Montana Water Law

For the 1980s

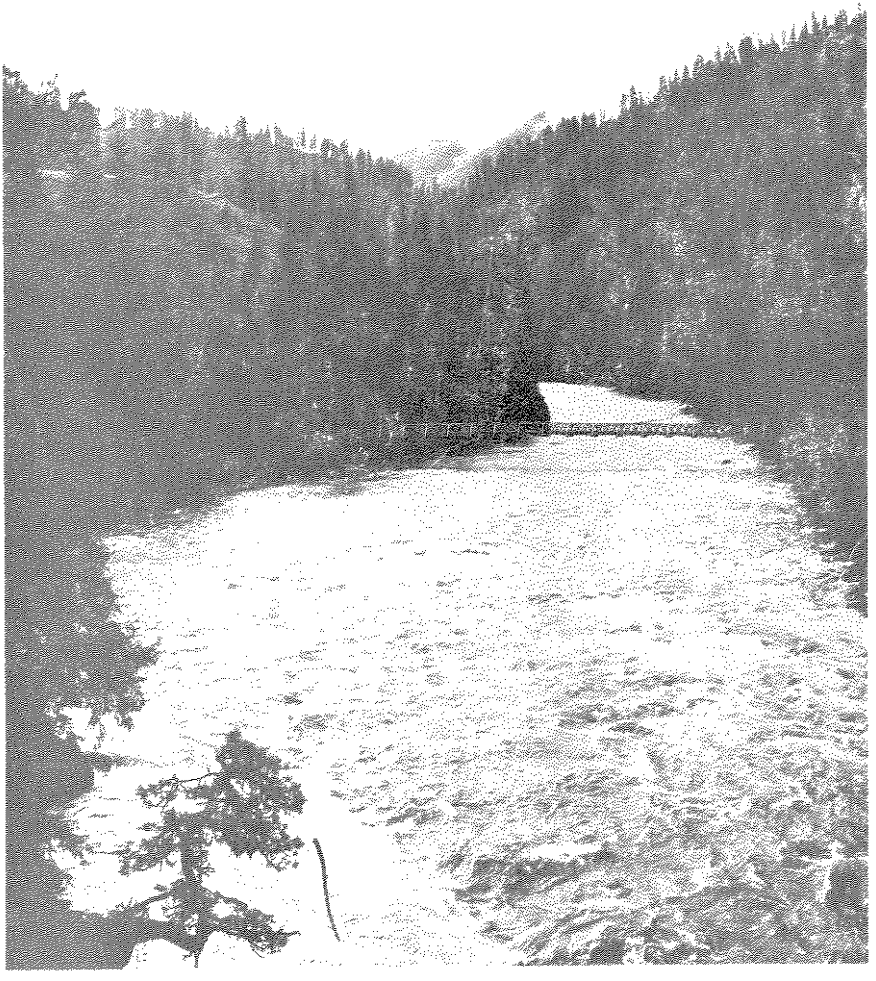

Photo Richard Walber

Albert W. Stone
Professor of Law
University of Montana

MONTANA WATER LAW FOR THE 1980's

Up-dating, Supplementing and Augmenting SELECTED ASPECTS OF MONTANA WATER LAW

by

Albert W. Stone
Professor of Law
University of Montana

ADDENDUM

MONTANA WATER LAW FOR THE 1980'S

Page 7. The original deadline for filing water claims, as set by the Supreme Court was January 1, 1982, as stated in the text. After this book was printed, however, the Attorney General petitioned the Court to extend the deadline for another year and a half. The Supreme Court held hearings on that petition on December 7, 1981, and on that date ordered a final extension for such filings to April 30, 1982. (Cas. No. 14833.)

Page 65. On November 30, 1981, the Supreme Court held a rehearing of Castillo v. Kunnemann, case no. 80-465, after this book was printed. The results of that rehearing have not been announced at this time. Pending that decision, it would appear that an appurtenant water right will pass with a conveyance of the land, or to various parcels upon the subdivision of the land, but the grantee or grantees must then notify the Department of Natural Resources and Conservation of the change in ownership. Prior approval by the Department is not required, and the water right will remain appurtenant to the land to which it was appurtenant prior to the sale or subdivision. (MCA sec. 85-2-403(1) & (2).)

But if the Seller wishes to reserve appurtenant water rights from the sale or subdivision, that amounts to a "severance" and cannot be done without prior approval by the Department of Natural Resources and Conservation. An appurtenant water right cannot be made appurtenant to other land (even land of the same owner), sold for other purposes, or otherwise severed from the land to which it was appurtenant without prior approval by the Department. (MCA sec. 95-2-403(3).) The September 29, 1981 opinion in Castillo v. Kunnemann (which was reheard on November 30, 1981) also held that this subsection applies to water rights acquired before the enactment of 95-2-403 in 1973.

All of the foregoing discussion is subject to confirmation or revision depending upon the outcome of the rehearing of the Kunnemann case. The reader should keep that in mind.

PREFACE

I wrote SELECTED ASPECTS OF MONTANA WATER LAW mainly during 1977. Since then Montana has come out with an entirely new code, so all of the code sections have been changed, and there have been a number of significant developments by both the Montana Legislature and by the Courts. As a result, that book needed up-dating, supplementing, and augmenting. The present work, MONTANA WATER LAW FOR THE 1980's, attempts to do just that.

The greatest area of activity during the 1980's will be the implementation of Senate Bill # 76 of the 1979 legislature, codified Part 2, Chapter 2, of Title 85, and that is where this book commences. Of almost equal importance for the decade of the '80's is the resolution of federal and Indian reserved water rights, and so this book closes with that subject in Part IV of this work.

But notwithstanding the revision of our water laws by the Montana Water Use Act of 1973, Senate Bill # 76, and other recent legislation, both our 1972 Constitution and our water laws preserve "existing rights". Nearly all water rights were acquired pursuant to statutory and case Law as it existed prior to 1973, and it is those rights that are going to be determined in future law suits and major adjudications. To know what those rights are, one absolutely must

know what the law was at the time those rights were acquired. Therefore, the middle part of this book deals with pre-1973 statute and case law, for the most part.

Moreover, our present water laws are built upon the law that previously existed, carrying it forward into our new laws. So there is a continuity, and to understand the new laws, one must understand the laws on which they are based, and which the new laws carry forward.

Many of the materials in Part I of this work, dealing with Senate Bill # 76, were taken from a paper that I wrote for The Montana Academy of Sciences and the Montana Water Resources Research Center, and delivered by me on April 3, 1981. I wish to thank those organizations for giving me their permission to use some of those materials, and to credit them as the source. I also used a portion of the speech and article that I produced for vol. 1 of the Public Land Law Review, University of Montana Law School for some of the materials in Part IV of this work, and wish to give similar thanks and credit for permission to use that material.

This work is written with lawyers primarily in mind, but with a consciousness that it will be useful and used by ranchers and farmers who are also concerned about water rights. Therefore, an attempt has been made to avoid "legalese" and jargon, and to explain the law so that it can be helpful and be understood by non-lawyer readers.

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF MONTANA CODE CITATIONS

I. THE BIG PROBLEMS FOR THE 1980's: ADJUDICATION.

A. SENATE BILL # 76.

On April 19, 1979, the Montana Senate and House passed Senate Bill # 76, and Governor Thomas Judge approved it on May 11, 1979. (Sen. J., 46th Legisl., 1979, pp. 1496, 1559-1560; House J., 46th Legisl., 1979, pp. 1617, 1694.) That law provides for the segmenting of the state into four water divisions (MCA, Title 85, Ch. 2, Part 2), for the massive and complex adjudication of all water right in each such division (encompassing the entire state), and for the creation of a Water Rights Compact Commission (MCA sec. 2-15-212) to negotiate the relative water rights of the state, the Indian tribes, and the United States. (Part 7, ch. 2, of Title 85, MCA.) Thus Montana began a monstrous undertaking of litigation and negotiation that will indirectly affect those of us in municipalities dependent upon our local governments to assert our need to have water come through our faucets, and will seriously and directly involve every person in the state who has a claim to a water right for his livelihood.

B. THE BACKGROUND REASONS FOR SENATE BILL # 76.

In the early days of Montana and the West, a person who needed water might divert an entire stream to his mining claim or his pastureland. There was no water law at the time, and so these practices became common and established: in time, law developed recognizing such uses of water as legal

water rights. (Kleinschmitt v. Greiser, 14 M. 484 (1894). Thus many "legal water rights" became established without any posting at the place of use, or any record of such rights, whether in the county of use or anywhere else. This informal, unorganized procedure for establishing important legal rights led to disputes and conflicts among users who disputed each other's priority dates and quantities of water uses.

Some Western states recognized the impending chaos in such unregulated -- indeed unknowable -- acquisitions of important rights to a resource which must be shared by many users. Colorado pioneered in water rights adjudication and administration by statute in 1879. (Colo. Laws, 1879, p. 94; Colo. Laws 1881, pp. 119 and 142; Colo. Laws 1887, p. 295.) Wyoming established its basic system of water rights administration and adjudication at the time of its statehood in its original Constitution of 1890. (Wyo. Const., Art. VIII, secs. 2, 4, and 5.) Wyoming's first legislature established the "permit system" for the acquisition of a water right: a person was required to apply for a permit in order to obtain any such right. (Wyo. Laws, 1890-91, ch. 8.)

Montana's legislature was also early in recognizing at least the need for a person to make his acquisition of a water right a matter of public record. In 1885, the Montana legislature required that:

> Any person hereafter desiring to appropriate ... must post a notice ... at the point of intended diversion ... and shall file with the county clerk ... a notice of appropriation. (Mont. Laws, 1885, secs. 6 through 10; RCM (1947) Title 89, secs. 810 to 814. Repealed in 1973 by the Water Use Act, about which more will be said later.)

Although that law remained a part of Montana's water law until 1973, it was emasculated as early as 1897 in Murray v. Tingley, 20 M. 260 (1897) which held that the enacted procedure was merely optional (apparently conservatively resisting any change having anything to do with water rights). A person could still proceed in accord with the custom and practices established prior to the statute. Moreover, even had the statute replaced the original, informal method (and many persons did indeed follow this statutory method until 1973), the postings and recordings under the statute were inadequate because they only recorded what the would-be-appropriator hoped or expected to divert and appropriate. There was no provision in that statute for ascertaining whether a person actually proceeded to take any water, and if so, how much. (See the excerpt from the statute, quoted above.)

That law and that decision left Montana in the chaotic situation of having no reliable record and even no information regarding the uses or claims to the rights to use the water of the state.

In 1885, the Montana legislature also passed a water rights adjudication statute (Mont. Laws, 1885, secs. 11 and

12; RCM (1947) Title 89, sec. 815.) but that law did not contemplate the final adjudication of streams or watersheds. (It is discussed in Stone, Are There Any Adjudicated Streams in Montana? 19 Mont. L. Rev. 19 (1957).) It merely provided for isolated lawsuits between particular water users over their individual rights in isolated parts of streams. The statute resulted only in piecemeal litigation, often repetitive and among the same neighbors, over and over again, disputing one another's claims. (See Stone, The Long Count on Dempsey: No Final Decision in Water Right Adjudication, 31 Mont. L. Rev. 1 (1969).) It did not lead to security in one's property rights nor to finality in determining the fair and legal distribution of water among neighboring claimants.

