Opinion No. 14-1271

July 11, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Honorable James A. French, State Engineer, Santa Fe, New Mexico.

WATER.

Discussion of law as to prior actual appropriation of water to a beneficial use.

OPINION

*{*131}* Sometime since you sent to me from your office the papers in the matter of Application No. 756 by W. C. McDonald to appropriate the waters of Bar "W" Draw, against which application Mills B. Foreman made a protest and I understand that you desire some expression of opinion from me as to the question of law involved in this matter.

Of course, I do not undertake to pass upon any questions of fact which are peculiarly within your province to decide, as for instance, whether the taking of water under the application of McDonald would actually interfere with what is claimed to be a prior appropriation by Foreman, or whether there is any water subject to appropriation, or whether Foreman has actually appropriated any water.

The only question of law that I can see in the matter is as to whether a person can, by actual appropriation and application of water to a beneficial use, without any attempt to comply with statutory requirements on the subject, obtain such a right as will enable him to prevent the approval by you of a subsequent application for a permit to appropriate the same water. This was an entirely new question to me as it had never arisen in the course of my practice, and my first natural impression was that the statutory method of acquiring a right to appropriate water was exclusive and that the protestant in such a case would have no standing. Examination of authorities, however, and a careful consideration of the reasoning upon which they are based, has led me to an exactly opposite conclusion.

In the State of Idaho, as will be seen by reference to Sections 3252 to 3266 of the Revised Codes of that state, published in 1908, there is an elaborate system provided for the acquisition of rights to divert and use water which, in a general way, is much like ours. It appears that this act, however, was originally enacted in 1903, but prior to that time there was a statutory method of appropriating water by posting and recording a notice of intention so to do and beginning work within sixty days thereafter. Under that earlier statute it was held, in the case of Sand Point Water & Light Co. vs. Panhandle Development Co., 83 Pac. 347, that a person desiring to appropriate water might do so either by actually diverting it and applying it to a beneficial use, or he might pursue the

statutory method of posting and recording his notice and beginning work *{*132}* within the statutory time; and in the later case the appropriation would date from the time of posting his notice. In other words, -- the only advantage of pursuing the statutory method was that, if the work was begun within the time limited and properly prosecuted, the right would relate back to the date of posting the notice.

In a later Idaho case, it was contended that, under the act of 1903, requiring application to be made to the state engineer for permits, water rights must be acquired under that statute and that no water right could be acquired by actual diversion and application to a beneficial use without first complying with the statute. On the other side it was contended that the right might be acquired in two ways, either by actual diversion and application to a beneficial use or by pursuing the steps prescribed by the statute. The Court, at the outset, calls attention to the provision of the Idaho Constitution on this subject which is, in substance, like our own. As quoted by the Court, it is as follows:

"The right to divert and appropriate the unappropriated water of any natural stream to beneficial use shall never be denied. Priority of appropriation is given the better right as between those using the water."

Our constitutional provision is in Section 2 of Article XVI, which reads as follows:

"The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."

Our constitutional provision, however, may not be applicable to the present case, as the claimed diversion and appropriation by Foreman was long before New Mexico became a state, but it is indicative of the policy of the state government which is the same as that heretofore declared by our territorial legislatures, as shown in Sections 1 and 2 of Chapter 49 of the Laws of 1907 and by Sections 1 and 2 of Chapter 102 of the Laws of 1905. The following quotation from the opinion of the Court will be found instructive:

"The doctrine prevailed prior to statehood, and in the earliest territorial history, that the 'first in time is the first in right,' in the diversion and use of the public waters. Indeed, this is the doctrine that has prevailed throughout the states and territories of the arid West; it is found, expressed in some form or other, in the Constitutions of most of the arid states, and has been reinforced by statutes in practically all of the irrigation states. It has never been the intention, so far as we are advised, of the legislature to cut off the right an appropriator and user of water may acquire by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream. It is like a man being actually in possession of realty; indeed, a water right is realty in this state. Section 3056, Rev. Codes; Ada County Farmers' Irr. Co. v. Farmers' Canal Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; McGinness v. Stanfield, 6 Idaho, 372, 55 Pac. 1020; Hall *{*133}* v. Blackman, 8 Idaho, 272, 68 Pac. 19. The Legislature, however, has provided for a constructive

