

Lease of Land. Water Right, on Leased Land. Improvement, Water Right, State Land. Water Right, How Located, Leased Land. Irrigation, of Leased Land.

Where land is leased and lessee on his own initiative and without action on the part of the state board procures water for use thereon, such water right does not attach to the land, but is the property of lessee.

February 2, 1912.

State Board of Land Commissioners,
Helena, Montana.

Gentlemen:

The question submitted to this office by letter of August 12, 1911, has been heretofore discussed by me before the board and action taken thereon, but in order to complete the files I here reduce the conclusions there reached to writing. The question submitted is:

If the lessee of state lands on his own initiative either locates or otherwise procures water for use on the lands so used by him, does the right to the use of the water so procured by the lessee attach to the land so as to pass to the state or to the succeeding lessee?

The state leases only that which it owns, and if it does not own a water right it cannot lease the same. Hence, if the state leases only the land it has no vested right in the water obtained by the lessee and cannot demand the same of the lessee at the termination of the lease. Neither can the lessee require his successor to purchase the water right as an improvement placed by him upon the land. But where the water right is obtained by the lessee under and by virtue of the provisions of Sec. 2176, then it does become an improvement upon the land, which the subsequent purchaser or subsequent lessee must pay for, but this section requires the lessee to make written application to the board and to acquire the water right either by location or otherwise by and with the consent of the board. Where the board has not been consulted and the provisions of this section complied with in the acquisition of the water right, the state at the expiration of the lease can have no claim to the water right but may demand compensation for the right of way across the state lands. Where

therefore, a lessee obtains water in the manner indicated in the question, when his lease expires, he must either use the water on some other land, or for some beneficial purpose, or it will work an abandonment of his water right.

Under the law of this state regulating water rights the locator of water may change the place of diversion, or the place of use, or the purpose for which the water is used.

Sec. 4840 et seq. Revised Codes.

Murray v. Tingley, 20 Mont. 260.

Hays v. Buzard, et al. 31 Mont. 74.

Head v. Hale, 38 Mont. 202.

It may be proper here to call attention to Sec. 2254 Rev. Codes, which prescribes the manner of locating water rights on and for Carey lands.

Respectfully submitted,

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