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INTRODUCTION TO WYOMING WATER ADMINISTRATION

Section 1. Constitutional Framework.

a. The water within the boundaries of Wyoming is "declared to be the property of the state" by Section 1, Article 8 of the Wyoming State Constitution. Section 2 establishes the State Board of Control, hereinafter referred to as Board, as the governmental body "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 various officers connected therewith." The State Board of Control is to be composed of the State Engineer and the superintendents of the state's four water divisions. The superintendents are appointed by the Governor based upon the results of examinations conducted by the State Engineer.

b. The Constitution also provides at Section 5, Article 8, that the State Engineer is to be appointed by the Governor and is to serve as President of the State Board of Control. In his or her capacity as State Engineer, he or she "shall have general supervision of the waters of the state and of the officers connected with its distribution." The ex-officio secretary is appointed by the Board (see W.S. 41-4-202). Additional administrative officers are provided by statute, most notably, the state's water commissioners.

Section 2. Water Divisions and Districts. Boundaries of the four water divisions are defined by W.S. 41-3-501. Each division is further subdivided into water commissioner districts by the Board, pursuant to W.S. 41-3-601. Any one stream system of "practicable administrative scope" is to be included within a single district. Each district is to be supervised by a hydrographer commissioner or water commissioner appointed by the Governor from among persons recommended by the superintendent of the water division in which the district is located.

Section 3. Lines of Authority. W.S. 41-3-603 provides that when called upon each hydrographer commissioner or water commissioner shall "divide, regulate and control the use of water of all streams within his district" according to the priority of lawfully established water rights. Actions of the various hydrographer commissioners or water commissioners may be

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appealed by injured persons to the division superintendents, whose decision may be appealed to the State Engineer. The decision of the State Engineer concerning an action or failure to act on the part of a hydrographer commissioner or water commissioner is a final administrative decision which may be appealed to the district court. In carrying out their duties, hydrographer commissioners or water commissioners and their assistants have the power to arrest offending persons.

Section 4. Types of Water Rights.

a. A Wyoming water right is a right to use the water of the state when it is applied under the law to beneficial use, as defined by permit or adjudication and its appropriation has been made in conformance with the applicable rules and regulations. W.S. 41-3-101 states: "beneficial use shall be the basis, the measure and limit of the right to use water at all times." The right attaches to the land or place of use for which appropriated and is limited to the purpose for which appropriated. Because water is so important to the economy of this state, its use is always limited to a concept of public interest. The only uses for which water rights may be established are those which receive "public recognition" under the laws of the state.

b. A small number of water rights in Wyoming were confirmed by court decrees prior to creation of the State Board of Control and the office of the State Engineer. Generally, all other water rights acquired prior to statehood were adjudicated by the State Board of Control on the basis of "Claims to Water Filed under Territorial Law" and are known as "territorial appropriations." The first state legislature enacted a comprehensive water code, which established a filing procedure for securing water rights by permit from the State Engineer with final adjudication by the State Board of Control. The majority of Wyoming water rights have been obtained through this permit and adjudication system.

c. Permits to appropriate water are issued for the direct diversion of the natural flow of a stream, the storage of water in a reservoir, the secondary attachment of stored reservoir

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water to specific lands or service area, for instream flow use, and for the withdrawal or other use of water from an underground source. A direct flow diversion is measured in cubic feet per second (c.f.s.), and in the case of irrigation, is statutorily adjudicated at a rate not to exceed one c.f.s. for each 70 acres of land irrigated (except when surplus and excess flows are available - see Sections 11 and 12). A storage right is measured in acre-feet (a.f.) and may be filled only in order of priority. An instream flow right is measured in c.f.s. A ground water right is measured in gallons per minute (g.p.m.) pumping rate and acre-feet (a.f.) per calendar year. All water rights are limited to the beneficial uses being made. The State Engineer may deny or modify an application for permit if he or she determines that the granting of an application would be injurious in some respect.

