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WATER LAW—Standing Requirement under the Wyoming Forfeiture Statute.
Platte County Grazing Association v. State Board of Control, 675 P.2d 1279 (Wyo. 1984).

Since 1965, the Platte County Grazing Association (PCGA) held direct flow water rights¹ of 64.06 cubic feet per second (c.f.s.)² for the irrigation of 4,470.13 acres.³ The water rights were appurtenant⁴ to a tract of ranchland near Rock River, Wyoming. This tract of land was purchased by the Casper Board of Public Utilities (CBPU) in 1981.⁵ Three Mile Creek and Rock Creek provided the source of supply.

Between 1977 and 1981, the PCGA irrigated less than half of the acreage for which they held adjudicated water rights.⁶ On October 30, 1981, contestants Lonesome Fox Corporation and S & S Ranch Company filed a petition for forfeiture with the Board of Control,⁷ pursuant to section 41-3-401 of the Wyoming Statutes.⁸ On February 10, 1982, Jankovsky

1. Brief for Appellee State Board of Control at 8, *Platte County Grazing Assoc. v. State Board of Control*, 675 P.2d 1279 (Wyo. 1984). The PCGA held both direct flow and storage water rights, but the Board determined that the forfeiture had no effect on the storage rights, except that the stored water would no longer be attached to the lands. State Board of Control, Order Record No. 27, p. 48, Nov. 19, 1982. For a discussion of the difference between direct flow and storage water rights see generally McLean, *Record Title to Water and Ditch Rights*, 6 Wyo. L.J. 201 (1952).
2. This unit is the official standard of measurement in most western states. "To determine flow in cubic feet per second, the area of the cross section of a stream is multiplied by the velocity of water in feet per second." F. TRELEASE, *WATER LAW CASES AND MATERIALS* 17 (3d ed. 1979).
3. Brief for Appellee, *supra* note 1, at 4. The rights appurtenant to this acreage were original supply rights. The PCGA also held supplemental supply rights for the irrigation of 235.0 acres. Supplemental supply is defined in section 41-3-113 of the Wyoming Statutes.
4. A water right becomes appurtenant to the land upon which the water is used and therefore becomes a "part and parcel of the realty." *Frank v. Hicks*, 4 Wyo. 502, 35 P. 475, 484 (1894).
5. Brief for Appellee, *supra* note 1, at 8.
6. The PCGA held adjudicated water rights to irrigate 4705.13 acres, 2235.45 of which were actually irrigated. State Board of Control, Order Record No. 27, pp. 79-80, Nov. 19, 1982.
7. Brief for Appellee, *supra* note 1, at 2.
8. 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 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

Ranch Company, Double K. Ranch Inc., and Noel Hall Company joined in the forfeiture action.⁹

The contestants sought a declaration that the PCGA had forfeited its water rights for the irrigation of 2568 acres, this being the difference between the total acreage with adjudicated water rights and the number of acres claimed to have been actually irrigated.¹⁰ In its petition, the contestants alleged that the PCGA had failed to comply with section 41-3-317 of the Wyoming Statutes¹¹ which requires one c.f.s. per seventy acres and had instead applied two c.f.s. to one half the land with adjudicated water rights.¹² Because the PCGA had failed to apply the water to the beneficial use for which the rights had been appropriated, the contestants requested that this portion of the water right be declared forfeited.¹³

After a public hearing on April 1, 1982, the Board found that the PCGA had violated the conditions of its water rights by failing to irrigate the land to which these rights were appurtenant. The Board therefore held that the water rights appurtenant to the acreage not irrigated were forfeited.¹⁴ The Board's decision was based on its conclusion that "an appropriation of water must be applied to the land to which it attaches at the authorized flow rate."¹⁵

After the Board approved the forfeiture petition, the PCGA filed a Petition for Judicial Review of Administrative Action in district court. On June 15, 1983, the district court certified the matter to the Wyoming Supreme Court under Rule 12 of the Wyoming Rules of Appellate Procedure.¹⁶

In a unanimous decision, the court reversed the Board's declaration of forfeiture, holding that the contestant's allegations were insufficient to establish standing.¹⁷ The court held that the standing requirement of sec-

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.

