use was decreed once again to be the basis, measure, and limit of the right to use water at all times under a state water right, just as it was 100 years earlier when such concepts were new, perspicacious, and innovative. In 1986, (*Zezus v. State Board of Control*) the court upheld the order of the Board of Control in re-quantifying a territorial water right originally adjudicated by decree of the territorial district court, finding an allocation of one cfs per 70 acres to be the amount "necessary and useful" for irrigation, even though a greater amount had been decreed by the territorial court in 1889. In *State ex rel. Squaw Mountain Cattle Company and Two Bar-Muleshoe Water Company v. Wheatland Irrigation District* (1986), the court preserved its concept earlier articulated in *Quinn et. al. v. John Whitaker Ranch Co. et. al.* (1939) that the allocation of irrigation water rights at a rate of one cfs for each 70 acres does not define beneficial use, and use of water in excess of that amount is not necessarily interpreted as constituting waste.

Nebraska v. Wyoming

In 1986, the State of Nebraska once again filed suit in the U.S. Supreme Court over the waters of the North Platte River. Although a comprehensive decree in the case had been issued in 1945 (see pages 65 and 67), Nebraska's new suit claimed to be for enforcement of that decree, complaining primarily that Wyoming's plans to construct Deer Creek Dam near Casper and current operation of Grayrocks Dam on the Laramie River were in violation of its terms. Wyoming made counterclaims in 1987 that Nebraska was demanding more water than allowed by the 1945 decree, and that Nebraska was improperly using water both stored in Glendo Reservoir and by-passing Tri-State Dam. Interim decrees on some of the matters were issued during the 1990s, but it took another 15 years of litigation to reach a settlement in the case.

The Period Between 1990 and 2000

Wyoming water issues in the last decade of the 20th century started out in some ways rocky, but progressed toward resolution of some sticky matters by its end.

Big Horn General Adjudication

The 1988 decree in the Big Horn General Adjudication created serious contentiousness on the Big Wind River in the dry years at the beginning of the 1990s, as the tribes sought full utilization of their roughly 500,000 acre-foot reserved right award against the non-Indians who had been encouraged by the U.S. government to homestead under the 1905 Act. Historically, Indian diversions had amounted to roughly half that amount of water, so the imposition and full use of an additional 250,000 acre-foot demand with the most senior priority date on the river system would amount to a loss of water from the white settler canals in dry years. As both parties could point to the federal government for creating the problem, both looked to the federal government for resolution, but none was forthcoming. The result was additional litigation, settlement discussion, and continued slogging through the remaining details of the original adjudication action.

The original suit had been broken into three phases; Phase I being the determination of Indian reserved rights; Phase II being determination of non-Indian federal reserved rights; and Phase III being confirmation and disposition of all State water rights acquired since territorial days. Phases I and II were fairly well completed by the early 1990's, but Phase III continues yet today. By the year 2000, five Supreme Court decrees on the various aspects of the case had been entered. One of many complex side issues during the course of the litigation, for example, was the disposition of claims by non-Indian landowners who had succeeded to land formerly owned by Indians. These non-Indian "Walton right" claimants reasoned that since their land had been owned by Indians at the time water was reserved to the Indian lands, but then sold to non-Indians, appropriation doctrine principles dictating that the water runs with the land would mean that the non-Indians would be entitled to the 1868 priority date as well. The Supreme Court ultimately agreed and awarded those claimants a reserved water right with an 1868 priority date for the practicably irrigable acreage (PIA) they could show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter.

A study of the entire Big Horn General Adjudication case provides a fascinating evolution of reserved water rights law in the American west, and once again, as with many times through history, has Wyoming being a leader among western states in demonstrating the flexibility, appropriateness, and vitality of the prior appropriation doctrine for meeting the needs of her citizens through changing times.

Nebraska v. Wyoming

The other major lawsuit continuing from the 1980's into the 1990's placed additional burdensome time and funding demands on the State Engineer's and Attorney General's offices, but had to be pursued nonetheless. Following Wyoming's counterclaims to Nebraska's allegations in 1987 (see page 90), the U.S. Supreme Court ruled in 1993 that, among other things, Nebraska's claim for enforcement of the 1945 decree actually

amounted to a desire to amend the decree, and the Tri-State Dam issues were too theoretical and speculative to resolve without a trial. The parties amended their pleadings, and in 1994 the court accepted Nebraska's claims against Wyoming's use of the Laramie River, Wyoming's development on tributaries below Pathfinder Reservoir, Wyoming's groundwater development and Wyoming's use of Horse Creek. The court also accepted Wyoming's counterclaims against Nebraska's use of by-pass flows at Tri-State Dam, conveyance loss calculations, Glendo Reservoir use, Warren Act compliance, and apportionment in allocation years. A major trial seemed unavoidable.

Discovery and disclosure, often affected by delay, dragged on into 1999, and a date for trial was ultimately set for May 10, 2000. However, on May 9th, literally hours before the trial was to begin, the parties reached a settlement agreement "in principle," and the special master appointed to conduct the hearings issued a stay of any further proceedings, giving the parties until December of 2000 to submit documents memorializing the Proposed Joint Settlement. The U.S. Supreme Court approved the settlement and entered its Modified North Platte River Decree in November, 2001. The modified decree, among other things, increased the acreage limitation on lands irrigated in Wyoming from 168,000 to 226,000, and now included tributary acreages between Pathfinder and Guernsey dams, but still excluded the Kendrick project. It also included groundwater wells which meet certain criteria as contributing to surface water allocations. Irrigation on the lower Laramie River was limited to 39,000 acres exclusive of the Wheatland Irrigation District, and, for the first time, the decree included a cap based on a ten year running average on the amount of water that can be consumptively used. In addition, all the new requirements of the decree necessitated a much more rigid accounting and measuring network and a resultant increase in the number of state engineer employees to carry out those needs.

The 1991 Laws

Year after year since at least 1913 (see page 43), the annual and biennial reports of the State Engineers and Water Division Superintendents had criticized the statutory setup wherein the water commissioners were appointed by the governor, employed by the counties, responsible to the State Engineer, and supervised by the Water Division Superintendents (see Appendix B). In 1938, Superintendent of Water Division One Ambrose Hemingway, wrote a 25-page report on the inadequacies of the historic system, remarking that if the counties were unsatisfied with the water commissioner's work for whatever reason, they were as likely as not, after a summer's hard and demanding work to not pay him at all. In that report, he advised "[T]he ideal water commissioner should have the good common sense expected of the old time round-up foreman; he should know as much about the irrigation law as the attorney general; he should be ever mindful of the admonition 'trust yourself when all men doubt you, but make allowance for their doubting too;' he should know as much about the duty of water as the state engineer; he must have the courage of the sheriff; and finally he should be willing to put in 18 hours of consecutive work, and call it a day."

