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The Transfer of Water Rights for Use in the Oil Industry

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COMMENTS

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Introduction

Due to an ever-increasing demand for petroleum products in our modern industrial society, the petroleum industry is constantly called upon to expand its spheres of operations so that the present supply will meet the growing demands. Along with this increased demand for oil, there has been a corresponding demand for water and water conservation, and, as a result of these trends, there has been a constant need to examine the availability of water for use within the oil and gas industry.

The primary focus of this article is an examination of the basic rights to the use of water within the petroleum industry and the extent to which state water law allows changes in the use of water for its appilcation in the development of oil resources. In particular, this study will examine both the common-law doctrine of riparian rights and the statutory doctrine of prior appropriation as these two doctrines affect the acquisition of water rights in the West.[1]

The importance of the acquisition of water rights by the petroleum industry is complicated by the historic reliance upon irrigation in these states. "In 1955 almost 90 per cent of the withdrawals in the eleven western states were for irrigation purposes and less than 9 per cent were for industrial uses."[2] As the West becomes more industrialized, water uses will have to be shifted to sustain the new priorities.

The Flexibility of the Appropriations System

This need for a change in priorities was, in fact, one of the main stimulants in the development of the appropriations

1. *See* Trelease, Water Law 1-2 (1967).
2. Fox, *Water: Supply, Demand and the Law*, 32 Rocky Mt. L. Rev. 452, 456 (1960).

system in the West. Thus, where the water available was far short of the amount needed for irrigation of all arid lands, the appropriation doctrine which placed greater emphasis upon beneficial use proved to be satisfactory in distributing water.[3]

To the extent that adequate water is available and unappropriated, water may be secured for use in oil recovery operations by complying with the individual state requirements necessary for appropriating water. These requirements have been defined by one writer as being physical acts necessary for a valid appropriation. They include: an intent to appropriate, notice of the appropriation, compliance with state laws, diversion of the water from a natural stream, and its application, with reasonable diligence and within a reasonable time, to a beneficial use.[4]

One question which frequently arises in this context is whether a lessee can acquire an appropriative right. One court has taken the minority view. In the words of the court it stated:

> It would be contrary to the spirit, as well as the letter of our law, to hold that it is possible for a temporary occupant of lands, who has no intention or ability of acquiring a permanent title thereto, to make a valid appropriation of a water right which must be necessarily appurtenant to that land.[5]

The majority rule, on the other hand seems to be that ownership of land is not of itself a prerequisite for the right to appropriate water. The rule has been defined in the following manner:

> A lessee, then, can make an appropriation in his own behalf, which is his property unless he is acting as agent for the lessor; and his right to transfer the appropriation to other land on the conclusion of his lease will then depend upon the State rule governing transfers of place of use and perhaps point of diver-

3. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 64, 65 (1942).
4. Trelease, *supra* note 1, at 28.
5. Tattersfield v. Putnam, 45 Ariz. 156, 41 P.2d 228, 235 (1935).

> sion, and upon the physical feasibility of making the change.[6]

Another problem incident to the acquisition of water rights under the appropriation system is that the right to be valid must be acquired for a beneficial purpose. In this respect, there has been little question as to whether the development of oil resources is a beneficial use even though western water law was molded to serve the needs of irrigated agriculture. One writer describes the purposes for which a right to water may be acquired in the following terminology:

> The usual purposes for which rights to the use of water may be acquired are mining, manufacturing and industrial uses generally, development of hydroelectric power, propagation of fish, irrigation, stockwatering, municipal, and domestic uses. All these have been held to be beneficial uses within the meaning of the statutory term. There can be little question about any proposed use which has as its object the substantial benefit or improvement of the appropriator's lands or which renders them usable, and which is a reasonable use in view of all the circumstances.[7]

Needless to say, the acquisition of an appropriative right to use water under the doctrine of prior appropriation would seem virtually impossible in areas where the waters are already over appropriated.[8] This, however, is not an accurate observation in that the basis of an appropriation system is its flexibility in permitting changes in the use of water.[9] This policy of flexibility permits the use of water to shift to more desirable and economic uses. The processes by which the use of water is changed has been described in this manner:

> Problems of reallocating the water from the purpose of the original appropriation to a new and higher purpose are presumably handled as are similar prob-

6. Hutchins, *supra* note 3, at 311.
7. *Id.* at 314.
8. Walker, *Problems Incident To The Acquisition, Use and Disposal of Repressuring Substances Used In Secondary Recovery Operations*, 6 ROCKY MT. MIN. L. INST. 273, 289 (1961); Trelease & Lee, *Priorities and Progress —Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 2 (1966).
9. Trelease & Lee, *Priorities and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 6 (1966).

