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# HJ26

## report

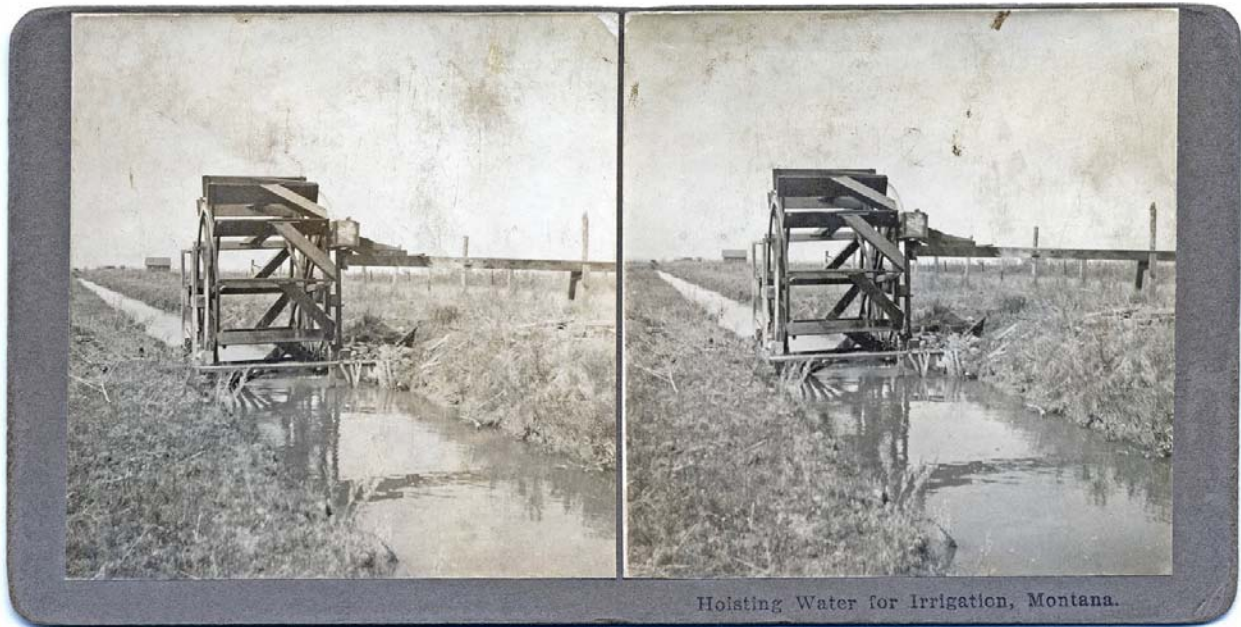
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Intersecting  
interests of estate  
owners and ditch  
owners

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Legislative Environmental  
Policy Office

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A Report to the 64<sup>th</sup> Legislature, September 2014

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“Hoisting Water for Irrigation, Montana.”

[circa 1910]

N.A. Forsyth, photographer

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**This report summarizes the work of the Water Policy Interim Committee specific to House Joint Resolution No. 26. Members received additional information and public testimony on the subject, and this report highlights key information and the processes followed by the WPIC in reaching its conclusions. To review additional information, including written minutes, exhibits, and audio minutes, visit the WPIC website: [www.leg.mt.gov/water](http://www.leg.mt.gov/water).**

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## **HJ26: An introduction**

Seeking to “examine the intersecting interests of estate owners and ditch owners and contemplate options to accommodate both estates,” the 2013 Legislature passed House Joint Resolution 26. This study topic presents a mix of property law, water law, and a healthy dose of history.

The legal underpinnings for irrigation as we know it in Montana began with the first Territorial Legislature, which in 1865 passed an act “to protect and regulate the irrigation of land in Montana territory.” If an appropriator’s land was far from a river or stream, the act declared that the appropriator “shall be entitled to a right of way through the farms or tracks of land which lie between him and said stream.”<sup>1</sup>

Canals and ditches have been integral to the Montana agricultural economy.

Today, 2 million irrigated acres are fed by ditches and canals. Most irrigators receive “off-farm” water from a water supply organization, such as an irrigation system or a users association. Others tap into private ditches and canals. A few develop and control their own groundwater sources for irrigation.<sup>2</sup>

Irrigated crops add economic value to Montana agriculture. Eighteen percent of all harvested cropland is irrigated, and irrigated crops represent a higher share of the total agricultural sector because of their increased productivity. Seventy-two percent of all irrigation water goes onto hay and pastureland, usually for use by the livestock industry.

Disputes between landowners and ditch owners occasionally arise. A landowner may wish to place bridges over ditches, change a canal route, or make other alterations. The ditch owner must agree to the action. Changing land use patterns — particularly subdividing and developing larger agricultural parcels into smaller home sites — may increase these conflicts.