In 1991, the legislature finally enacted laws to move those county employees into state government, severing the 115 year-old relationship those commissioners had had with the county commissioners since 1876. The statutes dealing with water commissioner appointments, terms of office, commissioner services, assistant commissioners and all others referring to water commissioners were amended to accommodate state employment of these historic officials. While the former county positions generally had few job qualification requirements, the new state position descriptions necessitated college degrees, or equivalent experience, for the first time. The statutory intent was to finally hire hydrologists and engineering-type personnel as water commissioners who could approach water administration scientifically and be conversant with 100 years of water law and practice. However, the age-old problem of water commissioner work being intensive during the summer water-use season with often little or no work in the winter continued to result in some commissioners being employed for only part of the year, with resultant difficulty in finding people who fit the qualifications and could afford to not have year-around work. The State compensation system at first had difficulty dealing with the historic statutory treatment of the on-call, full time/part time nature of water commissioner work, and couldn't initially compete with private-sector salaries for commensurate hydrologic and engineering skills, thus it took several years to phase out history and make an adequate transition.

Litigation 1990-2000

Appropriators and their attorneys continued to challenge the workings of the abandonment law through the 1990s. Questions about what conditions qualify as standing to bring about such an action, interpretation of the words "benefited," "injured," and "involuntary," and other machinations of the abandonment concept kept cases in front of both the Board of Control and the courts during the period. In Schulthess v. Carollo (1992), the statutory requirement that two water rights must be from the same source of supply for one to attempt abandonment of the other was at issue. In that case, a senior water right holder brought an abandonment action against a junior, using his 1945 surplus water right as proof of his "equal or junior" status required by the statute. Following a hearing before the Board of Control, the Board issued an order finding the surplus right used for standing from a tributary to be in the same source of supply as the right being abandoned which was on the mainstem, thus conferring standing on the petitioner. On appeal, the court said the Board of Control erred by not making adequate findings of fact in its determination that the petitioner had standing to bring the petition, also advising the Board that benefit or injury in abandonment actions had to be tangible and not theoretical.

In *Joe Johnson Company v. State Board of Control* (1993), the court held that a petitioner for abandonment of a neighbor's well had standing to bring such a petition if the petitioner had a well in the same source of supply (i.e. the same aquifer), and if the petitioner could prove benefit or injury to his well if the other well was not declared abandoned. To satisfy the standing requirements of the abandonment statute, the petitioner also had to prove it had a water right of equal or junior priority to the well being sought for abandonment. In that case, the fact that the petitioner's water right priority date in the aquifer would be improved by abandonment of the neighbor's water

right in the same aquifer was determined not to be sufficient evidence of "benefit" or "injury" to petitioner's water right. Again, theoretical "benefit" or "injury" to a petitioner's water right would not be found adequate to override the State's historic standard that the effects of abandonment must be tangible and supported by clear and convincing evidence.

Also in 1993, the Supreme Court overturned an order of the Board of Control, in which the Board found that supplemental supply rights (see page 76), by their statutory nature of only being used on occasions when the original right is unavailable, were not subject to abandonment. In *Hofeldt v. Eyre* the court surprised water officials all over the State in holding that supplemental supply rights, like all other water rights in the State, must be used at least once in every five year period when water in their source is available or risk being eligible for abandonment. The court reasoned that if the source of supply for the original water right has been adequate to supply the full amount of the appropriation for a full five year period, then there must not have been a need for filing a supplemental supply in the first place, and such an unused supplemental supply, when contested, will be found abandoned. No showing of intent or voluntary act of abandonment was necessary to cause the holder of a supplemental supply to lose his water right in that case.

In *Goshen Irrigation District v. State Board of Control* (1996), the court again applied the standard that the only thing that will protect a Wyoming water right from abandonment is actual use of water according to the terms of the permits and certificates at least once in every five year period, even in the absence of intent to abandon. In that case, the court upheld the order of the Board of Control partially abandoning a supplemental supply water right for which no use could be shown in the previous five years when water was available. The potential injury to a later priority reservoir right by having less water to store if the abandonment was unsuccessful was deemed sufficient evidence of injury to confer standing to the petitioner.

Three years later, in *Scott v. McTiernan* (1999), the court found that abandonment must be voluntary for water rights to be set aside in an abandonment action. In that case, the fact that an up-ditch neighbor prevented water from coming down the ditch to the land to which it attached caused the court to find the non-use was due to factors beyond the control of the down-ditch appropriator against whom the abandonment was filed. Although the lower appropriator failed to take affirmative steps for five years, other than requesting his up-ditch neighbor to send water down the ditch, the court found no abandonment since the down-ditch appropriator didn't intend to abandon his water right and his failure to use water was not voluntary.

Water Development

Wyoming Water Development Commission (WWDC) activities continued through the decade of the 1990's, completing dozens of canal rehabilitation, municipal and regional water supply, groundwater, and reservoir projects. In the early 1990's an enlargement of Wyoming's first reclamation dam, Buffalo Bill, was completed, adding another 250,000 acre feet of storage on the Shoshone River Drainage. In 2000, the Greybull Valley (formerly Roach Gulch) Dam on the Greybull River was completed, adding over 30,000

acre feet of new storage to that drainage. And in 2003 the High Savery Dam on Savery Creek was completed adding new storage for the Little Snake River Drainage.

In 1996 the State legislature directed the Water Development Commission and the State Engineer to draft recommendations for updating the 1973 Framework Water Planning Study (see page 80) with new basin planning studies for all the river basins of the State. In 1997, following submittal of their proposal, a pilot project was initiated in the Bear River Drainage, and in 1999 following the results of the pilot planning project, the legislature approved the concept of a statewide effort for updating and modernizing the State Water Plan, authorizing work to begin in the Bear and Green River Basins. The basin plans are the next step in the history of Wyoming water and are scheduled to be completed the first time through in 2005. The planning process in each basin consists of a diverse planning team guided by WWDC personnel and a Basin Advisory Group (BAG) of local citizens who provide ideas, input, guidance and direction to the planning effort. The final product of the effort in each basin is a comprehensive up-to-date detailed report containing demographic, hydrographic, hydrologic, and planning information of every kind concerning all portions of the planning area. These plans, along with the study of such concepts as temporary uses, by-product water resulting from coalbed methane gas production, and water leasing are the beginning points for the next steps in Wyoming's water history.

