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## RIGHTS OF THE ORIGINAL APPROPRIATOR TO RECAPTURE WATER USED IN IRRIGATION

In the arid and semi-arid regions of the West, water is precious. Here the law contemplates the conservation of water so that it may be subjected to the greatest practical use. Actually, only a small amount of the water diverted from streams to be used in irrigation is beneficially consumed in plant growth. After application to the soil, the water may collect in lower levels on the lands of the appropriator forming swamps; or it may percolate or drain naturally, thereby escaping from his lands. The irrigation water may also escape from the appropriator's reservoirs or canals before the water can be beneficially used in irrigation. This article is concerned with the right of the original appropriator to recapture these waters which escape from his lands or structures.<sup>1</sup>

In general, the original appropriator may recapture water before it leaves his land or prevent its escape. He is under no obligation to continue wasting the waters. The rights of an appropriator are not affected by the fact that the waters have once been used. Most courts require that the recapture be for a beneficial purpose, and some require the element of good faith.

This right to recapture by the original appropriator on his own land is well settled as against a claim by a lower landowner who has intercepted and beneficially used the escaping water before it reaches a stream.<sup>2</sup> A number of states including Colorado, Oregon, Idaho, Montana, and Nebraska permit appropriation of waste waters abandoned by the original appropriator, but such appropriations are subject to the right of the original appropriator to cease wasting the water. Neither can this right to recapture be lost by abandonment, for it is only the specific particles of water allowed to escape from the premises and run to waste that is abandoned, not the incoming waters or particles of water to be acquired in the future.<sup>3</sup> In other words, while there can be abandonment of water which has left the appropriator's lands, the right to cease the waste is never lost, no matter how long the waste has continued.

In some states, notably Colorado and Utah, appropriators of a stream acquire a right to have the waste water continue to the stream, if the water was originally diverted therefrom.<sup>4</sup> This right, however, does not take

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1. The article does not cover that field of law concerning return flow originally diverted from a stream system or watershed foreign to the stream system to which it would return. Reference, however, has been made to cases involving such waters.
  2. *Garns v. Rollins*, 41 Utah 260, 125 Pac. 867, 872, Ann. Cas. 1915 C, 1159 (1912). Here, the court stated that the law is well settled, in fact the authorities all agree, that one landowner receiving waste water which flows, seeps, or percolates from the land of another cannot acquire a prescriptive right to such water nor any right (except by grant) to have the owner of the land from which he obtains the water continue the flow. See also, *Burkart v. Meiberg*, 37 Colo. 187, 86 Pac. 98 (1906).
  3. *Wiel, S.C. Water Rights in Western States* (3rd ed. 1911), p. 51.
  4. *Comstock v. Ramsey*, 55 Colo. 244, 133 Pac. 1107 (1913). *Rasmussen v. Moroni*, 56 Utah 140, 189 Pac. 572 (1920).

effect until after the original appropriator allows the irrigation water to waste from his lands or structures. But once the water is released it must be allowed to return to the stream.

A different problem is presented when a natural stream flows through the lands of the appropriator. If he allows drainage or seepage to waste into the stream, it becomes subject to prior appropriations along the stream. Upon entering the stream, the drainage water becomes public water of the state and is no longer waste or seepage, though it may have been such previously.<sup>5</sup> In *Ramshorn Ditch Company v. United States*,<sup>6</sup> involving the North Platte Reclamation Project which encompasses lands on both sides of the North Platte River, the Federal Court recognized that the return flow, allowed to reach the river and commingle with its water is considered a part of the river inuring to the benefit of prior appropriators thereof. It was so held in a recent Utah case, *Lasson v. Seely*.<sup>7</sup> Here, the waters drained and seeped naturally into a slough, which was a water-course, flowing from the appropriators' lands to the lands of a lower owner who had an appropriation for the use of the slough waters. The landowner built a dam across the slough to recover the drainage and seepage. The court held that the water which had entered the stream was then out of the landowner's control and could not be recaptured from the stream without reappropriation. Thus, the original appropriator cannot build a dam upon the stream flowing within his lands to reclaim waters lost to the stream by natural drainage or seepage.

However, if the appropriator continues in possession and control of the waste water, as by collecting it in a drain, and deposits it into the stream with the intention of using the stream as a conduit, such water is still private, belonging to the appropriator and not the public. The water may be commingled with the waters of a stream, but it must be accurately measured when entering the stream and the loss due to evaporation and other causes while flowing in the stream must be accounted for, so as not to injure downstream appropriators. Where the seepage arises in the stream, it is lost to the appropriator, for it is difficult, if not impossible, to identify the amount commingled with the waters of the stream. An interesting view was taken by the Supreme Court of Montana in the case of *Rock Creek Ditch and Flume Company v. Miller*,<sup>8</sup> regarding seepage water arising in a stream. The court stated that water used in irrigation, except that which escapes control and runs away upon the surface, sinks in the ground; and, less that part which is consumed by plant life, mingles with the soil and remains suspended therein, or by percolation reaches bedrock, which frequently is the bed of a stream. Becoming a part of the stream, it is available for further use, and subject to appropriation. The

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5. *Binning v. Miller*, 55 Wyo. 451, 102 P.2d 54 (1940).