## **A Montana ditch**

A water right or permit in Montana includes a source, a place of diversion, and a place of use. The place of use can be distant from the source and the place of diversion, so canals or ditches are sometimes needed.

“There need be no relationship between the source of water and the locus of use,” wrote A. Dan Tarlock of the Chicago Kent College of Law in his book on American water rights. “Los Angeles, for example, enjoys water appropriated on the Colorado and Owens rivers hundreds of miles from the city.”<sup>3</sup>

Ditches, canals, and other waterways commonly have to pass over someone else’s land via an easement. An easement is a property right, often purchased. Canal easements include a

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<sup>1</sup> Section 1, An Act to Protect and Regulate the Irrigation of Land in Montana Territory, Laws of 1864. This act passed Jan. 12, 1865.

<sup>2</sup> PBS&J, *Irrigation in Montana: A Preliminary Inventory of Infrastructure Condition* (2009).

<sup>3</sup> A. Dan Tarlock, *Law of Water Rights and Resources*, § 5:24, Thomson Reuters/West Pub. Co. (2012).

dominant estate (the ditch owner) and a servient estate (the landowner on whose land the ditch must pass).

“The first appropriations in the West were made by persons entering on the public lands without express authority,” wrote David H. Getches, former dean of the University of Colorado Law School and natural resources law expert, referring to water diversions made from federal lands by miners.<sup>4</sup>

Although these early “trespassing” ditches and canals were validated by subsequent federal legislation, later ditch owners had to “reckon with private landowners when their diversions required crossing private lands.”<sup>5</sup>

The appropriation doctrine adopted by western courts and legislatures “solved the problem of the great distances that separated most productive uses from the streams.”<sup>6</sup>

“Requiring miners and irrigators to own land along streams before they could use water from a watercourse made no sense,” wrote Donald D. MacIntyre, former chief legal counsel for the Montana Department of Natural Resources and Conservation. The prior appropriation doctrine also “provided the security necessary for development.” According to MacIntyre: “As the West populated, the irrigators needed to cooperate with one another to develop systems of ditches and canals that required capital investment.”<sup>7</sup>

A ditch owner has two separate rights: a water right and a ditch right. The ditch right can also be parsed into two parts: the ability to move water, and the right to access to maintain and repair a ditch.<sup>8</sup>

## **Ditches in Montana law**

The 1889 Constitution — Montana’s first after gaining statehood — recognized the importance of irrigation ditches and canals to future settlement.

The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all dithes [sic], drains, flumes, canals and aqueducts [sic], necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.<sup>9</sup>

This language — minus the misspellings — was later incorporated into the 1972 Constitution.<sup>10</sup>

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<sup>4</sup> David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 182.

<sup>5</sup> *Ibid.*

<sup>6</sup> Donald D. MacIntyre, “The Prior Appropriation Doctrine in Montana,” 55 *Montana Law Review* 303 (1994).

<sup>7</sup> *Ibid.*

<sup>8</sup> Presentation by Michelle Bryan-Mudd, associate professor, University of Montana School of Law, and director, Land Use Clinic, to the WPIC, Sept. 10, 2013.

<sup>9</sup> Article III, sec. 15, 1889 Mont. Const.

<sup>10</sup> Article IX, sec. 3, 1972 Mont. Const.

A 1921 Montana Supreme Court case ended any confusion as to whether prior appropriation — and the subsequent irrigation schemes — was legal. Justice William L. Holloway wrote: “It is immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which the waters are taken.”<sup>11</sup>

In 1981, the Legislature prohibited interference with canal or ditch easements. Subsection 70-17-112(2), MCA, states that “a person may not encroach upon or otherwise impair any easement for a canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.”<sup>12</sup>

Encroachment or impairment includes any form of alteration, from placing a culvert and a bridge across a ditch to relocating a canal by digging a new route. Montana law does not allow any alteration unless “the holder of the canal or ditch easement consents in writing to the encroachment or impairment.”<sup>13</sup> The law also allows a ditch owner a secondary easement to access a canal for maintenance. This secondary easement has been the subject of lawsuits over the years. As a result, a servient landowner appears to have little leverage against a recalcitrant ditch owner.

Two other statutes relate to potential conflicts over irrigation ditches.

First, state subdivision law requires mapping of an easement — with room for maintenance — as part of a development project’s approval.<sup>14</sup> Second, laws related to irrigation districts state that an irrigation district or ditch owner is not liable for injuries or damages related to an irrigation ditch unless the district or owner was “grossly negligent or engaged in willful or wanton misconduct.”<sup>15</sup>

When landowners discover a previously unknown ditch and easement on their property — commonly hidden or overgrown — some seek to resolve the issue with a “quiet title” action. In this instance, a judge could declare an easement abandoned, thus relieving the servient landowner.

