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Stone: Improving Montana Water Law

Improving Montana Water Law

By ALBERT W. STONE*

Insecurity and uncertainty are the primary drawbacks in Montana's system of acquiring water rights—and for the most part they can be fairly easily eliminated. The insecurity and uncertainty are caused by the distortions inherent in our system of filing for water rights, by our practically useless law of abandonment of a water right, by the complete absence of any law defining the relative rights of users of underground water, and by the lack of finality in the adjudication of streams.

These are the areas of Montana water law which most need attention, according to nearly two dozen persons whose life work is centered about water law,¹ and who came to the Third Annual Water Resources Conference² to discuss means of improving that law. The following is a summary-report of the proceedings and recommendations of that Conference.

DISTORTIONS IN OUR FILING SYSTEM

(Paper prepared by State Engineers Fred Buck and Hans Bille, presented by Hans Bille and Sumner Heidel)³

Practically no useful information is contained in the county courthouses under our present system of filing for water rights, because the record thus created does not conform to physical fact. Many persons today are using water under perfectly sound and legal rights, without any record appearing in the courthouse at all. This is because rights to water can be acquired simply by past use of water.⁴ So the county records reflect less

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¹Persons present at the Conference were: Judge Ralph J. Anderson, Attorney, Helena; Hans Bille, Assistant State Engineer, Bozeman; Mrs. Jean Clark, Secretary, Law School, Missoula; Arthur Deschamps, Rancher, Missoula; Louis Forsell, Assistant Attorney General, Helena; S. L. Groff, School of Mines, Butte; Sumner Heidel, Assistant State Engineer, Helena; Leon Hurtt; Judge W. W. Lessley, District Judge, Bozeman; Mrs. Edwin G. Koch, League of Women Voters, Butte; Richard Konizeski; Eugene Mahoney, Attorney, Thompson Falls; Gail McMurtry; O. W. Monson, Montana State College, Bozeman; George Moon, St. Ignatius; George O'Connor; Bruce Orcutt, Rancher, Miles City; Robert Parnell, Project Engineer, St. Ignatius; Eugene Pike, Missoula Electrical Co-op, Missoula; Albert W. Stone, Conference Director, Missoula; Frank Sturmis, U. S. Geological Survey, Helena; Clarence Wohl, State Water Board, Helena.

²These Conferences are held annually, during the summer, in Missoula. The first two conferences were of general interest and for the purpose of public education on matters of national concern. In contrast, this Conference dealt with technical legal matters primarily of interest only to Montanans. It was a workshop-conference of persons interested in improving the functioning of Montana's water laws. It was held on August 1 and 2, 1958.

³Responsibility for the statements that follow in this and the following sections is upon the author. No attempt has been made to present a digest of each paper, or of the rather lengthy discussions which followed each paper. Rather, these statements are a composite of the papers and the discussions, as understood by the author.

⁴Revised Codes of Montana 1947, § 89-812, (hereinafter cited R.C.M. 1947) and the consistent judicial construction of that section.

than the total rights to water in a stream. But there is an opposite distortion at work too: the record at the courthouse contains only the filed statements of persons "desiring to appropriate" waters.⁵ Typically, such persons file for more water than they ever actually use or even than their systems, when completed, have capacity to handle.⁶ Indeed, in many instances persons have filed for large quantities of water, based upon such a "desire" to appropriate, and then failed to complete a diversion system which is essential to acquire the right.⁷ Yet the record shows only these numerous statements of persons "desiring to appropriate" without any indication of the extent to which their rights subsequently became fixed by completion and use. So the county records reflect more than the total rights to water in the stream, too.

