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## Water Law - Primary Jurisdiction of the Board of Control over Questions of Water Rights - Kearney Lake Land & (and) Reservoir Co. v. Lake DeSmet Reservoir Co.

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## CASE NOTE

**WATER LAW—Primary Jurisdiction of the Board of Control over Questions of Water Rights. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, 487 P.2d 324 (Wyo. 1971).\***

Kearney Lake, Land and Reservoir Company brought an action in district court to have part of the water rights of the Lake DeSmet Reservoir Company declared abandoned. On the first hearing before the Wyoming Supreme Court, the district court's dismissal of the complaint was sustained on the ground that the complaint failed to state a claim upon which relief could be granted.<sup>1</sup> In upholding the district court, the Wyoming Supreme Court also indicated that the plaintiff should have initiated the abandonment proceedings before the Board of Control.<sup>2</sup>

A rehearing was granted in order to specifically decide the issue of whether questions of abandonment of water rights must be initially determined by the Board of Control. The plaintiff contended that the courts have concurrent jurisdiction with the Board and may continue to initially determine abandonment questions. Defendant contended that the Board had exclusive jurisdiction in this area. The court held that the Board of Control has primary jurisdiction over questions of abandonment of water rights.<sup>3</sup> This meant that while the Board and the courts still have concurrent jurisdiction over abandonment questions, before the district court will grant relief, the abandonment issue should be initially determined by the Board.

### I. BACKGROUND

In the *Kearney* case the court stated that the relationship between the Board and the courts in cases involving abandon-

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1. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, 475 P.2d 548 (Wyo. 1970).
2. *Id.* at 549-50.
3. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, 487 P.2d 324, 328 (1971). Primary jurisdiction is also commonly referred to as prior resort. 2 COOPER, STATE ADMINISTRATIVE LAW 562 (1965).

ment was in an "intolerable situation."<sup>4</sup> The Wyoming Statutes provide a procedure for obtaining a declaration of abandonment of water rights.<sup>5</sup> Section 41-48 provides that a water user seeking a declaration of abandonment "shall present his case in writing to the board of control."<sup>6</sup> It had been contended prior to *Kearney* that this statute deprived the courts of jurisdiction and vested exclusive jurisdiction over abandonment of water rights in the Board.<sup>7</sup> This contention was rejected, but it was held that if the Board initially decided an abandonment question, that decision was final and binding on the parties unless the decision was appealed to the courts.<sup>8</sup>

In *Louth v. Kaser*<sup>9</sup> the court clearly held that the statutory procedure for determining abandonment was not exclusive and that the courts had concurrent jurisdiction to decide the question of abandonment in private litigation. While the *Louth* decision gave the contestant a choice of forums, it also gave an indication of things to come for the court quoted *Laramie Rivers Co. v. Le Vasseur*<sup>10</sup> to support the proposition that it would be desirable to have abandonment proceedings initially handled by the Board.<sup>11</sup> In *Wheatland Irrigation District v. Pioneer Canal Co.*<sup>12</sup> the court again took up this theme and stressed the particular knowledge and expertise of the Board in dealing with the technicalities involved in abandonment questions. Against this background the *Kearney* designation of primary jurisdiction in the Board

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4. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, 487 P.2d 324, 326 (Wyo. 1971).

5. WYO. STAT. §§ 41-47 to -53 (1957).

6. WYO. STAT. § 41-48 (1957).

7. This contention was made in *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P. 764 (1925).

8. *Id.* at 767.

9. 364 P.2d 96 (Wyo. 1961).

10. 65 Wyo. 414, 202 P.2d 680 (1949).

11. *Louth v. Kaser*, *supra* note 9, at 101.

12. 464 P.2d 533 (Wyo. 1970). This case also brings up a point which may have been significant in influencing the courts to continue to hold that there is concurrent jurisdiction and to continue to allow these proceedings to be initiated in the courts. Prior to the enactment of the Wyoming Administrative Procedure Act, the Board of Control lacked the power to grant discovery to the parties, while the court could grant this pre-trial procedure. Regardless of the board's expertise, if the parties could not adequately develop their cases because of a lack of access to needed information, nothing would be gained by forcing them to go before the Board.

of Control appears to have been the only means of reconciling the holdings of concurrent jurisdiction with the court's desire to have abandonment issues initially determined by the Board.

