

Marketing the Finest Ranch & Recreational Properties

A Summary: Water Rights in Wyoming

BY HARRIET M. HAGEMAN AND KARA BRIGHTON, HAGEMAN & BRIGHTON, P.C.

The purpose of this article is to provide a brief overview of a few basic principles for using and protecting water rights, and to identify additional resources where more in-depth information may be found. While this article focuses primarily on water ownership, use and management in Wyoming, we will also address a few aspects of Colorado water law.

Constitutional Foundation

The drafters of Wyoming's Constitution recognized the importance of water: "Water being essential to industrial prosperity, of limited amount, and ease of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all of the various interests involved." *Wyo.Const. Article 1, § 31.*

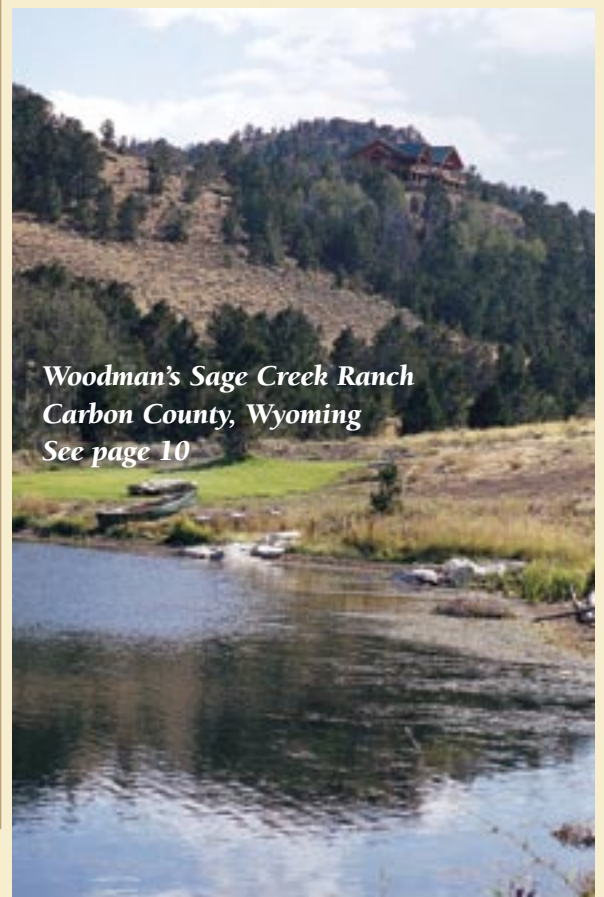
Ownership of water in Wyoming is addressed in Article 8, § 1: "The water of all natural streams, springs, lakes or other collections of still water within the boundaries of the state are hereby declared to be the property of the state." Colorado's Constitution addresses ownership from a somewhat different perspective: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public,

Continued on page 7

Yankee Boy Basin
Ouray, Colorado
See page 8



Woodman's Sage Creek Ranch
Carbon County, Wyoming
See page 10



and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.” *Colo.Const. Article XVI, § 5.*

Both Wyoming and Colorado adhere to the “first in time, first in right” form of water administration:

- “Priority of appropriation for beneficial uses shall give the better right.” *Wyo.Const. Article 8, § 3.*
- “Priority of appropriation shall give the better right as between those using the water for the same purpose. . . .” *Colo.Const. Article XVI, § 6.*

In Wyoming, it is the Board of Control (BOC), composed of the State Engineer and superintendents of the four water divisions, that is tasked with “supervision of the waters of the state and of their appropriation, distribution and diversion. . . .” *Wyo.Const. Article 8, § 2.* In Colorado, the water courts figure prominently in carrying out these tasks.

Water Rights in Wyoming

Surface Water Rights

In order to obtain a surface water right you must first file an application with the Wyoming State Engineer’s Office (WSEO). *Wyo.Stat. § 41-4-501.* “No appropriation shall be denied except when such denial is demanded in the public interest.” *Wyo. Const. Art. 8, § 3.*

The “nature of a water right” in Wyoming is described in *Wyo.Stat. § 41-3-101*: “A water right is a 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. . . . Beneficial use shall be the basis, the measure and limit of the right to use water at all times. . . .”

