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## Water Law - Statutory Forfeiture of Water Rights in Wyoming - Wheatland Irrigation District v. Laramie Rivers Co.

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**WATER LAW—Statutory Forfeiture of Water Rights in Wyoming. *Wheatland Irrigation District v. Laramie Rivers Co.*, 659 P.2d 561 (Wyo. 1983).**

The Laramie Rivers Company held two reservoir permits for the storage of 68,500 acre feet of water in Lake Hattie, a reservoir located west of Laramie in Albany County, Wyoming. Canals from the Laramie and Little Laramie Rivers provided the source of supply for the reservoir.

On April 5, 1972, the Wyoming State Engineer imposed a restriction on the reservoir, limiting the amount of water which could be stored to 27,400 acre feet because of weaknesses in the dam.<sup>1</sup> The restriction was to remain in effect until repairs were made to restore the dam to a safe condition.

Between 1972 and 1980, the Laramie Rivers Company made repeated efforts to obtain funds to repair the dam.<sup>2</sup> Finally, in March, 1980, the Wyoming Farm Loan Board approved a loan for \$90,000.<sup>3</sup> Within two weeks, Laramie Rivers Company submitted plans for repair of the dam to the State Engineer.<sup>4</sup> The State Engineer approved the plans and Laramie Rivers Company entered into a contract with Barker Construction Company. Work began on the dam on May 4, 1980 and repairs were completed on July 7.<sup>5</sup>

Prior to completion of the repairs, on May 23, Wheatland Irrigation District filed a forfeiture petition with the Board of Control.<sup>6</sup> The District sought a declaration that Laramie Rivers Company had forfeited its rights to 41,100 acre feet of water, the difference between the original adjudicated capacity of 68,500 acre feet and the restriction of 27,400 acre feet imposed by the State Engineer in 1972.<sup>7</sup> The District had standing because it held a reservoir permit junior to that of Laramie Rivers Company for storage of water in Wheatland Reservoir No. 3, which also receives its water from the Laramie River.<sup>8</sup> In its petition, the District alleged that Laramie Rivers Company had failed to use the 41,100 acre feet of water for the beneficial purposes for which it was appropriated during five successive years; therefore, that portion should be declared forfeited pursuant to section 41-3-401 of the Wyoming Statutes.<sup>9</sup>

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1. *Wheatland Irrigation Dist. v. Laramie Rivers Co.*, 659 P.2d 561, 564 (Wyo. 1983).

2. Brief for Appellees Laramie Rivers Co. and the University of Wyoming at 2, *Wheatland Irrigation Dist. v. Laramie Rivers Co.*, 659 P.2d 561 (Wyo. 1983).

3. The amount was later increased to \$142,000. *Id.*

4. *Id.*

5. *Id.* at 3.

6. 659 P.2d at 561.

7. *Id.* at 562.

8. *Id.*

9. *Id.* WYO. STAT. § 41-3-401 (1977) provides in part:

(a) Where the holder of an appropriation of water from a surface, underground or reservoir water source fails, either intentionally or unintentionally, to use the water therefrom for the beneficial purposes for which it was appropriated, whether under an adjudicated or unadjudicated right, during any five (5) successive years, he is considered as having abandoned the water right and shall forfeit all water rights and privileges appurtenant thereto. Notwithstanding any provision in this section to the contrary, the holder of an appropriation for the diversion and storage of water in a reservoir, from which

The Board of Control denied the petition, holding that the forfeiture action was not promptly asserted in that prior to its commencement Laramie Rivers Company had undertaken substantial work to repair the dam.<sup>10</sup> To grant the petition, the Board concluded, "would be to deny [Laramie Rivers Company] the fruits of its efforts to repair the dam . . . ."<sup>11</sup> The District Court for the Second Judicial District affirmed the Board's order of denial.<sup>12</sup>

The Wyoming Supreme Court reversed the lower court's judgment, finding that the petition was promptly asserted.<sup>13</sup> The court held that section 41-3-401 of the Wyoming Statutes provides that a forfeiture may be avoided only by application of the water to beneficial use, and not by undertaking repairs of the dam.<sup>14</sup> The court directed the district court to remand the case to the Board of Control for determination of whether Laramie Rivers Company had used the water in accordance with the statute and, if not, whether there was reasonable cause for nonuse.<sup>15</sup>