d. After an applicant obtains a permit from the State Engineer, and then proceeds to establish the water right by applying the water to beneficial use in accordance with the terms of the permit, a proof of appropriation may be submitted to the State Board of Control. The Board will then initiate adjudication procedures in accordance with Wyoming statutes and these regulations. Amendments or corrections of unadjudicated permits are generally accomplished by petition to the State Engineer. If a water right has been adjudicated, it can only be changed or modified by the State Board of Control. A permit to appropriate water authorizes the holder to make use of the water as limited in the permit. However, a water right as such is established only when the water is applied to beneficial use. A water right is publicly recognized and specifically defined when it is adjudicated by the State Board of Control, and a certificate of appropriation is issued. Stock reservoirs, stock or domestic wells, test wells, and other temporary uses are not typically adjudicated.

e. Certain rights to use waters of the state were awarded in the Big Horn River General Adjudication. Such rights have been recognized and adjudicated by various decrees therein. In addition to the types of rights described in subsections a through d above, some water rights were awarded based on the Winters reserved water right doctrine or were established by judicial decree. Such rights are recognized by the Board as they

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appear in various court decrees entered in that adjudication and the same have been incorporated into the official water records of the state.

Section 5. Ground Water.

a. W.S. 41-3-901 through 41-3-938 constitute a comprehensive ground water code. Although the use of ground water is not administered in exactly the same manner as is the use of surface water, a permit system is in effect in Wyoming. Prior to commencement of construction of a ground water development, a permit to appropriate ground water must be obtained from the State Engineer. Upon completion of construction and application of the water to beneficial use, and submission of proper documents, a proof is presented to the State Board of Control for adjudication. The statutes give authority to the State Engineer to resolve disputes involving interference between ground water appropriations or between surface water and ground water appropriations. For a detailed explanation of the procedures to be followed, see the Regulations and Instructions of the State Engineer's Office.

b. The statutes also provide procedures whereby a "ground water control area" may be designated by the State Board of Control upon the recommendation of the State Engineer after the Board holds a public hearing. After the boundaries of a newly designated control area are geographically and stratigraphically determined, all previously unadjudicated ground water rights (excepting stock, test wells or domestic ground water rights) within the control area are adjudicated. The State Engineer works with an advisory board, which is elected from within the control area. W.S. 41-3-915 provides that the appropriators in a control area "may agree to any method or scheme of control of withdrawals, well spacing, apportionment, rotation or proration of the common supply of underground water," and same may be instituted if ordered by the State Engineer.

Section 6. Administrative Regulation. Any person with a water right in a stream system may in writing, request the hydrographer commissioner or water commissioner to regulate the source of supply for his or her benefit. If regulated during periods of decreased natural supply, the priority of the appropriations will be observed as nearly as practical and the

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headgates for the junior-most appropriations may be adjusted in order to satisfy senior appropriations. The request shall be made in writing on a form provided by the State Board of Control (see Appendix A of these Regulations and Instructions for a sample). Upon approving a proper request for regulation, the hydrographer commissioner or water commissioner will act to limit each water right in accordance with the priority and amounts recorded in the official records of the state. Both direct flow and the filling of storage rights are regulated in the same priority manner. The regulation of ground water appropriations generally follows priority regulation except for ground water appropriations located within control areas. W.S. 41-4-208 requires the Board to publish a tabulation of adjudicated water rights to facilitate regulation. Where special provisions for administration of water rights arise by judicial decree, such rights shall be administered in accordance with applicable laws.