In extreme instances, a landowner may relocate or otherwise alter a ditch. The ditch owner may be initially unaware of this alteration and may continue to be none the wiser if the ditch owner’s water share continues to be delivered as in the past or if the ditch is not regularly maintained. But if the ditch owner’s water share becomes diminished, or if an encroachment or impairment is discovered during maintenance of the ditch, conflict — and lawsuits — may arise. A 2008 report on Montana’s irrigation systems reported that “the loss of irrigated acres in counties throughout the western region of Montana is likely also due to the transition from agricultural to recreation-based economies that these counties have experienced in recent years.”<sup>16</sup> This transition has been at the root of many conflicts between landowners and ditch owners.

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<sup>11</sup> *Mettler v. Ames Realty*, 61 Mont. 152, 201 P.702 (1921).

<sup>12</sup> Section 70-17-112, MCA.

<sup>13</sup> Section 70-17-112, MCA.

<sup>14</sup> Section 76-3-504(k) and (l), MCA.

<sup>15</sup> Section 85-7-2212, MCA.

<sup>16</sup> ECONorthwest, *Irrigation in Montana: A Program Overview and Economic Analysis* (August 2008).

Since statehood, about 100 cases involving “ditch easements” have reached the Montana Supreme Court. A majority of those cases relate to determining whether an owner has an easement. Easements are sometimes difficult to discern because they may be prescriptive or implied rights and thus not readily apparent. A minority of the 100 cases relate to interference with an easement.<sup>17</sup>

### **The *Musselshell Ranch Co.* decision**

A recent Montana Supreme Court decision clarified what was determined to be an encroachment — a culvert and a stone bridge — and maintenance access to a canal. In *Musselshell Ranch Co. v. Joukova*, the court also introduced the “reasonableness” standard for measuring an encroachment or impairment of a ditch easement:

The balancing of rights . . . incorporates a standard of reasonableness: whether the servient owner’s use unreasonably interferes with the easement rights.<sup>18</sup>

This reasonableness test is rooted in old legal treatises and reflected in the Montana Supreme Court’s case history. In some instances, the court allowed mild interferences with an easement, such as a pond or culvert. Encroachment involving a bulldozer was usually not deemed reasonable.<sup>19</sup>

Justice Nelson’s dissent in *Musselshell Ranch Co. v. Joukova* demonstrates his belief that state law and the Legislature have given no flexibility for encroachments.

“The statute is violated by virtue of the encroachment and impairment. End of story.”<sup>20</sup>

How this reasonableness test may be applied in the future remains to be seen.

### **HB149**

A bill during the 2013 legislative session proposed a solution for intractable disagreements between a landowner and a ditch owner. House Bill 149 defined an encroachment as a “relocation or alteration” that:

- does not occur when the canal or ditch is being used to deliver water; and
- does not create an impoundment of water or affect the delivery of the water, which includes the volume and timing of the delivery.

After the “encroachment” was complete, the landowner would notify the ditch owner. The bill did not address the secondary easement right for repair and maintenance.

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<sup>17</sup> Bryan-Mudd presentation to the WPIC, Sept. 10, 2013.

<sup>18</sup> *Musselshell Ranch Co. v. Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d 570.

<sup>19</sup> Bryan-Mudd presentation to the WPIC, Sept. 10, 2013.

<sup>20</sup> *Musselshell Ranch Co. v. Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d 570.

During consideration in the House Committee on Agriculture, an amendment was drafted that would have allowed a district court to declare the “relocation or alteration would not harm the canal or ditch owner or frustrate the purpose of the canal or ditch easement.”

Opponents of HB 149 offered the following concerns:

- Landowners aren’t often aware of ditch easements.
- Ditches are precisely engineered to move a certain amount of water, and any alteration could impair performance.
- Ditch owners may have to sue many times if landowners alter a canal through a newly subdivided property.
- The responsibility for future maintenance after a landowner alteration is unclear.
- The future liability after a landowner’s alteration is unclear.<sup>21</sup>

The House Committee on Agriculture did not advance HB149.

## **A Colorado judicial test and an Idaho statute**

Policy in two western neighbor states — Colorado and Idaho — may help inform this study and future policy decisions.