A water right in Wyoming is limited to 1 cubic foot per second (cfs) per seventy (70) acres. A person may obtain a “supplemental” supply from another source, if necessary, to obtain sufficient water to provide the 1 cfs

per 70 acres. *Wyo.Stat. § 4-3-113.* Pre-1945 rights may divert a second 1 cfs per 70 acres in a “surplus” water situation. *Wyo.Stat. § 41-4-318.* Pre-1985 rights may divert a second cfs per 70 acres in an “excess” water situation. While “surplus” and “excess” conditions are not defined by statute, the ability to divert this water depends upon (a) how much water is in the stream and (b) priority (i.e. how many appropriators have senior rights).

In Wyoming a water right runs with the land/property to which it is attached: “Water being always the property of the state, rights to its use shall attach to the land for irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made for which the right receives public recognition. . . .” *Wyo. Stat. § 41-3-101.* A water right may be severed from the land either through an abandonment proceeding or by a temporary or permanent transfer (changes of use and place of use).

Wyo.Stat. § 41-3-401 applies to the situation whereby a landowner with an equal or junior water right from the same source of supply seeks abandonment of a water right that is either equal to or senior in priority. *Wyo.Stat. § 41-3-402* defines the State Engineer’s authority to seek abandonment of a water right (a procedure rarely invoked in Wyoming history). “Where the holder of an appropriation of water from a surface, underground, or reservoir water source fails, either intentionally or unintentionally, to use the water therefrom for the beneficial purposes for which it was appropriated . . . during any five (5) successive years, he is considered as having abandoned the water right and shall forfeit all water rights and privileges appurtenant thereto.” *Wyo.Stat. § 41-3-401(a).*

A water right may also be severed from the land to which it is attached through either a permanent or

Continued on page 9

Niobrara Headwaters Ranch Lusk, Wyoming See page 9



MARKETING
THE FINEST
RANCH &
RECREATIONAL
PROPERTIES



Stary Double T Wildlife Ranch
Crook County, Wyoming
See page 8

temporary transfer pursuant to W.S. §§ 41-3-104 and 41-3-110. A transfer requires prior approval from the BOC or the State Engineer (depending upon the nature of right). A temporary transfer involves submitting an application to the WSEO. A permanent transfer is generally more complicated, and the BOC is required to consider several factors: “The change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.” *Wyo.Stat. § 41-3-104*. The BOC must also consider economic impacts and whether other sources of water are available.

Reservoir Rights

Reservoir rights are described in *Wyo.Stat. §§ 41-3-301* through 329. Reservoir rights are generally subject to the same rules as surface rights, with significant exceptions. First, the abandonment statute allows a reservoir owner to petition for an extension of time within which to beneficially use the water. *Wyo.Stat. §41-3-401*. Second, it is assumed that water stored has been put to beneficial use. *§ 41-3-325*. Third, stored water need not be attached to particular lands, although the appropriator may do so by obtaining a “secondary permit.” *Wyo.Stat. § 41-3-302*. Finally, stored water is not subject to the 1 cfs per 70 limitation.

Groundwater Rights

In Wyoming, all groundwater is subject to the permit system. *Wyo.Stat. § 41-3-901*. Groundwater permits are obtained pursuant to *Wyo. Stat. §§41-3-930, 905*.

Wyo.Stat. § 41-3-934. Groundwater rights are adjudicated pursuant to *Wyo.Stat. §41-3-935*.

Wyoming recognizes the conjunctive relationship between surface water and groundwater. “Where underground waters in different aquifers are so interconnected as to constitute in fact one source of supply, or where underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply.” *Wyo.Stat. § 41-3-916*.

Priority between surface and groundwater rights is administered through the use of “interference” claims. Any appropriation of either surface or underground water may file with the WSEO a written complaint alleging interference with his water right by a junior right. The WSEO then conducts an investigation and issues a report, which may suggest various means of stopping, rectifying or ameliorating the interference or damage caused thereby. *Wyo.Stat. § 4-3-911*. Any interested person may challenge the results of that investigation.

