

1981

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David W. Edwards

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Recommended Citation

Edwards, David W. (1981) "McCarran Amendment General Adjudications in Wyoming: Threshold Problems," *Land & Water Law Review*. Vol. 16 : Iss. 1 , pp. 53 - 69.

Available at: https://scholarship.law.uwyo.edu/land_water/vol16/iss1/3

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McCARRAN AMENDMENT GENERAL ADJUDICATIONS IN WYOMING: THRESHOLD PROBLEMS

On January 22, 1977 the Wyoming Legislature approved Section 1-37-106 of the Wyoming Statutes,¹ a new section of the Wyoming Uniform Declaratory Judgments Act,² providing for the general adjudication of water rights in a river system, to be brought in state district court by the State of Wyoming upon the relation of its attorney general.³ On January 24, 1977 the State of Wyoming filed suit under Section 1-37-106 for the general adjudication of all rights to the use of water in the Big Horn River System.⁴ The United States was joined in the proceeding, and on the same day the suit was filed the state district court ruled that joinder was proper⁵ under the McCarran Amendment.⁶ When the United States attempted to remove the suit to federal district court, its motion was denied.⁷

Initially, the state district court felt that it would be appropriate to certify certain legal and factual issues to the state board of control,⁸ as provided in the statute;⁹

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1. 1977 WYO. SESS. LAWS Ch. 2., § 1. Now WYO. STAT. § 1-37-106 (1977). [Hereinafter cited in text as Section 1-37-106].

2. WYO. STAT. §§ 1-37-101 to 1-37-115 (1977).

3. WYO. STAT. § 1-37-106(a) (1977).

4. In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming No. 4993 (Wyo. Dist. Ct., 5th Dist., filed Jan. 24, 1977). [Hereinafter cited in text as *Big Horn River Adjudication*].

5. *Id.* The district court's order provided:

1. This action is a general adjudication of all water rights on the Big Horn River System and all other sources in Water Division Number Three, State of Wyoming, and 2. That the United States of America by its enactment of 43 U.S.C. § 666 has waived its sovereign immunity and has consented to be joined in this action. . . .

6. 43 U.S.C. § 666 (1976). The McCarran Amendment is a waiver of sovereign immunity for a designated class of suits:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

7. *Wyoming v. United States of America* and all persons in the Big Horn River System and other sources in Water Division Number Three, State of Wyoming, No. C77-039K (D. Wyo. May 31, 1977).

8. Letter of Judge Joffe to counsel of record, at 2 (December 19, 1977).

9. WYO. STAT. § 1-37-106 (1977). The statute reads, in relevant part:

(a) The state of Wyoming upon the relation of the attorney general may institute an action to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system and all other sources, provided:

(i) For the purpose of this section:

however this use of the board of control was objected to by the United States.¹⁰ Ultimately, the district court chose a former Wyoming Congressman as special master, in early 1979.¹¹

By mid-1980, the United States had refused to accept the validity of the State Engineer's list of adjudicated rights, and had announced its intention to challenge all private rights for partial or total abandonment. Notice of this challenge was given to private water right holders by publication in area newspapers.¹² In June of 1980, the special master began to hear the United States' challenges of previously adjudicated private water rights. The resulting confusion

(A) The term "general adjudication" shall mean the judicial determination or establishment of the extent and priority of the rights to use water of all persons on any river system and all other sources within the state of Wyoming. The court conducting such a general adjudication shall:

- (I) Certify to the state board of control those legal and factual issues which the court deems appropriate for the board to determine. Upon such certification, the board shall exercise those powers and follow those procedures set forth in Rule 53 of the Wyoming Rules of Civil Procedure;
 - (II) Confirm those rights evidenced by previous court decrees, or by certificates of appropriation, or by certificates of construction heretofore issued by the Wyoming state board of control;
 - (III) Determine the status of all uncanceled permits to acquire the right to the use of the water of the state of Wyoming and adjudicate all perfected rights thereunder not theretofore adjudicated under W.S. 41-211 [§ 41-4-511];
 - (IV) Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and all other sources not otherwise represented by the aforescribed decrees, certificates, or permits;
 - (V) Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of all water rights and their relative priorities on the river system and all other sources;
- (B) The word "person" shall be construed to mean an individual, a partnership, a corporation, a municipality, the state of Wyoming, the United States of America, or any other legal entity, public or private;

