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COMMENT

Forfeiture Proceedings in Wyoming Water Law: The Legislature Revives Private Standing

In 1900, Wyoming's Chief Justice Potter wrote, "It is doubtful if any questions of graver importance than those affecting water rights are presented for judicial consideration."[1] Of those grave questions, perhaps the one most directly affecting an individual's water right is how that right may be lost.

In 1984, the Wyoming Supreme Court looked at one aspect of this question. In two surprising decisions, the court narrowed the rules about who has standing to initiate the statutory procedure for declaring water rights lost through forfeiture.[2] The Wyoming Legislature disapproved of this redefinition, and immediately amended the forfeiture statute.[3] At first glance, the concept of standing may seem unworthy of such attention by the court, by the legislature, and in this law review. Upon closer examination, however, the court's restrictive reading of standing struck at the fundamental principles of Wyoming water law. An examination of the policies and doctrines of Wyoming water law will guide interpretation of the new amendments to the forfeiture statute.

Background

Wyoming Water Law: State Administered Prior Appropriation

Prior appropriation theory is the foundation of water law in the western United States.[4] In Wyoming, a structure of administrative law was built on the foundation of prior appropriation.[5] The Wyoming Constitution itself combines state administration with prior appropriation. The constitution sets out the two basic principles of prior appropriation: "Priority of appropriation for beneficial uses shall give the better right."[6]

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1. Farm Investment Co. v. Carpenter, 9 Wyo. 110, 122, 61 P. 258, 259 (1900).
2. Cremer v. State Bd. of Control, 675 P.2d 250 (Wyo. 1984); Platte County Grazing Assoc. v. State Bd. of Control, 675 P.2d 1279 (Wyo. 1984).
3. S. 93A, 48th Leg. (Wyo. 1985).
4. F. Trelease, Water Law 2-5 (1967).
5. "Hewed out of necessity by men as able lawyers as the common law has known, [the prior appropriation doctrine] has been shaped and refined by its varied adoption in diverse states, until in the Wyoming system we find an administrative and legal development that must command the world's praise." Lasky, *From Prior Appropriation to Economic Distribution of Water by the State — Via Irrigation Administration*, 1 Rocky Mtn. L. Rev. 161, 162 (1929). Professor Lasky's article compared Colorado — which mostly rejected state administration and retained relatively pure prior appropriation doctrine — with Wyoming — which quickly adopted state administration. The contrast between the two states persists: "A Colorado lawyer looking at what passes for prior appropriation in the 'permit' states is apt to throw up his hands and say that isn't prior appropriation." Carlson, *Has the Doctrine of Appropriation Outlived its Usefulness?* 19 Rocky Mtn. Min. L. Inst. 529 (1974).
6. Wyo. Const. art. 8, § 3. The "two cardinal principles" of the prior appropriation doctrine "are that beneficial use of water, not land ownership, is the basis of the right to water, and that priority of use, not equality of right, is the basis of the division of water between appropriators when there is not enough for all." F. Trelease, *supra* note 4, at 2.

It also declares that water is "the property of the state,"[7] and creates the state board of control which "under such regulations as may be prescribed by law, [has] the supervision of the waters of the state and of their appropriation, distribution and diversion."[8] Building a structure of state administration on a prior appropriation foundation, Wyoming combined the best of both.

Virtues of Prior Apropriation: Security and Flexibility

Although the details of prior appropriation are unique to the western United States, seniority of use is the world's most common basis for distributing water.[9] Prior appropriation is a doctrine of private property rights in water, resembling in many ways the property concepts of land.[10] Finding support in the free market economic analysis of Adam Smith[11] and the liberal political philosophy of John Locke,[12] the prior appropriation system encourages individuals to put water to its highest and best use, producing for society the greatest total economic benefit.[13] Two attributes of prior appropriation create this effect: security and flexibility.[14]

Given a secure property interest in water, a person will invest the capital and labor needed to produce the greatest profit, and incidentally the greatest economic benefit for society. Without such security, long term ventures are too risky. Individuals invest only in those less productive projects which require little capital and labor, and promise quick returns.

A water right under prior appropriation is a secure property interest, said to last forever.[15] With amounts of water distributed on a strict seniority basis, a water right is as secure as the water source is predictable. The most senior users have a firm supply. The junior users with less dependable rights are encouraged to develop reservoirs to capture spring floodwaters and secure their supply of water for later use.[16] Water rights under

7. WYO. CONST. art. 8, § 1.

8. *Id.* § 2.

9. Trelease, *New Water Legislation: Drafting for Development, Efficient Allocation and Environmental Protection*, 12 LAND & WATER L. REV. 385, 414-15 (1977), *citing* Abstraction and Use of Water: A Comparison of Legal Regimes, at 81, U.N. Doc. ST/ECA/154 (1972).

10. Trelease, *The Model Water Code, the Wise Administrator and the Goddam Bureaucrat*, 14 NAT. RES. J. 207, 212-13 (1974).

11. A. SMITH, WEALTH OF NATIONS (A. Skimmer ed. 1970).

12. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT (Liberal Arts Press 1952).

13. For a discussion of prior appropriation as based on Adam Smith and John Locke, see Cuzan, *Appropriators versus Expropriators: The Political Economy of Water in the West*, in WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT 13 (T. Anderson ed. 1983).