Section 7. Reservoir Storage.

a. A reservoir is entitled to be filled in order of priority once each year if water is available. The water year is defined as from October 1 through September 30 of the following year. If water remains unused in the reservoir at the end of the water year, this water is termed "carry-over storage" and is counted toward providing the water to meet the following year's supply for the appropriation. For example, if a reservoir which has a right to store one thousand acre-feet has two hundred acre-feet remaining in storage which is carried over into the following year, then this appropriation would be entitled to again accrue only the remaining appropriated capacity (800 a.f.) as the storage right comes into priority on the permitted source of supply.

b. In order to conserve the waters of the state, it is a necessary requirement that all reservoirs be filled at times that will not interfere with or that will provide the least interference with the use of water by direct flow appropriators and thereby prevent a waste of water. W.S. 41-3-603 provides authority to the hydrographer commissioner or water commissioner to control reservoir filling and reads in part as follows:

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Such water commissioner shall have authority to require the filling of any reservoir whenever practical and water is available for storage from the stream or streams for which the appropriations for such reservoir are established.

All water which is allowed to flow past the reservoir diversion point after receipt of a notice or order to store from the hydrographer commissioner or water commissioner will be chargeable to the storage in the reservoir and the right to store may be reduced by that amount.

Section 8. Storage of Direct Flow Rights. W.S. 41-3-305 provides that the holder or owner of an adjudicated water right to use the direct flow of a surface stream may store the water "so long as no other Wyoming appropriator or user is injured or affected thereby." A request to store a direct flow right must be made in writing to the State Engineer. Approval must be given by the State Board of Control before the direct flow may be diverted into storage under authority of this statute. Consideration of a request to store direct flow is generally a complex matter, which requires the availability of detailed information. Since no injury to other appropriators can occur, the storage is limited to the historic consumptive use, and is restricted to the same place of use. The details concerning the storage of direct flow rights are set out in the Regulations and Instructions of the State Engineer's Office.

Section 9. Rotation of Water Use

a. W.S. 41-3-612 allows that water uses may be rotated with the approval of the hydrographer commissioner or water commissioner. The purpose of this statute is to bring about a more economic and efficient use of water. Rotation is accomplished in accordance with the specific rules set out in Chapter V, Section 23 of these regulations. The usual practice is to divert the collective supply available in priority to the appropriations to be rotated for irrigating the lands under each appropriation more quickly and efficiently. After the first irrigation, the diversion is closed down and the collective supply is used for the irrigation of the lands under another appropriation, etc. The rotation must be accomplished in such a

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way that there is no injury to other appropriators from the same source of supply. This is done by establishing a definite rotation period for irrigation of the land under each appropriation based on the number of acres irrigated by each appropriation plus an adjustment in time of irrigation to account for the differences in return flow patterns from the irrigation for each appropriation.

b. For example, assume that land under two appropriations to be rotated have the same general cropping pattern, soil characteristics, slope of land, etc., and therefore have similar return flow patterns, and that each appropriation is for one cubic foot per second for irrigation of 70 acres. Further assume that the one 70 acre tract can be irrigated in five days with the collective supply from both appropriations. The total supply of two cubic feet per second would be applied to the one 70 acre tract for a five day period and would then be shut off from these lands and be diverted at the same rate to the other 70 acre tract for another five day period.

c. If we assume the same general conditions are present except that the two appropriations are for 70 acres and for 140 acres, then water would be allowed for diversion on the larger tract for twice as long as for the smaller tract.

d. The above examples are over-simplified for most situations, but are intended to give a general idea of how rotation of water use operates.

Section 10. Supplemental Supply Rights. The appropriation of water as supplemental supply is defined in detail by W.S. 41-3-113. In general, it involves the appropriation of direct flow water from another surface water source to augment or supplement the available water for an existing appropriation for which the original source of supply does not provide a full supply. The amount of water, which may be diverted is the amount available, in priority, to bring the total water diverted from all surface water sources up to the original appropriated amount.

Section 11. Surplus Water. Whenever the supply of water in a stream exceeds the total amount required to satisfy all existing appropriations established on or before March 1, 1945, the stream is said to be in a surplus flow condition.