Part VI—Conclusion

The few hardy souls who inhabited Wyoming Territory at the time of its creation in 1868 could not have dreamed how their territory would look today, the same as we can't envision how it will look 135 years hence. The water history of Wyoming to this point is replete with failed dreams, obsolete industry, dried up plans, and abandoned hopes. But it is also full of prosperous biographies, financial successes, innovative developments, and strong economies all connected in some way to the same water supplies that were here when the territory was created. The "few public men" observed by William Smythe in 1899 "who happen to have found in this [water] line of work their best opportunity for usefulness" have provided the State today with a history of water rights, water law, water use and water development that is rich in heritage and sound in content. The legislators, state engineers, water commissioners, Boards of Control, water development commissioners and engineers, university professors, lawyers, irrigators, compact commissioners, sodbusters, supreme court justices, construction companies, and others who have all had a hand since 1868 in forming the water resource and supply system existing today have done well for Wyoming. The challenge is that those in the future will do as well.

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APPENDICES

APPENDIX A ..... Appropriation, Allotment, and Duty of Water

APPENDIX B .....Water Commissioners

APPENDIX C .....State Board of Control

APPENDIX D ..... Instream Flows

APPENDIX A

APPROPRIATION, ALLOTMENT, AND DUTY OF WATER

When territorial residents first started using water from Wyoming's streams, a determination of how much water they should be allowed for their uses wasn't a concern. The relative scarcity of diverters, the abundance of water, the failure of both the federal and territorial governments to assert public control over water, and the lack of scientific measuring capability, created a situation where an appropriator took whatever water was needed to fulfill the purposes of his use without concern for quantitative measure. Elwood Mead, in *Irrigation Institutions*, defined the practice as "appropriation—to take for one's own use." As more users appeared and the prospect of even more became evident, there arose a glimmer of the necessity for somehow quantifying the amount of water to which an appropriator might be entitled. The Irrigation Act of 1876 made reference to a sort of site-specific allocation guideline when it bestowed on all persons claiming a possessory right or title to land in Wyoming, the right to the use of water for irrigation "to the full extent of the soil, for agricultural purposes." Presumably, territorial legislators saw in this language a matching of the ability of the soil to take up water with the ability of the streams to provide it.

It wasn't until Elwood Mead appeared in Wyoming as Territorial Engineer 12 years later in 1888 that a more finite quantification of allowable appropriation was made. The 1888 legislature proclaimed that the "priority of right to the use of such water shall be limited and restricted to **so much thereof as may be necessarily used and appropriated for irrigation or other beneficial purposes**. . ." In additional language demonstrating that the amount of water appropriated could, indeed, be measured, the legislature proclaimed the cubic foot per second (cfs) to be the legal standard of water measurement in the territory. The limit of "beneficial use" as applied to purposes for which water had been or might be appropriated was recognized as being variable among different uses, and from location to location across the territory. The concept, however, when taken together with the continued authority of water commissioners to "prevent unnecessary waste" provided a fairly understandable instruction as to the measure of an appropriation—the amount of water that could be applied to beneficial use without unnecessary waste.

Still, Territorial Engineer Mead felt a standard measurable allotment of water for irrigation appropriations was desirable to put all irrigation rights on a common basis, and in 1889 set out to determine what that common factor might be. As a result, the 1890 state legislature established a numerical value for the measurement of individual irrigation allotments, being "one cubic foot per second for each seventy acres for which said appropriation shall be made." That value was based on studies made by Mead and discussed in his 1889 Annual Report. His studies had been aimed at determining a "correct standard for the duty of water" in Wyoming irrigation, defining "duty of water" as "the area of land upon which a definite volume of water will successfully produce crops." In seeking a standard value for a statewide duty of water that could be used to enumerate irrigation allotments, Mead searched for a volume of water that could be run

on a field constantly for four months (May through August) and result at the end of that season in an amount of water that provided full maturity of the crop on that field.

He chose for his study during the irrigation season of 1889 a 123.7-acre field of oats and a 7-acre field of potatoes at Wheatland. Installing a continuous flow recorder at the place where water entered the oat field, Mead and the farm manager irrigated the field "as though no record were being kept; there was an abundance of water and in the time of application and the amount used the sole idea was to produce the best results." They also kept a record of rainfall over the four-month season, measuring just over 10 inches from April through August.

Both fields matured as planned, and in back calculating at the end of the season, Mead found the average discharge of water onto the 123.7-acre oat field to have been 3.79 cfs (1 cfs/33 acres), and on the 7-acre potato field to have been 2.5 cfs (1 cfs/2.8 acres) on the days they were being irrigated. Extrapolating those values out to a four-month (122 day) irrigation season, he calculated that the constant flow onto the fields that would have accumulated the same volume would have been 1.32 cfs (1 cfs/94 acres) on the oat field, and 0.031 cfs (1 cfs/229 acres) on the potatoes.

It is critical today to recognize that the engineer and scientist whose work was acclaimed and adopted as the ultimate Wyoming authority, himself reported the use of 3.79 cfs on 123.7 acres (1 cfs/33 acres) as his average discharge necessary to efficiently irrigate his oat crop "to produce the best results." He reports having applied water in the same way Wyoming irrigators have always applied water—in an intermittent manner, charging the field with enough water to saturate the root zone, and then taking water completely off the field until later crop demand required another application, rather than in a continuous even application from the first day of the season to the last. His recommendation to the legislature of the 1 cfs/70-acre standard was based on an "equivalent average" water delivery over the course of the season, intending that, based on real and external conditions, there would sometimes necessarily be more water delivered, offset by periods when no water was delivered, but that all crops could mature with that duty as a seasonal average.

Engineer Mead recognized the limitations of his study to apply to irrigation across the entire state—period of irrigation, rainfall during the season, availability of water from the supplier, type of crop, and losses to seepage and evaporation in transporting the water from the river source to the place of measurement at the entrance to the field were all noted as variables. Additionally, grass and alfalfa crops across the state dwarfed oats and potatoes in acreage amounts. Nonetheless, when the state legislature met several months later in 1890, it adopted statewide what Mead felt to be an adequate average discharge to compensate for those variables in the 1 cfs per 70-acre allotment standard upon which irrigation adjudications have henceforth been based.

Certainly Engineer Mead's use of a May through August irrigation season, and his measurement of over 10-inches of rainfall as derived from measurements in eastern Wyoming are significantly removed from conditions in much of western Wyoming where

six or less inches of effective rainfall often requires irrigation diversion from April through September. Of equal significance is the fact that his water measurements were made at the entrance to the fields he was irrigating, not accounting for seepage and evaporation conveyance losses between the stream source and the fields—a distance that may be as much as 50 miles in some cases in Wyoming. Thirteen years later, Mead's 1903 writings recognized that "little more than one-half of the water turned into the canals" was delivered to the "margin of fields" in a study of a large number of measurements made by the U.S. Department of Agriculture. He further observed that USDA study would likely result in an "important gain to irrigation practice"-- that gain being "the establishment of an approximate standard duty of water when measured at the heads of canals."