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water or a portion thereof has not yet been beneficially used for the purposes for which appropriated, may apply to the board of control for an extension of time not to exceed five (5) years, within which to use water therefrom for the beneficial purposes for which it was appropriated. In the application the holder shall demonstrate the exercise of due diligence toward the utilization of the appropriation, and that notwithstanding the exercise of due diligence, reasonable cause exists for nonuse. Reasonable cause includes but is not limited to delay due to court or administrative proceedings, time required in planning, developing, financing and constructing projects for the application of stored water to beneficial use which require in excess of five (5) years to complete, delay due to requirement of state and federal statutes and rules and regulations thereunder and any other causes beyond the control of the holder of the appropriation. Upon receipt of an application for extension, the board of control shall proceed under the provisions of W.S. 9-276.19 through 9-276.33 [§§ 9-4-101 through 9-4-115] and may grant an extension of time as it finds proper, not to exceed five (5) years, for the application of the appropriated water to the beneficial use for which it was appropriated. A prior grant of extension of time hereunder does not preclude the holder from applying for additional extensions of time each not to exceed five (5) years, upon similar application and showing. The granting of an extension of time precludes the commencement of an abandonment action against the appropriation during the period of extension.

(b) When any water user who might be affected by a declaration of abandonment of existing water rights, desires to bring about a legal declaration of abandonment, he shall present his case in writing to the state board of control. The board has exclusive original jurisdiction in water right abandonment proceedings. The board shall, if the facts so justify, refer the matter to the superintendent of the water division where the abandonment is claimed to have occurred. The total absence of water to divert during an irrigation season precludes the inclusion of any such period of nonuse resulting therefrom in the computation of the successive five (5) year period.

10. *Petition of Wheatland Irrigation District, State Board of Control, Order Record No. 25*, p. 71, Oct. 6, 1981.

11. *Id.*

12. 659 P.2d at 561.

13. *Id.* at 566.

14. *Id.* at 567.

15. *Id.* at 568. On remand, the Board of Control declared the Laramie Rivers Company's water right forfeited down to the elevation of 7263. However, it was noted that there was a question as to the actual capacity of the reservoir as evidenced by the proof of appropriation and the water right filing maps. It appeared that a present day priority water right might be as valuable to Laramie Rivers Company as their present right. Minutes, State Board of Control Meeting in Cheyenne, Wyoming, pps. 31-32, August, 1983.

## BACKGROUND

*The Statute*

Section 41-3-401 of the Wyoming Statutes was enacted in 1888.<sup>16</sup> With two principal exceptions,<sup>17</sup> the statute has remained basically unchanged since that time. The statute provides in part that an appropriator who fails to use the water for the beneficial purposes for which it was appropriated for five successive years forfeits his water right.<sup>18</sup> It further provides that the holder of an appropriation for diversion or storage of water in a reservoir which has not yet been beneficially used may apply for an extension.<sup>19</sup> Upon demonstrating reasonable cause for nonuse, the holder may receive an extension from the Board of Control for up to five years, thus precluding the commencement of a forfeiture action during that time.<sup>20</sup> Additional extensions thereafter are also available under the statute. However, the extension provision applies only where water "has not yet" been used. It is not available to an appropriator who wishes to resume use of a temporarily unused right.

The statute further provides that any water user who might be affected by a declaration of forfeiture may file a petition with the Board of Control to bring about a legal declaration of forfeiture.<sup>21</sup> Finally, section 41-3-402 of the Wyoming Statutes provides that the State Engineer may initiate forfeiture proceedings with the Board of Control.<sup>22</sup>

Despite the various amendments to the forfeiture statute,<sup>23</sup> the purpose underlying it has remained unchanged since its enactment. In accordance with the policy prevalent throughout the arid western states, the statute was designed to ensure that water, a scarce and critical resource, was used in an efficient and beneficial manner. As the Wyoming Supreme Court has stated, "it is the policy in this state, along with that of all the arid regions, that its water should be put to the highest possible use . . . [N]o

16. 1888 WYO. SESS. LAWS Ch. 55., § 14.

17. An amendment in 1905 extended the period of nonuse from two to five years. 1905 WYO. SESS. LAWS Ch. 39., § 1. An amendment in 1977 allowed an appropriator who had not yet put the water to beneficial use to apply for an extension of up to five years. 1977 WYO. SESS. LAWS Ch. 126., § 1.

