

1973

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Recommended Citation

Toner, Thomas (1973) "Procedural Considerations in the Judicial Determination of Water Disputes," *Land & Water Law Review*. Vol. 8 : Iss. 2 , pp. 513 - 535.

Available at: https://scholarship.law.uwyo.edu/land_water/vol8/iss2/4

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COMMENTS

PROCEDURAL CONSIDERATIONS IN THE JUDICIAL DETERMINATION OF WATER DISPUTES*

An appropriative water right has been defined as an exclusive right to use water appropriated according to the law and applied to a beneficial use.¹ Suits to protect these rights have taken many different forms in Wyoming. These include actions seeking quiet title relief;² declaratory judgments;³ damages;⁴ injunctions to prevent wrongful diversions;⁵ writs of mandamus⁶ and mandatory⁷ and preventive⁸ injunctions against water officials; and declarations of abandonment of water rights.⁹ Of course, the relief requested by some plaintiffs includes a combination of these different remedies.¹⁰ The purpose of this comment is to examine the procedural problems relating to jurisdiction, parties, pleadings, and forms of relief which arise in water disputes.

JURISDICTION

A. Quiet Title, Declaratory Judgment, and Abandonment.

1. Power.

Wyoming Statute § 1-958 provides that a possessor of real property may bring an action to determine the interests of adverse claimants in the property. Since a water right is real property,¹¹ a quiet title action can be brought under this

*This comment was financed by the Water Resources Research Institute of the University of Wyoming.

1. *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258, 265 (1900); 2 KINNEY, IRRIGATION & WATER RIGHTS 1313 (2d ed. 1912).
2. *Wheatland Irrigation Dist. v. Dodge*, 387 P.2d 679 (Wyo. 1963); *Farm Investment Co. v. Carpenter*, *supra* note 1.
3. *Big Goose & Beaver Ditch Co. v. Wallop*, 382 P.2d 388 (Wyo. 1963).
4. *Van Buskirk v. Red Buttes Land & Livestock Co.*, 24 Wyo. 183, 156 P. 1122 (1916).
5. *Bales v. Ankney*, 382 P.2d 386 (Wyo. 1963).
6. *State ex rel. Mitchell Irrigation Dist. v. Parshall*, 22 Wyo. 318, 140 P. 830 (1914).
7. *Mitchell Irrigation Dist. v. Whiting*, 59 Wyo. 52, 136 P.2d 502 (1943).
8. *Condict v. Ryan*, 79 Wyo. 211, 333 P.2d 684 (1958); *Merrill v. Bishop*, 74 Wyo. 298, 287 P.2d 620 (1955).
9. *Yentzer v. Hemenway*, 440 P.2d 7 (Wyo. 1968).
10. The plaintiff sought an injunction, damages, and quiet title relief in *Wheatland Irrigation Dist. v. Dodge*, 387 P.2d 679 (Wyo. 1963).
11. *King v. White*, 499 P.2d 535 (Wyo. 1972); KINNEY, *supra* note 1, at 1329; TRELEASE, BLOOMENTHAL & GERAUD, CASES & MATERIALS ON NATURAL RESOURCES 69 (1965).

statute.¹² A suit to quiet title is not subject to easy classification in terms of *in rem*, quasi *in rem*, or *in personam* actions. One author has classified the Wyoming quiet title proceeding as being quasi *in rem*.¹³ This classification appears to be correct. A quasi *in rem* proceeding adjudicates the rights of only certain named defendants to property rather than the interests of all persons who might claim an interest in the property as is the case in a pure *in rem* action.¹⁴ Wyoming's quiet title action will only bind certain named defendants and their unknown heirs, devisees, and legatees.¹⁵

Since the Wyoming quiet title action is a quasi *in rem* proceeding, a Wyoming court will have power to quiet title to a water right only if the situs of the right is in Wyoming.¹⁶ The general rule appears to be that the situs of an appropriate water right is the place of diversion and not the place of use.¹⁷ Therefore, the situs problem will arise only when the water is diverted in one state and used in another.

The Wyoming Supreme Court was confronted by this issue in *Willey v. Decker*¹⁸ in which a suit was brought to determine priorities on a Montana-Wyoming stream. One of the defendants diverted water in Montana and used it in Wyoming. One of the plaintiffs diverted water in Wyoming and used it in Montana. The court held that Wyoming courts had the power to adjudicate defendant's right to the stream, apparently because the lands irrigated by that right were in Wyoming. However, the court refused to hold that Wyoming courts could adjudicate the plaintiff's right simply because he diverted water in Wyoming. This result seems to indicate that Wyoming rejects the general situs rule and will

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12. Kinney states that the general rule is that since a water right is real property, a quiet title action is proper. 3 KINNEY, IRRIGATION & WATER RIGHTS 2763 (2d ed. 1912).
 13. Note, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245, 1265 (1959).
 14. Note, *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 949 (1960).
 15. WYO. R. CIV. P. 4(h).
 16. *Willey v. Decker*, 11 Wyo. 496, 73 P. 210, 224 (1903); KINNEY, *supra* note 12, at 2760. An action to quiet title to water rights is also a local, not a transitory action. 6 CLARK, WATERS & WATER RIGHTS § 511.1, at 289 (1972).
 17. *West End Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P.2d 476 (1947); *Turley v. Furman*, 16 N.M. 253, 114 P. 278 (1911); WIEL, WATER RIGHTS IN THE WESTERN STATES § 344, at 370 (3d ed. 1911).
 18. 11 Wyo. 496, 73 P. 210 (1903).

hold that the situs of a water right is the place of use and not the place of diversion.

Since a water right is simply a right to use water, it has no situs in the sense that tangible property has. Therefore, the courts necessarily act somewhat arbitrarily in selecting either the place of use or the place of diversion as the situs of the right.¹⁹ Neither convenience nor fairness appear to dictate that one or the other be chosen. For example, interstate disputes of this nature normally arise between appropriators in contiguous states. There is usually, therefore, no problem with forcing a defendant to travel great distances in order to litigate.

