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Rights of Wyoming Appropriators in Underground Water

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NOTES

RIGHTS OF WYOMING APPROPRIATORS IN UNDERGROUND WATER

The over-appropriation of surface water for irrigation in many areas has caused the users of this natural resource to seek new supplies. The only available source of new water that is practical is underground water reached by irrigation wells. Underground waters were first dealt with briefly by the 1945 Legislature of the State of Wyoming. That statute,[1] so far as is material, is expanded by the 1947 Legislature in a comprehensive Act[2] relating to underground waters.

Sections one to four of the underground water law of 1945 are re-enacted with minor changes into corresponding sections of the Act of 1947. Section five of the 1945 statute provided for hearings to be held by the State Engineer to determine "the requirements of the users of water in the state," and to recommend legislation "for the regulation of the use of underground waters". This provision resulted in the legislation of 1947.

Section one of the 1947 Act provides that, "The reasonable use of all underground[3] waters of Wyoming and the protection thereof from excessive use is a matter of public interest affecting the public welfare". Section two states that the Act shall not be construed to interfere with an exising use when he water is economically and benficially used, and insofar as the use of underground water does not interfere with existing adjudicated surface rights, the right to use underground water is declared to be a "vested right".

1. Wyo. Comp. Stat. 1945, Sec. 71-404-7.
2. Wyo. S. L. 1947, c. 107.
3. Wyo. Comp. Stat. 1945, Sec. 71-404, word "percolating" deleted from 1947 Act.

Section three of the 1947 statutes declares, "Reasonable economic beneficial use shall be the basis, the measure and limit of the right to use underground[4] water at all times". The wording of this section is the same as that used in the surface water code,[5] except that there is no statutory limitation in volume of use of underground water as there is for surface water.[6] The use of underground water for domestic and stock use, and "where the area to be irrigated does not exceed four acres" is exempt by section four of the 1947 Act from further provisions of it. The exemption in the 1945 Act was two acres.

Section five of the 1947 Act provides for the filing of data, on or before the 31st of December, 1947, by those who have developed underground water already. The data to be filed includes the name and address of the claimant, the nature of the use of the water, the date when water for irrigation or other beneficial use was first used, the acreage and location by legal sub-division of the land reclaimed the first year and each subsequent year for three years, together with the dates of reclamation. The statement so filed must include the location, depth, size and type of well, and data relative to the pumping equipment, amount of water pumped each year, and a record of the formations encountered.

Section eight of the statute provides that those who hereafter intend to acquire underground water for beneficial use shall file a statement similar to that specified in section five. This statement shall be filed "within thirty days after construction is completed . . . with the State Engineer" and is called a registration. In the case of surface waters, which are administered strictly according to the rule of prior appropriation, the permission of the State Engineer must be obtained before the construction of a diversion is commenced.[7] This statute is a departure therefore, from the previous conception of distribution of surface waters. A registration of an underground appropriation being made after construction of the diversion, perhaps is of considerably less value than a permit to make a surface appropriation before construction, so far as a water user is concerned.

Section nine of the Act provides that the State Engineer is to determine the scope of underground water formations, and give notice of his findings to the State Board of Control, who will adjudicate the rights of the users. The notice of hearing to accept proof of underground users shall be given claimants by newspaper and registered mail, specifying the time and place where the State Engineer or his representatives will take proof of claims. Procedure under this section, including hearings and appeals, is governed, so far as applicable, by the statutes providing for such procedure in the surface water code.[8] After the hearings and the gathering of proof the State Board of Control shall enter of record an order determining and establishing priorities and will issue certificates to the water users which shall include all pertinent information concerning the appropriation. These certificates, which are prepared in the office of the State Board

4. Wyo. Comp. Stat. 1945, Sec. 71-406, word "percolating" deleted from 1947 Act.
5. Wyo. Comp. Stat. 1945, Sec. 71-401.
6. Wyo. Comp. Stat. 1945, Sec. 71-216.
7. Wyo. Comp. Stat. 1945, Sec. 71-238.
8. Wyo. Comp. Stat. 1945, Sec. 71-205-14, Adjudication; Sec. 71-229, Appeal.

of Control, shall be recorded in the county in which the well is located. This section further states, "The priority of appropriation shall be the determining factor in adjudicating underground water and the issuing of certificates of appropriation for use of underground water; the person, association, railway, or corporation first making such appropriation being first entitled to the use of said underground water".