## II. INITIATION OF PROCEEDINGS

The Board's primary jurisdiction means that the district court (if in the exercise of its discretion, it finds that it is necessary) will require the plaintiff first to seek relief before the Board and will allow the Board to initially determine the question. This limits the choices which the *Louth* case gave the plaintiff. An action for a declaration of abandonment of water rights can apparently be initiated in the courts. The Wyoming Supreme Court, however, indicated disapproval of such a proceeding when the sole or principal relief sought was a declaration of abandonment. Yet it felt that dismissal of the action would be inconsistent with its holdings of concurrent jurisdiction.<sup>13</sup>

An abandonment proceeding can still be initiated before the Board. Section 41-48 of the Wyoming Statutes still provides for this procedure, and nothing in the court's decision indicated disapproval of the procedure followed in the abandonment cases which reached the court before the *Kearney* decision. In those cases the proceedings were usually initiated before the Board.<sup>14</sup> As previously noted, the court seems to recommend this procedure when abandonment is the sole or principal issue involved in a dispute.

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13. *Kearney Lake. Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, *supra* note 4, at 328. The question of dismissal or stay of the action may be more complicated than the court indicates. In applying primary jurisdiction, the United States Supreme Court has upheld dismissal when the court could not grant relief regardless of the agency's action and when no purpose would be served by a stay because a similar suit could be instituted at a later time. *E.g.*, *Far E. Conference v. United States*, 342 U.S. 570 (1952); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). In other cases the court has upheld a stay, especially when the agency could not grant the relief sought. *E.g.*, *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940).

14. *Wheatland Irrigation District v. Pioneer Canal Co.*, *supra* note 12; *Yentzer v. Hemenway*, 440 P.2d 7 (Wyo. 1968); *Ward v. Yoder*, 355 P.2d 371 (Wyo. 1960); *Horse Creek Conservation Dist. v. Lincoln Land Co.*, 54 Wyo. 320, 92 P.2d 572 (1939); *Ramsay v. Gottsche*, 51 Wyo. 516, 69 P.2d 535 (1937).

## III. DISTRICT COURT DISCRETION

The discretion of the district court in deciding whether or not to apply this doctrine of primary jurisdiction is an important aspect of this case. The court did set down certain guidelines in order to aid the district court in the exercise of its discretion. They quoted with approval a statement from *United States v. Western Pacific Railroad Co.*<sup>15</sup> that the primary jurisdiction doctrine should be applied when the reasons for the existence of the doctrine are present and the purposes which the doctrine serves will be aided by its application in the particular litigation.

The court stated that the reasons for and purposes of the doctrine are to correlate the functions of the court and the Board in order to provide uniformity in decisions, to utilize the expertise of the Board<sup>16</sup> and to bring about an "orderly and desired procedure."<sup>17</sup> It seems that these reasons would often be present in an abandonment proceeding. The plaintiff or contestant must show that the defendant or contestee failed to use the water for beneficial purposes for five successive years;<sup>18</sup> that the contestant is an owner of an appropriation of water that would be appreciably benefited by a declaration of abandonment,<sup>19</sup> and that, while intent is not necessary for an abandonment of water rights,<sup>20</sup> the abandonment must be effected by a voluntary act.<sup>21</sup> In order to prove that the defendant failed to use the water for five years<sup>22</sup> or that the plaintiff would not be benefited by a declaration of abandonment,<sup>23</sup> rather technical evidence is often introduced.<sup>24</sup> Where these technicalities are involved, a more efficient eval-

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15. 352 U.S. 59 (1956).

16. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, *supra* note 4, at 325.

17. *Id.* at 326.

18. WYO. STAT. § 41-47 (1957).

19. *Horse Creek Conservation Dist. v. Lincoln Land Co.*, 54 Wyo. 320, 92 P.2d 572 (1939).

20. *Ward v. Yoder*, 355 P.2d 371 (Wyo. 1960).

