

2013

Water Policy Interim
Committee of the
Montana Legislature

Legislative
Environmental Policy
Office

[BACKGROUND FOR HJ26]

Irrigation ditches have delivered water to Montana users since settlement. Ditch easements are commonly used to convey water to water rights holders. Montana law does not allow encroachment of easements without ditch owner permission. Conflicts between landowners and ditch owners may be increasing. Other states may provide guidance regarding such disputes.

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HJ26: An introduction

Seeking to “examine the intersecting interests of estate owners and ditch owners and contemplate options to accommodate both estates,” the 2013 Legislature passed House Joint Resolution 26. This study topic presents a mix of property law, water law, and a healthy dose of history.

The legal underpinnings for irrigation as we know it in Montana began with the first Territorial Legislative Assembly. In 1865, the Territorial Legislature passed an act “to protect and regulate the irrigation of land in Montana territory.” If an appropriators land was far from the river or stream “he shall be entitled to a right of way through the farms or tracks of land which lie between him and said stream...”¹

Canals and ditches have since been integral to Montana agricultural economy.

Today, 2 million irrigated acres are fed by ditches and canals. Most of these irrigators receive “off-farm” water from some type of water supply organization, whether it be an irrigation system or some sort of users association. Others tap into private ditches and canals. A few develop and control their own groundwater sources for irrigation.²

Irrigated crops add economic value to in Montana agriculture. Eighteen percent of all harvested cropland is irrigated, and these crops represent a higher share of the total agricultural sector, due to increased productivity from irrigation. Seventy-two percent of all irrigation water goes onto hay and pastureland, usually for use by the livestock industry.

Disputes between landowners and ditch owners occasionally arise. Landowners may wish to place bridges over ditches, change a canal route, or make other alterations. The ditch owner must agree to any such action. Changing land use patterns – particularly the subdivision and development of larger agricultural parcels into smaller home sites – may accelerate these conflicts in some areas of Montana.

A water right or permit in Montana includes a source, a place of diversion and a place of use. Oftentimes, the place of use is some distance from the source and place of diversion. Therefore, canals or ditches are sometimes necessary.

“There need be no relationship between the source of water and the locus of use,” wrote A. Dan Tarlock of the Chicago Kent College of Law and author of a book on American water rights. “Los Angeles, for example, enjoys water appropriated on the Colorado and Owens rivers hundreds of miles from the city.”³

These ditches, canals or other waterways often had to pass over someone else’s land via an easement. An easement is a property right, often purchased. Canal easements include a dominant estate – the ditch owner – and a servient estate – the landowner on whose land the ditch must pass.

¹ Section 1, *An Act to protect and regulate the irrigation of land in Montana Territory*, Laws of 1864. This act passed Jan. 12, 1865.

² PBS&J, *Irrigation in Montana: A Preliminary Inventory of Infrastructure Condition* (2009)

³ A. Dan Tarlock, *Law of Water Rights and Resources*, § 5:24, Thomson Reuters/West (2012)

“The first appropriations in the West were made by persons entering on the public lands without express authority,” wrote David H. Getches, former dean of the University of Colorado Law School and natural resources law expert, referring to water diversions made by miners from federal lands.⁴

While these early “trespassing” ditches and canals were validated by subsequent federal legislation, others had to “reckon with private landowners when their diversions required crossing private lands.”⁵

The adoption of the prior appropriation doctrine by Western courts and legislatures “solved the problem of the great distances that separated most productive uses from the streams.”⁶

“Requiring miners and irrigators to own land along streams before they could use water from a watercourse made no sense,” writes Donald D. MacIntyre, former chief legal counsel for the Montana Department of Natural Resources and Conservation. The prior appropriation doctrine also “provided the security necessary for development.”

“As the West populated, the irrigators needed to cooperate with one another to develop systems of ditches and canals that required capital investment.”⁷

Framework for Montana irrigation policy

The 1889 Constitution – Montana’s first after gaining statehood – recognized the importance of irrigation ditches and canals to future settlement.

