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Water Law: Recognition of a Public Water Right (Paradise Rainbows v. Fish and Game Commission, 421 P.2d 717, 1966)

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IV

To recapitulate:

- 1) The right of privacy exists as a complex of four distinct torts;
- 2) Privacy actions have been used with or as alternatives to defamation actions; and
- 3) The constitutional guarantees of freedom of speech and the press apply equally to defamation and "false light" privacy actions, both requiring knowing or reckless falsity on the part of the defendant.

The next logical step, perhaps taken invisibly by the instant case, is the absorption of defamation by the right of privacy. *Griswold*⁵⁴ seems to indicate that the most likely course for the Court to take is the balancing of one constitutional right against another—freedom of speech and press against the equally fundamental right of privacy. Balancing at this point seems to favor the former. In the instant case, six of the nine justices favor a strong or absolute priority of claims for freedom of the press over the competing claims of privacy. It thus seems safe to say that the Court is not going to move far from its present position in the foreseeable future. This one aspect of the right of privacy may swallow defamation in due course, but the tests of defamation seem destined in turn to swallow this segment of the right.⁵⁵

V

There is a grim irony in this story of a man who wanted the right "to be let alone." To assert that right, he has stood in the judicial spotlight for eleven years, through a trial and five appeals,⁵⁶ only to find himself thrown back for further proceedings. Should he prevail, his vindication of his right of privacy, which affects us all, must seem a Pyrrhic victory. In any event, the right of privacy as heretofore conceived seems much narrower.

WILLIAM J. CARL.

WATER LAW: RECOGNITION OF A PUBLIC WATER RIGHT.—Respondent DePuy mandamused the Fish and Game Commission to relicense his artificial fish ponds.¹ The appellant then instituted an action for a mandatory injunction to compel the respondent to build a fishladder on his

⁵⁴*Supra* note 21.

⁵⁵In a manner reminiscent of the Gingham Dog and the Calico Cat.

⁵⁶155 N.Y.S.2d 234 (1956); 207 N.Y.S.2d 901 (1960); 216 N.Y.S.2d 497 (1961); 240 N.Y.S.2d 286 (1963); 15 N.Y.2d 986, 207 N.E.2d 604 (1965); and instant case.

¹REVISED CODES OF MONTANA, 1947, § 26-306 (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.) provides for the licensing of artificial lakes and ponds. The ponds in question had been licensed before and although there had been some slight

diversion dam.² The trial court held for respondent on both issues, finding that the Commission's denial of the license had been arbitrary, and that there was no evidence to support the Commission's argument that the diverted stream was a natural avenue for fish. On appeal to the Supreme Court of Montana, *held*, affirmed. Mandamus will lie to compel proper administrative action where there has been a flagrant abuse of discretion. The court went on to say that while a public water right for recreational purposes was not found here, under the proper circumstances one should be recognized.³ *Paradise Rainbows v. Fish and Game Commission*, 421 P.2d 717 (Mont. 1966).

The importance of this decision lies in its implied recognition of a public water right.⁴ Heretofore it was not recognized that the public could acquire rights in water for fishing or other recreational purposes.⁵ However, it appears as a necessary implication of this decision that the public may acquire such a right in certain recreational waters by sufficient use.⁶ The Fish and Game Commission contended that the public had used the creek as a natural fish hatchery and for fishing before DePuy built his dam.⁷ Such use by the public was said to have created a water right which was prior in time to that of the respondent's.⁸ In response to this argument the court said:⁹

Such a public right has never been declared in the case law of this state. California, an appropriation doctrine jurisdiction, whose

changes in the ponds due to highway construction the Court did not feel there was a sufficient basis for the refusal. Instant case at 719.

²R.C.M. 1947, § 26-104(9) makes it the duty of the Fish and Game Commission "to furnish plans for, and to direct and compel the construction and installation and repair of fish ladders upon dams and other obstructions in streams, which, however, shall be installed and maintained at the expense of the owners of said dam or other obstruction."

³The MONT. CONST. art. III, § 15 declares that every beneficial use of water shall be a public use. The public right implied by the court here is analogous to a private right, but it is based on use by the general public rather than an individual. For a background in public water rights see: WATERS AND WATER RIGHTS §§ 35-39 (Clark ed. 1967).