The concept that it takes more water at the head of a ditch than is required to make beneficial use on the fields under that ditch was well understood by early Wyoming lawgivers, but finds less understanding among non-irrigators today. That the measure of water rights has always been defined to be "limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes" (1888 laws), and that "beneficial use shall be the basis, measure and limit of the right to use water at all times" (1910 statutes), was a recognition of that fact from the earliest days. The 1890 legislature's attempt to equate an instantaneous allotment rate of 1 cfs/70-acres with "beneficial use" was apparently unsuccessful. Mead's own studies showed it took more water than that on an intermittent, charge-the-field basis, as described above, but it had been found that such an "equivalent acreage" yardstick was workable and desirable for quantifying permits on equal footing and allocating water during times of shortage.

The struggle to relate the standard allotment rate to the amount of water that could be applied to beneficial use for irrigation without unnecessary waste was still going on in 1916 according to the biennial report of State Engineer James B. True. In advancing his proposals for desired new or amended legislation, he noted "Dr. Elwood Mead, the founder of our irrigation laws, joins us in urging the passage of the following law: 'The rate at which water can be used for irrigation purposes shall not exceed 1 cfs for each 30 acres of land irrigated. The total amount of water actually applied to the land shall not exceed 2½ acre feet per acre. . .'" That proposal never became law, but it makes obvious the historic water use practices at the time and shows the State's top water official's desire to have the law comport to practice. In order to finally attach a finite measurable value to the volume of direct flow water needed to make beneficial irrigation use, the legislature in 1945 enacted what is today commonly known as the surplus water law, limiting pre-1945 water right holders to 2 cfs for each 70 acres described on the holder's certificate(s) of appropriation, whenever the stream source is not in "free river" conditions. This volume and legislation conformed to Mead's observations that half the water diverted is delivered to the margins of fields, and provided, forty years later, for his desire for the "establishment of an approximate standard duty of water when measured at the heads of canals."

The Wyoming Supreme Court in 1986, confirmed the retroactivity of this concept to the years prior to enactment of the surplus water law, in dealing with a contract entered in the

year 1900. In that decision, discussing the propriety of a water company diverting more than 1 cfs per 70 acres under the terms of that 1900 contract, the court said

> "We are not informed of any construction of that [1 cfs/70 acres allocation] statute that suggests that more water than 1 cfs per 70 acres of land constitutes waste.. . .[I]t is appropriate to perceive that statutory measure as primarily controlling the allocation of a scarce resource rather than a per se standard for waste. . . The statute by itself does not demonstrate that additional water would not be beneficially used . . ." (State ex rel. Squaw Mountain Cattle Company and Two Bar-Muleshoe Water Company v. Wheatland Irrigation District, 1986).

APPENDIX B

WATER COMMISSIONERS

Settlement along Wyoming's streams occurred over a period of time. The first settler on each stream had the waters of that drainage pretty much to himself and his appropriations were based on his own needs and the beneficial use he could make without thought of interference. However, as soon as the second appropriator on that stream took up his homestead, whether upstream or downstream from the first, the dynamics of the use of that stream changed permanently. On a large river, or over long distances between appropriators on the same stream, the effects of the subsequent (junior) appropriator's uses may not have been particularly noticeable at first. But when those uses occurred in proximity to the first (senior) appropriator's diversions, or when they occurred as voluminous amounts of water, or as more and more appropriators began to divert, particularly on smaller streams, they soon altered historic streamflow patterns and created competition for the available water supply.

At first, territorial officials abstained from involvement in that competition, expecting instead that the appropriators could work out their differences on the basis of prior appropriation as that concept was adopted in the 1869 laws. However, by 1876 the Territorial Legislature had recognized the need for a neutral party to become involved when appropriators began to compete for available flows. That neutral party actually consisted initially of a three-person commission appointed by the county commissioners whenever the necessity arose. The duty of that commission was to simply rotate the available water supply among the interested and affected parties, but it was prohibited from impairing any prior vested right in doing so.

As the need for more intense oversight became more obvious, the 1886 legislature broke Wyoming Territory into eight "irrigation districts" and required the appointment of a single water commissioner to each district. Districts where homestead settlement was occurring rapidly were made smaller than those in the slower-growing, farther reaches of the territory, but were still far greater in size than one commissioner could be expected to cover with any frequency, given the modes of travel available in 1886. For example, "District One" consisted of "all lands irrigated from ditches from the North Platte River and its tributaries, except the Laramie River" from the Wyoming-Nebraska state line upstream to a spot near present-day Orin Junction, plus "Crow Creek, Lone Tree Creek, Pole Creek, Horse Creek, Chugwater Creek, Cheyenne River, Niobrara River and their tributaries." Certainly one lone water commissioner on horseback had little chance of covering that area of approximately 9,000 square miles effectively. But it was not expected that he should do so.

The law prescribed the duty of the water commissioners as being "to divide the water in the natural stream(s) of their districts among the several ditches taking water from the same, according to the prior rights of each," and to "shut and fasten the headgates of any ditch(es) which, in time of scarcity of water make it necessary" based on the priorities of

other rights on the stream. A first reading of that statute, together with the one describing the size of the commissioners' areas of responsibility, would lead to a conclusion that such a duty was impossible. That statute appears to require one water commissioner to conduct those activities on a continuous basis in all parts of his district. However, another section of those 1886 laws provided the explanation of the legislative intent and kept with the general philosophy of minimal police power. Section 8 required that "[s]aid water commissioners shall not begin their work **until they shall be called on by two or more . . . persons controlling ditches** in their several districts **by application in writing . . .** and they shall not continue performing services after the necessity therefore shall cease." The statute then fixed the commissioners' pay at five dollars a day, and limited their work to not exceed 50 days in any one year. They were required to keep an accurate account of the time spent in their official duties and present a bill to their county commissioners for what work was done.

Thus it was clarified that each water commissioner would be appointed by the governor for a two-year term to be on "standby," in case two appropriators would make a call for the service of dividing water on one or more of the drainages in his "irrigation district." If he was not called in writing, he didn't work as water commissioner during his appointment, and "free river" conditions existed in which appropriators took what water they needed without oversight. These provisions were all carried forward into statehood, and were only slightly changed in 1910 when a provision was made for continuous employment of a water commissioner in situations "where the service [of administering water] may be improved." The requirement that a call for regulation be in writing is still present in the law today, even though the water commissioners now work on a monthly salary basis monitoring headgates and keeping records of diversions, rather than just being on "standby."

