

# Wyoming Water Law 101

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# Today's Presentation

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- Foundation
- State Engineer
- Board of Control
- Types of Water Rights
  - Surface Permits
  - Ground Water Permits
- Abandonment
- Instream Flow
- Subdivision Development
- Questions

# Constitutional Foundation

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- Wyoming Constitution
  - Article 1, Section 31
    - State Controls the Water
  - Article 8, Section 1
    - Water is Property of the State
  - Article 8, Section 2
    - Established Board of Control
  - Article 8, Section 3
    - Priority Appropriation Doctrine

# Beneficial Use

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- W.S. § 41-3-101
  - Beneficial Use shall be the Basis, the Measure and Limit of the Right to Use Water at All Times
  - Foundation of Every Water Right
  
- Recognized Uses Include:
  - Irrigation
  - Municipal
  - Industrial
  - Power Generation
  - Recreational
  - Stock
  - Domestic

# State Engineer's Office

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- Charged with the Regulation and Administration of the Water Resources in Wyoming
- Issue Water Rights to Anyone who will Make Beneficial Use of Water

# State Engineer's Office

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- Regulatory Functions
  - Surface Water
  - Ground Water
  - Board of Control
  
- Interstate Streams Program
  - Compacts
  - Decrees

# State Engineer's Office

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- Four Water Divisions

- Div. 1: North Platte, South Platte and Snake Rivers
- Div. 2: Yellowstone and Missouri Rivers north of North Platte and east of Big Horns
- Div. 3: Big Horn River, Clark's Fork
- Div. 4: Green and Bear Rivers

# State Engineer's Office

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- State Engineer and Superintendents
  - Appointed by the Governor
  - Duties and Powers
    - Execute laws relative to distribution of water
    - Regulate and use storage
    - Authority to close headgates
- Superintendent Decisions can be Appealed to the State Engineer



# SEO Website

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- <http://seo.state.wy.us>
  - Press Releases
  - Frequently Asked Questions
  - Documents
    - Forms
    - Pamphlets
    - Annual Reports
  - Water Rights Database
  - Statutes – Title 41

# Board of Control - Membership

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- Title 41, Chapter 4
  - State Engineer; Four Superintendents
- State Engineer – Patrick Tyrrell
- Superintendent Div. 1 – Randy Tullis
- Superintendent Div. 2 – Carmine LoGuidice
- Superintendent Div. 3 – Loren Smith
- Superintendent Div. 4 – Jade Henderson
  
- Administrator – Allan Cunningham

# Board of Control Duties

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- Duty to Compile all Adjudicated Water Rights in Each Basin
  - Tab Book
- Maintain Water Right Records – Open to Public
- Regularly Quarterly Meetings
- Special Meetings Available
- Petitioner Requesting pays Costs
- Majority of Members Constitutes a Quorum
- Ex Officio Secretary Appointed by Board

# Board of Control Jurisdiction

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- Exclusive Jurisdiction
  - Abandonment
  - Change in Use
- Adjudicated Water Rights
  - Change in Point of Diversion
  - Correction of Errors

# Types of Water Rights

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- Surface
- Ground
- Reservoir
- Preferred Uses

# Surface Water Rights

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- Original Supply
  - Statutory Limit of 1 cfs per 70 acres
- Supplemental
- Surplus Water Rights
- Excess Water Rights

# Supplemental Water Right

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- W.S. § 41-3-113
  - New source of supply for lands for which an appropriation of water from a primary source already exists
  - Total amount diverted not to exceed 1/70

# Surplus Water Right

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- W.S. §§ 41-4-318 through 41-4-324
- Rights Senior to March 1, 1945 can Divert an Additional 1 cfs per 70 acres before anyone Junior can divert



# Excess Water Right

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- W.S. §§ 41-4-329 through 41-4-331
- Anyone Senior to March 1, 1985 can divert an additional one cfs per 70 acres before anyone Junior can divert

# Ground Water Rights

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- Original Supply
- Additional Supply

# Wyoming's Ground Water Statutory Framework

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- Definitions
- Priorities
- Policy
- Interference
- Control Areas

# Definitions

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- Underground Water – W.S. § 41-3-901(a)(ii)
- Aquifer – W.S. § 41-3-901(a)(iii)
- Well – W.S. § 41-3-901(a)(iv)

# Policy – W.S. § 41-3-931

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- If located in an area not designated as a critical area, it SHALL be granted as a matter of course
- Proposed Use is Beneficial
- Proposed Means of Diversion and Construction are Adequate
- Deny for Public Interest
  - Reviewed by Board of Control