“The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all dithes [sic], drains, flumes, canals and aqueducts [sic], necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.”⁸

This language – minus the misspellings – was later incorporated into the 1972 Constitution.

A 1921 Montana Supreme Court case ended any confusion whether prior appropriation – and the subsequent irrigation schemes – was legal. Justice William L. Holloway wrote “...it is immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which the waters are taken.”⁹

In 1981, the legislature prohibited interference with canal or ditch easements. Subsection 70-17-112(2), MCA, states that “no person may encroach upon or otherwise impair any easement for a

⁴ David H. Getches, *Water Law in a Nutshell*, 182, West Publishing Co. (1997)

⁵ I.b.i.d.

⁶ Donald D. MacIntyre, “*The Prior Appropriation Doctrine in Montana*,” 55 Montana Law Review 303 (1994)

⁷ i.b.i.d.

⁸ Article III, sec. 15, 1889 Mont. Const.

⁹ Mettler v. Ames Realty, 61 Mont. 152, 201 P. 702 (1921)

canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.”¹⁰

Encroachment or impairment appears to include any form of alteration, from placing a culvert and a bridge across the ditch or relocating the canal by digging a new route. Montana law does not allow any alteration unless “the holder of the canal or ditch easement consents in writing to the encroachment or impairment.”¹¹ The law also allows a ditch owner a secondary easement to access their canal for maintenance. This secondary easement has been the subject of lawsuits over the years. As a result, it appears a servient landowner appears to have little leverage against a recalcitrant ditch owner.

In extreme instances, a landowner may take matters into their own hands and relocate or otherwise alter a ditch. The ditch owner may be unaware of this alteration – and may be none the wiser – if the ditch owner’s water share continues to be delivered as in the past or if the ditch is not regularly maintained. But if the ditch owner’s water share has been diminished, or an encroachment or impairment is discovered during maintenance of the ditch, conflict – and lawsuits – may arise. A 2008 report on the state of Montana’s irrigation systems reported “the loss of irrigated acres in counties throughout the western region of Montana is likely also due to the transition from agricultural to recreation-based economies that these counties have experienced in recent years.”¹² This transition has been at the root of many landowner-ditch owner conflicts.

Court decision, 2013 legislation

A recent Montana Supreme Court ruled clarified what was determined to be an encroachment – a culvert and a stone bridge – and maintenance access to the canal. In *Musselshell Ranch Co. v. Joukova*, the court also introduced a new reasonableness standard for measuring an encroachment or impairment of a ditch easement:

“The balancing of rights...incorporates a standard of reasonableness: whether the servient owner’s use unreasonably interferes with the easement rights.”¹³

How this “reasonableness” test may be applied in the future – and what is and isn’t a reasonable interference – remains to be seen.

A bill during the 2013 session proposed a solution for intractable disagreements between a landowner and a ditch owner. House Bill 149 defined an encroachment as a “relocation or alteration” that:

- Does not occur when the canal or ditch is being used to deliver water; and
- Does not create an impoundment of water or affect the delivery of the water, which include the volume and timing of the delivery.

¹⁰ Section 70-17-112, MCA

¹¹ Section 70-17-112, MCA

¹² ECONorthwest, *Irrigation in Montana: A Program Overview and Economic Analysis* (2008)

¹³ *Musselshell Ranch Co. v. Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d 570

After the “encroachment” was complete, the landowner would notify the ditch owner.

During consideration in the House Committee on Agriculture, an amendment was drafted, which would have allowed a district court to declare the “relocation or alteration would not harm the canal or ditch owner or frustrate the purposed of the canal or ditch easement.”

Opponents to HB 149 said:

- Landowners aren’t often aware of ditch easements;
- Ditches are precisely engineered to move a certain amount of water, and any alteration could impair performance;
- Ditch owners may have to sue many times if landowners alter a canal through a newly subdivided property;
- Unclear future maintenance after a landowner alteration; and
- Unclear future liability after a landowner alteration.¹⁴

The House Committee on Agriculture did not advance HB 149.

