Natural Resources Journal

13 Nat Resources J. 1 (*Winter 1973*)

Winter 1973

Prerequisite of a Man-Made Diversion in the Appropriation of Water Rights - State ex. rel. Reynolds v. Miranda

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COMMENT

THE PREREQUISITE OF A MAN-MADE DIVERSION IN THE APPROPRIATION OF WATER RIGHTS — *STATE ex. rel. REYNOLDS v. MIRANDA**

The appropriation doctrine in water law is based on the principle that he who uses water beneficially gains rights to use water in the future. The doctrine is in contrast with the riparian doctrine which grants water rights to owners of land adjacent to rivers and streams. Through appropriation, water rights in a river may be gained without ownership of any adjacent land. An owner of river-bank property in a riparian jurisdiction has water rights although he may never have used the river water.

A man-made diversion is generally required in order to perfect water rights by appropriation[1] and, as a practical matter, diversions are generally necessary for efficient use regardless of the legal requirement. However, some beneficial uses can function without a diversion and the users have occasionally fought the diversion requirement. The results of these cases often have turned on whether the court thought the claim was based in riparian or appropriation law. If the water is beneficially used, the claim is properly an appropriation claim and not a riparian claim, because the claim is not based on the locational nexus of stream and property but rather on the application of water to beneficial use. The position taken by many courts that a diversion is necessary is unfortunate, since it has served to defeat claims made on the basis of beneficial use unaided by artificial diversion, and it seems difficult to logically differentiate such uses from those accomplished with the aid of an artificial diversion. As a result, a conflict has emerged between the concept of beneficial use and the diversion requirement.

The New Mexico Supreme Court, in the case of *State ex rel. Reynolds v. Miranda*,[2] has resolved the conflict in favor of the diversion requirement. This comment will discuss the implications and logic of the court's decision.

In 1969 Lorenzo Miranda filed a declaration of ownership of water rights and applied for a change in the point of diversion in order to

*83 N.M. 443, 493 P.2d 409 (1972).

1. Hutchins, *Background and Modern Developments in State Water-Rights Law*, in 1 Water and Water Rights §§ 20.3, 22.2 (R. Clark ed. 1967); 1 W. Hutchins, Water Rights Laws in the Nineteen Western States 366 (1971); F. Trelease, Cases and Materials on Water Law 28 (1967); 1 S. Wiel, Water Rights in the Western States §§ 364-367 (3rd ed. 1911).

2. 83 N.M. 443, 493 P.2d 409 (1972).

drill two wells for irrigation. Miranda's declaration was based on a claim he said had been perfected by his predecessors prior to 1907 (when the New Mexico statutory water law[3] came into effect) by the grazing of cattle on grass in the Abo Wash (Socorro County) and the harvesting of such grass for winter use. Sometime after World War I, an arroyo formed in the wash and the natural irrigation declined. With his suit, Miranda sought the State's permission to use his purported water rights by drilling into the Rio Grande Underground Water Basin. The controversy was limited by stipulation to the issue of the diversion requirement, thus avoiding the issues of abandonment and forfeiture. Miranda presented no evidence that any man-made diversion was constructed or used in perfecting the claim. The New Mexico Supreme Court dismissed Miranda's claims, holding that "man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes."[4]

The New Mexico Supreme Court thus adopted the general rule of appropriation that a man-made diversion is necessary in order to perfect water rights, at least as to agricultural uses. A logical extension of this rule when water rights are purchased is that the maintenance and use of a man-made diversion is necessary in order to avoid the loss of water rights by abandonment or forfeiture.

A few cases, most notably in Colorado, have taken exception to the general rule. The Colorado cases began with *Thomas v. Guiraud*[5] which contained dictum that diversion would be irrelevant if the water were being successfully applied to beneficial use.[6] In the case of *Larimer Co. Reservoir Co. v. People ex rel. Luthe, Dist. Atty.*,[7] the court solidified the *Thomas* dictum by holding that a natural depression in a streambed may be used as a reservoir and the contained waters legally appropriated without a man-made diversion. The Eighth Circuit Court of Appeals later held, in *Empire Water & Power Co. v. Cascade Town Co.*,[8] a case involving the aesthetic use of a stream, that an appropriation based on natural flow should only be denied if the use of such flow were found wasteful.