21. *Ramsay v. Gottsche*, 51 Wyo. 516, 69 P.2d 535 (1937); TRELEASE, BLOOMENTHAL & GERAUD, CASES & MATERIALS ON NATURAL RESOURCES 157 (1965).

22. This issue was raised and technical evidence was presented in *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, *supra* note 12.

23. This issue was raised and technical evidence was presented in *Yentzer v. Hemenway*, 440 P.2d 7 (Wyo. 1968).

24. This evidence includes the testimony of engineers and aerial photos which are examined for variance in color in order to determine if the land has been irrigated. See notes 22 and 23, *supra*.

uation of the evidence might be obtained by certifying the question to the Board. This would save the time which would otherwise have to be devoted to educating the court so that the significance of the evidence could be understood. If the Board handles the question, it would be unnecessary to present information which forms part of the basis of the expert's knowledge but which is new and strange to those outside the field. In addition, by referring these issues to the Board in most instances, the court will be establishing a systematic method of fact finding which should lead to the uniformity and the orderly procedure that the court desires.

The court also indicated that under the doctrine of primary jurisdiction "factual issue(s)" will be certified to the Board.<sup>25</sup> This seems to constitute a further limitation on the district court's discretion, and it is in accord with the general rule that the doctrine of primary jurisdiction has no application where solely a question of law is involved.<sup>26</sup>

Another factor, which was not mentioned by the Wyoming court but which has been recognized by other courts, in determining whether to apply the primary jurisdiction doctrine is whether the agency is competent or has the power to grant the relief sought by the parties.<sup>27</sup> This factor will probably seldom create any difficulties where abandonment is involved. Whether the plaintiff goes before the court or the Board, he will be seeking a declaration of abandonment, and the Board is competent to grant this relief.<sup>28</sup>

In exercising its discretion, it has also been recommended that the court determine whether the application of the primary jurisdiction doctrine will impose too great a burden on

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25. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, *supra* note 4, at 328.

26. *United States v. W. Pac. R.R.*, 352 U.S. 59 (1956); *Great Northern R.R. v. Merchants Elevator Co.*, 259 U.S. 285 (1922); 2 COOPER, *STATE ADMINISTRATIVE LAW* 569 (1965).

27. *Morris v. Bd. of County Comm'rs for Jefferson County*, 150 Colo. 33, 370 P.2d 438 (1962); *Oliver v. Iowa Power & Light Co.*, 183 N.W.2d 687 (Iowa 1971); *Foree v. Crown Central Petroleum Corp.*, 431 S.W.2d 312 (Tex. 1968); 2 COOPER, *STATE ADMINISTRATIVE LAW* 570 (1965).

28. WYO. STAT. § 41-50 (1957). This statute states that the Board may declare the rights abandoned.

the litigants in terms of expense and delay.<sup>29</sup> The Wyoming court indicated, however, that it felt there would be little or no additional expense to the litigants because of this procedure and that any additional delay was justified by the advantages of establishing an orderly procedure.

The essence of the primary jurisdiction doctrine is the development of an orderly and sensible coordination of the work of the agencies and the courts.<sup>30</sup> In order to achieve this coordination and to prevent primary jurisdiction from becoming simply "an automatic judicial response to an abstraction labeled 'expertise',"<sup>31</sup> the district court must engage in a balancing of these different factors. Slavish adherence to the doctrine without this evaluation would defeat the goal of establishing a proper and viable relationship between the court and the Board.

#### IV. CERTIFICATION TO THE BOARD

Once the question is certified to the Board, a new rule adopted by the State Engineer and the Board of Control pursuant to the Supreme Court's instructions in the *Kearney* case provides that the parties are to proceed with the matter as though it had been originally instituted before the Board.<sup>32</sup> The rules governing disputes originally instituted before the Board provide that the plaintiff or contestant must present a petition for a declaration of abandonment to the Board.<sup>33</sup> The procedure for making a determination of abandonment is generally that set out by Wyoming Statutes, Sections 41-48 to -52. These provide that, if necessary, the Board will refer the matter to a division superintendent who shall conduct a hearing, take evidence, and report to the Board. The Board shall then conduct a final hearing where additional evidence

29. *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587 (1926); *Catholic Medical Center of Brooklyn & Queens, Inc. v. Rockefeller*, 305 F. Supp. 1256 (E.D.N.Y. 1969); Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L.R. 577, 592 (1954); Note, *The Doctrine of Primary Jurisdiction: A Reexamination of its Purpose and Practicality*, 48 GEO. L.J. 563, 573, (1960).

