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PRIVATIZATION OF THE WATER RESOURCE: SALVAGE, LEASES AND CHANGES*

Albert W. Stone**

The 1991 biennial legislative session made two substantial policy changes to Montana water law: (1) The legislature enacted Chapter 308 which provides an incentive to salvage water by the use of water-saving methods; and (2) the legislature enacted Chapter 435 which allows temporary or intermittent changes and reallocation of water. This essay discusses these enactments, and the substantial changes in policy that they effect.

Chapter 308, codified at section 85-2-419 of the Montana Code states:

It is the declared policy of the state in 85-1-102 to encourage the conservation and full use of water. Consistent with this policy, holders of appropriation rights who salvage water, as defined in 85-2-102, may retain the right to the salvaged water for beneficial use. Any use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right must be approved by the department as a change in appropriation right in accordance with 85-2-402. Sale of the salvaged water must also be in accordance with 85-2-403, and the lease of the right to salvaged water for instream flow purposes must be in accordance with 85-2-436.¹

In Montana, as elsewhere, waters have been notoriously over-appropriated. Claims and decrees have resulted in paper record rights to more water than many of the appropriators ever put to a beneficial use.² These errors may be perpetuated by the decrees in the current statewide adjudication process.³

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1. MONT. CODE ANN. § 85-2-419 (1991) (emphasis added). Section 85-2-102 of the Montana Code simply contains definitions; as of 1991, section 85-2-102 also includes a definition of salvage: " 'Salvage' means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods." MONT. CODE ANN. § 85-2-102(14) (1991).

Sections 85-2-402 and 403 require approval by the Department of Natural Resources and Conservation for any change of purpose, place of use, or ownership. MONT. CODE ANN. § 85-2-402 to -403 (1991). Section 85-2-436 authorizes the Department of Fish, Wildlife and Parks to lease water for instream flow purposes. MONT. CODE ANN. § 85-2-436 (1991).

2. Allen v. Petrick, 69 Mont. 373, 377-78, 222 P. 451, 452-53 (1924).

3. Whether these errors will be so perpetuated depends on whether the erroneous claims are caught DNRC's examination process, or are the subject of a successful objection by another appropriator.

The traditional rule is that an appropriator may take only the amount of water that is reasonably efficiently needed for *the purpose* of the appropriation.⁴ Any excess beyond this need must be left in the stream for other uses and users.⁵ "The tendency of recent decisions of the courts in arid states is to . . . regard the actual beneficial use, installed within a reasonable time . . . as the test of the extent of the right."⁶

The Arizona case of *Salt River Valley Users' Ass'n. v. Kovacovich*⁷ illustrates this point. In *Kovacovich*, the defendants extended their water use by irrigating additional lands adjacent to the lands for which they had water right permits.⁸ They had employed water-saving practices so that "no more water was thus used by defendants to irrigate all of their lands here involved than was formerly used upon only their lands with a valid water appropriation."⁹ The court said:

Beneficial use is the measure and limit to the use of water. (Citation omitted.) The appellees may only appropriate the amount of water from the Verde River as may be beneficially used in any given year upon the land to which the water is appurtenant even though this amount may be less than the maximum amount of their appropriation. . . . Any practice . . . whereby appellees may in fact reduce the quantity of water actually taken inures to the benefit of other water users and neither creates a right to use the water saved as a marketable commodity nor the right to apply same to adjacent property¹⁰

Kovacovich is a particularly strong case for allowing further use of salvaged water because these facts were conceded: "[B]ecause of water-saving practices, no more water was thus used."¹¹ So *Kovacovich* did not raise the factual issue of whether there was *bona fide* salvage, or simply the use (or sale or lease) of more water because the "right" was in excess of the appropriator's needs or historic use.¹²

4. *Brennan v. Jones*, 101 Mont. 550, 567, 55 P.2d 697, 702 (1935). See also *Enlarged South Side Ditch Co. v. John's Flood Ditch Co.*, 183 P.2d 552, 554 (Colo. 1947).

