

## No. 18

**WATER, Retention by Means of Small Storage Dams for Live-  
stock or Irrigation—STREAMS, Conflicting Rights on,  
Determined How**

Held: **Two principles of law to be considered:**

1. **The right of appropriation as fixed by 7093, Revised Codes of Montana, 1935.**
2. **The right of one to use water which falls upon or originates upon his own land.**

February 7, 1941

Senator Herbert H. Haight  
The Capitol  
Helena, Montana,

Dear Senator Haight:

In reply to your inquiry as to who may retain water by means of small storage dams for livestock or irrigation, and what determines the rights of the parties where there are conflicting rights on small intermittent streams, I would advise you that there are two principles of law which must be considered in connection with this matter:

1. The right of appropriation as fixed by the statute of Montana, and
2. The right of one to use water which falls upon or originates upon his own land.

Our statute in relation to appropriation is as follows (Section 7093, Revised Codes of Montana, 1935):

"The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."

Thus we see that an appropriation may be made from whatever is called a water course and this appropriation is valid against all later appropriators, except as to waters which fall upon the lands of some particular person who desires to use them on his own land.

A water course has been defined in the head note of a decision by the Supreme Court of this State as follows:

"A 'watercourse' within the meaning of the law of water rights may be formed by waters flowing down the channel of a gulch in times of storms and melting snow from the hills at its source and draining from the surrounding territory; it is a living stream with well-defined banks and channel, not necessarily running at all times but fed from other and more permanent sources than mere surface water; its channel may at times be dry, but so long as to the casual glance it bears the unmistakable impress of the frequent action of water which had flowed through it from time immemorial, it is a watercourse from which water may be appropriated."

Popham v. Holloron, 84 Mont. 442, 275 Pac. 1099.

This rule therefore fixes the right to appropriate water in a coulee, except as to the rights of another to retain water which originates on his own land.

As to the right of one to retain water which originates on his land, the rule has been stated as follows:

"It is generally held that the owner of the soil has the absolute right to the surface water thereon, and he may, in the improvement

of his lands, or for his own use, retain all such water, and prevent it from percolating or flowing upon the lower land of an adjoining proprietor."

27 R. C. L. 1138.

In the case of *Benson v. Cook*, 201 N. W. 526, 528, the Supreme Court of South Dakota states:

" . . . It is a settled rule and a rule from which we believe there is no dissenting voice, that the owner of land has the absolute right to the surface water found thereon, and that he may retain such water for his own use and prevent it from flowing upon the land of another."

The application of these two rules I believe will in most instances determine the rights of persons who have, or who may construct, small dams upon their own lands and govern the rights to retain water in case of conflict.

Sincerely yours,

JOHN W. BONNER  
Attorney General