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## The Right to Use Waste Water before It Re-Enters the Stream

Lesa Lee Wille

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avert some supposed but not actual danger. Admitting the state courts have a problem if they are to effectively curb subversive elements from entering their bars, nevertheless, such control cannot be exerted in derogation of the aforementioned rights. Possibly such control could be maintained under the ruling advanced in the *Anastaplo* case,<sup>49</sup> that is, failure to answer relevant inquiries justifies refusal to certify. However, there is some doubt that this ruling would be enforced in light of the suggestion in the *Konigsberg* case, that the applicant must first be expressly warned that he may be refused admission for this reason alone. Even in the event that the applicant was properly warned, there still exists some question regarding the Supreme Court's position if it were asked to uphold a state decision denying certification where the inquiries were not answered on the belief or grounds that they were privileged under the Constitution. The Supreme Court decision in the *Schware* case indicates that an applicant's good moral character will be determined upon his present standing rather than his somewhat distant past actions. In the final analysis the tenor of the recent Supreme Court decisions and the continued existence of a peace-time economy indicate the possibility of a more relaxed attitude by state bar committees in certifying applicants to the bar where there is some question concerning their present or past political views or associations.

ROSS MERLIN BEYER

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#### THE RIGHT TO USE WASTE WATER BEFORE IT RE-ENTERS THE STREAM

In the arid and semi-arid western states, the scarcity of and increasing need for water has focused attention on waste water. Waste water is water that has been permitted to waste or escape after it has served the purpose of the lawful claimant. It is also water that the lawful appropriator has allowed to seep from ditches, reservoirs, or canals and percolate from beneath his soil before the water can be beneficially used. Eventually, most of these waters will percolate or flow back to the stream from which they were appropriated. This article is concerned with the question of whether these waters can be appropriated after they have left the control of the original appropriator, and before they return to the stream from which they were appropriated.

In the recent Wyoming case of *Bower v. Big Horn Canal Ass'n*,<sup>1</sup> the plaintiff constructed drains and a ditch to collect seepage water from defendant's canal, and by pumping the water into a ditch and across a steel flume, he irrigated arid lands other than those upon which the seepage arose. The court held that such waters were subject to appropriation by

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49. At this time there is no record that *Anastaplo* has ever attempted to appeal the Illinois Supreme Court decision to the U.S. Supreme Court.

1. .... Wyo. ...., 307 P.2d 593 (1957).

him, subject to prescribed procedures and subject to the right of the canal association to terminate the source of supply and also subject to the rights of prior appropriators further down the stream, if it were proven that interception of this water materially damaged their prior rights.

Previous to the *Bower* case, the Wyoming Supreme Court had stated, in the case of *Binning v. Miller*,<sup>2</sup> that waste and seepage water, in the absence of statute to the contrary, could not be appropriated. The *Bower* case recognized that the court, when it made this statement, had merely meant that a person seeking to appropriate seepage water could not thereby secure a permanent right to continue to receive the water, since the original appropriator might be able to use more of the water on the land for which it was originally appropriated.

In determining the question of the right to appropriate waste and seepage water, the courts have had to weigh the rights of the appropriator seeking to appropriate the seepage and waste water against the rights of the upper owner from whose appropriation the waste accrued, against the rights of the lower prior appropriators on the stream, and against the rights of the lower subsequent appropriators on the stream.

The courts agree that the appropriator of seepage and waste water has no rights against the upper owner from whose appropriation the waste accrued. It is a settled rule, that the appropriator who originates the water upon his land may recapture the water for a beneficial use upon his premises at any time.<sup>3</sup> The courts of this region say that while that water denominated as waste water may be used after it escapes, no permanent right can be acquired to have the discharge kept up, either by appropriation, or a right by prescription, estoppel,<sup>4</sup> or acquiescence in its use while it is escaping, even though expensive ditches or works are constructed for the purpose of utilizing such waste water, unless some other element enters into the condition of affairs, other than the mere use of water.<sup>5</sup>

The next rights to be considered are those of the appropriators of waste and seepage water against the lower prior appropriators on the stream. The courts agree that where the waste water, on return to the stream, is necessary to supply the appropriation of prior appropriators, it cannot be intercepted by junior users before it reaches the stream.<sup>6</sup> The rights of a stranger to intercept and appropriate seepage of waste water in derogation of the rights of prior appropriators of the waters of a stream to which it would otherwise percolate was first presented in Colorado in the case of

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2. 55 Wyo. 451, 102 P.2d 54 (1940).

3. 11 Wyo. L.J. 39 (1956).

4. 2 Kinney on Irrigation and Water Rights, §§ 1121-1128, p. 2123.

5. *Tongue Creek Orchard Co. v. Town of Orchard City*, 131 Colo. 177, 280 P.2d 426 (1955). This court said that an owner of water rights is not obligated to continue to maintain conditions so as to supply water to appropriators of waste water from such owner's land at any time or in any quantity when acting in good faith.

6. 2 Kinney on Irrigation and Water Rights, § 661, p. 1152; *Hugh v. Porter*, 51 Ore. 318, 95 Pac. 732 (1908).

