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# A NEW RULE OF LAW FOR THE ABANDONMENT OF WATER RIGHTS

Elaine M. Hightower

## I. INTRODUCTION

The Montana Water Use Act of 1973<sup>1</sup> substantially revised the law pertaining to abandonment of water rights. The Montana Legislature provided that the new statutory provisions would apply only to those rights appropriated after 1973 and those rights decided in the adjudication process established by the Act.<sup>2</sup> Any appropriation acquired prior to the enactment of the Act was to be determined by application of prior case law and statutes repealed by the 1973 Act.<sup>3</sup>

The contested water rights in *79 Ranch, Inc. v. Pitsch*<sup>4</sup> were appropriated prior to 1973. In its holding, the Montana Supreme Court significantly departed from prior case law, and both redefined the element of intent needed to establish abandonment and shifted the burden of proof.

This note reviews Montana law as it stood prior to 1973, discusses the changes implemented by the Montana Legislature, and analyzes the extent and future impact of the Montana Supreme Court's decision in *79 Ranch, Inc. v. Pitsch*.

## II. CASE LAW PRIOR TO THE WATER USE ACT OF 1973

Prior Montana case law has consistently required two elements to prove abandonment: (1) nonuse of the appropriation,<sup>5</sup> and (2) an intent to abandon.<sup>6</sup> The court has repeatedly held that abandonment by the appropriator must be voluntary,<sup>7</sup> and has applied the *Bowyer's Law Dictionary* definition of abandonment: "Abandonment must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he

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1. Montana Water Use Act, ch. 452, 1973 Mont. Laws 1121.

2. MONT. CODE ANN. § 85-2-404(3) (1983).

3. *Id.*

4. — Mont. —, 666 P.2d 215 (1983).

5. Nonuse is defined as "relinquishment of possession." *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923).

6. *Musselshell Valley Farming and Livestock Co. v. Cooley*, 86 Mont. 276, 283 P. 213 (1929); *St. Onge v. Blakely*, 76 Mont. 1, 245 P. 532 (1926); *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923); *Tucker v. Jones*, 8 Mont. 225, 19 P. 571 (1888).

7. *St. Onge v. Blakely*, 76 Mont. 1, 14, 245 P. 532, 536 (1926); *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 571, 599 (1923).

desires no longer to possess the thing . . . .”<sup>8</sup>

Intent to abandon, a question of fact,<sup>9</sup> is the more difficult element to prove. Historically, the burden of proof must be met by a preponderance of the evidence and has fallen upon the party attempting to prove the abandonment.<sup>10</sup> In *Thomas v. Ball*<sup>11</sup> the court emphasized that once an appropriation has been perfected, the courts must exercise extreme care before declaring abandonment of the appropriation.<sup>12</sup> Periods of nonuse up to thirty years have been found not to prove an intent to abandon.<sup>13</sup> Long periods of nonuse have been held to be “potent evidence”<sup>14</sup> of the intent to abandon, but nothing more.

The court in past holdings declared abandonment of an appropriation based on nonuse only where: (1) the land itself was also abandoned;<sup>15</sup> (2) the party left the property to be taken by another person;<sup>16</sup> (3) there was no beneficial use of the water right for a long period of time because the appropriator was using another water source;<sup>17</sup> or (4) the water right was not appurtenant to the land and there was no use of the water for a long period of time.<sup>18</sup> In contrast, if the property had not been abandoned<sup>19</sup> or if some

8. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 P. 1054, 1058 (1895). The court has also held that when a party has left “the property to be taken by any other person,” then an intention to abandon can be inferred. *Featherman v. Hennessy*, 42 Mont. 535, 540-41, 113 P. 751, 753 (1911).

9. MONT. REV. CODES ANN. § 89-802 (1947) (repealed 1973).

10. *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964); *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923).

11. 66 Mont. 161, 213 P. 597 (1923).

12. *Id.* at 167, 213 P. at 599.

