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McGowan v. United States, 206 F. Supp. 439 (D. Mont. 1962)

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creased bond premiums passed on by the contractor as the cost of doing business.

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A LANDOWNER HAS THE RIGHT TO INTERCEPT WATER PERCOLATING BENEATH HIS LAND EVEN THOUGH IT SUPPLIES A SPRING WHICH ANOTHER HAS APPROPRIATED.—Plaintiff owns eighty acres of farm land in the Helena valley. In 1920, his predecessor in interest validly appropriated eighty miners inches of water from several springs arising in the channel of Ten Mile Creek. In 1959 the Bureau of Reclamation commenced construction of an irrigation and drainage project in the valley, which included the construction of a drain ditch that generally parallels the channel of the stream in question. At its closest point, the ditch is about one/fourth mile from these springs. Plaintiff contended, and the trial court found, that the construction of the ditch caused the springs from which plaintiff appropriated his irrigation water to dry up. Ten Mile Creek, with the exception of the water supplied by these springs, is dry during the irrigation season. The drying up of these springs, therefore, eliminated plaintiff's only source of irrigation water. He brought suit against the United States under the Tucker Act,[1] alleging the taking of a property right in violation of the fifth amendment. *Held,* although the federal project caused plaintiff's springs to dry up, under applicable Montana law governing percolating water, that loss was *Damnum absque injuria. McGowan v. United States,* 206 F. Supp. 439 (D. Mont. 1962).

The Federal court in the instant case relies on the common law rule concerning percolating water, first set out in the English case of *Acton v. Blundell,*[2] which states that a landowner has the unqualified use of his land. Thus he can deprive a neighbor of his percolating water supply without liability for any injury, thereby sustained, regardless of the length of time the neighbor has beneficially used the water. At one time, this rule had been adopted in nearly all the western states.[3]

Surface water in all western states is capable of appropriation.[4] Once appropriated, the appropriator is protected from interference by any person except a prior appropriator. The question presented by the instant case is whether an appropriator should be protected from interference by a landowner who intercepts tributary water which percoluates beneath his land.

This paper will attempt to show that in concluding that the appropriator is not protected, the court has misinterpreted the applicable Mon-

[1] 28 U.S.C. § 1346(a)(2). This statute simply gives the consent of the United States to be sued in all cases which involve constitutional issues.
[2] 152 Eng. Rep. 1223 (Ex. 1843).
[3] Hutchins, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 156 (1942).
[4] *Id.* at 30.

Montana Law Review, Vol. 24 [1962], Iss. 2, Art. 6

tana law in two fundamental respects: (1) in failing to differentiate between percolating water which is a tributary to a stream and percolating water which is not, and (2) in failing to recognize that even if the common law doctrine applies in Montana,[5] it is applicable only in the latter situation.

Before developing these points, it is worthwhile to examine the decisions from foreign jurisdictions cited by the court in the instant case. On page 443 the court states that if the owner of the land across which the drainage ditch ran had dried up plaintiff's spring, there could be no recovery. The court then cites a series of cases. Several are from eastern states[6] where there is no right of appropriation. There, under the riparian doctrine, only the landowner adjacent to the stream has any rights to the water therein. For this reason the question presented in the instant case is not answered by reference to these jurisdictions. Other cases cited include *Gould v. Eaton*[7] which has not been the law in California since 1902,[8] and two cases from Washington,[9] neither of which involved appropriated water or tributaries to a stream. The Utah case cited[10] involved non-appropriated percolating water. The court stated:[11]

> The defendants are not seeking to appropriate water to which the plaintiffs had previously established rights to use. If it were so, the plaintiffs as prior appropriators would own the rights to the use of the water and such rights would be entitled to protection.

Concerning the question here under discussion, the Utah court has taken a position exactly opposite to the one taken in the instant case. That court has held that "one who has appropriated the water of a spring has also appropriated the percolating water supplying it, and has a right to prevent the owner of adjoining land from intercepting such water although the interception occurs on the latter's land."[12]

A close reading of cases from other jurisdictions will show that although there is considerable support for the court's statement in those states *not* recognizing the appropriation doctrine, there is little support for it in the semi-arid western states.[13]

In the instant case, the court relies on the distinction between underground channel water and underground percolating water,[14] concluding that because the water in the instant case was found to be percolating at the point of interception, such interference did not give rise to an action-

