

Opinion No. 298

Water Rights—State Lands—Easements

HELD: A water right may be perfected when water from springs has been appropriated on state land and conveyed across said land through a pipe line without securing a right of way in the form of an easement from the state.

August 10, 1933.

You ask "whether or not a water right is perfected when water in the form of springs has been appropriated on state land and conveyed across said land through a pipe line without securing a right of way in the form of an easement from the state."

It appears from the report of the state forest warden attached to your letter that three persons who own and occupy tracts adjoining state land are obtaining their supplies of water thru pipes which tap four springs located on said state land. It further appears that the predecessors in interest of at least two of these occupiers followed the provisions of Sections 7100 and 7101, Revised Codes 1921, in appropriating or attempting to appropriate the waters of three of the springs. The report also discloses that two permittees who occupy small tracts of said state land have no water available for domestic use unless permitted to take water from one or another or all of said springs.

The rule is universally recognized that in order to acquire a water right on the private land of another, one must acquire an easement in such land. An easement can be acquired only by grant from the owner, by condemnation proceedings or by adverse user. (*Prentice v. McKay*, 38 Mont. 114).

This rule, however, has no application to public land. The laws of Mon-

tana give a person the right to go on the public domain for the purpose of appropriating water flowing through the same or having its source therein. The diversion of such water may be made by a ditch, flume, pipe or aqueduct. (Section 7093 et seq., Revised Codes 1921; *Smith v. Denniff*, 24 Mont. 20; *Prentice v. McKay*, supra.)

The first appropriator on a stream or spring is entitled, by virtue of his prior right, to the use and enjoyment of the water to the full extent of his original appropriation, even when this includes all of the water of the stream or spring, and this right continues so long as he applies all of the water appropriated to some useful or beneficial purpose. (*Mettler v. Ames Realty Co.*, 61 Mont. 152; 2 Kinney on Irrigation and Water Rights, sec. 781; 40 Cyc. 714-718). The legislative declaration is that, as between appropriators, he who is first in time is first in right. (Section 7098, Revised Codes, 1921).

If it be so that the three persons mentioned above have validly appropriated all of the water which flows from the four springs in question, then the fact that the permittees are without any water is of no consequence in the case. In Montana, moreover, no preference right is given to a junior appropriator for the use of water for domestic purposes.

It may be well to add that a person can acquire a water right by adverse user as against the state. (*State v. Quantic*, 37 Mont. 32).