Section ten of the Act also deals with the priority of appropriation. For diversions completed before the passage of the Act the priority of appropriation dates from the time of the completion of the well, or other means of obtaining underground water. The priority of subsequent diversions dates from the registration of the well, or other means of obtaining underground water. Section eleven provides that abandonment of use of underground water shall be "under the same procedure as set up for abandonment of surface waters". Section twelve provides that a change in the point of diversion may be made providing the user obtains water from the same aquifer by approval of the State Board of Control.

The doctrine of prior appropriation of surface water is adapted to the western states. Both the doctrine of prior appropriation and the problem of supplying water for irrigation exist because the ratio of land to water in this region is less than it is in the middle western and eastern areas where rainfall alone is sufficient to mature crops.[9] The pioneers of the western and mountain states have realistically met the problem by developing the doctrine of prior appropriation and the rule of beneficial use. The doctrine and the rule is, generally speaking, that the landowner who first applies water to a beneficial use and continues to do so, has the better right. This "first in time, first in right" rule is the fundamental law of surface rights in the state of Wyoming,[10] and the same rule is applied to underground water as declared in section nine of the statute previously quoted. The constitution of Wyoming lays the foundation for state ownership of surface waters until they are appropriated for beneficial use, by saying, "The water of all natural streams, springs, lakes and other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."[11] Although it might be argued that all underground waters whether moving or stationary, form a part of the water table that supports surface lakes and streams that are available for beneficial use,[12] and are therefore subject to the rule of prior appropriation, it is believed that the constitutional declaration does not include underground waters. While considering the question raised by this constitutional provision and its application to seepage water, the Wyoming Supreme Court stated in *Binning v. Miller*[13] "If . . . we do not

9. Winter, Four Hundred Million Acres, (1932) p. 259, "For every 100 acres of land in the eleven Western States there is approximately one acre of water; while in the remaining States for every 100 acres of land there are 2.3 acres of water. The non-arid States have therefore nearly two and one third times as much water surface relatively to land surface than the arid States. The average mean annual rainfall in the eleven western public land States is 18 inches while the remaining 37 States have 40 inches".
10. Wyoming Constitution, Article VIII, Sec. 3.
11. Wyoming Constitution, Article VIII, Sec. 1.
12. 1941 Yearbook of Agriculture, Climate and Man, U. S. Dept. Agriculture, p. 532.
13. (1940) 55 Wyo. 451, 102 P.(2d) 54.

give any strained construction to these provisions, it would seem clear that only water in natural streams, springs or lakes are subject to appropriation". The statutory provision that excessive use of underground water "is a matter of public interest affecting the public welfare",[14] falls far short of the constitutional provision given above which states the water to be the "property of the state".

The Supreme Court of Wyoming considered the ownership of underground water over a quarter of a century ago in the case of *Hunt v. City of Laramie.*[15] The right to appropriate for a beneficial use concerned the water of a spring that had been developed by the landowner. In denying the right of appropriation to another, the court said, "that percolating waters developed artificially by excavation and other artificial means . . . belong to the owner of the land upon which they are developed . . ." In the absence of the 1947 statute, the rule of this case would appear to be controlling when applied to irrigation wells, and the landowner who constructed an irrigation well would be entitled to the waters developed without control from the state. The general legal history of a landowner's right to underground waters may be stated by four doctrines of law that follow:

First, the English rule, that the owner of land owns all the water that is under the land. The doctrine finds effect in the case of *Acton v. Bundell.*[16] The court in deciding the rights of adjacent well owners held the case under the principle, ". . . which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to this neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action". In 1942 this rule is cited by Hutchins, Selected Problems in the Law of Water Rights in the West,[17] as being accepted without qualification in the western states of North Dakota, South Dakota, Texas and Wyoming. The same author states, "The result of extreme application of the rule of absolute ownership, however, is that a landowner may not only abstract water from his land for any legitimate enterprise, but in so doing may exhaust the common supply otherwise available for use by his neighbor without liability for any resulting injury, regardless of the length of time the neighbor may have been using the ground water beneficially".

Second, the American or "reasonable use" rule means that the landowner's right to take water is not unlimited, but is based on the rights of his neighbor to use the underlying water as well. Hutchins states,[18] "The so-called American rule of reasonable use did not originate in the West. California, which has

14. Wyo. S. L. 1947, c. 107, Sec. 1.
15. (1919) 26 Wyo. 160, 181 Pac. 137.
16. (1843) 12 Mies. & Wels. 324, 354.
17. Hutchins, Selected Problems in the Law of Water Rights in the West, (1942) p. 156.
18. Hutchins, Selected Problems in the Law of Water Rights in the West, (1942) p. 158-9.

had more cases on ground waters than any other Western State, and the first of that group to adopt the rule of reasonable use, did not do so until 1902-3, 40 years after the New Hampshire decision in *Bassett v. Salisbury Manufacturing Co."*[19] The rule of reasonable use is an advancement over the English rule in the settlement of legal controversy arising over underground water in the West, and has found acceptance in Nebraska,[20] Oklahoma,[21] and Washington.[22] While California was the first Western state to adopt the rule, it was not entirely satisfactory for the situation found there, and the courts of that state have developed the rule of equitable apportionment, which they call the docrtine of correlaive rights.[23]

Third, the rule of correlative rights is that the landowner's right to use underground water is in the proportion that his surface lands bear to the percentage of underground supply available, both as to his needs and the needs of others. Hutchins sums up by saying, "Under the correlative doctrine, owners of overlying lands have equal rights to the ground-water supply for use on such lands, and each is entitled to an equitable apportionment if the supply is not enough for all".[24] The application of the rule depends upon the fact situation in each instance, and thus it is variable. Both the rule of reasonable use and the rule of correlative rights falls short of the rule of prior appropriation.

Fourth, the rule of prior appropriation applied to underground waters is a restatement of the rule as applied to surface waters. First in time first in right, as applied to irrigation wells, means that "The first appropriator to divert and apply to a beneficial use the quantity of water from the underground source which the necessities of his irrigated area require, is entitled to continue that use as against any and all subsequent apropriators".[25] This seems to be the logical rule of prior appropriation for surface waters. This rule has been applied by statute in Idaho,[26] Nevada,[27] and Oregon,[28] and to underground waters of streams, channels, artesian basins, reservoirs, or lakes having reasonably ascertainable boundaries in New Mexico, [29] and Utah.[30] The rule of appropriation of underground waters has been applied by court decision in Colorado[31] where such waters are tributary to a stream.

What conclusion is reached as to the status of the law in this state relative to underground waters? The problem of the case of *Hunt v. City of Laramie*,[32] which concerned the ownership of underground water developed artificially by the landowner has never been raised since the Court's ruling in this case. Speak-