18. WYO. STAT. § 41-3-401 (1977). See *supra* note 9. Although the statute uses both the term "forfeit" and the term "abandoned" the former is technically the correct term. Abandonment is a court created doctrine requiring intent by an appropriator to abandon a water right. Forfeiture is a statutory doctrine and results from the failure, either intentional or unintentional, of an appropriator to use the water to which he is entitled. For a general discussion of the distinction between abandonment and statutory forfeiture of water rights see 2 HUTCHINS, WATER RIGHTS LAW IN THE NINETEEN WESTERN STATES 306, 325 (1974).

19. WYO. STAT. § 41-3-401 (1977). The extension provision was enacted for the limited purpose of protecting the right of Texaco to store water in Lake DeSmet for future use. It applies only when a reservoir has been constructed and is storing water but has not yet put the water to beneficial use. The provision is an attempt to provide incentive for the development of reservoirs when there is no immediate use for the water by excepting the water therein from forfeiture under the statute. Letter from Lawrence J. Wolfe, Senior Assistant Attorney General, State of Wyoming, to author (November 17, 1983).

20. *Id.*

21. *Id.*

22. WYO. STAT. § 41-3-402(a) (1977).

23. See *supra* note 17.

one should be able to get control of any part of it for mere future speculative profit or advantage."<sup>24</sup>

The rationale behind this policy is clear: in an area where water is in short supply and yet subject to great demand, an appropriator should not be allowed to maintain a water right through extended periods of nonuse when others may be able to put it to use and thereby further development and production.<sup>25</sup>

Although the Wyoming Supreme Court has acknowledged the importance of the policy of maximum use of available water,<sup>26</sup> it has not been that policy upon which the court has traditionally relied in construing the Wyoming forfeiture statute. Instead, the court has relied on the well-established legal principle that forfeitures are not favored by the courts.<sup>27</sup> A review of Wyoming case law prior to the *Laramie Rivers* decision illustrates the important role this principle has played in previous forfeiture cases.

### *Wyoming Case Law*

Wyoming had scarcely achieved statehood when the supreme court was confronted with its first major case dealing with water rights. In *Farm Investment Co. v. Carpenter*,<sup>28</sup> the court carefully outlined the nature and extent of the right granted by the Wyoming Constitution<sup>29</sup> and the forfeiture statute.<sup>30</sup> While acknowledging that the right established by appropriation amounts to a property right, the court emphasized that the right does not attach to the water as it flows along its natural channel. Rather, the right attaches to the use of a specified amount of water for beneficial purposes, and its perpetuation is dependent upon an appropriation "lawfully made and continued."<sup>31</sup> In other words, the right is vested only so long as the appropriator continues to make beneficial use of the full amount of water to which he is entitled.

While thus recognizing the policy underlying the statute, the court has consistently held that forfeitures of water rights are not favored in law. In *Ramsay v. Gottsche*<sup>32</sup> the court's dislike of forfeitures was reflected in its

24. *Scherck v. Nichols*, 55 Wyo. 4, 20, 95 P.2d 74, 78-79 (1939).

25. 2 KINNEY, IRRIGATION AND WATER RIGHTS 2021 (2d ed. 1912).

26. *Scherck v. Nichols*, 55 Wyo. 4, 20, 95 P.2d 74, 78-79 (1939).

27. *Ramsay v. Gottsche*, 51 Wyo. 516, 69 P.2d 535 (1937).

28. 9 Wyo. 110, 61 P. 258 (1900).

29. WYO. CONST. art. 1, § 31 provides:

"Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved."

WYO. CONST. art. 8, § 1 provides:

"The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

WYO. CONST. art. 8, § 3 provides:

"Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

30. 1890 WYO. SESS. LAWS Ch. 8.

31. 61 P. at 265.

