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Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965)

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cases because the defendant might be denied a fair trial even though the news media disseminates nothing that would be inadmissible at trial. Unfortunately, it is necessary to wait until the trial has begun before the test can be applied because the court must ascertain whether or not the jurors have been exposed to inadmissible evidence. In that respect, it might cause delay and added expense. The *Marshall* rule would give effect to the fundamental premise that guilt or innocence should be determined solely on the evidence produced in a court of law.[40] A literal application of this premise in connection with the *Marshall* rule would seem to declare that a juror becomes incompetent if he has learned of *any* evidence through pre-trial publicity. This, of course, would be an unsatisfactory extension of the *Marshall* rule. In the sensational case it would be impossible to find a juror who does not have some acquaintance with the facts. Therefore, the *Marshall* rule should be limited to inadmissible evidence and perhaps to the pre-trial publication of confessions.[41]

Because of the defects inherent in the Montana and federal rules it is submitted that the Montana court should adopt the rule of the *Marshall* case. In addition, the federal courts should impose the rule of the *Marshall* case upon the states as an essential element of the Fourteenth Amendment's Due Process clause. Two recent federal cases have applied reasoning similar to that used in Marshall in their review of state convictions.[42] "Fundamental fairness" requires that a judge's verdict be based solely on evidence that is admissible at trial.

LARRY PETERSEN.

WATER LAW: A STATE CANNOT "APPROPRIATE" A MINIMUM FLOW OF WATER IN A NATURAL STREAM FOR PRESERVATION OF FISH.—A water conservation district, acting under a Colorado statute empowering it to "file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to

Briggs v. United States, 221 F.2d 636 (6th Cir. 1955); Marson v. United States, 203 F.2d 904 (6th Cir. 1953); Krogman v. United States, 225 F.2d 220 (6th Cir. 1955): an unfavorable, incorrect report of evidence against defendant which comes to the attention of jurors, raises a rebuttal presumption that the rights of the defendant have been prejudiced.

[40]*Patterson v. Colorado, supra* note 14.

[41]A confession has a natural tendency to prejudice any community. Yet the news media proffers confessions without the tempering effects of cross-examinations, contrary evidence, or instructions. Disqualifying a juror who learned of defendant's confession before trial seems to be in accord with Jackson v. Denno, 378 U.S. 368 (1964). The Supreme Court held that a jury determination of voluntariness of a confession denied the defendant due process of law. One reason advanced by the Court was that a confession, even if determined to be involuntary, would affect the jury's consideration of other evidence. A confession read by a juror before trial would seem to fall within the proscription of this ruling.

[42]*Shepherd v. Florida, supra* note 13; Shepperd v. Maxwell, 346 F.2d 707 (6th Cir. 1965).

preserve fish . . . ."[1] filed a claim to adjudicate its water right in the minimum flow of three natural streams.[2] The lower court dismissed. On appeal to the Colorado Supreme Court, *held,* dismissal sustained. Acquisition of a right through appropriation requires a showing of both beneficial use and actual diversion. Therefore, the water district could not appropriate the minimum flow of these streams unless there was a diversion. *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.,* 406 P.2d 798 (Colo. 1965).

A basic principle in water law is that the corpus of running water cannot belong to individuals.[3] As a result, water law is concerned only with a usufructuary right.[4] Under English common law running water was *publici juris,* that is, the property of the public and while in its natural state not subject to private ownership.[5] The Eastern States follow this doctrine,[6] holding that riparian landowners on non-navigable streams have limited rights to the use of water flowing through or adjacent to their land.[7] Most Western States, however, have rejected the theory of riparian rights and substituted the doctrine of prior appropriation.[8] Under this doctrine land ownership does not include water rights.[9] Such rights can be established only by applying the water to a beneficial use.[10]

The state's interest in water flowing through its boundaries has been defined both in terms of "title" and "control."[11] For example, the United

[1]COLO. REV. STAT. ANN. § 150-7-5(10) (1963).

[2]Plaintiff's claim gave the points of initiation of the rights, volume of water, time of initiation, and ''evidence of the public intention to use the waters'': construction of campgrounds, fish hatcheries, stock of streams at public expense, utilization for fishing for 40 years, studies by state agencies of minimum flow necessary for preservation of fish life. There was no diversion.

[3]1 WIEL, WATER RIGHTS IN THE WESTERN STATES § 7 (3rd ed. 1911).

[4]*Id.* § 15. A water right, or ''usufructuary right'' is the right to use the water. Smith v. Denniff, 24 Mont. 20, 60 Pac. 398 (1900).