19. (1862) 43 N. H. 569, 82 Am. Dec. 179.
20. (1933) 124 Neb. 802, 248 N.W. 304.
21. (1936) 179 Okla. 53, 64 P.(2d) 694.
22. (1913) 75 Wash. 407, 134 Pac. 1076.
23. Hudson v. Dailey, (1909) 156 Cal. 617, 105 Pac. 748.
24. Hutchins, Selected Problems in the Law of Water Rights in the West, (1942) p. 159.
25. A. W. McHendrie, The Law of Underground Water, (1940) 13 R.M.L.R. 1, 8.
26. Idaho Code Ann., 1932, sec. 41-103.
27. Nev. Comp. Laws, 1931-41, sec. 7993.10.
28. Ore. Comp. Laws Ann., 1940, sec. 116-443.
29. New Mex. Stat. 1941, Supp. 1943, sec. 77-1101-11.
30. Utah Code Ann., 1943, sec. 100-1-1.
31. Dalpez v. Nix, (1935) 96 Colo. 540, 45 P.(2d) 176.
32. (1919) 26 Wyo. 160, 181 Pac. 137.

ing broadly and applying the rule of this case to all underground waters, it placed our state under the English rule, and this remained the law until the enactment of the 1945 statute,[33] which changed the law of underground water to the rule of reasonable use. Thereafter the 1947 statute[34] again expanded the law of underground waters to include the rule of prior appropriation, but did not establish it to the same extent as the rule of prior appropriation has been applied to surface waters.

What purpose has the statute accomplished? The views of the users of underground water were sought by the State Engineer at meetings held in various parts of the state. Taken as a whole, the water users were about equally divided on the question of whether they wanted any type of state control.[35] Probably the legislation produced is at present satisfactory to most of them, but that does not necessarily make it the best or most beneficial law. This statute does not put a brake on the taking of water after the rate of pumping exceeds the rate of recharge. Since no permit is necessary in advance to drill an irrigation well, anybody can drill a well, any time. The statute provides for a registration of a well thirty days after completion of the diversion, and mainly it accomplishes the registration of old and new wells. While the administration of the law is evidently expected to be performed by the State Engineer and his present staff, there is no provision made for the shutting down of a well of a junior appropriator, when such appropriator is pumping deterimentally to the right of a senior appropriator. The test of the statute will come when the senior appropriator attempts to obtain an injunction against the junior appropriator who has pumped the water to a level where it is impossible for the senior appropriator to extract it with his present equipment.

This raises the problem of the junior appropriator who digs a deeper well than the senior appropriator, thereby drying up his diversion, but with still a sufficient supply of water in the aquifer for both, if the senior in turn deepens his well. Is the senior entitled to either an injunction against the junior appropriator or to damages for the amount that a deeper diversion will cost him? Cases from other jurisdictions may give an answer to these questions left unanswered by the statute. In the case of *Wrathall* v. *Johnson*,[36] the Supreme Court of Utah, considered the question of whether a complaint of a senior appropriator against a junior appropriator who had drilled four wells on adjoining land and thus dried up the well of the plaintiff alleged a cause of action entitling the plaintiff to an

33. Wyo. Comp. Stat. 1945, Sec. 71-404-7.
34. Wyo. S. L. 1947, c. 107.
35. Memo, State Engineer to Governor of Wyoming, No. 22, 1946, "As provided by Chapter 139 of the 1945 Session Laws the State Engineer held hearings at Pine Bluffs, Torrington, Laramie and Cheyenne on September 24, 25, 26 and 27, 1946, to determine the needs and secure the opinions of those interested in the appropriation of ground water. Of those present at the Torrington hearing, the majority favored some legislation to provide for regsitration and regulation of wells. At the Laramie and Cheyenne hearings, opinions for and against ground water legislation were about equally divided while at Pine Bluffs in the vicinity of the greatest ground water development, those present were nearly all opposed to such legislation. However, some of the water users expressed themselves as of the opinion that some form of making a record of the wells should be established".
36. (1935) 86 Utah 50, 40 P.(2d) 755, 777.

injunction and damages. In holding that plaintiff's pleading stated a cause of action, the court said, "To permit an adjoining landowner to drive a well and by natural flow or by pumping or otherwise dry up a neighbor's well that had been driven and used for over thirty-five years invades the right of the neighbor, destroys his prior appropriation, injures his vested and recognized right, is actionable . . ."

