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THE LATENT INFLUENCE OF EQUITY IN
WYOMING v. COLORADO (1922)

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Abstract. Clearly, the doctrine of prior appropriation played an integral part in Justice Willis Van Devanter's decision in Wyoming v. Colorado (1922). Not so clear was the pervasive influence of equity in the justice's opinion. In many ways, Van Devanter's thinking is in keeping with the historical unfolding of the United States Supreme Court's use of equity to resolve interstate water conflicts.

As most people who have ever looked at a map of the West quickly realize, the state of Colorado harbors the headwaters and major portions of the watersheds of four major regional rivers: the Platte, the Arkansas, the Rio Grande, and the Colorado. Consequently, any water development in Colorado will naturally affect the stream flow into any of its neighboring states. Since the people in the bordering states also want to use these interstate stream flows for their own economic growth, this situation has long caused contention between Coloradans and their neighbors in those states.

In 1922 the United States Supreme Court attempted the resolution of an interstate river dispute between Colorado and Wyoming. Justice Willis Van Devanter's decision for the Court seemed to affirm the application of prior appropriation, "first in time, first in right," regardless of state boundaries. While the prior appropriation doctrine formed an important part of Justice Van Devanter's opinion, the role of equity in his thinking deserves more attention. Equity "involves little more than a weighing of the comparative reasonableness of possible uses of the water in competing states" (Leshy 1990, 10). Indeed, one can argue equity governed the Wyoming v. Colorado decision while considering the states' relative prior appropriation rights.

Equity and prior appropriation are not mutually exclusive doctrines, as revealed in the justice's opinion. Similarities exist in Van Devanter's logical
development of equity, in Justice David Brewer’s *Kansas v. Colorado* decision of 1907, and in such later landmark cases as *Nebraska v. Wyoming* (1945) and *Colorado v. New Mexico* (1982) and (1984). Justice Van Devanter had cleverly weighed existing irrigation practices and the initiation of new ventures. His reasoning resulted in an affirmation of the prior appropriation doctrine, the rewarding of irrigation in Wyoming at the expense of Colorado interests, and the application of equity as set forth in *Kansas v. Colorado* (1907). Nonetheless, while the justice’s opinion seemed to favor Wyoming, it still allowed Coloradans to protect their interests in ways unanticipated by people in Wyoming.

**Setting of and Precursors to the Case**

Around 1900 irrigators in southern Wyoming began noticing Coloradans’ uses of the Laramie River. In the north-central part of Colorado several small creeks join to form a stream cutting a narrow alpine valley. When irrigated the hay meadows provided Coloradans excellent grazing for their stock, but yielded little opportunity for agriculture. The water course continues north into Wyoming for about 50 miles and then swings to the east through the Laramie Mountains before crossing the plains where irrigation crusaders built the Wheatland project (Fig. 1). Other reclamationists in Colorado also wanted the water of the Laramie, but they wanted to divert flows out of the Laramie Valley and route them into the Cache la Poudre River and then divert the flows onto the high plains near Greeley. The promoters and farmers near Wheatland, Wyoming, could ill afford this diversion of the Laramie River.

Even before the farmers and investors of the Wheatland project, others in Wyoming had aired complaints to their attorney general about Colorado water users. “It appears that our Colorado friends have almost robbed us of Sand Creek,” wrote James M. Hoge, a Wyoming rancher (Hoge 1902). Coloradans were diverting the flows of this small tributary to the Laramie River through the Divide Ditch, a canal crossing the Continental Divide, and dumping the diversions into Sheep Creek, which flowed eastward and joined the North Fork of the Cache la Poudre River. Hoge requested permission
Figure 1. Location of the Laramie River, the Greeley-Poudre Irrigation and Wheatland Districts, and the Laramie-Poudre tunnel. The map also locates cities and other rivers of tangential importance to *Wyoming v. Colorado.*
from the Wyoming State Engineer to make alterations to his reservoir system to compensate for his losses in Sand Creek.