30. DAVIS, *ADMINISTRATIVE LAW TEXT* § 19.01 at 374 (3d ed. 1972).

31. Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws*, 102 U. PA. L.R. 577, 603 (1954).

32. State Engineer, *Rules and Regulations of the Wyoming State Engineer's Office*, pt. III, ch. VII, § 1 (1971) [Hereinafter cited as Regs.].

33. Regs., pt. III, ch. V, § 7a.

may be presented.<sup>34</sup> The rules of practice in these proceedings are provided for in the Board's regulations.<sup>35</sup>

The new rule provides that the Board shall then make a written decision and order containing findings of fact and conclusions of law. If the district court's order so requires, the Board's decision, order, and record of its hearings will be certified to the court. If the court's order does not expressly require certification, then judicial review of the order is to be governed by Rule 72.1 of the Wyoming Rules of Civil Procedure.<sup>36</sup>

#### V. REVIEW BY THE COURT

In the *Kearney* case the Wyoming Supreme Court provided that the district court's review of the Board's proceedings is to be governed by the Wyoming Administrative Procedure Act, Section 9-276.32<sup>37</sup> and by Rule 72.1 of the Wyoming Rules of Civil Procedure.<sup>38</sup> The statute and the rule restrict review of the Board's action to a determination of whether or not

- (1) [t]he agency acted without or in excess of its powers;
- (2) the decision or other agency action was procured by fraud;
- (3) the decision or other agency action is in conformity with the law;
- (4) the findings of fact in issue in a contested case are supported by substantial evidence; and
- (5) the decision or other agency action is arbitrary, capricious or characterized by abuse of discretion.<sup>39</sup>

The review is also limited to the record made before the Board and supplemental evidence which may be introduced if it is shown that the evidence is material and that there was a good reason for failing to present it before the Board.<sup>40</sup>

34. WYO. STAT. § 41-48 to -52 (1957).

35. Regs., pt. III, ch. VI, §§ 1 to 26.

36. Regs., pt. III, ch. VII, § 3.

37. WYO. STAT. § 9-276.32 (Supp. 1971).

38. WYO. R. CIV. P. 72.1.

39. WYO. STAT. § 9-276.32(c) (Supp. 1971).

40. WYO. R. CIV. P. 72.1(h)(i).



It appears that the scope of judicial review of the Board's proceedings is not influenced by the manner in which the question comes to the Board. If the abandonment proceeding was initiated before the Board or if the action was originally dismissed by the court,<sup>41</sup> the Wyoming Administrative Procedure Act would clearly govern any judicial review. If the question is certified to the Board, it appears that for the purpose of review the Board's answer has the same status as a decision in a proceeding initiated before the Board. The certification proceedings seem to fit the description of a reviewable agency action under the Act. It is a "final decision of an agency in a contested case."<sup>42</sup> The court also indicated that this is more than just an advisory opinion which the court could disregard because the Board's decision is not reviewed unless a party requests the court to do so.<sup>43</sup>

The Wyoming Statute, Section 41-53, which provided for a trial *de novo* by the district court on the Board's decision in abandonment cases, is now superseded by the Act and the rules adopted by the Wyoming Supreme Court.<sup>44</sup> Section 9-276.32(b) provides that the rules adopted by the court under the provisions of the Act which relate to judicial review by the district courts may supersede existing statutory provisions.<sup>45</sup> Pursuant to this statute, the court adopted Rule 87(b) which provides that all statutory procedures relating to procedure on appeal from or review of administrative action are superseded.<sup>46</sup> Rule 72.1 states that all ap-

41. As was indicated, dismissal is unlikely in these cases.

42. WYO. STAT. § 9-276.32(a) (Supp. 1971).

43. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, *supra* note 4, at 328.