> lems relating to land resources. Today, land originally patented to an individual as a homestead and used for agricultural purposes might be better used as a factory site or as a city airport. No administration runs the farmer off his lands and terminates his property rights on the ground that he is making an inefficient and wasteful use of a natural resource. The industrialist simply offers to buy the land, tendering enough money to make it attractive to the farmer to leave . . . . The sale will be made to the highest bidder and the land will serve its optimum use. In theory the same process holds true for transfers of western water rights held by irrigators, when industrial or municipal uses are more valuable. If the industrialist or the city cannot pay the price, then by definition the transfer of the water to them would not produce greater benefits. If in fact, it will produce greater benefits, the value to the purchaser is greater than the value to the seller, and the transfer can be made as in the purchase of the land. The movement of water to its highest beneficial use is supposed to be thus insured by economic forces, rather than by legal processes or governmental intervention.[10]

Thus, it may be possible for a resource developer to purchase a water right from a prior appropriator and then change its use subject only to state statute.[11] This general rule, allowing an appropriator to change the purpose of his use, is modified to the extent that procedures for obtaining permission to make a change are dependent on the specific state water law.[12] These procedures vary from those states which prescribe administrative agency action[13] to states which require a filing of an amended permit[14] to states which require court action to prohibit a change in the purpose or use of the water.[15]

Furthermore, the privilege granted by various state statutes to change the purpose for the use of water is limited

10. *Id.* at 4-5.
11. Hutchins, *supra* note 3, at 378.
12. Trelease & Lee, *supra* note 8, at 22.
13. *Id.* at 21.
14. *Id.* at 22.
15. *Id.* at 22.

by the qualification that such change may not be made to the detriment of others having superior rights.[16] The rule has been stated:

> that an appropriator of water may at his discretion change the use to which his water is put, provided it continues to be devoted to some legitimate beneficial use, and provided the change in its use does not injure those having superior rights.[17]

The purchase of a water right and the subsequent change of use would seem to create a problem in those states, such as Nebraska, Nevada, Oklahoma, South Dakota and Wyoming, where statutes have restricted changes in the purpose of use to varying degrees.[18] These states generally restrict the change in uses providing that the water right shall attach to and follow the land to which it is used. In the event that the water right becomes impractical to use either beneficially or economically at the place to which it is appurtenant, the right may be severed from the land by obtaining approval and complying with applicable state water law.[19]

The prohibitive character and effect of these state statutes restricting the change of water use varies. In Nevada the statute is applicable to all water used in the state, while in Oklahoma the statute applies only to water used in the state for irrigation purposes. The Wyoming statute[20] provides that water rights for the direct use of the natural, unstored flow of a stream cannot be detached from the lands, place, or purpose of use for which acquired, without loss of priority. In Wyoming, no provision is given for a change in water use when continued use has become inefficient or wasteful.

A leading authority, however, has suggested that the transfer of water rights within Wyoming is not as severe as popularly supposed.[21] Exceptions to the Wyoming Water Act

16. Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954).
17. Orange County Water District v. City of Riverside, 173 Cal. App. 2d 137, 343 P.2d 450, 483 (1959).
18. NEB. REV. STAT. § 46-122 (1960); NEV. REV. STAT. §§ 533.040, 533.325 (1960); S. D. CODE § 61.0128 (Supp. 1960); OKLA. STAT. tit. 82, § 34 (1961); WYO. STAT. § 41-2 (1957).
19. *See* NEV. REV. STAT §§ 533.040, 533.325 (1960).
20. WYO. STAT. § 41-2 (1957).
21. Trelease & Lee, *supra* note 8, at 5.

by virtue of other sections have made inroads into the "no-change" character of the statute.