Hoge also wanted to enjoin his "friends" in Colorado from further water use. He took action against Colorado irrigators, and the decision of the United States Circuit Court for Colorado in _Hoge et al. v. Eaton et al._, 135 Fed. 411 (1905), recognized the equal standing of prior appropriation dates on interstate streams. The Court of Appeals, however, reversed this decision in _Eaton v. Hoge_, 141 Fed. 64 (1905), holding in part that Hoge had not shown that he had at least $2,000 in property at stake. If the small stream of Sand Creek could stir local passions, clearly the specter of transmountain diversions from the Laramie Valley to the Platte Valley in Colorado could, and did, focus the attention of farmers all along the Laramie River in Wyoming.

Douglas A. Preston, the Wyoming attorney general, would not have considered prosecuting a costly suit of original jurisdiction in the United States Supreme Court had the complaining about Colorado irrigators been limited to small farmers like Hoge. A more substantive issue was needed, and the promoters of the Wheatland tract supplied exactly the stimulus the attorney general required. In 1883 surveyors completed the initial mapping of the Wheatland project, and the real work of developing it began in 1883. The 50,000 acre Wheatland tract was a Carey Act development, with Senator Joseph M. Carey and his son involved as company officers. By 1910 the owners had constructed a large storage reservoir on the Laramie River and had opened two additional tracts of land for irrigation (J.A. Johnston 1916, 58-75; M.R. Johnston 1916, 57-58).

The investors needed an undiminished flow of the Laramie River to supply their venture, and they became worried about the effects of a project in the upper reaches of the Laramie Basin in Colorado. The people of the Greeley-Poudre Irrigation District needed additional water in the Cache la Poudre River to irrigate their tract of 125,000 acres of land northeast of Greeley. A tunnel, a few miles in length, through the Laramie Mountains could divert Laramie River flows into the Cache la Poudre River, and this supplement would then supply the additional water needed by the district (Link 1916, 520-48, 559-60, 930-4; Akin 1916, 548-59).
The Kansas-Colorado Case as Precursor

The plan to divert about 100,000 acre feet of water from the Laramie River into the Cache la Poudre scared the Wheatland tract investors, and they made full use of their political power to stop Coloradans from pursuing their plans. As early as 1904, they had made perfectly clear their displeasure with Coloradans' attitudes toward water use. Senators Carey and Francis E. Warren, the Wyoming state engineer Clarence T. Johnston, Wyoming water lawyers, irrigation investors in the Wheatland project, the attorney of the Wyoming Development Company, and others appeared as witnesses for the United States government during the testimony taken for *Kansas v. Colorado* (1907). Each objected to Colorado's claim to sovereign control over the water originating within its boundaries and to the tunnel project connecting the Laramie to the Cache la Poudre basin. The witnesses all made special reference to the adverse effects of Coloradans' plans on the development of the Wheatland project (Carey 1905, 1324-34; Warren 1905, 1289-94; Johnston 1905, 1059-61).

During the testimony, the Wyoming witnesses advocated a mutual recognition by the states of priorities along interstate streams. Justice Brewer, however, formulated the doctrine of equity in solving the difficult questions before him. Since 1890 Kansans had been complaining about Coloradans taking their water from the Arkansas River. In 1901, the State of Kansas initiated the first United States Supreme Court suit of original jurisdiction over interstate water issues. The suit became a massive undertaking with millions of dollars in investments at risk in both states, as well as the future operations of the Reclamation Service formed in 1902.

The case pitted two differing doctrines of water use: the prior appropriation doctrine of Colorado and the riparian doctrine of Kansas. Prior appropriation in Colorado and in Wyoming recognized the right of their citizens to use the publicly owned water of the states. First in time, first in right applied in both, with the priority dates established by court decrees in Colorado and by the state engineer in Wyoming. In both, the state engineer regulated diversions from all streams according to the respective dates of the water rights. The riparian doctrine of Kansas guaranteed to the owner of land on the
bank of a stream the right to his or her water undiminished in quantity and unaffected in quality by any “unreasonable” use of the upstream flow by any other person (Aiken 1988, 38-44; Hutchins 1957, 38-43).