44. Section 9-276.32(b) may raise an issue of unconstitutional delegation of the legislative power to repeal statutes to the judiciary. This issue is beyond the scope of this note; however, it seems unlikely that the court would now declare that it had no power to apply a rule which it has used in several cases in addition to *Kearney*. See *Thornley v. Wyo. Highway Dept.*, 478 P.2d 600 (Wyo. 1971); *City of Casper v. Regan*, 433 P.2d 834 (Wyo. 1967). In addition, courts have been allowed to supersede existing procedural statutes by the enactment of rules of procedure. *Burney v. Lee*, 59 Ariz. 360, 129 P.2d 308 (1942). There may be a dispute over whether the scope of review is a matter of procedural or substantive law. However, administrative repeal of substantive legislative enactments by the adoption of administrative regulation has been held to be constitutional. 1 SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 2024 (1943).

45. WYO. STAT § 9-276.32(b) (Supp. 1971).

46. WYO. R. CIV. P. 87(b).

peals from administrative agencies and all proceedings for trial *de novo* reviewing administrative action shall be governed by Rule 72.1.<sup>47</sup>

If Section 9-276.32 and Rule 72.1 did not supersede Section 41-53, a rather anomalous procedure might exist as a result of the *Kearney* case. If a proceeding for a declaration of abandonment was initiated in the Board of Control, upon review the district court might have been able to hold a trial *de novo* on the issue under Section 41-53; while if the action was initiated in the courts and certified to the Board, review would have been limited by the more restrictive procedures of Section 9-276.32 and Rule 72.1.<sup>48</sup>

## VI. IMPACT ON OTHER AREAS OF WATER LAW

The *Kearney* decision may also have implications for the relationship between the courts and the administrative agencies in other areas of water law. The court stated that the decision might have an impact on the future but that their present concern was the relationship between the courts and the Board in cases involving the issue of abandonment.<sup>49</sup> There are indications, however, that the decision may eventu-

47. In *Wheatland Irrigation Dist. v. Pioneer Canal Co.* the court indicated that section 9-276.32 and Rule 72.1 do supersede section 41-53. The court had to decide whether the Wyoming Administrative Procedure Act or section 41-53 applied to the action; thus indicating that the two procedures are mutually exclusive. The court held that section 41-53 governed the appeal in this case and that the Wyoming Administrative Procedure Act did not apply because this was a "pending" proceeding at the time the Act became effective in 1966. *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, *supra* note 12.

48. This difference would perhaps not be significant if the courts adopted the rather restrictive interpretation given trial *de novo* in the cases involving review of the decisions of the Board of Land Commissioners. These cases required the court to uphold the Board's findings if they were based on substantial evidence and no fraud, illegality, or abuse of discretion was shown. *Ray McDermott & Co. v. Hudson*, 348 P.2d 73 (Wyo. 1960); *Rayburne v. Queen*, 76 Wyo. 393, 303 P.2d 486 (1956). There are, however, indications that a trial *de novo* under section 41-53 was not so limited and that the trial court was actually in error if it limited itself to a review of the record made before the Board of Control. *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, 464 P.2d 533 (Wyo. 1970). In addition, under this statute the district court was the sole judge of the credibility of witnesses and was entitled to interpret the evidence. *Ward v. Yoder*, 355 P.2d 370 (Wyo. 1960). Under the Wyoming Administrative Procedure Act, however, a trial *de novo* is given a restricted meaning, and the court cannot re-determine all of the facts and substitute its judgment for that of the agency. *City of Casper v. Regan*, 433 P.2d 834 (Wyo. 1967).

49. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, *supra* note 4, at 326.

ally be expanded into other areas. In outlining the procedure to be followed in certifying a question to the Board, the court stated that the Board should adopt rules "whereby upon certification to the board by the district court of a factual issue, such as abandonment," the Board could proceed to determine the issue.<sup>50</sup> This language seems to indicate that the questions which may in the future be certified to the Board are not limited solely to abandonment issues.