6. 269 Fed. 80 (8th Cir. 1920). District court decision in 254 Fed. 842 (D. Nebr., 1918).

7. 120 Utah 671, 238 P.2d 418 (1951).

8. 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1921).

court said that seepage waters in this instance lose their identity, and ownership over them is lost. This is to be contrasted with often quoted words from the opinion of District Judge Dietrich in *United States v. Haga*.<sup>9</sup> In the absence of abandonment,

“ . . . one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purpose, is entitled to its exclusive control so long as he is able and willing to apply it to a beneficial use, and such right extends to what is commonly known as wastage from surface run-off and deep percolation. . . . Nor is it essential to his control that the appropriator maintain continuous actual possession of such water.”

Of course, even under this opinion there is still the difficult problem of identification of the seepage, a necessary prerequisite to the right of recapture.

Although the appropriator may lose his right to the waste water, which he allows to waste into a stream on his own lands, he may recapture the waste before it enters the stream. In the Utah case, previously discussed, *Lasson v. Seely*,<sup>10</sup> the court recognized the right of the original appropriator to recapture drainage on his own land before it entered the stream. But, when seepage is returning to the stream from which it was originally diverted, courts have encountered some difficulty in sustaining the right to recapture before the seepage enters the stream. The problem was recently before the Supreme Court of Montana in two separate cases involving the same parties and over the same dispute. The dispute first reached the court in the case of *Woodward v. Perkins*,<sup>11</sup> followed four years later by *Perkins v. Kramer*.<sup>12</sup> The appropriator attempted to divert water into “pot holes” for storage. The precise scheme failed and the waters seeped back toward the stream due to the porosity of the soil. The stream flowed through the lands of the appropriator, and by means of ditches next to the stream, he intercepted the seepage just before it entered the stream. Lower appropriators of the stream objected to his interference. In the first case the appropriator was denied the right to recapture. A majority of the court held that water seeping through the soil loses identity; and the seepage arising along the bed of a stream, as a part of its supply and source, is a part of the stream. The dissent set forth the issue as being one of identification of the seepage only, and held that the trial courts finding on this issue should be conclusive. Also, the dissent iterated the general rule that an appropriator may recapture waters before they escape from his land, and cited Montana cases in support.<sup>13</sup> Following

9. 276 Fed. 41 (D. Idaho, 1921).

10. Note 7 supra.

11. 116 Mont. 46, 147 P.2d 1016 (1944).

12. 121 Mont. 595, 198 P.2d 475 (1948). Defendant, Kramer, was a plaintiff in the previous case of *Woodward v. Perkins*, note 11 supra.

13. One of the cases cited is *Rock Creek Ditch and Flume Co. v. Miller*, note 8 supra, in which the general rule was stated to be, that an owner of the right to use the waste on his own private property, while in his possession, may collect it, recapture it, before it leaves his possession, but after it gets beyond his control, it thus becomes waste and is subject to appropriation by another.

this decision, the appropriator ceased diverting the water into the "pot holes" and the seepage arising in the drains disappeared. He again brought his cause before the court, the second case cited above, with demonstrative proof that the seepage collected in his drains was the same he had attempted to store. This time the court recognized his right to recapture the escaping waters and a commission of a manifest error in the former decision. A vigorous dissenting opinion accompanied this second case.

Often the seepage and drainage will collect in a natural depression on the land of the original appropriator, flowing naturally therefrom. The artificial flow may soon take on the characteristics of a natural watercourse and become subject to appropriation even in states not having statutes permitting appropriation of seepage and drainage waters.<sup>14</sup> But even these appropriations remain subject to the right of the original appropriator to recapture from the artificially created stream before the water leaves his premises.<sup>15</sup>

The appropriator may allow the waste waters to flow naturally from his premises; or, if necessary, he may construct a drainage system to take the waste from his land. The courts have applied two similar tests to determine whether the original appropriator may claim the right to these waters off his premises. The primary test is "abandonment". If the appropriator allows the water to escape from his premises with no intent to recapture, he has abandoned the right to reclaim.<sup>16</sup> Another test is whether the appropriator controls the waste leaving his land, thereby retaining possession.<sup>17</sup> Actually, the two tests have the same effect as to surface drainage, but when the water escapes by seeping underground and reappears on the lands of others a different result is reached with each test. If the original appropriator intended to recapture the escaping seepage, under the first test he has not abandoned the seepage and could reclaim it. By applying the control test he would no longer have any right to the seepage.