⁴The rule that a flagrant abuse of discretion may be corrected by mandamus appears to be settled in Montana. See: *State ex rel Marshall v. District Court*, 50 Mont. 289, 294-95, 146 Pac. 743 (1915); *Westercamp v. State Board of Chiropractic Examiners*, 137 Mont. 451, 458, 352 P.2d 995, 999 (1960); *Skaggs Drug Centers v. Mont. Liquor Control Board*, 146 Mont. 115, 123-24, 404 P.2d 511, 516 (1965). On the other hand the Court's recognition of the possibility of a public water right is not settled, but the concept is one of great future importance to the State. Therefore it will be considered exclusively.

⁵Instant case at 721.

⁶See *supra* note 3.

⁷Instant case at 721.

⁸*Ibid.* If the public had a prior right, DePuy could not use the water to the detriment of that right. *Bullerdick v. Hermsmeyer*, 32 Mont. 541, 554, 81 Pac. 334 (1905). However, the Court held that by his appropriation DePuy had acquired a property right in the use of *all* the water in Armstrong Spring Creek, which he had diverted by means of a dam. It was on this dam that the Commission sought to have the fish-ladder erected. Such a fishladder, however, would necessitate a release of DePuy's water over the dam. This would constitute a taking of DePuy's property and "(i)ndividuals who have put water to a beneficial use should not have their rights arbitrarily diluted under claim of sovereign rights or otherwise."

⁹Instant case at 721. (emphasis added)

Constitutional provisions relating to water rights are virtually the same as Article III, § 15 of the Montana Constitution, has recognized such a right and has upheld statutes requiring fishways. *People v. Glenn-Colusa Irr. Dist.*, 127 Cal.App. 30, 15 P.2d 549. Under the proper circumstances we feel that such a public interest should be recognized. This issue will inevitably grow more pressing as increasing demands are made on our water resources. An abundance of good trout streams is unquestionably an asset of considerable value to the people of Montana.

While the Commission's argument is plausible, we cannot yield to it, given the facts at hand.

The court found the facts were insufficient to establish a public right for three reasons. First, and most important was the failure to find sufficient use by the public. Contrary to the contentions of the Commission, the court found: "Armstrong Spring Creek is a short stream and is obviously not a major migratory route for large numbers of fish."¹⁰ The other reasons for the rejection of the public right were more pragmatic. The court implied that the Commission was estopped because the dam had been built with its knowledge and yet no demand was made for a fishladder at that time.¹¹ Finally, a mandatory injunction, as an extraordinary remedy, required a stronger showing on the part of the Commission to move the discretion of the court.¹²

The court gave little indication of what facts would be sufficient to find a public right. Further, it did not define the nature of the public right it had denied. States which have dealt with the question have described the right in terms of "minimum flow."¹³ That is, the public acquired a right to a certain flow of water in the natural stream bed which is not subject to further appropriation.¹⁴ Such a definition is not sufficient. Rather, the right must be defined broadly enough to provide water of both sufficient quantity and quality to support fish. The mere fact of running water in a stream bed will not necessarily maintain a game fish habitat.¹⁵ The quality of the water is of equal, if not greater, importance than quantity. For example, the amount of pollution in the water and its temperature have a marked effect on the ability of a stream

¹⁰*Ibid.*

¹¹*Ibid.* DePuy constructed the dam in 1957 under the inspection of several members of the Commission. The action of injunction was brought more than seven years later and after DePuy had brought his action for mandamus. Still there is a question as to whether estoppel would have been proper under these circumstances. In the past the Court has required an element of constructive fraud as well as a duty to speak and actual reliance. *Sherlock v. Greaves*, 106 Mont. 206, 217, 76 P.2d 87 (1938); *Moore v. Sherman*, 52 Mont. 542, 547, 159 Pac. 966 (1916); *Fabian v. Collins*, 3 Mont. 215, 229, 231 (1878). Further it would appear that a public agency's action should not estop the public where the right was acquired through non-agency action.

¹²*Ibid.* "It is the law of this state that injunctions are extraordinary remedies, granted with caution, and in the exercise of sound judicial discretion. *State ex rel Blackwood v. Lutes*, 142 Mont. 29, 381 P.2d 479."

¹³See *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 406 P.2d 798 (Colo. 1965).

¹⁴*Ibid.* The Plaintiff there sought to appropriate a minimum flow necessary for the preservation of fish life.