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When surplus flows are available during the water year, they are divided proportionally among the irrigation water rights holders with priorities on or before March 1, 1945, up to an additional one c.f.s. for each 70 acres irrigated. Rights with priorities later than March 1, 1945, may be regulated to meet the demands for surplus water made by the owners of water rights with priorities earlier than or equal to March 1, 1945 (see W.S. 41-4-317 through W.S. 41-4-324). Surplus water only applies to irrigation water rights that are based on the statutory diversion rate of 1 c.f.s. per 70 acres, and not to volumetric awards made in acre-feet per acre.

Section 12. Excess Water. Whenever the supply of water in a stream exceeds the amount required to satisfy all existing appropriations established on or before March 1, 1985, the stream is said to be in an excess flow condition. When excess flows are available during the water year, they may be beneficially used by irrigation water rights holders with priorities dating from March 2, 1945 through March 1, 1985, up to an additional one c.f.s. for each 70 acres irrigated (see W.S. 41-4-329 through W.S. 41-4-331). Excess water only applies to irrigation water rights that are based on the statutory diversion rate of 1 c.f.s. per 70 acres, and not to volumetric awards made in acre-feet per acre.

Section 13. Temporary Use of Water. Permission for temporary use of water for such purposes as road construction, well drilling, and other purposes may be obtained from the State Engineer through the procedures set out in the State Engineer's Regulations and Instructions. Also outlined in the State Engineer's Regulations and Instructions, is the procedure to be followed for changing a water use to a different type of use on a temporary basis. However, when an existing right is temporarily changed, the new use can have a marked affect on the return flow to the stream as compared to the return flow resulting from the historic use. For this reason, the hydrographer commissioner or water commissioner must assess the change in return flow, as well as other effects on the stream resulting from the temporary use. He or she must then make adjustments in the amount of water remaining for diversion to insure that there is no adverse affect on other appropriators from the same source of supply.

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Section 14. Water Year. The water year is defined as from October 1 through September 30 of the following year.

Section 15. Diversion and Conveyance Changes.

a. Pursuant to W.S. 41-3-114, the State Board of Control may consider and grant a petition to change a point of diversion or a petition to change a point of diversion and/or means of conveyance for an adjudicated water right provided that the petitioner can demonstrate that no other appropriator will be injured by the change. When a change of point of diversion is approved, the water right at the new location cannot exceed the amount of water available at the original point of diversion and may be restricted to a lesser amount if return flow or other factors so indicate.

(1) If a permit is involved rather than an adjudicated water right, the petition for change of point of diversion or change of point of diversion and/or means of conveyance is directed to the State Engineer.

(2) Prior to 1965, there was no statutory requirement for recording a change of point of diversion and means of conveyance. Such changes could have been made as a matter of right as long as no injury to other appropriators occurred. Changes made prior to 1965 to the point of diversion and means of conveyance can be recorded with the Board by submittal of a petition if the following conditions are met:

(a) There must be proof that 1. The change occurred prior to 1965, so that it is clear that this action is to correct the records to reflect the situation as it has existed and been operated on the ground since that time; 2. No injury has occurred to other appropriators;

(b) The new point of diversion must have a current and accurate legal survey tie, to a known corner of the public land survey, on file in the State Engineer's Office;

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(c) The entire appropriation must have been changed and is now being sought for recordation, or the portion changed must include the full acreage covered in the quarter-quarters. If only a portion of a water right within a given quarter-quarter is served by the new point of diversion, this subsection does not apply;

(d) The appropriation must have been diverted at least once in the last five years when water was available through the non-recorded pre-1965 point of diversion and means of conveyance.

A sample format for a petition to facilitate the described change of point of diversion and means of conveyance is found in Appendix A of these Regulations and Instructions.

b. Under special circumstances, the division superintendent may give permission for a temporary change of point of diversion or change of point of diversion and/or means of conveyance until a proper petition can be prepared. The request shall be in writing on a form provided by the Board or in a letter which states all the same information as required by the printed form (see Appendix A of these Regulations and Instructions for a sample). A temporary change will be limited to one irrigation season.