Early records show that water commissioners only stayed in the position a short time, often only one season, even though the statutes between 1886 and 1907 fixed the tenure of their appointments at two years. Even after the legislature eliminated the two-year limit in 1907, few water commissioners stayed in the position longer than just a very few years until the 1930s and 1940s. As they were appointed to be employees of the respective counties, it was county government that was responsible for compensating them and little information can be found showing that the counties cared much about the positions. Certainly the statutes didn't require the counties to prepare a very large budget for water commissioner services in fixing their pay at five dollars a day and allowing them to work only when called upon, and even then, not to exceed 50 days a year. A 1926 report to the State Engineer by Ambrose Hemingway, the Superintendent of Water Division One, railed for 25 pages about the inadequacies and shortcomings of the water commissioner program at the time, and stopped short only of pleading for the State to take over the compensation of its on-the-ground water officials. Nearly every biennial and annual report after that time lodged similar complaints and pleas, but it wasn't until 1991 that the changeover finally occurred.

Hemingway characterized the position with tongue-in-cheek in the following way: "The ideal water commissioner should have the good common sense expected of the old time

roundup foreman; he should know as much about irrigation law as the Attorney General; he should be ever mindful of the admonition 'trust yourself when all men doubt you, but make allowance for their doubting too;' he should know as much about the duty of water as the State Engineer; he must have the courage of the sheriff; and finally he should be willing to put in 18 hours of consecutive work. . .and call it a day." Because of the meager compensation and those demands for knowledge, applicants for the positions were not plentiful, and generally were local irrigators or water right holders themselves who took the position to gain the few extra dollars it could provide. They were rarely skilled in water measurement science or technique, and rarely stayed in the position long enough to become completely or professionally familiar with all the water rights, ditches, reservoirs, and administration records necessary to regulate their assigned drainages to the letter of the law. Nonetheless, the one attribute that appears consistently in reports about them is that they were persons of high integrity who generally gave the State their best and most sincere efforts during the terms of their appointments.

Although the requirement that each ditch have a proper measuring device had been in the law in 1888, by 1890 that had been changed to where the superintendent held discretionary authority as to whether he chose to order such installations. Historical records do not show how widespread the superintendents had issued orders for measuring devices, but State Engineer Adrian J. Parshall provides a hint as to conditions in 1914, when he remarked in his biennial report "At least two-thirds of the water used in Wyoming is not measured out to the consumer, and scarcely any is measured at all accurately."

In the late 1930s, two hydrographer-commissioners, one full-time and one part-time, were finally employed by the State Engineer, both in Water Division One. These officials were the first professional commissioners to have technical water measuring skills and actually had the ability to regulate their river on the basis of measured streamflows and diversions. That corps of hydrographers grew to five by 1952, being four in Water Division One and one in Water Division Three, with one more being added for Water Division Two by 1956. By 1958 each of the four water divisions finally had its own hydrographer as Division Four was able to hire one for the Bear River. Still, in that same year, the Superintendent of Water Division Four articulated the situation as it had existed and been criticized for the previous 70 years: "At present salaries it is not possible to get men to make proper distribution of water, as very few are qualified to make stream measurement by current meter or other methods. Usually a farmer or rancher, without proper training in hydrography must be relied upon to divide water among his neighbors, which usually proves a thankless job."

Thus, with the exception of Water Division One, it wasn't until the 1960's that accurate and professional water measurement with the intent of proper administrative priority regulation when someone "called the river" finally became possible on the major rivers of the State. When such a call was made by a senior appropriator whose water right was being shorted, the hydrographer-commissioner would first be obligated to make measurements or consult gaging stations to determine how much water was available in the stream for distribution to the water right holders from that source. He then would

begin a systematic regulation of headgates in reverse order of priority until he had shut off enough water from junior priority users to satisfy the calling senior(s). As the waning streamflows continued to recede, he would continue to curtail additional junior rights to keep the senior calling rights satisfied, or until the calling senior notified the commissioner that the call was no longer necessary and curtailment of junior rights could cease.

Today, nearly all drainages in the state have skilled and professional hydrographers. When the 1991 legislature, 101 years after statehood, finally provided for state employment of all such officials, the requirement for a college degree in hydrology, hydrography or a related field, gave the superintendents, the State Engineer, and the residents of the State the confidence that water supplies could henceforth be properly regulated by persons with adequate skills and background. Still, the necessity recognized in territorial days that these officials be of high integrity remains an important qualification today, as the competition for water among appropriators never ceases to manifest itself in creative requests for personal attention which often do not recognize the commissioners' duty to the entire drainage. Accordingly, the water commissioners continue to be the basic unit of a sound water administration system today, just as they were in 1876.

APPENDIX C

STATE BOARD OF CONTROL

No state in the country can boast a more effective administrative body for carrying out its constitutional and statutory water provisions than Wyoming. In creating the Board of Control, the State constitution provided for a five-man quasi-judicial tribunal whose duty is to "have supervision over the waters of the State, their appropriation, distribution and diversion, and of the officers connected therewith." The Board is composed of the State Engineer as president, and the superintendents of the four Water Divisions. Although the 1891 statutes originally required that two meetings a year be held to conduct the business of the Board, by 1977 the workload had increased to the point that it now takes four meetings a year, with infrequent special meetings also being called. The Board meets quarterly in February, May, August, and November, and meetings usually last nearly a full week. As the superintendents each live in their respective water divisions, the Board of Control employs a staff in Cheyenne, to organize, catalog, house, process and archive the business of the Board. The administrator of that staff is also known as the Board's Adjudication Officer, and has among his crucial duties, the co-signing of adjudication certificates and preparation of tabulation books and their updates.

In creating the Board of Control, the delegates to the 1889 Constitutional Convention, upon declaration that the waters of the State are property of the State, sought to create a body with consummate authority. Delegate Melville C. Brown of Albany County articulated the idea as follows:

"We propose here to appoint a board of control, and for what purpose? We say that the State shall be the owner of this water, and shall have the right to control it. . .When we appoint a board of control to manage this water system that we say belongs to the State, let us give them authority to control it for the highest and best uses of the people of the State, and don't fix that control by saying that appropriation shall settle the matter. Leave it to the Board of Control to say what equities enter into this matter of the use of water, and let them consider every question that arises in connection with its appropriation, and then say under all the equities of the case who shall be entitled to the use of that water, and not say that the matter of prior appropriation shall settle it."

History shows the Board of Control to have always been composed of thoughtful individuals of knowledge and high integrity. The requirement in the 1907 statutes that superintendent candidates successfully pass a written exam separates these positions from other governor appointees, and guarantees competence. In the 114 years of its existence, the Board of Control has adjudicated over a hundred thousand water rights and decided tens of thousands of petitions for amendments to water rights. In relation to the number of deliberative actions taken, appeals of the Board of Control's decisions to the district and supreme courts are scant, and, while some of its decisions have been reversed by those courts, more have been upheld without modification.