The county records are like a child's Christmas list: he didn't get some of the things on the list, and he did get some things which were not on the list. To remedy this, the Conference recommended:

1. In the future, rights to water should be acquired *only* through filing—no more rights merely by past use alone.

2. Past acquired rights which are now not on record (*i.e.*, those acquired by use) should be placed on record. Water users should be encouraged to record these rights by offering them this incentive: a water user who files a statement of his rights will be accorded a presumption that his filed statement is the truth; but if a water user does not file a statement placing his claim on record, he shall have the burden of proof in establishing the extent of his past acquired right.⁸

3. Filing requirement should be revised so as to gain more useful and reliable information: (a) in addition to the present filing of "desires," appropriators should be required to file a final report of completion of the appropriation which tells what was done, how the water was taken, what it was taken for, the amount needed, and the capacity of the completed system; (b) in the case of projects which require more than a year to complete, interim or progress reports should be required annually until a final report of completion can be filed.

4. As an initial step toward a more centralized system, county clerks should be required to make a copy for the State engineer's office of all filings for water rights.

THE LAW OF ABANDONMENT

(Paper by Eugene Mahoney, Attorney, Thompson Falls)

The future development of various areas of Montana requires that where useful resources are going to waste, rights to use those resources should be obtainable. If a person appropriated water nearly a century ago, used the water for a dozen years, and has evidenced no intent since then

⁵R.C.M. 1947, § 89-810.

⁶See the eloquent discussion of this problem in *Allen v. Petrick*, 69 Mont. 373, 377-379, 222 Pac. 451, 452-453 (1924).

⁷R.C.M. 1947, § 89-811.

⁸This technique for encouraging the filing of past rights is not new—it is exactly the technique used in the past. R.C.M. 1947, §§ 89-813, 89-814.

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to make further use of the water, that water should not run to waste each year. But there can be no security in the right of a new appropriator until the right of the former appropriator is determined. Has he abandoned his right which has for so long been unused?

Abandonment, under our law, must be proved by the person who claims that a prior appropriator abandoned his right, and a part of that proof must be that the prior appropriator *intended* to abandon it.⁹ This last part of the proof has been insurmountable—it has been impossible to establish intent to abandon.¹⁰ To remedy this, the Conference recommended:

Water rights should not be forfeited merely through non-use.¹¹ But after a considerable period of non-use, it is fair to shift the burden of proof, so that the person who has, for so long, made no use of the water must prove that he did not intend to abandon. Specifically: ten consecutive years of non-use should be *prima facie* evidence of an intent to abandon.

LAW OF UNDERGROUND WATER

(Papers by Mr. Bruce Orcutt, rancher, Miles City, and Mr. S. L. Groff, Montana Bureau of Mines and Geology, Montana School of Mines, Butte)¹⁴

Groundwater law in Montana is in a more uncertain state than surface water law. Thus far the Supreme Court has not been called upon to indicate whether constitutional¹² or statutory¹³ provisions affecting surface water also have an effect on groundwater, and there has not yet been a case involving two conflicting uses of groundwater (*e.g.*, where one person drills a well and uses water until his well runs dry by reason of subsequent drillings and uses by others which lower the water table.)¹⁴ Furthermore, the physical facts which should determine wise legal provisions and decisions on groundwater are as yet unknown.¹⁵

Many of the needed physical facts can be obtained economically by well-drilling logs filed by well-drillers. But the present law is not sufficiently clear whether the landowner or the driller has the responsibility of filing such logs and, since there is no penalty for failure to file, the needed information is often not filed.¹⁶ The Conference reached the following recommendations:

1. An underground water code is not advisable at this time because there is insufficient knowledge of the physical facts con-

⁹R.C.M. 1947, § 89-802, and cases collected in Stone, *Are There Any Adjudicated Streams in Montana?*, 19 MONT. L. REV. 19, 26 & n. 31 (1957).

¹⁰*Ibid.*

¹¹Judge Ralph J. Anderson, Helena, presented a paper concerning constitutional problems raised by the various proposals entertained by the Conference. He concluded that such forfeiture of rights would likely fall before an attack on its constitutionality.

¹²MONT. CONST. art. III, § 15.

¹³R.C.M. 1947, § 89-801.