# Interference – Statutory Req.

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- W.S. § 41-3-911
  - Complainant Must Have a Valid Water Right
  - Complaining Well Must be “Adequate”
  - Substantial Evidence of Actual Interference
  - \$100 Filing Fee
  - State Engineer Undertakes Investigation
  - State Engineer Reports
  - Appeal to Board of Control

# Adequate Well

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- Well Depth
  - Completed in a manner that allows maximum beneficial use of ground water
- Well Construction
  - Allow water to efficiently enter and flow out
- Well Condition
  - Useful life of pump and other equipment
- Responsibility of Well Owner to Maintain

# Control Area BOC Designation

## W.S. § 41-3-912

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- Use of ground water approaching a use equal to the current recharge rate
- Ground water levels are declining or have declined excessively
- Conflicts between users are occurring or are foreseeable
- The waste of water is occurring or may occur
- Other conditions exist that require regulation for protection of public interest



# Control Area Advisory Board

## W.S. § 41-3-913

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- Shall Consist of 5 Adults who Own Land in the Control Area
- Election – 1 vote per acre
- Following formation, Terms are 4 Years
- Reimbursed for Board Activities

# Other Control Area Statutes

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- Adjudication

- W.S. § 41-3-914

- Corrective Controls

- W.S. § 41-3-915

- Moratorium on Permits
- Limit Permissible Total Withdrawal
- Order Junior Appropriators Off

# Regulation of Ground Water

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- Prior Appropriation Doctrine
- Physical Complications
- Geohydrologic Data
  - Initiation of New Rights
  - Exercise of Existing Rights
- Practical Examples

# Prior Appropriation Doctrine

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- Groundwater regulated for the benefit of surface water right or other groundwater right when:
  - Interference Established
  - Determination of Same Source of Supply
    - W.S. § 41-3-916
      - Can Adopt Corrective Measures  
Provided in W.S. § 41-3-915

# Physical Complications in Integrating Priorities

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- Delayed Impact of Junior Diversions
- Selection of Junior Appropriators for Closure
  - Can be determined to be arbitrary and violation of equal protection rights

# Geohydrologic Data

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- Integrated Management Requires Detailed Water Supply Data
- Data Often Lacking
  - Initiation of New Rights
    - Burden of Proof – Not on Applicant
  - Exercise of Existing Rights
    - Burden of Proof – Senior Water Right

# Comparison to Other States

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- Texas
  - Rule of Capture
- Nebraska
  - Correlative Rights Doctrine
- Colorado
  - Water Courts

# Ground Water Conclusion

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- Drought has Exposed Surface and Ground Water Conflict
- Little or No Recognition in New Permitting
- Surface Water or Senior Ground Water have Burden of Proof to Regulate Junior Ground Water Rights



# Reservoir Rights

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- Reservoir Permit
  - Enlargements
- Secondary Permit
  - Necessary to protect use of stored water for irrigation on certain lands
- Safety of Dams Inspections

# Preferred Use

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- W.S. § 41-3-102
- Preference Rights – Water for:
  - Drinking purposes (man & beast)
  - Municipal purposes
  - Use of steam engines, culinary, bathing, etc
  - Industrial purposes
- Exercised in accordance with condemnation proceedings

# Abandonment - Underlying Philosophy

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- Water Must Be Put to Beneficial Use
- “Use It or Lose It”
  
- Abandonments are not favored in law, and the evidence must be clear and convincing that it was the intent of the owner to abandon.

*Ramsey v. Gottsche, 51 Wyo. 516 (1936)*

# Abandonment Statute

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- W.S. § 41-3-401
  - If an Appropriator Fails to Intentionally or Unintentionally use his Water for Beneficial Use during any Five Successive Years, He is Considered to Have Abandoned his Water Rights

# Abandonment Procedure

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- Exclusive Jurisdiction of the Board of Control
- When Action Filed, Superintendent must Notify ALL Affected Water Users
- Board of Control Decisions can be Appealed to District Court and Wyoming Supreme Court

# Standing

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- Must Prove Two Essential Facts:
  - Must Possess a Valid Water Right of Equal or Junior Standing to the Right of Your Neighbor;  
AND
  - Your Water Right and Your Neighbor's Right Must be from the Same Source of Supply

# Benefit or Injury

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- If You Met the Non-Use and Standing Requirement, You Must Prove:
  - You Will Benefit from the Abandonment OR
    - (Improvement in Priority is NOT Sufficient to Prove Benefit)
  - You will Sustain Injury if your Neighbor Reactivates his Water Right

# Abandonment of Reservoir Rights

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- Reservoirs May Make Application to Board of Control for a Five Year Extension in order to avoid abandonment
  - Must Demonstrate Due Diligence Toward Utilization of the Appropriation; OR
  - Demonstrate Reasonable Cause for NonUse
    - Court Proceedings
    - Planning, Developing or Financing for Construction Project
    - Any Other Causes Beyond the Control of the Appropriator