In defining and employing equity, Justice Brewer sought to achieve two basic goals. He wanted to limit the United States government’s power to control interstate streams, and he hoped to avoid declaring which doctrine, prior appropriation or riparian rights, prevailed on interstate streams. As a solution, Brewer devised equity, essentially an accounting procedure that weighed the gains made by one state’s use of water against another’s. Since the gross economies of both states had shown growth, he awarded the more energetic water developers, in this case the Coloradans, the right to maintain their use of river flow even if it meant some curtailment of economic development in the Arkansas Valley in western Kansas. He excluded any federal doctrinal control over unnavigable streams and left the individual states to decide their own water doctrines. Finally, Brewer denied Colorado’s claim to complete sovereignty over the river within its own boundaries to the exclusion of any other state’s interest in the same flow (Sherow 1990, 57). All of these basic tenets of equity would figure in Justice Van Devanter’s decision in Wyoming v. Colorado.

States’ Arguments in the Wyoming-Colorado Case

When Douglas Preston filed Wyoming’s complaint in the United States Supreme Court in 1911, he made three basic arguments. He opened by establishing the water needs and uses of Wyoming irrigators. The people living in the Laramie Basin in Wyoming had 325,000 acres of land in irrigation. To produce crops on this acreage required more than the Laramie River flow could normally provide. With demand exceeding supply the attorney general could then assure the Court of no wasted water in Wyoming (Bill of Complaint 1916, 7-8).

Second, Preston argued that while irrigators in Wyoming could live with the shortage of water, they could not brook Coloradans’ intention to take water from the Laramie watershed by transferring it to the Cache la Poudre Basin. Although Colorado uses of water within the Laramie watershed
returned a majority of the diversions back into the river, water diverted out of the basin returned nothing. The tunnel project guaranteed a reduction of the river flow into Wyoming. If irrigators were already short of water, then the tunnel diversions would compound the Wyoming water shortage (Bill of Complaint 1916, 8-9).

Attorney General Preston concluded by advocating the mutual recognition by the affected states of the prior appropriation dates of water users along the Laramie River, an interstate stream (Bill of Complaint 1916, 9-10). The logic was simple. If farmer A in Wyoming had a right dated 1870, and farmer B in Colorado had a right dated 1872, then the Wyoming irrigator would have his/her right satisfied before the Coloradan could divert. This contention denied Colorado's claim to absolute sovereignty over all of the water originating within its boundary regardless of the effects on any downstream users in another state.

Fred Farrar, the Colorado attorney general, and the attorneys representing the Greeley-Poudre Irrigation District and the Laramie-Poudre Reservoir and Irrigation Company (the contracting company building the tunnel when the suit began) used their understanding of equity to argue against Wyoming's right to complain. Little if any material harm, reasoned these lawyers, would come to Wyoming irrigators as a result of the tunnel project. Most of the river flow would be diverted to fill storage reservoirs in winter, supposedly when the Wheatland tracts could not use the water. Coloradans, they further claimed, applied water in more economic and productive ways than did irrigators in Wyoming. The cold and high Laramie Plains and to a lesser extent the Wheatland District could not compare to the superior crop production found in the Cache la Poudre Valley. Besides, the two Wheatland tract additions and their water rights postdated the initiation of the tunnel project in 1902. The Larimer County district court of Colorado followed normal state procedures and awarded the Greeley-Poudre Irrigation District an August 2nd, 1902, priority for the tunnel. Consequently, the recognition of interstate prior appropriation dates would not offer Wyoming enterprises any relief from tunnel diversions. Moreover, and regardless of Wyoming's claims otherwise, the Colorado attorneys believed the state possessed sovereign control over all water originating within the state bound-
aries regardless of any detrimental effects to any neighboring state. As far as Colorado attorneys were concerned, the burden of conserving water fell disproportionately upon the downstream state, and Wyoming irrigators had not shown a proclivity to conserve (Colorado 1916, 27-33).

Of course, the Wyoming attorneys viewed Colorado arguments as a slap in the face. At one point the attorney general facetiously summarized the situation: “By what moral or legal right can the favored Colorado irrigator throw upon his Wyoming neighbor, already handicapped by an 'arctic' climate, and an irresponsible soil, the burden of spending useless sums to conserve an imaginary or elusive surplus in the Laramie, which he so freely wastes in the Poudre; and this in order to seize the cheaper and more dependable supply already appropriated by [people in Wyoming]” (Plaintiff 1916, 93). As Wyoming attorneys viewed the suit, any acceptance of Colorado's position would seriously undermine their irrigators' enterprises.