In the Idaho case of *Noh v. Stoner*,[37] junior appropriators of underground waters drilled wells deeper than those of the senior appropriator. The junior appropriators argued that they were diverting hitherto unappropriated water, and that the senior appropriator's pumping equipment was not adequate. They contended that if this caused an injury to the senior appropriator, he must take reasonable measures to deepen his well at his own expense. These contentions were rejected by the court, which pointed out that to uphold such a theory might result in a race of well owners to deepen their diversions and ultimately end in complete depletion of the water supply. The court said, "If subsequent appropriators desire to engage in such a contest the financial burden must rest on them and with no injury to the prior appropriators or loss of their water". The junior appropriator must therefore pay for the deepening of a senior appropriator's shallow well.

The Colorado Supreme Court in the case of *Faden v. Hubbell*,[38] was dealing with percolating water captured by means of ditches and wells. Waters percolating on adjacent lands of the parties in the suit were captured in ponds and used to rear fish commercially. The plaintiff claimed that the defendant was trying to put plaintiff out of the fish raising business because plaintiff refused to join a marketing association formed by the defendant, and for this reason the defendant deepened water diversions to the detriment of the plaintiff. The defendant in this case was the prior appropriator. The court held that the defendant could not change or deepen its point of diversion to the detriment of the junior appropriator. The Court applied rules relative to surface waters, stating, "A junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation". The logical conclusion to be drawn from these cases is that the courts of other states will protect the diversion of a prior appropriator as against the junior who drills a deeper well.

In determining the rights of respective well owners, the courts will always be confronted with the question of reasonableness of the depth of the prior diversion. The question may well be framed, what is a reasonable depth for an irrigation well in the respective area, and was the well of the senior appropriator drilled to a reasonable depth? These are questions of fact to be deduced from the evidence in each case. The reasonable depth to divert water from an aquifer by large irrigation ditches such as those found on the North Platte Project may be considerably less than the depth of extraction from an aquifer presumably fed from mountain ranges, such as those in the Pine Bluffs area. If the well of the

37. (1933) 53 Ida. 651, 26 P.(2d) 1112, 1114.
38. (1933) 93 Colo. 358, 28 P.(2d) 247, 251.

senior appropriator was reasonably deep, perhaps he should have a claim for damages if he has to deepen it subsequently due to the extraction of water by a junior appropriator. It would not seem fair on the other hand to award him damages if his well was unreasonably shallow when first constructed.

In discussing the question of reasonableness of diversion of surface waters, the California court in *Waterford Irrigation District v. Turlock Irrigation District*[39] stated, "The mere inconvenience, or even the matter of extra expense, within limits which are not unreasonable, to which a prior user may be subjected, will not avail to prevent a subsequent appropriator from utilizing his right. There must be a substantial, as distinguished from a mere technical or abstract, damage to the right of the prior appropriator by the exercise of the subsequent appropriator of his right to entitle the former to relief against any attempt of the latter to utilize his right". And where such method of diversion was found reasonable, the right of the senior appropriator has been protected against the diversion of the junior appropriator. Thus in the case of *Bowles Reservoir Co. v. Bennett*,[40] the Colorado Supreme Court found, ". . . the plaintiff's adjudicated senior appropriations, both for its ditch and its reservoir, which have always been enjoyed by gravity, have been injuriously affected and practically nullified by the defendants, who by pumping the water from the reservoir and using the same for irrigating their lands, have deprived the senior appropriator of the enjoyment of its senior right. The plaintiff, having the senior adjudicated right to use the water from its reservoir, may not, against its will, be compelled to bear the expense of pumping the water upon its lands which by gravity would reach the same were it not that the defendants' by pumping the water from the reservoir, had diverted it to their own use and prevented the plaintiff from the enjoyment of its prior right to have the water thereof flow by gravity upon its lands which had been thus irrigated thereby before the defendants resorted to their plan of pumping".

