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Forfeiture of Water Rights in Wyoming

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NOTES

FORFEITURE OF WATER RIGHTS IN WYOMING

Wyoming law, in regard to the forfeiture of water rights, needs strengthening. Without this strengthening, the economy of Wyoming will suffer by our failure to fully utilize our greatest natural resource—water.

The present law, and its interpretation in a series of decisions of our Supreme Court, has helped to create a situation whereby, of the 2,750,000 acres of land in Wyoming having adjudicated water rights, only 1,600,000 acres are actually being irrigated[1]—that is, more than one-third of the water rights in Wyoming are "paper rights" holding priority upon lands upon which the water is not used.

The requirement that water be put to beneficial use is a basic element of our irrigation law. When the Wyoming Constitution was adopted, this principle was written into it. "Priority of application for beneficial uses shall give the better right."[2] Our statutes refer to this beneficial use theory many times, always recognizing it as the important factor. For instance, in limiting the amount of water that may be appropriated for land, our law says ". . . provided, that such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on lands, for the benefit of which the appropriation may have been secured. . . ."[3]

In the Wyoming Compiled Statutes (1945) Section 71-401, the use of water is limited thus: "Beneficial use shall be the basis, the measure, and the limit of the right to use water at all times, not exceeding the statutory limit." So we see, the requisition of a permit, the limit of the appropriation, and the use of water are all dependent upon beneficial use.

Most of the states of the West have been quite insistent that the beneficial use must continue if the appropriator is to retain his right. Otherwise the rights are forfeited. In one of the very early California cases (1895) dealing with forfeiture, their Supreme Court held that failure of the appropriator to make beneficial use of the water for a period of more than five years resulted in a forfeiture of the right, even though there was no statutory period stated.[4] That court called it a "mischievous perpetuity" to allow an appropriation to be retained indefinitely without beneficial use.[5] The United States Supreme Court, in discussing beneficial use and forfeiture, had this to say:

> There must be no waste in arid lands of the "treasure" of a river. The essence of the doctrine of prior appropriation is bene-

1. Statistics from Report of Wyoming Natural Resources Board (1958) "Wyoming's Water Resources" p. 5.
2. Const. of Wyo., Art. 8, Sec. 3.
3. Wyo. Comp. Stat. § 71-216 (1945).
4. Smith v. Hawkins, 42 Pac. 453, 110 Cal. 122 (1895).
5. Ibid., at p. 455.

ficial use, not a stale or barren claim. Only diligence and good faith will keep the privilege alive.[6]

The Utah statute is similar to our own. It provides:

> When the appropriator or his successor in interest abandons or ceases to use water for a period of seven years, the right ceases, and thereupon such water reverts to the public and may again be appropriated. . . .[7]

In interpreting this statute, the Utah Court declared:

> Abandonment and non-use of water rights presupposes that such waters are thereby permitted to run to waste, to prevent which the state steps in and permits others, who will put the water to beneficial use, to do so.[8]

In Oregon, when water was not put to use on lands belonging to the State, the Court has gone so far as to hold that the State forfeited water rights. The Court said that "The waste of water by an agency of the State, by failure to put it to beneficial use, is no less an injury to the common good than a similar waste by a private individual."[9]

In most cases, when State stautes say that forfeiture shall take place after a period of non-beneficial use, the courts have concerned themselves because of failure to put the water onto the land. In New Mexico, however, when the defendant let artesian well water flow over uncultivated land, the court there said, "Any such water right has now become lost by continuous non-use, *through waste* (italics supplied) for more than four years as shown by the evidence."[10] Thus this court went beyond non-use and said that wasteful use forfeited a water right.

Here in Wyoming, our statute is ostensibly quite explicit in its wording.

> . . . and in case the owner or owners of any such ditch, canal, or reservoir shall fail to use the water thereof for irrigation or other beneficial purpose during any five (5) successive years, they shall be considered as having abandoned the same, and shall forfeit all water rights, easements, and privileges appurtenant thereto, and the water formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal, or reservoir had never been constructed. . . .[11]

In connection with this statute, the use of the word "abandonment" was unfortunate for it is not synonymous with "forfeiture" and the two should not be used interchangeably. An attempt to apply the strict meaning of abandonment in interpreting such statutes inevitably leads to confusion, as the underlying principles are not identical.

6. Washington v. Oregon, 297 U.S. 517, 56 S.Ct. 540, 80 L.Ed. 837 (1936).
7. Comp. Laws of Utah § 3648 (1917).
8. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937) at p. 900.
9. Withers v. Reed, 194 Or 541, 243 P.2d 283 (1951).
10. State v. McLean, 62 N.M. 264, 308 P.2d 983 (1957) at p. 988.
11. Wyo. Comp. Stat. § 71-701 (1945).

The Supreme Court of Utah stated the distinction thus:

> There can be no abandonment of a water right unless there is a concurrence of the acts of the party with his intent to desert, forsake, or abandon the right. A forfeiture for non-use during the statutory time may occur despite a specific intent not to surrender the right. It is based not upon an act done, or an intent had, but upon a failure to use the right for the statutory time.[12]

The Wyoming statute should be clarified by deleting the words "they shall be considered as having abandoned the same" and simply stating that non-use for the stautory period would result in forfeiture of the right. The question of intent would then not be brought in to muddy the waters.

Over the years, a series of Wyoming Supreme Court decisions has been a major factor in protecting rights which should have been forfeited.

One of the early decisions regarding water rights in Wyoming was an action brought against the State Engineer and the Water Commissioner to enjoin them from shutting off a part of the water claimed by the plaintiffs.[13] The Court pointed out that it was the duty of the administrative offices of the Board of Control to distribute the water according to established rights. The Court then went on to say, "They (the Engineer and Commissioner) are not empowered to determine questions of forfeiture and abandonment." Thus the only state agency empowered with jurisdiction over the state's water was precluded from initiating any affirmative action toward forfeiture.