# Forfeiture

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- W.S. § 41-3-402
  - If an Appropriator fails to Intentionally or Unintentionally Use his Water for Beneficial Use during any Five Successive Years, the State Engineer may Initiate Forfeiture Proceedings Against the Appropriator with the Board of Control to Determine the Validity of the Unused Right

# Instream Flow

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- W.S. §§ 41-3-1001 through 41-3-1014
- Article 10, Chapter 3
  - Storage for recreational pool or establish or maintain fisheries is a Beneficial Use
  - UNAPPROPRIATED water may be appropriated for instream flows
  - Water used shall be minimum flow necessary to establish or maintain fishery

# Instream Flow

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- Must Specifically Define Stream Segment and Amount
- State of Wyoming owns the water rights – Held by WWDC
- Limitation on Location
- Feasibility Study – WWDC Prepares
  - SEO conducts Hearings

# Instream Flow Statistics

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- Approximately 90 Applications
- 17 Have Proceeded to Permit Status
- 2 of 17 Have Been Adjudicated
- No Call for Regulation Has Been Placed

# Subdivision Development – Water Implications

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- Inadequacy of Delivery Systems
- Ground Water Impacts
  - Quantity and Quality
- Liability Concerns

# Wyoming Subdivision Statutes

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- W.S. §§18-5-301 through 18-5-315
  - Authority
  - Definitions
  - Exemptions
  - Minimum Requirements
  - Enforcement
  - Penalties

# Authority

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- W.S. § 18-5-301
- Jurisdiction Vested in Board of County Commissioners in Which the Land is Located
  - No Person shall Subdivide Land or Commence the Physical Layout or Construction of a Subdivision without First Obtaining a Subdivision Permit from the Board of the County in which the Land is Located.  
W.S. § 18-5-304
- Each County Approaches Differently

# Definitions – W.S. § 18-5-302

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- Person: includes individual, corporation, association
- Subdivision: creation of division of a lot, tract, parcel or other unit of land for immediate or future purpose of sale or development for residential, recreational, industrial, commercial or public uses.
- Water Supply System: . . . Separate water supply systems used solely for irrigation or stock water are NOT included



# Examples of Exemptions – W.S. § 18-5-303

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- Single Gift or Sale to Member of Landowner's Immediate Family
- Eminent Domain
- Boundary Line Adjustments
- Creates Cemetery Lots
- Except as Provided in W.S. § 18-5-316, Parcels 35 Acres or Larger

# 2008 Changes – W.S. § 18-5-316

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- Describes requirements for large acreage subdivisions
- County may elect to apply subdivision requirements to the sale of parcels that are 35 acres up to 140 acres.
- Adopted to give the Counties more authority in terms of planning, zoning, and growth management

# Minimum Requirements

## W.S. § 18-5-306

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- Compliance with Zoning Regulations
- Survey Plat
- Title
- Sewage System Study
- Easements
- Roadway Access
- Evidence of Financial Resources
- Water Rights
- Conservation District Review
- DEQ Review of Sewage and Water Supply Systems

# Water Rights

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- Prior to Final Approval, Subdivider SHALL Provide:
  - Evidence of Relinquishment to SEO (Authorization to Detach) **OR**
  - Evidence of Petitions to Board of Control **OR**
  - Water Distribution Plan Approved by SEO
  
- If Lands Proposed for Subdivision are Located within the Boundaries of an Irrigation District, Evidence that the Plan has Been Submitted for Review and Recommendations

# Option No. 1 - Abandonment

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- Voluntary Abandonment
  - Removing Water Right from Land Forever
  - Requires Petition to State Engineer or Board of Control (depends on status)
- Authorization to Detach
  - Requires Board of Control filing
  - Allows 5 Years to Transfer
    - If no Transfer – Voluntary Abandonment

# Option No. 2 - Transfer

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- Change Place of Use from the Subdivided Lands to Other Irrigable, Non-Permitted Lands
- Requires Petition to State Engineer or Board of Control (depends on status)

# Option No. 3 – Water Distribution Plan

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- Retains Water Rights on Subdivided Lands
- Requires Submittal and Approval by State Engineer's Office
- May Require Petition to State Engineer or Board of Control

# The Subdivision Gap

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- The Board may Exempt from the Minimum Requirements a Subdivision of One or More Units of Land into not More than a Total of Five Units of Land
  - Simple Subdivision
- Lots that are Over 35 Acres may be Exempt Depending on the County – W.S. 18-5-316



# Questions?

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