9. Brief for Appellee, *supra* note 1, at 3.
10. Specifically, the contestants alleged forfeiture of the water rights for 2451.18 acres having original supply an 117.7 acres having supplemental supply. *Id.* at 4.
11. WYO. STAT. § 41-3-317 (1977).
12. Platte County Grazing Assoc. v. State Board of Control, 675 P.2d 1279 (Wyo. 1984).
13. Brief for Appellee, *supra* note 1, at 4.
14. State Board of Control, Order Record No. 27, p. 62, Nov. 19, 1982.
15. *Id.* at 63.
16. 675 P.2d at 1280.
17. *Id.* at 1281.

tion 41-3-401 of the Wyoming Statutes may only be met by a showing that previously appropriated water rights would be abridged or injured if forfeiture were denied.¹⁸ On February 2, 1984, the contestant's petition for rehearing was denied.¹⁹

BACKGROUND

Historical Development

The 1886 Irrigation Act²⁰ was the first legislation which recognized prior appropriation as the basis of water rights in Wyoming.²¹ The state constitution, adopted in 1890, further provided the foundation upon which water rights were to be granted.²²

The doctrine of prior appropriation developed in the arid western states due to insufficient groundwater or rainfall to support natural crop growth.²³ With the maxim "first in time, first in right" at its heart, the doctrine helped to resolve disputes over a scarce and critical resource.²⁴

The concept of beneficial use is a fundamental part of the prior appropriation doctrine,²⁵ a concept in which most of the important rules of the doctrine are rooted. For example, section 41-3-101 of the Wyoming Statutes bases the requisition of a permit, the limit of the appropriation and the use of the water on beneficial use.²⁶

Also crucial to the application of beneficial use is the appurtenance of water to a specific tract of land²⁷ and the statutorily defined "duty of

18. *Id.* at 1283.

19. 675 P.2d 1279 (Wyo. 1984).

20. 1886 WYO. SESS. LAWS ch. 61.

21. The Act declared the waters of Wyoming to be public property, dedicated to the use of the people. See Gould, *Wyoming Water Rights — A Primer*, 3 WYOMING ISSUES 13 (1980).

22. 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.

23. Shupe, *Waste in Western Water Law; A Blueprint for Change*, 61 OR. L. REV. 485 (1981).

24. *Irwin v. Phillips*, 5 Cal. 140 (1855). This case involved a dispute between two miners. The first had diverted the flow of the stream some distance to work his claim. The second located a claim downstream, and when he found he had no water, filed suit against the first. The court held that the riparian doctrine was inapplicable and applied the principle of first in time, first in right.

25. An irrigator only has a right to those diversions that are applied to a beneficial use. See, e.g., *Gossner v. Utah Power and Light*, 612 P.2d 337, 341 (Utah 1980); *John Meier and Sons v. Horse Creek Conservation District*, 603 P.2d 1283, 1288 (Wyo. 1979).

26. WYO. STAT. § 41-3-101 (1977) provides in part:

Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding the statutory limit . . . (Emphasis supplied).

27. WYO. STAT. § 41-3-101 provides in part:

Water rights for the direct use of the natural unstored flow of any stream cannot be detached from the lands, place or purpose for which they are acquired. . . .

water."²⁸ Section 41-4-317 of the Wyoming Statutes sets the maximum permissible amount of water which may be applied to land: one cubic foot per second for every seventy acres.²⁹ This statute has remained unchanged since 1890 and the limit it imposes pervades Wyoming water law.³⁰ Indeed, the direct flow limitation and the continuing obligation of beneficial use form the cornerstones of water rights in Wyoming.