The place of diversion situs is supported by the argument that the water right is in a sense represented by a certificate of appropriation issued by the state in which the diversion occurs.²⁰ The Restatement of Conflicts adopts the rule that a state has power to exercise jurisdiction to affect interests in intangible things embodied in a document which is within the state.²¹ The place of use situs is supported by the argument that the right is not perfected until it is applied to a beneficial use and that the injury occurs to the land on which the water is used. Since both states have an interest in the water right, a possible solution may be to define the situs of the water right as either the place of diversion or the place of use. There would then be concurrent jurisdiction in the two states, and the first state in which an action to quiet title is brought should proceed to determine the case without interference by the courts of the other state.

*Rickey Land and Cattle Co. v. Miller and Lux*²² indicates that this approach may be correct. In this case A, who diverted water in Nevada, sued B in a Nevada court to enjoin B from diverting water in California to the injury of A's lands in Nevada. B, who had lands in California, then instituted a suit in California to quiet title to this water right. The Supreme Court held that there was concurrent jurisdic-

19. Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241 (1940).

20. WYO. STAT. § 41-211 (1957).

21. RESTATEMENT (SECOND) OF CONFLICTS § 63 (1971).

22. 218 U.S. 258 (1910).

tion in the two courts and that the issues in the two suits were so much the same that the "court first seized should proceed without interference."²³ The California court was enjoined from hearing the quiet title action.

Since a quiet title action is essentially an action for declaratory relief,²⁴ the quiet title jurisdiction requirements would also apply to declaratory judgment actions in which the plaintiff seeks a determination of the relative rights to water. An abandonment proceeding, like a quiet title action, involves the determination of title to or the status of property located within the court's jurisdiction. Therefore, abandonment proceedings also appear to be quasi in rem proceedings and subject to these procedural considerations.

2. Competence and Venue.

Since the Wyoming district courts are courts of general jurisdiction, competence or jurisdiction over the subject matter will be established once the situs of the water right is determined to be in Wyoming for power purposes.²⁵ Wyoming Statute § 1-30 provides that actions for "the recovery of real property, or of an estate or interest therein" must be brought in the county in which the subject of the action is situated. Generally this will again require a determination of the situs of the water right. *Willey* may indicate that the place of use determines the situs for venue as well as power purposes. It seems, however, that there will generally be no compelling reason for selecting the place of use over the place of diversion and that situs for the purpose of the venue statute should be either where the water is diverted or where it is used.²⁶

Depending upon the nature of the quiet title action, the situs of the water rights may not always determine the appropriate venue for the action. For example, Ohio, the law of origin for Wyoming's venue statute, has held that an action by a plaintiff, who was in possession of and had legal title to real property, to cancel a recorded mechanic's lien against

23. *Id.* at 262. For a case which follows the holding in *Rickey* see *Brooks v. United States*, 119 F.2d 636 (9th Cir. 1941).

24. *Ohio Oil Co. v. Wyo. Agency*, 63 Wyo. 187, 179 P.2d 773, 780 (1947).

25. WYO. CONST. art 5, § 10.

26. CLARK, *supra* note 16, at § 511.2.

the property was not an action to recover real property or an interest therein within the meaning of the venue statute.²⁷

B. Actions for Damages and Injunctions.

1. *Local-Transitory Actions.*

The local-transitory distinction raises difficult problems in this area. It should be noted that some authorities classify the local-transitory problem as a venue question, which means that it is waivable.²⁸ Others, however, treat the problem as one of jurisdiction which cannot be waived.²⁹

The majority rule is that suits for injuries to real property must be brought in the state in which the property is situated.³⁰ This requirement has been severely criticized,³¹ and the rule has been rejected in several states.³² In addition it has generally only been applied to actions for damages to *land* although it is often phrased in terms of *real property*.³³ Kinney indicates that the local action rule also applies to actions for damages for injuries to water rights.³⁴ It seems, however, that the mere fact that water rights are classified as real property should not lead to an automatic application of the rule to in personam actions for damages or injunctions.

The Wyoming Supreme Court has apparently rejected the local action rule as it applies to suits for injuries to water rights. It adopted the general rule that where personal jurisdiction is obtained over the defendant, an in personam action for damages or an injunction will lie even though the situs of the water right is in another state.³⁵ It held in *Willey* that if the defendant is before the court, then the court can assert personal jurisdiction over the defendant in an action

27. *Gustafson v. Buckley*, 161 Ohio St. 160, 118 N.E.2d 403 (1954).

28. Comment, *Local Actions in the Federal Courts*, 70 HARV. L. REV. 708, 713 (1957).

29. Moore indicates that the true distinction between local and transitory is the distinction between *in rem* and *in personam* proceedings. 1 MOORE, FEDERAL PRACTICE 1455-6 (1972).

30. *Id.* at 1461.

31. *Id.* at 1455-6.

32. See, e.g., *Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W.2d 994 (1952); Annot., 30 A.L.R.2d 1219 (1953); Annot., 42 A.L.R. 196 (1926).

33. MOORE, *supra* note 29.

34. 3 KINNEY, IRRIGATION & WATER RIGHTS 3101 (2d ed. 1912).

35. CLARK, *supra* note 16, at 291-92.

for wrongful interference with a water right if the wrongful act or the resulting injury occurred in this state.³⁶

If the wrongful diversion occurs in Wyoming, then the wrongful act occurred in this state, and there is jurisdiction even though the plaintiff's place of use and diversion are located outside this state. If the defendant wrongfully diverts water outside Wyoming, and deprives Wyoming lands of the water, Wyoming courts still have jurisdiction because the resulting injury occurs in this state. Finally, if a plaintiff diverts water in Wyoming and uses it outside the state and if he is wrongfully deprived of that water by defendant's diversion outside the state, Wyoming also has jurisdiction. In *Willey* the court reasoned that the plaintiff has a right to have the water flow downstream to his headgate. This right is located in Wyoming, and if that right is interfered with by an upstream appropriator, an injury occurs in this state.³⁷

2. Power.

The defendant must be served with process before the court can assert personal jurisdiction over him. The preceding discussion of local-transitory actions, of course, assumed that the defendant was before the court either because he was served within the state, waived his objections to the power of the court, or came before the court by some other means. If the defendant is a nonresident, serious problems may arise in securing personal jurisdiction.