Protecting Water Rights

The individual appropriator is in the best position to protect his or her water right, and should take steps to do so. First, every water right holder should have copies of the permits. Second, water right holders should know their priority date(s), the lands to which those rights are attached, and the uses permitted. Third, the water right should be adjudicated or perfected. Fourth, holders should make sure that the actual use matches that of the permitted use. Fifth, records of diversions and use should be maintained.

MOST IMPORTANTLY, a water right holder must exercise the water right by applying it to beneficial use.

Continued on page 11

**MARKETING
THE FINEST
RANCH &
RECREATIONAL
PROPERTIES**

Conclusion

It is not possible to address all aspects of water law in a short article. We have attempted to summarize a few of the more basic principles. Anyone who is considering the purchase of a ranch or farm should understand the nature of the water rights that are attached. Anyone selling a farm or ranch should understand the nature of the property right that they own.

About Hageman & Brighton

Harriet M. Hageman and Kara Brighton began their legal partnership on August 1, 2000. The partners of Hageman & Brighton focus their practice almost exclusively on water, natural resource, and land use issues, representing clients in Wyoming and Nebraska. Ms. Hageman and Ms. Brighton represented the State of Wyoming in *Nebraska v. Wyoming*, as well as on those matters associated with the endangered and threatened species in Central Nebraska. They also successfully handled the "roadless rule," obtaining a nation-wide injunction against its implementation. They currently represent the "Wolf Coalition" challenging the Fish

& Wildlife Service's rejection of the Wyoming Wolf Management Plan and its refusal to manage and control the wolves as required by the Final Rule.

If you would like additional information about the foregoing article or water rights in general, please contact Ms. Hageman or Ms. Brighton at (307) 635-4888.

Other Resources

State Engineer, home page:

<http://seo.state.wy.us>

Wyoming Water Law Summary:

<http://www.uwyo.edu/ces/PUBS/b849r.pdf>

Title 41. Water statutes:

<http://legisweb.state.wy.us/statutes/sub41>.

http://sowwy.state.wy.us/cgi-win/SSCGI_2.exe

<http://wyomcases.courts.state.wy.us/applications/oscn/search.asp?ftdb=STWY>

Rancher or Renaissance Man

BY JACK KAVANAUGH

There is not another profession or lifestyle that requires so many different talents and skills as ranching. A successful rancher must be: an agronomist, hydrologist, meteorologist, conservationist, veterinarian, equestrian, medic, diesel mechanic, welder, heavy equipment operator, land planner, road builder, bridge builder, fence builder, carpenter, ditch digger, financier, economic forecaster, accountant, butcher, baker, candlestick maker, and teacher of the next generation. And, on top of all of that, he must be able to untangle the confusion of numerous government rules and regulations that he has to live by.

The vagaries of the grain and meat futures markets plus the high cost of land make it difficult if not impossible for ranchers to earn a living commensurate with the investment in land and equipment required. It is no wonder that we have fewer and fewer real ranchers every year. Economic, social and political pressures exerted today make it extremely difficult for the family rancher to survive. But survive they do, albeit in smaller numbers than in the past. In order to get along today a rancher must be as proficient with a computer as he is with a branding iron. Advances in vaccines, medication, artificial

insemination and implanted electronic tracking devices make it easier to care for and trace cattle. Those that hang on tenaciously do so because they love the lifestyle and the independence. The incredible hard work and long hours are made up for by the serenity of living next to nature in some of the most beautiful places on earth. Making a lot of money does not enter into the equation.

Survival for the next generation sometimes means operating as a tenant rancher or farmer for the many wealthy hobby ranchers who are buying up much of our scenic ranch land for fishing, hunting and other recreational purposes. Most of these folks want to keep their acquisitions just as they are but know little of land stewardship. The government's endorsement of tax-friendly conservation easements provides incentives for wealthy hobby ranchers to keep the land in agriculture. This in turn provides an opportunity for young ranchers, who are not able to afford today's land prices, to stay on the land and preserve the ranch heritage. Most hobby ranchers are eager to hire capable managers to tend the cattle and cut the hay.

Hopefully, we will always have true ranchers around to keep the face of the west from changing.

MARKETING
THE FINEST
RANCH &
RECREATIONAL
PROPERTIES