10. Letter of Judge Joffe, *supra* note 8.

11. Order of Judge Joffe (May 4, 1979).

Counsel for Wyoming, the United States, and the Shoshone and Bannack Tribes (who by this stage had entered the case on behalf of Indian water claims agreed that the board of control should not serve as Special Master, because of conflicts. These conflicts had to do with members of the board claiming water rights in the area to be adjudicated, and with the board as Special Master passing on its own prior rulings. Counsel were able to agree to former Wyoming Congressman Teno Roncalio as Special Master, and the court so ordered. Interview with Judge Joffe (October 6, 1980) (notes on file with *Land & Water Law Review*).

12. Addendum to schedule of the special master (May 7, 1980). Final notice of the special master (May 10, 1980).

over the adequacy of notice to private parties, and the sheer magnitude of the challenges led to a stipulation between the State of Wyoming and the United States that all previously adjudicated private rights be provisionally confirmed by the special master, and that all challenges of private rights be deferred. The United States agreed to wait until the priorities of its rights on the Big Horn River System were fixed, and to confine its challenges to private rights senior to the United States in priority date.¹³

The stipulation between the State of Wyoming and the United States only postponed the questions which were raised when the special master began to hear challenges based on abandonment. Those questions were concerned with the proper roles of the special master and the board of control in a suit under Section 1-37-106.

This comment will examine Section 1-37-106 in the context of statutes and case law, both state and federal. It will also examine the roles to be played by the board of control and a special master in a general adjudication under Section 1-37-106. Reference to particular facts in the *Big Horn River Adjudication* is intended to point out generally applicable problems and solutions in any action which may be brought under the new statute.

BACKGROUND

In all of the western states, water rights may be adjudicated under special statutory procedures, in addition to ordinary civil actions.¹⁴ The concept of a special statutory procedure began in Colorado,¹⁵ as a purely judicial proceeding.¹⁶ From statehood on, Wyoming has used the purely administrative approach to adjudications¹⁷ under special

13. Order of the special master (June 26, 1980).

14. For a thorough history and discussion of special statutory adjudication procedures, see HUTCHINS, 2 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES ch. 15 (1974). [Hereinafter cited as HUTCHINS]. See also, Note, *Finality of General Adjudication Proceedings in the Seventeen Western States*, 1966 UTAH L. REV. 152 (1966).

15. LONG, A TREATISE ON THE LAW OF IRRIGATION, 193 (1901).

16. HUTCHINS, *supra* note 14, at 453.

17. The early difficulties and ultimate success of administrative adjudications are chronicled by Wyoming's first state engineer, Elwood Mead, in MEAD, IRRIGATION INSTITUTIONS ch. XI (1903).

statutes. In Wyoming, such administrative adjudications are carried out by the board of control,¹⁸ and are final unless appealed to the courts.¹⁹

One persistent problem under both the Colorado and Wyoming models was that no adjudication could be truly general if a water right of the United States were involved, and if the United States chose to assert sovereign immunity.²⁰ In 1952, Congress passed the McCarran Amendment, waiving sovereign immunity in certain loosely-defined suits to adjudicate water rights.²¹

With the advent of federal non-Indian reserved rights,²² and their inevitable clash with western views, the United States sought to avoid submitting to state jurisdiction, the McCarran Amendment notwithstanding.²³ In *Dugan v. Rank*,²⁴ the Supreme Court affirmed a construction of the McCarran Amendment which restricted its operation to general adjudications of all water rights on a river system. *Dugan* thus made it plain the United States could not be joined under the McCarran Amendment in any proceeding in which private parties sought to adjudicate a limited number of claims solely between themselves and the government. All the rights of all the owners on a given stream must be involved in the proceeding.²⁵

A series of three Colorado cases which reached the Supreme Court measured the Colorado statutory adjudication procedures against the McCarran yardstick. It became apparent that the Court in *Dugan* had been more interested in preventing private suits under the McCarran waiver, than in laying down a strict definition of general adjudication. In *United States v. District Court in and for the County of Eagle*,²⁶ the Court approved joinder of the United States in

18. WYO. STAT. § 41-4-301 *et seq.* (1977).

19. WYO. STAT. § 41-4-326 (1977).

20. CLARK, 2 WATERS AND WATER RIGHTS § 106 (1967).

21. 43 U.S.C. § 666 (1976). For pertinent language of the McCarran Amendment, *see* note 6, *supra*.