A 2001 Colorado Supreme Court decision laid out a judicial test for resolving ditch easement disputes. The court concluded that “there are circumstances where ditch alterations cause no harm to the benefitted owner and greatly aid the burdened owner.”<sup>22</sup> Justice Rebecca Love Kourlis wrote:

We find ourselves at the onset of the 21st century with competing land uses in Colorado proliferating and somewhat unclear common-law precedent as to the interlocking rights of estates benefitting from easement and those estates burdened by them. . . . In other areas of property law, the law in Colorado has begun to recognize that the competing uses between two interested owners should be accommodated, if possible, and that inflexible notions of dominant and servient estates do little to advance that accommodation.<sup>23</sup>

The court test allows “reasonable changes in the location or dimensions of an easement” if the changes do not lessen the utility of the easement, increase burdens on the ditch easement, or frustrate the purpose of the easement.<sup>24</sup>

Some states, the court noted, already have similar flexibility, including New York, Maryland, and Missouri. The opinion also notes that the idea has been rejected in some western states, including Arizona, California, Nevada, and Washington.

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<sup>21</sup> Minutes of the House Committee on Agriculture, Feb. 19, 2003.

<sup>22</sup> Scott C. Miller, “New Ditch Easement Law in Colorado,” American Bar Association *Water Resources Committee Newsletter*, Vol. 5, No. 3 (February 2002).

<sup>23</sup> *Roaring Fork Club, LP v. St. Jude’s Co.*, 36 P.3d 1229, Colo. Supreme Court (2001).

<sup>24</sup> Miller, “New Ditch Easement Law in Colorado.”

More than just resolving disputes, the judicial test would allow both landowners and ditch owners to “maximize the overall utility of the land.” A declaratory judgment by a court applying this judicial test — before an alteration is made — would discourage “self-help” actions, according to the Colorado court. This test might also help when multiple owners of a single ditch cannot agree to a project or improvement.

As in Montana, Idaho law requires the written permission of a ditch owner before a ditch is changed by a landowner. And like many places, “self-help” actions by servient landowners regularly make their way into the courts. Judges in these cases have sometimes concluded that if the proper amount of water is being delivered, then damages to the ditch owner are minimal.

Idaho statute allows a landowner to:

bury the ditch, canal, lateral or drain of another in pipe on the landowner’s property, provided that the pipe, installation and backfill reasonably meet standard specification for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done.<sup>25</sup>

Furthermore, increased maintenance costs must be borne by the landowner. And, of course, written permission must be obtained.<sup>26</sup>

Idaho law contains four concepts not mirrored in Montana law:

- Burying a ditch or canal is an option to resolve a conflict.
- The law sets an engineering standard to measure the quality of work if the canal is altered.
- The landowner is responsible for increased maintenance costs that result from any alterations or improvements.
- A ditch owner cannot relocate a canal without the landowner’s approval.

## **Considerations for law?**

Could Montana law be altered to make ditch relocation more “accommodating” while also protecting the property rights of irrigators?

Most broadly, the Legislature could define a “reasonable” encroachment, as the term was raised by the Montana Supreme Court in the *Musselshell Ranch Co.* case.<sup>27</sup>

If a “reasonable” encroachment is defined, other protection may need to be considered.

A ditch owner’s rights may need to be protected, such as the implied secondary right to inspect and repair a relocated canal. If a landowner decides on a measure of “self-help” — altering a ditch without the consent of the ditch owner — the ditch owner may need the right to restore the

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<sup>25</sup> Section 42-1207, Idaho Code.

<sup>26</sup> *Ibid.*

<sup>27</sup> Testimony of Abigail St. Lawrence and Hertha Lund to the WPIC, May 13, 2014.

ditch to its original condition.<sup>28</sup> Sometimes, ditch owners and landowners reach an agreement over ditch easement disputes. A law to enforce these agreements could provide useful.<sup>29</sup>

Rather than defining “reasonable,” the Legislature could take smaller steps.

One approach to minimize conflicts between landowners and ditch owners could be to issue disclosure statements at the time of a parcel sale, similar to the use of mold disclosure statements.<sup>30</sup>

State subdivision law requires local governments to adopt provisions that require identification of ditch easements.<sup>31</sup> But individual localities may present this information differently — potentially adding confusion. For example, the town of Manhattan uses language repeated verbatim from the Montana Code Annotated.<sup>32</sup> But the documents available online for Lewis and Clark County refer only to “easements” in general; no reference to “ditch” appears anywhere in the 24-page procedures.<sup>33</sup>

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<sup>28</sup> St. Lawrence testimony to the WPIC, May 13, 2014.

<sup>29</sup> *Ibid.*

<sup>30</sup> Bryan-Mudd presentation to the WPIC, Sept. 10, 2013.

<sup>31</sup> Section 76-3-504(k), MCA.

<sup>32</sup> Section 11-6-13, Manhattan Town Code.

<sup>33</sup> “Procedures for Major Subdivisions,” Lewis and Clark County subdivision regulations, Dec. 18, 2007.