

**Irrigation District—Teton Co-operative Reservoir Company Not Bound by a Decree to Which it was Not a Party—Extent of Water Rights.**

The Teton Co-operative Reservoir Company is not bound or estopped by a decree rendered in an action to which it was not a party. An appropriator of water is limited to the amount of water that his original ditch would carry before subsequent appropriations were made by others.

An appropriator can claim water in excess of that actually used, providing he has lands upon which it may be applied to a beneficial use, and providing it does not exceed the original capacity of the ditch at the time the right of subsequent appropriators attach.

C. S. Heidel, Esq.,  
State Engineer,  
Helena, Montana.

My dear Mr. Heidel:

I have your letter regarding your investigation of the available water of the Teton River for use by the Teton Cooperative Reservoir Company in connection with its present irrigation and reclamation project.

It appears that this company in 1902 filed on 3,000 second-feet of water of this stream and that this company has since constructed a large reservoir diversion dam and intake canal and has made use of these stored waters for several years for irrigation purposes.

The Bynum Irrigation District of Teton County proposes to purchase the water rights of the Teton Cooperative Reservoir Company and has made application to have the Irrigation District Bond Commission certify a proposed bond issue by the latter company. This involves an investigation on the part of the Commission of the available water supply and water rights of the Teton Cooperative Reservoir Company.

In 1904 a suit was instituted in the District Court of Teton County which resulted in a decree being entered in 1908 settling and decreeing 400 second-feet of the waters of this stream to prior appropriators. The Teton Cooperative Reservoir Company was not made a party to this suit. It is contended that this decree was not based upon beneficial use and that several sets of measurements show less than 300 second-feet actually diverted during irrigation season, and that this is more than is put to a beneficial use and is more than the carrying capacity of the ditches at the date of the decree.

You wish to be advised:

1. Whether the Teton Cooperative Reservoir Company is bound by or estopped by the decree to which it was not a party.

2. Whether it can lawfully claim waters of the Teton River in excess of the present carrying capacity of the ditches of the several parties whose rights were adjudicated by the decree.

3. Whether it can claim water of this stream in excess of that which is actually put to a beneficial use.

Your first question is answered in the negative. One not a party to a suit to determine contract rights in an irrigation ditch is not bound by the decree rendered therein and his rights must be determined as if such suit had not been instituted.

Carns v. Dalton, 56 Ore. 596, 110 Pac. 170;

Stocker v. Kirtley, 6 Ida. 795, 59 Pac. 891.

See, also:

Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715.

The rule is stated in 3 Kinney on Irrigation and Water Rights, at page 2830, as follows:

"A decree and judgment is not *res judicata* as to the persons who were not made parties to the action, or as to their rights. Neither is it binding on persons who were made parties to the action, but who were not served with legal process, and who did not appear in the action; such adjudication being as to them without due process of law."

The two remaining questions are answered by the following Montana cases:

McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648;

Conrow v. Huffine, 48 Mont. 437.

See, also:

Sloan v. Byers, 37 Mont. 503;

Bennett v. Quinlan, 47 Mont. 247.

In Conrow v. Huffine, *supra*, our Supreme Court quoted from the McDonald Case as follows:

"The test of the extent of an appropriation with reference to a subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches through his remaining land, provided that the total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropria-

tion and the subsequent water right, the capacity of the ditch, by means of which he first made his appropriation, is the test of the extent of it."

And then proceeds as follows:

"Under this rule, the extent of the right of the first appropriator is measured by the capacity of the original ditch. After the use has been installed, however, if the capacity of the ditch exceeds the amount required for reasonable use, the necessity for the use, and not the size of the ditch, is the measure of the extent of the right. (*Toohey v. Campbell*, 24 Mont. 13, 60 Pac. 396; *Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575.) The tendency of recent decisions of the courts in the arid states is to disregard entirely the capacity of the ditch and regard the actual beneficial use, installed within a reasonable time after the appropriation has been made, as the test of the extent of the right. (1 *Wiel on Water Rights*, sec. 476; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811; *Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867; *Drach v. Isola*, 48 Colo. 134, 109 Pac. 748; *Larimer County Canal No. 2 Irr. Co. v. Poudre Valley R. Co.*, 23 Colo. App. 249, 129 Pac. 248; *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 102 Pac. 481; *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 1102, 102 Pac. 728.)

"The use of water flowing in the streams of this state is declared by the Constitution to be a public use. (Constitution, Art. III, sec. 15.) The use must be beneficial, and, when the appropriator or his successor ceases to use the water for such purpose, the right ceases. (Rev. Codes, sec. 4841.) If conditions change as time passes, and the necessity for the use diminishes, to the extent of the lessened necessity the change inures to the benefit of subsequent appropriators having need of the use, for, subject to the rule that 'as between appropriators the one first in time is first in right' (sec. 4845), the prior appropriator may not divert from the stream more than an amount actually necessary for his use (sec. 4844). While, therefore, the extent of the right cannot in any case exceed the capacity of the means of diversion, the ultimate question in every case is: How much will supply the actual needs of the prior claimant under existing conditions?"

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.