The structure of the Board was designed as a classic checks and balances system by the State's founders. To avoid abuse of power, many decisions of the State Engineer were allowed to be appealed to the full Board of Control if desired. Decisions of the Board could be further appealed to the district court. Conversely, an appeal from the order of a Water Division Superintendent acting alone on a matter in his water division could be had to the State Engineer, with his decision on the matter also appealable to the district court.

As established in the first State laws, the Board continues today to adjudicate newly permitted water rights under substantially the same procedures as outlined in 1891. This consumes a sizable portion of two of the four meetings each year. Additionally, when any holder of an adjudicated water right desires to change its point of diversion, place of use or type of use, or file abandonment against other water rights, the Board requires a petition seeking the same be submitted to the Board staff in Cheyenne and docketed for action by the Board at its regularly scheduled meetings. If the matter requires a public hearing, the Board may refer it for such hearing to the Superintendent in whose water division the water rights occur. The statutes empower the Superintendents to issue oaths and subpoenas and perform other "quasi-judicial" functions in preparing and conducting the hearing. Although a Superintendent may hold a hearing on behalf of the full Board, he is not authorized to issue a decision on the matter himself, but must, instead, present the transcript and exhibits for deliberation by the entire Board, which then votes and issues a proper order of the majority decision on the matter. Debate among the members is often lengthy and full of disagreement, but a Wyoming water right holder can be assured that, at the end of the debate, a well-reasoned and thought-out decision will be issued based on the law and the merits of the matter.

In 1934, the State Attorney General opined "When any matter involving the waters of the State is not regulated or covered by statutory law, the State Board of Control and the State Engineer have wide discretion and powers in the matter. . .[if] the Wyoming statutes on water rights and Wyoming case law are extremely sparse, [m]uch depends on the discretion of the State Board of Control."

The Wyoming Supreme Court has often reinforced the value of the Board of Control to Wyoming's system of water administration in saying,

> "The Board of Control should be utilized to settle water matters because of its peculiar knowledge and expertise as to the technicalities involved, as well as the realities pertaining to water use" (Kearney Lake v. Lake DeSmet, 1970),
>
> "This court has encouraged the use of the board and mentioned 'the ludicrous spectacle of learned judges solemnly decreeing water rights'" (Louth v. Kaser, 1961),
>
> "The Board of Control is better equipped to handle matters relating to water" (White v. Wheatland Irrigation District, 1966),

> "The Board of Control is no doubt better equipped than a court to determine such intricate and involved matters" (Laramie Rivers Company v. LeVasseur, 1949),
>
> "This court has always deferred to the State Board of Control with respect to factual matters because of the Board's peculiar knowledge and expertise, as well as the realities and records pertaining to the use of water" (Basin Electric Power Cooperative v. State Board of Control, 1978).

The Board of Control is the basic authority in, and has been an innovator in, deciding such difficult concepts as are implicit in changes to preferred use, changes in point of diversion, abandonment, and changes in place of use when the parties involved have much at stake financially, politically and with regard to their water rights. It is the duty of the Board of Control to draw on its own precedents and history in maintaining consistent and proper disposition of matters coming before it, and provide thorough and well-reasoned orders upon its decisions. It can never be said that the Board of Control does not put extreme and considerate effort into its deliberations on any issue before it. As the parties coming before the Board are strong in the advocacy of their often opposing positions, it is the neutrality and impartiality of that historic body that is necessary to take into account the effects of any petition on the State as a whole, ignore emotionalism, and issue an opinion based on the facts of the law it upholds.

Members of the Wyoming State Board of Control 1890-2002

A study of the makeup of the Board of Control through the years of this history provides an interesting insight into political activities in the State. In the early years of the Board of Control, it appears the Governors of the State adhered to somewhat of a four-year appointment cycle in maintaining a degree of continuity on the Board. Recognizing that such a Board operates best by overlap of some of the terms of experienced Superintendents, others were replaced at regular intervals. Occasionally (1899, 1911, 1919, and 1939) a clean sweep was made with the appointment of an entire new Board all at once, an occurrence that must have been daunting to the new appointees. For a period during the 1920s, 30s and 40s, State Engineers and Superintendents changed nearly every four years. On occasion, Superintendents who had previously served on the Board were reappointed after being off for several years. Only one Superintendent, L. C. Bishop, succeeded to the office of State Engineer, likely because most Superintendents, while well qualified in their own rights, do not possess the credentials of Registered Professional Engineer which the statutes mandate for that esteemed high office.

		Superintendent			
Year	**State Engineer**	**Div. I**	**Div. II**	**Div. III**	**Div. IV**
1890	Elwood Mead	J. A. Johnston	Edward Gillette	N.H. Brown	C.H. Priest
1891	"	"	W.J. Clarke	"	Wm. Hinton
1892	"	"	"	"	"
1893	"	"	Jack Dow	"	A. Chamberlain
1894	"	"	"	"	"
1895	"	"	Edward Gillette	"	C.H. Priest
1896	"	"	"	"	"
1897	"	"	"	"	"
1898	"	"	"	"	"
1899	Fred Bond	W.M. Gilchrist	C.B. Holmes	B.B. Morton	O.A. Hamilton
1900	"	"	"	"	"
1901	"	"	F.H. Stotts	"	"
1902	"	"	"	"	"
1903	Clarence T. Johnston	Pitt Covert	"	Lou Blakesley	"
1904	"	"	"	"	"
1905	"	"	"	"	Walter Dunton
1906	"	"	"	"	"
1907	"	"	"	"	"
1908	"	"	Harrison Fulmer	"	"
1909	"	"	"	"	"
1910	"	"	"	"	Lloyd Thomas
1911	Adrian J. Parshall	Frank Knittle	C.W. Stroud	G. Ralph Hoover	C.E. Howell
1912	"	"	"	"	"
1913	"	"	"	"	"
1914	"	"	"	"	"
1915	James B. True	"	"	Ole Robertson	Robert E. Carron