[5]There has been no case decided in Montana in which the court has adjudicated a factual situation involving an attempt to appropriate water while it is still percolating.
[6]Gallerani v. U.S., 41 F. Supp. 293 (D. Mass. 1941) and United States v. Alexander, 148 U.S. 186 (1892) (arose in Dist. Col.).
[7]111 Cal 639, 44 Pac. 319 (1896).
[8]Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663 (1902).
[9]Evans v. City of Seattle, 182 Wash. 450, 47 P.2d 984 (1935); Wilkining v. State of Wash., 54 Wash. 2d 692, 344 P.2d 204 (1959).
[10]N. M. Long and Co. v. Cannon-Papanikolas Constr. Co., 9 Utah 2d 307, 343 P.2d 1100 (1959).
[11]343 P.2d at 1102.
[12]Peterson v. Wood, 71 Utah 79, 262 Pac. 828 (1927), as summarized in 109 A.L.R. 409.
[13]For a state by state summary of western percolating water law see *supra* note 3 at 182-265. For a list of recent legislative action see 22 MONT. L. REV. 50 (1960).
[14]Instant case at 442.

able injury. Montana courts have not recognized this distinction in those cases where the percolating water is found, as it was in the instant case, to be a tributary to a stream. The decision considered by the court as controlling in the instant case is *Ryan v. Quinlan*.[15] Plaintiff, in that case, found himself without sufficient water to irrigate his land by virtue of a previous adjudication which had determined that plaintiff's appropriation from Dempsey Creek in Deer Lodge County was inferior to those of prior appropriators. In an attempt to increase his water supply, he constructed a headgate on Blind Lake, situated above the Dempsey Creek canyon, and conducted water to his land from a small rivulet which ran from the lake toward Dempsey Creek until it disappeared into the ground some 3000 feet from it. Defendant objected to the use of this water, contending the rivulet was a tributary to Dempsey Creek and hence part of his appropriated water. The Montana Supreme Court held for the plaintiff because there was no showing that the water from Blind Lake reached the creek. It refused to answer the question as to the right of the parties had there been proof the water did reach the creek saying,[16] "The condition in which this case reached this court, however, does not require the announcement of any definite rule." Thus the court, in deciding this factual question held *only* that the defendant did not prove the rivulet was a tributary to Dempsey Creek. However, in dictum, the court stated:[17]

> The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. . . . We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land as one of its natural advantages, and in the eyes of the law a part of it; and we think we are warranted in this view by well considered cases.

This statement, that underground water should not be subject to any rules is contrary to the settled policy of the Montana court concerning the use and development of water in this state. In *Allen v. Petrick*[18] the court stated:[19]

> The use of water in Montana is vital to the prosperity of our people. Its use, even by an individual, to irrigate a farm, is so much a contributing factor to the welfare of the state that the people in adopting the Constitution declared it to be a public use.

The instant case shows that the development and use of water is not facilitated by allowing interference with stream water which has been appropriated, merely because at the place of interception the water is percolating. If public policy favors irrigation and development of land,

[15] 45 Mont. 521, 124 Pac. 512 (1912).
[16] *Id.* at 534, 124 Pac. at 516.
[17] *Id.* at 532, 124 Pac. at 515.
[18] 69 Mont. 373, 222 Pac. 451 (1924).
[19] *Id.* at 377, 222 Pac. at 452. *Accord*, Anaconda Nat'l Bank v. Johnson, 75 Mont. 401, 407, 244 Pac. 141, 142 (1926); Donich v. Johnson, 77 Mont. 229, 239, 250 Pac. 963, 965 (1926).

then the water necessary to that development and irrigation should be subject to regulation and not left to the caprice of the owner of the land under which it percolates. Public policy has been authoritatively settled; the conclusion should logically follow. Further, many of the objections concerning the difficulty of ascertaining the direction in which percolating water moves have been mitigated by technological developments. It is now a relatively easy process to trace underground water through the use of dye and radioactive materials.

The question which the instant case purportedly decides on the authority of *Ryan v. Quinlan*, is expressly not decided in that case. However, in the same year, 1912, the Montana Court handed down a decision directly in point.[20] Plaintiff had appropriated sixty miners inches of water from Spaulding Creek in Gallatin County. On the upper side of the stream, and separated from it by dry ground, was some low lying swampy ground owned by the defendant. To drain these marshes, defendant ran a drainage ditch across the lower end of them, between the creek and the swamps. Plaintiff brought suit, contending that the swampy water was a tributary to the creek and thus included in his appropriation. The court held that the burden was upon the interceptor to show that the intercepted water did not reach the creek and in the absence of such proof, plaintiff was entitled to the water in defendant's ditch.[21] Since the only method by which the water could have reached the stream was by percolation, the court in effect said that an appropriation of stream water includes that water which percolates into it.