The Forfeiture Statute

The rights of an appropriator who fails to make beneficial use of his water allocation are not secure.³¹ Section 41-3-401 of the Wyoming Statutes provides that a water right is forfeited when an appropriator fails to use his allocation of water for the beneficial purposes for which it was intended. The statute further provides that a water user who "might be affected" by a forfeiture action may petition the Board of Control.³²

The Board of Control derives its authority to entertain petitions for forfeiture from the Wyoming Constitution³³ and its power to promulgate rules and regulations from the Wyoming Statutes.³⁴ However, the Board has no authority to enforce the statute unless a complaining water user or the State Engineer³⁵ initiates forfeiture proceedings.³⁶ The Board does not police the water rights; the water users themselves are self-policing.³⁷ This restriction on who may bring suit is consistent with the well established principle that forfeitures are not favored by the courts.

28. The Wyoming Supreme Court has defined the term "duty of water" as a "measure of water, which by careful management and use, without wastage, is reasonably required to be applied to any given tract of land. . . ." *Basin Electric Power Cooperative v. State Board of Control*, Wyo. 578 P.2d 557, 564 (1978) (quoting *Farmers Highline Canal and Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629, 634 (1954), *reh'g denied*, 272 P.2d 636 (1954)).

29. WYO. STAT. § 41-4-317 provides in part:

[T]hat such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on lands . . . provided, that no allotment for the direct use of the natural unstored flow of any stream shall exceed one (1) cubic foot per second for each seventy (70) acres of land for which said appropriation shall be made. . . .

30. *See, e.g.*, WYO. STAT. §§ 41-3-101, 41-3-113.

31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-131(B)-(C) (Supp. 1981-82); CAL. WATER CODE § 1241 (West Supp. 1981); IDAHO CODE § 42-222(2) (Supp. 1981); NEV. REV. STAT. § 533.060 (1981); N.M. STAT. ANN. § 72-5-28 (1978 & Supp. 1980); OR. REV. STAT. § 540.610 (1979); UTAH CODE ANN. § 73-1-4 (1980). *See also* Novak, *Abandonment and Forfeiture: How to Hold a Water Right As Development Takes Place*, 28 ROCKY MTN. MIN. L. INST. 1249 (1982).

32. WYO. STAT. § 41-3-401. *See supra* note 8.

33. WYO. CONST. art. 8, § 2 provides in part:

There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriations, distribution and diversion. . . . Its decision to be subject to review by the courts of the state.

34. WYO. STAT. § 41-4-211(b) (Supp. 1983) provides that:

The board of control may adopt reasonable rules and regulations to carry out the duties imposed by law on the board of control.

35. WYO. STAT. § 41-3-402 (1977).

36. Before forfeiture of vested water rights can operate, there must be a formal declaration, "procured by some one clothed by law with proper authority to invoke it." *Horse Creek Conservation District v. Lincoln Land Company*, 54 Wyo. 438, 92 P.2d 572, 579 (1939).

37. Trelease, *The Model Water Code, The Wise Administrator and the Goddam Bureaucrat*, 14 NAT. RES. J. 207 (1974).

Wyoming Case Law

One of the earlier decisions regarding water rights in Wyoming outlined the policy of beneficial use which underlies the forfeiture statute. In *Parshall v. Cowper*,³⁸ the court held that the local water commissioner could limit an appropriator's diversion to prevent waste or use "in excess of the volume to which the appropriator is lawfully entitled."³⁹ In other words, the right to use water only vests if the beneficial use for which it was appropriated continues.⁴⁰ In 1975, the court reaffirmed this policy in *Budd v. Bishop*,⁴¹ holding that a water right is subject to reduction if not applied for beneficial purposes.⁴²

Although the court has acknowledged the policy of the forfeiture statute to be one concerning the continuing obligation of beneficial use and the prevention of waste, when construing the statute the court has relied on the principle that equity abhors a forfeiture.⁴³ In 1937, the court expressly articulated its reliance on this principle with the following language: "Forfeitures are not favored, and an appropriator will not be held to have abandoned his right except upon reasonable clear and satisfactory evidence."⁴⁴ Again in 1955, the court reaffirmed the principle that forfeitures are not favored and will be waived if not promptly asserted.⁴⁵

When construing the standing requirement under the forfeiture statute, the court has consistently held that a water user need not be adversely affected or injured to have standing under the statute. In an early 1937 case, the United States District Court for the District of Wyoming said: "the plaintiff should be required to prove that he would be *benefited* if defendant's appropriation were cut off."⁴⁶ This requirement of standing was extended in 1939 when the Wyoming Supreme Court held in *Horse Creek Conservation District v. Lincoln Land Co.*,⁴⁷ that a water right was affected if it was either enlarged or abridged rather than simply if it was abridged.⁴⁸

In *Yentzer v. Hemenway*,⁴⁹ the court held that the contestants' possible advancement of priorities alone conferred standing upon them as affected

38. *Parshall v. Cowper*, 22 Wyo. 385, 143 P. 302 (1914).