		Superintendent			
Year	**State Engineer**	**Div. I**	**Div. II**	**Div. III**	**Div. IV**
1916	James B. True	Frank Knittle	C.W. Stroud	Ole Robertson	Robert E. Carron
1917	"	"	James Scrivner	Wm. C. Snow	"
1918	"	"	"	"	"
1919	Frank C. Emerson	L.C. Bishop	C.W. Stroud	Lou Blakesley	M.I. McQuaig
1920	"	"	"	"	"
1921	"	"	"	"	"
1922	"	"	"	"	"
1923	"	"	N.V. Kurtz	H. R. Armeling	O.O. Davis
1924	"	"	"	"	"
1925	"	"	"	"	"
1926	"	"	"	"	"
1927	John H. Whiting	"	G.C. Morrow	Charles A. Welch	L.D. Tanner
1928	"	"	"	"	"
1929	"	"	"	"	"
1930	"	"	"	"	"
1931	John A. Whiting	"	"	"	"
1932	"	"	"	"	"
1933	Edwin W. Burritt	"	"	"	"
1934	"	"	"	"	David P. Miller
1935	"	Ambrose Hemingway	"	Mark N. Partridge	"
1936	John D. Quinn	"	"	"	"
1937	"	"	"	"	"
1938	"	"	"	"	"
1939	L. C. Bishop	S.S. Sharp	Clyde R. Wood	Thales Smith	Emil Gradert
1940	"	"	"	"	"
1941	"	"	"	"	"
1942	"	"	"	"	"
1943	"	Ambrose Hemingway	Ed J. Johnson	Guy Higby	David P. Miller
1944	"	"	"	"	"
1945	"	"	"	"	"
1946	"	"	"	"	"
1947	"	"	"	"	"
1948	"	"	"	"	"
1949	"	"	Clyde R. Wood	"	"
1950	"	"	"	"	"
1951	"	W.J. Knowlton	"	Thane Baldwin	"
1952	"	"	"	"	"
1953	"	"	"	"	Emil Gradert
1954	"	"	"	"	"
1955	"	"	"	Thales Smith	"
1956	"	"	"	"	"
1957	Earl Lloyd	Ben LeVasseur	Charles C. Lawrence	"	"
1958	"	"	"	"	"

		Superintendent			
Year	**State Engineer**	**Div. I**	**Div. II**	**Div. III**	**Div. IV**
1959	Earl Lloyd	Ben LeVasseur	Charles Lawrence	DeVere Hinckley	David P. Miller
1960	"	"	"	"	"
1961	"	"	"	"	"
1962	"	"	"	"	"
1963	Floyd A. Bishop	"	"	Kenneth Bower	John Teichert
1964	"	"	"	"	"
1965	"	Earl Michael	William Long	"	"
1966	"	"	"	"	"
1967	"	"	"	"	"
1968	"	"	"	"	"
1969	"	"	"	"	"
1970	"	"	"	"	"
1971	"	"	"	"	"
1972	"	"	"	"	"
1973	"	"	"	"	"
1974	George L. Christopulos	Earl Michael	Paul Kawulok	Ken Bower	John Teichert
1975	"	"	"	"	"
1976	"	"	"	DeVere Hinckley	"
1977	"	"	"	"	"
1978	"	"	"	"	"
1979	"	"	"	Tommie J. King	"
1980	"	"	"	"	"
1981	"	"	"	Craig Cooper	"
1982	"	"	"	"	"
1983	"	"	"	"	"
1984	"	"	"	"	"
1985	"	"	"	"	"
1986	"	"	"	"	"
1987	Gordon W. Fassett	"	Michael Whitaker	"	"
1988	"	Wm. D. Jones	"	"	"
1989	"	"	"	"	"
1990	"	"	"	"	"
1991	"	"	"	"	"
1992	"	"	"	"	"
1993	"	"	"	"	Jade Henderson
1994	"	"	"	"	"
1995	"	"	"	"	"
1996	"	"	"	"	"
1997	"	"	"	"	"
1998	"	Randall Tullis	"	"	"
1999	"	"	"	"	"
2000	"	"	"	"	"
2001	Patrick Tyrrell	"	"	"	"
2002	"	"	"	Don Englert	"

APPENDIX D

INSTREAM FLOWS

The concept of securing an appropriation and water right for water not diverted, but rather left in its original channel, has generated thorough investigation and study in Wyoming. As discussed at length in the text of this History, the foundations of the Wyoming water use system, in separating out who could be identified as an appropriator and who could not, required diversion of water from the stream channel as an element of proof of appropriation. The word "appropriate," after all, means "to take for one's own use" (see Elwood Mead's *Irrigation Institutions*, Chapter IV, The Doctrine of Appropriation).

The section of this History entitled Litigation 1890-1896 (page 30), describes that the Wyoming Supreme Court in 1896 required four elements of proof to demonstrate to State officials that an appropriation had been made and to avoid frivolous or speculative attempts to control the State's water: 1) an intent to appropriate, (flood water running naturally over the surface of a field, for example, did not qualify as an appropriation since there was no intent on the part of the user to appropriate—it just happened); 2) an open physical demonstration of the intent, such as investing capital in surveying a ditch or building a diversion works; 3) reasonable diligence aimed at getting the water claimed in a fairly urgent manner; and 4) application of the water to a beneficial use. Further, the doctrine of water use which recognizes rights to water left in its channel, the riparian doctrine, was specifically rejected in Wyoming in clear language by the court in that 1896 case (*Moyer v. Preston*). That rejection was recognized and specifically upheld by the U.S. Supreme Court in both *Wyoming v. Colorado* (1922) and *Nebraska v. Wyoming* (1945).

For the next 85 years, every water right application in Wyoming was measured against those four criteria. All appropriators and potential appropriators were held to the same standards, and if they failed in any of those requirements, their application was subject to cancellation. Municipal, domestic, railroad, culinary, manufacturing, industrial, livestock, mining, milling, irrigation, steam generation, reservoir storage and other water users were all treated the same way in regard to their obligations to demonstrate those elements of proof of appropriation.

Thus, in the 1970's, when the concept of appropriating water for instream flows for fisheries purposes in Wyoming became popular in some sectors, a conundrum was created with existing law and historic practice. Where the thousands of previously authorized Wyoming water right holders had been required to divert water as an element of the proof of their appropriation, recognition of instream flows as an appropriation would mean just the opposite. Where the thousands of previously authorized Wyoming water right holders had been required to expend capital as a showing of diligence to prove the seriousness of their intent, no such investment would be required of the appropriator of an instream flow right. Where the thousands of previously authorized

Wyoming water right holders had been required to show the Water Division Superintendent a crop of hay, or the generation of power, or a public water supply system, as proof that the water had been used beneficially, the appropriator of an instream flow right would not be required to make a showing of any such kind. Additionally, after five decades of negotiations of interstate compacts and countless State expenditures on litigation with downstream states aimed at keeping as much water in Wyoming as possible, the prohibition against out-of-channel diversion implicit in providing instream flows appeared to validate sending some of that hard-earned water straight on down the rivers to other states. Further, with specific rejection of the riparian doctrine of water law in Wyoming having occurred consistently through history, the acceptance of instream water rights would be to embrace a philosophy the courts had regularly disallowed.