32. 51 Wyo. 516, 69 P.2d 535 (1937).

holding that forfeitures must be shown by clear and convincing evidence<sup>33</sup> and that, despite the statute, an appropriator would not be deemed to have forfeited his right where his failure to use the water for the statutory period was caused by disastrous flood waters.<sup>34</sup>

The court's reluctance to declare forfeitures was again reflected in *Horse Creek Conservation District v. Lincoln Land Co.*<sup>35</sup> There, the court held that when an appropriator used as much of his entitlement as was available, nonuse of the remaining portion was excused.<sup>36</sup> In *Scherck v. Nichols*,<sup>37</sup> the court extended this trend of cases by holding that forfeiture must be voluntary and that a water right could not be held to be forfeited if nonuse was caused by circumstances beyond the appropriator's control.<sup>38</sup> That forfeitures are not favored by the court is also reflected in cases holding that forfeitures do not occur automatically after nonuse for the statutory period. Instead, a formal declaration of forfeiture must be obtained.<sup>39</sup>

The major case upon which both parties in *Laramie Rivers* relied to support their claims was *Sturgeon v. Brooks*,<sup>40</sup> in which the Wyoming Supreme Court reaffirmed the principle that forfeitures are not favored and must be promptly asserted or will be waived.<sup>41</sup> The water right in question had not been applied to beneficial use for approximately twenty years.<sup>42</sup> By the time the forfeiture petition was filed, however, the appropriator had twice repaired the dam and had recommenced use of the water.<sup>43</sup> The court held that the petition was not timely filed.<sup>44</sup> Because forfeitures are not favored and must be promptly asserted, and because the dam had been repaired twice and the water put back to use, the court reasoned that it would be *inequitable* to hold that the appropriator's rights were forfeited.<sup>45</sup>

More recently, in *Wheatland Irrigation Dist. v. Pioneer Canal Co.*,<sup>46</sup> the court reaffirmed the legal precept that forfeitures are not favored unless justified by clear and convincing evidence.<sup>47</sup> The facts involved an appropriator who allowed a portion of the water to which he was entitled under a reservoir permit to seep through the dam for a period of five years. No attempt was made to either repair the dam or recommence storage of the adjudicated amount prior to the commencement of the forfeiture action.<sup>48</sup> The court found the evidence of forfeiture to be both clear and convincing and declared the right forfeited.

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33. 69 P.2d at 539.

34. *Id.* at 541.

35. 54 Wyo. 320, 92 P.2d 572 (1939).

36. 92 P.2d at 577.

37. 55 Wyo. 4, 95 P.2d 74 (1939).

38. 95 P.2d at 80.

39. *Horse Creek Conservation District v. Lincoln Land Co.*, 54 Wyo. 320, 340, 92 P.2d 572, 579 (1939); *Sturgeon v. Brooks*, 73 Wyo. 436, 458, 281 P.2d 675, 683 (1955).

40. 73 Wyo. 436, 281 P.2d 675 (1955).

41. 281 P.2d at 683.

42. *Id.*

43. *Id.* at 684.

44. *Id.*

45. *Id.*

46. 464 P.2d 533 (Wyo. 1970).

47. *Id.* at 537.

48. *Id.* at 539.

The cases described above illustrate the traditional approach taken by the Wyoming Supreme Court in applying the Wyoming forfeiture statute. None of these cases, however, directly addressed the question of whether commencement of activities other than use of the water prior to the filing of a forfeiture petition would be sufficient to prevent forfeiture. In *Sturgeon*, the court held that an appropriator who had repaired the dam and recommenced use of the water prior to the filing of the forfeiture petition had not forfeited his right.<sup>49</sup> In *Pioneer Canal*, the court held that an appropriator who had not repaired the dam or recommenced use of the water prior to the time the petition was filed had forfeited his right.<sup>50</sup> In *Laramie Rivers*, the court encountered for the first time an appropriator who had begun repairs but had not recommenced use of the water when the forfeiture petition was filed.

### THE PRINCIPAL CASE

In *Laramie Rivers*, the Wyoming Supreme Court reversed the district court's ruling upholding the Board of Control's denial of the forfeiture petition. The Board had found that the forfeiture was not promptly asserted for the reason that prior to commencement of the action *Laramie Rivers Company* had undertaken substantial work to repair the dam in order to recommence storage to the full adjudicated amount.<sup>51</sup> In reaching its holding, the Board relied in part on prior Wyoming case law in which the maxim that forfeitures are not favored was applied.<sup>52</sup>

In overturning the Board's order, the Wyoming Supreme Court relied on the principle that in construing a legislative enactment the court must, if possible, ascertain the intent of the legislature from the wording of the statute and must give the words their plain and ordinary meaning.<sup>53</sup> On this basis, the court held that section 41-3-401 of the Wyoming Statutes requires forfeiture whenever nonuse of the water is shown for the statutory five year period.<sup>54</sup> The only use which will save an appropriator from the "gnashing teeth" of the statute is beneficial use of the water itself.<sup>55</sup> Activities aimed at restoring beneficial use are of no avail, even if begun prior to commencement of the forfeiture action.