[5]*Id.* §§ 2-3. At the civil law, air, running water, the sea and its shores were part of the negative community, that is things which as yet had not come into the possession or control of anyone. Therefore, no one could own these unless he actually captured them as in a bucket or jar. The common law called the members of the negative community *publici juris.* Waters within the ebb and flow of the tide, however, were property of the crown.

[6]Shively v. Bowlby, 152 U.S. 1, 14 (1894); Weil, *Theories of Water Law,* 27 HARV. L. REV. 530, 531 (1913-14).

[7]Ulbrich v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 79 (1889). Generally see United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 702 (1899). 56 AM. JUR. *Water* § 13 (1947).

[8]Wiel, *Theories of Water Law, supra* note 6, at 531.

[9]Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). For a discussion of the ''Colorado Doctrine'' as compared to the ''California Doctrine'', which does not totally reject the common law doctrine see Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702, 704 (1921). See also 1 WIEL, *op. cit. supra* note 3, §§ 151-87. Montana has adopted the Colorado Doctrine. *Mettler, supra* at 707.

[10]Fort Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032, 1033 (1892); Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444, 447 (1896). But the appropriator does not get ''title'' to the water, only the right to use it. See Stone, *Problems Arising Out of Montana's Law of Water Rights,* 27 MONT. L. REV. 1, 6 n. 23 (1965).

[11]The question of whether a state can appropriate a minimum stream flow for preservation of fish has never been decided by Colorado or any other state following the appropriation doctrine. There have been decisions which determine a state's interest

States Supreme Court held that states are given plenary control over the *publici juris* waters within their boundaries and can determine the extent of appropriation or riparian ownership.[12] The New Mexico Supreme Court has held that the state owns the water.[13] In that case the question was whether, without diversion, a state agency could declare certain waters open for public fishing. The defendant claimed it could prohibit public fishing in a reservoir covering its land because land ownership included exclusive fishing rights. Because the state had not appropriated the water to the public, it had no authority to declare the water open for public fishing and recreation. The court held that land ownership did not give an exclusive right:[14]

> Nor can we approve the theory that, even though these be public waters, subject to such appropriation, nevertheless they cannot be *used* by the public until *appropriated* by the public *for* such use. That would be saying that the public must first appropriate its own property, the very waters reserved to it and which have always "belonged" to it, subject, of course to being specifically appropriated for *private* beneficial use.

Appropriation is not an unlimited right.[15] While an appropriator may be the first to divert, he cannot ignore the public interest.[16] The state acting through its sovereign capacity can control appropriation.[17] This is demonstrated by statutes providing for adjudication of priorities

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as opposed to the federal interest in waters originating on or flowing through federal reservations; but this has little bearing on a state's right to appropriate stream flow as opposed to the rights of private citizens. See Winters v. United States, 207 U.S. 564 (1908); F.P.C. v. Oregon, 349 U.S. 435 (1935); Arizona v. California, 373 U.S. 546 (1963). See also Veeder, *Winters Doctrine Rights*, 26 MONT. L. REV. 149 (1965), and Veeder, *The Pelton Decision*, 27 MONT. L. REV. 27 (1965).

[12]California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935).

[13]State *ex rel.* State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945). The constitutions of most Western States make express dedications to public use of unappropriated waters within the state. See COLO. CONST. art. 16, § 5; MONT. CONST. art. 3, § 15. Generally, see 1 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS §§ 372-89 (2d ed. 1912). The dedications were ratified by Congress when the states were admitted to the union. Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 264 (1900); Stockman v. Leddy, 53 Colo. 24, 129 Pac. 220, 222 (1912). The interpretations of dedication have been varied: Wilterding v. Green, 4 Idaho 773, 45 Pac. 134, 138 (1896) (the water appropriated is a public use); Wheeler v. Northern Colo. Irrig. Co., 10 Colo. 582, 17 Pac. 487, 489 (1888) (title is in the public); *Stockman, supra* (state has title); *Farm Investment Co., supra* (same); *Smith v. Denniff, supra* note 4 (state owns water).

[14]*State Game Comm'n, supra* note 13, at 432. (Emphasis in original.) The court went on to say there could be no estoppel against the state because of inaction. But see Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685 (1905).

[15]Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 683 (1875); Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 417 (1897).

[16]Clough v. Wing, 2 Ariz. 371, 17 Pac. 453 (1888). Even in states where appropriation does not apply, riparian rights are held to be subject to public uses such as navigation and a municipality's right to take water for its public water system. Minneapolis Mill Co. v. Board of Water Comm'rs of City of St. Paul, 56 Minn. 485, 58 N.W. 33 (1894); Nekoosa-Edwards Paper Co. v. Railroad Comm'n, 201 Wis. 40, 228 N.W. 144 (1929).