¹⁴Present guesses at Montana's law of groundwater are based upon cases where a user of percolating water interferes with the source of supply of a streamwater user. See *Ryan v. Quinlan*, 45 MONT. 521, 124 PAC. 512 (1912).

¹⁵Groff, *Groundwater in Montana*, *De Re Metallica*, Dec. 1957, p. 1.

¹⁶R.C.M. 1947, §§ 89-3101 to 89-3103 (Supp. 1957).

cerning groundwaters; special administrative agencies would need organizing and staffing; and it may be the course of wisdom to move toward a unified treatment of surface and groundwater rather than treating them as separate from a legal point of view.¹⁷

2. The professional well-driller should be required to file logs with the county clerk, who should transmit copies to the State Engineer and the Montana Bureau of Mines and Geology.¹⁸

3. To enforce the requirement of filing, persons who drill wells for pay should be required to be licensed, without fee, by the State Engineer. The licenses should be revocable upon failure to comply with the filing requirement.

4. To protect our groundwater resources from dissipation and pollution, seismographic holes should be plugged, just as oil wells are now required to be plugged.¹⁹

ADJUDICATION OF WATER RIGHTS

(Papers by Prof. O. W. Monson, Head of the Agricultural Engineering Department, M.S.C., Bozeman, and Judge W.W. Lessley, District Judge for the 18th Judicial District, Bozeman.)

From a practical standpoint "the flat statement 'this is a decreed right' whether used at the headgate or in the lawyer's office does mean much."²⁰ But there is a need to enforce this popular impression by bringing the legal effect into conformity with it, because "the feeling of finality concerning adjudicated streams is illusory."²¹ It is illusory because our laws do not require a person to determine his own right in relation to the rights of all other water users who are effected by his right.²² In fact our laws do not provide any means whereby a person can, with certainty, bring into the decree all other water users who are affected.²³ Hence there is no guaranty of a stable and permanent priority.

In addition to the foregoing inherent uncertainty, there is the problem that streams are adjudicated piecemeal. Persons involved in one suit obtain no security against the persons involved in another adjudication—that is, unless the decrees overlap, which is rather another complication than a solution.²⁴

Any large municipal or industrial use of water has an effect upon the supply of water for many miles of stream length, without regard to judicial districts or county boundaries. Hence there is an increasing need for more comprehensive adjudications in terms of geographical extent, as well as in terms of inclusiveness of interested persons.

¹⁷This seemed particularly true after hearing the presentation of Mr. Groff on the point that from a physical point of view groundwater and surface water are inter-related and inseparable.

¹⁸The only change in existing law, is the identification of who has the responsibility for filing. See note 16, *supra*.

¹⁹R.C.M. 1947, § 60-127 (C) (1).

²⁰From the paper of Judge Lessley.

²¹*Ibid.*

²²R.C.M. 1947, § 89-815 is permissive as to joinder.

²³*Ibid.*, and see Stone, *Are There Any Adjudicated Streams in Montana?*, 19 MONT. L. REV. 19 *passim* (1957).

²⁴See *Whitcomb v. Murphy*, 94 Mont. 562, 23 P.2d 980 (1933), and *State ex rel Swanson v. District Court*, 107 Mont. 203, 82 P.2d 779 (1938).

Enforcement of water right decrees is left to the district judges, which results in placing too many administrative tasks upon an organization designed to carry out primarily judicial functions. The problem is depicted in these words:²⁵

The ultimate 'work horse' of all enforcement and supervision of all decreed water and appropriated water is the District Judge. The burden of the minutiae of this task is impossible to appreciate. If it is a judicial district in which much water must be controlled and admeasured the working season is from June to September. The judge must know intimately all decrees, keep abreast of the transfers so that his first knowledge is workable. Know competent persons to appoint as water commissioners. Understand and know the precise locations of hundreds of ditches, diversion points and storage areas. Understand the duty of water, how to measure it, and know background of water users. The judge must expect to be called at all hours of the day and night by water users, water commissioners and ditch riders. He scans the skies at the spring-tide, checks the water table, for he knows if it is a dry year his task will be increased 'ten fold.'