Further, the court stated that the statute precludes the Board of Control and the courts from denying a forfeiture petition when an appropriator has failed to beneficially use the water for five successive years.<sup>56</sup> While acknowledging the validity of the precept that forfeitures are not favored, the court stated that the Board's reliance on it in this case was misplaced.<sup>57</sup> When the legislature has established a clear directive and the facts of a case

49. 281 P.2d at 684.

50. 464 P.2d at 540.

51. Petition of Wheatland Irrigation District, State Board of Control, Order Record No. 25, p. 71, Oct. 6, 1981.

52. *Id.* at 70.

53. 659 P.2d at 564.

54. *Id.* at 565.

55. *Id.* at 567.

56. *Id.* at 565.

57. *Id.* at 566.

satisfy the requirements of that directive, the court concluded, the Board and the courts have no choice but to follow it.<sup>58</sup>

Turning to the Board's application of prior case law, the supreme court again rejected the Board's conclusions. The Board had concluded that *Sturgeon v. Brooks* stood for the proposition that forfeitures must be promptly asserted or will be waived.<sup>59</sup> Based on that premise, the Board held that the forfeiture in *Laramie Rivers* was not promptly asserted because, prior to its commencement, Laramie Rivers Company had begun repairs on the dam.<sup>60</sup> The supreme court rejected the Board's holding, stating that a petition could not be denied under the statute on the ground that it was not timely filed if it was filed before the contested water was restored to beneficial use.<sup>61</sup> In *Laramie Rivers*, the court concluded, the prompt assertion rule had no relevance because the petition was filed prior to the resumption of actual use of the water.<sup>62</sup> In contrast, the appropriator in *Sturgeon* had not only repaired the dam prior to commencement of the forfeiture action, he had resumed use of the water.<sup>63</sup> Thus, the rule of law established in *Laramie Rivers* is that efforts to restore a water right are not sufficient to prevent forfeiture absent actual use of the water prior to commencement of the forfeiture action.

#### ANALYSIS OF THE COURT'S OPINION

In *Laramie Rivers*, the Wyoming Supreme Court adopted an unusually strict approach in construing the Wyoming forfeiture statute but failed to justify its position in light of prior case law. Traditionally, when confronted with a case brought under the forfeiture statute, the court has relied on the precept that forfeitures are not favored.<sup>64</sup> In *Laramie Rivers*, however, the court abandoned its traditional approach in favor of strict statutory construction.<sup>65</sup> While that approach is consistent with the method employed in at least one other jurisdiction,<sup>66</sup> it is clearly inconsistent with the principle endorsed repeatedly by the Wyoming Supreme Court that forfeitures are not favored. It may well be inconsistent with the policy of promoting beneficial use of available water as well.

In *Laramie Rivers*, the court justified its conclusion that the abhorrence of forfeiture maxim was inapplicable by stating that section 41-3-401 of the Wyoming Statutes compelled the court to forfeit the right in question.<sup>67</sup> Yet under earlier forms of the same statute,<sup>68</sup> the court relied

58. *Id.* at 565.

59. Petition of Wheatland Irrigation District, State Board of Control, Order Record No. 25, p. 70, Oct. 6, 1981.

60. *Id.* at 71.

61. 659 P.2d at 566.

62. *Id.*

63. *Id.*

64. See *supra* text accompanying notes 31-39.

65. See *supra* text accompanying notes 53-58.

66. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967). The court held that the development of water necessitates strict adherence to statutory sanctions, without nonconformance or delay—"lest our whole economy lag to the detriment of our future." *Id.* at 791.

67. 659 P.2d at 565.

