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Constitutionality of the Wyoming Underground Water Statute

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NOTES

CONSTITUTIONALITY OF THE WYOMING UNDERGROUND WATER STATUTE

The Wyoming Legislature enacted an underground water statute in 1947 which provides that the reasonable use of all underground water in the State is a matter of public interest[1] and that no interference will be permitted with any existing right to such waters when beneficially and economically applied.[2] The statute requires that those who have developed underground water must file data concerning same.[3] The State Engineer is then empowered to determine the scope of underground water formations, and to give notice of his findings to the State Board of Control, who will adjudicate the rights of the users.[4] After hearings and gathering of proof by the Board, a record of priorities of appropriation shall be made and certificates shall be issued to all water users.[5]

Although the Wyoming act has not been judicially contested, similar legislation has been subjected to constitutional objections in the courts of other states. It is the purpose of this paper to determine, in the light of constitutional provisions and judicial decisions applicable both in Wyoming and in other States where the question has arisen, the validity of the act under consideration.

The applicable Wyoming constitutional provisions are that "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the porperty of the State,"[6] and subse-

1. Wyo. Sess. Laws 1947 c. 107 sec. 1.
2. Id. at sec. 2.
3. Id at sec. 5.
4. Id. at sec. 9.
5. Ibid.
6. Wyo. Const. Art. VIII, sec. 1.

quent provisions placed the power of supervision[7] and the power of control[8] over "waters" of the State in the State. It is also provided that priority of appropriation for beneficial use shall give the better right.[9]

Inasmuch as it has been said that the declaration of either the court or the legislature as to the use and ownership of waters constitutes a vested right, it is well to broadly review the various precepts which the courts have applied in this regard. There are four possible rules concerning the use of underground waters. The English Rule is that which holds that the landowner has an absolute ownership in underlying percolating waters and a right to extract such water at will.[10] The American or Reasonable Use Rule provides that the landowner's right to take water from the underground basin is not unlimited, but is based on the rights of his neighbor to use same.[11] The rule of Correlative Rights provides that the landowner's right to use underground water is determined by the measure that his surface land bears to the amount of underground water available, both as to his needs and the needs of others.[12] The rule of Prior Appropriation is an application of the same principle applicable to surface waters.[13]

In the Wyoming case of *Hunt v. City of Laramie*[14] the dispute involved the right to the surface water flowing from an artificially developed spring as between the landowner upon whose land the water had been developed and an adjoining landowner upon whose land the water also flowed. The Supreme Court held that the waters in question were not subject to the law of appropriation contended for by the adjoining landowner, inasmuch as they had been developed by digging into the subsurface formation. The court said that "percolating water developed artificially by excavation and other artificial means . . . belong to the owner of the land upon which they are developed."[15]

Due to the *Hunt* decision, it has been said that Wyoming follows the English Rule in respect to the use of underground waters.[16] If that were true, the statute under consideration would likely be attacked on the ground that it is violative of the Wyoming constitutional provisions that "no person shall be deprived of . . . property without due process of law,"[17] and that "private property shall not be taken . . . for public or private use without just compensation."[18]

It is significant that in the case which announced the English Rule the landowner there sued had deepened his mine equipment below the depth of his neighbor's equipment, causing the common water table to lower to the detriment of the neighbor.[19] In the *Hunt* case the dispute involved the right to the waters on

7. Wyo. Const. Art. VIII, sec. 2.
8. Wyo. Const. Art. I, sec. 31.
9. Wyo. Const. Art. I, sec. 33.
10. Acton v. Blundell, 12 M. & W. 324, 152 Eng. Rep. 1223 (1843).
11. Note, 1 Wyo. L. J. 114 (1947).
12. Id. at 115.
13. Ibid.
14. Hunt v. City of Laramie, 26 Wyo. 160, 181 Pac. 137 (1919).
15. Id. at 169, 181 Pac. at 140.
16. Hutchins, Selected Problems in the Law of Water Rights in the West 264 (U. S. Dep't Agric. 1942); Note, 1 Wyo. L. J. 116 (1947).
17. Wyo. Const. Art. I, sec. 6.
18. Wyo. Const. Art. I, sec. 33.
19. Acton v. Bundell, supra note 10.