The Wyoming long arm statute has remedied many of these problems.³⁸ Personal jurisdiction can be obtained over a nonresident defendant by service outside the state in the following situations:

1. The defendant wrongfully diverts water in Wyoming (even though he uses it outside the state), and this diversion deprives the plaintiff's Wyoming lands or his means of diversion located in Wyoming³⁹ of water. Such action would constitute tortious injury by an act done in this state.⁴⁰

36. *Willey v. Decker*, 11 Wyo. 496, 73 P. 210, 224 (1903).

37. *Id.* at 225.

38. WYO. STAT. §§ 5-4.1 to -4.3 (Supp. 1971).

39. See *Willey v. Decker*, *supra* note 36, holding that such action causes an injury in this state.

40. WYO. STAT. § 5-4.2(a) (iii) (Supp. 1971).

2. The defendant diverts water outside the state. The water is used by the defendant in Wyoming, and this diversion deprives the plaintiff's Wyoming lands or means of diversion of water. The claim for relief arises from an injury caused by a tortious act outside the state, and the defendant's use of the wrongfully diverted water on Wyoming lands seems to constitute engaging in a "persistent course of conduct in this state" which causes tortious injury in Wyoming.⁴¹

If the defendant diverts and uses the water outside Wyoming, then the long arm statute does not permit service outside the state in order to obtain personal jurisdiction over the defendant. In this case the defendant would lack sufficient minimum contacts with Wyoming to justify out of state personal service.

3. *Competence and Venue.*

The Wyoming district courts are, of course, competent to hear these suits because they are the courts of general jurisdiction in the state.⁴² If the suit is styled in the form of an ejectment action⁴³ for the recovery of real property, the action would have to be brought in the county in which the water right is situated.⁴⁴ This again involves a determination of the situs of the right. It appears, therefore, that it may be desirable in some situations to avoid the ejectment form of action in order to eliminate the situs problem.

An injunction against wrongful diversion would have the same effect as ejectment and would be a superior alternative from the venue standpoint. If damages or an injunction are sought against a nonresident defendant, the action may be brought for venue purposes where the cause of action arose or where the plaintiff resides.⁴⁵

It may, however, be difficult to determine where the cause of action arose when the water was wrongfully diverted by the defendant in one county and injury resulted to lands

41. WYO. STAT. § 5-4.2(a)(iv) (Supp. 1971).

42. WYO. CONST. art. 5, § 10.

43. WYO. STAT. § 1-959 (1957). As is shown below, this form of action is probably not correct.

44. WYO. STAT. § 1-30(1) (1957).

45. WYO. STAT. § 1-36 (1957).

situated in another county. It has been suggested that neither the diversion alone nor the injury alone is sufficient to constitute a cause of action against the person diverting the water. Therefore, since the cause of action arose partly in each county, the plaintiff could properly bring the action in either county.⁴⁶

PRIMARY JURISDICTION

This subject has been more exhaustively treated in a prior volume of this law review;⁴⁷ however, a brief summary of this doctrine will be given here. The doctrine of primary jurisdiction provides that where a court and an administrative agency have concurrent jurisdiction over a question, the issue should be initially determined by the administrative agency.⁴⁸ This doctrine affects Wyoming water law because it will determine whether certain proceedings should be initiated before the courts or the State Engineer and the Board of Control.

In *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*⁴⁹ the Wyoming Supreme Court held that the Board of Control has primary jurisdiction over abandonment of water rights.⁵⁰ In determining whether the primary jurisdiction doctrine should be applied to a particular question, consideration should be given to the following factors: (1) the Board's expertise, (2) the desirability of uniformity of decisions, (3) coordination of efforts between the Board and the courts, (4) whether a question of law or fact is involved, (5) expense and delay, and (6) whether the Board can grant the relief requested.⁵¹

46. *Deseret Irrigation Co. v. McIntyre*, 16 Utah 398, 52 P. 628 (1898); *Willey v. Decker*, *supra* note 36, at 224; *CLARK*, *supra* note 16, at 294.

47. 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), 7 LAND & WATER L. REV. 599 (1972).

48. DAVIS, ADMINISTRATIVE LAW TEXT § 19.01, at 373 (1972).

49. 487 P.2d 324 (Wyo. 1971).

50. The proposed Wyoming Water Rights Act of 1973 (Working Draft #1, Dec. 1971) Ch. 2, § 41, at 41-42 specifically provided that the Board of Control shall have "exclusive original jurisdiction in water right abandonment proceedings."

51. Note, *supra* note 47, at 602-04.

PARTIES

A. Suits against water officials.

Suits seeking an injunction or writ of mandamus against a water official have been used in Wyoming. Some of these are actually designed to determine water rights among private appropriators. For example, in *Mitchell Irrigation District v. Whiting*,⁵² the plaintiff sought a mandatory injunction requiring the defendant water commissioner to prevent diversion by certain upstream appropriators. The Wyoming Supreme Court held that the water official was merely a nominal party. The appropriators whose interests would be damaged by an injunction issued against the water official were held to be indispensable parties.

Mitchell was decided before the adoption of the Wyoming Rules of Civil Procedure. Rule 19,⁵³ however, seems to require a similar result. An appropriator who is not joined would not be bound by a decision against the official. If the official is ordered to stop the appropriator's diversion, as a practical matter the appropriator's ability to protect his interest has been impaired.⁵⁴ A decree adverse to the water official would have an injurious effect on the absent party's interest.⁵⁵

More importantly, a decision in the absence of the appropriator who would be adversely affected would subject the water official to a substantial risk of incurring inconsistent obligations.⁵⁶ If appropriator A sues the water commissioner and obtains an order compelling him to close B's headgate and B is not joined, then B could sue the commissioner in a separate action and obtain an injunction preventing the water official from closing the same headgate.