Section 16. Change of Location of a Well. Pursuant to W.S. 41-3-917, the Board may consider and grant a petition to change the location of all ground water rights provided the petitioner can demonstrate that no other appropriator will be injured by the change. A change of location of a well may be allowed only for the amount of water the well is actually capable of producing, but not in excess of the adjudicated or demonstrated amount of use during the past five years, whichever is less.

Section 17. Water Rights Transfers.

a. Changes of place of use are authorized by W.S. 41-3-104. This type of petition is filed when lands with attached adjudicated water rights which, for example, have become seeped or otherwise unfit for production of crops by irrigation, and it

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is the desire to change the land description by excluding these lands and substituting other suitable lands of equal or less area. This type of petition is also used to redescribe appropriations to reflect on the record the actual situation on the ground.

b. Changes of use are authorized by W.S. 41-3-104. A change 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." In considering a proposed change of use, the Board must quantify the rights proposed for change of use based upon actual diversion or pumping records or otherwise reliable information. The Board also examines the economic losses and benefits of the proposed change of use and inquires into "whether other sources of water are available for the new use".

Section 18. Abandonments. Pursuant to W.S. 41-3-401, an owner of a water right may deliberately relinquish an adjudicated water right or seek involuntary abandonment of a water right owned by another appropriator by a petition to the Board. A petition for involuntary abandonment may be brought before the Board by any appropriator whose water right may be benefited by a declaration of abandonment of an existing water right or whose water right might be injured by the reactivation of an unused water right.

Section 19. Preferred Uses.

a. Certain uses of water including municipal, stock and domestic uses are defined by law as preferred uses. W.S. 41-3-102 sets out the preferred uses and establishes their order of preference. Water for industry is a preferred use over water for irrigation except that the use of water for steam power plants and industrial purposes does not give the right of condemnation. Water rights for these uses may be obtained through the regular permit and adjudication procedures, or by acquisition of the right to use water already appropriated for some other purpose, such as irrigation.

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The law allows a preferred use to condemn a lower ranking use in accordance with the provisions of civil law relating to condemnation of property. Following a successful condemnation action, a petition for change of use must be submitted to the Board.

b. Regardless of how a preferred use appropriation is acquired, the right to divert water is subject to regulation in accordance with the priority date of the acquired water right. The condemnation procedure does not expand the nature of the right condemned by a preferred use. It only ensures that the change of use can occur. W.S. 41-3-907 provides an exception for appropriations of underground water for stock or domestic purposes (with certain quantity limitations), which may be used at any time regardless of priority dates.

Section 20. Rights-of-Way. The issuance of a permit by the State Engineer, or the granting of a petition or the adjudication of a water right by the State Board of Control does not give a right-of-way to the water appropriator over the lands of any other person. The individual appropriator is responsible for obtaining proper and necessary rights-of-way or easements by negotiation and agreement or otherwise by compliance with the law of the state.

Section 21. Interstate Compacts and Court Decrees. In addition to complying with state water law, Wyoming appropriators must comply with any restrictions on water use contained in interstate water compacts and court decrees. In the administration of such rights, the Board will follow any specifically mandated provisions of administration of rights contained in such compacts and decrees. The local water administrators will be familiar with these additional restrictions applicable to their districts and may be contacted for further information.

Section 22. Instream Flow. Prior to 1986, Wyoming water law required water to be diverted from its natural channel and conveyed to a point of use or stored constituting beneficial use. In 1986, enactment of the instream flow law expanded this concept to allow only the State of Wyoming to own a water right for instream flow in a natural channel for fisheries purposes.

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Thus, pursuant to W.S. 41-3-1001 through 41-3-1014, a new water right can be issued, or an existing right changed, to allow water, when available, to remain in the natural stream channel and be protected for fisheries purposes according to its water right priority. With proper permitting, instream flow needs may be met from reservoir storage.