39. *Id.* at 304.

40. *See* *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258 (1900).

41. 543 P.2d 368 (Wyo. 1975).

42. *Id.* at 373.

43. *Shupe*, *supra* note 23, at 500.

44. *Ramsay v. Gottsche*, 51 Wyo. 516, 69 P.2d 535 (1937). This case also held that an appropriator has not forfeited his water right if he is prevented from using the water because of floods. *Id.* at 541. *See also* *Scherck v. Nichols*, 55 Wyo. 4, 95 P.2d 74, 80 (1939) (where the court held that forfeiture will be denied if non-use is due to circumstances beyond the appropriator's control); *Yentzer v. Hemen*, 440 P.2d 7, 13 (Wyo. 1968) (where the court held that factors not under control of the appropriator were a defense to an action for abandonment).

45. *Sturgeon v. Brooks*, 73 Wyo. 436, 281 P.2d 675 (1955). *See also* *Snake River Land Co. v. State Board of Control*, 560 P.2d 733 (Wyo. 1977) and *White v. Wheatland Irrigation District*, 413 P.2d 252 (Wyo. 1966).

46. *Haige v. Lincoln Land Company*, 18 F. Supp. 637, 639 (1937) (emphasis added).

47. 54 Wyo. 438, 92 P.2d 572 (1939).

48. *Id.* at 580 (quoting *Holland v. Dickerson*, 41 Iowa 367 (1875)).

49. 440 P.2d 7 (Wyo. 1968).

parties.⁵⁰ In other words, a showing that the contestants "could be benefited"⁵¹ by the forfeiture was sufficient to enable them to bring suit.

More recently in *Kearney Lake, Land and Reservoir Co. v. Lake DeSmet Reservoir Co.*,⁵² the court rejected a challenge to standing under the forfeiture statute holding that one does not have to show injury to initiate proceedings for forfeiture.⁵³

Contrary to this long line of cases acknowledging the idea that a *beneficial* as well as an *adverse* effect would confer standing, the court very recently held in *Cremer v. State Board of Control*,⁵⁴ that a contestant who "cannot show that its water rights are abridged"⁵⁵ is not an affected water user under the forfeiture statute. In that case, senior appropriators were denied standing to seek forfeiture of a junior appropriator's right.⁵⁶ In *Platte County*, the court for the first time denied standing to a junior appropriator to challenge the misuse of a senior appropriator's right,⁵⁷ relying heavily on the principles set forth in *Cremer*.

THE PRINCIPAL CASE

In *Platte County* the court reversed the Board of Control's declaration of partial forfeiture.⁵⁸ In their constitutionally protected capacity to supervise water rights,⁵⁹ the Board had found that of the 4720 acres in question, a total of 2235 were actually irrigated. The Board declared the water rights to irrigate the remaining 2485 acres forfeited.⁶⁰ In its decision, the Board concluded that the contestants had standing under the forfeiture statute because they would be benefitted by the forfeiture action.⁶¹

The Wyoming Supreme Court rejected this analysis, holding that the contestants had failed to allege or prove that PCGA's use of its water had adversely affected the contestants' previously appropriated water rights.⁶² According to the court, an allegation of PCGA's noncompliance with their permit provisions, coupled with a showing that the water rights of the contestants would have been enhanced by a declaration of forfeiture, was insufficient to establish standing.⁶³ For an appropriator to have standing to complain, the court held that he must show the unauthorized use or misuse

50. *Id.* at 12.

51. *Id.*

52. 475 P.2d 548 (Wyo. 1970).