Wyoming attorneys built their suit through the testimony of irrigators, lawyers, developers, and particularly through the work of Ralph I. Meeker, their expert engineer. Meeker had the task of measuring the flow of the Laramie and then showing with precise measures how the normal flow could not sustain the operations of the Wyoming systems. Given this argument, the construction of the tunnel would further deplete the flow of the river and destroy irrigation ventures in Wyoming.

Wyoming irrigators wanted Coloradans to respect their prior appropriation dates as if the state boundary did not exist. As the attorney general put it: “The universal holding is that priority of appropriation gives priority of right on interstate streams the same as on streams wholly within one state” (Plaintiff 1916, 94). As part of the attorney general's overall strategy, he used the testimony of irrigators, canal system engineers, and developers to establish the dates of all the irrigation projects in the Laramie Basin of Wyoming and Colorado. Then the relative rights of irrigators in both states could be established. Most importantly, Wyoming attorneys refused to recognize the 1902 Colorado priority of the tunnel and argued the tunnel appropriation should date 1909, the year when the project actually began diverting water into the Cache la Poudre River. Furthermore, if appropriation rights were to be honored as if no state line existed, then Colorado could not assert complete
sovereignty to water within its boundaries. As the attorney general of Wyoming correctly noted, the court had already made its displeasure with the Colorado position known in *Kansas v. Colorado* (1907) (Plaintiff 1916, 128).

The Wyoming attorney general did make one interpretative error. He claimed: “In a contest for property of any kind we have never known a case where it was held material that one of the parties could make better use of the property involved than the other” (Plaintiff 1916, 131). Nonetheless, Justice Brewer had given such an opinion in *Kansas v. Colorado* (1907). Even though water diversions in Colorado had obviously injured irrigators in the western portion of Kansas, Justice Brewer allowed this as part of the equitable division of water existing between the two states in the early 1900s. He made this determination keeping in mind the higher returns of water uses in Colorado than in Kansas (Sherow 1990, 57). Then, if *Kansas v. Colorado* were to serve as a precedent in *Wyoming v. Colorado*, the Wyoming attorney general stood on shaky ground.

Colorado attorneys hoped to build their case on the principle of equitable division as penned by Justice Brewer in *Kansas v. Colorado* (1907). In Justice Brewer's decision, equity did not necessitate an equal division of the flow of an interstate river. Rather, equity meant the most efficient distribution of water to facilitate economic growth, or “ventures,” in both states. These lawyers fully understood this view of equity and sought to use it against Wyoming.

The attorney general and the counsel for the other two Colorado companies had a three-point strategy. The first was to show how Colorado’s present and future uses of the Laramie River would constitute an equitable division of the stream flow. Within this “most important” view of equity, the priority of uses in Colorado were to be contrasted to those in Wyoming to illustrate how Coloradans took more pains to conserve, could make more efficient use of, and could take greater economic gains from the Laramie flows than their counterparts in Wyoming (Carpenter 1931; Colorado Attorney General ca. 1913, 5-13).

The Colorado attorneys based their arguments on the testimony of two experts, Louis G. Carpenter, an engineering professor at Colorado State Agricultural College and the main expert witness appearing for Colorado in
Kansas v. Colorado, and the state engineer, John E. Field. The techniques of irrigation in both states were compared and contrasted, as were the crop yields. What the Coloradans hoped to show was the greater economic return of irrigation in Colorado. The witnesses portrayed wasteful uses of water in Wyoming, which suggested that if only Wyoming irrigators took more care in their practices, then no shortages would exist (Carpenter 1916, 384-446; Field 1916, 361-84).

In Colorado’s final brief, the main arguments became clearly focused. One cannot overemphasize Colorado’s use of equity in this suit. In fact, Fred Farrar, the attorney general, insisted on avoiding any references to prior appropriation dates of any Colorado enterprises. For him, the merits of the suit did not rest on the mutual recognition by states of appropriation dates on interstate streams. What mattered was the higher economic returns of irrigation in the Cache la Poudre Valley over those in the Laramie Plains or in the Wheatland tracts. Therefore, Wyoming irrigators had no right to strip Coloradans of their initiatives. Only under pressure from the attorneys representing the Greeley-Poudre Irrigation District did the attorney general bring prior appropriation dates into his arguments, and then only when dating the tunnel, which he argued had an August 1902 priority (Carpenter 1931). This date placed the tunnel well ahead of the enlargements around the Wheatland tract.