[17]White v. Farmers' Highline Canal & Reservoir Co., 22 Colo. 191, 43 Pac. 1028, 1030 (1896). The state's police power in this area is partially derived from state's power to prevent breaches of peace over the distribution of rights in water, and upon the economical utilization of water.

on streams where the volume of water claimed is greater than that available.[18]

In the instant case, the Water Conservation District was a state agency entrusted with the "conservation, use and development of the water resources of the Colorado River and its principal tributaries."[19] The District's right was based upon statutory authority to claim minimum stream flow. However, the court said that the legislature had not intended "such an extreme departure from well established doctrine . . . [and therefore] no such departure was brought about by said statute."[20] The court apparently treated the District as a private individual and applied conventional appropriation rules, thereby ignoring the state-agency nature of the District.

The statute's purpose was to establish Colorado's rights to a portion of its running waters. The Colorado Constitution states that unappropriated water is "declared to be the property of the public and the same is dedicated to the use of the people of the state subject to appropriation . . . ."[21] It also guarantees the right to divert unappropriated waters and specifically provides that "priority of appropriation gives the better right."[22] While the state cannot prevent diversion by other appropriators[23] there is nothing prohibiting it from asserting its own appropriation. Because it would be impossible to claim the minimum flow by diversion,[24] the legislature must have intended perfection of the District's appropriation solely by beneficial application and filing of the claim, without diversion.[25]

By granting this power to file claims, the legislature established a public policy that natural streams are to be used to preserve fish. Water applied to this purpose is, therefore, a beneficial use. If the state chooses to treat its claim as an appropriative right, then the only manner for recording the priority is through adjudication proceedings. The District attempted to do this in the instant case.

A state can regulate the amount and method of appropriation.[26] Thus, it should have power to appropriate for public use. Because the state is acting in the common interest, it should not be restricted by rules

[18]*Farmers' Independent Ditch Co., supra* note 10, at 449.

[19]COLO. REV. STAT. ANN. § 150-7-1 (1963).

[20]Instant case at 800.

[21]COLO. CONST. art. 16, § 5.

[22]*Id.* at § 6.

[23]Larimer Co. Reservoir Co. v. People *ex rel.* Luthe, 8 Colo. 614, 9 Pac. 794, 797 (1886).

[24]Even if the state did divert the minimum flow, necessarily it would have to let it go back into the channel where it would be subject again to appropriation. Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. 331, 333-34 (1898).

[25]In order to obtain a priority of appropriation in Colorado, one must file under the Adjudication Act of 1943; COLO. REV. STAT. ANN. §§ 148-9-1 to 149-9-27 (1963). Under § 148-9-2 the district court has jurisdiction "For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water . . . and all other questions of law and questions of right growing out of, or in any way involved or connected therewith . . . ." Apparently this would include jurisdiction over rights not obtained by diversion.

[26]*Larimer Co. Reservoir Co., supra* note 23, at 797.

that pertain to private rights. If diversion is not essential to protect the common interest in water, then the legislature should not be required to provide for diversion when a state agency appropriates.

The act of diversion was the most practical method of giving notice of a right before recording systems were established. But now, beneficial use and not diversion is the critical test of an appropriation.[27] Therefore, under modern recording systems a diversion is superfluous when water is to be used in the channel. Even Colorado has held that if diversion is not necessary for beneficial use an appropriative right may be valid without it.[28]

In Montana a water right can be perfected by using water, without recording or posting.[29] Proof of this "use" right is made by physical evidence of the use. Many of Montana's streams traditionally have been used for public fishing, and preservation of fish-life should be considered a beneficial use.[30] It is not clear whether a diversion is necessary for perfection of a water right in Montana,[31] but it is certain that beneficial use rather than diversion of water is the primary concern of public policy.[32] Montana needs a statute declaring that preservation of fish life is a beneficial use of water and providing that diversion, when not essential to beneficial application of the water, is not required for perfection of a right. This would avoid an interpretation similar to that occurring in the instant case.[33]

It is submitted that the court in the instant case erred by ignoring

[27]*Fort Morgan Land & Canal Co., supra* note 10, at 1034; *Larimer Co. Reservoir Co., supra* note 23, at 796.

[28]Town of Genoa v. Westfall, 141 Colo. 584, 349 P.2d 370 (1960). See also 35 U. COLO. L. REV. 493, 506-509 (1963).

[29]See Stone, *Problems, supra* note 10, at 2-4.