53. *Id.* at 549.

54. 675 P.2d 250 (Wyo. 1984).

55. *Id.* at 255.

56. For a general discussion of junior and senior water rights see Rechar, *Water Rights Laws*, 3 WYOMING ISSUES 24 (1980).

57. 675 P.2d at 1283.

58. *Id.* at 1281. WYO. STAT. § 41-3-401(e) states that upon consideration of the evidence, the Board "shall vote to declare the right in question abandoned, either *wholly* or *partially* . . ." (emphasis added).

59. See *supra* note 33.

60. See *supra* note 14.

61. 675 P.2d at 1281.

62. *Id.* at 1283.

63. *Id.* at 1281.

adversely affected his water rights. In other words, he must allege and prove that his *existing* water right was injured.⁶⁴

The court held that proof of the injury was a jurisdictional requirement which must be met in order for a water user to bring an abandonment petition against the water rights of others.⁶⁵ Relying on principles set forth in *Cremer*, the court interpreted the words "might be affected"⁶⁶ to mean *adversely* affected water rights, as compared to an enhancement of those rights.⁶⁷ The court held that the right to bring a forfeiture action under the statute was only available to an appropriator who could show his rights were changed to his disadvantage. The principle of law, then, established in *Platte County*, is that absent a showing that a contestant's water right has been *adversely* affected, the mere unauthorized use or misuse of water does not give the contestant standing to complain.⁶⁸

ANALYSIS

Cremer Distinguished

In arriving at the conclusion that the contestants in *Platte County* did not have standing, the court relied heavily on the *Cremer* decision. The facts in *Platte County*, however, were substantially different from those faced by the court in *Cremer*.⁶⁹ There the court was confronted with a challenge by senior appropriators seeking a forfeiture of a junior appropriator's water right.⁷⁰ Relying on the principle that a prior appropriator cannot interfere with the rights of a junior appropriator so long as the senior receives all the water to which his appropriation entitles him,⁷¹ the court denied the forfeiture.

In *Platte County*, however, junior appropriators were challenging the rights of senior appropriators, yet the court took the same narrow view of standing as it did in *Cremer*.⁷² In equating two factually dissimilar cases, the court has concluded that "might be affected" means *adversely* affected in all situations.

If the court had relied on prior case law which was factually consistent with *Platte County*,⁷³ rather than relying on *Cremer* which was not, this

64. *Id.* at 1283.

65. *Id.*

66. WYO. STAT. § 41-3-401. See *supra* note 8.

67. 675 P.2d at 1283.

68. *Id.*

69. See also Brief of Appellees in Support of Petition for Rehearing, *Platte County Grazing Assoc. v. State Board of Control*, 675 P.2d 1279 (Wyo. 1984).

70. 675 P.2d at 252. *Platte County* may also be distinguished from *Cremer* in that the *Cremer* dispute involved surplus water rights as opposed to original supply rights.

71. In *Cremer*, the court relied on *Mitchell Irrigation District v. Whiting*, 136 P.2d 502 (Wyo. 1943). See also 2 KINNEY, IRRIGATION AND WATER RIGHTS 1377 (2d ed. 1912).

72. It is interesting to note that the authority used to support the narrow view of standing in *Cremer* was *Washakie Co. Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980), where the court held that "[s]tanding should not be construed narrowly or restrictively." 606 P.2d at 317.

73. See, e.g., *Yentzer v. Hemenway*, 440 P.2d 7 (1968) where junior appropriators challenged seniors for the same source of supply.

narrow definition of standing would have been avoided. The court should have held, as it often has,⁷⁴ that where a junior seeks forfeiture of a senior appropriation, the junior's right might be affected if it is either *abridged* by misuse or would be *enlarged* by a declaration of forfeiture.

The Standing Concept

In *Washakie Co. Sch. Dist. No. One v. Herschler*,⁷⁵ the court held that standing "is not a rigid or dogmatic rule but one which must be applied with some view to realities as well as practicalities."⁷⁶ The decision in *Platte County*, however, severely restricts the approach to standing under the forfeiture statute.