The whole issue rested with a correct interpretation of equity as defined in Kansas v. Colorado. This is very apparent in the following telling quotation from the final brief:

The defendants feel that priority of rights between users in different states has no place in a suit between sovereign states affecting the water of interstate streams, except possibly, that the relative priorities might be one of the many factors from which the court would determine the reasonableness of the use in one state as against another, or, in other words, might be one factor in determining the equities between the states.
Equity in Water Law

We believe the decision of the court in the case of *Kansas v. Colorado*, 206 U.S. 46 is decisive of this contention *(Defendants 1916, 121)*.

The implications of this position, though, worked against Colorado's view of sovereignty over the water originating within its boundaries. If the Court could determine the equities of water use between two states and if the Court could redistribute the water between the two to correct any inequities, then Colorado could not possibly retain sovereignty over its waters.

Besides the interests of Colorado and Wyoming, the Court heard from the United States government. Federal officials basically played a minor role in the suit since the attorneys simply wanted to preserve the doctrine of "reserved rights." The successful prosecution of Colorado's notion of sovereign rights would have certainly jeopardized the reserved right doctrine as expressed in the *Winters* decision *(Hundley 1978, 455-82; 1982, 17-42)*. The federal government also wanted a decision establishing its right to any unappropriated water in the Laramie River, which would establish a precedent for reserved water rights attached to reclamation projects. Other than these two concerns, the federal government had little interest in the merits of the suit *(United States 1917, i-vi)*.

**Van Devanter's Decision**

After the various parties had concluded their final arguments, the responsibility for writing the opinion fell upon Justice Willis Van Devanter. This development, which the Colorado attorneys had fully expected, boded ill for the upstream state's interests. Justice Van Devanter, by any account, lacked judicial impartiality. There was far more to his prejudice than simply hailing from Wyoming and having served as a state and federal judge there. He and Judge John W. Lacey, "Wyoming's leading council" during the suit, had been former law partners in Cheyenne. In addition, Justice Van Devanter and Judge Lacey were also brothers-in-law, and according to Delph Carpenter, one of the Colorado attorneys, "were known to entertain the most intimate personal and family relations." Furthermore, Ralph Meeker, the
consulting engineer for Wyoming, listened to the final arguments presented before the Court and then remained in Washington, DC, "as the confidential adviser of Van Devanter" in the areas of hydrology and engineering (Carpenter 1931).

The Colorado attorneys knew they could not do much about what surely amounted to a conflict of interest. The problem for them lay in the writing of the *Kansas v. Colorado* decision by Justice Brewer. Brewer was a former Kansan, and he had written a decision in most respects favorable to Colorado interests. Colorado attorneys entertained the notion of requesting that someone else other than Justice Van Devanter write the opinion but felt such a request "bad policy" in light of the precedent established by Justice Brewer. So, from 1917 to 1922, a time which included three arguments before the Court, the Colorado attorneys waited anxiously for the Court's opinion (Carpenter 1931).

Justice Van Devanter's opinion clearly reflected the principles of equity as established in *Kansas v. Colorado* (1907). For some time historians and legal scholars have distorted Justice Van Devanter's decision by interpreting it as recognizing prior appropriation dates along interstate streams as if no state boundary existed. The justice had simply used one prior appropriation date in Colorado as the means to divide the stream flow of the Laramie River between the two states in an equitable manner, and thereby denied Colorado's contention of sovereign control over its water by apportioning the Laramie River flow between the two states.

When Justice Van Devanter's methods of determining an equitable division of the Laramie River are analyzed, his role as an "amicable compounder" is clear. An amicable compounder, according to Justice White, was a jurist who adjusted "rights according to [his/her] conception of equity wholly divested of any rule of law" (Loomis 1906, 58-60). Justice Van Devanter approached his role as an amicable compounder in *Wyoming v. Colorado*, 259 U.S. 485-96 (1922) in the following manner. First, he determined the flow of the Laramie River based almost entirely upon Ralph Meeker's findings. Then he calculated the available flow for the Laramie-Poudre Tunnel project and for all Wyoming appropriations along the Laramie River to and including the Wheatland District at 288,000 acre feet. He came
to this figure after deducting an average of 22,250 acre feet per year for the
gross diversions within Colorado. Next, he attached an appropriation date of
October 1909 to the Colorado tunnel, which conveniently postdated the
extensions to the Wheatland District. Then he totaled the diversions within
Wyoming predating October 1909 and came to a figure of 272,500 acre feet
per year. This amount constituted the Wyoming allotment, and the remain-
der, some 15,500 acre feet, the justice allotted to the tunnel project (Table I).
In his computations, then, only the water-right date for the tunnel played a
crucial role in the decision.