68. See *supra* note 17.



heavily on the maxim in refusing to grant forfeitures.<sup>69</sup> For example, in a 1939 case the court's dislike of forfeitures was decisive in holding the statute inapplicable where nonuse was caused by circumstances beyond the appropriator's control, despite the fact that the statute made no mention of such an exception.<sup>70</sup> In a 1937 case, the court found the statute to require clear and convincing evidence of nonuse before a forfeiture could be declared, although the statute then in effect contained no such requirement.<sup>71</sup> The statute in effect in 1955 did not expressly provide that a formal declaration of forfeiture was necessary before a right would be deemed lost; the court nonetheless held that such a declaration was necessary.<sup>72</sup> Finally, despite the absence of such considerations in the language of the statute, the court has looked to principles of equity and public policy in refusing to declare a water right forfeited.

In *Sturgeon*, for example, the court expressly declared that public policy did not require that the forfeiture statute be construed so strictly as to deprive an appropriator of the benefits of his labor and expenditures.<sup>73</sup> *Sturgeon* has since been said to suggest that "estoppel may be applied to prevent the harsh results of forfeiture where the alleged nonuser has expended substantial funds in reapplying the water to a beneficial use, or where a substantial period of time has elapsed between the commencement of the action and the alleged nonuse period."<sup>74</sup>

Thus, until *Laramie Rivers*, the supreme court had not felt constrained to look only at the plain and ordinary meaning of the statutory language. Instead, it affirmatively applied the principle that forfeitures are not favored. With that principle, the court combined considerations of equity and public policy. The result was an approach which promoted fairness and flexibility. The facts present in *Laramie Rivers* could have easily been applied to reach a similar result.

First, prior to commencement of the forfeiture action, Laramie Rivers Company had attempted to obtain funds to repair the dam in compliance with a state imposed restriction on its use of a portion of its water right.<sup>75</sup> The Company finally received a loan for \$142,000 in 1980. Second, the State Engineer approved the Company's plans for repair, despite the fact

69. See *supra* text accompanying notes 31-39.

70. *Scherck v. Nichols*, 55 Wyo. 4, 24, 95 P.2d 74, 80 (1939). The statute construed by the court was then codified as WYO. REV. STAT. § 122-421 (1931).

71. *Ramsay v. Gottsche*, 51 Wyo. 516, 529, 69 P.2d 535, 539 (1937). (The statute construed by the court was the same as that in *Scherck*.)

72. *Sturgeon v. Brooks*, 73 Wyo. 436, 458, 281 P.2d 675, 683 (Wyo. 1955). The statute construed by the court was then codified as WYO. COMP. STAT. § 71-701 (1945).

73. 281 P.2d at 685.

74. Novak, *Abandonment and Forfeiture: How to Hold a Water Right as Development Takes Place*, 28 ROCKY MT. MIN. L. INST. 1249, 1271 (1982).

75. Brief for Appellees, *supra* note 2, at 2.

that he must have known the water right was subject to forfeiture<sup>76</sup> and that he had the statutory authority to initiate forfeiture proceedings himself under these circumstances.<sup>77</sup> Third, Laramie Rivers Company had executed a contract for the repairs, and work had commenced prior to the filing of the forfeiture petition.<sup>78</sup> Fourth, Wheatland Irrigation could have filed its petition at least as early as 1977,<sup>79</sup> yet failed to do so until three years later—after Laramie Rivers Company had commenced efforts at considerable expense to restore its water right.

The intent of Laramie Rivers Company to restore use of the water was clear. Reasonable efforts to do so had commenced. Wheatland Irrigation could have filed its petition at least three years earlier. Under these circumstances, and in light of prior case law, the supreme court should not have felt constrained to forfeit the water right in question. While it is true that *Laramie Rivers* represents the first case in which the court confronted the question of whether efforts to restore a water right are sufficient to prevent forfeiture absent actual use of the water, that distinction does not justify the court's departure from prior case law. The distinction created by the court between use of the water and reasonable efforts to restore use is artificial, unnecessary, and unfair. While this distinction may be suggested by a strict reading of the statute, it does not effectively promote the policy upon which the statute is based.

The effect of the court's rulings in *Laramie Rivers* is to impede rather than promote the policy of beneficial use of available water. It does so by discouraging appropriators from attempting to revive unused water rights. The distinction created by the court between use of the water and efforts to restore use significantly reduces any incentive an appropriator may previously have had to expend the time, effort and capital to restore an unused water right. If a forfeiture petition can be filed at any time prior to actual use of the water, whether a project to restore use is one-fourth or three-fourths complete, the risk may well outweigh the appropriator's interest in restoring his right. The court's holding, therefore, does not inspire efforts to restore use; instead it increases the uncertainty already inherent in a water right to a degree that discourages such efforts.<sup>80</sup>

Further, the court's holding in *Laramie Rivers* raises questions about the status of existing water rights. Where safety considerations demand

76. This suggestion is based on the fact that Laramie Rivers Co. was notified of the restrictions imposed on the Lake Hattie dam by letter from the State Engineer. The letter included no time limit on the repairs. When the State Engineer received the company's plans for repair, he must have realized that they were in response to his limitations on storage imposed eight years earlier.