The Arizona Supreme Court in the case of *Prima Farms v. Proctor*,[41] granted relief by requiring the junior appropriator of an underground stream to deliver, through its means of diversion, the water requirements of a senior appropriator, when the junior, by means of subsequent diversions, ruined the prior appropriator's well by drying it up. The well of the senior appropriator was shown to be near the outer edge of the underground stream, and he could not obtain water even by deepening his well. The court stated that the rule of prior appropriation applied to an underground stream of water the same as it applied to surface waters, and that a prior appropriator had the same right to protection of his means of diversion as did an appropriator of surface waters. The court also pointed out that the senior appropriator has the right to have the underground water at the same level as when he originally made his diversion, and if the junior appropriator withdraws water until it is not available for the senior appropriator the junior must provide water for the senior.

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39. (1920) 50 Cal. A. 213, 194 Pac. 757, 761.
40. (1932) 92 Colo. 16, 18 P.(2d) 313, 315.
41. (1926) 30 Ariz. 96, 245 Pac. 369.

Conflicting interests between appropriators of underground water could be largely eliminated by requiring the potential underground water users to obtain permits for an appropriation from the State Engineer *before* drilling a well. The permit would be granted after it was determined that there was sufficient water available for beneficial use of the applicant, and that the well was to be reasonably deep. Such an addition to the law would solidify the property rights of the underground appropriators, as well as secure the rights of surface appropriators of water as against the underground users. Such an amendment would conform with the general purpose of protecting the water resources of the state, in that they might be developed to supply the greatest amount of beneficial use to the greatest number of irrigators. The data to be obtained from the drilling of wells would soon demonstrate the boundaries and capacities of underground basins, and use of the water will determine the recharge capacity. Thus the permit to be issued in advance of the drilling of a well would be an effective brake on the overdevelopment of a water producing area to the detriment of the prior appropriator.

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APPLICATION OF STANDARDS FOR TITLE EXAMINATION TO CONVEYANCES BY STRANGERS TO TITLE

The WYOMING STATE BAR has adopted *Standards For Title Examination*[1] in order to achieve uniformity of treatment in minor errors of record title among title examiners.[2] The ambiguity in meaning of *Standard No. Four* leads to a confusion which defeats the purpose for which the Standards have been adopted. The Standard states:

> "Stranger to Title—Instrument By.
>
> Problem: If a deed or encumbrance appears in the chain of title executed by one who has no record interest, is such a deed or encumbrance to be considered a defect in the title?
>
> Answer: No."

"Chain of title" has been defined as those "successive conveyances commencing with the patent from the government or some other source and including the

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1. (1947) 1 Wyoming Law Journal 32. Standards adopted at the 1946 meeting of the State Bar Association. "The pioneer state in state wide formulation of standards was Connecticut which published its standards in 1937. The Real Estate section of the American Bar Association in 1938 sponsored a movement for adoption of such standards in all states where the title opinion method is employed. Kansas and Colorado and a number of other states have followed Connecticut's example and the move is spreading." (1945) 24 Neb. L. Rev. 120. Texas and Nebraska have adopted similar standards. See (1945) 8 Tex. B. J. 550; (1945) 24 Neb. L. Rev. 120.
2. "Your Committee believes that lawyers generally, in examining Abstracts of Title, require minor defects in instruments to be corrected because they know that in time other lawyers may examine the same Abstract of Title, and are likely to require these minor defects to be corrected, notwithstanding the fact that they do not constitute any real hazard with respect to the merchantability of the title.
"Your Committee believes that the formulation and adoption of set of standards for Title Examination by the Wyoming State Bar will serve to greatly alleviate if not dispense with entirely the vicious circle which arises from this situation." Report, *Committee on Standards For Title Examination.* (1947) 1 WYOMING LAW JOURNAL 31.