13. *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964) (nonuse of water rights for 30 years); *St. Onge v. Blakely*, 76 Mont. 1, 245 P. 532 (1926) (nonuse for a period of 12 years); *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923) (nonuse for essentially 20 years); *Moore v. Sherman*, 52 Mont. 542, 159 P. 966 (1916) (nonuse for 12 years); *Smith v. Hope Mining Co.*, 18 Mont. 432, 45 P. 632 (1896) (nine years of nonuse); *Tucker v. Jones*, 8 Mont. 225, 19 P. 571 (1888) (eight years of nonuse).

14. *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896).

15. *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909) (owner died and left no heirs or successors to his land or the attached water right).

16. *Featherman v. Hennessy*, 42 Mont. 535, 113 P. 751 (1911).

17. *O’Shea v. Doty*, 68 Mont. 316, 320, 218 P. 658, 659 (1923).

18. *Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist.*, 185 Mont. 409, 605 P.2d 1060 (1980). The Thorsons’ right was partly appurtenant and partly unattached. When a water right has been applied to a beneficial use, it then becomes appurtenant to the land upon which it has been applied. The unattached right must be applied to a beneficial use within a reasonable amount of time. *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 222 (1983) (Ettien, D.J., dissenting); *Bailey v. Tintinger*, 45 Mont. 154, 177-78, 122 P. 575, 583 (1912).

19. In *Tucker v. Jones*, 8 Mont. 225, 19 P. 571 (1888), the person claiming the water right left the state for 11 years, but came back to claim his property once again. The court in *Smith v. Hope Mining Co.*, 18 Mont. 432, 45 P. 632 (1896), pointed to the upkeep of the

use of the water had been made, regardless of the purpose,<sup>20</sup> the court held against abandonment.

### III. REQUIREMENTS OF THE WATER USE ACT OF 1973

The Montana Legislature, in 1973, provided that a party owning a water right with a priority date before July 1, 1973, must file a claim of his right with the Department of Natural Resources and Conservation (Department) before June 30, 1983.<sup>21</sup> Failure to file such a claim establishes a conclusive presumption of abandonment.<sup>22</sup> An appropriator can either abandon his right by intending to cease its use or create a prima facie presumption of abandonment by nonuse for a period of ten successive years during which available water exists.<sup>23</sup> The burden of proof is on the Department to establish abandonment by a preponderance of the evidence.<sup>24</sup> Both the Department and a junior appropriator have standing to assert abandonment by petitioning for abandonment in the same district court that earlier determined the appropriation right.<sup>25</sup>

### IV. 79 RANCH, INC. v. PITSCH

#### A. *Facts and Procedure*

Vandervoort, Pitsch, and 79 Ranch, the parties to this action, owned land adjacent to Big Coulee Creek in Golden Valley County, Montana. Vandervoort's land lay downstream and Pitsch's land

mine to indicate both the property and the water right had not been abandoned.

20. Both in *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964), and *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923), some use of the water had been made.

21. MONT. CODE ANN. § 85-2-221, -222 (1983). Together, these statutes exempt "[c]laims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources and claims for rights in the Powder River Basin" already filed.

22. MONT. CODE ANN. § 85-2-226 (1983).

23. MONT. CODE ANN. § 85-2-404 (1983) provides:

(1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed considered abandoned and shall immediately expire.

(2) If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for his use, there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

24. MONT. CODE ANN. § 85-2-405(2) (1983).

25. MONT. CODE ANN. § 85-2-405(1) (1983).

upstream from that of 79 Ranch.<sup>26</sup> In 1977, the creek held insufficient water to meet the needs of the parties and this action followed.<sup>27</sup>

Both Eugene Schaff, operator of 79 Ranch, and Pitsch traced their respective water rights to those appropriated by the Montana Cattle Company, their predecessor in interest. The Montana Cattle Company, however, ceased use of these rights in 1911 or 1913.<sup>28</sup> Evidence indicated that neither Pitsch, Eugene Schaff, nor their immediate predecessors knew of these water rights when they filed subsequent notices of appropriation in 1973.<sup>29</sup>

Pitsch also claimed water rights established by Claude Hill and Bert Schaff, his predecessors in interest. Hill had filed two notices of appropriation but did not follow the statutory requirements. A few of these acres were irrigated in the 1920's but the evidence did not show the purpose or the extent of use.<sup>30</sup> Bert Schaff had filed a subsequent notice of appropriation in 1973; he never used the water, however, because he failed to complete his sprinkler system due to a lack of the necessary parts. Pitsch later began irrigation after installment of a new sprinkler system in 1976.<sup>31</sup> Eugene Schaff commenced irrigation in 1973, the same year he filed his notice of appropriation.<sup>32</sup> Vandervoort's water rights extended from 1902 onwards.<sup>33</sup>

