

## VOLUME NO. 36

## Opinion No. 99

**WATER AND WATERWAYS—Groundwater, appropriation; WATER AND WATERWAYS—Appropriation, filing requirements; Sections 89-810, 89-811, 89-812, 89-829, 89-2913, 93-401-16, R.C.M. 1947.**

**HELD:** 1. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may acquire a water right by appropriation by filing a "GW-2" notice of completion after July 1, 1973, under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).

2. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may secure a water right by filing a notice of completion, form 602, after July 1, 1973, pursuant to the Montana Water Use Act, section 89-865 et seq., Revised Codes of Montana 1947, in lieu of any filings under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).

3. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may secure a priority date as of the time of filing a notice of completion, either form "GW-2" or form 602, pursuant to section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).

4. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may not secure a "use right" in the well, with a date of priority dating from the first day the water was put to a beneficial use. The owner of such a well may obtain a water right with a date of priority dating from the time of filing a notice of completion pursuant to the statutory procedure for appropriating groundwater under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).

September 10, 1976

Mr. Gary J. Wicks, Director  
Department of Natural Resources and Conservation  
32 S. Ewing  
Helena, MT 59601

Dear Mr. Wicks:

You have requested my opinion on the following questions:

1. May the owner of a well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, secure a water right by filing a "GW-2" notice of completion after July 1, 1973, under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973)?

2. May the owner of such a well secure a water right by filing a notice of completion, form 602, after July 1, 1973, pursuant to the Montana Water Use Act, section 89-865, et seq., Revised Codes of Montana 1947, in lieu of any filings under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973)?
3. If either or both of the above filings are permissible, what would be the well owner's date of priority?
4. May the owner of such a well make no filings of any kind, and instead rely upon a "use right" in the well, with a date of priority dating from the first day the water was put to a beneficial use?

Prior to July 1, 1973, the effective date of the new Water Use Act (section 89-865 et seq.), the statutory procedure for appropriating groundwater in Montana was found in Chapter 29, Title 89, R.C.M. 1947. Section 89-2913 provided in pertinent part:

(b) **On and after January 1, 1962**, any person desiring to appropriate ground water may complete a notice of appropriation and file it with the county clerk of the county in which the appropriation is located.

(d) After filing a notice of appropriation, in order to acquire a right based thereon, the person must, within ninety (90) days, commence actual excavation and diligently prosecute construction of a well and, upon its completion, file a notice of completion with the county clerk of the county in which the appropriation is located.

(e) A failure to file a notice of appropriation deprives the appropriator of his right to relate his date of appropriation back, and results in the **dating of his appropriation as of when he files a notice of completion**. Until a notice of completion is filed with respect to any use of ground water instituted after January 1, 1962, no right to that use **of water shall be recognized**. However, in the case of uses instituted prior to January 1, 1962 and diligently prosecuted to completion on or after that date, the date of appropriation shall relate back to the date of commencement of construction, upon the filing of a notice of completion. (Emphasis supplied)

As to groundwater appropriation made between January, 1962 and July 1, 1973, for which no notice of completion was ever filed, the statutes appear to absolutely require that a notice of completion be filed by the appropriator in order for his right to be recognized.

The possibility of filing a notice of completion in 1974 or thereafter for a well completed five or ten years ago was not excluded by section 89-2913. Subsection (d) provided that if a notice of appropriation were filed and the appropriator wished to have his right relate back, the notice of completion must be filed upon completion of the groundwater appropriation. Subsection (e) however, contemplated an appropriator filing a notice of completion at some date subsequent to the date of completion of the appropriation. Failure to file a notice of appropriation or notice of completion upon completion of the appropriation

results in the date of priority being held in limbo until such time as a notice of completion is filed. The statute seems to contemplate that an appropriator should be able to file a notice of completion at any subsequent date. Furthermore, section 89-2913 did not require any particular form but rather required that a notice of completion be filed containing the information specified in section 89-2913 (a).

Therefore, in response to your first three questions, it is my opinion that the owner of a well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made may secure a water right by filing a notice of completion after July 1, 1973, pursuant to section 89-2913. The priority of such a water right is the date when the notice of completion is filed, unless the use was instituted prior to January 1, 1962. The form which is actually filed, whether it be a "GW-2" adopted pursuant to the old groundwater code or "Form No. 602" adopted pursuant to the new Water Use Act, is of no significance and is essentially an administrative decision that rests with the Department of Natural Resources and Conservation.

You further requested my opinion as to whether a groundwater appropriator may rely upon a "use right" in the water with a date priority from the time the water was put to a beneficial use in lieu of complying with the statutory appropriation procedure.

Prior to the enactment of the groundwater code in 1962 (sections 89-2911 through 89-2936), there was substantially no groundwater law in Montana. See **Ryan v. Quinlan, et al**, 4 Mont. 521, 532, 124 P. 512 (1912); **McGowan v. U.S.**, 206 F. Supp. 845, 850 (D. Mont. 1960).