Notice Justice Van Devanter did not award any Wyoming irrigators the
right to divert water before the Greeley-Poudre Irrigation District could
through its tunnel. Rather, the Skyline Ditch could divert 18,000 acre feet per
year; the hay meadow farmers could divert 4,250 acre feet per year; and the Greeley-Poudre Irrigation District could divert 15,500 acre feet per year before Wyoming irrigators could count on receiving any flows from the Laramie River. Prior appropriation, as if state boundaries were absent, would not govern the continued distribution of water between the states, and both remained free to administer water rights according to the laws of each.

Interpretations of Van Devanter’s Division

Yet modern scholars have often read Justice Van Devanter’s decision as the recognition of prior appropriation dates along interstate rivers as if the boundary between the states did not exist. The voluminous writings of Frank J. Trelease have greatly influenced the scholarship of western water law. Of Van Devanter’s decision he wrote, “The rule of priority was adopted [by the Court] for determining the equitable share of the two states in the river, but it was put into effect in an unusual manner” [emphasis added] (Trelease 1955, 1-2). Later, he openly recognized equity in the Wyoming decision, but still placed a heavier emphasis on the role of prior appropriation when he wrote “priority is equity’ between two states that apply the law of prior appropriation internally” (Trelease 1985, 349).

Other scholars have followed Trelease’s interpretation. M. Paul Holsinger (1970, 53), a Van Devanter biographer, and Norris Hundley (1966, 177-80), a water historian, viewed Justice Van Devanter’s opinion as a recognition of prior appropriation rights along interstate streams as if no state boundary existed. Even recently, scholars have missed the principle of equity in Justice Van Devanter’s opinion. A. Dan Tarlock (1985, 395-96) viewed the justice’s decision as a “reliance on a modified doctrine of prior appropriation.” Anderson and others (1984, 410-12) argued the Court distanced itself from Brewer’s Kansas v. Colorado (1907), decision and in following Van Devanter’s lead ignored state boundaries in settling the dispute between Colorado and Wyoming over the Laramie River flow.

This oversight of equity in Justice Van Devanter’s decision has also found its way into lawyers’ arguments before the Supreme Court. The attorneys for Nebraska employed the doctrine of interstate prior appropria-
tion in their suit against Wyoming in the late 1930s and early 1940s (Tarlock 1985, 399), and by New Mexican attorneys in their fight against Colorado over the Vermejo River in the late 1970s and early 1980s (Tarlock 1985, 404). Interestingly, the court rejected the governing principle of interstate prior appropriation in both suits and settled the issues using the doctrine of equity.

Both Tarlock (1985, 399) and Trelease (1985, n. 349) have viewed Justice William O. Douglas's decision in *Nebraska v. Wyoming* (1945), as a marked departure from Justice Van Devanter's opinion in *Wyoming v. Colorado* (1922). Still, similarities in the decisions exist. Both allowed priority to serve as a guiding principle within the broader notion of equity and both considered the availability of storage water in the contending states. Also, both opinions considered the consumption rates of water in each state. And as apparent in Justice Brewer's decision of *Kansas v. Colorado* (1907), elements of cost-benefits analysis played a latent role with the Wyoming Wheatland project interests coming out ahead. Clearly, while not denying the importance of priority, equity formed a crucial part of Justice Van Devanter's thinking.