Vandervoort and 79 Ranch brought this action to enjoin Pitsch's use of the Big Coulee Creek water, and to determine the parties' respective water rights. The district court found that both Pitsch and 79 Ranch had abandoned the water rights appropriated by the Montana Cattle Company, and Pitsch had further abandoned the water rights claimed by Hill due to the fact that the water had not been used for at least forty years and perhaps as long as sixty years. Pitsch and 79 Ranch appealed from that judgment, the Montana Supreme Court remanded,<sup>34</sup> and the district

26. *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 216.

27. *Id.* at \_\_\_, 666 P.2d at 217.

28. *Id.* This land was irrigated by a series of ditches.

29. *Id.* at \_\_\_, 666 P.2d at 219.

30. *Id.* at \_\_\_, 666 P.2d at 217.

31. *Id.* at \_\_\_, 666 P.2d at 216. Schaff filed a notice of appropriation for 30 cubic feet per second of water.

32. *Id.* at \_\_\_, 666 P.2d at 216-17.

33. *Id.* at \_\_\_, 666 P.2d at 217. Vandervoort's water rights depended on notices of appropriation for 1000 miner's inches in 1902, 100 miner's inches in 1909, 320 miner's inches in 1925 and 300 miner's inches in 1926.

34. *79 Ranch, Inc. v. Pitsch*, \_\_\_ Mont. \_\_\_, 631 P.2d 690 (1981), *appeal after remand*, \_\_\_ Mont. \_\_\_, 666 P.2d 215 (1983).

court reentered the prior judgment.<sup>35</sup> Pitsch and 79 Ranch once again appealed.

### B. *The Court's Opinion*

The Montana Supreme Court affirmed the district court's finding of abandonment. The court held that forty years of nonuse "is strong evidence of an intent to abandon the water rights. . . . [S]uch a long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse."<sup>36</sup> Although the court purported to recognize "an approach for the determination of abandonment of water rights consistent with the express intent of our legislature,"<sup>37</sup> it actually ignored this intent. For ninety-five years the Montana courts have ruled that nonuse alone cannot establish abandonment of an appropriation,<sup>38</sup> and that a party claiming abandonment has the burden of proof.<sup>39</sup> The 1973 Water Use Act provides for the adjudication of all water rights claimed before July 1, 1973, to be determined under the statutory and case law applicable prior to that time.<sup>40</sup> The court ignored this directive of the legislature. By holding that a showing of nonuse for a long period of time raises a rebuttable presumption of an intent to abandon and shifts the burden of proof onto the nonuser,<sup>41</sup> the court effectively overruled prior Montana case law on water rights abandonment.

### C. *Application of the New Rule*

The court in *Pitsch* set forth a general guideline, adopted from

35. *Pitsch*, \_\_\_ Mont. \_\_\_, 666 P.2d at 216. The district court entered scant findings and established the following water rights and priorities:

(a) Vandervoort—50 inches for use on W½ Section 23-6N-21E., with priority date as of June 1, 1924.

(b) 79 Ranch—45 inches for use on SW¼ Section 25-5N-19E., with priority date as of June 13, 1973.

(c) Pitsch—68 inches for use on Section 35-5N-19E., with priority date as of July 1, 1976.

36. *Id.* at \_\_\_, 666 P.2d at 218.

37. *Id.* at \_\_\_, 666 P.2d at 219.

38. *Thomas*, 66 Mont. at 168, 213 P. at 600. In *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896), the court found nonuse to be merely "potent evidence of abandonment, nothing more." In *Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist.*, 185 Mont. 409, 605 P.2d 1060 (1980), the court held only the unattached water right to be abandoned by nonuse, not the appurtenant right.

39. *Thomas*, 66 Mont. at 168, 213 P. at 597.