It is no answer to say that he may appoint water commissioners, for he is the ultimate authority for both the water users and the water commissioner—and he is easily reached.

The problems connected with the adjudication of streams are complex and require extended study. No easy solutions are apparent. The recommendation reached at the Conference was that particular study was needed on these matters:

1. Procedures for private stream adjudication to ensure finality of priority, *e.g.*, a "quiet title" procedure.²⁶
2. Procedures to insure adjudication of entire streams to avoid 'crazy quilt' situations, overlapping and conflicting decrees.
3. Revision of the present method of supervision and administration of water rights to free the district judge from the minutiae of the task.

CONCLUSION AND LEGISLATION

At the conclusion of the Conference a committee of four was appointed to draft legislation to implement the improvements in Montana water law which had been agreed upon.²⁷ That committee is currently working on a legislative proposal, a tentative draft of which is set out in the Appendix hereto.

²⁵From the paper of Judge Lessley.

²⁶Suggested in the paper of Judge Anderson, note 11, *supra*. Such a "quiet title" procedure would presumably follow that contained in R.C.M. 1947, §§ 93-6201 to 93-6239.

²⁷Members of the Committee are Judge Anderson, Mr. Groff, and Professors Monson and Stone.

APPENDIX

The Committee has not yet approved a particular draft, and when it does the draft is subject to modification by the participants in the Conference. However, as an illustration of such a draft, the following may be of interest, and comments upon it would be welcomed by the author. Suggested amendments and additions to existing sections of the Revised Codes of Montana, 1947 are indicated by underlining:

I. IMPROVEMENT OF FILING:

S9-S10. NOTICE OF APPROPRIATION. Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, *aquifer*, or other natural source of supply concerning which there has not been an indication of the right to use the waters, or some part thereof, must post a notice in writing in a conspicuous place at the point of intended diversion or *well-site*, stating therein:

1. The quantity of water claimed, measured as hereinafter provided;
2. The purpose for which it is claimed and place of intended use;
3. The means of diversion or *withdrawal*, with size of flume, ditch, pipe, *pump*, or aqueduct, by which he intends to divert it;
4. The date of appropriation;
5. The name of the appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county clerk of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion of such stream, with reference to some natural object or permanent monument. The notice shall be verified by the affidavit of the appropriator or some one in his behalf, which affidavit must state that the matters and facts contained in the notice are true.

There shall be no other means of acquiring a right to the waters of a river, or stream, ravine, coulee, spring, lake, aquifer, or other natural source of supply concerning which there has not been an adjudication, on and after January 1, 1960.

S9-S11. DILIGENCE IN APPROPRIATING. Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted or *withdrawn*, and must prosecute the same with reasonable diligence to completion. If the ditch or flume or *means of withdrawal*, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

S9-S11.5. PROGRESS NOTICE AND FINAL NOTICE. *Within one year after the date of appropriation the appropriator shall file with the county clerk of the county in which such appropriation is made, a notice of completion on a form supplied by the office of the state engineer to the various county clerks. It shall provide for the complete reporting of the completed diversion or pumping works from each point of diversion or penetration of the earth's surface, including the means used to obtain water, the manner of use, place or places of use, time or times of use, description of the physical system employed, the capacity of the system and the quantity of water taken and used during the year and such other information as the state engineer may require; PROVIDED, however, that if the appropriation cannot be completed with diligence within one year after the date of appropriation, then in lieu of said notice of completion, the appropriator shall similarly file within 60 days following each anniversary of his date of appropriation a notice of progress, similarly prepared and distributed, which shall provide for the reporting of the work done during the year. Each year during which completion is diligently pursued, a notice of progress shall be so filed, until completion, when a notice of completion shall be filed.*

Upon the filing by the appropriator of a notice of appropriation, notice of completion or notice of progress, the County Clerk shall make a copy thereof and transmit said copy to the office of the state engineer. The state engineer shall attend to filing copies of such notices in any additional counties affected by the appropriation, the county clerks of which are hereby directed to accept such filings.