The Wyoming Statute provides that water reservoir rights are freely alienable.[22] Therefore, a person wishing to develop oil or gas resources may buy or lease essential water from persons who own reservoir rights. This pattern of freely transferable reservoir rights is also followed in all states applying appopriation law.[23] Although the Wyoming Statute does not allow for condemnation of water rights for industrial purposes, it does imply that these industrial users may buy rights on the open market.[24] This, in effect, gives the resource developer another avenue from which he can obtain water rights without altering the priority of the right.[25]

In addition to these sources, the oil or gas lessee in Wyoming may capture and impound surface water, or diffused surface water as it is sometimes called.[26] This judicial decision seems to reinforce the general rule that diffused surface waters are not subject to appropriation[27] in the absence of specific statutory language to that effect.

THE FLEXIBILITY OF THE RIPARIAN SYSTEM

In those states in which riparian law controls the use of water, transferability to alternative uses and users is dependent upon the interpretation of the doctrine by each state.[28] In those states which follow the "natural flow" riparian doctrine any substantial withdrawal from the stream in quality or quantity is unreasonable and, consequently, enjoinable by downstream riparians. Furthermore, no diversion to non-riparian lands is permitted and such diversion may be enjoined by downstream riparians even though there is no direct interference with his use of water.[29] The riparian system

22. WYO. STAT. § 41-37 (1957).
23. *See* Comment, *The Nature Of A Reservoir Right*, 3 LAND & WATER L. REV. 443 (1968).
24. Trelease & Lee, *supra* note 8, at 18.
25. Newcastle v. Smith, 28 Wyo. 371, 205 P. 302 (1922).
26. Riggs Oil Co. v. Gray, 46 Wyo. 504, 30 P.2d 145 (1934).
27. Hutchins, *supra* note 3, at 112.
28. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEXAS L. REV. 24, 33 (1954).
29. 6-A American Law of Property § 28.56, at 161-162 (A. J. Casner ed. 1954).

of water law in this instance seems to be unduly restrictive and its application will restrict the availability of water for the development of oil and gas resources.

The "reasonable use" doctrine of riparian law seems to be more flexible in allowing transferability of water rights to alternative uses. The "reasonable use" theory allows the riparian landowner the right to use so much of the water that will not unreasonably interfere with the use of others. Thus, his use generally can only be enjoined by a lower riparian when it is excessive or otherwise unreasonable.[30]

The fact that a state by judicial interpretation or statute follows the "reasonable use" doctrine will not prevent a lower riparian from enjoining nonriparian uses even though he can show no harm.

> This is not surprising when one reflects that outside of those western states which permit appropriated waters to be carried to lands noncontiguous to the source stream, a nonriparian has no basis whatever for any kind of water right.[31]

Two states[32] have taken a minority view and have held that nonriparian use of water is not unreasonable per se. This view would seem to be more conducive to shifts in water uses and has been beneficial in allowing the development of oil. It must be kept in mind that the court limited its holding in Oklahoma by stating that while nonriparian uses are not generally unreasonable per se, other circumstances, such as the quantity of water, might make the use unreasonable.

SUMMARY

In the light of the law with respect to watercourses, it would seem that the requirement for more water in the mineral-industrial segment of our society will become more critical. As the demand increases in areas where the water supply is fully utilized, potential users, such as the petroleum in-

30. *Id.* at 163.
31. *Id.* at 163.
32. Smith v. Stanolind Oil & Gas Co., 197 Okla. 499, 172 P.2d 1002 (1946); Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927).

dustry, will find it necessary to compete with prior users for the available supplies.

The ultimate answer to the problem of securing necessary water for new uses lies in a relatively free market in which the transfer of water rights is not impeded by the doctrines of appropriation or riparian water rights. An appropriation system which does not restrict the transfer of water rights enables the potential user to purchase necessary water in the market place. A riparian doctrine which permits nonriparian owners to establish a water right also allows the mineral-industrial developers to obtain water necessary for their industries.

In the alternative, other approaches, such as storing necessary water or developing conservation practices, will be necessary if an adequate supply of water is to be provided for the increasing industrialization and development of the West.

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