But not only were the individual water users ill-served by this failure to establish water rights; the public interest also required an inventory of the state's water needs so that future negotiations or dealings with downstream states could allocate the waters of our interstate rivers. Montana simply had no way to serve and protect either the individual user or the broad public interest.

C. THE RESPONSE.

These needs were addressed in the Montana Water Use Act of 1973. (Mont. Laws, 1973, ch. 452.) It established a "permit system" as the exclusive means of acquiring a water

right (MCA sec. 85-2-301), and (more importantly for this discussion) a system of final stream adjuciations. This law became effective on July 1, 1973, and forthwith the Department of Natural Resources and Conservation commenced just such an adjudication in the Powder River Basin.

But by 1979, six years after its beginning, the adjudication of the Powder River Basin was still in its initial stages. One of the difficulties with the 1973 adjudication provisions was that representatives from the Department of Natural Resources were required to go into the field, walk the old ditches and laterals, and physically discover all of the unrecorded, unassetted, and unknown water rights. So the legislature became restless over the evident prospect of a century or more which would be needed to adjudicate the water rights for the entire state. It sought procedures needed for the improvement and acceleration of the process.

The 1979 legislature was restless for an additional reason: three lawsuits had already been filed by the United States Department of Justice and an Indian tribe. (U.S. v. Tongue River Water Users Ass'n., No. CV 75-20-Blg. (D. Mont.) filed 8/1/75; U.S. v. Big Horn Low Line Canal, No. CV 75-34-Blg. (D. Mont. filed 8/29/75; and Northern Cheyenne Tribe v. Tongue River Water Users Asa'n., No. CV 75-6-Blg. (D. Mont.) filed 8/14/75 and the Department of Justice had prepared and was about to file four more suits, all in the federal. courts,

to adjudicate federal rights in Montana streams and rivers which bordered on or ran through federal or Indian lands. (U.S. v. Aasheim, CV 79-40-Blg.; U.S. v. Aageson, CV-79-21-GF; U.S. v. AMS Ranch, Inc., CV 79-22-GF; and U.S. v. Abell, CV-79-33-M. All of the foregoing were filed on April 5, 1979.) If streams were to be adjudicated, the Montana legislature believed that the litigation must take place in state, not federal, courts. And yet the quagmire of adjudication under the 1973 Water Use Act in the Powder River demonstrated that Montana had no effective general water adjudication Law to offer as an alternative to the federal lawsuits. Clearly, the 1973 law was not working: it was already bogged down, even as it applied to one small river basin.

So, motivated by need, frustration, outside pressure, and fright, the 1979 legislature drafted and passed Senate Bill # 76. It segregates the state into four immense water divisions for the purpose of more quickly adjudicating the water rights in the entire state. (Part 1, Ch. 2 of Title 85, MCA. To illustrate: the Water Judge for the Yellowstone Basin may hear groups of claims in various different locations within his division (MCA sec. 85-2-215) and may issue separate preliminary decrees for portions of his water division and ultimately a final decree covering all of the water users in the entire Yellowstone River Basin, including those on the tributary streams and creeks. (MCA

secs. 85-3-231 and 85-2-234, as amended by N.B. # 667, 1981 legislature.) The other three water divisions are the Missouri River and its tributaries below the mouth of the Marias River, the Missouri River and its tributaries from the Marias upstream to its various headwaters, and the water west of the Continental Divide (the Clark Fork and Kootenai drainages). (MCA sec. 3-7-102.)

To accelerate the adjudication procedure, the Department of Natural Resources and Conservation will no longer have to go out and find all of the known and unknown water rights, users, and claimants; rather, the users and claimants must all file claims to their water rights by January 1, 1982, or be presumed to have abandoned their unfiled claims. (MCA sec. 85-2-212. The original statutory deadline was to be June 30, 1983, but pursuant to legislative authorization, the Montana Supreme Court shortened the time period to January 1, 1982, by its Order of June 8, 1979.) The Department established field offices to assist persons in filing their claims. In addition, each water division has a District Judge designated as the Water Judge for that district (MCA sec. 3-7-201), and he will be assisted by one or more Water Masters. (MCA sec. 3-7-201 as amended by H.B. # 667, 1981 Legislature.) S.B. # 347, 1981 Legislature provides for the appointment by the Supreme Court of a Chief Water Judge, to serve until June 30, 1985, and thereafter for 4-year terms, subject to the contin-

uation of the water divisions by the legislature. His job is to supervise and push the adjudication process,

In each water division, after the filing by the Water Judge of preliminary decrees, persons may file objections and obtain a hearing. (MCA sec. 85-2-233.) These hearings are likely to be complex, involve very many parties, and require a great amount of time to complete. Following the hearings the Water Judge will issue the final decree (MCA sec. 85-2-234), which may, of course, be appealed to the Montana Supreme Court (MCA sec. 85-2-235) and then there may be such further proceedings as may be determined necessary by that Court.

D. THE **FEDERAL** ADJUDICATIONS.

As mentioned, one of the motivating factors which has brought forth Senate Bill # 76 was the threat of several law-suits in the federal courts, brought by an Indian tribe and the United States Department of Justice (cited in the preceding section hereof.) The four suits filed on April 5, 1979, appear to be in anticipation of Senate Bill # 76, passed by the House and Senate two weeks after their filing; and the passage of S.B. # 76 appears to be a reciprocal response to the filing of those suits.

After the passage of S.B. # 76 and the Montana ***Supreme*** Court Order of June 8, 1979, the State of Montana moved to dismiss all of the federal suits. Montana's motion to dismiss

was granted by the United States District Judges Battin and Hatfield on November 26, 1979. The dismissal has been appealed, and at this writing rests with the Ninth Circuit Court of Appeals in San Francisco.

The stated reason for the mass dismissal of all seven federal and Indian lawsuits was "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." This action by the federal district courts is not surprising if taken in context with a little background.

E. BACKGROUND AND DISCUSSION OF THE FEDERAL SUITS.

1. The Basic Precedent.

In 1952, Senator McCarran of Nevada added a rider to the Department of Justice Appropriation Act, which amended the federal public land laws, and is referred to as "the McCarran Amendment." (43 U.S.C. sec. 666 (1976). It removes the sovereign immunity of the United States for adjudications of water rights in river systems, and for the administration of those rights. The McCarran Amendment was the focal point of the "Mary Akin" case in the United States Supreme Court, which held that, pursuant to that amendment, both Indian and United States water rights may be adjudicated in state as well as federal courts. (Colorado River Water Conservancy Distr. v. United States, 424 U.S. 808 (1976).) Mary Akin was the first

listed defendant in the original federal filing of this case, but lost her position in the title of the case because she did not join in the appeal. Nevertheless, for convenience, the case is most commonly referred to as the Akin case.) The decision ordered the dismissal of a federal water rights suit in Colorado, in deference to a water adjudication which had been filed in the Colorado state courts. There is an apparent parallel between the Supreme Court's order of dismissal in the Akin case and the Montana federal district courts' dismissal of the federal suits in the Montana cases.

2. Comparing the Precedent.

Although the dismissal of the Montana federal cases was based upon the U.S. Supreme Court's dismissal of the Akin case, the Montana dismissals involve factors which are not completely parallel to those in the Akin case. Some of the reasons upon which the U.S. Supreme Court based its dismissal of the Akin case are not readily applicable to the Montana cases.

Four of those reasons are: (1) Colorado had both a well-established system and a long history of water rights adjudication which had been working since 1879; (2) the Colorado State Engineer administered and managed the adjudicated water rights; (3) the federal District Court in Denver was on the other side of the Continental Divide and some 300 miles away from Durango where the state suit had been filed;

and (4) the United States was already participating in other Colorado state water proceedings.

In contrast: (I) Montana's first stream adjudication law was enacted in 1973 and was already bogged down in just one small watershed, the Powder River Basin, six years after its commencement. The 1973 law was replaced by the new S.B. # 76 in 1979, which had not worked at all at the time of the dismissal of the federal suits; (2) the administration of water rights under S.B. # 76 will eventually be entrusted to the four Water Judges in the four water divisions in Montana; (3) the federal cases in Montana were divided among the federal district courts in Billings, Great Falls, and Missoula, all more readily accessible throughout the year than Denver is to Durango; and (4) the federal government has no prior experience in Montana state water proceedings. Colorado water rights have been organized and administered since 1879, and are in working order. Therefore, Montana offers a recognizable contrast. The two situations are clearly different.

3. A Serious Problem With the Federal Cases.

With these differences in mind, there is good reason for the U.S. Department of Justice and the Indian tribes to appeal the dismissal of the federal cases. But there is one important reason, both practical and legalistic, why they should stay dismissed. It is that the federal suits cover

only those waters bounding on or flowing through federal enclaves, rather than all water users in the state, and more importantly, they will affect only water users named as parties in those federal suits. Although the federal suits name perhaps as many as 8,000 Montanans as parties, those are not all of the Montanans who need to be included in the decrees in those snits. Because of our state's history, we have thousands of people with "use rights" -- water rights that are unrecorded, unlitigated, and unknown. These people are not named as parties in the federal suits for the simple reason that they are unknown. They may be as numerous as those who are actually named as parties in the federal suits. But their rights cannot be affected without affording them a chance to assert their claims, and have their days in court. Any lawsuit which omits so many persons whose rights are legally disregarded is an abortive, inconclusive, and wasteful lawsuit. (See Montana's long experience with such suits, reviewed in Stone, Are There Any Adjudicated Streams in Montana? 19 Mont. L. Rev. 19 (1957), and Stone, the Long Count on Dempsey: No Final Decision in Water Right Adjudication, 31 Mont. L. Rev. 1 (1969).)

4. Montana's Avoidance of That Problem.

In contrast, S.B. # 76 goes to great length to include all claimants to water rights, affording them due process and an opportunity to be heard through a meticulous notice

procedure. The legislature required all claimants to file their claims by January 1, 1982. To provide claimants with adequate notice, it ordered that notice of this deadline be published 30 days after the Montana Supreme Court ordered the filing, and again annually in all daily newspapers in the state and in at least one newspaper in each county (MCA sec. 85-2-213(1)); notice must be posted in each county courthouse (MCA sec. 85-2-213(2)); it must be enclosed with each statement of property taxes (MCA sec. 85-2-213(3)); it must be periodically provided to the press services (MCA sec. 85-2-213(4)); and it must be served upon the U.S. Attorney General or his representative (MCA sec. 85-2-213(5)). Consequently, any decree resulting from the proceedings established by S.B. # 76 will be all-encompassing, conclusive, and effective. (Of the 19 Western states, including Alaska and Hawaii, only two do not provide for notice by publication: North and South Dakota; Oklahoma has two adjudication systems, one of which does not provide for publication. This subject is reviewed in Stone, Montana Water Righte - A New Opportunity, 34 Mont. L. Rev. 57, 70-71 (1973).) The inconclusive nature of the federal suits and the conclusiveness of the Montana state court proceedings are powerful reasons why the Ninth Circuit may affirm the dismissal of those federal cases.

