

Wyoming Water Law



LARRY MACDONNELL
JUNE 14, 2018
PINEDALE, WYOMING

The Wyoming Model



Elwood
Mead

Prior Appropriation



- Possession of water (appropriation)
- Combined with beneficial use
- Establishes a continuing right of use
- Senior to all subsequent uses (prior)

Wyoming always a prior appropriation jurisdiction



- Common law riparian rights do not apply
- Affirmed by territorial legislature
- Expressly provided in Wyoming Constitution (Art. VIII, § 3: “Priority of appropriation for beneficial use shall give the better right.”)

Water the property of the state



- “The water of all natural streams, spring, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.” WY Const. Art. 8, §1
- State serves as trustee of the public resource:
“Water being essential ... its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.” Art. 1, §31

State supervision of appropriation



- Party/entity interested in use of state's water must make application to State Engineer
 - Name/address of applicant
 - Nature of proposed use
 - Location and description of works
 - Time to begin construction
 - Time required for completion
 - Time until water applied to beneficial use

Review and approval



- “It shall be the duty of the state engineer to approve all applications made in proper form, which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights or be otherwise detrimental to the public welfare.” Wyo. Stat. 41-4-503
- Priority date relates back to application date

Review and approval



- “But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application and refuse to issue the permit asked for.”
§41-4-503
- Construction begins once the permit issues

Time limits



- Completion of construction within 5 years
- Provide written notice of completion and written notice of application of water to beneficial use
- Final proof of appropriation within 5 years of completion of construction
- Extensions permissible upon request

Certificate of appropriation



- Evidence of actual beneficial use in accordance with terms of the permit ultimately reviewed by the Board of Control
- If satisfied that use has been “perfected,” issues a certificate of appropriation
- A perpetual right of appropriation so long continued beneficial use

Beneficial use



- “the basis, the measure and limit of the right to use water at all times”
- Many types of uses recognized by statute and by State Engineer’s Office (SEO)
- Quantity
 - Irrigation: 1 c.f.s. per 70 acres
 - Duty of water (amount actually necessary)

Preferred Uses



- Hierarchy: drinking water, **municipal** uses, steam engines, culinary, laundry, bathing, refrigerating, steam and hot water heating, steam power plants, **industrial**, **irrigation**, water turbines
- Higher uses can condemn lower uses
- Change of use procedure

Supplemental supply water right



- Authorizing diversion and use of water from a source of supply different than the one originally used
- Use from both sources still limited to 1 cfs/70 acres

Surplus water



- Statutorily authorizes all water rights with priority date of March 1, 1945 or earlier to divert up to an additional 1 cfs/70 acres of water in stream in excess of that required by all existing pre-1945 rights

Excess water



- Provided a similar right to divert and use additional water to all rights established between March 1, 1945 and March 1, 1985

Use of water outside the state



- Special application to the State Engineer requiring comprehensive consideration of 10 statutorily-identified considerations
- Hearing required
- SE final opinion within 120 days of hearing
- Legislative approval if 1,000 af/yr or more

Forfeiture/abandonment



- Failure to put water to beneficial use for five or more consecutive years
- Final determination made by the Board of Control
- Action can be brought by junior appropriator who would benefit or by the State Engineer
- Not favored under Wyoming law

Changes of point of diversion



- If right certificated, application to Board
- If right permitted, application to SE
- Written approval of intervening appropriators
- No injury to other appropriators

Changes of purpose or place of use



- File a petition with the Board
- Cannot increase the quantity of water historically diverted, rate of diversion, or historic consumptive use or decrease historic amount of return; no injury
- Board also may consider economic effects

Temporary changes



- For up to two years
- Application to State Engineer
- Assumed 50% consumption for direct flow irrigation rights; can be adjusted
- No injury; right of curtailment

Storage water



- Application to SE for permit to construct reservoir and beneficially store and use unappropriated water
- Owners may lease water; sell a share of the storage capacity with the right to use water; or users may obtain a secondary permit from the SE based on agreement with the owner for the use of storage water
- Division superintendent to make report of all annual uses