B. Suits between appropriators.

In a suit between appropriators, there generally would be no need to join the water officials who administer the stream

52. 59 Wyo. 52, 136 P.2d 502 (1943).

53. Wyo. R. Civ. P. 19.

54. Wyo. R. Civ. P. 19(a) (2) (i).

55. According to *Am. Beryllium & Oil Corp. v. Chase*, 425 P.2d 66 (Wyo. 1967), this is one test of an indispensable party.

56. Wyo. R. Civ. P. 19(a) (2) (ii).

which is the subject of the dispute unless the water official is interfering or threatening to interfere with the water.⁵⁷ The Wyoming practice appears to be not to join the water officials.⁵⁸ In a quiet title action, for example, where no right of the state would be prejudiced by the court decree and failure to comply with statutory procedures is not an issue, there would be no reason to join the state or the water officials.⁵⁹

C. Suits by Water Distribution Agencies.

The problem in this area is whether water distribution agencies, such as mutual water companies and irrigation districts, can maintain actions against claimants to the water diverted by the agency without joining its shareholders or consumers.

The questions which cause the difficulties are: (1) who owns the water right and, therefore, has a right to protect it, and (2) what damage does the agency itself sustain by reason of the wrongful diversion of water. One authority has stated, "Whether the distributing agency or the consumer 'owns' the water right often presents perplexing problems of semantics."⁶⁰ He concludes, however, that the courts have adopted a variety of theories so that in most states

in external relationships between the project and other claimants to the water, the distributing agency is regarded as the 'proprietor of the appropriation', but internally, between the distributor and the consumer, the consumer has property rights that the court will protect from arbitrary action by the distributor.⁶¹

Wyoming's system of granting a primary permit to the agency to divert and store the water and a secondary permit

57. Clark, however, states that if a stream is being administered by a water official, the official must generally be joined as a party, but his position does not appear to be supported by the cases which he cites. For example, he cites: *Koch v. Whitten*, 140 Colo. 109, 342 P.2d 1011 (1959); *Reynolds v. W.S. Ranch Co.*, 69 N.M. 169, 364 P.2d 1036 (1961); and *Calderwood v. Young*, 212 Ore. 197, 315 P.2d 561 (1957). In these cases the water official was either the sole defendant or the sole plaintiff. They did not involve the propriety of joining the official in essentially private disputes. CLARK, *supra* note 16, at 296-97.

58. *See, e.g.*, *Van Buskirk v. Red Buttes Land & Livestock Co.*, *supra* note 4, in which damages were sought; and *Wheatland Irrigation District v. Dodge*, *supra* note 2, in which the plaintiff sought to quiet title to the water rights.

59. *Hudson v. West*, 47 Cal. App. 2d 823, 306 P.2d 807, 808 (1957).

60. TRELEASE, *supra* note 11, at 263.

61. *Id.* at 264.

to the consumer to apply the water to beneficial use gives the agency rights in the water which it can enforce against adverse claimants.⁶² In addition where the water distribution agency has been adjudicated a water right or was organized by consumers transferring their rights to the agency in exchange for shares in the agency's rights,⁶³ the agency is the holder of the water right. There appears to be no conceptual difficulty in allowing the agency to sue to protect that right.⁶⁴

While the issue has not been decided in Wyoming, the general rule is that a water distribution agency can, without joining its consumers, maintain an action to adjudicate water rights, to quiet title to water rights, or to obtain injunctive relief against adverse claimants.⁶⁵ However, when the agency seeks damages, the courts have split over the question of joinder.

The Utah Supreme Court held in *Gunnison-Fayette Canal Co. v. Gunnison Irrigation Co.*⁶⁶ that a nonprofit mutual water company, which was the holder of a water right, could sue for the value of the water which had been wrongfully diverted by the defendant. It could not sue for the damage to the shareholder's crops,⁶⁷ and all amounts recovered were to be held in trust for its shareholders. This result seems to be unsatisfactory for two reasons.

First, this result may subject a defendant to a multiplicity of suits. If the consumers are not to go uncompensated for their individual damages, they must also be entitled to sue the defendant. The wrongdoer could be sued by the distributing agency and by each consumer, yet each case would involve the proof of the same facts with variations only in the area of damages. Under the Utah holding, the

62. WYO. STAT. § 41-26 to -27 (1957).

63. *TRELEASE*, *supra* note 11, at 257.

64. If the company, such as a carrier ditch, owns only the physical distribution works, then it cannot sue claimants to water which its consumer are entitled to use. *TRELEASE*, *supra* note 11, at 264.

65. *See* Annot., 100 A.L.R. 561 (1936). There are cases in Wyoming in which the water distribution agency has sued without joining its consumers and shareholders. *See, e.g.,* Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Co., 487 P.2d 324 (Wyo. 1971); Mitchell Irrigation Dist. v. Whiting, 59 Wyo. 52, 136 P.2d 502 (1943).

66. 22 Utah 2d 45, 448 P.2d 707 (1968).

67. This followed the court's holding in *Salt Lake City v. E. Jordan Irrigation Co.*, 40 Utah 126, P. 593 (1911).

consumers are certainly not indispensable parties and apparently are not even necessary parties. Therefore, there appears to be no means of guaranteeing that the defendant would not be subjected to a variety of actions for one wrongful act.

Secondly, there is some conceptual difficulty with the measure of damages in this case. The company is awarded the value of the water wrongfully diverted. The company does not, however, own the corpus of the water; rather it only has a right to divert and use a specific quantity.⁶⁸ The damages should be measured by the impact of the interference on the company's use of the water. Of course, the company itself does not apply the water to a beneficial use and theoretically should not be entitled to damages.