77. See *supra* text accompanying note 22.

78. 659 P.2d at 564.

79. The restrictions on the amount of water that could be stored in the reservoir were effective in 1972. Therefore, the statutory five year period had run by 1977 and Wheatland Irrigation could have filed a forfeiture petition. However, counsel for Wheatland Irrigation claimed that water from the reservoir had not been applied to beneficial use for two years prior to the State Engineer's order. Therefore, Wheatland Irrigation could have commenced a forfeiture action as early as 1975. Brief for Appellant at 3, Wheatland Irrigation Dist. v. Laramie Rivers Co., 659 P.2d 561 (Wyo. 1983).

80. For a discussion of the uncertainties inherent in water rights, see Dewsnup, *Assembling Water Rights for a New Use: Needed Reforms in the Law*, 17 ROCKY MT. MIN. L. INST. 613, 630 (1972).

temporary nonuse of a portion of a water right, the decision may lead to loss of water rights by major appropriators simply because funding, planning, and work designed to restore use of the water cannot be completed within the statutory five year period.<sup>81</sup> The prospect of losing part of a water right may in turn deter appropriators from making necessary repairs and may thus perpetuate unsafe conditions.

Finally, the court's ruling in *Laramie Rivers* raises questions about future development in Wyoming. In light of that ruling, it is apparently impossible to reserve water for future use once it has been applied to beneficial use. Yet, under some circumstances there may be a need to hold a water right without use as development occurs.<sup>82</sup> In addition, although conservation of water has not been a primary concern in the past, it is likely to become so as demand for water increases and the already limited supply decreases. As a result, the policy of promoting maximum use of available water may find itself replaced by policies promoting conservation and more efficient use of existing supplies.<sup>83</sup> The notion that an appropriator must use his full entitlement, whether he needs it in a particular year or not, or risk losing it may be forced to give way as pressures on available water increase. The Board of Control and the courts must begin consideration of such factors now if Wyoming is to remain in the forefront of modern water law. In addition, consideration should be given to possible changes in the Wyoming forfeiture statute.

#### SUGGESTED STATUTORY CHANGES

In *Laramie Rivers*, the court relied almost exclusively on the language of section 41-3-401 of the Wyoming Statutes in declaring the contested water right forfeited. If the court continues to approach forfeiture cases on the basis of strict statutory construction, the problems and inequities which result will continue as well. In order to remedy the situation, the following statutory changes are recommended.

First, the statute should provide that either use of the water or reasonable efforts to restore use prior to commencement of the forfeiture action will prevent application of the statute.<sup>84</sup> Such a provision would not

81. Minutes, State Board of Control Meeting in Cheyenne, Wyoming, p. 77 (August, 1983). The holders of a reservoir permit for Jackson Lake requested an extension in connection with the unused storage capacity in Jackson Lake Reservoir. The Board concluded that such an extension could not be allowed because the law under which it was sought did not cover capacity presently constructed and not being used. *Id.* at 78.

82. For a discussion of some circumstances where there might be a need to hold a water right without use as development occurs see, Novak, *supra* note 74, at 1273-74.

83. Pring and Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MT. MIN. L. INST. 25-1, 25-21 (1979).

84. An example of a provision of this type is found in the Texas forfeiture statute which provides in part:

At the conclusion of the hearing, the commission shall cancel the permit, certified filing, or certificate of adjudication to the extent that it finds that:

- (1) any portion of the water appropriated under the permit, certified filing, or certificate of adjudication has not been put to an authorized beneficial use during the 10-year period;
- (2) the holder has not used reasonable diligence in applying the unused portion of the water to an authorized beneficial use; and
- (3) the holder has not been justified in the nonuse or does not then have a bona fide intention of putting the unused water to an authorized beneficial use within a reasonable time after the hearing.