This is made more explicit in *Woodward v. Perkins*,[22] again concerning the water rights to Dempsey Creek. Perkins, in this case, concocted a rather ingenious scheme to increase his supply of water necessary for the adequate irrigation of his land. During the spring run off, he diverted water from the creek and conveyed it to a series of pot holes situated on his land above the creek. This water was stored for use during the irrigating season. However, it soon developed that the pot holes were porous, allowing the water to seep out the bottom. Perkins, in order to recapture the water, ran a ditch along the bank of the stream to collect the water. Since the land he wished to irrigate was downstream from the pot holes, Perkins let the water back into the stream and recollected it at the desired point, less the amount which had evaporated. Plaintiff alleged that this was an interference with his appropriation. At the resulting trial, Perkins contended that he had developed a new source of water which was not subject to the earlier appropriation decree.[23] He further contended that under applicable Montana water law, even if the water

[20]Spaulding v. Stone, 46 Mont. 483, 129 Pac. 327 (1912).
[21]The distinction between this case and the *Quinlan* case seems to be only one of who bears the burden of proof. In *Quinlan*, the rivulet disappeared more than 3000 feet away from Dempsey Creek. At this distance it seems logical to make the appropriator prove that the alleged tributary does in fact reach the main stream. However, in the *Spaulding* case, the intercepting ditch was much closer, at one point even crossing the main stream. At this close proximity, the burden shifts to the interceptor to show that he is not interfering with the rights of the prior appropriator.
[22]116 Mont. 46, 147 Pac. 1016 (1944) (2 justices dissenting).
[23]If a person can show he has increased the supply of a stream since the last appropriation, he is entitled to the increase as "developed water."

which he had collected in his ditch did not come from his pot holes, he was nevertheless entitled to it as the owner of the land under which the percolating water moved. The first contention was rejected for lack of proof that the water collected in the ditch came from the pot holes,[24] and the second because the "ownership of land where water has its source does not necessarily give exclusive right to such water so as to prevent others from acquiring rights therein.[25] The court said:[26]

> Seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to that stream as part of its source of supply, same as feeder springs. An appropriator on the stream has the right to all such tributary flow even as against the owner of the land.

Both of these cases are as significant for what is left unsaid as for what they say. Both involve percolating water, yet this is mentioned only in passing. Neither case attempts to decide the questions involved by referring to the dictum in the *Quinlan* case. Yet both are aware of that case. In *Perkins,* the dissent relies on the dicta in *Ryan v. Quinlan.* The majority, although citing it for a different proposition, impliedly rejects it by failing to recognize Perkins' second contention. Thus it would seem that where percolating water is a proven tributary to a stream, the common law governing percolating water is not applicable. The Federal District Court in the *McGowan* case, by basing its decision on the distinction between surface water and percolating water, would seem to be ignoring Montana precedent. By allowing a landowner to interfere with tributory percolating water, the court has held contra to earlier cases.

The rule laid down by the *Spaulding* and *Woodward* cases can be stated quite simply. By an appropriation of water from a stream, the appropriator is protected from interference with that water by any landowner, across or under whose land it flows, irrespective of whether it is surface water, underground channel water, or underground percolating water. In all situations, the prior appropriator should be protected. This rule is based on public policy, logic, and common sense. It gives an element of certainty to those who wish to develop and use water for purposes of irrigation. It is in accord with the constitutional statement that water in this state is public and to be used by all.[27] It ends the rather arbitrary common law distinction between percolating and underground channel water, substituting a uniform law in its place, subject only to differences in the difficulty of proof. Consequently, in the instant case, when the court found that the construction of the drain was the cause of drying up the springs in Ten Mile Creek,[28] it is submitted that the court

[24]This contention created repeated litigation for the Montana Supreme Court. On the second appeal, 119 Mont. 11, 171 P.2d 997 (1946), the court held that the earlier case was res judicata; again 2 justices dissented. Perkins then asked for a writ of supervisory control, which was denied without hearing. Finally, on the third appeal, the court allowed him to introduce new evidence to prove that the water from the pot holes was the water collected in his ditch. Perkins v. Kramer, 121 Mont. 595, 198 P.2d 475 (1948) (Justice Adair dissenting).
[25]*Supra* note 22 at 53, 147 P.2d at 1019.
[26]*Ibid.*
[27]MONT. CONST. art. III, § 15.
[28]Instant case at 442.

had answered the only question involved and should have found for the plaintiff as a matter of law.