In addition, the new rule adopted by the Board of Control and the State Engineer is broadly phrased and provides:

If a District Court determines that the Board of Control is to have primary jurisdiction to make the initial determination of a question involving the waters of the State of Wyoming, and their appropriation, distribution, and diversion, the Board of Control shall assume jurisdiction and shall hear and decide such question upon its certification to the Board by the District Court.<sup>51</sup>

This broad phrasing may be an additional indication of a willingness to expand the principle of primary jurisdiction into other areas, which will be discussed below.

### A. Adjudication of Priorities

As in the case of abandonment proceedings, the courts and the Board have been held to have concurrent jurisdiction to adjudicate priorities of water rights,<sup>52</sup> and, as in the abandonment cases, the Board of Control's adjudication of water rights is final and binding upon any collateral attack.<sup>53</sup> In *Simmons v. Ramsbottom* the court stated that one of the reasons for the holding of concurrent jurisdiction was that in the Board's formative period it was faced with a large amount of work, few adjudications of priorities had been made, and the Board was hampered by limited appropria-

50. *Id.* at 328.

51. Regs., pt. III, ch. VII, § 1.

52. *Anita Ditch Co. v. Turner*, 389 P.2d 1018 (Wyo. 1964); *Laramie Rivers Co. v. Le Vasseur*, 65 Wyo. 414, 202 P.2d 680 (1949); *Simmons v. Ramsbottom*, 51 Wyo. 419, 68 P.2d 153 (1937); *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258 (1900).

53. *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 100 P.2d 124 (1940); *TRELEASE, supra* note 21, at 169.

tions.<sup>54</sup> In other words, if the courts did not adjudicate priorities, no other agency could. The legislature certainly did not intend that result. This reason for concurrent jurisdiction is no longer convincing. On the other hand, the reasons of uniformity, expertise, and orderly procedure appear to be as applicable to the adjudication of priorities as they are to abandonment. For example, the technicalities involved in priority cases, which might be better understood by administrative experts, have been recognized by the Wyoming Supreme Court on several occasions.<sup>55</sup>

In addition, the factors of whether the dispute involves solely a question of law and of expense and delay do not seem to be significantly different from the abandonment cases. A problem may arise in the adjudication of priorities over the agency's competency to grant the relief requested by the parties. In the courts, these actions usually take the form of an action for a declaratory judgment or an action to quiet title. The remedy which the Board can give is a final order of adjudication that sets forth the date of priority, the amount of water appropriated, and the character of use;<sup>56</sup> this order is conclusive on all the claimants on the stream to which the adjudication relates.<sup>57</sup> This appears to give the Board the power to grant the relief which the party requests. It would seem, therefore, that the doctrine of primary jurisdiction should also be applied in this area.

## B. Distribution of Water

Section 41-64 of the Wyoming Statutes provides that the water commissioner is to regulate and divide the water of his district according to the priority of each user.<sup>58</sup> In *Van Buskirk v. Red Buttes Land & Livestock Co.* the Wyoming Supreme Court held that a water user could sue for damages or an injunction without first calling on the water

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54. *Simmons v. Ramsbottom*, 51 Wyo. 419, 430-31, 68 P.2d 153, 156 (1937).

55. *Laramie Rivers Co. v. Le Vasseur*, 65 Wyo. 414, 202 P.2d 680 (1949); *Ryan v. Tuity*, 13 Wyo. 122, 78 P. 661 (1904); *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258 (1900).

56. WYO. STAT. § 41-181 (1957).

57. WYO. STAT. § 41-190 (1957).

58. WYO. STAT. § 41-64 (1957).

commissioner to regulate the ditch.<sup>59</sup> This indicates that the doctrine of primary jurisdiction does not apply to a suit for damages for wrongful diversion of water.

Wrongful diversion questions may involve technical problems and call for expertise; an orderly procedure might result from the application of the doctrine. It seems, however, that the impact which the *Kearney* case will have on *Van Buskirk* will depend largely on the weight which the court gives to the factor of the inadequacy of the administrative remedy.