22. *See, e.g.,* Federal Power Commission v. Oregon, 349 U.S. 435 (1955) and Arizona v. California, 373 U.S. 546 (1963).

23. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 203 (1971).

24. *Dugan v. Rank*, 372 U.S. 609 (1963). [Hereinafter cited in text as *Dugan*].

25. *Id.* at 618.

26. *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971). [Hereinafter cited in text as *Eagle County*].

a supplemental adjudication²⁷ in state court. It dismissed as "extremely technical" the government's argument that the proceeding was not a general adjudication because the owners of previously decreed rights were not before the Colorado court.²⁸

In *United States v. District Court in and for Water Division No. 5*,²⁹ the companion case to *Eagle County*, the Court also upheld joinder of the United States under the Colorado Water Rights Determination and Administration Act of 1969,³⁰ involving monthly proceedings before a referee on water rights applications filed within a particular month.³¹ According to the Court, *Water Division No. 5*, like *Eagle County*, "reaches all claims, perhaps month by month but inclusively in the totality. . . ."³²

Finally, in *Colorado River Water Conservation District v. United States*,³³ the Court expressly allowed state adjudication of Indian reserved rights. It pointed out that its decisions in *Eagle River* and *Water Division No. 5* had subjected federal reserved rights to state general adjudication proceedings, and that to avoid piecemeal adjudications, Indian rights should not have special treatment.³⁴ The Court stressed the availability of a comprehensive adjudication system in Colorado, as evidenced by the Colorado Water Rights Determination and Administration Act, previously approved in *Eagle County* and *Water Division No. 5*, and by responsibility given to the state engineer to manage and allocate Colorado water in accordance with adjudicated rights.³⁵

These Colorado successes did not go unnoticed in Wyoming. One of the unresolved questions about the scope of

27. COLO. REV. STAT. § 148-9-7 (1963).

28. *United States v. District Court in and for the County of Eagle*, *supra* note 26, at 525.

29. *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). [Hereinafter cited in text as *Water Division No. 5*.]

30. COLO. REV. STAT. § 37-92-101 *et seq.* (1973).

31. COLO. REV. STAT. § 37-92-302 (1973).

32. *United States v. District Court in and for Water Division No. 5*, *supra* note 29, at 529.

33. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

34. *Id.* at 810.

35. *Id.* at 819-20.

the McCarran Amendment's immunity waiver had been whether and to what extent it consented to administrative proceedings. It had been pointed out that it would be anomalous to waive sovereign immunity for proceedings in some states but not in others.³⁶ The emphasis on "suit" and "court" in the language of the McCarran Amendment were said to be simple drafting errors by some commentators.³⁷ However, no congressional redrafting was forthcoming, so the uncertainty remained about administrative hearings, under the Wyoming system, as "suits."³⁸ Hence Wyoming's interest in the Colorado procedure, which had now survived Supreme Court challenges three times.

After *Eagle River*, Dean Trelease noted the impatience of the Supreme Court with "technical" and "frivolous" objections of the United States, and wrote that the Court might be "quite willing to accept a construction of the Amendment which includes an administrative adjudication, subject to appeal to the courts, or to transfer to the courts for final stages, as falling within the principal of *Eagle County*."³⁹

Section 1-37-106 of the Wyoming Statutes⁴⁰ was passed as a response to the trio of Supreme Court cases from Colorado, beginning with *Eagle River*.⁴¹ The attraction of these three cases was that they provided a pre-approved procedure for conducting McCarran Amendment general adjudications in state district courts. The Colorado experience was also of particular interest to Wyoming because it provided a guide to dealing with adjudications of Indian and non-Indian reserved rights.