5. Negotiation.

Senate Bill # 76 also created a Water Rights Compact Commission (MCA sec. 2-15-212) to negotiate the relative water rights of the state, the Indian tribes, and the United States. Part 7, Ch. 2 of MCA Title 85.) Ch. 268 of the 1981 legislature, revised MCA sec. 85-2-217 and Part 7, by providing that while negotiations for a compact are being pursued, all proceedings to generally adjudicate those rights in Montana courts shall be suspended, as well as the obligation of those parties to file claims for those resented tights. This suspension will continue as long as negotiations are continuing or ratification is being sought, but if approval (by the United States, the tribes, and the Montana Legislature) has not been accomplished by July 1, 1985, the suspension shall terminate. Upon termination, federal and Indian reserved rights must be filed within 60 days, and they will be treated similar to other filed claims. Also, if negotiations terminate prior to the above date, there is a 60 day deadline for such filing. And as to tribes or federal, agencies that do not participate in negotiations, no suspension of filing requirements applies. If negotiations are successful, the adjudications will be greatly simplified; if unsuccessful, the negotiable issues will then become a part of the general adjudications.

The vexed and unsettled problems of federal and Indian reserved rights must be left for treatment elsewhere. (For a discussion of some of those problems, see Part IV of this book, infra.)

II. WATER RIGHTS SYSTEMS.

A. THE RIPARIAN RIGHTS DOCTRINES.

1. Eastern, mid-western and some western states adopted the riparian doctrine of water rights simply as a part of the common law of England. In its purest theoretical form, it bestows upon owners of land adjacent to a stream the right to have that stream continue to flow in its natural condition, without depletion or degradation. This is called the "natural flow" theory or doctrine, but it has scarcely been utilized in reality because of its unrealistic strictness. It, therefore, has been modified by a "reasonable use" doctrine.

2. The principal features of the reasonable use doctrine of riparian rights are that the various riparian landowners have equal rights in the watercourse, regardless of whether any of them have made prior uses, and the use must be "reasonable" under the circumstances, a criterion which introduces a quality of uncertainty. What is reasonable in one area may not be in another; what is reasonable during a plentiful year may not be so in a year of drought; and what was reasonable in 1930 may not be reasonable in the 1980's.

The right attaches by reason of ownership of riparian land, and the several such landowners share the water, and their water rights for the reasonable use and development of their riparian lands.

a. Under the "source of title'' test as to what is riparian land, the riparian sight extends only to the smallest tract held under one title in the chain of title descending to the present owner. The application of this rule results in an ever-diminishing amount of riparian land. (See Boehmer v. Big Rock Creek Irrig. Distr., 48 P. 908 (Cal. 1897).

b. Under the "unity of title" test, the riparian right extends to all of the riparian proprietor's land within the watershed of the stream, which is not severed from the riparian tract by another person's land. Hence, a riparian owner may increase his riparian land by purchase of adjacent uplands.

c. The word "riparian" is also used to describe the location of land that is contiguous to water: that landowner's rights of access, wharfage, navigation, recreation, and other uses of the body of water, even in jurisdiction which do not recognize the riparian system of water rights. (See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 534 F.2d 1376 (1976) adopting the opinion in 380 F. Supp. 452 (D. Mont. 1974), cert. den. 429 U.S. 929 (1976), holding that landowners riparian to Flathead Lake have common law riparian rights of access to the lake, and of wharfage to effectuate that access.)

B. THE "CALIFORNIA DOCTRINE".

1. The Act of July 26, 1866 recognized and confirmed appropriations of water on the public lands of the United States. (30 USC sec. 51.) Ironically, although California was the cradle of the prior appropriation system of water rights (see discussion of that system, which follows), in Lux v. Haggin, 10 P. 674 (Cal. 1886) and San Joaquin and Kings River Canal & Irrig. Co. v. Worswick, 203 P. 999 (Cal. 1922), California adopted the view that appropriation rights could be acquired only on public Land, and that none had validity before the 1866 Act.

Federal grants of riparian land carried with them riparian water rights. Hence California adopted a dual system of water rights: (1) riparian rights along the streams as of the date of a federal patent; and (2) appropriation rights by diversion of waters from public lands. If the latter diversion took place prior to 1866, its priority date was July 26, 1866, or, if it was subsequent to 1866, it dated from the time of diversion. (This in a state which passed the "Possessory Acts" of 1851 and 1852 which are cited and discussed in connection with the discussion of the Appropriation System, infra.)

2. Some form of this complicated dual system was adopted in all of the Pacific Coast states, and the tier of states from North Dakota to Texas which lie on the

100th meridian.

C. MODIFICATIONS AND ADOPTION OF ADMINISTRATIVE SYSTEMS.

Because of the confusion and unworkability of having two mutually inconsistent systems of water rights law, all of the "California Doctrine" states have severely limited and restricted riparian water rights, and adopted statutes enacting administrative systems of acquiring and administering water rights and distribution, so that they are now quite similar to the strict appropriation of "Colorado Doctrine" states. The latter led the way, commencing with Colorado's administrative system in 1879. The changes in the "California Doctrine" states to an administrative system is as follows:

Calif.: 1928 Const. Amend. (Art. XIV, sec. 3); Water Code Div. 2, Parts 2 and 3; Tulare Irr. Distr. v. Lindsay-Strathmore Irr. Distr., 45 P.2d 972 (Cal. 1935).

Kans.: L. 1945, c. 390; L. 1957, c. 539; K.S.A. secs. 82a-701 to 82a-725; State ex rel. Emery v. Knapp, 207 P.2d 440 (Kans. 1949).

Nebr.: L. 1889, c. 68, sec. 7, p. 504; R.R.S. 1943, secs. 46-203 to 46-243; Crawford v. Hathaway, 93 N.W. 781 (Nebr., 1903).

N. Dak.: L. 1905, c. 34; N.D. Cent. Code, Chs. 61-03 and 61-04.

Okla.: L. 1910, c. 40; L. 1963, c. 205 and 207; Okl. St. Ann. Tit. 82, c. 1.

Oreg.: L. 1891, p. 52; L. 1899, p. 172; L. 1905, ch. 228; L. 1909, ch. 216; Oreg. Rev. Stats., c. 537 (1979); Hough v. Porter, 95 P. 732 (Oreg. 1908), 98 P. 1083 (Oreg. 1909), 102 P. 728 (1909).

S. Dak.: L. 1907, c. 180; S.D. Comp Laws, Tit. 46, c. 5 and 10.

Texas.: L. 1917, c. 88; Vernon's Ann. Civ. St., Tit. 128, c. 1; Water Code secs. 5.303 to 5.322; Motl v. Boyd, 286 S.W. 458 (Tex. 1926); State v. Valmont Plantations, 355 S.W. 2d 502 (Tex. , 1962).

Wash.: L. 1917, c. 117; Wash. Rev. Code Ann., secs. 90-14-10 and ch. 90.03.

D. ORIGINS AND DEVELOPMENT OF THE APPROPRIATION SYSTEM.

Curiously, although California was the source and place of origin of the appropriation system, it spoiled that system for itself in Lux v. Haggin (10 P. 674 (Cal. 1886)) and so the pure appropriation system became known also as the "Colorado Doctrine". The states that adopted the appropriation system are the mountain states: Arizona, New Mexico, Colorado, Nevada, Utah, Wyoming, Idaho, and Montana (see Mettler v. Ames Realty Co., 61 M. 152 (1921).) The origins and development of the appropriation system of water law

have a close relationship to the development of public land law and mining law, particularly the latter. Hence, an outline of the history of those related developments is in order.

1. Under the English common law, the Crown had an interest in all gold and silver under the lands, and the control of mining them in England as well as in the colonies. Following the Revolutionary War, the thirteen American colonies succeeded to the Crown's interest in minerals.

2. Under the Articles of Confederation, the Continental Congress sought to raise money to pay war debts by selling public lands in the Western Territories. The Ordinance of May 29, 1785, provided for the surveying, plotting, and sale of public lands, but reserving one-third interest in all gold, silver, copper, and lead. (U.S. Publ. Land Comm. Report, House Exec. Doc. 47, Part 4, 46th Cong., 3rd Sess., GPO 1881, Chapt. XXVI, p. ,306.)

3. After formation of the Union, attempts were again made to raise money by the sale of the public lands. The policy was a failure. There was a long period of few sales, and very little mining activity. There were only a sporadic few lead mines and insignificant bits of other mineral activity. So there was no incentive not reason to develop a general mineral policy or administration.

4. An 1807 statute prohibited the acquisition of any interest in public lands simply by settlement or occupancy. (2 Stat. 445 (1807).) This will be referred to later in connection with the Gold Rush and the '49ers.

The General Pre-emption Act of 1841 (5 Stat. 453) provided for the sale of 160-acre tracts at $1.25 per acre, but reserved all mineralized lands. There was little mining activity, and no federal policy except the reservation of mineralized lands. That exception was continued in the Homestead Act of 1862 (12 Stat. 312; 43 U.S.C. sec. 161) and subsequent land laws disposing of public lands.

5. At the close of the Mexican War of 1845-48, the Treaty of Guadalupe Hidalgo was signed on Febr. 2, 1848, ceding to the United States, from Mexico, a vast area, including California and Nevada. (9 Stat. 922.)

A little more than a week prior to the signing of that treaty, on January 24, 1848, John Marshall discovered gold in the tailrace of a lumber mill owned by John Sutter, on the South Fork of the American River, at Coloma, between Auburn and Placerville. The American River is just one of the many tributaries of the Sacramento and San Joaquin Rivers, that flow from the crest of the Sierra, down the West slope, and through the foothill country where the gold was discovered.

Sutter and Marshall attempted to keep the discovery secret, but word soon leaked out. People rushed from their

homes, ranches, and businesses to the foothills in search of fortunes. Many sought to find the "Mother Lode" from which the placer gold in the streams had eroded. Hence, this foothill area of California extending north-south along the Sierra is known as the "Mother Lode" country. It is a large area, with a linear distance of over 300 miles, from about Weaverville in the north to the Kern River east of Bakersfield in the south. There was no single rich location or lode -- the "Mother Lode" was never found. The mining activity, with but few exceptions, was placer mining rather than lode mining.

Word of the strikes spread through the world, and the population of California multiplied a hundredfold in three years, from around 2,500 to around 250,000. The '49ers were not just Americans emigrating overland, around the Horn or across the Isthmus. It was an international gold rush, attracting many Welsh miners, Germans, English, Irish, Chinese, Chilean, Mexican, and many others. They had their racial and ethnic wars. There are still some old rusty cannons up in some of the ravines of the Mother Lode country.

The principal tributaries of the Sacramento and San Joaquin Rivers were the Pit, Feather, Yuba, American, Cosumnes, Mokelumne, Stanislaus, Tuolumne, Merced, Kings, and Kern Rivers. The principal towns, interesting and visitable today (mostly along state highway 49) were Whiskey-

town, Susanville, Sierraville, Downieville, Nevada City, Grass Valley, Colfax, Auburn, Coloma (State Historical Park), Placerville, Sutter Creek, Drytown, Jackson, Angel's Camp, Coulterville, Mariposa, Columbia (State Historical Park), Sonora, Chinese Camp, and Fiddletown.

6. For all the romanticism surrounding the '49ers, they were in fact trespassers on the public lands, and converters of federal minerals. It was not their land and it was not their gold.

They began attaining "law and order" by establishing "mining districts" and other community institutions to govern their affairs, mining rights and water rights, with rules and regulations, and by crude and informal law enforcement such as flogging, banishment, and capital punishment.

California was admitted into the Union in 1850, partly because it was a "free" state, and so would affect the political balance favorably to the antislavery movement.