By regulating the ditch the water commissioner could stop the wrongful diversions and prevent them in the future. This would perform many of the functions of an injunction which a court could issue. The water commissioner and the Board of Control cannot, however, award damages in order to compensate the plaintiff for the defendant's actions. If the plaintiff is seeking damages, it may seem futile to require him to go first to the water commissioner. In the case of a declaration of abandonment or an adjudication of priorities, the effect of an order of the Board is much the same as a judgment or order of the court. This is not true in a suit for damages, and some courts have seized upon the inability of an administrative agency to award damages as a means of avoiding the primary jurisdiction doctrine.<sup>60</sup>

It may be desirable to get administrative advice on the question of whether there was a wrongful diversion; this may be done by forcing the plaintiff to first take advantage of the administrative remedies available to him. The Supreme Court of Texas has limited the application of the rule of inadequate administrative remedy to those situations where the administrative agency is powerless to grant the relief sought *and* the agency has no authority to make incidental findings which are essential to granting the relief.<sup>61</sup> In regulating the water, the water commissioner will divide the water according to the priorities of the parties. In any contest

59. *Van Buskirk v. Red Buttes Land and Livestock Co.*, 24 Wyo. 183, 156 P. 1122 (1916); *TRELEASE*, *supra* note 21, at 170.

60. *E.g.*, *Oliver v. Iowa Power and Light Co.*, 183 N.W.2d 687 (Iowa 1971).

61. *Foree v. Crown Central Petroleum Corp.*, 431 S.W.2d 312 (Tex. 1968).

arising out of the commissioner's action, the issue of whether one of the parties was wrongfully diverting water would, therefore, be resolved. A finding of wrongful diversion is, of course, essential to an award of damages. Thus it would be possible for a court which adopted the Texas approach to find that the inadequacy of administrative remedy does not militate against the application of the doctrine.

If a plaintiff is required first to go to the water commissioner to ask for relief in which the plaintiff is not primarily interested, the elements of expense and delay seem to play a more important role. If the party wishes to appeal from a commissioner's action or inaction, he has a right to appeal to the division superintendent and from his decision to the state engineer and finally to the district court.<sup>62</sup> The Wyoming Administrative Procedure Act requires that the administrative remedies be exhausted before a party is entitled to judicial review.<sup>63</sup> An aggrieved party would probably have to exhaust all of the administrative avenues open to him. This procedure may aid the district court in sorting out the facts of a wrongful diversion, but the important point is that the entire procedure would only decide the question of whether the water commissioner erred in regulating and dividing the water. The plaintiff is seeking damages.

It must be remembered that the inadequacy of the administrative remedy is only one factor in the determination of whether the doctrine of primary jurisdiction will be applied. Given the *Van Buskirk* decision, the rather lengthy administrative proceedings, and the Board's inability to grant the relief requested, it seems that the *Kearney* case will probably not inject the primary jurisdiction doctrine into a damage suit for wrongful diversion.

### C. Joint Ditches.

The Wyoming Statutes provide that when joint owners of a ditch or reservoir dispute over the distribution of water, the owners may apply to the water commissioner to divide

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62. WYO. STAT. § 41-63 (Supp. 1971).

63. WYO. STAT. § 9-276.32(a) (Supp. 1971).

the water.<sup>64</sup> A forerunner of this statute<sup>65</sup> was involved in *Stoner v. Mau*.<sup>66</sup> In that case the court held that the statutory remedy was not exclusive and allowed the plaintiff to sue for damages and an injunction even though he had not requested an appointment of a person to distribute the water.

If the plaintiff is merely seeking injunctive relief, the remedy which the water commissioner could grant would seem as adequate as an injunction because the commissioner is empowered to divide the water according to the parties' rights and is to continue this work until its necessity ceases.<sup>67</sup> Accepting the statement in *Stoner v. Mau* that this statute did not deprive the court of its equitable jurisdiction in this area, it still seems that, given the commissioner's ability to prevent wrongful diversion, the factor of inadequate administrative remedy should not work against the application of the primary jurisdiction doctrine. If, however, the action is for damages for the wrongful taking of water, the reasons advanced against the application of the doctrine in the area of suits for wrongful diversion of water would again apply. The inadequacy of the administrative remedy would again work against the doctrine's application.