Other concerns had been raised in Wyoming prior to passage of the new statute. It had been pointed out that

36. Comment, *Adjudication of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 CALIF. L. REV. 94, 117 (1960).

37. *Id.* at 118. See also, CLARK, 2 WATERS AND WATER RIGHTS 95 (1967).

38. See, Comment, *The McCarran Amendment—A Method of Clarifying the Implied Reservation Doctrine*, 7 LAND & WATER L. REV. 587, 595 (1972).

39. TRELEASE, *supra* note 22, at 207.

40. WYO. STAT. § 1-37-106 (1977).

41. Hanks, *Federal-State Rights and Relations*, in 2 WATERS AND WATER RIGHTS § 106.2 n. 76 (Clark ed. 1978 Supp.). See also, Comment, *Determination of Federal-State Rights Pursuant to the McCarran Amendment: General Adjudications in Wyoming*, 12 LAND & WATER L. REV. 457 (1977).

there were large deviations between water use in the field and water records in the state engineer's office.⁴² All of Wyoming's streams had been adjudicated between 1892 and 1922.⁴³ This raised two problems. Water records were substantially out of date, and no statutory mechanism contemplated the readjudication of Wyoming streams.⁴⁴ Passage of the new adjudication statute made it possible to deal with the problems of state records and previously adjudicated streams.

Section 1-37-106 of the Wyoming Statutes⁴⁵ should be construed with several purposes in mind. It was passed to bring Wyoming's statutory general adjudications within the McCarran Amendment, so that federal and Indian claims could be adjudicated in state district court, and so that all persons within a river system would know their relative priorities. But the new statute was not passed in a vacuum. It should also be construed so as to do the least possible violence to other state statutes and state case law.

An extensive examination of Section 1-37-106 was made in this law review, during the same year it was passed.⁴⁶ The conclusion was that, while the statute was open to possible challenge on grounds that it did not provide for a general adjudication or a judicial proceeding, its close similarity to the Colorado system should bring it within the scope of the McCarran Amendment.⁴⁷ It remains now to examine the effect of Section 1-37-106 on state statutes and case law, in the context of the only action yet brought under Section 1-37-106: the *Big Horn River Adjudication*.

STATUS OF PREVIOUSLY ADJUDICATED RIGHTS

The new general adjudication statute, Section 1-37-106, provides: "The court conducting such a general adjudication shall: . . . (II) confirm those rights evidenced by previous

42. McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns*, 5 LAND & WATER L. REV. 23 (1970).

43. TRELEASE, *CASES AND MATERIALS ON WATER LAW* 182 (3rd ed. 1979).

44. TRELEASE, *supra* note 23, at 207-208.

45. WYO. STAT. § 1-37-106 (1977).

46. Comment, *supra* note 41.

47. *Id.* at 483-4.

court decrees, or by certificates of appropriation, or by certificates of construction heretofore issued by the Wyoming State Board of Control.”⁴⁸ This language raises issues which turn on the interpretation of the word *confirm*.

If the language of a statute is unambiguous, there is no need for a court to construe it.⁴⁹ An ambiguity exists when a word or group of words in a statute is susceptible of more than one meaning.⁵⁰ Section 1-37-106 provides no definition of *confirm*, nor has the term been construed by the Wyoming Statutes in other sections. The dictionary definition of *confirm* suggests several meanings:

Confirm: To complete or establish that which was imperfect or uncertain; to ratify what has been done without authority or insufficiently. To make firm or certain; to give new assurance of truth or certainty; to put aside past doubt; to give approval to.⁵¹

This definition shows the ambiguity of *confirm*, and hence the necessity of judicial construction. Three possible meanings of *confirm* suggest themselves: *confirm* means 1) “rubber stamp,” or 2) “de novo inquiry,” or 3) “limited inquiry.”