Counsel for Miranda relied upon the recent Colorado case of *Town of Genoa v. Westfall*,[9] which in turn rested on *Thomas* and *Fort*

3. N.M. Stat. Ann. §§ 75-1-1 *et seq.* (Repl. 1968).
4. 83 N.M. at 445, 493 P.2d at 411.
5. 6 Colo. 530 (1883).
6. *Id.* at 533.
7. 8 Colo. 614, 9 P. 794 (1886).
8. 205 F. 123 (8th Cir. 1913). The case was one of Colorado law.
9. 141 Colo. 533, 349 P.2d 370 (1960).

Morgan Land & Canal Co. v. South Platte Ditch Co.[10] In the latter case there is language, as in the syllabus by the court, suggesting that a diversion is a necessary prerequisite for appropriation but the facts and the court's discussion of the case clearly indicate the holding to be that an appropriation is only valid when based on actual beneficial use.[11] Dictum that a diversion is a requirement appeared in *Fort Morgan* and also in *Farmers' High Line Canal & Reservoir Co. v. Southworth*,[12] cited by the *Fort Morgan* court, undoubtedly because the diversions were already present and did not create an issue in these cases. The only issue necessary to deciding all of these cases was the issue of beneficial application, not the issue of diversion. Thus, the courts' position suffered from overbreadth insofar as their discussions indicate the necessity of diversion. This error in overbreadth was present in the New Mexico case of *Harkey v. Smith*[13] in which diversion was not even a purported issue, but the New Mexico Supreme Court cited *Harkey* in *Miranda* for the enunciation of principles of appropriation, among them, the necessity of diversion.

The *Miranda* court attempted to distinguish *Genoa* by correctly reciting Colorado's beneficial use and intent requirements for perfection without diversion. The court then declared that grazing was not the application of water to beneficial use nor did it evidence the necessary intent to use beneficially. The court erred in assuming that beneficial use or the lack of it was relevant to the *Miranda* case. The case was limited to the issue of diversion, as the court itself admitted in the first paragraph of its opinion. Beneficial use and intent, which are general requirements for appropriation and which are not peculiar to appropriation without diversion, should not have been considered by the court. The court seems, however, to have first decided that Miranda should not be allowed to have a favorable decision because of the lack of beneficial use and intent. The court then answered the question, "is diversion necessary?", as if the question were that of beneficial use.

The court cited *Walsh v. Wallace*,[14] a Nevada case which rejected a water rights claim based on grazing because there was no diversion, to support its contention that a diversion was necessary for the appropriation of water. The *Miranda* court did not discuss *Steptoe Live Stock Co. v. Gulley*[15] (although Miranda's counsel cited this case

10. 18 Colo. 1, 30 P. 1032 (1892).
11. *Id.* 30 P. at 1034. The court accepted the *Larimer* statement that "the true test of the appropriation of water is the successful application thereof to the beneficial use designed."
12. 13 Colo. 111, 21 P. 1028 (1889).
13. 31 N.M. 521, 247 P. 550 (1926).
14. 26 Nev. 299, 67 P. 914 (1902).
15. 53 Nev. 163, 295 P. 772 (1931).

in his brief) in which the Nevada Supreme Court in effect overruled the *Walsh* holding by allowing the appropriation of water based on watering of livestock without a diversion. In *Walsh,* the Nevada court had been concerned with eradicating any supposed elements of the riparian doctrine in Nevada and the justices apparently felt that use without diversion was such an element (they did not decide the issue of whether grazing was beneficial use). The *Steptoe* court attempted to distinguish *Walsh* by assuming that a diversion was necessary for irrigation.[16]

The Utah Supreme Court has also misconceived the assertion of a water right without diversion as riparian in nature and then rejected the claim because the riparian doctrine was not recognized in Utah.[17] The Idaho Supreme Court made the same error,[18] but the Oregon Supreme Court escaped the trap when it allowed the perfection of water rights based on natural irrigation.[19] Samuel Wiel, author of *Water Rights in the Western States,*[20] also seems to have feared that claims based on use without diversion were proceeding under the riparian doctrine and he made the same error that the Nevada (in *Walsh*), Utah, and Idaho courts made, namely, deciding the issue on the supposed proper form rather than on the substance of the appropriation doctrine.