TEX. WATER CODE ANN. § 11.182 (Vernon 1982) (emphasis added).

only prevent the inequitable result reached in *Laramie Rivers* but it would encourage appropriators to restore unused rights.

Second, the statute should provide an appropriator the opportunity to show reasonable cause for nonuse whether or not he has applied for an extension.<sup>85</sup> Presently, the statute provides for such a showing only after application for extension. It thereby excludes appropriators who are attempting to resume use of the water following a temporary period of nonuse.

Third, the statute should provide an appropriator the opportunity to apply for an extension where he intends to resume use of the water.<sup>86</sup> Presently the statute allows an extension only where the water has "not yet" been used. There is no rational reason for allowing an extension where water has never been used, and not allowing one where water has been used.

Fourth, the statute should provide that when the State Engineer has reason to believe that an appropriator has forfeited his right, the State Engineer *shall* initiate forfeiture proceedings.<sup>87</sup> Presently section 41-3-402 of the Wyoming Statutes provides that the State Engineer *may* initiate forfeiture proceedings. That the current provision may lead to inequitable results is aptly illustrated in *Laramie Rivers*.<sup>88</sup> The State Engineer knew the full water right was not being beneficially used because of the restriction imposed in 1972. Nonetheless, he approved Laramie Rivers Company's plans for repair eight years later without giving any indication that the right was subject to forfeiture. With the State Engineer's approval in hand, Laramie Rivers Company began the repairs. Under these circumstances, it was inequitable for the court to declare the right forfeited. When the State Engineer knows a right has not been used for the statutory period and is requested to take affirmative action with respect to the restoration of the right, it would not be unduly burdensome to require him to initiate forfeiture proceedings. Alternatively, he should be required to notify the appropriator of the possibility of forfeiture.

### CONCLUSION

In *Laramie Rivers*, the Wyoming Supreme Court established the rule that forfeitures of water rights under section 41-3-401 of the Wyoming Statutes may only be avoided by application of the water to beneficial use.

85. *Id.*

86. The Utah forfeiture statute provides for an extension not exceeding five years within which to resume use of water. UTAH CODE ANN. § 73-1-4 (1980).

87. The forfeiture statutes of Montana, Nebraska, North Dakota and Texas provide that the state engineer or authorized agency *shall* initiate forfeiture proceedings where an appropriator fails to use the water for the specified number of years. The Montana statute qualifies the authorized agency's obligation to initiate such proceedings by stating that it must do so when there is reason to believe an appropriator may have forfeited his right. MONT. CODE ANN. § 85-2-405 (1981); NEB. REV. STAT. § 46-229.02 (1978); N.D. CENT. CODE § 61-04-24 (Supp. 1981); TEX. WATER CODE ANN. § 11.174 (Vernon 1982). The New Mexico statute provides that when an appropriator fails to use the water for the specified number of years, the state engineer must give notice of nonuse to the appropriator, and, if one year after receiving notice, the appropriator fails to use the water, it reverts to the public. N.M. STAT. ANN. § 72-5-28 (1978 & Supp. 1983).

88. See *supra* text accompanying notes 77-78.

Thus, undertaking efforts to repair a dam in order to put a reservoir back into use will not prevent forfeiture, even if such efforts are commenced before a forfeiture petition is filed.

In construing the phrase "use of the water" in its narrowest sense, the court departed from its traditional approach to forfeiture cases. Prior to *Laramie Rivers*, the court had relied heavily on the principle that forfeitures are not favored in law to refuse to find a forfeiture of water rights. With this principle, the court combined considerations of equity and public policy. The result was a series of forfeiture cases in which the court advocated considerations of equity and flexibility over strict statutory construction.

With the *Laramie Rivers* decision, however, the court has retreated from such considerations. In doing so, it may well be guilty of impeding the policy upon which the forfeiture statute is based. The distinction created by the court between use of the water and other efforts to restore such use is less likely to promote the policy of beneficial use of available water than it is to impede that policy.

As growth continues in the west, the pressures placed on our system of water allocation will increase proportionately. Population growth alone is certain to place greater demands on available water, not to mention agricultural, industrial, and energy development. At the same time, environmental and recreational interests in preserving some water for non-consumptive uses are likely to remain in the forefront of public concern. These are but a few of the reasons that existing water law should be carefully scrutinized to ensure that it is promoting rather than impeding sound water policy.

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