In construing an ambiguous statute, the court must use the legislative language in light of the purposes intended to be accomplished by the legislature.⁵² And in ascertaining legislative intent, the court must “look to the mischief the statute was intended to cure, the historical setting surrounding its enactment, the public policy of the state, the conclusions of the law and all other prior and contemporaneous facts and circumstances.”⁵³ In this regard, the court could look at any or all of the following in construing *confirm*: 1) the Colorado McCarran Amendment cases which reached

48. WYO. STAT. § 1-37-106(a) (i) (1977).

49. Hayes v. State, 599 P.2d 558, 564 (Wyo. 1979).

50. State ex rel. Albany County Weed and Pest Dist. v. Board of County Commissioners of Albany County, 592 P.2d 1154, 1156 (Wyo. 1979).

51. H. BLACK, BLACK'S LAW DICTIONARY 270 (5th ed. 1979).

52. Basin Electric Power Cooperative v. State Board of Control, 578 P.2d 557, 561 (Wyo. 1978).

53. *Id.* at 563.

the United States Supreme Court; 2) discrepancies between Wyoming water records and actual use; 3) the fact that all streams in Wyoming have been adjudicated; 4) other Wyoming statutes; and 5) Wyoming case law.⁵⁴

If *confirm* were taken as equivalent to "rubber stamp," then previously adjudicated rights could not be challenged for abandonment or forfeiture, or any other reason.⁵⁵ Given the Colorado experience discussed previously, this approach probably stays within the scope of the McCarran Amendment.⁵⁶ The difficulty is that there is no opportunity to update the state engineer's records by bringing them into line with current water use.⁵⁷ However, given the uncertainty of the law in this rapidly changing area of adjudicating federal claims in state courts, the Legislature may well have adopted this definition of *confirm*, to avoid putting established rights at risk.

If *confirm* were taken as equivalent to "de novo inquiry," then previously adjudicated rights could be challenged for any reason. This approach would permit questions of abandonment and forfeiture to be raised, but it would also permit questions to be raised about the validity of the original adjudication.⁵⁸ However, questioning the validity of a prior adjudication would be quite difficult. In Wyoming, a decree fixing a water right priority is ordinarily *res judicata* as to all parties to the action in regard to all matters directly and necessarily decided as the basis of judgment.⁵⁹ The legislature cannot make the board of control's adjudication of water priorities binding upon one not a party to the proceedings, but the board's adjudication is "at least prima facie evidence of correctness," even as to those not parties to the proceedings.⁶⁰ A decree of adjudication

54. See text accompanying notes 41 through 45, *supra*.

55. See Comment, *supra* note 41, at 481, for a discussion adopting the "rubber stamp" approach.

56. See text accompanying note 26, *supra*.

57. See text accompanying note 42, *supra*.

58. Such a possibility was foreseen in TRELEASE, *supra* note 23, at 208.

59. Van Tassel Real Estate and Livestock Co. v. City of Cheyenne, 49 Wyo. 333, 54 P.2d 906, 915, cert. den., 299 U. S. 574 (1936).

60. Laramie Irrigation and Power Co. v. Grant, 44 Wyo. 392, 13 P.2d 235, 243 (1932).

is admissible against the world to show that the grantee therein has title to the water in question according to the terms thereof, and it is as effectual as any binding judgment can be, except as to him, not a party to the same adjudication, who can overcome the *prima facie* effect thereof.⁶¹

Adjudicated water rights will not be set aside unless justified by clear and convincing evidence;⁶² if such rights are of long standing, the courts will be even more reluctant to set them aside.⁶³ It is also proper to note that in a 1949 declaratory judgment action, the Wyoming Supreme Court refused to allow an attack on a decree approving the action of the board of control in awarding water rights, when the action of the board and the decree of the district court were "merely erroneous".⁶⁴

It seems politically unrealistic to impute to the Legislature the intent to allow the validity of previous adjudications to be attacked: it is simply too high a price to pay for the privilege of adjudicating in state court. Such a definition of *confirm* would also be inconsistent with the current Wyoming statutes, which state that "[t]he final orders or decrees of the state board of control, in the proceedings provided by law for the adjudication and determination of rights to the use of the public waters of the state, shall be conclusive as to all prior appropriations."⁶⁵ This language has remained unchanged since it was approved in 1901.⁶⁶

Of the two approaches to defining *confirm*, the first is preferable because it does not place established rights at risk; it avoids the difficulty inherent in opening old decrees, and it is probably the intent of the Legislature.