40. MONT. CODE ANN. § 85-2-404 (1983).

41. *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 218.

other jurisdictions, concerning the proof needed to rebut the presumption of abandonment.<sup>42</sup> "To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope."<sup>43</sup> Applying this broad standard to the specific facts in *Pitsch* the Montana Supreme Court held that an excuse of insufficient funds to complete a sprinkler system did not rebut the presumption of abandonment.<sup>44</sup> The court quoted *In re C F & I Steel Corp.*,<sup>45</sup> a Colorado case, which labeled such economic excuse a "gleam-in-the-eye philosophy."<sup>46</sup>

The Montana Supreme Court gave no further guidance as to the application of this new rule of law to future cases. Two issues must be considered: What constitutes an unreasonable period of nonuse? What evidence must be shown to overcome this presumption?

The Montana Supreme Court indicated its support of the Water Use Act of 1973, and its wish to approach case law with the Act in mind.<sup>47</sup> According to the Act, nonuse for ten successive years creates a presumption of abandonment.<sup>48</sup> In light of the court's recognition of the Act, ten years of nonuse offers a reasonable guideline and will most likely create a presumption of abandonment in future Montana cases even though the Act's ten-year presumption was specifically meant to apply only to those water rights appropriated after 1973.

Cases from other jurisdictions cited by the Montana Supreme Court require proof of abandonment by "clear and convincing" evidence.<sup>49</sup> Montana case law, however, has traditionally demanded only proof of abandonment by a preponderance of the evidence.<sup>50</sup> Apparently the Montana court still demands proof only by a preponderance of the evidence, since in quoting cases from other jurisdictions it omitted any language referring to "clear and convincing" evidence.<sup>51</sup>

In the 1966 Colorado case of *Hallenbeck v. Granby Ditch and*

42. The court referred to Colorado, South Dakota, and Texas case law.

43. *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 218.

44. *Id.* at \_\_\_, 666 P.2d at 218-19.

45. 183 Colo. 135, 515 P.2d 456 (1973).

46. *Id.* at 140, 515 P.2d at 458.

47. *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 219.

48. MONT. CODE ANN. § 85-2-404 (1983).

49. *Hallenbeck v. Granby Ditch and Reservoir Co.*, 160 Colo. 555, 420 P.2d 419 (1966). In *City of Anson v. Arnett*, 250 S.W.2d 450, 452 (Tex. Civ. App. 1952), the court stated that the party must prove abandonment by clear and satisfactory evidence.

50. *Thomas*, 66 Mont. at 168, 213 P. at 600.

51. *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 218.

*Reservoir Co.*,<sup>52</sup> the court found a rebuttable presumption of abandonment. The appropriator overcame this presumption by showing that during the course of nonuse it continued to keep its water system in repair even though it lacked sufficient funds to make the system wholly usable. The state of dilapidation resulted from financial difficulties and a shortage of engineers and materials during World War II.<sup>53</sup> The Colorado court held that "a reasonable justification for non-use may very well exist where it can be shown that economic, financial or legal difficulties or natural calamities" caused the nonuse.<sup>54</sup>

The Colorado court later distinguished *C F & I Steel* from *Hallenbeck*. The petitioner in *C F & I Steel* argued that, since over time it had made several surveys to determine the economic feasibility of once again using the appropriation, there was never an intent to abandon the water right. The court disagreed. Petitioner had not only failed to maintain its water system, but also failed to use the appropriation for fifty-four years.<sup>55</sup> The presumption of abandonment was not rebutted.

Respondents in *Beaver Park Water, Inc. v. City of Victor*<sup>56</sup> rebutted the presumption of abandonment. The Colorado court enumerated the relevant factors. The company's officers testified that there was never an intent to abandon; that the water station could be made operational within thirty days; that during the period of nonuse there was adequate water from another supply; and that the company also leased the water right as an emergency source, mortgaged its interest in the water right, and attempted to negotiate its sale.<sup>57</sup> Together these factors showed sufficient intent not to abandon the appropriation.

In the case law prior to the court's decision in *Pitsch*, the Montana Supreme Court referred to circumstances that could be offered as an excuse for the long period of nonuse. Those circumstances include upkeep of the property used in conjunction with the contested appropriation,<sup>58</sup> intermittent periods of use,<sup>59</sup> and varying contract obligations premised on the appropriation.<sup>60</sup>

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52. 160 Colo. 555, 420 P.2d 419 (1966).