The only way, then, that forfeiture action might be initiated was by action of an individual. In determining what individuals might bring a suit, a further restriction was added when in *Horse Creek Conservation District v. Lincoln Land Co.*,[14] the Court declared: "Those who are authorized to use the procedure set forth (in the statutes) are only those whose rights would be affected." The Court then went on to say that since the plaintiff had only a junior flood-right that it was difficult to perceive how the plaintiff's rights would be appreciably improved if the defendant's ditch rights were abandoned, and so the plaintiff was not entitled to bring the action.

Thus, the present interpretation is that an action for forfeiture can only be initiated by another user who can clearly show that he will be benefited—in other words, by a junior appropriator who can show he will get the water.

Another complicating factor in an action for forfeiture involves the interpretation of law regarding the effect of re-use of water and the statute of limitations.

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12. Ibid Note 8 at page 899.
13. Parshall v. Cowper, 22 Wyo. 385, 143 Pac. 302 (1914).
14. Horse Creek Conservation District v. Lincoln Land Company, 54 Wyo. 320, 92 P.2d 572 (1939).

In the *Horse Creek* case it was held that until a declaration of forfeiture had been made, the owner of the water rights retained title to them, and was justified in their continued use.

In 1954, the Supreme Court was confronted with a case in which the plaintiff brought an action against a reservoir owner to prevent the latter from repairing the dam on the reservoir.[15] The plaintiff asserted that non-use of the reservoir for more than ten years automatically resulted in the forfeiture of the water rights. In discussing the case, the Court said, "It could not be conceded that all that need be shown is the non-use for the statutory period of time or that forfeiture automatically follows the failure to use the water rights." The Court referred to *Horse Creek*, saying, "We did not (in *Horse Creek*) decide when a proceeding or action of forfeiture may be or must be commenced in order to deprive the owner of his rights, except that we held that if the water not used for a period of five years is, however, used for ten years prior to the action of forfeiture, the action for such forfeiture can no longer be brought."

Later on, in the opinion, the Court said that if the action had been brought before the reservoir owner again put the reservoir into use, the Court "would have been justified, if not constrained, to declare a forfeiture." Thus, while recognizing forfeiture, the Court at the same time clearly indicates that if use of water is resumed before cancellation proceedings are initiated, the right is preserved and there can be no forfeiture.

The Nebraska statute might well serve as a guide to our Wyoming legislature. There, in addition to general supervisory duties, the Department of Roads and Irrigation is expressly given a statutory obligation to initiate proceedings to declare water rights forfeited.[16] In upholding the authority of the Department, the Supreme Court of Nebraska declared:

> An appropriator will not be permitted to retain an interest in the use of public waters which he has never put to beneficial use, or having been once put to a beneficial use has failed for the statutory period to continue such use. It is the express duty of the Department of Roads and Irrigation to determine the appropriations, or parts thereof, which are subject to forfeiture for non-use and make the waters covered thereby available to junior appropriators or new applicants.[17]

In a later case, in an action by the State to enjoin a landowner from appropriating water from a creek, the notice by publication which the Department had given the landowners' predecessor was fully upheld as cancelling the water rights and a permanent injunction was sustained, against the landowner's resumption of use.[18]

15. Sturgeon v. Brooks, 73 Wyo. 436, 281 P.2d 675 (1954).
16. Neb. Rev. Stat. § 46-229.02 (1943).
17. State v. Birdwood Irr. Dist., 154 Neb. 52, 46 N.W.2d 884 (1951) at p. 889.
18. State v. Neilsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

The constitutionality of the Nebraska statute, when attacked on the grounds that it was a taking of private property without due process of law, has been fully upheld. "One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights."[19]

If Wyoming is to fully utilize its water, serious consideration should be given, in addition to clearing up the ambiguous wording of our present statute, to placing the initiation of action within the power of the Board of Control just as Nebraska has done in their supervisory agency. This would be in line with the thinking at the time of the adoption of the Wyoming Constitution when it was said, "When we appoint a Board of Control to manage this water system that we say belongs to the State, let us give them authority to control it for the highest and best uses of the people of the State."[20]

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MANUFACTURERS' LIABILITY FOR BREACH OF AN IMPLIED WARRANTY

In a majority of the courts today, before a buyer can successfully maintain an action for breach of an implied warranty against a seller, the buyer must show that there is contractual privity between the parties. As a result of this privity requirement, a manufacturer is well insulated from the claims of an injured retail buyer unless the buyer can somehow show negligence on the part of the manufacturer, or the manufacturer is finally reached by carrying liability back through the retailer. But should the element of privity be required in an action on an implied warranty, thus protecting the very person who is responsible for manufacturing and marketing the product which has caused the injury? Recently a few courts have rejected this privity requirement and have held manufacturers strictly liable for their products on the theory of implied warranties.

An implied warranty has been defined as one imposed by law, arising from the relations between the parties, the nature of the transaction and the surrounding circumstances.[1] This warranty arises regardless of the seller's intention to create it, but it is rather an inference or conclusion of law which is said to have arisen from the presumed intention of the parties. Once an implied warranty is created by reason of the circumstances of the sale, the law conceives of such a warranty as being a term of the contract.[2]

19. Dawson County Irr. Dist. v. McMullen, 120 Neb. 245, 231 N.W. 840 (1930).
20. Journal and Debates of the Constitutional Convention Wyoming (1889) at p. 503.

1. Rogers v. Toni Home Permanent, 167 Ohio St. 244, 147 N.E.2d 612 (1958).
2. 77 C.J.S., Sales § 314 (1952).