14. Trelease, *New Water Legislation, supra* note 9, at 405-16; Trelease, *The Model Water Code, supra* note 10, at 212-25. In application in the various states, the prior appropriation doctrine may be modified so that security or flexibility are impaired. *See, e.g.*, WYO. STAT. § 41-3-101 (1977), which restricts transfers.

15. Arizona v. California, 283 U.S. 423, 459 (1931). In view of the potential of losing water rights through abandonment, forfeiture, or condemnation, a better description would be that water rights under prior appropriation are "of indefinite duration." Trelease, *The Model Water Code, supra* note 10, at 223.

16. 4 RESTATEMENT (SECOND) OF TORTS, Introductory Note on the Nature of Riparian Rigts and Legal Theories for Determination of the Rights, at 214 (1979).

a riparian system are not so secure. A riparian owner is protected in his reasonable use of water, but the amount of water he receives may vary over the years to accommodate the reasonable uses of other riparian owners. Riparian owners have generally equal rights to the water regardless of seniority.[17] In addition, riparian rights belong only to the owners of land bordering the water, so a riparian owner may completely lose his water rights if the natural channel of the stream changes and his land no longer borders the water.[18]

Water rights should also be flexible enough to allow changes to new and better uses. When water rights are freely transferable, the user with the most productive use can bid the highest and move the water to that most profitable use. Absent this flexibility, water rights become tied to less efficient, less productive uses.

Ideally, water rights under prior appropriation are freely transferable.[19] Water can be moved to the highest and best uses. Under the riparian system, on the other hand, water must be used on the land bordering the water. Even the most desirable and productive uses of water are not allowed on land which does not border the water.[20]

Where water rights are both secure and flexible, water will be allocated efficiently and produce the maximum economic benefit. It is not merely a theoretical proposition that the prior appropriation doctrine promotes private development of resources. As Elwood Mead, "the father of Wyoming water law,"[21] observed, "In the last third of the nineteenth century the arid West became one of the greatest irrigated districts on the globe."[22]

State Administration: Improving on Prior Appropriation

While Mead acknowledged the virtues of prior appropriation theory, he criticized the practical workings of the prior appropriation system. Seniority and beneficial use clearly define water rights in theory, but in practice these rights have to be protected "with shotguns and shovels on the banks of ditches or by means of injunctions in the courts."[23] Witnesses of early developments are often dead or gone, and even those present to testify could have inaccurate and conflicting recollections. "Great discrepancies regarding the dates of beginning the work, the sizes

17. *Id.* § 850, comment d.

18. Wholey v. Caldwell, 108 Cal. 95, 41 P. 31 (1895).

19. "Under the law of this state as established at the beginning, the water right which a person gains by diversion from a stream for beneficial use is a private right — a right subject to ownership and disposition by him, as in the case of other private property. All the decisions recognize it as such." Thayer v. California Dev. Co., 164 Cal. 117, 125, 128 P. 21, 24 (1912). *See also* 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 468-69 (1971).

20. *See, e.g.*, Stratton v. Mount Hermon Boys' School, 216 Mass. 83, 103 N.E. 87 (1913).

21. McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns: I Wonder Where the Water Went?*" 5 LAND & WATER L. REV. 23, 24, n.3 (1970).

22. E. MEAD, IRRIGATION INSTITUTIONS 349 (1903).

23. *Id.* at 187.

of the ditches, and the amounts of water used are the rule rather than the exception in these adjudications."[24]

Other writers also noted problems with the pure system of prior appropriation. While it worked well enough as "a pioneering system,"[25] once the land was settled by enough people to use all the available water and more, then the system proved unworkable. "Looking backwards it seems naive that it should ever have been thought possible for the original prior-appropriation doctrine to exist at all."[26]

Because of problems in practical application, the pure prior appropriation doctrine lost ground to state administrative systems almost from the beginning.[27] Wyoming was the leading state in combining state administration with prior appropriation,[28] and its system illustrates how an administrative system improves on pure prior appropriation.[29] A state administered system is easier to apply because official records, kept in a predictable place and in understandable form, make it easier for Wyoming courts to establish relative rights among water users. State administration also allows state guidance of water development with a view to Wyoming's public good. But because Wyoming's state administered system is founded on prior appropriation, water rights remain secure and flexible, producing efficient allocation and maximum beneficial use.

A few examples demonstrate how official records make it easier to administer water rights. First, to establish a water right under prior appropriation, a person simply diverts the water and puts it to a beneficial use. Later, questions can arise about the exact date on which this act of appropriation took place, and thus about the the seniority of the water right. Wyoming statutes require an appropriator to acquire water rights by applying for a permit from the state engineer.[30] Under Wyoming's state administered system, the user's priority date is firmly established by the date of application.[31]

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24. *Id.* at 68.

25. Wiel, *Theories of Water Law,* 27 HARV. L. REV. 530, 532 (1914).

26. Lasky, *supra* note 5, at 173.

27. *Id.* at 171.

28. *See supra* note 5 and accompanying text.

29. Mead wrote that Wyoming had, through its administrative system, "in effect abandoned the doctrine of appropriation." E. MEAD, *supra* note 22, at 82. Lasky concluded that the changes "were not so much variations of the administrative method as changes from prior-appropriation to a public ownership and control." Lasky, *supra* note 5, at 171. It seems that both scholars failed to consider that the state administers a scheme of water rights based on seniority and beneficial use, or in other words, based on prior appropriation.