¹⁵BIENNIAL REPORT OF THE MONTANA FISH AND GAME COMMISSION, May 1, 1960 - April 30, 1962, at 21.

to support game fish.¹⁶ Agricultural silt in sufficient quantity impedes the flow of oxygen to the fish eggs and prevents their maturation.¹⁷ Irrigation also may increase the temperature of the water above a desirable level for game fish.¹⁸

Traditional private water rights are not so limited. In Montana and other appropriation doctrine jurisdictions, a person who puts water to a beneficial use acquires a right to a certain quality of water as well as a certain quantity.¹⁹ The beneficial use of water by the public should be the basis for recognizing a parallel right.²⁰

The court, in its implicit recognition of a public right avoided two potential problems. One is the traditional requirement of an actual diversion of the water to create a water right.²¹ This was satisfactory for typical private uses such as mining and irrigation.²² But a diversion would not normally be practical to appropriate water for fishing and other recreational uses.²³ The other problem is whether game fish use is a beneficial use within the meaning of the Constitution; the court implied it was.²⁴

In certain respects there appears to be little difference between a public right and the traditional private water right. For example, to acquire the right all that is required for both is the application of water to a beneficial purpose.²⁵ However, unlike a private use, where

¹⁶*Id.* at 27. A test was run of Blue Water Creek to test the effect of temperature and agricultural pollution on fish life and habitat. Samples were taken above and below a diversion for irrigation. Above the diversion where the water was cool and clean, one acre of stream produced over 4,000 trout and only 40 suckers. Below the ditches that returned the warm irrigation waste water, in one acre, only 80 trout were found while there were over 12,000 suckers, dace and minnows.

¹⁷*Ibid.* Without silt there was a 98% hatch while in silt there was 0% hatch.

¹⁸*Ibid.* In the test described *supra* note 16, the temperature of the water had increased from 72 degrees to 81.

¹⁹*Atchinson v. Peterson*, 1 Mont. 561 (1872), *aff'd*, 87 U.S. 507, 514-15 (1874); *Jones v. Hanson*, 133 Mont. 115, 320 P.2d 1007, 1014 (1958).

²⁰There is no reason to deny the public the right, although ascertaining what the condition of the water was at the time of the appropriation will be more difficult than in the case of some private rights. See: *Allen v. Petrick*, 69 Mont. 373, 222 Pac. 451 (1924).

²¹See: *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, *supra* note 13. See also, 27 MONT. L. REV. 211 (1966), for a comment on this decision. Most prior Montana decisions have concerned themselves with appropriations which utilized water by means of a diversion, which may explain the judicial language which seems to indicate the need for a diversion. See especially: *Sherlock v. Greaves*, *supra* note 11. But see: *Federal Land Bank v. Morris*, 112 Mont. 445, 116 P.2d 1007 (1941); *Montana Power Co. v. Broadwater Missouri Users Association*, 50 F.Supp. 4 (D.Mont. 1942); *rev'd on other grounds*, 139 F.2d 998. (9th Cir. 1944).

²²For a historical background in Montana water law see: *Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575 (1912).

²³The fish habitat is the natural stream bed and therefore it would do no good to divert the water. However it is possible to store water by means of a dam in order to provide for certain recreational facilities.

²⁴MONT. CONST. art. III, § 15. The Montana Court recognized an appropriation for a fish pond in *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206 (1936). However the public right implied by the Court here would require a general recognition of game fish use as a beneficial use.

²⁵The similarity is more conceptual than real. In the usual private appropriation there are means of diverting the water out of the natural channel and then its subsequent

there is a physical diversion, with a public use there is limited evidence of the appropriation. The past use of a stream by fishermen may be difficult to prove.²⁶ Further the court has indicated that the fact that there are fish in the stream will not be sufficient to find a public right.²⁷ This will mean that for the individual stream a certain quantum of use will have been necessary to establish a water right in the public.²⁸ Thus the standard of use which the courts establish will determine at what time, on the individual stream, a right might have been acquired.²⁹

There may be some question as to whether such a right could be acquired after 1921 on adjudicated streams.³⁰ The Montana Supreme Court has held the statutory method of appropriation exclusive on such streams.³¹ However the statute was intended to deal exclusively with private rights and is not appropriate for a public right.³² On non-adjudicated streams there would be no problem, for the mere application of the water to a beneficial use would be sufficient.³³

This decision wisely leaves open the most important question: what type and quantum of use is necessary for the establishment of a public water right? The answer to this question will not be simple, and it cannot be reached without having a marked effect on both public and private users. The seemingly vested interests of private users are potentially subject to a prior appropriation by the public.³⁴ Although recreation is a non-consumptive use there would still be a certain quantity of water taken from other users in dry years. Further, if there were industrial or agricultural pollution in sufficient quantity, the quality of the water would have to be upgraded.³⁵

application to a beneficial purpose. In the case of a public right, there is no diversion and in most streams there will be some public use, but it may or may not be sufficient to acquire the right. However, in both instances if the application is of sufficient public benefit to warrant the use of the water, then there will be the acquisition of a water right.