*Comstock v. Ramsey*.<sup>7</sup> In this case, one who had undertaken to appropriate water returning to a stream through percolation from irrigation ditches by purchasing the land between the ditches and the river, was held to acquire no rights in such seepage water against prior appropriators farther down the river whose supply of water was entirely dependent upon the return of such seepage water to the river. This decision was followed in *Black v. Taylor*<sup>8</sup> when the court held that where lands contain seepage, return flow, and percolating ground and surface waters, which if not intercepted or interfered with will become a part of and tributary to a stream, the owner of such land cannot dig and operate distributing and drainage ditches to collect, carry and use such water by diversion thereof for irrigation of dry land and for domestic purposes, in derogation of the rights of prior appropriators down the stream.

The law of Idaho<sup>9</sup> states that all ditches now constructed or to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams. Following this doctrine, the courts of Idaho have stated that subject to rights of owners or prior appropriators thereof, waste and seepage waters may be appropriated.<sup>10</sup>

The final rights to be considered, are those of the appropriator of waste and seepage water against the rights of the lower subsequent appropriators on the stream. Wyoming, in the case of *Bower v. Big Horn Canal Ass'n*,<sup>11</sup> stated that an appropriation of seepage water was superior to any claim of subsequent appropriators on the stream. There is no settled opinion in the western region regarding the rights of the appropriator of seepage and waste water against subsequent appropriators from the stream. In some states where this question has not actually been litigated, the statutes are so broadly constructed that they might very well allow this appropriation.<sup>12</sup>

Arizona, in the case of *Vantex Land and Development Company v. Schnepf*,<sup>13</sup> introduced a party whose rights have not been dealt with in this article, and who had not been ascribed any rights previous to this case. In this case, plaintiff, owner of land below that of defendant, had an appropriation of waste water that originated on the land above that of defendant and which flowed through a wash across the land of defendant to the land of plaintiff. Plaintiff sought to enjoin the defendant from intercepting such flow. The majority, denying the plaintiff relief, stated that an appropriation of waste water flowing from high lands did not obli-

7. 55 Colo. 244, 133 Pac. 1107 (1913).

8. 128 Colo. 449, 264 P.2d 502 (1953).

9. Idaho Code, § 42-107 (1948).

10. *Sebern v. Moore*, 44 Idaho 410, 258 Pac. 176 (1927).

11. Note 1 supra.

12. Utah Code Ann., § 100-1-1 (1943); Rev. Codes of Mont., § 7093 (1921); Ariz. Rev. Stat., § 45-101 (1956); Idaho Code, § 42-107 (1948).

13. .... Ariz. ...., 308 P.2d 254 (1957).

gate owners of intermediate lands to permit such water to flow over their land and that the defendant could stop the water when it entered his property and use it since he was under no obligation to deliver it to the plaintiff.<sup>14</sup> This case is inconsistent. Even though the plaintiff did not have an easement, he did have an appropriation, and when the court gave the defendant the right to use the water, it gave an upper landowner a right to water that had already been appropriated.

The Western Region is a growing agricultural region, and must use all the water it has at its disposal for maximum production. It has been stated that all over the region there are small amounts of water that are never used but which are allowed to continue to waste, generally because of the inability of persons to make valid appropriations.<sup>15</sup> The Wyoming court, in the *Bower* case, has held that this seepage and waste water could be appropriated and that such appropriation would be valid against all but prior appropriators. This decision should make it possible for water users in Wyoming to search out and use water that has, previous to this decision, been neglected.

LESA LEE WILLE

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#### RESIDENCE AND SETTLEMENT LAWS, THEIR EFFECT ON ELECTIONS, WELFARE AND THE RIGHT OF FREE MOVEMENT

The settlement and residence laws of this country affect each of us in a very real way. We may be required to reside in a state, county and precinct a certain period of time before we can exercise our voting privilege,<sup>1</sup> hold office, have full use and protection of the courts, are permitted to practice many professions, secure public assistance, medical<sup>2</sup> and psy-

14. The dissent quoted Ariz. Rev. Stat., § 45-101 (1956), which says, "The water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter." The dissent contended that the water in this case belonged to the public and could be appropriated, and once appropriated should be allowed the protection afforded all such waters.

15. Guy O. Woodward, Extension Irrigation Specialist, speech given February 15, 1955, University of Wyoming.

1. Wyo. Const., Art. VI, § 2. "Every citizen . . . who has resided in the state or territory one year and in the county wherein such residence is located sixty days next preceding any election, shall be entitled to vote at such election, except as herein otherwise provided."

Wyo. Comp. Stat. § 31-104 (1951). ". . . (3) who, being a qualified elector in this state and a resident of, and registered in any precinct in this State, shall not be disqualified to vote in that precinct, although he has moved into some other precinct where he has not gained residence and been registered before the date of election."

2. A cause for special concern are the residence restrictions on the availability of care for the tuberculous. In control of tuberculosis there are very practical as well as humanitarian considerations with regard to residence restrictions. Although several states have abolished (or never had) residence requirements for tuberculosis care, others retain them. Taylor, "Medical Services Hampered by Restrictive Residence Requirements," in *Residence Laws; Road Block to Human Welfare*, National