The Colorado judicial test, Idaho statute

Policy in two Western neighbor states – Colorado and Idaho – may help inform this study and future policy decisions.

A Colorado Supreme Court decision laid out a judicial test for resolving ditch easement disputes. The court concluded that “there are circumstances where ditch alterations cause no harm to the benefitted owner and greatly aid the burdened owner.”¹⁵ Justice Rebecca Love Kourlis of the Colorado Supreme Court wrote:

“...we find ourselves at the onset of the 21st century with competing land uses in Colorado proliferating and somewhat unclear common-law precedent as to the interlocking rights of estate benefitting from easement and those estates burdened by them...In other area of property law, the law in Colorado has begun to recognize that the competing uses between two interested owners should be accommodated, if possible, and that inflexible notions of dominant and servient estates do little to advance that accommodation.”¹⁶

The court test allows “reasonable changes in the location of dimension of an easement” if the changes do not lessen the utility of the easement, increase burdens on the ditch easement, or frustrate the purpose of the easement.¹⁷

¹⁴ Minutes of the House Committee on Agriculture, Feb. 19, 2003

¹⁵ Scott C. Miller, *New Ditch Easement Law in Colorado*, American Bar Association Water Resources Committee Newsletter Archive, Vol. 5, No. 3, (2002)

¹⁶ *Roaring Fork Club, LP v. St. Jude’s Co.*, 36 P.3d 1229, Colo. Supreme Court (2001)

¹⁷ Scott C. Miller, *New Ditch Easement Law in Colorado*, American Bar Association Water Resources Committee Newsletter Archive, Vol. 5, No. 3, Feb. 2002

Some states, the court noted, already had similar flexibility, such as New York, Maryland, and Missouri. The opinion also notes that the idea has been rejected in some states, such as Maine.

And more than just resolving disputes, the judicial test would allow both property owners to “maximize the overall utility of the land.” A declaratory judgment by a court applying this judicial test – before an alteration is made – will discourage “self-help” actions, according to the Colorado court. This test may also help if multiple owners of a single ditch cannot agree to a project or improvement.

Like Montana, Idaho law requires written permission of a ditch owner before it is changed. And like many places, “self-help” actions by servient landowners regularly make their way into the courts. Judges in these cases have sometimes concluded that if the proper amount of water is being delivered, then damages to the ditch owner are minimal.

Idaho statute allows a landowner to “bury the ditch, canal, lateral or drain of another in pipe on the landowner’s property, provided that the pipe, installation and backfill reasonably meet standard specification for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done.”¹⁸ Furthermore, increased maintenance costs must be borne by the landowner. And, of course, written permission must be obtained.¹⁹

Idaho law contains three concepts not mirrored in Montana law:

- Burying a ditch or canal is an option to resolve a conflict;
- The law sets an engineering standard to measure the quality of work if the canal is altered;
- The landowner is responsible for increased maintenance costs as a result of any alteration or improvements; and
- A ditch owner cannot relocate a canal without the landowner’s approval.

Conclusion...and possible next steps

Irrigation ditches were an integral tool for settling the West – and continue to be very important to the region’s agricultural economy.

Montana law prohibits any encroachment or impairment with an irrigation ditch or canal without written permission from the ditch owner. A recent Montana Supreme Court ruling may allow some flexibility if the ditch’s functionality is not “unreasonably” impaired.

Other states have different legal tools and policies for resolving landowner-ditch owner disputes. A Colorado legal test is intended to head off “self help” action by landowners.

The Water Policy Interim Committee appears to have several options as they advance on the HJ 26 study. Suggested next steps may include:

¹⁸ Sec. 42-1207, Idaho Code

¹⁹ I.b.i.d

- Additional WPIC staff research, as determined by the WPIC;
- Input from affected parties in Montana regarding ditch easement disputes, including suggestions for improving current law;
- Input from Colorado water rights/land use attorneys, discussing that state's court test to resolve ditch easement disputes;
- Input from other states regarding ditch easement disputes; and
- Other steps, as determined by the WPIC.

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