30. WYO. STAT. § 41-4-501 (1977). *See* Laramie Rivers Co. v. LeVasseur, 65 Wyo. 414, 202 P.2d 680 (1949).

31. WYO. STAT. § 41-4-512 (1977). The state engineer must keep records of applications and their dates. *Id.* § 41-4-502. Mead also noted the advantages of a state record system over intermediate notice systems. County records were public, but "not accessible. The claims to water from the Missouri River in Montana were recorded in fourteen counties." Where an appropriator had to post notice in a conspicuous place, "usually the conspicuous place . . . is in some willow thicket, or along the cottonwood-bordered banks in some lonesome bend of the stream, where . . . 'only jack-rabbits and coyotes see the notice'." E. MEAD, *supra* note 22, at 70-71.

Second, state records provide a solid basis for adjusting rights among water users. The records contain information like the name and address of the right holder, the source of supply, and the location and description of the water project.[32] If the water is used for irrigation, the records contain a legal description of the land irrigated.[33] Maps or plats may be included, along with diagrams and cross sections of ditches and canals.[34] With this concrete evidence, a Wyoming judge can adjudicate water rights with much greater confidence than if relying on oral testimony alone.[35]

As a third example of how state administration improves on pure prior appropriation, Wyoming provides statutory forfeiture as a way unused water rights can be lost.[36] Water rights under pure prior appropriation are lost through abandonment, which requires both nonuse and an intent to give up the right. Even where nonuse for many years can be proven, it is often difficult to show intent to abandon. In contrast, forfeiture occurs from failure to use water for a given time, regardless of intent. It is easier to prove nonuse alone than to prove nonuse plus intent to abandon. The Wyoming system makes it easier to clear the books of unused rights so that the water can be secured to more productive uses.

The other major advantage of Wyoming's state administered system is that it allows the public interest to be considered. When the state administers water rights, the public can participate in the process. For example, when an individual applies for a water right through Wyoming's permit process, the state engineer must consider whether the right applied for will be detrimental to public welfare. If the water right will be contrary to the public interest, the permit application must be denied.[37] When an individual seeks to perfect the right under an approved permit, the state engineer publicizes this and allows interested persons to dispute the proof of appropriation.[38] Similarly, in a forfeiture action, other water rights holders or interested persons may participate in the proceedings.[39]

Not only is the public able to participate in Wyoming's state administered system, but the state relies on public participation for proper regulation of water rights. The state engineer has neither the personnel nor the financial resources to regulate water rights alone.[40] Proper ad-

32. WYO. STAT. § 41-4-501 (1977).
33. *Id.* § 41-4-502.
34. *Id.* §§ 41-4-505 to -510.
35. *Compare* McIntire, *supra* note 21, suggesting that the state records may not be entirely reliable.
36. WYO. STAT. § 41-3-401 (1977). Although the statute speaks of "abandonment," it is a forfeiture provision. Abandonment of a water right, under the common law, requires both nonuse and an intent to abandon the right. Statutory forfeiture is imposed for some breach of duty, usually failure to use the water for a specified time, and occurs without regard to intent. *See* 2 W. HUTCHINS, *supra* note 19, at 317-18. While courts and legislatures have not been careful to distinguish abandonment and forfeiture, the two concepts will be kept separate in this comment except in quotations from statutes or court opinions.
37. WYO. STAT. § 41-4-503 (1977).
38. *Id.* § 41-4-511.
39. *Id.* §§ 41-3-401 to -402.
40. *See, e.g.*, McIntire, *supra* note 21, at 25.

ministration of water rights depends on the assistance of interested private parties who, for example, question whether a proposed use is beneficial and in the public interest, or initiate forfeiture proceedings against unused or misused water rights.

FORFEITURE IN A STATE ADMINISTERED PRIOR APPROPRIATION SYSTEM

Under Wyoming's state administered prior appropriation system, the state claims ownership of the water.[41] Appropriators acquire water rights from the state by following the statutory permit process and putting the water to beneficial use.[42] Appropriators can lose their water rights by failing to use the water beneficially in accordance with the state law.[43]

The procedure for obtaining a forfeiture of water rights is set out in the Wyoming statutes.[44] When water rights are forfeited, the water reverts to the state and someone else can acquire the rights to the water. If a water source is fully appropriated, the holders of rights junior to the forfeited right simply move up the priority list and their water supply becomes more secure.[45]

Forfeiture thus adds to the security and flexibility of water rights. Junior rights become more secure, and water rights move from unproductive nonuse to productive use. Forfeiture plays an important part in the efficient allocation of the scarce water resource.

While forfeiture may be desirable, still the law does not favor it.[46] Both the Wyoming Legislature and the Wyoming Supreme Court have imposed obstacles to forfeiture. For example, the legislature has required a petitioner for forfeiture to present his case in writing, advertise the hearing, and pay for the hearing record and transcript.[47]

The Wyoming Supreme Court, to avoid unnecessary or inequitable forfeitures, has stated that forfeitures must be proven by clear and convincing evidence.[48] It has held that water rights are not abandoned where nonuse is caused by factors beyond the appropriator's control.[49] In addition, the court has said that water rights are considered forfeited only after a formal legal declaration, and a water right which has not been used for years is reactivated by use any time before the forfeiture proceeding is commenced.[50]

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41. WYO. CONST. art. 8, § 1.