It seems that Utah's resolution of this problem is unsatisfactory. It also seems that those courts which allow the company to seek equitable relief without joining the consumers are inconsistent when they deny the company the right to sue for damages for the individual injuries suffered by their shareholders.⁶⁹ Their real complaint is that since the company has suffered no damage itself, it is not a real party in interest in a damage suit.⁷⁰

The real party in interest requirement is designed to require the action to be brought by the person who, according to the governing substantive law, is entitled to enforce the right.⁷¹ If the water company has the right to enforce the substantive right in an equity action, it should also have the right to protect that interest in other ways. The action need not necessarily be brought in the name of the person who will ultimately benefit from the recovery.⁷² The courts which require that the consumers be joined overlook this factor.

Rule 17 of the Wyoming Rules of Civil Procedure states that a "trustee of an express trust . . . may sue in his own

68. See *Farm Investment Co. v. Carpenter*, *supra* note 1, at 265; 1 WIEL, WATER RIGHTS IN THE WESTERN STATES 730 (3d ed. 1911).

69. *Farmer's Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 45 P. 444 (1896) (allowed the irrigation company to sue to determine priorities). *Eaton v. Larimer & Weld Reservoir Co.*, 3 Colo. 366, 33 P. 278 (1893) (denied reservoir company the right to collect on a bond for damage to shareholders' crops).

70. *Nev. Ditch Co. v. Pac. Livestock Co.*, 63 Ore. 363, 127 P. 984 (1912).

71. *Wyo. Wool Marketing Ass'n. v. Urruty*, 394 P.2d 905 (Wyo. 1964).

72. 6 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE 644 (1971).

name without joining with him the party for whose benefit the action is brought."⁷³ It has been suggested that the water distribution agency holds legal title to the water, and the consumers hold equitable title so that there is a trustee-beneficiary relationship between the agency and the consumer.⁷⁴ While this may not be truly a trust so as to come within the phrase "a trustee of an express trust", the relationship is similar to a trust arrangement. Since the specific enumerations of those who are real parties in interest in Rule 17 are merely illustrations of the rule,⁷⁵ and the agency-consumer relationship is so similar to the trustee-beneficiary relationship, the agency should be treated as the real party in interest.

When the water right has been adjudicated to the corporation, some type of trust theory justification would probably be worked out in any event in order to allow the consumer to sue. Unless the consumer has some type of interest or equitable title, he could not sue to protect a right "owned" by the corporate entity.

This problem could be avoided if the water distribution agency was obligated to indemnify its consumers for any loss of water caused by wrongful diversion or if its articles provided for an assignment of the consumers' claims to the corporation. Even the courts which require joinder appear to recognize these exceptions.⁷⁶

PLEADING AND FORMS OF ACTION

Rule 8(a) (1) of the Wyoming Rules of Civil Procedure requires that the pleading set forth a short, plain statement of the claim showing that the pleader is entitled to relief. The purpose of this section is to determine of what that statement should consist.

A. Quiet Title.

The minimum requirements of pleading in a quiet title action are that the plaintiff allege: (1) he is in possession of

73. WYO. R. CIV. P. 17(a).

74. KINNEY, *supra* note 34, at 2662.

75. WRIGHT & MILLER, *supra* note 72, at 667.

76. See *Nev. Ditch Co. v. Pac. Livestock Co.*, *supra* note 70; *Gunnison-Fayette Canal Co. v. Gunnison Irrigation Co.*, *supra* note 66, at 709 (Henriod dissenting).

a described water right, (2) he is the owner in fee simple of the water right, (3) the defendant claims an estate or interest in the water right which is adverse to the plaintiff, and (4) the defendant has no estate, right, title or interest whatsoever in the water right.⁷⁷

Some problem may be created by the possession requirement when the defendant is not merely asserting a claim but has already diverted the water. The plaintiff is then deprived of the use of the water, and his situation is comparable to a landowner who is deprived of the use of his land by a third person's seizure of possession. It seems that in this situation a quiet title action may not be appropriate and that it is only proper so long as the plaintiff is using the water and the defendant is simply asserting an adverse claim. The Wyoming court has, however, stated that the possession requirement is based on the availability of full protection to the plaintiff through an action in ejectment or its statutory substitute.⁷⁸ Where legal remedies are inadequate, the Wyoming court has dispensed with the possession requirement in quiet title actions. In *Chesney v. Valley Live Stock Co.*⁷⁹ the court held a mortgagee not in possession could bring a quiet title action to cancel a quit claim deed as a cloud on title because there was no adequate remedy at law. As is shown below, the common law action of ejectment and the Wyoming statutory substitute are not available alternatives in a water rights dispute. Therefore, a quiet title action may be appropriate even though the defendant has already diverted the plaintiff's water.

The possession and other procedural difficulties which are inherent in a quiet title action may, however, be avoided by bringing a declaratory judgment action.

B. Abandonment.

In order to obtain a declaration of abandonment of a water right, the pleader should allege: (1) the defendant failed to use the water for beneficial purposes for five succes-

77. *Hunziker v. Knowlton*, 78 Wyo. 241, 324 P.2d 266 (1958); Wyo. STAT. § 1-958 (1957). See Wyo. R. Civ. P. Form 16.

78. *Ohio Oil Co. v. Wyo. Agency*, 63 Wyo. 187, 179 P.2d 773, 779 (1947).