The substance of the appropriation doctrine is beneficial use. Diversion may serve to put potential water users on notice of prior appropriations and there is also the argument that diversions prevent some waste of water resources. The water permit system now provides notice to potential water users and apparently obviates that element of the argument for man-made diversions.[21] As to waste, the state engineers generally have sufficient power independent of the diversion requirement to enjoin wasteful acts and to require procedures for avoiding waste.[22]

Some uses are efficient without a man-made diversion. Examples might include stock-watering, recreational use, and fish culture. Over-appropriation of water in the various basins does not moot the

16. *Id.* 295 P. at 774.

17. Hardy v. Beaver County Irr. Co., 65 Utah 28, 234 P. 524 (1924).

18. Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909).

19. In re Water Rights in Silvies River, 115 Or. 27, 237 P. 322 (1925). Oregon has a combined riparian-appropriation system of water rights and, as a result, this case may be of limited persuasiveness in "pure" appropriation states.

20. S. Wiel, *supra* note 1.

21. Water permit systems do not presently supply complete information on actual or intended appropriations, but this hardly vitiates the argument that the permit supersedes the diversion as an information source since direct observation is a more unsatisfactory method of ascertaining water rights. Any failings of a permit system can be corrected.

22. *See, e.g.,* N.M. Stat. Ann. §§75-5-5 to -6, -37 (Repl. 1968).

issue because water rights are saleable and an old use perfected with a diversion may be converted to a use for which a diversion would be superfluous. The requirement of a diversion where none is needed is economically inefficient and burdensome as well as unfair and prejudicial in its legal consequences. Such a requirement is economically inefficient because the same amount of product is created at greater cost; burdensome because it forces a capital outlay by a person who often cannot afford such an expenditure; unfair because it forces a class of water users to take an otherwise unnecessary action that is perhaps required because the other classes of water users have found a diversion necessary regardless of any legal requirement; prejudicial because it denies uses that may require that no diversion be made.

If a conservation organization bought a canyon and all the water rights needed to assure the natural flow of water through the canyon and a court were willing to define the club's recreational use and preservation of the natural area as beneficial use, the organization would nevertheless lose its water rights if the diversion rule were strictly followed.[23] It is true that the New Mexico Supreme Court limited its ruling to agricultural cases, but in light of stock-watering that holding should be overruled. Furthermore, if the *Miranda* holding is not overruled, the holding may be extended to non-agricultural cases in the future.

The *Miranda* holding and the general rule requiring diversion are unnecessary embellishments of the appropriation doctrine and have undesirable effects. The courts need only look for intent to use the water beneficially, the time of appropriation, actual application to

23. For other discussions of diversions re recreation *see* Ellis, *Watercourses—Recreational Uses for Water Under Prior Appropriation Law*, 6 Natural Resources J. 181 (1966); Comment, *Water Appropriation For Recreation*, 1 Land & Water L. Rev. 209 (1966). Willis Ellis's article is a critique of *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 158 Colo. 331, 406 P.2d (1965), a case in which the Colorado Supreme Court erroneously stated that "There is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' . . . without diversion. . . ." The court did not discuss *Thomas v. Guiraud*, *supra* note 5, or the other Colorado cases holding otherwise, *supra* notes 7 and 8. To support its position, the court cited *City and County of Denver v. N. Colorado Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954), in which diversion was not an issue but which did cite *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 98 P. 729 (1908), which contains the unsubstantiated statement that "it has been repeatedly decided in this jurisdiction that an 'appropriation' consists of an actual diversion of water from a natural stream, followed within a reasonable time thereafter by an application thereof to some beneficial use." The other case cited by the *Colorado River Water Conservancy Dist.* court seems to substantiate the court's position since in that case, *Board of County Comm'rs v. Rocky Mountain Water Co.*, 102 Colo. 351, 79 P.2d 373 (1938), it was assumed that diversion was a critical element in appropriation. *Board of County Comm'rs* is poor support because it did not involve a non-diversionary use. Even if it were conceded that prior Colorado cases support the diversion rule, that concession would only lend support to what the law might have been and not to what the law should be.

beneficial use, and conformance with statutory law in order to give the appropriation doctrine its proper reach. *Miranda* should be overruled and the diversion rule eliminated from the appropriation doctrine. The appropriation doctrine would then be more economically efficient and less burdensome as well as be legally fairer and less prejudicial.

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