However, a third approach is possible. If *confirm* were taken as equivalent to "limited inquiry," then previously adjudicated rights could be challenged for abandonment or

61. *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 100 P.2d 124, reh. den., 55 Wyo. 347, 102 P.2d 745, 750-751 (1940).

62. *Wheatland Irr. Dist. v. Pioneer Canal Co.*, 464 P.2d 533, 537 (Wyo. 1970).

63. *White v. Wheatland Irr. Dist.*, 413 P.2d 252, 259 (Wyo. 1966).

64. *Laramie Rivers Co. v. Le Vasseur*, 65 Wyo. 414, 202 P.2d 680, 683 (1949).

65. WYO. STAT. § 41-4-326 (1977).

66. 1901 WYO. SESS. LAWS Ch. 67. § 1.

forfeiture, but old decrees could not be reopened.⁶⁷ This approach would allow the state engineer's office to update its records⁶⁸ without calling into question the validity of all the old decrees themselves. Such a definition of *confirm* would also be consistent with state statutes and case law.⁶⁹

This third approach combines the advantages of the "rubber stamp" and "de novo inquiry" approaches, by making secure the validity of previous adjudications and by permitting the update of the state engineer's records. It also avoids the disadvantages of an all or nothing approach.

Since the purpose of a declaratory judgment is to terminate controversy and remove uncertainty, the result of failure to raise claims or issues which could be raised under either the "de novo" or "limited inquiry" approaches, ought to be that such claims and issues are barred in any future litigation. The *res judicata* effect of an adjudication under Section 1-37-106 should therefore be co-extensive with the jurisdiction of the district court, including claims and issues which could have been raised but were not.

PRIMARY JURISDICTION OF THE BOARD OF CONTROL: ABANDONMENTS AND PRIORITIES

On questions of abandonment in Wyoming, there has been a jurisdictional tug-of-war between the courts and the Legislature.⁷⁰ The Wyoming Supreme Court has resisted efforts to construe past statutes as depriving the courts of jurisdiction over abandonment, although the court did concede early on that a decision on abandonment, made initially by the board of control, was final unless appealed to the courts.⁷¹ Later the court held that state courts had concurrent jurisdiction over abandonment questions.⁷² Finally, in 1971, in *Kearney Lake, Land and Reservoir Co. v. Lake*

67. WYO. STAT. § 41-4-326 (1977), limits rehearings to one year after any final order of the board of control adjudicating the priorities upon any stream.

68. See text accompanying note 42, *supra*.

69. See text accompanying note 60, *supra*.

70. See Note, *Primary Jurisdiction of the Board of Control over Questions of Water Rights*, 7 LAND & WATER L. REV. 599 (1972).

71. Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 P. 764, 767 (1925).

72. Louth v. Kaser, 364 P.2d 96 (Wyo. 1961).

DeSmet Reservoir Co.,⁷³ the court held that the board of control had primary jurisdiction over questions of abandonment.

The 1973 legislative response, in the next biennial session after *Kearney Lake*, was Section 41-3-401(b) of the Wyoming Statutes,⁷⁴ which conferred exclusive original jurisdiction on the board of control for all abandonment proceedings. However, Section 1-37-106 contemplated that in a suit under its provisions, the district court would have discretion to certify to the board of control "those legal and factual issues which the court deems appropriate".⁷⁵ This procedure is in obvious conflict with Section 41-3-401(b), placing exclusive original jurisdiction with the board when the issue is abandonment—unless Section 1-37-106 can be construed as altogether excluding the consideration of abandonment in a general adjudication under its provisions. For reasons which were discussed in an earlier section of this comment, it is quite unlikely that abandonment issues can be avoided entirely in a suit under Section 1-37-106.⁷⁶

Because the court will originally have before it all issues in a general adjudication under it, Section 1-37-106 is *pro tanto* an amendment of Section 41-3-401(b), which conferred exclusive original jurisdiction on the board, where the issue is abandonment. This result finds support in Wyoming case law. All statutes relating to the same subject or having the same general purpose must be read as constituting one law. If possible, all such statutes should be construed to avoid conflicting or confusing results; however, if a conflict cannot be reconciled so that the provisions of all the statutes can stand together, then a later provision will prevail over a prior one, and the prior law is considered amended by implication to the extent of the conflict.⁷⁷ It is clear that the board has lost its exclusive original jurisdiction over abandonment

73. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, 487 P.2d 324 (1971). [Hereinafter cited in text as *Kearney Lake*].