79. 34 Wyo. 378, 244 P. 216 (1926).

sive years,⁸⁰ (2) the abandonment was effected by the defendant's voluntary act,⁸¹ and (3) the plaintiff is the owner of an appropriation of water that would be appreciably benefited by a declaration of abandonment.⁸²

C. Suits against water officials.

In *Le Beau v. State of Wyoming ex rel. White*⁸³ the plaintiff sought a writ of mandamus compelling the water commissioner to regulate the controlling works of a reservoir in accordance with the priorities existing upon the Rock Creek watershed and to distribute such water as a part of the natural waters of Rock Creek. The commissioner had released the reservoir water into another watershed. The court denied the writ on two grounds: (1) There was a serious dispute over whether the water had been illegally impounded, and a writ of mandamus will issue only where the right sought to be enforced is "clear and certain, so as not to admit to any reasonable controversy."⁸⁴ (2) The plaintiffs failed to show that they had no plain and adequate remedy at law since the courts could pass on the question of illegal impoundment in an "ordinary suit."⁸⁵

The writ of mandamus appears to be proper only where the duty to be performed is ministerial, and the obligation is peremptory and clearly defined, and there is no adequate remedy at law.⁸⁶ It will be appropriate in those cases where a plaintiff asks not that a decision be made one way or the other but only that a decision be made.⁸⁷ This was the situation in *State ex rel. Mitchell Irrigation District v. Parshall*⁸⁸ in which the Board of Control refused to even pass on the

80. Wyo. STAT. § 41-47 (1957).

81. *Ramsay v. Gottsche*, 51 Wyo. 516, 69 P.2d 535 (1937). It is not necessary to allege or prove that the defendant intended to abandon the water right. *Ward v. Yoder*, 355 P.2d 371 (Wyo. 1960). It is, however, a defense to abandonment if nonuser is caused by facts not under the appropriator's control. *Yentzer v. Hemenway*, 440 P.2d 7, 13 (Wyo. 1968).

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

83. 377 P.2d 302 (Wyo. 1963).

84. *Id.* at 303.

85. While a writ of mandamus is a legal remedy, the court issuing it is controlled by equitable principles. *State ex rel. Cross v. Bd. of Land Comm'rs*, 50 Wyo. 181, 58 P.2d 423 (1936).

86. *Le Beau v. State of Wyo. ex rel. White*, *supra* note 83.

87. *Work v. United States ex rel. Rives*, 267 U.S. 175, 184 (1925).

88. 22 Wyo. 318, 140 P. 830 (1914).

plaintiff's proofs of appropriation in order to determine whether the plaintiff had a water right. The court issued the writ compelling the Board to pass upon the plaintiff's proofs because the plaintiff was not asking that he be granted a water right but only that the water official be required to perform his statutory duty of reviewing the applications for a permit.

On the basis of this case, it appears that the petition for the writ should state facts showing: (1) the applicant has an interest in obtaining this writ, (2) he has complied with all conditions precedent to demanding official action, (3) there was a clearly defined, indisputable legal duty resting on the respondent to take certain action,⁸⁹ (4) the official or board was guilty of a breach of this duty or an abuse of discretion, and (5) the petitioner has no plain and adequate remedy at law.⁹⁰

An attempt may be made to avoid some of the stringent requirements of the writ of mandamus by seeking instead a mandatory injunction against the water official. However, a mandatory injunction issued to compel an official to perform a duty imposed by law is identical in its function and purpose to a writ of mandamus.⁹¹ Different criteria should not govern their availability in this area. The issuance of an injunction to restrain the official from performing an injurious act is governed by the same equitable principles that govern the issuance of any injunction.⁹²

D. Tort actions.

1. *In general.*

If a plaintiff seeks damages for a wrongful interference with his water right, his pleading will be sufficient if it alleges facts showing: (1) he is the owner of a certain described⁹³

89. *State ex rel. Whitehead v. Gage*, 377 P.2d 299, 300 (Wyo. 1963).

90. *LeBeau v. State of Wyo. ex rel. White*, *supra* note 83, at 304, indicates that not only must the traditional legal remedies be inadequate but equitable remedies, such as injunctions, must also be inadequate.

91. *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E.2d 716, 720 (1967); *Bd. of Managers v. City of Wilmington*, 235 N.C. 597, 70 S.E.2d 833 (1952).

92. The requirements for an injunction are discussed below.

93. The plaintiffs should allege in "clear and concise language plaintiffs are the owners of the water rights in question." *Hunziker v. Knowlton*, 78 Wyo. 241, 324 P.2d 266 (1958).

right to use water,⁹⁴ (2) the defendant has wrongfully interfered with this right, (3) the defendant's actions are the proximate cause of this interference, and (4) the plaintiff is thereby injured.⁹⁵ This claim for relief appears to have its roots in the common law form of action of trespass on the case. This action lay to protect injuries to solely intangible rights, such as a water right.⁹⁶ The nature of the action required the allegations of right, duty, breach, and proximate cause.⁹⁷ The modern requirements are similar.

2. Ejectment.

At common law ejectment would not lie to recover intangible real property, such as in incorporeal hereditament, a water course, or a natural stream.⁹⁸ A water right has been held to be an incorporeal hereditament by the Wyoming court.⁹⁹ In *Allen v. Houn*¹⁰⁰ the court also stated that the Wyoming ejectment¹⁰¹ statute is the same in substance as the common law ejectment action and is simply stripped of the fictions and technicalities of pleadings which it involved.¹⁰² It appears, therefore, that an action to recover a water right based on the Wyoming ejectment statute is not technically proper even though the defendant has diverted all of the plaintiff's water and applied it to his own use.¹⁰³

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94. Clark suggests that it is desirable to allege the basic elements of the water right, *i.e.*, (1) The quantity of water appropriated; (2) The source; (3) The priority date of appropriation as related to other rights and priorities; (4) The point of diversion; (5) The nature of the use or the purpose to which the right of use applies; (6) The time, period, or season when the right of use exists; and (7) The place of use. He also states that it is good practice to refer to the water right by number if there is a certificate of appropriation and to incorporate the certificate by reference. 6 CLARK, *WATERS & WATER RIGHTS* 302 (1972).
95. *See, e.g.*, the statement of the pleadings in *Campbell v. Wyo. Development Co.*, 55 Wyo. 347, 100 P.2d 124 (1940); *Van Buskirk v. Red Buttes Land & Livestock Co.*, 24 Wyo. 183, 156 P. 1122 (1916); *Gustin v. Harding*, 20 Wyo. 1, 121 P. 522 (1912); *Stoner v. Mau*, 11 Wyo. 366, 72 P. 193 (1903). *See also* CLARK, *supra* note 94, at 301; KINNEY, *supra* note 34, at 3108-09.
96. CRIBBET, *JUDICIAL REMEDIES* 42 (1954).
97. SHIPMAN, *COMMON LAW PLEADING* 214 (1923).
98. KINNEY, *supra* note 34, at 3039; SHIPMAN, *supra* note 97, at 177.
99. *Frank v. Hicks*, 4 Wyo. 502, 35 P. 475, 481 (1894).
100. 30 Wyo. 186, 219 P. 573 (1923).
101. WYO. STAT. § 1-959 (1957).
102. *Allen v. Houn*, *supra* note 100, at 578, 581.
103. The determination of the correct form of action is important for the purposes of the statute of limitations. Wyo. Stat. § 1-13 (1957) provides a ten year period for actions to recover title or possession of lands, tenements, or hereditament. Since *Frank v. Hicks*, *supra* note 99 stated that a water right is an incorporeal hereditament, the period of limitations should be ten years even if ejectment is not a proper remedy.