5. *Brennan*, 101 Mont. at 567, 55 P.2d at 702.

6. *McDonald v. State*, 220 Mont. 519, 529, 722 P.2d 598, 604 (1986) (quoting *Conrow v. Huffine*, 48 Mont. 437, 138 p. 1094 (1914)).

7. 411 P.2d 201 (Ariz. 1966).

8. *Id.* at 202.

9. *Id.*

10. *Id.* at 203-04 (citations omitted).

11. *Id.* at 202.

12. See *Quigley v. McIntosh*, 110 Mont. 495, 505-06, 103 P.2d 1067, 1072 (1940) (denying the extended use of a decreed right: "The mere fact that all the lands to which the additional use of water has been applied were included within the description in the plead-

In Montana, *Quigley v. McIntosh*¹³ is an example of an attempted extended use of a decreed "right" that was in excess of the established beneficial use.¹⁴ The Montana Supreme Court denied this attempt and followed the traditional rule, explaining:

It seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven, cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decreed Of course, water must be appropriated and decreed under our system for some useful and beneficial purpose. (Citation omitted.) The proof of the existence of such purpose and the use applied to the same, as shown in the original cause, of necessity formed the basis for the awards finally given in the 1913 decree.¹⁵

The long-standing policy underlying these decisions characterizes water as a public resource that cannot be owned by individual users.¹⁶ The 1972 Montana Constitution provides:

All . . . waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.¹⁷

Section 85-2-101(1) of the Montana Code additionally states:

[T]he legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.¹⁸

So it follows that water is a *shared* resource. After the water has been used for the beneficial public purpose allowed by a permit or

ings at the time of the decree, in no manner furnishes basis for, or justifies, the extended use" in the absence of intent to make such extended use at the time the appropriation was made, together with diligent development of the use. See also *Conrow v. Huffine*, 48 Mont. 437, 444-45, 138 P. 1094, 1096 (1914) for similar language.

13. 110 Mont. 495, 103 P.2d 1067 (1940).

14. *Id.*

15. *Id.* at 505, 103 P.2d at 1072.

16. See, e.g., MONT. CONST. of 1889, art. III, § 15 ("The use of all water . . . shall be held to be a public use."); *In Re Yellowstone River Water Rights*, 253 Mont. 167, 173, 832 P.2d 1210, 1213 (1992) ("[T]he State of Montana owns the underlying fee to all of the water in the state."); *In Re Clark Fork River Drainage*, ___ Mont. ___, ___, 833 P.2d 1120, 1122 (1992) (reiterating that a water right is not a right to possession of a quantity of water, but of its beneficial use); *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 433, 666 P.2d 215, 218 (1983) ("the fundamental policy that a water right does not mean possession of a quantity of water, but its beneficial use").

17. MONT. CONST. art. IX, § 3(3).

18. MONT. CODE ANN. § 85-2-101(1) (1991).

an appropriation,¹⁹ the water becomes available for other public purposes or for others to make similar use of it.²⁰

Pursuant to this policy of water appropriation, water users must be reasonably efficient, to conserve this public resource which they are privileged to use and to save and provide this public resource for other users and other uses.²¹ The state may enforce reasonable efficiency pursuant to statutes.²² Of course conservation may also be voluntarily accomplished by a conscientious or socially conscious user.

Lately, water marketing has frequently been touted as a means of accomplishing efficiency of water use and socially desirable allocations of water.²³ Changes in the purpose, place, and ownership of a water right have always been with us and have been regulated to assure that the public resource is used in the public interest and without injury to other private interests.²⁴

Section 85-2-419 of the Montana Code goes farther than just allowing changes in water rights, at least as courts have viewed water rights under prior policy. This statute, by encouraging additional or expanded uses of surplus water that are not necessary for the purposes for which an appropriation was made, or for which a permit was issued, allows the creation of new water rights with preexisting earlier priority dates. In this manner the water right becomes more than usufructuary, and takes on attributes of ownership not only of the right, but also of the water itself, as a private commodity rather than as a public resource. Under section 85-2-419, appropriators may market the excess water rather than allow it to remain public property for further private or public interests.

