Opinion No. 161.

Water and Water Rights—Appropriation—Beneficial Use.

HELD: An appropriator of water cannot have and hold the right to a greater amount of water than is placed to a beneficial use.

August 22, 1935.

State Water Conservation Board
Helena, Montana

In response to your request for my opinion upon the question,

"What are the legal rights acquired by an appropriator of 285,000 inches of water of a stream when the appropriator has never placed to beneficial use to exceed 1,600 inches and the present capacity of the canal is approximately 500 inches?

"Can an appropriator of water have and hold the right to a greater

amount of water than placed to beneficial use?"

I submit the following reply.

Section 7094, R. C. M. 1921, provides: "The appropriation must be for some useful or beneficial purpose and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact and shall be determined as other questions of fact."

One of the leading decisions on this subject was rendered by our Supreme Court in the case of Bailey v. Tintinger, 45 Mont. 154, at page 178, announcing the rule that: "The appropriator's need and facilities, if equal, measure the extent of his appropriation. If his needs exceed the capacity of his means of diversion, then the capacity of ditch, etc., measures the extent of his right. If the capacity of his ditch exceeds his need, then his needs measure the limit of his appropriation."

The Supreme Court in the case of Conrow v. Huffine, 48 Mont. 437, at page 444 further clarified the law by holding: "The use of water flowing in the streams of this state is declared by the Constitution to be a special use. The use must be beneficial, and when the appropriator or his successor ceases to use the water for such purpose the right ceases."

The latest pronouncement of the Supreme Court in the case of Gilcrest v. Bowen, et al, 95 Mont. 44, at page 56 broadens the rule heretofore established, in the following language: "Law and equity give to the first locator of land and claimant of water a sufficient quantity of water to irrigate his land. (Thorp v. Woolman, 1 Mont. 168.) The amount is determined by his needs and facilities for use at the time of appropriation. (Conrow v. Huffine, 48 Mont. 437, 138 Pac. 1904; Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702.) Much depends upon the intention of the appropriator; if he intended originally to bring his entire tract under cultivation and constructs a ditch large enough to do so, it is immaterial that he did not do so at once; he may later irrigate his whole tract under the original appropriation. (Smith v. Duff, 39 Mont. 382, 102 Pac. 984, 133 Am. St. Rep. 587; Toohey v. Campbell, above.)"

Our conclusion is, therefore, that an appropriator of water cannot have and hold the right to a greater amount of water than placed to beneficial use. Where one has sought to appropriate 285,000 inches of water from a stream, and has never placed to beneficial use to exceed 1,600 inches, and the present capacity of the canal is approximately 500 inches, it would seem that his maximum appropriation would be 1,600 inches. Whether or not he can clam more than 500 inches is dependent upon the evidence of abandonment.