3. *Nuisance.*

A private nuisance is a non-trespassory interference with a person's private use and enjoyment of his land.¹⁰⁴ This form of action seems well adapted to suits for wrongful interference with appropriative water rights. This is shown by the situations in which an upstream junior appropriator wrongfully diverts water which would otherwise reach a downstream senior appropriator or pollutes the water so as to render it unusable. While each appropriator is entitled to divert a certain quantity and quality of water,¹⁰⁵ the senior appropriator is not entitled to the possession of any particular corpus of water until it is running in his diversion works.¹⁰⁶ Therefore, the junior's interference appears to be non-trespassory since it is not incidental to and does not result from an unprivileged entry or intrusion on the plaintiff's land.¹⁰⁷ In addition the senior's right to use the water for the purpose for which the appropriation was made has been impaired.

The Wyoming court appears to have adopted the Restatement of Torts criteria for determining what constitutes a private nuisance.¹⁰⁸ The Restatement's rule is that there is no liability under the nuisance theory unless the non-trespassory invasion of another's private use and enjoyment of land is intentional and unreasonable or unintentional and the product of negligent, reckless, or ultra-hazardous conduct.¹⁰⁹ Where the defendant's conduct is intentional but reasonable or entirely accidental, there is no liability.

The danger of the Restatement's language can be seen in the following situation: A large corporation which is the entire economic base of a community requires an additional cubic foot per second of water in order to conduct its opera-

104. RESTATEMENT OF TORTS § 822 (1939); RESTATEMENT (SECOND) OF TORTS (Tent Draft No. 16) § 821D (1970). The court characterized the defendant's wrongful diversion as a nuisance in *Willey v. Decker*, 11 Wyo. 496, 73 P. 210 (1903), and pollution caused by the defendant as a nuisance in *Sussex Land & Livestock Co. v. Midwest Refining Co.*, 294 F. 597 (8th Cir. 1923).

105. *Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 57 (1913).

106. *Farm Investment Co. v. Carpenter*, *supra* note 1, at 265.

107. RESTATEMENT OF TORTS § 822, comment e (1939).

108. *Schork v. Epperson*, 74 Wyo. 286, 287 P.2d 467 (1955); Comment, *The Availability and Limitations of the Private Nuisance Doctrine in Wyoming*, 7 LAND & WATER L. REV. 545 (1972).

109. RESTATEMENT OF TORTS § 822 (1939). The Wyoming court seemed to affirm the fault criterion in nuisance actions in *Lore v. Town of Douglas*, 355 P.2d 367, 370 (Wyo. 1960).

tions economically and stay in business. A small farmer is a senior appropriator with an appropriation of one c.f.s. The corporation, knowing that the farmer is a senior appropriator, diverts the extra water, and the farmer's crops are destroyed. This is an intentional act, and the next step under the Restatement's language is to determine if it is reasonable. This in turn is determined by whether the utility of the actor's conduct outweighs the gravity of the harm.¹¹⁰ The preservation of the economic base of an entire community probably outweighs the destruction of one farmer's crop. No court, however, should allow the farmer to be deprived of his water right without compensation. The Restatement's test would appear to allow exactly this result because the interference is intentional but reasonable.¹¹¹

Professor Fleming James, Jr., however, contends that the Restatement's position is against the weight of case authority.¹¹² He suggests that there should be liability if substantial harm is caused by the intentional invasion of the private use and enjoyment of land, even though the conduct or condition causing the harm is socially useful, is maintained with all due care, and is in a suitable, convenient location.¹¹³ In effect he would remove the requirement for finding fault on the part of the defendant before characterizing his conduct as a private nuisance. Instead in determining liability, it would be only necessary to look to the impact of the defendant's actions on the plaintiff. In the above example, a determination that the small farmer would be substantially harmed would lead to the corporation's liability.

James' approach would explicitly recognize that when a junior appropriator causes substantial harm to a senior appropriator by a non-trespassory interference with the senior's private use and enjoyment of land, he will be held strictly

110. RESTATEMENT OF TORTS § 826 (1939), applied in *Schork v. Epperson*, *supra* note 108, at 470.

111. The courts have devised several means of avoiding such results. One of these is the "conditional fault" concept. An activity is reasonable if compensation is paid and unreasonable if it is not. This, however, appears to be a type of security blanket for those who are comfortable with a theory of recovery only of the word "fault" is used. James, *infra* note 112.

112. James, RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 16), Memo at 140 (1970).

113. *Id.*

liable. The American Law Institute is apparently moving toward this goal. Tentative Draft No. 17 still defines a nuisance in terms of an intentional and unreasonable invasion,¹¹⁴ but the Institute has voted to include the following provision: "Even though one's conduct is reasonable in the sense that its social utility outweighs the harms and risks it causes, he is subject to liability for damages, but not to an injunction."¹¹⁵ The corporation in the example would in effect have the power of condemnation but not the power to steal. The Wyoming court has followed the Restatement before, and it seems appropriate for the court to reject the potentially dangerous language of the first Restatement and adopt the rule which leads to the result most courts will reach in any event.¹¹⁶

RELIEF

A. Damages.

The function of compensatory damages is to place the injured person as nearly as possible in the condition which he would have been in if the wrong had not occurred.¹¹⁷ This section's purpose is to determine how that function is performed in water disputes.