Groundwater



- Definition: any water, including hot water and geothermal steam, under the surface of the land or the bed of any stream, lake, reservoir, or other body of surface water, including water that has been exposed to the surface by excavation such as a pit
- Also water from springs flowing less than 25 gallons/minute used for domestic or stock purposes
- By-product water from mining/oil & gas if put to a beneficial use

Wells



- Definition: any artificial opening or excavation in the ground, however made, by which underground water is sought or through which it flows by natural pressure or is artificially withdrawn
- Construction of well requires permit from SE
- Regulations governing well construction

Permitting



- Application form with required info
- To be granted “as a matter of course” so long as water placed to beneficial use and well is adequate
- May be denied if not “in the public’s water interest”
- Existing water levels/pressures not protected

Process



- One year to start construction
- Three years to complete construction
- When water placed to beneficial use, the priority date relates back to permit application date
- Permittee may seek adjudication

Change of location/use



- Well location may be changed to another location within the same aquifer without loss of priority; cannot increase quantity; no injury
- Can use same procedures as for surface water to make a change of use

Groundwater control areas



- Established by Board of Control
- Where (i) use equals/exceeds recharge; (ii) groundwater levels declining; (iii) user conflicts; (iv) waste of water; (v) other
- Local advisory boards

Corrective controls authorized



1. Closing area to further appropriation
2. Determining permissible withdrawals and allocating uses
3. Reducing or curtailing pumping
4. Rotating uses
5. Well spacing requirements

Managing interference



- Well pumping may cause impacts on senior surface water or groundwater withdrawals
- Complaint filed with State Engineer
- SE makes investigation and report
- Board makes final determination

Physical interconnection



- Where sources of water are in fact so interconnected as to constitute a single source of supply, priorities are to be integrated
- Presumption is no interconnection
- SE can use corrective controls as necessary to manage interconnected uses

Instream flows



- Appropriation of unappropriated water in channel (no diversion) to maintain or improve existing fisheries a beneficial use
- Storage of water for recreational pool or for release to support existing or new fishery
- Within an identified segment of stream

Process



- Game and Fish Commission initiates
- Water Development Commission files the application on behalf of State; feasibility study
- SE may conduct additional studies and must hold public hearing
- State may also acquire existing rights and change to instream flow

Interstate rivers



- Wyoming a headwaters state
- Snake, Bear, Green, Big Horn, Tongue, Powder, Yellowstone originate in Wyoming; North Platte originates in Colorado
- Shared uses allocated by interstate compact or equitable apportionment decree

Interstate Compacts



- Authorized between states under U.S. constitution, with congressional approval; federal and state law
- Wyoming party to 6 interstate compacts, including the Colorado River Compact and the Upper Colorado River Basin Compact

Colorado River Compact



- Negotiated among 7 states in 1922
- Divided the basin at Lee Ferry in northern Arizona, authorizing beneficial consumptive use of 7.5 million acre-feet each in the Upper and Lower basins, plus an additional 1 maf in LB



Colorado River Compact



- UB non-depletion obligation to ensure that 75 maf passes Lee Ferry in consecutive 10-year periods; not allowed to withhold unused water
- UB also obligated to provide half the annual required water delivery to Mexico

Upper Colorado River Basin Compact



- Negotiated among 4 UB states in 1948
- Primarily concerned with apportioning use of the UB's allocation under the 1922 Compact
- Colo: 51.75%; NM: 11.25%; Utah: 23%; Wyo: 14%

Upper Basin Compact



- Established the Upper Colorado River Commission
- Specified duties including determining the extent of curtailment of consumptive use in each UB state if necessary

Thank you!

A background image of a mountain range at sunset. The sky is a gradient of orange and yellow, while the mountains are silhouetted in various shades of blue. The quote is centered over this image.

**Whiskey is for drinking;
water is for fighting over.**

Mark Twain

 quote fancy