42. WYO. STAT. §§ 41-4-501 to -517 (1977).

43. *Id.* §§ 41-3-401 to -402. For a thorough analysis of forfeiture under Wyoming law, see Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 P.2d 258 (1900).

44. WYO. STAT. §§ 41-3-401 to -402 (1977).

45. *See, e.g.*, Gardner v. State, 614 P.2d 357 (Colo. 1980)

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

47. WYO. STAT. §§ 41-3-401(b) to -401(d) (1977).

48. *Ramsay*, 51 Wyo. at 529, 69 P.2d at 539; Wheatland Irrigation Dist. v. Pioneer Canal Co., 464 P.2d 533, 537 (Wyo. 1970).

49. Scherck v. Nichols, 55 Wyo. 4, 95 P.2d 74 (1939).

50. Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P.2d 572 (1939); Sturgeon v. Brooks, 73 Wyo. 436, 281 P.2d 675 (1955).

The requirement of standing is the greatest obstacle to forfeiture actions. Forfeiture proceedings can be initiated by the state engineer[51] or, until recently, by "any water user who might be affected by a declaration of abandonment of existing water rights."[52] Interpreting this standing requirement, the court noted that standing was not unlimited.[53] For example, the court held that a petitioner loses standing when he sells his land and water rights before the forfeiture hearing because standing to seek a forfeiture follows the property interest affected by the forfeiture.[54]

Standing to Bring Forfeiture Proceedings Before 1984

The Wyoming federal district court was the first court to interpret the statute which granted private standing in forfeiture proceedings. In *Hagie v. Lincoln Land Company,*[55] the court read the standing requirement broadly, but concluded that Hagie did not have standing because he failed to show he would benefit from the forfeiture. The court wrote, "It would seem to be at least a reasonable principle to adopt in a construction of the statute, that the plaintiff should be required to prove that he would be benefited if defendant's appropriation were cut off."[56]

The Wyoming Supreme Court approved of this fairly broad construction, stating only two years later that standing was limited to those whose rights would be either enlarged or abridged. In *Horse Creek Conservation District v. Lincoln Land Company,*[57] the court considered the flow of Horse Creek and the number of appropriators with priorities higher than the plaintiff district, and concluded that the district would not benefit from the forfeiture. Accordingly, the court held that the district did not have standing to maintain the forfeiture action.

In the 1968 case of *Yentzer v. Hemenway,* the court relied on *Horse Creek* in holding that Hemenway had standing because she had shown she would benefit from the forfeiture of Yentzer's water rights. The court concluded that Hemenway was "affected" within the meaning of the forfeiture statute.[58]

The court in 1970 explicitly rejected a claim that a petitioner had to allege loss or impairment of its rights before it could maintain a forfeiture action. In *Kearney Lake, Land, and Reservoir Company v. Lake DeSmet Reservoir Company,* Lake DeSmet made this argument, but did not con-

51. WYO. STAT. § 41-3-402(a) (1977).
52. *Id.* § 41-3-402(b). The language specifying who may initiate a private forfeiture proceeding was changed by the legislature in 1985. *See infra* text accompanying notes 107-110.
53. *Horse Creek,* 54 Wyo. at 342, 92 P.2d at 580.
54. L Slash X Cattle Co. v. Texaco, Inc., 623 P.2d 764, 769 (Wyo. 1981).
55. 18 F. Supp. 637 (D. Wyo. 1937).
56. *Id.* at 639.
57. 54 Wyo. 320, 92 P.2d 572 (1939).
58. Yentzer v. Hemenway, 440 P.2d 7, 11 (Wyo. 1968).

vince the court that "initiation of proceedings for abandonment can be brought only by one who has already suffered injury."[59]

THE COURT'S REDEFINITION OF STANDING

In two 1984 decisions, the Wyoming Supreme Court changed its former rules of standing in forfeiture proceedings. In *Cremer v. State Board of Control*,[60] the court first shifted toward restricted standing. Although the *Cremer* decision could have been limited to its facts, the court's language hinted that standing had been altered. The court confirmed this change in *Platte County Grazing Association v. State Board of Control*.[61]

Cremer v. State Board of Control

In *Cremer*, Schmid alleged that Cremer had failed to put his water to beneficial use for more than five years, and petitioned the board of control to declare Cremer's rights forfeited.[62] Schmid's rights were senior to Cremer's, but both had priority dates earlier than 1945. Under the Surplus Water Rights Act,[63] once Schmid and Cremer had received their base water supply of one cubic foot per second per seventy acres, allocated by seniority, then both were potentially entitled to another cubic foot per second per seventy acres out of the surplus water, allocated on an acreage basis. Schmid asserted that, because the surplus water was allocated by acreage, not seniority, the forfeiture of Cremer's junior water rights would benefit Schmid by increasing the amount of surplus water Schmid would receive. Both the board of control and the district court agreed that this enlargement of Schmid's water rights made him an "affected" party,[64] with standing to attack Cremer's junior water rights.[65]

The supreme court reversed, holding that Schmid did not have standing to attack Cremer's rights. The court reasoned that surplus water rights were inseparably attached to base rights. The seniority of Schmid's base rights protected them from infringement by Cremer, and so Schmid's senior base rights could not support standing. Because the surplus rights and base rights were inseparable, Schmid could not base standing on his surplus rights either. The *Cremer* decision could have been only an extension of the rule that a senior appropriator cannot attack the rights of a junior.