The damages claimed for diversion of a natural stream must be for the injury to the plaintiff's enterprise consequent to the loss of the flow and use of the water, not for the value of the water at so much per inch or gallon, since the plaintiff does not own the *corpus* of the water, but a usufruct.¹¹⁸

Other authorities have taken the position that the measure of damage in this area is the reasonable value of the water taken.¹¹⁹ Wiel's statement, however, seems to be the correct approach to damages for wrongful interference with a water

114. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 17) § 822 (1971).

115. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 17) § 31 (1971).

116. *Sussex Land & Livestock Co. v. Midwest Refining Co.*, 294 F. 597 (8th Cir. 1923), provides some authority for adopting this approach. The court stated on page 604 that where water is rendered unfit for stock purposes by pollution, the authorities are that an actionable wrong has occurred, and "it is no defense that the cause of the pollution was a natural user of land in a careful manner."

117. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 137 (1935).

118. WIEL, *supra* note 68, at 699.

119. CLARK, *supra* note 16, at § 516.1.

right. A water right is a right to use water, and the plaintiff will be restored to his original condition before the wrong if he is compensated for the injury to his land or business caused by the wrongful interference.

If the taking is permanent or if seepage or pollution causes permanent damage, the measure of damages is the depreciation in the permanent value of the plaintiff's estate, *i.e.*, the difference between the market value of the land immediately before the injury and the value immediately after.¹²⁰ If crops are destroyed because of diversion or pollution, there is a split of authority over the measure of damages. Some courts hold that the measure is the value of the crops that would have been produced under ordinary conditions less the expenses of producing and marketing a mature crop.¹²¹ Others state that such damage is too speculative and hold that the measure is the difference between the rental value of the land with water and its rental value without water.¹²² *Sussex Land and Livestock Co. v. Midwest Refining Co.*¹²³ upheld a trial court's award of damages to pasture land caused by pollution of water equal to the difference in the rental value of the land with the pollution and the rental value without the pollution.

B. Injunction.

In order to obtain an injunction, the plaintiff must first show that he has a valid right to use a specified quantity of water¹²⁴ and that an injunction will benefit him.¹²⁵ Of course, the prerequisite of no adequate remedy at law must be met,¹²⁶ and the remedy at law is inadequate if the injured party will

120. CLARK, *supra* note 16, at § 516.1; KINNEY, *supra* note 34, at § 1697; WIEL, *supra* note 68, at 638. In *Whitmore v. Utah Fuel Co.*, 26 Utah 488, 73 P. 764 (1903), however, the court held that the measure should be the cost of purchasing a like water right for delivery to the same land.

121. KINNEY, *supra* note 34, at § 1698; WIEL, *supra* note 68, at § 638. Of course, if the crop is only a partial failure, an additional deduction would be made for the crop which was produced. *Petrofesa v. Denver & Rio Grande W. R. Co.*, 110 Utah 109, 169 P.2d 808 (1946).

122. KINNEY, *supra* note 34, at § 1698.

123. 294 F. 597 (8th Cir. 1923).

124. *Merrill v. Bishop*, 74 Wyo. 298, 287 P.2d 620, 626 (1955); the plaintiff will be entitled to injunctive relief if he has a right to divert any amount of water even if some of the water right has been abandoned. *Louth v. Kaser*, 364 P.2d 96 (Wyo. 1961).

125. *Mitchell Irrigation Dist. v. Whiting*, 59 Wyo. 52, 136 P.2d 502, 508 (1943).

126. *Miller v. Hagie*, 59 Wyo. 383, 140 P.2d 746 (1943).

suffer irreparable harm.¹²⁷ The danger of a multiplicity of suits is also present where one appropriator threatens to continue to divert water claimed by another. If a junior appropriator threatens and intends to wrongfully divert or pollute waters claimed by a senior appropriator, the remedies at law would be inadequate to prevent the injury from occurring.¹²⁸ Finally, an injunction may be the only means by which a senior appropriator can in effect recover the use of water which has been wrongfully diverted or polluted. As was shown above, the common law or statutory action of ejectment apparently does not lie to recover the use of water. If the senior appropriator is denied this legal remedy, then an injunction should certainly be issued.

The court will, however, balance the equities in determining whether to grant an injunction or simply damages.¹²⁹ The Wyoming court has also further restricted the situations in which an injunction will issue in a water dispute by applying the maxim that "he who seeks equity must do equity". This rule was applied to deny an injunction to compel a ditch corporation to supply water to a consumer when the consumer had not tendered or paid proper assessments.¹³⁰

If a plaintiff seeks an injunction and then goes further and requests a determination of the extent and priority of a water right, the Wyoming court will treat the action as a suit to quiet title.¹³¹ The pleading and jurisdiction questions will then be governed by the rules of quiet title actions.

CONCLUSION

The unique nature of an appropriative water right causes a number of procedural problems when it is forced into forms of action which were originally designed to protect different kinds of rights and property. The purpose of this comment was to alert the Wyoming practitioner to some of these problems, point out the consequences and propriety of

127. *Lee v. Brown*, 357 P.2d 1106 (Wyo. 1960).

128. *Brown v. J. C. Penney Co.*, 54 F. Supp. 488 (D. Wyo. 1943).

129. *Hillmer v. McConnell Bros.*, 414 P.2d 972, 973 (Wyo. 1966); Comment, *supra* note 108, at 551.

130. *Henderson v. Kirby Ditch Co.*, 373 P.2d 591 (Wyo. 1962); *McHale v. Goshen Ditch Co.*, 49 Wyo. 100, 52 P.2d 678 (1935).

131. *Hunziker v. Knowlton*, 78 Wyo. 241, 324 P.2d 266 (1958).

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bringing certain forms of actions and seeking different types of relief, and indicate possible solutions to procedural problems which have not yet confronted the Wyoming Supreme Court.

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