The statutory appropriation procedure for surface water was found in Chapter 8 of Title 89, R.C.M. 1947. The Supreme Court of Montana consistently held that an appropriator could obtain a surface water right without complying with the statute by simply diverting water and putting it to a beneficial use. **Vidal v. Kensler**, 100 Mont. 592, 594-95, 51 P.2d 235 (1935); **Bailey v. Tintinger**, 45 Mont. 154, 169, 122 P. 575 (1912); **Murray v. Tingley**, 20 Mont. 260, 269 (1897). These non-statutory rights were called "use rights". The legislature's only intent in enacting the statutory appropriation procedure was to regulate the doctrine of "relation back", which allowed the priority of the right to date back to the original date of filing. **Murray v. Tingley**, 20 Mont. 260, 269 (1897). The court emphasized that the legislature did not intend to deny a surface water right to one who failed to comply with the statutory appropriation procedure. 20 Mont. at 268-69.

The statutory appropriation procedure for surface water from **adjudicated** streams was found in section 89-829. The Supreme Court of Montana has held that the legislature did intend the statutory appropriation procedure for surface water from adjudicated streams to be exclusive, so that no right was obtained by one not complying with the statute. **Anaconda National Bank v. Johnson**, 75 Mont. 401, 410, 244 P. 141 (1926); **Donick v. Johnson**, 77 Mont. 229, 246, 250 P. 963 (1926).

The statutory appropriation procedure for groundwater was patterned after the surface water appropriation procedure, and essentially regulates the doctrine

of relation back. Compare sections 89-810 through 89-812 with section 89-2913. While the court in **Murray v. Tingley** was certain that the legislature did not intend the surface water statutory procedure to be exclusive, such a conclusion cannot be drawn from the groundwater code. Section 89-2913(e) specifically provided:

Until a notice of completion is filed with respect to **any use of groundwater** instituted after January 1, 1962, **no right to that use of water shall be recognized.** (Emphasis supplied)

In construing a statute, the intention of the legislature is always to be pursued if possible. Section 93-401-16; **State ex rel. Krona v. Holmes**, 114 Mont. 372, 376, 136 P.2d 220 (1943). In determining legislative intent, one must first resort to the plain meaning of the words used. **State ex rel. Cashmore v. Anderson**, 160 Mont. 175, 184, 500 P.2d 921, 924 (1972).

Therefore, in response to your fourth question, it is my opinion that the plain meaning of section 89-2913(e) is that the statutory procedure for appropriating groundwater under section 89-2913 was exclusive, so that no right was obtained by not complying with the statute.

It has been suggested that since an owner of a well completed between January 1, 1962 and July 1, 1973, for which no previous filing has been made pursuant to section 89-2913, had not perfected a groundwater right he must instead comply with the new Montana Water Use Act. I must disagree with this suggestion.

In 1972, Montana adopted a new constitution which became effective on July 1, 1973. One provision pertinent to the present inquiry, subdivision (1), was added in Section 3, Article IX of the 1972 constitution, and provides:

**All existing rights** to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (Emphasis supplied)

The question which thus arises is whether the owner of a well completed between January 1, 1962, and July 1, 1973, for which no previous filing had been made pursuant to section 89-2913, has an "existing right" to the use of groundwater, as contemplated by subdivision 1 of Section 3, Article IX of the 1972 Constitution.

The word "existing" is to be examined in the context of the law under which the right is claimed. **General Agriculture Corp. v. Moore**, 32 St. Rep. 426, 431, (1975). In this regard it is evident from section 89-2913(e) that an owner of a well completed between January 1, 1962 and July, 1973, for which no previous filing has been made, cannot secure a non-statutory groundwater "use right" since the statutory procedure for appropriating groundwater was exclusive. Thus a non-statutory groundwater right cannot be construed to come within the meaning of the phrase "existing right".

Nonetheless, an appropriator can obtain an "existing right" other than through use. The Montana Supreme Court had occasion to analyze the phrase in **General Agriculture Corp. v. Moore, supra**. General Agriculture

Corporation involved a petition by the plaintiff seeking to appropriate surplus waters from an adjudicated stream under the provisions of section 89-829. While the action was pending the legislature enacted the Montana Water Use Act. The new Act substituted a new procedure for the appropriation of water rights. The former Act, including the section under which the plaintiff instituted its petition, was repealed.

Quoting **Whitemore v. Murray City**, 107 Utah 445, 154 P.2d 749, 751, the court stated at 32 St. Rep. 431:

... Although it is true that plaintiff does not and cannot have a right to the use of the water until he has completed his works and put it to a beneficial use, nevertheless, the right to proceed and acquire this right by complying with the statutory requirements is a valuable right and its value often depends upon its priority. ...