California promptly passed "Possessory Acts" in 1851 and 1852 (Stats. 1851, c. 5, sec. 621; and Stats. 1852, c. 82; Calif. C.C.P. sec. 748), confirming the rights of the miners to carry on their activities and recognizing the customs, rules, and regulations as "laws" developed by the miners to govern their activities.

a. Among these was the recognition that the first person to stake a claim and work it, had the

exclusive right and should be protected from all others: first in time is first in right.

b. Placer mining frequently required the diversion of water to work an area away from a stream. The miners applied the same doctrine to water rights: the first to divert the water had a prior and superior right to anyone who came later. Ownership of riparian land was not a requisite: they were either ignorant of, or simply ignored, riparian law.

7. There still was no basic federal mineral policy except for the reservation of all mineralized lands for the United States, so, in U.S. v. Parrott, Fed. Cas. 15,998 (C.C. Cal. 1858) and U.S. v. Castillero, 67 U.S. 17 (1862) claimants to the New Almaden mine in Santa Clara County, who failed to prove a title acquired from Mexico, were found to be trespassers on U.S. public lands. In 1863 President Lincoln issued a writ to remove miners from the New Almaden mine, based on the Act of 1807 (supra) which prohibited the acquisition of any interest in the public lands simply by settlement or occupancy.

The Homestead Act of 1862 provided further uncertainty to the miners, particularly with respect to their use of water, for Homesteaders had a legal claim which they could enforce against the miners on public lands.

8. Efforts were made to legitimize the activities of

the miners, but without early success. In fact, there was much sentiment in Congress for the U.S. to utilize its ownership of the minerals to raise revenue, through sale, lease, and royalties. "Free mining" was becoming a controversial political issue between the populous East and the boisterous West.

This political controversy was exacerbated by the discovery, in 1859, of the Comstock Lode, at Virginia City, Nevada (between Reno and Carson City). It was the richest lode of precious metals ever, and incited more interest in having the U.S. gain some revenue from such invasions of the public domain.

This issue was pushed into the background by the onset of the Civil War and the political problems which it involved. Among those problems was a need for two Republicans from a "free" state to help pass Reconstruction policy, and the passage of the 13th and 14th Amendments to the U.S. Constitution. (13th: abolishing slavery and involuntary servitude; 14th: "All persons born or naturalized ... are citizens....")

a. So, Nevada was admittsd to the Union in 1864; the 13th Amendment was passed in 1865, and the 14th was introduced in 1866, and passed three years later.

b. Sen. Stewart of Nevada was largely instrumental in maneuvering through the Lode Mining Act of 1866, which recognized the customs and usages of the

miners, and their appropriation of water, which should be "maintained and protected." In fact, it recognized existing uses of waters for all purposes. (14 Stat. 251; 30 U.S.C. sec. 51.)

Thus began western water law, as well as federal mining law. The 1866 Act established free mining so far as it applied to lode mining, thus protecting the Comstock Lode. Placer mining was added in 1870, and future homesteaders were put on notice that they would take subject to these prior water uses. (16 Stat. 218; 30 U.S.C. sec. 52.)

9. The mining laws were consolidated in the General Mining Law of 1872, which remains our basic mining law today, so far as metaliferous minerals are concerned. (30 U.S.C. sec. 22, et seq.)

The Desert Land Act of 1877 provided for the settlement of Western lands, and provided for the use of water by prior appropriation, reserving the unused water for future appropriations. (43 U.S.C. sec. 321; 19 Stat. 379.)

10. Conclusions.

In Broder v. Natoma Water Co., 101 U.S. 274 (1879) the United States Supreme Court discussed and interpreted the effect of the 1866 Act. The Court said:

> It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of

> agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one .... (Emphasis by the Court.)

The similar cases of Atchison v. Peterson, 87 U.S. 507 (1874) and Basey v. Gallagher, 87 U.S. 670 (1874), relied upon in the Broder case (supra) arose in Montana, and are supported by California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935).

From these beginnings the prior appropriation doctrine was developed in the mountain "Colorado Doctrine" states, consistent with the emphasized language quoted from the Broder case (supra). Ultimately the prior appropriation system of water rights developed into an administrative system (still based upon prior appropriation) with Colorado's adjudication laws of 1879 (Colo. Laws, 1879, p. 94), and Wyoming's introduction of the "permit system" in 1890-91 (Wyo. Laws, 1890-91, ch. 8).

This, at a time when there was no such field of law as "Administrative Law."

III. DEVELOPMENT OF THE APPROPRIATION SYSTEM IN MONTANA.

A. CONSTITUTIONAL PROVISIONS.

1889 Const., Art. III, sec. 15: "The use of all waters ... and the right-of-way over the lands of others, for all ditches ... shall be held to be a public use...."

1972 Const., Art. IX, sec. 3. Subparagraph (1) recognizes existing rights; subparagraph (2) provides "The use of all waters ... the right-of-way over the lands of others for all ditches ... shall be held to be a public use"; subparagraph (3) provides that all waters "... are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law"; and subparagraph (4) directs the legislature to provide for administration and for centralized as well as local records.

1. The Constitution should be broadly and liberally construed and interpreted. (Spratt v. Helena Power Transmission Co., 37 M. 60, 78 (1908), refusing to enjoin condemnation proceeding, basing the refusal on Art. III, sec. 15, 1889 Const. Donich v. Johnson, 77 M. 229 (1926) construed that Constitutional Language as establishing a policy of encouraging irrigation and cultivation, so plaintiff was held to be entitled to the water stored by him in reservoirs on Race Track Creek, now in Powell County. Similar reliance upon Art. III, sec. 15 in relationship to reservoiring waters

appears in Federal Land Bank v. Morris, 112 M. 445, 454 (1941); Richland County v. Anderson, 129 M. 559, 564 (1956); and Farmers Union Oil Co. v. Anderson, 129 M. 580, 583 (1956).)

General Agricultural Corp. v. Moore, 166 M. 510 (1975) held that the 1972 Constitution's preservation of "existing rights" protects one who filed a petition seeking an appropriation on an adjudicated stream prior to the 1973 Water Use Act, which petition was pending on rhe effective date of that Act. The Act repealed the law on which the petition was based, but petitioner was afforded the opportunity to complete the appropriation pursuant to the repealed law.

Art. IX sec. 3, of the 1972 Constitution, protecting "existing rights" was similarly used as a basis for permitting Intake Water Co. to proceed toward acquiring an appropriation. Intake filed for a large appropriation from the Yellowstone River on June 29, 1973, just two days prior to the effective date of the 1973 Water Use Act. The latter Act repealed the prior law under which Intake had filed, but it was found to have an "existing right" to proceed under the prior law. Montana Department of Natural Resources and Conservation v. Intake Water Co., 171 M. 416 (1976).

2. The Constitutions also support MCA sec. 85-2-414 (and its predecessor statutes extending back to 1895) permitting eminent domain by private parties, to obtain access

to water. (Ellinghouse v. Taylor, 19 M. 462 (1897); the Spratt case, supra; and Clark v. Nash, 198 U.S. 361 (1905), wherein the U.S. Supreme Court upheld a similar Utah statute and constitutional provision, under the U.S. Constitution.)

One should keep in mind the words of Justice Holmes in Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909), that the adoption of the English common law by the Western states " ... is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames."

B. WHAT WATERS CAN BE APPROPRIATED?

1. Pre-1973, erroneously, it is believed, in order to obtain a valid appropriation, the diversion must have been from a "watercourse". The distinction between a "watercourse" and "vagrant surface water" grew from the need to establish liability or non-liability of persons who diverted water onto a neighbor's property, causing damage. Detached floodwaters were "vagrant surface waters", a "common enemy", and no liability attached for reasonable efforts of self-protection. But "watercourse" waters could not be so diverted, causing damage, without liability attaching. Montana's development of the distinction between surface and watercourse waters commenced with cases involving damages caused by diversions or obstructions which resulted in flooding neighboring land.

Fordham v. Northern Pacific Ry. Co., 30 M. 421 (1904) involved a railway fill and embankment, diverting the high flow of the Bitterroot River onto the plaintiff. The court found that the water was in a "watercourse" and so defendant was liable for the damages. In LeMunyon v. Gallatin Valley Ry. Co., 60 M. 517 (1921), the railway from Three Forks to Bozeman dammed a swale, causing runoff waters to flood plaintiff. The court found no watercourse, but merely "surface waters", and so there was no liability for damages, A similar holding was made in O'Hare v. Johnson,, 116 M. 410 (1945) and Tillinger v. Frisbie, 138 M. 60 (1960). For there to be a "watercourse" rather than merely "vagrant surface waters", the courts must find some regularity of flow or connection with a known stream, and signs of a channel with a bed and banks. Apparently a swale or depression that drains periodic surface run-off will not qualify. Roope v. Anaconda Co., 159 M 28 (1972). Most of the more recent cases have used this distinction to determine what waters may be appropriated, i.e., in what waters can one acquire a water right. Such a case was Meine v. Ferris, 126 M. 210, 212 (1952) saying: "A natural water course is 'a living stream with defined banks and channel, not necessarily running at all times, but fed from other and more permanent sources than mere surface water.'" The court was appropriately quoting from Popham v. Holloran (infra), an

appropriation case which in turn was quoting from LeMunyon v. Gallatin Valley Ry. Co. (supra) a flood damage case.

RCM (1947) sec. 89-801 (repealed in 1973) said "...an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same." But in Popham v. Holloran, 84 M. 442 (1929), it was held that the water which seeped and leaked from a flume into Holloran Gulch (tributary to the Bitterroot River) must be a water-course for there to be a valid appropriation. The court did find it a "watercourse" because the flow was regular during the irrigation season, and had created little channels, and so the plaintiff had a protectible water right. Defendant was prohibited from depriving plaintiff of his water by catching the water farther up the Gulch by means of a dam and diversion works. The same requirement was imposed on Hay Coulee in Blaine County in Doney v. Beatty, 124 M. 41 (1950), but the court found it was not a watercourse, only "surface waters," so the plaintiff could not enjoin junior users who were higher up in the Coulee, from storing, using, and depleting the waters. Actually, the court found that the waters in Hay Coulee were mere "surface waters" up where the defendants were, but a "watercourse" down where the plaintiff was. (See Federal Land Bank v. Morris, 112 M. 445 (1941) for earlier litigation involving some of the same parties, and the same Coulee.)

2. Post 1973, MCA sec. 85-2-102(14) provides: "'Water' means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including geothermal water, diffuse surface water, and sewage effluent." Then the remainder of the code speaks only of "water", without distinction, which is consistent with the quoted definition. It is hoped that the distinction between "watercourses" and "surface waters", which arose (and still exists) for the purpose of deciding liability for flooding, has been eliminated for the purpose of deciding whether a person can obtain a protectible water right in his source of supply. If it is a good enough source for a person to develop it, why not recognize a water right in that person?

3. Waste, drainage, and return flow waters may be appropriated by a Lower appropriator from a watercourse or drain ditch. (Wills v. Morris, 100 M. 514 (1935); Newton v. Weiler, 87 M. 164 (1930). But such an appropriator cannot compel his source to continue to have waste, or to continue the use which produces drainage or return flow. (Newton case, supra, Popham v. Halloran, 84 M. 442 (1929); Bower v. Big Horn Canal Co., 307 P.2d 593 (Wyo. 1957); Galiger v. McNulty, 80 M. 339 (1927).