Practically speaking, the reactivation of the PCGA's water rights would adversely affect return flows to the contestants' downstream rights.⁷⁷ The PCGA irrigated less than half of the acreage for which its adjudicated water rights were appropriated. Reapplication of water to the entire 4485 acres would mean the same quantity of water would be applied to more than double the acreage to which it had been applied in the past. As a consequence, less unused water would return to the stream in the form of return flows, to the detriment of the downstream contestants.⁷⁸ Faced with less water than they have had for the last five years, it would be necessary for the contestants to make regulatory calls to the detriment of junior upstream rights.⁷⁹

It appears then, that had the court followed its own holding in *Washakie* and viewed standing practically and realistically, the court would have held that the contestants had not only been affected, but that they had been *adversely* affected.

Statutory Construction

Standing to bring a forfeiture action is governed by statute rather than common law principles.⁸⁰ The Wyoming Supreme Court has recently construed the language of the forfeiture statute in *Wheatland Irrigation District v. Laramie Rivers Co.*,⁸¹ holding that "words utilized in the statute are to be given their plain and ordinary meaning unless otherwise

74. See *supra* notes 46-53 and accompanying text.

75. 606 P.2d 310 (Wyo. 1980).

76. *Id.* at 317.

77. See *supra* note 69.

78. The National Water Commission has outlined this problem as follows: "Most water uses are only partly consumptive, so that water diverted for use but not consumed reaches the stream again and becomes part of the watercourse to satisfy downstream rights." NATIONAL WATER COMMISSION, A SUMMARY — DIGEST OF STATE WATER LAWS 37 (1973).

79. Any person with a water right in a stream system may request the water commissioner to regulate the stream for his benefit. The water commissioner will act in accordance with the priority and amounts recorded in the official records of the state. During periods of decreased flow, the priority appropriations will be observed and the headgates of the junior-most appropriations may be closed. See WYOMING STATE BOARD OF CONTROL, REGULATIONS AND INSTRUCTIONS, Ch. 1, Section 6.

80. Statutory forfeiture also differs from common law abandonment in that it does not require proof of an intent on the part of the irrigators to cease using their water. See, e.g., *Gila Water Co. v. Green*, 29 Ariz. 304, 241 P. 307 (1925); *In re Waters of Manse Spring*, 60 Nev. 280, 108 P.2d 311 (1940). For a discussion of further distinctions between forfeiture and abandonment, see TRELEASE, *supra* note 2, at 192.

81. 659 P.2d 561 (Wyo. 1983).

indicated."⁸² In that case the court upheld a petition for forfeiture in the face of claims that equity demanded otherwise.⁸³ Their decision was based on the clear, unambiguous language of the law.⁸⁴

In the past the court has clearly and unambiguously construed "might be affected" to mean adversely *or* beneficially affected.⁸⁵ And yet in *Platte County*, the court ignored the common definition of "affected" and held it to mean only adversely affected.

The court also ignored the rules and regulations promulgated by the Board of Control.⁸⁶ The regulation adopted by the Board concerning forfeiture states that a complaining water user must submit evidence that the "granting of abandonment would *benefit* him."⁸⁷ It is an established principle in Wyoming that rules and regulations adopted pursuant to statutory authority have the force and effect of law.⁸⁸ The court has also held that Board orders are "clothed with the dignity" of any other court decree.⁸⁹ In *Platte County*, however, the court failed to recognize the findings of fact which supported the Board's conclusion that contestants had standing.⁹⁰

Implications For Future Litigation

The practical effect of the court's decision in *Platte County* is that it will be virtually impossible for a junior appropriator to establish standing under the Wyoming forfeiture statute. The position of the junior appropriator is such that forfeiture of a senior existing water right could only benefit him.⁹¹ And yet, *Platte County* holds that standing may only be established by proof of detriment or injury. In order to prove such detriment or injury, the water must be in use. However, if it is in use, the junior appropriator is precluded from petitioning the Board of Control for forfeiture.