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59. Kearney Lake, Land and Reservoir Co. v. Lake DeSmet Reservoir Co., 475 P.2d 548 (Wyo. 1970). "Although defendant insists plaintiff's complaint must allege an impairment of rights to use water under its permits before a claim is stated . . . neither the argument nor precedents convince us that . . . initiation of proceedings for abandonment can be brought only by one who has already suffered injury." *Id.* at 549.

60. 675 P.2d 250 (Wyo. 1984). The court used the term "abandonment," taken from the statute, although the proceeding was actually for forfeiture.

61. 675 P.2d 1279 (Wyo. 1984).

62. *Cremer*, 675 P.2d at 251-52.

63. WYO. STAT. §§ 41-4-317 to -324 (1977).

64. *Id.* § 41-3-401(b).

65. *Cremer*, 675 P.2d at 253-54.

Some language in the *Cremer* opinion, however, indicated that the court had completely redefined standing in water forfeiture cases. The court said that "an appropriator's rights are not 'affected' for the purpose of bringing abandonment unless those rights are changed to his disadvantage. In other words, he has to be able to show *injury*."[66] Although the court said it was merely "reiterat[ing] the historic rule,"[67] and cited several cases as precedent,[68] in fact the court was making radical changes in the rules of standing.[69]

Platte County Grazing Association v. State Board of Control

In *Platte County*, the court made it clear that the *Cremer* holding was not limited to its facts. *Cremer* had held that a senior appropriator must show injury to have standing to attack a junior appropriator's water right. The court further restricted standing in *Platte County* by holding that a junior appropriator had to show injury to have standing to attack a senior's rights.[70]

The petitioners for forfeiture in *Platte County* were ranchers with water rights junior to Platte County Grazing Association. The ranchers alleged that the grazing association had been using the entire amount of water under its rights to irrigate only half of the land to which the rights were attached.[71] Asserting that this was contrary to the statutory limit of one cubic foot per second per seventy acres, and thus a failure to use water "for the beneficial purposes for which it was appropriated,"[72] the ranchers petitioned for a declaration that at least part of the grazing association's water rights were forfeited.[73]

Although the ranchers had clearly established that forfeiture of the grazing district's water rights would benefit them,[74] the court relied on *Cremer* and held that the ranchers lacked standing: "[W]e held in the *Cremer* case that 'affected' means *adversely* affected — *injured* — it connotes a use which results in an *abridgement* of the contestant's water rights as compared to an enhancement of those rights."[75] The court stated that the ranchers had to show injury to their water rights before the board of control or the courts had jurisdiction to hear the claim.[76]

66. *Id.* at 256 (emphasis in original).
67. *Id.*
68. *Id.* at 254-56.
69. *See infra* text accompanying notes 85-102.
70. *Platte County*, 675 P.2d 1279, 1283 (Wyo. 1984).
71. WYO. STAT. § 41-4-317 (1977).
72. *Id.* § 41-3-401(a).
73. *Platte County*, 675 P.2d at 1280.
74. The court quoted at length from the ranchers' testimony, including these statements: "[I]f some of the rights that are senior to mine are abandoned, I would end up with more water," and "[i]f abandonment is granted, it would mean that our water rights will be more valuable." *Id.* at 1282.
75. *Id.* at 1283-84 (emphasis in original).
76. *Id.*

The court sidestepped the substantive issue in *Platte County* by raising the standing issue on its own motion.[77] The court held that a junior appropriator must show injury to have standing to attack a senior's rights. The court said that *Cremer* supported the *Platte County* decision, but actually *Cremer* had held the converse: that a *senior* must show injury to seek forfeiture of a *junior's* water rights.

Inconsistent with Precedent

The court relied on essentially the same precedents in both *Cremer* and *Platte County.*[78] *Cremer* cited only one additional case, on the general issue of standing.[79] Not one of the cases cited supports the court's conclusions that injury must be shown for standing in a water rights forfeiture proceeding.

The *Cremer* opinion first cited *Washakie County School District Number One v. Herschler*[80] on the general law of standing. In that case, the court upheld the standing of a school district to seek a declaratory judgment on the constitutionality of the state's school finance system.[81] *Cremer,* in contrast, dealt with statutory standing in a water rights forfeiture action, and the common law rules of standing considered in *Washakie County* were inapplicable.[82] The court in *Cremer* needed only to interpret the statutory grant of standing to "any water user who might be affected."[83]

Even the common law rules of standing considered in *Washakie County* did not support the narrow interpretation of statutory standing in *Cremer* and *Platte County.* The *Washakie County* opinion stated that standing "is not a rigid or dogmatic rule but one that must be applied

77. The major issue framed by the parties on appeal was whether the use of water contrary to the statutory limits worked a forfeiture of the water right. *See* Brief of Appellants at 17-34, Brief of Appellee State Board of Control at 31-44, Brief of Appellees-Contestants Lonesome Fox Corporation, et al. at 15-28, Platte County v. State Bd. of Control, 675 P.2d 1279 (Wyo. 1984). The standing issue had not been raised by any of the parties at any level of the proceedings, and the parties complained in the petition for rehearing that they had no opportunity to brief or argue the standing question. Brief in Support of the State Board of Control's Petition for Rehearing at 3-5, Platte County v. State Bd. of Control, 675 P.2d 1279 (Wyo. 1984).