But query, if one can acquire such a water right, after the particular source is terminated by non-use or ditch-lining

or the like, why cannot the disadvantaged appropriator who concedely had a water right, proceed to aesett that right and take water from the original, true source -- the main-stream. Or if the loss of water is from activity such as ditch-lining, if the ditch continues to divert the original amount of water, why should not the disadvantaged water right holder assert a right to a portion of the water in the more efficient ditch, so as to divert directly from it rather than from its seepage?

If the ditch is now taking less water or the upland user is making more efficient use of his water which results in depriving the appropriator of seepage and drainage, it seems that the latter appropriator should be permitted to successfully apply for a change in the place of diversion to the original source.

4. This leads to the question whether the original appropriator may intercept and recapture his own waste, drainage, or return flow water. The answer given by one of Montana's earliest cases was an unqualified "yes". (Woolman v. Garringer, 1 M. 535, 543 (1892).) The earlier cases that permitted recapture and re-use of water while it is still seeping and percolating under one's own land naturally follow from the view of groundwater expressed in Ryan v. Quinlan, 45 M. 521 (1912) and part of the holding in Woodward v. Perkins, 116 M. 46 (1944) and McGowan v. U.S.,

206 F. Supp. *439* (D. Mont. *1962)* that percolating waters are anybody's or nobody's -- they are not within the appropriation system so, of course, the landowner could take them.

But in Perkins v. Kramer, *148* M. *355 (1966)* the rule of Ryan v. Quinlan et al. (supra) was repudiated. Now a person can track, trace and show the movement of groundwater, and that it is tributary flow, subject to the rule of priorities.

Even as to imported water, the importer should establish the purpose and extent of his appropriation and use as of the time of bringing in the alien water (and a reasonable time thereafter to develop his purpose). Once established, then the percolating return flow is indistinguishable from the spring that fed Wyman Creek in Rock Creek Ditch and Flume Co. v. Miller, *93* M. *248 (1933)* (holding such alien water return flow to be subject to the rights of prior appropriators) and consistent with Cqnrow v. Huffine, *48* M. *437 (1914)* (holding that once the appropriator's use is established, the needs for that use are the upper limits of the appropriator's right).

Oregon's law follows the foregoing view. The quantity of water covered by an appropriation must have been a part of the appropriator's original appropriation and use, and he must have commenced to recapture the return flow within a reasonable time during the development of his appropriation

purposes. (Jones v. Warmsprings Irr. Distr., 91 P.2d 542 (1939, Oreg.).)

In post 1973 Montana, changes in any appropriation (such as changes in the places of diversion or use, or the purpose of a use) require the permission of the Department of Natural Resources (MCA sec. 85-2-402), and permission will not be granted if others will be adversely affected. But recapture and re-use do not smack of mere "changes in appropriation rights" under the code: the tenor of the Water Use Act is to look upon appropriations as a franchise to use public property (water) for "a beneficial use." (see, e.g., MCA secs. 85-2-301; 85-2-312; 85-2-314; 85-2-315.) Additional uses of the water by means of recapture and re-use would seem to be more of the character of new appropriations for which permits must be obtained under MCA secs. 85-2-301 to 85-2-314.

5. Developed water. Although the prior appropriator is entitled to the natural flow of a stream, and any natural increase in the flow which may occur during the irrigation season (within the limits of his appropriation), he is not entitled to water which someone else has developed and added to the stream. (Beaverhead Canal Co. v. Dillon Electr. L. & P. Co., 34 M. 135 (1906). Generally, "developed water" is thought to be water which has been brought up from underground, or drained from non-tributary sloughs or swamps. But very few persons who claim to have developed water

carry the burden of proving their claims.

In Smith v. Duff, 39 M. 382 (1909), defendant ran a ditch through a swamp and claimed an increase of water. But it appeared that he had only accelerated the flow, adding no new waters. (Sort of the opposite of storage.) In Spaulding v. Stone, 46 M. 483 (1912), defendant's ditch started at the source of Spaulding Creek, paralleled the Creek, intersected the Creek at several points, and was deeper than the Creek. He failed to convince the court that he had added drainage water to the Creek. The facts in West Side Ditch Co. v. Bennett, 106 M. 422 (1938) are similar to the Spaulding case, and so is the result.

But sometimes the court finds that there has been "developed water." In Forrester v. Rock Island Oil & Refining Co., 133 M. 333 (1958), although Jake Slough contributed some water to Blacktail Deer Creek, the court found that defendant's ditches collected waters from the Slough and other seepage waters which would not have flowed into the stream. He was found to have developed waters. Wills v. Morris, 100 M. 504 and 100 M. 514 (1935) bath involved "developed waters" in that the affected waters (from Blix Creek and Camas Creek, respectively) would not have reached Union Creek (tributary of the Blackfoot River) during the irrigation season, so the defendants (Bennett and Hays, respectively) had superior rights to that water

over Union Creek appropriators.

Although a person who stores water in a reservoir is entitled to its use, he hasn't actually added water to the stream, and so reservoired water is not always referred to as "developed" water. The practical and legal effect are the same, though. In Rock Creek Ditch & Plume Co. v. Miller, 93 M. 248 (1933), the water was diverted from Rock Creek around a ridge to Trout Creek. Those who imported this new water, of course, had the first right to use it, but the court said that it did not fit the definition of "developed water." It must be a finely drawn definition. The care in nomenclature is not justified by any difference in result. (Incidentally, after the new water had been used by the importers and seeped out into a spring and creek, it no longer was treated as imported water, but became subject to the previously existing priorities.)

An amusing case from another jurisdiction is Southeastern Colo. W.C. Dist. v. Shelton Farms, Inc. 529 P.2d 1321 (Colo. 1975). Defendant bought 500 acres along the Arkansas River, and cleared much of it of phreatophytes (water consuming plants such as willows, cottonwood, tamarisk and salt cedar). He claimed that by so doing he had saved and contributed to the river system 442 acre-feet of water per year: developed water which he should have the first right to use. In denying

defendant any new water right, the Colorado Supreme Court said, in part (p. 1327):

> "...if individuals salvaging public water lost to encroaching phreatophytes were permitted to create new water rights where there is no new water, the price of salt cedar jungles would rise sharply. And we could expect to see a thriving, if clandestine, business in salt cedar seed and phreatophyte cultivation." (Quoting from New Mexico's State Engineer, S.E. Reynolds.)

C. ACQUISITION OF WATER RIGHTS.

1. The United States, acting through the Bureau of Reclamation, had, in the past, appropriated water pursuant to state laws, as would seem to be required by sec. 8 of the Reclamation Act (Act of June 17, 1902, c. 1093, sec. 8, 32 Stat. 390, 43 U.S.C. sec. 383) which provides:

> Nothing in ... this title shall be construed as affecting...or to in any way interfere with the laws of any State...relating to the control, appropriation, use or distribution of water...and the Secretary...shall proceed in conformity with such laws....

But in Ivanhoe Irrig. Distr. v. McCracken, 357 U.S. 275 (1958), the United States Supreme Court said:

> We read nothing in sec. 8 that compels the United States to deliver water on conditions imposed by the state.

And in City of Fresno v. California, 372 U.S. 627 (1963) the same court said:

> ...we cannot, consistently with Ivanhoe hold that the Secretary must be bound by state law in disposing of water under the Project Act.

These statements by the United States Supreme Court are consistent with its construction of similar legislative statements in other areas, as illustrated by the following:

a. Sec. 9(b) of the Federal Power Act (16 U.S.C. sec. 802(b)) requires:

> That each applicant for a license hereunder shall submit to the commission --
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State...within which the proposed project is to be located....

The United States Supreme Court held that the Federal Power Commission was free to issue a license in direct conflict with the laws of the state. (First Iowa Hydro-Electric Co-op. v. F.P.C., 328 U.S. 152 (1946); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); F.P.C. v. Oregon, 349 U.S. 435 (1955).

b. The Clean Water Act (33 U.S.C. 1323 (Supp. IV)) requires that federal installations must

> comply with Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements.

The United States Supreme Court held that federal installations need not obtain a permit as required by state law. (E.P.A. v. California, 426 U.S. 200 (1976).)

c. The Clean Water Act (42 U.S.C. sec. 1857f) requires agencies of the federal government to

> comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

The United States Supreme Court held that federal agencies need not obtain a state permit pursuant to state laws. (Hancock v. Train, *426* U.S. *167* (1976).)

With this background, the Bureau of Reclamation applied to the California State Water Resources Control Board for a permit to impound *2.4* million acre-feet of water from the Stanislaus River for the Bureau's New Melones Project, a part of its Central Valley Project. Although the Board approved the Bureau's application, it attached 25 conditions to it. So the Bureau proceeded with the project in disregard of the conditions. California sought an injunction, which was denied by the lower federal courts because of the state of the law according to the U.S. Supreme Court, as outlined above. But the Court granted certiorari to review the decisions of the lower courts.

It therefore came as a surprise when the Supreme Court reversed the 9th Circuit, and ruled that the Bureau of Reclamation must comply with all conditions of state law (which are not in direct conflict with express Congressional directives) and so, pursuant to section 8 of the Reclamation Act (supra) the Bureau must obtain a permit and comply with its conditions (unless any of the conditions are in such

conflict) in obtaining a water right on the Stanislaus River and operating the New Melones Project.

Section 8 of the Reclamation Act means what it appears to mean.

Probably it is permissible to state without citation of authority that nearly all public agencies which require or control water have the power of eminent domain.

Under a long line of cases from U.S. v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) to U.S. v. Rands, 389 U.S. 121 (1967), it has been held that when the United States exercises its "navigational servitude" under the Commerce Clause of the U.S. Constitution, to divert, impound, or otherwise affect waters that are navigable or tributary thereto, it need not pay compensation to persons whose use of, access to, or proximity to the water is taken or adversely affected. But Congress may direct that compensation be paid for such interference with private interests and values connected with the water. Congress has done so with respect to land (not water uses nor water rights by themselves) affected by federal projects connected with navigation. In section III of the Rivers and Harbors and Flood Control Act of 1970 (33 U.S.C. sec. 595a) which provides:

> In all cases where real property shall be taken by the United States...in connection with any improvement of...waterways...the compensation to be paid for the real property...above the normal high water mark of navigable waters...shall be the fair market

> value...based upon all uses to which such real property may reasonably be put...any of which uses may be dependent upon access to or utilization of such navigable waters..."

Essentially, the foregoing enactment overrules that long line of cases from U.S. v. Chandler-Dunbar, supra, to U.S. v. Rands, supra, so far as the value of the land is related to "access to or utilization of" the waters. There is no such provision providing for compensation for the taking, under the Commerce Clause and the Navigational Servitude, of a person's water rights.

2. What interest in land, or access to water, must one have to make an appropriation? Based on the history of the origins of the appropriation doctrine, in which the '49ers simply trespassed on public lands and acquired water rights recognized by state law as early as the California "Possessory Act" of 1851 (supra) and confirmed by federal law in the Lode Mining Act of 1866 (supra) and Broder v. Natoma Water Co., 101 U.S. 274 (1879), it would seem that there would be no need to inquire into land ownership to determine a person's water right. But California subsequently held that appropriations could not be made on private lands: the diversion must be made from public lands. (San Joaquin and Kings River Canal Co. v. Worswick, 203 P. 999 (Cal. 1922).)