The forfeiture statute developed as a practical solution to the impossibility of state inspection, control and enforcement of the thousands of appropriations across the state. The problem is misuse or non-use of water rights, while the solution remains a self-policing system requiring free access to the Board of Control. In *Basin Electric Power Coop. v. State Board of Control*,⁹² the court noted that "[i]n ascertaining legislative intent, we must look to the mischief the statute was intended to cure. . . ."⁹³ The mischief here is misuse of a state granted water right, and without free access to the Board of Control, the self-policing nature of water right enforcement in Wyoming is effectively destroyed.

82. *Id.* at 564 (citing Board of County Commissioners of the County of Campbell v. Ridenour, 623 P.2d 1174, 1174, 1184 (Wyo. 1981)).

83. See also Green River Development Co. v. FMC Corp., 660 P.2d 339 (Wyo. 1983).

84. 659 P.2d at 564.

85. See *supra* text accompanying notes 46-53.

86. The Board derives its authority to make such rules and regulations from WYO. STAT. § 41-4-211(b) (Supp. 1983).

87. Regulations and Instructions, State Engineer's office, Part IV; State Board of Control, Part IV, Section 7 (emphasis added).

88. Yeik v. Dept. of Revenue and Taxation, 595 P.2d 965, 968 (Wyo. 1979).

89. Wallis v. Luman, 625 P.2d 759, 765 (Wyo. 1981).

90. State Board of Control, Order Record No. 27, p. 62, Nov. 19, 1982.

91. See *supra* note 69.

92. 578 P.2d at 557.

93. *Id.* at 563 (citing Carter v. Thompson Realty Co., 58 Wyo. 279, 131 P.2d 297 (1942)).

SUGGESTED STATUTORY CHANGES

In *Platte County*, the court took a narrow and restrictive view of standing under the forfeiture statute. If the court continues to do so, virtually all junior water users will be incapable of establishing standing. This in turn will obliterate the self-enforcing nature of the water law system. In order to remedy the situation, the following statutory changes are suggested.

The statute should provide that a water user who might be affected includes, but is not limited to, juniors in date of priority to the right for which forfeiture is sought, who can show that reactivation of the challenged water rights will adversely affect, or that forfeiture would enhance, the water user's own rights. Such a provision would have allowed the contestants in *Platte County* to have argued the merits of their case and consequently the court could have ruled on the substantive issues involved in the dispute.

The statute should further provide that in the event that the court finds insufficient facts to establish standing, the dispute should be remanded to the Board of Control for additional findings of fact. Under such a statutory scheme, the Board would have been allowed to substantiate its conclusion that the contestants in *Platte County* did indeed have standing.

CONCLUSION

In *Platte County*, the Wyoming Supreme Court established the principle that the standing requirement of section 41-3-401 of the Wyoming Statutes may only be met by a showing that previously appropriated water rights would be adversely affected if forfeiture were denied. Thus, a contestee's non-compliance with permit provisions, coupled with a showing that the contestant's water rights would be enhanced by a forfeiture, is insufficient to establish standing.

The court could have avoided this narrow definition of standing in five ways. First, if the court had relied on prior case law which was factually consistent with *Platte County*, rather than relying on *Cremer* which was not, the incorrect conclusion that "might be affected" means adversely affected would never have been reached.

Second, if the court had viewed standing practically and realistically as precedent demands, the court would have held that the contestants had not only been affected, but that they had indeed been adversely affected.

Third, if the court had determined that there was no need for judicial construction of the forfeiture statute, as they did in *Laramie Rivers*, the court would not have wrongly interpreted the common and unambiguous definition of standing under the statute.

Fourth, if the court had given the rules and regulations of the Board of Control the force and effect of law, the court would not have failed to

recognize that the Board's findings of fact supported its conclusion on standing.

Finally, if the court had recognized the vital role that free access plays in the enforcement of water rights in Wyoming, it would not have so restrictively defined the standing requirement.

The decision in *Platte County* unnecessarily weakened the doctrine of prior appropriation, the essence of which "is beneficial use, not a stale or barren claim. Only diligence and good faith will keep the privilege alive."⁹⁴

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94. *Washington v. Oregon*, 297 U.S. 517, 527 (1936).