78. Both *Cremer* and *Platte County* cited Mitchell Irrigation Dist. v. Whiting, 59 Wyo. 52, 136 P.2d 502 (1943); Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P.2d 572 (1939); Hagie v. Lincoln Land Co., 18 F. Supp. 637 (D. Wyo. 1937); and Campbell v. Wyoming Dev. Corp., 55 Wyo. 347, 100 P.2d 124 (1940).

79. *Cremer,* 675 P.2d at 254, cited Washakie County School Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied,* 449 U.S. 824 (1980). *Platte County,* 675 P.2d at 1283, referred back to *Cremer* on the standing issue, but did not cite *Washakie County.*

80. 606 P.2d 310 (Wyo. 1980), *cert. denied,* 449 U.S. 824 (1980).

81. *Id.* at 317.

82. "Where a person is expressly authorized by statute to bring a particular action, his right of action arises directly out of the statute, and he needs no title under the substantive law to authorize such suit." 59 AM. JUR. 2D *Parties* § 24 (1971). *See also* 73A C.J.S. *Public Administrative Law and Procedure* §§ 117, 118, 120 (1983).

83. WYO. STAT. § 41-3-401(b) (1977).

with some view to realities as well as practicalities. Standing should not be construed narrowly or restrictively."[84]

The first water law case cited in *Cremer* on the standing question was *Mitchell Irrigation District v. Whiting.*[85] The court used *Mitchell* to support the *Cremer* conclusion that a senior appropriator has no basis for seeking forfeiture of a junior's water rights.[86] *Mitchell,* however, dealt with an injunction, not with forfeiture of water rights. In *Mitchell,* a senior appropriator sought to enjoin a junior appropriator from diverting water from the North Platte River. The court found, because of the distance between the junior appropriator's diversion and the senior's, and because of the physical properties of the river, that shutting off the junior's diversion would not give Mitchell any more water. The court denied the injunction because Mitchell would not benefit from it.[87]

The *Mitchell* court held that a plaintiff must show he would be benefited before a court will grant an injunction. This did not support the conclusion that a plaintiff must show injury to have standing in a forfeiture proceeding.

The *Cremer* court next cited *Horse Creek Conservation District v. Lincoln Land Company*[88] for the propositon that a "water user is statutorily 'affected' by a declaration of abandonment if his water rights are abridged."[89] The court took a twenty-three line quotation from *Horse Creek* to show that affected means injured. Unfortunately, the *Cremer* court omitted some important language from the middle of the *Horse Creek* quotation, language which stated that the term affected means "either enlarged or abridged."[90]

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84. *Washakie County,* 606 P.2d at 317. *Washakie County* relied heavily on Brimmer v. Thompson, 521 P.2d 574 (Wyo. 1974), where the court found standing and a justiciable controversy even though all parties asserted essentially the same position.

85. 59 Wyo. 52, 136 P.2d 502 (1943).

86. *Cremer,* 675 P.2d at 255.

87. *Mitchell,* 59 Wyo. at 73, 136 P.2d at 508-09.

88. 54 Wyo. 320, 92 P.2d 572 (1939).

89. *Cremer,* 675 P.2d 255.

90. The *Cremer* court quoted this language from *Horse Creek:*

> Finally, returning again to the opening words in the sentence last above quoted from the procedural statute, Section 122-422, *supra,* "when pursuant to the provisions of § 122-421, any water user who might be *affected* by a declaration of abandonment," etc., it is manifest that the italicized word, "affected," is both significant and controlling. It indicates to our mind that it was not the legislative purpose to open the door to any person whomsoever to undertake proceedings to procure a declaration of abandonment. Those who are authorized to use the procedure set forth in Sections 122-422 to 122-427, W.R.S.1931, inclusive, are only those whose rights would be "affected." * * * Our statute evidently means therefore, that if a party's water rights would be abridged in some way, i.e., changed to his disadvantage, he may invoke the statutory procedure. 92 P.2d at 580.

675 P.2d at 255. Where the *Cremer* court put asterisks in the above quotation, the *Horse Creek* court had stated:

> Says the Supreme Court of Iowa in Holland v. Dickerson et al., 41 Iowa 367: "A right is affected, if it is either enlarged or abridged." *See, also,* McCormick v. Central Coal & Coke Co., 117 Kan. 686, 232 P. 1071; Butterfield v. Butler, 50 Okl. 381, 150 P. 1078; Harris v. Friend, 24 N. Mex. 627, 175 P. 722.

Horse Creek, 54 Wyo. at 342-43, 92 P.2d at 580.

The *Horse Creek* court denied standing to a junior appropriator because, given the flow of Horse Creek and all the appropriators with priorities higher than the plaintiff, the junior would not benefit from forfeiture of the senior's rights.[91] If plaintiff had shown he would benefit, the *Horse Creek* court would not have denied him standing. *Horse Creek* did not support the *Cremer* conclusion that a plaintiff must show injury to have standing in a forfeiture action.

Next, the *Cremer* court cited *Hagie v. Lincoln Land Company.*[92] The *Cremer* opinion quoted forty-seven lines from *Hagie* to show that a plaintiff in a forfeiture case must show injury,[93] but omitted the very next line of *Hagie:* "It would seem to be at least a reasonable principle to adopt in a construction of the [forfeiture] statute, that the plaintiff should be required to prove that he would be *benefited* if defendant's appropriation were cut off."[94]

The *Hagie* opinion was similar to the *Horse Creek* opinion, holding that a plaintiff had no standing because he had not shown he would benefit from the forfeiture.[95] Like the *Horse Creek* court, the *Hagie* court would have allowed plaintiff standing if he had shown benefit. Like the *Horse Creek* opinion, the *Hagie* opinion offered no support for the conclusion that a plaintiff must show injury to have standing.