In Montana, in Prentice v. McKay, 38 M. 114 (1909) it

was said that a trespasser on private land cannot acquire a water right. Actually, Mrs. Prentice appears to have had a revocable license to tap a spring on her husband's adjacent land. But her husband's land was subject to a mortgage, the foreclosure of which was found to revoke the licease, and the license itself was found to be an insufficient land interest on which to found a water right.

Scott v. Jardine Gold M. & M. Co., 79 M. 485 (1927) held that one cannot acquire a water right on another's land without an easement. But Connolly v. Harrel, 102 M. 295 (1936) is a clear holding that a mere revocable license for access to water is sufficient to support an appropriation. In that case, Harrel and Rosenberger posted their notices of appropriation in June of 1929 on the lands of one Jensen who had a ditch from Hell Roaring Creek in Lake County which ditch crossed his land to where the two parties diverted the water from it toward their own ditch. They had the oral consent of Jensen: a revocable license. In July, 1929, Connolly joined the former two appropriators, making his own appropriation, and the three enlarged Jenson's ditch without his knowledge or consent.

Jensen revoked their license (actually, the license of Harrel and Rosenberger of June, 1929) so they found other access to the water. In this action to adjudicate their respective rights, Harrel and Rosenberger were awarded

priority over Connolly, the former two obtaining a June, *1929* priority date, and Connolly a July priority. Clearly the former two had a water right based on an oral, revocable license, and it would seem that Connolly may have acquired a right as a trespasser against Jensen.

The court reviewed Prentice v. McKay and Scott v. Jardine, supra, noted the independence of water rights and ditch rights, and held that the former could be acquired through a revocable license to use a ditch. That holding was essential to the result in the case, and it seems sound, based as it is upon the mutual independence of a water right and a ditch right. In addition to Connolly v. Harrel, supra, there are several cases holding that there is no necessary relationship between a ditch right and a water right, e.g., Smith v. Krutar, *153* M. 325 *(1969);* Galiger v. Hansen, *133 M. 34, 39-40 (1958).*

Galahan v. Lewis, 105 M. *294 (1937)* and Clausen v. Armington, *123* M. *1* (1949) are in accord. In both of these latter cases, the appropriation was made from another's ditch, rather than from the stream itself. In Glantz v. Gabel, 66 M. *134 (1923)* the plaintiff commenced diverting out of defendant's ditch, which ultimately resulted in his being awarded a prescriptive right in defendant's ditch and an 1896 water right: the year that the prescriptive period commenced to run, when he began diverting -- as a trespasser.

In sum, it seems that one needs only the most fragile and slight interest in land or access to water as a basis to support an appropriation.

3. Originally, as in the case of the '49ers, an appropriation was acquired simply by putting the water to a beneficial use. This is illustrated by Kleinschmitt v. Greiser, 14 M. 484 (1894), involving pre-statutory appropriations. The right related back to the commencement of work, and as new lands were opened up requiring water, their priority date was that of the original appropriation. The court was not concerned with diligent development. McDonald v. Lannen, 19 M. 78 (1897) is similar. Toohey v. Campbell, 24 M. 13 (1900) initiated the limitation that the appropriator must have intended to irrigate the additional land at the inception. This would be evidenced, in part, by the capacity of his works. (Bailey v. Tintinger, 45 M. 154 (1912); Wheat v. Cameron, 64 M. 494 (1922).)

In 1885 the legislature passed RCM secs. 810 to 812 (repealed in 1973) providing that:

> Any person hereafter desiring to appropriate... must post a notice...at the point of intended diversion... [and] shall file with the county clerk... a notice of appropriation...verified by affidavit... [and] must proceed to prosecute...the work...with reasonable diligence to completion.... A failure to comply... deprives the appropriator of the right ...as against a subsequent claimant who complies therewith, but by complying...the right to the use of the water shall relate back to the date of posting the notice. (Emphasis added; comprises several code sections; very condensed.)

But in Murray v. Tingley, 20 M. 260 (1897) the parties had failed to comply with the foregoing because their filings were not verified by affidavit. The court held that the statute was not mandatory nor exclusive, and that both parties had valid appropriations, dating from the time of completion and putting the water to a beneficial use. From the time of Murray v. Tingley until the 1973 Water Use Act, a person could acquire a right on an unadjudicated stream by simply using the water. (Musselshell Valley Co. v. Cooley, 86 M. 276 (1929).)

Furthermore, as noted earlier, a person who commenced his proceedings to appropriate water prior to the Water Use Act, but proceeded with diligence toward completion after that act, and after these statutes were repealed, could still relate his right back to the date of commencement. (Mont. Dept. of Natural Res. & Conservation v. Intake Water Co., 171 M. 416 (1976),) involving an appropriation of great magnitude, wherein the requirement of "diligence" was satisfied largely by legal, administrative, and engineering work.) This rule was held to be required under the 1972 constitution's protection of "existing rights" (Art. IX, sec. 3(1)) in General Agriculture Corp. v. Moore, 166 M. 510 (1975), a case involving a proceeding under RCM (1947) sec. 89-829 (repealed in 1973) to appropriate from adjudicated Cow Creek in Blaine County.

From the foregoing, it may be seen that until 1973 (and for the completion of a few appropriations thereafter) the two principal means of acquiring a water right on an unadjudicated stream in Montana were: (1) simply put the water to use; or (2) post at site, file with the county clerk and proceed toward completion with reasonable diligence. There is, of course, no record of "use rights" (method #1), and as to rights acquired by posting and filing (method #2), the county clerk's records are unreliable to the extreme. Their unreliability stems from the facts that: (1) the filings were made in anticipation of appropriating -- but a filer may give up the idea and make no appropriation; and (2) a prospective appropriator will typically file for the maximum amount that he can imagine that he might develop, and therefore in most cases it is a record of an amount grossly in excess of the amount of water actually appropriated. (See Allen v. Petrick, 69 M. 373, 377-379 (1924), a quotation from which appears infra.) The statutes have never required a "notice of completion," i.e., an accurate report: on what was actually done after the filing of a notice of appropriation.

The courts have generally followed a rule of thumb that about one miner's inch per acre serves the needs of most appropriators (Conrow v. Huffine, 48 M. 437 (1914)), but even in cases supporting that rule, amounts substantially in excess of that amount have been awarded. (Worden v. Alexan-

der, 108 M. 208 (1939); Boehler v. Boyer, 72 M. 472 (1925); and Allen V. Petrick, supra, and quoted infra.)

4. In 1907 the legislature provided for the method for appropriating water from an adjudicated stream, but it was held to be optional. So, in 1921, RCM 89-829 (repealed in 1973) was enacted, requiring the filing of a petition in a district court in order to appropriate from an adjudicated stream. This method was not optional, it was exclusive. (Anaconda National Bank v. Johnson, 75 M. 401 (1926,); Donich v. Johnson, 77 M. 229 (1926); and Hanson v. South Side Canal Users' Ass'n., 167 M. 210 (1975).) Unfortunately, neither the statute nor the cases provide guidance as to when a stream is to be considered adjudicated. There is no precise line. (See Stone, Are There Any Adjudicated Streams in Montana? 19 Mont. L. Rev. 19 (1957).)

5. The 1973 Water Use Act, secs. 85-2-301 et seq. requires a person to obtain a permit from the Department of Natural Resources in order to acquire a water right, and the statute is quite emphatic that it is exclusive. (MCA sec. 85-2-301.)

Except for public agencies, which may reserve water and thus appropriate water in a stream (MCA sec. 85-2-316), a person must "divert, impound, or withdraw (including by stock for stock water)." (Sec. 85-2-102(1).)

6. Under both sec. 85-2-102(1) of the 1973 Water Use Act (above) and the statutes repealed by that law, physical activity such as "divert, impound or withdraw" is required in order to obtain an appropriation. The statutory law which was repealed in 1973 provided in RCM (1947), secs.:

> 89-810 "Any person hereafter desiring to appropriate... must post a notice...at the point of intended diversion, stating therein... .
>
> ....
>
> "3. The means of diversion....
>
> Within twenty days after the dare of appropriation... file with the county clerk...a notice of appropriation, which...shall contain the name of the stream from which the diversion is made...and an accurate description of the point of diversion...." (Emphasis supplied.)
>
> 89-811 "Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted...." (Emphasis supplied.)

Why would a "diversion" etc. be thought necessary? It was natural for our water laws to grow up with terminology which required a "diversion" for a beneficial use, because both placer mining and irrigation generally required it, and they were the only principal uses which concerned our courts and legislatures at the time that water law was developing.

But now there are other uses which do not require a diversion, e.g. hydro-power. And some modern uses do not require impoundment or withdrawal either, e.g. all manner of water-based recreation: swimming, fishing, water skiing, gold mining, scuba diving and so on.

Murray v. Tingley, 20 M. 260(1897) established that the quoted code sections(excerpted, above) were not the exclusive means of acquiring an appropriation prior to 1973, and so they are not definitive with respect: to the means of acquiring an appropriation right. The principal other means was merely by making use of the water: a "use" right.

One may ask whether "diversion for a beneficial use" was not merely illustrative of the most common means by which the public made use of the water, rather than a definition of a requisite. "Beneficial use" seems to be the real touchstone of the appropriation system of water rights.

This raises the question whether a private person or the public could make an in-stream appropriation before 1973. In Paradise Rainbow v. Fish and Game Comm'n., 148 M. 412, 419-420(1966) the Supreme Court contemplated that the public might acquire a right by the beneficial use of the water for fishing. The facts of the case did not require a decision on this interesting issue.

MCA sec. 85-2-102(1) recognizes appropriation "by stock for stock water." No "dam, ditch, reservoir or other artificial means was used" for watering cattle in Steptoe Live Stock Co. v. Gulley, 295 P. 772(Nev. 1931), where the court conceded that there must be a diversion with intent to put the water to a beneficial use. Upholding a Nevada appropriation, the court said "if the drinking by cattle constitutes a diver-

sion, then the necessary intent must be that of the cattle,"

Should in-stream use by people (at least prior to the ill-advised restricted definition of "appropriation" in the Montana Water Use Act of 1973) have less recognition and dignity than in-stream use by cattle? (See discussion of public rights, infra.)

7. A subsequent appropriator could theoretically acquire priority over a prior appropriator by using the water continuously for five years (formerly 10 yrs.) while the prior one needed it and knew that he was being deprived. This process is called "prescription" or "adverse use." Many cases involve the claim to a water right by prescription or adverse use, but few such claimants are successful. Of these few, there are: State v. Quantic, 37 M. 32 (1908), in which the defendant counterclaimed for a prescriptive right and the plaintiff defaulted; Stearns v. Benedick, 126 M. 272 (1952) by a vague, difficult to understand opinion; Cook v. Hudson, 110 M. 263 (1940) wherein the court said that plaintiff gained a prescriptive right, but it appeared to be a title by occupancy and by a chain of oral conveyances; Verwolf v. Low Line Irrig. Co., 70 M. 570 (1924) where, in times of shortage, water was distributed equally, prorata to all members of the irrigation company, though the earlier members had prior rights which they should have asserted; Firestone v. Bradshaw, 157 M. 181 (1971) in which

the holder of a 10/142nd interest in a water right acquired a full one-half interest by using that much for the prescriptive period while the other party needed the water; and O'Connor v. Brodie, 153 M. 129 (1969) which is more of a ditch rights case arising in the Orchard Homes area of Missoula, but where the court found that plaintiff acquired a prescriptive water right to Fairgrounds Creek which arose on defendant's land.