S9-S12. EFFECT OF FAILURE. A failure to file a notice of appropriation and a notice of completion deprives the appropriator whose date of appropriation is on or after January 1, 1960 of the right to the use of water. A failure to file a notice

of progress deprives such an appropriator of the right to the use of water as against a subsequent claimant who fully complies herewith and whose date of appropriation is prior to said appropriator's completion date. By complying with the provisions of this chapter the right to the use of the water shall relate back to the date of posting the notice of appropriation.

89-813. RECORD OF DECLARATION. Persons who have heretofore acquired rights to the use of water or who do so prior to January 1, 1960, and whose rights are not a matter of record by reason of adjudication or by reason of their acquisition by the statutory method of acquiring an appropriation, shall, within two years after the publication of this chapter, file in the office of the county clerk of the county in which the water right is situated, a declaration in writing similar to a notice of completion on a form prepared and supplied by the state engineer to the county clerks. A failure to comply with the requirements of this section shall in no wise work a forfeiture of such rights, or prevent any such claimant from establishing such rights in the courts, but he must maintain the burden of proving such unrecorded rights.

The county clerk shall make a copy of each such declaration and transmit said copy to the office of the state engineer, who shall attend to filing copies in any other counties affected by the appropriation, as in the case of a notice of completion.

89-814. RECORD PRIMA FACIE EVIDENCE. The record provided for in sections 89-810 through 89-813, inclusive, when duly made, shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

II. ABANDONMENT:

89-802. APPROPRIATION MUST BE FOR A USEFUL PURPOSE — ABANDONMENT. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact. *Ten consecutive years of non-use is prima facie evidence of intent to abandon all or a part of a water right.*

III. UNDERGROUND WATER:

60-127. POWER AND DUTIES OF COMMISSION.

C. The commission has authority, and it is its duty:

(1) To require: (a) identification of ownership of oil or gas wells, producing properties and tanks, (b) the making and filing of acceptable well logs, reports on well locations, and the filing of directional surveys, if made, provided, however, that logs of exploratory or wildcat wells need not be filed for a period of six (6) months following completion of such wells, (c) the drilling, casing, producing and plugging of wells in such manner as to prevent the escape of oil or gas out of one stratum into another, the intrusion of water into oil or gas stratum, blowouts, cavings, seepages, and fires: and the pollution or dissipation of fresh water supplies by oil, gas, salt, or brackish water, or by other means, (d) the furnishing of a reasonable bond with good and sufficient surety, conditioned for performance of the duty to properly plug each dry or abandoned well, (e) proper gauging or other measuring of oil and gas produced and saved to determine the quantity and quality thereof, (f) that every person who produces, transports or stores oil or gas in this state shall make available within this state for a period of five (5) years complete and accurate records of the quantities thereof, which records shall be available for examination by the commission or its agents at all reasonable times, and that every such person file with the commission such reports as it may prescribe with respect to quantities, transportations, and storages of such oil or gas, (g) that any perforation of the geologic structure shall not permit the pollution or dissipation of ground water resources, regardless of whether a well is drilled.

89-3104. LICENSING OF WELL DRILLERS. *It shall be unlawful for any person, firm or corporation to drill or to begin the drilling of a well for water for pay without a valid, existing license for the drilling of such wells issued by the state engineer of Montana. The state engineer shall provide and issue such licenses without fee, to persons who apply and who have not previously had such a license revoked within the two years preceding said application.*

89-3105. PENALTIES FOR VIOLATION OF THIS ACT. *Any failure to comply with any of the terms of this chapter shall result in the revocation of the license herein provided for, by the state engineer, in addition to any other penalties provided by law.*

Section 94-1511 already makes it a misdemeanor to practice a trade without a license, where a law requires a license.