The final Wyoming water case cited in *Cremer* was *Campbell v. Wyoming Development Company.*[96] The court quoted this language from *Campbell:* "Before a party may attack the right of another, either on constitutional or other grounds, he must first show that he himself has a right which has been invaded thereby. He must have an interest which is affected."[97] Taken out of context, this language seems to indicate that a person must show his rights were invaded to have standing. But that was not the holding in *Campbell.*

Campbell claimed prescriptive water rights in the Little Laramie River, and sought to quiet title to those rights against the development company. The court found that Campbell had no prescriptive rights to protect,[98] and thus no standing to question the development company's rights. The *Campbell* court held that a person must have some interest to protect before he has standing. It did not hold that a person must show injury to that interest.

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91. *Horse Creek*, 54 Wyo. at 343-44, 92 P.2d at 580-81.
92. 18 F. Supp. 637 (D. Wyo. 1937).
93. *Cremer*, 675 P.2d at 257.
94. *Hagie*, 18 F. Supp. at 639 (emphasis added).
95. *Id.* at 640.
96. 55 Wyo. 347, 100 P.2d 124 (1940).
97. *Cremer*, 675 P.2d at 256, *quoting Campbell*, 55 Wyo. at 397, 100 P.2d at 140.
98. *Campbell*, 55 Wyo. at 397-98, 100 P.2d at 139. The court found that Campbell could not have prescriptive rights for three reasons. First, water rights in Wyoming after 1890 could be initiated only through the permit process. Second, the court found that the facts did not support Campbell's claim of prescriptive rights. Third, a prior adjudication of the Little Laramie River foreclosed Campbell's claim of additional rights. *Id.* at 388-95, 100 P.2d at 137-39.

Curiously, the court in *Cremer* and *Platte County* ignored cases which were directly on point. In *Yentzer v. Hemenway,*[99] the Wyoming Supreme Court had held that the advancement in priority of Hemenways' water rights made her an affected party, and that was enough to establish standing. In *Kearney Lake, Land and Reservoir Company v. Lake DeSmet Reservoir Company,*[100] the court explicitly rejected a claim that Kearney must show injury to have standing. The court held that Kearney had standing because it would benefit if Lake DeSmet's water rights were forfeited. And in *Wheatland Irrigation District v. Laramie Rivers Company,*[101] where the court said "the only use which will rescue contestees from the gnashing teeth of [the forfeiture] statute is *the use of water* '* * * for the beneficial purposes for which it was appropriated * * *',"[102] the court did not require plaintiffs to show injury in order to have standing.

The court in *Cremer* and *Platte County* should have considered these cases which held that either benefit or injury can support standing in forfeiture proceedings. Instead, the court relied on *Washakie County,* a case which dealt with common law standing not statutory standing, and on *Mitchell,* which was an equity suit not a forfeiture action. The court then misapplied two water rights forfeiture cases, *Horse Creek* and *Hagie,* which denied standing because the plaintiffs had not shown they would benefit from the forfeiture. The court then cited *Campbell,* which denied standing to a plaintiff who had no water rights to protect. The result in *Cremer* and *Platte County* was therefore directly contrary to previous Wyoming case law.

Contrary to Wyoming Water Policy

In addition to being inconsistent with precedent, the *Cremer* and *Platte County* decisions were contrary to the policies of a state administered prior appropriation system. These decisions destroyed the private action for forfeiture due to nonuse, because no water user could ever meet the standing requirements. Take the typical case of a junior water user who seeks forfeiture of the unused water rights of a senior appropriator. The senior has not put his water to any use for more than five years. Under the forfeiture statute, this senior should be considered to have forfeited his water rights.[103] But the junior cannot show injury from the senior's nonuse, because the senior has left his water in the stream for the junior to use. The junior is injured only if the senior begins to reuse the water. But under Wyoming law, the senior's water right is reactivated by reuse of the water,[104] and the junior can not then seek a forfeiture.

99. 440 P.2d 7 (Wyo. 1968).
100. 475 P.2d 548 (Wyo. 1970).
101. 659 P.2d 561 (Wyo. 1983).
102. *Id.* at 567.
103. WYO. STAT. § 41-3-401 (1977).
104. *See* Sturgeon v. Brooks, 73 Wyo. 436, 281 P.2d 675 (1955); Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P.2d 572 (1939).

Even under the *Cremer* and *Platte County* standing requirements, the junior could argue that he is trying to prevent future injury by stopping the senior from reactivating the senior rights. But that was the same sort of injury the ranchers in *Platte County* were hoping to prevent. The court denied them standing. After *Cremer* and *Platte County,* this junior appropriator can *never* initiate a forfeiture proceeding against the senior's unused water rights.[105]

With no private party able to seek forfeiture, the state engineer would have to enforce the forfeiture statutes on his own.[106] The state engineer, however, does not have the personnel, the time, or the money, to assume the heavy burden of regulating water rights all by himself. If the forfeiture statues were not enforced, unused water rights would accumulate on streams. Junior water rights would become insecure, because the seniors' unused rights could be reactivated at any time. Junior water users would be unwilling to make the investments required for more productive uses, and water rights would remain tied to less productive uses. *Cremer* and *Platte County,* by destroying the private forfeiture action, struck at the security and flexibility which make a state administered prior appropriation system so desirable.