the surface after they had been artificially developed by digging at a shallow depth.[20] An analysis of the *Hunt* case may prove that the waters there involved were developed waters, which represent an increase in the surface supply, and which are so developed that the flow of a natural spring is increased as a result of the improvement by artificial means.[21] Such improvements result in adding water to a source of supply, such as a stream, and also result in the acceleration of the flow of water which would have reached the stream in any event but at a later time.[22] It has been held that one who actually develops a new supply of water has the first right to its use.[23] Thus it could be strongly contended that the Wyoming court in the *Hunt* case was not applying the English Rule, but rather the rule applicable to developed waters.

The courts of other States which have adopted the prior-appropriation of underground water doctrine have been confronted with many of the problems of constitutionality confronting the Wyoming statute.

The constitutional provision of Utah reads that "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose are hereby recognized and confirmed."[24] The Utah Supreme Court in 1900 held that percolating water in privately owned land is not public water and hence not subject to appropriation.[25] The same rule was subsequently upheld.[26] An 1880 statute[27] was amended in 1933 to read that "All waters in . . . this State . . . whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."[28] This statute was directly in issue when the case of *Wrathall v. Johnson*[29] was decided. The court pointed out that the constitutional provision made no exceptions as to surface, subterranean or percolating waters, and stated that "If there is no movement of this so-called 'percolating water', there is no controversy; it is simply there and not a subject of appropriation under any meaning given to the law. . . . However, if there is movement of water through the soil, be it ever so slow it is usually found by tracing it from the immediate source of supply through the feeders to the ultimate source."[30] The court construed the statute by interpreting it thus: The waters of streams . . . or other sources of supply . . . whether or not flowing above or under the ground in known or defined channels, etc.[31] The court said that because a lake, a stream, a saturated area, an artesian basin, or other source of supply is under the ground does not exclude it from other source of supply. One concurring Justice disagreed with this theory on the ground that inasmuch as the court had previously declared underground water to be the absolute property of the land-

20. Hunt v. City of Laramie, supra note 14.
21. State Water Law in the Development of the West 23 (National Resources Planning Board 1943).
22. Ibid.
23. Ibid.
24. Utah Const. Art. XVII, sec. 1.
25. Willow Creek Irrigation Co. v. Michaelson, 21 Utah 248, 60 Pac. 943 (1900).
26. See Horne v. Utah Oil Refining Co., 59 Utah 279, 202 Pac. 815 (1921).
27. Laws of Utah 1880, c. 20, sec. 6.
28. Utah Code Ann. 1943, Vol. 5, sec. 100-1-1.
29. Wrathall v. Johnson, 86 Utah 50, 40 P. (2d) 755 (1935).
30. Id. at 764.
31. Id. at 779.

owner it may have even then been too late for legislative action declaring such waters to be publicly owned under the police power. He declared that it would be a taking of private property without compensation and seriously unsettle rights which had become vested.[32]

In the light of the *Wrathall* decision and the liberal interpretation which the Utah court applied to the statute there, it would seem that the same court would have less difficulty in upholding the Wyoming statute, inasmuch as the Wyoming constitution placed the power of supervision and the power of control over "waters" of the State in the State. It is probably true that the Utah decision amounted to judicial law making inasmuch as the English Rule had twice previously been declared by the court as applicable to private property.[33]

The New Mexico constitution, after declaring all existing rights to the use of waters of the state for beneficial purpose confirmed,[34] provides that the unappropriated water of every "natural stream, perrennial or torrential, within the State . . . is hereby declared to belong to the public and to be subject to appropriation. . . ."[35] In a 1930 case,[36] it was argued that the statutory and constitutional inclusion of specific waters, as subject to appropriation, amounted to an exclusion of all other waters. The court rejected this argument, stating that "The declaration of both courts and legislature, and, subsequently of the Constitution, that priority of appropriation should determine the right to the use of the waters of running streams, did not necessarily exhaust the principles underlying such declarations. . . . Legislatures indeed adopt general laws for future application, but, practically, only as situations develop requiring legislative action."[37] The court disposed of the vested rights argument by pointing out that the claimed right to the underground water had never been declared in that jurisdiction, and that the English Rule was not applicable to conditions in that State. That the question as to the exclusiveness of the enumerated waters is unsettled in Wyoming was brought out in a 1935 case when the court said that ". . . The Legislature, even if it could lawfully do so, has not attempted to go beyond the terms of the Constitution, and has made no provision for the appropriation of waters other than those mentioned in the Constitution."[38]