[30]There is a recognized public right of fishery. Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273, 42 L.R.A. 305 (1898); Annot. 60 L.R.A. 481 (1902). Determination of what is a beneficial use appears to be made as a question of fact in each case. Generally, if the water is put to a "useful purpose" it is considered a beneficial use. Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 417 (1897). The question of whether preservation of fish-life is a beneficial use has not been answered by Montana's courts. *But cf.* State v. Aitchison, 96 Mont. 335, 30 P.2d 805 (1934) (eminent domain).

[31]Perkins v. Kramer, 121 Mont. 595, 198 P.2d 475, 477 (1948), citing *Larimer Co. Reservoir Co., supra* note 23, which said that "the true test of appropriation of water is the successful application thereof to the beneficial use designated, and the method of distributing or carrying the same or making such application is immaterial." at 796. Clausen v. Armington, 123 Mont. 1, 212 P.2d 440, 450 (1949), which might be read as holding that non-essential diversion is not required. Montana Power Co. v. Broadwater-Missouri Water Users' Ass'n, 50 F. Supp. 4 (D. Mont. 1942), (*reversed on other grounds*, 139 F.2d 998 (1944)), apparently found an appropriation for hydroelectric dams without diversion.

[32]Public policy recognizes the right of a person to "take and use all of the waters of a stream, if . . . necessary to his use and actually used by him for a lawful purpose." *Mettler v. Ames, supra* note 9, at 707. The Montana Constitution states: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or *other beneficial use* . . . shall be held to be a public use." MONT. CONST. art. 3, § 15. (Emphasis supplied.)

[33]Statutory provision for assertion and enforcement of the public's right might be accomplished by authorizing institution of adjudication proceedings by the Attorney General or the Fish and Game Commission. Such a provision would eliminate the uncertainty of the public's right and prevent its possible usurpation, as well as provide notice to present and future appropriators of the extent of the public's right.

the state's fundamental power and the Water District's public character. The state's power to regulate natural resources should not be denied or limited by doctrines adopted when mining and agriculture were the only public concerns. The public's interest in water has changed and diversified, as is demonstrated by the popularity of all forms of water recreation. As the demand on recreational resources becomes greater because of a larger population with more free-time, states must have adequate methods for asserting the public right.[34] Western water law has always been flexibly administered in order to obtain the most beneficial use of water.[35] As Mr. Justice Cardozo said: "The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. *We may not suffer it to petrify at the cost of its animating principle.*"[36] (Emphasis supplied.) The Western States cannot allow the doctrine of appropriation to "petrify" at the expense of the changing public interest in the limited water supply.

JOHN R. GORDON.

STATUTORY PRESUMPTION OF GUILT FROM PRESENCE AT ILLEGAL DISTILLERY. —Defendant Gainey's conviction for carrying on an illegal distillery business was reversed by the United States court of appeals.[1] The court held unconstitutional a statute[2] authorizing an inference of guilt from the accused's unexplained presence at a distillery. On certiorari to the Supreme Court of the United States, *held,* reversed. *United States v. Gainey,* 380 U. S. 63 (1965).

Defendant Romano's conviction of the possession, custody, and con-

[34]A good example of unimaginative application of the doctrine of appropriation with disturbing results is Cascade Town Co. v. Empire Water & Power Co., 181 Fed. 1011 (D. Colo. 1910), where the district court found that the private town of Cascade had water rights to the spray of Cascade Falls to keep the walls and floor of the canyon green. The circuit court reversed in favor of the power company that wanted to build a hydroelectric dam on the falls; holding that there was no diversion of the spray nor application to a beneficial use because beauty was not an economical use of water. 205 Fed. 123, 129 (8th Cir. 1913).

[35]Western water law originated in the mining camps of California. *Basey v. Gallagher, supra* note 15. The riparian theory was rejected (or avoided) by legislatures and courts because of its rigidity. The mining custom of prior appropriation was better suited to frontier environment. As more persons settled the land and streams became fully appropriated, the "first come, first served" maxim of appropriation proved impractical. The courts and legislatures made changes following the public policy favoring the most economical use of water. See Wiel, *Public Policy in Western Water Decisions,* 1 CALIF. L. REV. 11, 14-20 (1912); Wiel, *Theories of Water Law, supra* note 6, at 531-33.

[36]Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861, 862 (1922). Justice Cardozo was speaking of mutuality of remedy, but the principle is equally applicable here.

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[1]Barrett v. United States, 322 F.2d 292 (5th Cir. 1963).

[2]68A Stat. 683 (1954), 26 U.S.C. § 5601(a)(1) (1958) provides that: "Any person who . . . has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."