Since Moore was attempting to remove whatever priority General Agriculture Corporation might have gained by commencing its appropriation before the 1973 amendments, the court felt compelled to hold at 32 St. Rep. 431, that:

[l]imiting "use" to perfected or actual use would nullify the existing right to priority created by the filing.

In the instant situation, a well owner's priority would date from the time the notice of completion was filed. In this regard, requiring the well owner to perfect his claim under the Water Use Act would not affect the priority date he would otherwise be entitled to under section 89-2913.

Nonetheless, it is significant that former section 89-2913 permitted a well owner to commence construction of diversion facilities before filing a notice of completion prerequisite to perfecting contingent groundwater rights. In contrast, the Montana Water Use Act requires that the appropriator obtain a permit from the Department of Natural Resources and Conservation [§89-880] after an application therefore is filed, a notice of the application be published [§89-881] and hearings be conducted thereon [§89-883]. Objections to the application are heard during this hearing [§§89-882 and 89-883].

Thus it is conceivable, if not probable, that a person who has invested considerable amounts of capital necessary to complete groundwater diversion facilities under the old groundwater code may either be unable to acquire a permit to use these facilities or may receive a conditional permit as a consequence of perfecting his right under the Montana Water Use Act.

As the Montana Supreme Court stated in **General Agriculture, Corp.**, *supra*, at page 431:

Property rights in water consist not alone in the amount of the appropriation, but, also, in the priority of the appropriation....

Since the priority held by the owner of a well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may thus be jeopardized by the hearing process or by the power of the department to condition permits issued under the new Water Use Act, I must conclude that this

well owner possesses an "existing right" to perfect his contingent right pursuant to the law as it existed when diversion commenced.

This conclusion finds support in the new Montana Water Use Act. Section 89-867 (3) defines "appropriate" to mean:

(3) ... to divert, impound, or withdraw ... a quantity of water, ...

Section 89-880 (1) provides:

(1) After July 1, 1973, a person may not appropriate water except as provided in this act, ...

When read together it is clear that these sections intend to regulate the procedure, and rights acquired thereby, of appropriating water after July 1, 1973. Since the word "appropriate" is defined to mean "to divert ... or withdraw ... a quantity of water" after July 1, 1973, and since the old groundwater code allowed the diversion or withdrawal of water before an application was filed it follows that the legislators intended not to regulate diversions and withdrawals commenced under the old act, though not perfected, by the new Montana Water Use Act.

This conclusion conforms to the construction placed upon the phrase "existing right", as used in subdivision (1) of Section 3, Article IX of the 1972 Montana Constitution, and the Water Use Act by the Department of Natural Resources and Conservation. The department has defined "existing right" in section 36-2.14J (1)-S1400 (1) (e) of the Montana Administrative Code as:

(e) "Existing right", in addition to the definition given the term by Section 89-867 (4) of the Act, **includes any appropriation of water commenced prior to July 1, 1973, if completed according to the law as it existed when the appropriation was begun.** (Emphasis supplied)

This regulation was promulgated prior to the 1975 Legislative Assembly. During this Session the Montana Water Use Act was amended in several major respects. Nonetheless, the department's interpretation of the phrase "existing right" was left unchanged. Generally, if the Legislature by its inaction has long sanctioned a certain construction, language apparently unambiguous may be given by the courts such construction, especially if the usage has been public and authoritative. **Miller Ins. Agency v. Porter, et al.**, 97 Mont. 567, 20 P.2d 643, 646 (1933). While it is recognized that the **Miller Insurance Agency** decision considered executive construction of a statute, and the present matter involves executive construction of a constitutional provision, the department's construction conforms to what I have concluded is the proper interpretation of the phrase "existing right" as used in section 3, Article IX of the 1972 Constitution, and therefore, is of consequence in interpreting that phrase.

**THEREFORE, IT IS MY OPINION:**

1. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may acquire a water right by appropriation by filing a "CW-2" notice of completion after July 1, 1973, under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).

2. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may secure a water right by filing a notice of completion, form 602, after July 1, 1973, pursuant to the Montana Water Use Act, section 89-865 *et seq.*, Revised Codes of Montana 1947, in lieu of any filings under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).
3. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may secure a priority date as of the time of filing a notice of completion, either form "GW-2" or form 602, pursuant to section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).
4. An owner of an underground well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, may not secure a "use right" in the well, with a date of priority dating from the first day the water was put to a beneficial use. The owner of such a well may obtain a water right with a date of priority dating from the time of filing a notice of completion pursuant to the statutory procedure for appropriating groundwater under section 89-2913, Revised Codes of Montana 1947 (repealed July 1, 1973).

Very truly yours,

ROBERT L. WOODAHL  
Attorney General