## VII. CONCLUSION

One of the much proclaimed advantages of the doctrine of primary jurisdiction is its flexibility.<sup>68</sup> This flexibility should be attained by committing to the district court the decision of whether to apply the doctrine. This discretion should, however, not be exercised arbitrarily. Rather, in order to achieve this orderly and desired procedure and the coordination between the courts and the Board, it should be

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64. WYO. STAT. § 41-252 (1957).

65. Laws of March 1, 1897, ch. 68 § 1, [1897] Wyo. Laws 123. This statute provided that when joint owners of an irrigation ditch were unable to agree on the division or distribution of water received through the ditch, either of the owners could apply to the district court for an order appointing a suitable person to take charge of the ditch for the purpose of making a just distribution.

66. 11 Wyo. 360, 72 P. 193 (1903).

67. WYO. STAT. § 41-252 (1957).

68. McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 CALIF. L. REV. 129, 154 (1940).

exercised within the limits of the guidelines set down by the Wyoming Supreme Court.

The court indicated that the expertise of the Board and uniformity in decisions were among the factors to be considered in exercising this discretion.<sup>69</sup> Thus, if the factual situation presented by a case is particularly complex and if the district court is confronted with much technical evidence, the application of the doctrine can assist the court in understanding the evidence. If the principal or sole issue presented by the case is one of abandonment, the Wyoming Supreme Court indicated that the proceedings should be initiated before the Board, and, if not, the district court should certify the question to the Board.<sup>70</sup> This would achieve the desired uniformity of decision and a sensible coordination between the courts and the Board.

Another factor to be considered in the attempt to achieve this orderly and sensible coordination of efforts would be whether the question presented is one of fact or solely one of law. If solely one of law, a sensible procedure would not require referral of the question from an institution which is the specialist in the area of law, the district court. In addition, the problems of expense and delay should always be given weight in determining whether to apply the doctrine. Finally, if the Board cannot grant the relief requested, there would seem to be a serious question regarding the degree of order and sense inherent in a system which would blindly require referral to the Board of all questions in the area.

Speculating on the possibility of the expansion of this doctrine into other areas of water law, it seems that the striking similarities in the development of the law of adjudication of water rights and the development of the law of abandonment may indicate that this doctrine will be carried over into the adjudication area.<sup>71</sup> In the areas of distribu-

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69. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, *supra* note 4, at 325.

70. *Id.* at 328.

71. The similarity can be seen in the holdings of (1) concurrent jurisdiction in the Board and the courts and (2) the binding nature of the Board's decision on collateral attack. Compare *Louth v. Kaser*, 364 P.2d 96 (Wyo. 1961) (abandonment); *Simmons v. Ramsbottom*, 51 Wyo. 419, 68 P.2d 153 (1937) (adjudication), with *Wyoming Hereford Ranch v. Hammond Pack-*



tion of water and disputes over water rights in joint ditches, the expansion of the primary jurisdiction doctrine would appear to be hindered by cases which seem to reject it.<sup>72</sup> Nonetheless, the arguments for the application of the doctrine in these cases seem to be particularly strong when injunctive relief is sought. When damages are requested, the argument is considerably weakened. Even if the previous cases are overruled or distinguished, when the remedy sought is damages, there is a strong factor working against the application of the doctrine of primary jurisdiction.

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ing Co., 33 Wyo. 14, 236 P. 764 (1925) (abandonment); Campbell v. Wyoming Development Co., 55 Wyo. 347, 100 P.2d 124 (1940) (adjudication). Finally, in both instances the remedy which the parties are seeking is a declaration that they either have or do not have a certain right.

72. Van Buskirk v. Red Buttes Land & Livestock Co., *supra* note 59 (wrongful diversion of water); Stoner v. Mau, *supra* note 66 (joint ditches). The statute involved in *Stoner* is not the same one that Wyoming now has, but the reasoning of the case would also seem to apply to section 41-64 of the Wyoming Statutes.