Although the Spaulding and Woodward cases are the only decisions directly in point, the general rationale of protecting the prior appropriator has been recognized many times. In *Rock Creek Ditch and Flume Co. v. Miller*,[29] the defendant had validly appropriated 120 miners inches of water from Wyman Creek. Seepage water from plaintiff's nearby irrigation ditch percolated into Wyman Creek, substantially increasing its flow. Plaintiff claimed a right to this seepage water and as owner, attempted to retake it from the creek. He made no attempt to appropriate it as developed water. A lawsuit eventually resulted in which the court relied on the dictum in the *Quinlan* case for the proposition that once the water has seeped into the soil, it becomes part of it and the former owner loses all rights to its use. However, by protecting the defendant's appropriated right to the percolating water, the court recognized that percolating water can be appropriated after it has formed a channel, and once appropriated, it is protected from interference.

In *Beaverhead Canal Co. v. Dillon Electric Light and Power Co.*,[30] the court sustained the contention that if a person increases the flow of a stream, he can appropriate the increase as developed water. The court then continued:[31]

> The prior appropriator of an particular quantity of water from a stream is entitled to the use of that water. . . . To the extent of his appropriation his supply will be measured by the water *naturally flowing in the stream* . . . whether those waters be furnished by the usual rain or snows, . . . *or by springs or seepage which directly contributes.* (Emphasis added.)

The court in the instant case cites *Popham v. Holloran*,[32] *Wills v. Morris*,[33] and the *Miller*[34] case for the proposition that percolating water cannot be interfered with after it has collected and formed in a channel.[35] The court then adds that this water can be interfered with before it forms a channel. The factual situations in these cases only involved the question of the validity of the appropriation and did not concern themselves with whether recognition of an appropriation extends to the protection of a percolating source of supply. Read in conjunction with the *Spaulding* and *Woodward* cases, the implication is clear however, that such appropriation does protect the appropriator from interference.

The court in the instant case, concluded that if plaintiff's proposition were carried to a logical conclusion, a landowner would be forced to continue irrigating against his wishes when his waste water contributed to a junior appropriator's source of supply.[36] This contention was considered and rejected under a factual situation similar to the one contemplated by

[29]93 Mont. 248, 17 P.2d 1074 (1932).
[30]34 Mont. 135, 85 Pac. 880 (1906).
[31]*Id.* at 141, 85 Pac. at 882.
[32]84 Mont. 442, 275 Pac. 1099 (1929).
[33]100 Mont. 514, 50 P.2d 862 (1935).
[34]*Supra* note 29.
[35]Instant case at 444.
[36]*Ibid.*

the court in the instant case. The court there held that the upper irrigator was a prior appropriator and so long as he continued to control the water he was not bound to respect the desires of a later appropriator, at least as long as his use was beneficial and not the result of a malicious desire to deprive his neighbor of water.[37]

It is submitted that the distinction drawn by the court in the instant case is invalid under applicable Montana law as stated in earlier decisions. The court relies on dictum from the *Quinlan* case which is not applicable to the factual situation here presented; the court further ignores those cases directly in point. A fair interpretation of the *Quinlan* case, and those decisions which rely on it, gives rise to the sole proposition that percolating water cannot be appropriated before it reaches a defined channel. But once it has reached a defined channel and has, as in the instant case, been validly appropriated, these cases are not relevant in determining if the appropriation protects the appropriator from interference by the land owner. It is submitted that no extension of the *Quinlan* proposition to the factual situation here presented can be justified on any rational basis. Once the court found that the intercepted water supplied the plaintiff's springs and hence was the source of his appropriation, it should have concluded that by virtue of such appropriation the plaintiff was protected against interference by the defendant. This protection should be granted regardless of whether the alleged interference occurs: (1) above the ground in the stream itself, (2) underground, where the water is in a defined channel,[38] or (3) underground, where the water is percolating in its migration toward the stream. By failing to realize that the Montana Supreme Court does not recognize a distinction between propositions 2 and 3, it is submitted that the court reached a result contrary to the law which it purported to apply.

The rule as herein stated places a definite burden on a landowner to exercise care in the development and use of his land. However, as applied to water in an underground channel, this rule has long been recognized without a similar objection. If adopted, it would place the emphasis where it properly belongs—on proof of interference—rather than on the arbitrary distinction between channelized and percolating water.

It is submitted that the decision in the instant case is in error and not founded upon a correct interpretation of the Montana authority. It is to be hoped that the Montana Supreme Court will not follow the Federal District Court but will, when the question is properly presented, decide that a person is entitled to be protected against interference with his appropriation of underground percolating water, where such water is found to be a tributary to a stream.

GORHAM SWANBERG

[37]Newton v. Weiler, 87 Mont. 164, 286 Pac. 133 (1930).
[38]The instant case seems to recognize that propositions one and two would be protected under Montana law. Instant case at 442.