53. *Id.* at 568, 420 P.2d at 426.

54. *Id.* at 567, 420 P.2d at 426.

55. *C F & I Steel*, 183 Colo. at 139, 515 P.2d at 458.

56. ——— Colo. ———, 649 P.2d 300 (1982).

57. *Id.* at ———, 649 P.2d at 302-03.

58. *Smith v. Hope Mining Co.*, 18 Mont. 432, 45 P. 632 (1896).

59. *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964); *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923); *Moore v. Sherman*, 52 Mont. 542, 159 P. 966 (1916).

60. *Smith v. Hope Mining Co.*, 18 Mont. 432, 45 P. 632 (1896).



These same factors can in the future contribute to rebuttal of the presumption of an intent to abandon. The court has nonetheless left the appropriator with a vague standard to be defined by future case law.

## V. SUMMARY

A required showing of intent to abandon beyond mere nonuse was an entrenched rule of Montana case law overruled in *Pitsch*. Technically the holding of *Pitsch* contravenes legislative intent. The legislature intended for rights appropriated prior to 1973 to be adjudicated in accordance with the now repealed statutes and prior case law.<sup>61</sup> Prior Montana case law has never hinted at a presumption of abandonment and consequent shifting of the burden of proof.

Appropriators in Montana have relied upon this body of case law and, in accordance with the Water Use Act of 1973, have filed claims of right for their appropriations.<sup>62</sup> If appropriators had been aware of this new rule, they might have taken the necessary steps to maintain their water rights and rebut such a presumption. Presently, an appropriator's water rights are at the mercy of an unclear and ill-defined rule of law.

Because water is a precious commodity,<sup>63</sup> a basic underlying premise of water law is the need to apply all water to a beneficial use.<sup>64</sup> Recognizing this principle, the Colorado courts have consistently found a rebuttable presumption of abandonment after an unreasonably long period of nonuse.<sup>65</sup> In the same light, the Montana Supreme Court in *Pitsch* makes an effort to assure present use of all water.

Rebutting a presumption of abandonment requires affirmative

61. MONT. CODE ANN. § 85-2-404(3) (1983) provides: "This section does not apply to existing rights until they have been determined in accordance with part 2 of this chapter." In his dissent District Judge Ettien, sitting by designation, stated: "To me, it is clear the legislature wanted the status quo on pre-July 1, 1973, water law to be maintained until water rights were established under the 1973 Act." *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 222. (Ettien, D.J., dissenting).

62. *Id.*

63. Justice Weber, in his concurring opinion, referred to *Shammel v. Vogl*, 144 Mont. 354, 362, 396 P.2d 103, 107 (1964), which states, "[t]he loss of a water right . . . is a serious occurrence in Montana and other semi-arid western states." *Pitsch*, \_\_\_ Mont. at \_\_\_, 666 P.2d at 220 (Weber, J., concurring).

64. In *C F & I Steel*, 183 Colo. at 140, 515 P.2d at 458, the court recognized "the large demands for all of the appropriatable water in this state and the consequent high value of water. . . ."

65. *Beaver Park Water, Inc. v. City of Victor*, \_\_\_ Colo. \_\_\_, 649 P.2d 300 (1982); *In re C F & I Steel Corp.*, 183 Colo. 135, 515 P.2d 456 (1973); *Hallenbeck v. Granby Ditch and Reservoir Co.*, 160 Colo. 555, 420 P.2d 419 (1966).

proof of intent not to abandon. Stale and unused rights will be eliminated, and present users will be assured of the right to use their appropriations without fear of an unused claim later assuming priority. Certainty will be injected into the system now, rather than after the present adjudication process is complete. In *Pitsch*, the court ruled in favor of assured application of water to a present beneficial use, rather than relying on prior case law.

## VI. CONCLUSION

The Montana Supreme Court has propounded a new rule of law. It has overruled past case law in opposition to legislative intent. Eventually both the legislature and the courts would be wise to enforce such a rebuttable presumption of an intent to abandon due to long and continuous nonuse. This should only be done, however, in conjunction with the intent of the Montana Legislature.