Typifying the much greater number of cases wherein the prescriptive claim failed is the recent case from the North Fork of the Blackfoot River, Smith v. Krutar, 153 M. 325 (1969), containing an excellent discussion of the law on the subject. The burden of proof is on the party alleging or claiming a prescriptive right (Lamping v. Diehl, 126 M. 193, (1952).) Further good discussion is printed in Havre Irr. Co. v. Majerus, 132 M. 410 (1958) and King v. Schultz, 141 M. 94 (1962), in which the prescriptive claims also failed.

The 1973 Water Use Act prohibits the future acquisition of water rights by prescription (MCA sec. 85-2-301) but that does not preclude the future assertion that a prescriptive right was acquired prior to 1973.

The 1973 Water Use Act will have no effect upon future acquisitions of ditch rights, or rights of way by prescription or adverse use. These cases are also quite numerous,

but are conceptually quite distinct from water rights. (Galiger v. Hansen, 133 M. 34 (1958).)

D. **AMOUNT OF WATER.**

1. Measurement. Montana Laws, 1885, sec. 14 (repealed by Laws, 1899, p. 126, sec. 4) gave a physical description of the means of measuring a miner's inch. It consisted of placing a box in an eddy, with a sliding gate which could be opened or closed, to allow more or less water to flow through the opening. Each square inch of opening would permit one miner's inch of water to flow through. The opening created by the sliding gate was six inches high, and the water was brought to an eddy standing three inches above the top of the opening.

In Montana, 40 miner's inches equals one cubic foot per second. (MCA sec. 85-2-103(2).) (Miner's inches are not the same in every state.)

A cubic foot per second, or cfs., or second foot, equals 7.48 gallons per second and is the "legal standard for the measurement of water rights in this state." (MCA sec. 85-2-103(1).) Notwithstanding that command, since most of the old filings and decrees are in terms of miner's inches, the courts continue to use the latter measurement.

An acre foot is the amount of water required to cover an acre with one foot of water. It is a useful term in

describing the amount of water stored in a reservoir, or the annual flow of a river.

2. The amount of water that it is reasonable for a person to appropriate was discussed briefly under C. 3 (above). Early appropriations claimed excessive amounts, and early decrees were generous. Part of the explanation of the latter is contained in this short excerpt from the excellent discussion in Allen v. Petrick, 69 M. 373, 377-379 (1924):

> Ample quantities of water being available in the stream, the settlers claimed extravagant amounts.... But the duty of water was seldom, if ever, understood. Almost every irrigator used an excessive amount of water, some all they could get. Some actually washed the seed out of the ground .... [E]xtravagant quantities of water were awarded the litigants by the courts. In instances more water was awarded than some of the ditches of the litigants ever would carry; in others much greater quantities of water than the litigants ever could use beneficially.... In water suits in which members of this court have been engaged the trial judges have been confronted with aged witnesses who testified to what took place in early days. These vernable men, having more or less knowledge of what they testified about, frequently looked through mental magnifying glasses in attempting to recall forgotten things from bygone days. The difficulty encountered in attempting to do equal and exact justice upon testimony of this character is always great and sometimes insuperable.

E. REACTION TO EXCESSIVE CLAIMS AND DECREES.

There are, however, a number of important cases that impose strictness, limitations, and reductions on the amount claimed, or, in the more recent of these cases, even in the amount of a decreed water right. They deserve some extended discussion.

1. In Power v. Switzer, 21 M. 523 (1898) plaintiffs appropriated all of the water in Uncle George's Creek in connection with mining activities. (One would expect that they thus acquired an 1868 right to all the water in the creek. Not so,) Later, plaintiffs' needs declined to only about four inches for domestic purposes, but they used the rest to grow wild hay. In 1895, defendants diverted 15 inches for brick manufacturing. Without reliance upon the doctrine of abandonment, but rather, using the criteria for acquiring a water right, the court found plaintiff's right to be only four inches, and the defendant was decreed the balance of the creek.

2. In Conrow v. Huffine, 48 M. 437 (1914), Moore diverted the entire stream in 1868 to irrigate a total of 70 acres, and in prior litigation in 1889 Moore was decreed the entire flow of the creek. Defendants were successors to the entire Moore right. Plaintiff desired to irrigate, conceded defendants' priority, but challenged their quantity. Plaintiff had not been a party to the 1889 lawsuit or the decree. The court limited defendants' exercise of the Moore right (and the right itself) to 70 inches (for defendants' 70 acres), saying:

> "...the necessity for the use and not the size of the ditch is the measure of the extent of the right. [citations omitted] The tendency of recent decisions of the courts in the arid states is to disregard entirely the capacity of the ditch and regard the

> actual beneficial use, installed within a reasonable time...as the test of the extent of the right.... the ultimate question in every case is: How much will supply the actual needs of the prior claimant under existing conditions?" (pp. 444-445.)

On fundamental principles, of course, the prior decree was not conclusive against plaintiff because neither he nor any predecessor in interest of his was a party to the prior litigation. (See, e.g., State ex rel Reeder v. District Court, 100 M. 376 (1935); State ex rel McKnight v. District Court, 111 M. 520 (1941); Wills v. Morris, 100 M. 514 (1935), all of which are water rights cases.)

3. In Galiger v. McNulty, 80 M. 339 (1927) defendant was awarded an 1868 priority to 150 inches of water, for use from May 1 to November 1 of each year, and 300 inches from May 1 to July 15 of each year, thus cutting down defendant's presumed right and use to conform to the pattern of use originally established by defendant in his prior mining operation, even though he changed his use to agriculture and wanted to use the full amount of his mining appropriation for the new purpose.

4. Similarly, the appropriator in Smith v. Duff, 39 M. 382 (1909), who changed his use to irrigation was restricted to using the water in the Spring and Fall, which is when it was used in a mining operation. This, and Galiger v. McNulty (supra) are changes in the commonly held view that a water right can be exercised at any time that the owner has

a use for it; the court in both cases Looked to the pattern of use established for the original purpose of the use. (Caveat emptor!)

5. In Gilcrest v. Bowen, 95 M. 44 (1933) Croke diverted and used all of the water of Antelope Creek (tributary of the Judith River) in his 172-inch ditch, to irrigate 160 acres which he occupied. (This would surely seem to give Croke a 172-inch water right.) Croke ultimately patented only 80 of those acres, but, quite properly, at p. 57, the court recognized that Croke had about a 160-inch water right. Another settler patented from the United States the other 80 acres, with no privity with Croke or Croke's water right. Croke sold his remaining 80 acres together with his water right to defendant. The court awarded defendant only an 80-inch water right. It didn't say what happened to the other 80 inches, so no one knows. It just evaporated:

> [Defendant] could acquire only sufficient water to irrigate the land he acquired, and, on the record, he acquired at most a right to 80 inches of the Croke right. (Emphasis added.)

This, notwithstanding that a water right may be severed from the land to which it may have been appurtenant, and can thus become an easement (or water right) in gross. (Smith v. Deniff, 24 M. 20, 27 (1900); Lensing v. Day & Hansen Co., 67 M. 382 (1923); Maclay v. Missoula Irrig. Distr., 90 M. 344, 353 (1931); Kofoed v. Bray, 69 M. 78, 84 (1923); Osnes

Livestock Co. v. Warren, 103 M. 284, 292-294 (1936).)

6. Similarly, in Peck v. Simon, 101 M. 12 (1935), plaintiff had a 400-inch right for mining purposes, but converted to irrigation in 1882. He was awarded only a 275-inch right, the Supreme Court saying he was properly limited to the amount required for irrigation. (Incidentally, plaintiff was downstream from defendant, so defendant would not be prejudiced by a mere change in use.) The case is similar to Power v. Switzer, supra.

7. Brennan v. Jones, 101 M. 550 (1936) was a case of the purchase of lower Skalkaho Creek water rights (decreed in 1916) where it was held that the purchaser could take only so much water as his grantor could have taken, from time to time, for the purpose of the grantor's appropriation. This throws some confusion into the sale of a water right, but is based on the reasonable proposition that a use cannot be extended, or a right enlarged by its sale, even though the right may contain a surplus beyond the needs of the seller.

Sherlock v. Greaves, 106 M. 206 (1938) approved and quoted the relevant language from Brennan v. Jones.

8. In Quigley v. McIntosh, 110 M. 494 (1940), the parties had rights decreed in 1913, and since they had decreed to them more than they were currently using, they expanded their irrigated acreage (and commenced to develop a swimming pool) within the land described by their

original. pleadings, and within the amounts decreed to them. The court denied the right to so extend their uses, saying:

> It seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven, cannot subsequently extend the use sf that water to additional lands not under actual or contemplated irrigation at the time the right was decreed, to the injury of subsequent appropriators.... Of course, water must be appropriated and decreed under our system for some useful and beneficial purpose. [cite] The proof of the existence of such purpose and the use applied to the same, as shown in the original cause, of necessity formed the basis for the awards finally given in the 1913 decree. (p. 505.)

The result seems to indicate that the trial court may have to "fill in" the 2913 decree with further prescriptions, such as a description of the acreage to be irrigated, or the number of hours per day or days per week that the appropriators can use the amount of water decreed to them, or some other limitation. The Quigley case is approved and this concept confirmed in Luppold v. Lewis, 172 M. 280 (1977).

One case provided for a physical solution to assure a plaintiff the quantity of water to which he was entitled. In Anderson v. Cook, 25 M. 330 (1901), plaintiff owned a one-third interest in a reservoir, ditch, and water right, the defendant owning the remaining two-thirds. But plaintiff had to transport the water in the ditch for more than a mile beyond the point where the defendant took out his two-thirds of the water. The court decreed that plaintiff was

entitled to all of the water, to the exclusion of the defendant, two days a week; defendant could take it the test of the time. That provided plaintiff with sufficient "carriage water" to make his appropriation more useful.

F. RESERVOIRS AND STORAGE.

1. Art. III, sec 15 of the 1889 Constitution and Art. IX, sec. 3(2) of the 1972 Constitution provide that the use of land as sites for reservoirs is a public use. RCM (1947) sec. 89-801(1) (repealed in 1973) provided that an appropriator may impound waters in a reservoir and thereby appropriate them. The 1973 Water Use Act, MCA sec. 85-2-305 provides: "A person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed in this chapter."

2. Many cases express that the policy of the state is to strongly encourage storing water so as to reduce waste and increase its beneficial use. (Ryan v. Quinlan, 45 M. 521 (1912); Anaconda National Bank v. Johnson, 75 M. 401 (1926); Donich v. Johnson, 77 M. 229 (1926); Woodwsrd v. Perkins, 116 M. 46 (1944); Perkins v. Kramer, 121 M. 595 (1948); Richland County v. Anderson, 129 M. 559 (1956); Farmers Union Oil Co. v. Anderson, 129 M. 580 (1956); Sunset Irr. Distr. v. Ailport, 166 M. 11 (1974); and Federal. Land Bank v. Morris, 112 M. 445 (1941). Of the foregoing Constitutional

provisions, statutes, and cases, only the last cited case makes an attempt to consider the nature of a reservoir right:

> Generally, and briefly, in this state, what are the reservoir rights of any person? We would say that, in any year, to store for use in that or succeeding years what he has a right to use, and also any additional amounts that others would not have the right to use, and that will otherwise go to waste, seems to cover the situation in this case. (p. 456.)