While the return flow from a single appropriator is usually insignificant, the amount of return flow from an irrigation district or federal project is very great in many instances, and the right of the project to recapture becomes a more serious problem.<sup>18</sup> The large amount of return flow created within the boundaries of a project, due to waste from irrigation or seepage from structures, either seeks existing streams or forms a stream of itself, constituting a watercourse. The right of recapture from these streams is dependent upon whether the project has abandoned its right to

14. *Binning v. Miller*, note 5 *supra*.

15. *Binning v. Miller*, note 4 *supra*.

16. *Schulz v. Sweeney*, 19 Nev. 359, 11 Pac. 253 (1886). *Milner Low Lift Irr. Dist. v. Eagen*, 49 Idaho 184, 276 Pac. 608 (1930).

17. *Hagerman Irr. Co. v. East Grand Plans Drainage Dist.*, 25 N.M. 649, 187 Pac. 555 (1920). See also, *Rock Creek Ditch and Flume Co. v. Miller*, note 8 *supra*.

18. *In Nebraska v. Wyoming*, 325 U.S. 589, 596, 65 S.Ct. 1332, 1341, 89 L.Ed. 1815, the Special Master's Report showed the amount of return flow from the North Platte Project to be 700,000 acre feet in 1927.

reclaim such waters.<sup>19</sup> The intention to abandon is essential and must be determined as a question of fact. The intention to recapture must exist at the time the seepage and drainage waters are allowed to escape from the control of the project.<sup>20</sup> Intention alone is insufficient. Within a reasonable time the project must pursue by some overt act to recapture the escaping water.<sup>21</sup> Of course, if the appropriator does abandon, he may recapture if no new rights to the water have been acquired.

The right of a project to recapture in the absence of abandonment is the prevailing rule, but in Colorado the rule is different where the water escapes from a project's reservoir or canal. In Colorado, once the water seeps from the reservoir or canal, and would return to the stream, it cannot be recaptured or intercepted but must be allowed to return to the stream.<sup>22</sup> Under this rule intention to recapture and diligence in attempting to recapture are immaterial.<sup>23</sup> But the Colorado rule applies only to seepage which merges or mingles with the underground water. In *McKelvey v. North Sterling Irrigation District*,<sup>24</sup> the waters from a ditch crossing a draw seeped through the bank of the ditch into the draw. The court, in upholding the right to recapture, stated that the water once lawfully in possession of the appropriator may, in the absence of an intent to abandon, be prevented from escaping, or may be recaptured while escaping. This case is distinguished from those cases involving seepage which commingles with underground waters in *Ft. Morgan Reservoir and Irrigation Company v. McCune*.<sup>25</sup> In *United States v. Tilley*,<sup>26</sup> the federal court held the Colorado view to be contra to the view taken by a majority of courts today.

The law regarding the appropriator's right to recapture escaping irrigation water is still in a formative stage. The problem will continue to present itself for a certain amount of waste from irrigated lands and irrigation structures is inevitable. As new appropriations continue to drain the available water resources of existing streams in the West, flows from irrigation projects and lands become more important; and much litigation can be expected over such waters in the future.

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19. *United States v. Ide*, 263 U.S. 497, 44 S.Ct. 182, 68 L.Ed. 407 (1924), involved recapture by the United States of seepage waters within its project which were flowing in what had been a dry gulch. The court stated that the law was clear, that the United States had a right to save and continue to use drainage, seepage, and waste waters of its project as long as such waters could be identified and had not been abandoned.

20. Intent to recapture must exist when the return flow becomes an artificial increment to the stream or is discharged into the stream: *Jones v. Warm Springs Irr. Dist.*, 162 Ore. 186, 91 P.2d 542 (1939). See also, *Ramshore Ditch Co. v. United States*, note 9 supra.

21. See cases cited in note 20 supra and also *United States v. Haga*, note 9 supra.

22. For the development of the doctrine in Colorado, see: *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107 (1913); *Durkee Ditch Co. v. Means*, 63 Colo. 6, 164 Pac. 503 (1917); *Trowel Land & Irr. Co. v. Bijou Irr. Dist.*, 65 Colo. 202, 176 Pac. 292 (1918); *McKelvey v. North Sterling Irr. Dist.*, 66 Colo. 11, 179 Pac. 872 (1919); *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improvement Co.*, 66 Colo. 202, 191 Pac. 129 (1920); and *Fort Morgan Reservoir & Irr. Co. v. McCune*, 71 Colo. 256, 206 Pac. 393 (1922).

23. *Fort Morgan Reservoir & Irr. Co. v. McCune*, 71 Colo. 256, 206 Pac. 293 (1922).

24. 66 Colo. 11, 179 Pac. 872 (1919).

25. Note 23 supra.

26. 124 F.2d 850, 858 (1941), certiorari denied, 316 U.S. 691 (1942).