THE LEGISLATURE'S RESPONSE

In its 1985 session, the Wyoming Legislature amended the forfeiture statute by "specifying who has standing to initiate abandonment proceedings."[107] The amendments very clearly overrule *Cremer* and *Platte County.* The fact that the legislature acted at its first opportunity indicates that the legislators believed the court's decisions threatened the policies and goals of Wyoming water law.

Senate File 93, as introduced and passed, amended the forfeiture statute to specify:

> The following persons have standing to petition the state board of control to declare the abandonment of existing water rights under this section:
>
> (i) any person who has a valid adjudicated water right or is the holder of a valid permit from the same source of supply which is equal to or junior in date of priority to the right for which abandonment is sought; or

105. There may be one situation in which an appropriator could meet the standing requirements of *Cremer* and *Platte County.* If a senior user who had water rights to irrigate a tract of land near the stream was instead bottling the water and selling it, then a junior user could show he was injured because the senior user's consumptive use gave no return flow to the stream as would irrigation. But this example does not change the fact that the standing requirements of *Cremer* and *Platte County* prevented all forfeiture actions based on non-use of water.

106. The state engineer can initiate a forfeiture preceeding under WYO. STAT. § 41-3-402 (1977).

107. Preamble, S. 93A, 48th Leg. (Wyo. 1985).

> (ii) the holder of a valid water right entitled to surplus water under W.S. 41-4-318 through 41-4-324, petitioning to abandon a water right from the same source of supply if the right sought to be abandoned has a priority date of March 1, 1945, or earlier.[108]

Subpart (i) of this amendment supports the standing of the ranchers who had junior rights on the same stream as the grazing association in *Platte County*. Subpart (ii) gives standing in *Cremer* to Schmid, because Schmid and Cremer both held pre-1945 water rights. The legislature could hardly have been more blunt in overruling *Cremer* and *Platte County*.

The legislature added one amendment to the forfeiture statute which the original bill had not included. The bill as introduced listed those who had standing, and simply deleted the grant of standing to "any water user who might be *affected* by a declaration of abandonment of existing water rights."[109] The legislature amended the bill to retain this section and grant standing to "any water user who might be *benefitted* by a declaration of abandonment of existing water rights *or who might be injured by the reactivation of the water right.*[110]

It could be argued that the two changes are redundant, both merely overruling *Cremer* and *Platte County*. But because the legislature consciously added the second amendment after the bill was introduced, it must have considered the additional change important. The Wyoming Supreme Court has often said that every portion of a statute should be given meaning, and no part should be ignored.[111] The court must give meaning to both amendments by considering why the legislature made both changes.

After the court had severely restricted standing in *Cremer* and *Platte County*, the legislature probably feared that a statutory list of persons who had standing might be read as exclusive. The second amendment indicates that those specified are merely examples of who has standing, not a complete listing. Cases may arise in which others, besides those listed in the original amendment, have an interest in forfeiture of unused water rights. In the future, if the court considers this legislative intent, it will grant broad standing under the amended forfeiture statute.

Broad standing in forfeiture actions promotes the basic policies of Wyoming's state administered prior appropriation system. Forfeiture encourages water use for the greatest economic benefit.[112] The legislature, in overruling *Cremer* and *Platte County*, recognized the value of forfeitures, and affirmed that forfeitures should not be too greatly discouraged.

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108. S. 93A, 48th Leg. (Wyo. 1985).
109. S. 93, 48th Leg. (Wyo. 1985).
110. S. 93A, 48th Leg. (Wyo. 1985) (emphasis added).
111. Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557, 566 (Wyo. 1978); Thompson v. Wyoming In-Stream Flow Comm., 651 P.2d 778, 787 (Wyo. 1982).
112. *See supra* text accompanying notes 9-20.

Wyoming courts should recognize that there are already sufficient safeguards against inequitable forfeitures,[113] and should not read standing too narrowly.

CONCLUSION

Wyoming's state administered prior appropriation system is designed to allocate water efficiently and produce the maximum economic benefit for the people of Wyoming. The Wyoming Supreme Court redefined some of the rules of Wyoming water law in 1984, holding that private parties must show injury to their water rights to have standing in forfeiture proceedings. This holding was contrary to previous Wyoming cases, which held that benefit from the forfeiture was enough to support standing. More importantly, the court effectively destroyed the private action for forfeiture, and imposed on the state the impossible burden of regulating water rights without the help of interested private parties.

Fortunately, the Wyoming Legislature recognized that the court's new rules of standing threatened the policies of Wyoming water law. In its 1985 session, the legislature amended the forfeiture statute, both to overrule *Cremer* and *Platte County,* and to make it clear that standing in forfeiture proceedings should be broad enough that all interested private parties can help the state regulate water rights.

In the wake of *Cremer* and *Platte County,* the legislature demonstrated its dedication to present Wyoming water policies. If the court recalls this dedication, it will take care that in changing the rules, it does not threaten the policies. Water rights in Wyoming must remain secure and flexible to achieve efficient allocation of water and the greatest economic benefit to the people of Wyoming.

EDWARD W. HARRIS

113. *See supra* text accompanying notes 47-54.