²⁶BIENNIAL REPORT OF THE FISH AND GAME COMMISSION, *supra* note 15, and similar reports will give some indication of the amount of public use certain streams receive.

²⁷Instant case at 721.

²⁸The Court gave as one of the reasons for denying the right in this instance the lack of sufficient use by the public. See note 10, *supra*.

²⁹This point in time will determine the relative rights of public and private users. See: *Bullerdick v. Hermsmyer*, *supra* note 8.

³⁰If the public right existed before 1921 it is not precluded by the fact that the stream is now adjudicated. *Donich v. Johnson*, 77 Mont. 229, 250 Pac. 963 (1926).

³¹If sufficient public use of the stream was not until after 1921 there would be a question as to whether a public right could have been acquired on an adjudicated stream, since the statutory method has been held exclusive. *Anaconda National Bank v. Johnson*, 75 Mont. 401, 411, 244 Pac. 141 (1926); *Donich v. Johnson*, *supra* note 30, at 246.

³²R.C.M. 1947, § 89-829 contemplates appropriation by means of diversion and hence would not seem to apply to a non-diversionary public right.

³³*Vidal v. Kensler*, 100 Mont. 592, 594-95, 51 P.2d 235 (1935); *Clausen v. Armington*, 123 Mont. 1, 14, 212 P.2d 440, 447-48 (1949).

³⁴*Bullerdick v. Hermsmyer*, *supra* note 8.

³⁵The appropriator who has priority has a right which is measured by his maximum need. Hence, under certain conditions, an appropriator may be entitled to all the water in the stream. *Sayre v. Johnson*, 33 Mont. 15, 18-19, 81 Pac. 389 (1905).

A balance may be achieved between these interests if the criteria for the establishment of the public right are such that only valuable recreational waters are appropriated. To accomplish this such intangibles as reputation and access will be as important as the number of fish.³⁶

Game fishing is America's leading form of outdoor recreation.³⁷ Each year more than a quarter of a million fishermen, spending 36 million dollars, fish Montana waters.³⁸ A majority of them prefer stream fishing.³⁹ Montana is one of the leading trout fishing states in the nation,⁴⁰ yet this asset is one which can be quickly lost. In the Black Hills of South Dakota 1,200 miles of trout streams have dwindled to 160.⁴¹ The proper application of the instant decision could prevent such an occurrence in Montana.

JAMES A. POORE III

CRIMINAL LAW: CONSECUTIVE SENTENCES ALLOWED FOR BURGLARY AND LARCENY COMMITTED IN A SINGLE CRIMINAL TRANSACTION.—Petitioner and companions, intent on stealing beer, broke a window in a beer parlor. They returned to a cafe, drank coffee, and then drove around to ascertain the location of the city policeman so they would know it was safe to proceed. Seeing him park his car, they returned to the saloon, climbed in the broken window and removed 19 cases of beer from the premises. *Held*, petitioner committed the separate and distinct offenses of burglary and larceny and may be given consecutive sentences for each. *Morigeau v. State*, 423 P.2d 60 (Mont. 1967).

Whenever a defendant is charged with more than one offense arising out of a single criminal transaction, the question arises whether he is being punished twice for a single crime. He may be charged with an included offense—a crime that must necessarily be committed in the commission of another. For example, assault is included in assault and battery,¹ and there can be no crime of robbery² without the included

Since the appropriator is entitled to a certain quality of water also, this will create conflicts due to the purity of water needed by fish. See *Atchinson v. Peterson*, *supra* note 19 and also note 16.

³⁶The primary consideration is the public use of the water rather than the preservation of the fish *per se*. Thus the type of fish as well as the number is an important consideration.

³⁷BIENNIAL REPORT OF THE MONTANA FISH AND GAME COMMISSION, May 1, 1958-April 30, 1960, at 23.

³⁸*Ibid.*

³⁹*Id.* at 32.

⁴⁰*Id.* at 23.

⁴¹COMMISSION REPORT, *supra* note 15, at 21.

¹See REVISED CODES OF MONTANA, 1947, §§ 94-601 to 94-605, "Assaults." (REVISED CODES OF MONTANA are hereinafter cited R.C.M.)

²R.C.M. 1947, § 94-4301. (robbery defined).