It took over ten years of study of those departures from historic Wyoming water law for the legislature to work within the historic integrity and evolution of the statutes to enact an acceptable instream flow law in 1986. The result contained parallels sculpted to the extent possible to the historic elements of intent and diligence by requiring a permit and scientific studies, and physical demonstration by requiring the Game and Fish to expend capital on installation of measuring devices to facilitate administration by the water commissioner. It also addressed the concern over loss to the State of compact allocations by prohibiting instream flow permits from sending more water out of state than is required to meet downstream compact allocations. However, although it deems that beneficial use has automatically been made simply by the lapse of a period of 30 days from the date the State Engineer approves the permit, the amount of water required for that historic element of proof has been found to be difficult to quantify. For this reason, the initial feasibility studies are critical for the State Engineer's use in conducting as much analysis as possible, prior to acting on a permit that thereafter may be virtually unabandonable.

The law is found in Wyoming statutes 41-3-1001 through 1014, and describes a process wherein the State of Wyoming, through the Wyoming Water Development Commission (WWDC), can be the only legal applicant for an instream flow water right. Accordingly, "[n]o person other than the State of Wyoming shall own any instream flow water right." Even though the law provides a mechanism by which a private holder of an existing State water right can gift or transfer his or her rights to accomplish desired instream flows, the State must be the recipient of the gift. This provision is consistent with conventional legal thought as expressed by A. Dan Tarlock: "[I]nstream uses differ from water rights applied to the more traditional uses in that the public is the real beneficiary of the dedication. . . . Because the benefits of instream uses inevitably redound to the public rather than the claimant, only public rather than private bodies should be permitted to claim water for instream uses." (The Recognition of Instream Flow Rights: "New" Public Western Water Rights. 25 Rocky Mountain Mineral Law Institute 24-1, 24-3. 1979).

Changes to instream flow from another use are authorized by the statute. As with all other changes in use of Wyoming water rights, a change to instream flow must come about as a petition to the State Board of Control. The Board of Control disposition of the petition is prescribed by the change-in-use statute, 41-3-104, and prevents the Board from

granting any petition in which the new use would exceed the amount of water historically diverted under the existing use, exceed the rate of historic diversion under the existing use, increase the historic amount of consumptive use under the existing use, or decrease historic return flow amounts. The Board of Control must also consider such factors as economic loss to the community and State if the historic use is discontinued, the extent to which such economic loss is offset by the new use, and whether other sources of water are available for the new use. The statute requires that the change must be to a preferred use, thus making instream flows, by definition, a preferred use. However, since irrigation, for example, is a non-preferred use, a change from irrigation to instream flow, if found not to be satisfactory, could not presently be undone by a change back to irrigation.

Individuals not wishing to turn their water rights over to the State, or to make a permanent irreversible change of their historic water rights to instream flow, have sought a methodology for making such a change on just a temporary basis. This concept has been heavily debated and has difficulty overcoming the basic tenets of the appropriation doctrine in which water historically not diverted for a senior priority is, by law, water belonging to the next most junior for his or her diversion. However, there is no law requiring that an appropriator whose irrigation water right is in priority must divert it—if he or she chooses to not irrigate and instead leave the water for that right in the stream where it passes his or her headgate, they may do so without risk of abandonment as long as they don't allow a five-year period of non-use of the original right to lapse. Similarly, there is no law prohibiting a number of neighboring appropriators from agreeing to an arrangement to resist diverting from a stream where it courses through their contiguous properties if the priorities of their irrigation rights are such that an arrangement of that nature would create a desired instream flow, as long as other appropriators on the same stream who are not party to the arrangement are not affected. Such arrangements can, in effect, create the "temporary instream flows" being sought in some circles with no need for new legislation or amendment to any statute, and without any risk to existing water rights.

Another key requirement of the instream flow statute is that the permit applications are made by stream segment, as recommended to the Wyoming Water Development Commission by the Wyoming Game and Fish. As of 2002, some 82 stream segments had applications for permits filed for instream flow. Like all other water right permits, each has its own priority date logged into the records of the State Engineer, and is recognized as a valid demand on that stream as of the date of its priority. Because of the differences between instream flow rights and all other types of appropriative rights in Wyoming, the process of finalizing those rights takes considerable time. The State Engineer, in evaluating the permit applications, must take into account all the impacts of the action as directed by the statute, and, unlike all other permit applications, address public input. The Water Division Superintendents, in upholding their duty to equally guard all the water rights on the streams of interest, must, as always, be deliberate and considerate in evaluating the elements of proof of appropriation when initiating proof on these unconventional rights. And the Board of Control must carefully consider adjudication of

instream flow proofs in the same neutral and thorough manner as all other rights it has adjudicated in the past 110 years.

All have been criticized in recent years for the amount of time it takes to adjudicate instream flow water rights. Although over 80 permit applications have been filed by the Wyoming Game and Fish Department, less than half have been approved, and less than 10 have been adjudicated. These numbers have been portrayed as somehow a threat to the security of the permit filings, or perhaps indifference, on the part of the State Engineer, Water Division Superintendents and Board of Control. They are not. Because instream flow rights do not require a diversion and because the act of beneficial use is, by statute, automatic, there is no threat that delay in adjudication will affect the integrity of the permit application in any way. The priority date on the permit application holds its place in line and more recent filings for other uses requiring a diversion in the same area will always be junior and subject to the instream flow. Similarly, a concern that instream flows must urgently be granted on the streams of concern before some act of dewatering occurs is generally unfounded. Present day large-scale diversion proposals are few and well-regulated by state and federal requirements for mitigation. The possibility that some new unknown, unseen project of such a size that it would impact a stream without safeguards for instream flow is patently remote. All state and federally-funded water development projects in the State today have a component that recognizes in-channel flow, either in the form of reservoir releases or natural flow bypasses.

A deliberate and thoughtful approach was taken to integrate instream flow water rights into Wyoming's historic and orderly system of water right allocation. Extensive compromise from opposing ideas on the issue of instream flows went into the original legislation and no sector of the Wyoming economy got everything it wanted in that historic law, but all got a workable product. Nonetheless, human nature seems to encourage continued pressure to get more. Wyoming legislators since territorial days have correctly been guarded and cautious about amending the water laws, and the results of that caution have continuously provided every resident of the State with an adequate water supply for their basic needs, and for most of their basic wants, while keeping the covetous hands of downstream states at bay. It is incumbent upon the State's citizens to recognize that legislation enacted after as much process and compromise as went into the instream flow law should not lightly be disregarded or discarded, and to insure that any changes proposed in that law are in the best interest of the entire population of all sectors of the state.