74. 1973 WYO. SESS. LAWS Ch. 176, § 1. Now WYO. STAT. § 41-3-401(b) (1977). [Hereinafter cited in text as Section 41-3-401(b)].

75. WYO. STAT. § 1-37-106(a) (i) (A) (I) (1977). For the relevant text of the statute, see note 9, *supra*.

76. See text accompanying notes 49 through 54, *supra*.

77. *Johnson v. Safeway Stores, Inc.*, 568 P.2d 908, 913 (Wyo. 1977).

when that issue is raised in a suit under Section 1-37-106. What is not clear from the language of Section 1-37-106 is the status of the board in such a suit when abandonment is raised. If abandonment is raised, it is within the discretion of the court to refer that issue to the board of control. There is a strong argument for the court to do so, applying the doctrine of primary jurisdiction.

All the policy reasons which led the Wyoming Supreme Court to the conclusion that the board should have primary jurisdiction over abandonment remain in the case of a general adjudication. Utilizing the board has the virtues of uniformity of decision and access to expertise.⁷⁸ In addition, there is a suggestion in *Kearney Lake* that where the district court has jurisdiction but refers abandonment to the board, the procedure should be along the lines of Rule 53 of the Wyoming Rules of Civil Procedure, for masters.⁷⁹ This suggestion seems to fit precisely into the framework of the new general adjudication statute, which prescribes the use of Rule 53 by the board in considering issues certified to it.⁸⁰

In short, Section 1-37-106 takes from the board of control the exclusive original jurisdiction given the board in Section 41-3-401(b). On the issue of abandonment, the situation under Section 1-37-106 is the same as when abandonment was first raised before the court under the old system of concurrent jurisdiction. A court conducting a suit under Section 1-37-106 should recognize the similarity, and certify abandonment issues to the board by the mechanism suggested in *Kearney Lake*: primary jurisdiction. In addition, the court should note that Section 1-37-106 specifically provides terms for using the board, while omitting any reference to the use of a special master. The only difference between *Kearney Lake* and Section 1-37-106 in this respect is that under the concurrent jurisdiction approach decisions of the board of control were final unless appealed; while under Section 1-37-106, once issues have been certified to

78. *Kearney Lake, Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, *supra* note 73, at 325.

79. *Id.*

80. WYO. STAT. § 1-37-106 (1977). For the relevant text of the statute, *see* note 9, *supra*.

and decided by the board of control, the board's findings must be accepted under Rule 53(e)(2) unless clearly erroneous.

In Wyoming the courts and the board of control have concurrent jurisdiction to adjudicate rights to appropriate water for beneficial use and to determine state water right priorities.⁸¹ This result flows both from state statutes⁸² and case law.⁸³ The same considerations which led the Wyoming Supreme Court to invoke the doctrine of primary jurisdiction in *Kearney Lake*, for abandonment, should lead the court conducting a suit under Section 1-37-106 to invoke the doctrine in favor of the board of control when the issues are appropriation of water for beneficial use or determination of state water right priorities.⁸⁴ Such a use of the board of control was clearly foreseen and approved by the Wyoming Supreme Court in 1949:

Irrigation matters frequently involve many technicalities in connection with which courts cannot be expected to be experts, while the members of the Board of Control supposedly are The trial court would have had the right to ask the parties to go and have the matter of priorities first determined by the Board of Control We find no good reason why the court may not avail itself of the aid which may be furnished by having a previous adjudication of the right made by the Board of Control, just as it might refer a case to a referee.⁸⁵

While the language of the Wyoming Supreme Court is permissive, it is also consistent with the *Kearney Lake* rationale for primary jurisdiction.⁸⁶

In the context of the *Big Horn River Adjudication*, the doctrine of primary jurisdiction should be applied, and certification to the board of control should be made, whenever issues of beneficial use, abandonment, or priority of

81. *Anita Ditch Co. v. Turner*, 389 P.2d 1018 (Wyo. 1964).