Except for public service entities,²⁵ Montana historically has prohibited the leasing or sale of water (as distinguished from sale of a water right).²⁶ This policy stemmed from the underlying policy

19. There was no provision for a "permit" prior to 1973.

20. *Basey v. Gallagher*, 87 U.S. 670, 683 (1874).

21. *Id.*

22. See MONT. CODE ANN. §§ 85-2-114 to -116 (1991).

23. See generally John D. Musick, *Reweave the Gordian Knot: Water Futures, Water Marketing and Western Water Mythology*, 35 ROCKY MTN. MIN. L. INST. 22-1 (1990); John E. Thorson, *Water Marketing in Big Sky Country: An Interim Assessment*, 29 NAT. RESOURCES J. 479 (1989).

24. MONT. CODE ANN. §§ 85-2-402 to -403 (1991). *In Re Yellowstone River Water Rights*, 253 Mont. at 174, 832 P.2d at 1214 ("These rights . . . are protected against unreasonable state action; however, they have not been granted indefeasible status. . . . [T]he State Legislature may enact constitutionally sound regulations including the requirement for property owners to take affirmative actions to maintain their water rights.").

25. See *Rock Creek Ditch and Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074 (1933); *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912).

26. See *Sherlock v. Greaves*, 106 Mont. 206, 76 P.2d 87 (1938); *Rock Creek Ditch and*

that the public, not the appropriator, owns the water.²⁷ “[T]he State of Montana owns the underlying fee to all of the water in the State and thereby retains substantial regulatory power over water rights.²⁸ In 1991, however, Montana enacted Chapter 435, now section 85-2-407 of the Montana Code, which compliments section 85-2-419. Section 85-2-407 provides:

(1) An appropriator may not make a temporary change in appropriation right for his use or another’s use except with department approval in accordance with 85-2-402 and this section.

(2) A temporary change in appropriation right may be approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for consecutive or intermittent use.²⁹

Although the foregoing does not *expressly* say that water may now be leased in Montana, there seems little, if any, difference between such “temporary” changes and leases.

This latest trend favors reallocation through economic determinism, treating water simply as a commodity. A person may: (1) “salvage” water and make additional uses of the unneeded water (or lease it for instream flow to the Department of Fish, Wildlife and Parks);³⁰ or (2) make a “temporary change” of the original appropriation; or (3) make a “temporary change” of salvaged water to other persons, purposes, or places.³¹

Western states are seeking better means of water allocation, particularly reallocation.³² A free market place for water is seductively attractive partly because of its seeming simplicity. But can economics—the highest monetary value—be the principal criterion at a time when environmental and intangible human values are increasingly pressing for recognition? This raises a policy question which should be considered now, at the outset of these new statutes: Should a water right continue to be a usufructuary right or privilege to use a resource that belongs to the public and in which the public has a strong and special interest, or should a water right

Flume Co., 93 Mont. 248, 17 P.2d 1074; *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927).

27. MONT. CONST. art. IX, § 3(3) states: “All . . . waters . . . are the property of the state for the use of its people.” MONT. CODE ANN. § 85-2-101(1) (1991) states: “[T]he waters within the state are the property of the state for the use of its people.”

28. *In Re Yellowstone River Water Rights*, 253 Mont. at 179, 832 P.2d at 1217 (citing *State v. McDonald*, 220 Mont. 519, 524, 722 P.2d 598, 601 (1986)).

29. MONT. CODE ANN. § 85-2-407 (1991).

30. MONT. CODE ANN. § 85-2-419 (1991).

31. MONT. CODE ANN. § 85-2-407 (1991).

32. Musick, *supra* note 23, at 22-1.

confer exclusive private ownership of this once public resource?