notice, and to those who avail themselves of the statute and give this notice there is given a certain period of time in which to commence the construction of diverting works, and a further period of time in which to complete such works, and divert the water and apply it to the beneficial use for which the application was made. This is a protection to the claimant; but, if he should actually divert the water and apply it to a beneficial use, before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired. He would then be in actual possession of the property to the extent of the diversion and use, and to that extent would need no protection from a constructive notice which a compliance with the statute affords.

"Nielson having actually diverted all the water of Wood canyon and used it in the irrigation of his crops grown on his desert entry, prior to the time appellants made application to the state engineer for a permit to appropriate the waters of the same stream, he was therefore 'first in right,' and could not be deprived of such right through a permit or license from the state engineer, or otherwise."

Nielson vs. Parker, 115 Pac. 490.

In a case in a Federal Court, which was somewhat complicated by the fact that the water was from a stream rising in Montana and flowing into the state of Wyoming the rule applied is the same. The complainant in the case filed no notice as a claimant to the water in accordance with the laws of Wyoming, where he used it, and it was conceded that he did not comply with the requirements of the Wyoming statute and the Court said that the question was, -- could one seeking to make appropriation of water acquire the right to its use without complying with the statutes of the state, and the Court held that the only effect of a failure to comply with the statute was to deny the power of an appropriator to claim as of the date of the beginning of his work, the penalty being to limit his right to the time when the water is actually supplied and used.

Morris vs. Bean, 146 Fed. 426-7. The case last cited was affirmed by the Circuit Court of Appeals and is reported in 159 Fed. 651.

In a Montana case the lower court made a decree based on the theory that a water right could not be acquired save by compliance with the statute regulating the appropriation of water and the Supreme Court said that that was an erroneous view of the law. The Court said that in enacting the law the legislature did not contemplate that one who failed to comply with its terms but who had nevertheless actually diverted water and put it to a beneficial use, should acquire no title thereby, and that the object of the statute is to preserve evidence of right and also to regulate the doctrine of relation back. The Court further said that it was satisfied that the legislature did not intend that one who failed to comply with the statute, but who had nevertheless actually diverted water, could be deprived of it by another who complied with the statute at a time subsequent to the former's completed diversion.

*{*134}* Murray vs. Tingley, 50 Pac. 724, 725.

In a California case, the objection was made that the actual appropriator of water had never complied with the provision of the Civil Code for the acquisition of water rights, but the Court said that it was without merit as the evidence clearly showed that he and the plaintiff, who was his grantee, had actually appropriated and used the water for years before the defendant interfered with it and that the law was settled, where there has been an actual appropriation of water, a right to it is acquired without following the course laid down in the Code.

Watterson vs. Saldunbehere, 35 Pac. 433.

Another California case considers the matter rather more at length and notwithstanding a statutory provision that a failure to comply with the rules laid down in the Code deprives claimants of the right to the use of the water as against a subsequent claimant who complies therewith, the Court holds in favor of the prior actual appropriator notwithstanding that he had not complied with the statute.

Wells vs. Mantes, 34 Pac. 324-5.

In the present case, I understand that it is conceded that the protestant never made any attempt to comply with the statutory requirements of New Mexico before the making of the application by McDonald and, therefore, as stated at the beginning of this letter, the only question of law can be the one which I have discussed, and I am forced to the conclusion, both by reason and authority, that the prior actual appropriator, whose diversion of the water and its application to a beneficial use are visible, thereby giving notice to any other interested person, will give a better right to the water than could be obtained under an approved application to you for the right to appropriate the water. I must again repeat, however, that I do not undertake to pass upon any question of fact, such as to whether there was appropriation of water by the protestant and application to a beneficial use, or when or to what extent such appropriation, if any, was made.

I return herewith the papers in the case.