82. Wyo. STAT. §§ 41-4-310 and 41-4-325 (1977).

83. *Simmons v. Ramsbottom*, 51 Wyo. 419; 68 P.2d 153, 159 (1937).

84. Primary jurisdiction of the board of control over priority questions is discussed in more detail in Note, *supra* note 70, at 608-09.

85. *Laramie Rivers Co. v. LeVasseur*, *supra* note 64.

86. See text accompanying note 78, *supra*.

state water rights arise in the suit. Obviously, these applications of primary jurisdiction would initially remove such issues from the purview of the special master.

ROLE OF THE SPECIAL MASTER

The special master in the *Big Horn River Adjudication* has apparently chosen to define *confirm* as "limited inquiry".⁸⁷ But if the court invokes the doctrine of primary jurisdiction, it should certify all questions of abandonment,⁸⁸ beneficial use, and priority⁸⁹ of state water rights to the board of control. Such a certification to the board would clear the way for the special master to devote his efforts to the portion of Section 1-37-106 dealing with reserved rights of the United States and the Tribes. This task is set out in Section 1-37-106(a) (i) (A) (IV) of the Wyoming Statutes.⁹⁰

Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and all other sources not otherwise represented by the afore-described decrees, certificates, or permits.

In this area of reserved rights, the considerations which dictate primary jurisdiction for the board of control are largely absent. The board has no experience in adjudicating reserved rights. Such rights, by their nature, cannot have been abandoned by nonuse, nor need they be put to beneficial use to establish their validity. The expertise of the board can be of little help in this area, and there is no concern that a determination by the special master will not mesh with the work of the board of control—the board has done no work in the area of reserved rights. There is no good reason, therefore, why the special master should not concentrate on

87. This is evidenced by an order of the Special Master, setting out a stipulation among counsel for Wyoming, the United States, and the Tribes, in which they agree to a provisional conformation of previously adjudicated rights. They further agree to refrain from challenging these provisionally confirmed rights until after all federal and Indian claims have been determined by the Special Master and the district court. The Tribes and the United States may contest only those rights which have a higher priority than their own. Order of the Special Master (June 26, 1980).

88. See text accompanying note 77, *supra*.

89. See text accompanying note 81, *supra*.

90. WYO. STAT. § 1-37-106(a) (i) (A) (IV) (1977).

issues relating to reserved rights. This procedure should put to rest any federal fear that bias would influence the board of control. Withholding the consideration of reserved rights from the board leaves with the special master the principal area where state and federal rights are in direct conflict, and thus also removes the principal area where any bias of the board could harm federal interests.

Arguments that the board of control is disqualified⁹¹ from assuming primary jurisdiction over questions of abandonment, beneficial use, and priorities of state water rights are best met by pointing to the need for uniformity of decision, the expertise of the board in these areas, and the fact that under Wyoming Rule of Civil Procedure 53 the district court may exercise control over the board. The district court may modify or reject the board's report, or may recommit it to the board with instructions.⁹² In addition, there is no real conflict between federal and state interests when a bona fide question of abandonment is raised. The state wishes to update its records so that it can more effectively administer its waters; the board would therefore have no reason to automatically rule out abandonment.

CONCLUSION

Section 1-37-106 of the Wyoming Statutes meets the requirements of the McCarran Amendment for judicial "suits" and for general adjudications. Under Section 1-37-106, the board of control should have primary jurisdiction over abandonment and over questions of priority. It is possible to construe Section 1-37-106 in a way which allows "paper" rights to be removed from the files of the state engineer, while at the same time it allows the validity of prior adjudications themselves to go unchallenged. This construction should be adopted.

A special master in a suit under Section 1-37-106 should defer to the board of control on issues of abandonment, beneficial use, and priority of state water rights. He should,

91. See note 11, *supra*.

92. Wyo. R. Civ. P. 53.

however, hear all issues having to do with federal reserved rights, since he is as well-equipped to do so as the board of control, and since no previous work of the board would thereby be disturbed.

DAVID W. EDWARDS