Strangely enough, while many modern historians have overlooked the centrality of equity, the public officials and private lawyers in both states who were contemporaneous to the *Wyoming v. Colorado* (1922) decision all recognized the key role equity played in Justice Van Devanter's decision. Certainly, Carpenter, who argued the case for Colorado, believed the justice had based his opinion on equity (Carpenter 1931). Both the state engineer of Wyoming in 1923 and the attorney general in 1932 noted the application of equity in Van Devanter's opinion (Wyoming State Engineer 1923, 42-7; Greenwood 1932). And in 1939, Michael Hinderlider, one of the more influential state engineers of Colorado to hold office, believed equity was the governing principle in the justice's opinion (Hinderlider 1939, 1826-27, 1836-38).

What of the United States' position in this suit? Justice Van Devanter made short shrift of any interest the US Attorney General's office had in the case. The issues in the suit, the justice asserted in *Wyoming v. Colorado*, 259 U.S. 465 (1922), neither jeopardized any established diversions, nor did they affect any public land holdings. Moreover, private irrigation interests had already claimed all of the river leaving no unappropriated river flow for the
federal government to claim (Hundley 1966, 178). Consequently, the justice saw no reason to entertain the United States' concerns.

Conclusions

Like the history of so many interstate water conflicts, Justice Van Devanter's decision did not settle the dispute. As attorneys and engineers from both states realized, he had miscalculated the amount of water needed by the hay meadow farmers in Colorado by perhaps a factor of eight. These irrigators often cheated by diverting more from the Laramie than Justice Van Devanter's decree allowed, creating tensions in both states. Moreover, during drought years the Wyoming irrigators often suffered while the Greeley-Poudre District diverted its full entitlement into the tunnel. The execution of Van Devanter's decree did not depend upon the appropriation date of the tunnel, which postdated those of the Wyoming systems. Colorado, in accordance with Van Devanter's decree, had a certain amount of water that the state could take from the Laramie River. The state could administer the diversion of this amount however and whenever it so desired. The tunnel intake, located high in the Laramie watershed, always had some water flowing by it, whereas in drought years river flows rapidly diminished on the Laramie Plains and beyond (Hinderlider 1939, 1837; Breitenstein 1950, 1-3; Trelease 1955, 4). Colorado irrigators, fully within the parameters of Van Devanter's decision, made sure they took all of their water before allowing any flows to reach Wyoming, drought or not.

Before these and other new problems were solved, the states would engage in three more United States Supreme Court suits and sign a consent decree in 1957. Wyoming v. Colorado, 260 U.S. 1 (1922), was a modification of the initial decree. The next two decisions came in Wyoming v. Colorado, 286 U.S. 494 (1936), and Wyoming v. Colorado, 309 U.S. 572 (1940). On May 13, 1957, the United States Supreme Court entered the consent decree recognizing the stipulation agreed to by both the representatives of Colorado and Wyoming on February 8, 1957. The 1957 stipulation has effectively governed diversions from the Laramie River since.
None of these later Supreme Court decisions nor the decree interfered with Justice Van Devanter's employment of equity. Van Devanter had simply taken equity as Justice Brewer defined it in *Kansas v. Colorado* and applied an accounting procedure, albeit as an attempt to please Wyoming water interests, to rectify the dispute. In the justice's opinion, equity took precedence over the prior appropriation doctrine. In both Brewer's and Van Devanter's opinions, the Court retained the power to determine an equitable division of water between contending states while allowing the states the sole right to administer the flows within their boundaries. Brewer and Van Devanter both attempted to use equity to deny any federal control over any nonnavigable interstate flows.

Scholars are beginning to notice the centrality of equity in interstate water suits (Anderson 1984, 405-29; Tarlock 1985, 381-411). Those who think prior appropriation governs interstate stream use and base their arguments on Justice Van Devanter's decision in *Wyoming v. Colorado* (1922), are standing on shaky ground. In reality, the justice's opinion had affirmed the Court's commitment to the use of equity, which substantiates the view of John D. Leshy that "the innovative character, pervasiveness, and durability of the principles of prior appropriation are exaggerated" (Leshy 1990, 5). The doctrine, Leshy (1990, 10) argues when commenting on the apportionment of interstate river flows for federal reclamation projects, has never been paramount; "rather the controlling principle is 'equitable apportionment.'" He concedes, as do I, that "priority of use is a factor, sometimes the most important one," but this admission does not take away from equity, but rather adds to it. And so it was in Justice Van Devanter's decision, which is an indication of how the Court has used equity in conjunction with prior appropriation in settling Western water disputes.

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