The Constitutional provision of Colorado declares only the water of every natural stream to be public water subject to appropriation.[39] Notwithstanding the fact that the Constitution and statutes of that State have apparently limited the priority of appropriation system to the waters of natural streams, whether surface or subterranean, the Colorado Supreme Court has held that the same law and the same rules apply to the appropriation of underground waters which are not

32. Id. at 801.
33. See note 25, supra.
34. N. M. Const. Art. 16, sec. 1 (Bobbs-Merrill 1941).
35. N. M. Const. Art. 16, sec. 2 (Bobbs-Merrill 1941).
36. Yeo v. Tweedy, 34 N. M. 611, 286 Pac. 970 (1930) (reversed on procedural ground).
37. Id. at 973.
38. See State v. Hiber, 48 Wyo. 172, 44 P. (2d) 1005, 1008 (1935).
39. Colo. Const., Art. XVI, sec. 5.

and cannot be a part of a natural stream.[40] While this holding also apparently amounts to judicial law making, it would seem that under the circumstances a like holding under the Wyoming Constitution would be nothing more than a liberal interpretation.

The words "other collections of still water" which appear in the Wyoming constitutional provision concerning the enumeration of certain waters as the property of the State[41] have not been construed. Inasmuch as these words follow the word "lakes" an argument may be put that the constitutional draftsmen intended that by the injection of these words, percolating waters[42] were to be included, as distinguished from waters flowing in defined subterranean streams.[43] The latter waters have universally been held to be appropriable on the grounds that they are underflows or subflows of a surface stream, flowing in known and defined channels.[44] While it has been said that all ground waters are generally in motion, flowing through the interstices of the soil as a result of geological conditions and hydrostatic forces,[45] nevertheless, percolating waters, particularly those collected behind impervious stratum, are relatively "still" as compared to ground waters flowing in defined subterranean streams, in much the same way that lake water is still as compared to waters of a surface stream.

From the foregoing considerations, it would seem that, given a liberal constitutional construction as distinguished from a strict construction, the act under consideration is valid.

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CAN CO-LESSEES UNDER AN OIL AND GAS LEASE COMPEL A PARTITION IN KIND?

In regard to the rights of parties holding undivided interests in fee simple to the surface and minerals, or minerals only, it is well settled that if there is no known oil and gas in the premises, a partition in kind may be granted to a co-tenant,[1] and it has been held that even though there was a possibility of the existence of oil and gas, a partition in kind may be granted where there was no evidence of injury to a co-tenant as the result of the partition.[2] Generally, if a partition in kind would result in an injury to one or more of the co-tenants, partition will

40. Ripley v. The Park Center Land and Water Company, 40 Colo. 129, 90 Pac. 75 (1907); Dalpez v. Nix, 96 Colo. 540, 45 P. (2d) 176 (1935).
41. Wyo. Conts. Art. VIII, sec. 1.
42. Hutchins, supra Note 16, at 152 (percolating waters are waters in ground channels still undefined and unknown).
43. Ibid (waters flowing in known and defined underground channels having characteristics of surface watercourses).
44. Ibid.
45. Id. at 146.

1. Henderson v. Chesley, 273 S. W. 299 (Tex. Civ. App. 1925); Collier v. Collier, 184 Okla. 38, 84 P. (2d) 603 (1938); Wolfe v. Stanford, 179 Okla. 27, 64 P. (2d) 335 (1937); Wight v. Ingram-Day Lumber Company, 196 Miss. 823, 17 So. (2d) 196 (1944).
2. Tuggle v. Davis, 292 Ky. 27, 165 S. W. (2d) 844 (1942).