3. That is an unfortunately general rather than a specific and definitive statement. May a reservoir owner fill his reservoir while a subsequent irrigator is currently in real need of the water? Is it for use in the current year or storage for the future? Three recent cases express a preference for direct flow diversions, although they do not expressly so hold. (Whitcomb v. Helena Water Works Co., 151 M. 443 (1968); Gwynn v. City of Phillipsburg, 156 M. 194 (1971); and Allendale Irr. Co. v. State Water Conservation Board, 113 M. 436 (1942).) The last cited case simply places the burden of proof on the subsequent storage claimant to disprove interference with prior appropriators.

Then, too, "beneficial use" is not an absolute. What may be justified in a wet year may not be "beneficial" and may even be "wasteful" in a drought year. These words are words of degree. Filling a reservoir for possible use in future years could be prohibited on this basis, if a neighbor's crops are wilting. That caution could be applied to diversions of water for other purposes too.

4. Although it may be reasonable to require a permit to build a reservoir, or to fill it, it seems questionable that there should be any such thing as a reservoir water right. As pointed out in Kinney on Irrigation and Water Rights, p. *1480:* "'Storage' is not a use. The storage is merely an incident of the means of making the use occurring between the diversion and the application."

In effect, a reservoir is just a wide, slow area in a person's irrigation works, intended to store and delay delivery of the water to the beneficial use. It is the beneficial use which is the basis for any appropriation, and a reservoir enables a junior appropriator to take water for that use when, perhaps, neither he nor anyone else has any need for water, store it, and later use it at a time when he might have no right to take from the natural flow.

G. CHANGES **OF USE.**

1. The 1973 Water Use Act, MCA secs. *85-2-402* and *85-2-403* restrict all changes of use, and any severance of water from land to which it has become appurtenant. These sections require prior approval of the Department of Natural Resources and Conservation. The Department will probably be guided by prior case law in determining whether such changes or severances will have adverse effects.

That prior Departmental approval is required was decided by the Montana Supreme Court on Sept. 29, 1981, in Castillo v. Kinnemann, case no. 80-465.

MCA sec. 85-2-403 provides for the transfer of an appropriation right, but requires the transferee to file with the Department a notice of transfer on a form prescribed by the Department.

When agricultural land is to be subdivided, or there is to be any other change in water use, prior Departmental approval is required, and unless a severance is made (after Departmental approval), the appropriation will be divided among the subdivided tracts in proportion to the number of acres irrigated on each tract. (Spaeth v. Emmett, 142 M. 231 (1963), Castillo v. Kunnemann, case no. 80-465, Sept. 29, 1981.)

2. RCM (1947) sec. 89-803 permitted changes in the point of diversion, place, and purpose of use, so long as it caused no injury to others. Many cases have been concerned with such changes, and they have given the statute straightforward construction. Sain v. Montana Power Co., 20 F. Supp. 843 (D. Mont. 1937) allows such changes if others are not prejudiced. Perhaps the last case to be decided under that statute (which was repealed in 1973) was Thompson v. Harvey, 164 M. 133 (1974). Thompson owned early decreed rights to 125 inches from Deep Creek in Broadwater County, with which he irrigated 80 acres, and sought in this action to change

the point of diversion of 75 inches, 4 1/2 miles upstream, to irrigate 80 more acres. Defendants had inferior rights upstream; they obtained their water by means of an exchange: they purchased water from the State's Missouri-Broadwater Canal to supply Thompson, and then they took the Deep Creek Water. If Thompson's diversion were moved upstream, he could no longer be supplied from the Missouri-Broadwater Canal, and so defendants' inferior water rights would have to give way to supply his senior rights in Deep Creek. The court found that such a change would be unfair to the junior appropriators, and denied Thompson the right to change.

3. Frequently the change in place of use results from a city's purchasing water rights, to transport the water out of the watershed for municipal use. (Except for the possible eminent domain element, the fact that it is a city makes no legal difference.) The biggest problem is the deprivation of other users' rights to the return flow. Generally, such a purchaser can only remove the amount of water which the seller consumed: if there was previously a 50% return flow, then only 50% of the purchased right can be taken. Brennan v. Jones, 101 M. 550 (1936).

In Spokane Ranch & Water Co. v. Beatty, 37 M. 342 (1908), the City of Helena was permitted to take its purchased water which had been used out of the watershed for placer mining, but not permitted to take its purchased agricultural water

rights out of the watershed. Lokowich v. City of Helena, 46 M. 575 (1913) is a re-affirmation of the Spokane Ranch case. Creek v. Bozeman Water Works Co., 15 M. 121 (1894) and Gassert v. Noyes, 18 M. 216 (1896) are to the same effect. Brennan v. Jones, 101 M. 550 (1936) (previously discussed) is clearer than any of the foregoing cases, but even so it does not settle exactly how much water can be taken: the purchaser will have to conform his taking of water to the pattern established by his grantor's uses and purposes.

4. Efficiency of use. Can one make a more efficient use of his water, and then apply the saved water to an extended use? (This question is really discussed in another context in III B. 4, and III C. (above) and so will only be touched on here.) Such a policy would encourage economy, efficiency, and maximum use. But it would also encourage a good deal of wishful thinking, or cheating, and controversy among neighbors. This is so for several reasons. As previously noted, many appropriations are excessive, and the claimed "new efficiency" may be only a guise to take more water and increase one's use, contrary to Quigley v. McIntosh, 110 M. 495 (1940). It certainly would strain neighborly relations for the downstream appropriator to investigate whether the upper user was truly more efficient: and not simply taking more water. Similarly, it would not improve such relations if the newly claimed, more effficient

use was downstream, and its claimant sought to close the headgate of a junior upstream user during a time of ehortage, while the claimant was expanding the purposes of his water use.

It seems probable that our law is opposed to such extensions of use. The basis of the appropriative right is not a quantity of water, but the beneficial use: a right to use public property (water} for a particular purpose. In effect, a franchise. This seems to be the message of the cases discussed under III c (above, particularly Conrow v. Huffine, 48 M. 437 (1914), and Quigley v. McIntosh, supra.)

H. LEASE OR TEMPORARY TRANSFER OF WATER RIGHT.

1. It is clear that one may appropriate water for the purpose of delivering it to others, as in the case of municipalities, ditch companies, irrigation and conservancy districts, and other service organizations. (MCA sec. 85-2-415 to 418 and sec. 85-2-102(2); Bailey v. Tintinger, 45 M. 154 (1912) ; Sherlock v. Greaves, 106 M. 206 (1938) .)

2. But if one has an ordinary appropriation, which is excessive for his current needs, he must leave the water in the stream for other appropriators, or return it to the stream for them. He cannot simply lease his surplus from time to time. (MCA sec. 85-2-412; Creek v. Bozeman Water Works Co., 15 M. 121 (1894); Galiger v. McNulty, 80 M. 339,

355-357 (1927); Tucker v. Missoula Light & Ry. Co., 77 M. 91, 100-101 (1926); Brennan v. Jones, 101 M. 550, 567 (1936).

In Sherlock v. Greaves, supra, the court found (at pp. 220-221) that since it was inconsistent for an agricultural appropriator to sell or lease water, which was occurring in this case by permitting the residents of Radersberg to purchase water from the ditch, the appropriator had become a public utility, possibly under the jurisdiction of the Public Service Commission.

For an explanation of the effect and interpretation of RCM (1947) secs. 89-823 to 826 (now MCA secs. 85-2-415 to 418) consistent with the foregoing, see Rock Creek Ditch & Flume Co. v. Miller, 93 M. 248, 263-264 (1933) and Sherlock v. Greaves, 106 M. 206 (1938).

3. Problems connected with an ordinary sale and transfer of a water right are considered under "Changes of Use" (paragraph G. 3. above.)

I. ABANDONMENT.

1. RCM 89-802 (repealed in 1973) provided for abandonment of a water right, as a question of fact. By the time of Meagher v. Hardenbrook, 11 M. 385 (1891), the judicial handling of abandonment had become clear: to prove abandonment one had to prove that the other party intended to abandon his water right. (Tucker v. Jones, 8 M. 225 (1888);

McCauley v. McKeig, 8 M. 389 (1889). Since then the cases finding abandonment are extremely rare and obscure in application. (Head v. Hale, 38 M. 302 (1909); Power v. Switzer, 21 M. 523 (1898); Gilcrest v. Bowen, 95 M. 44 (1933); Peck v. Simon, 101 M. 12 (1935). The latter three cases teach the result of abandonment, but don't purport to be abandonment cases, and do not specifically find abandonment, although a loss of water right resulted in each of them.) Abandonment is an issue in many cases, for it is an easy allegation for one side or the other, or both, to make. But the burden of proving the intent to abandon is upon the person asserting it. (Thomas v. Ball, 66 M. 161 (1923).) Even though it was said that ten years of non-user is potent evidence of intent to abandon (Smith v. Hope Min. Co., 18 M. 432 (1896), such intent, abandonment, was not found in that case.

One recent case expressly finds abandonment: Holmstrom Land Co. v. Meagher County Newlan Creek Water Distr., 605 P.2d 1060 (Mont. 1980). The case was an adjudication of Sheep Creek in Meagher County, a tributary of the Smith Rivet which flows westerly out of the Little Belt Mountains. The trial court awarded defendants Thorson 337 miners' inches with a priority in 1900, based on use, and conveyances of 337 miners' inches from the Thorsons' predeceseors down to the Thorsons.

But Mr. Thorson testified that neither he, nor his

predecessors in interest, had ever used the full 337 miners' inches for a beneficial purpose. (p. 1068). At p. 1069 the court says:

> Thorson also testified that there was no evidence that his predecessors in interest had irrigated any more than twenty acres from Sheep Creek. Seventy-five years of nonuse is sufficient to provide "clear evidence'' of abandonment....
> Additional testimony established that it took up to 4 miners' inches per acre to properly irrigate land which is similar to Thorsons. This evidence is sufficient to allow the granting of 80 miners' inches to Thorsons with a priority date of September 20, 1900.. .."

Although this case in unique in Montana, in that it squarely finds abandonment, it too is questionable. The foregoing quotations lend themselves more readily to the conclusion that the Thorsons' predecessors never acquired more than an 80-inch water right: in the first place, rather than a conclusion of abandonment.

2. The 1973 Water Use Act also provides for abandonment (MCA sec. 85-2-404) and says that ten successive years of non-use while water was available creates a prima facie presumption of abandonment. But then in pargr. (3) of that section it says: "This section does not apply to existing rights until they have been determined in accordance with part 2 of this chapter." (Part 2 is the adjudication process, statewide, inaugurated by Senate Bill # 76, 1979 legislative session.)

Now that puts us in a peculiar situation. Although the Powder River adjudication is in process, and the Water Judges, Water Masters, and the Department of Natural Resources are commencing to adjudicate the remainder of the state in the four water divisions, right now there are no existing rights in the entire state that have been "determined in accordance with part 2 of this chapter." So the new section on abandonment has no effective application with respect to anything. Not yet, anyhow. And the previous statute on abandonment (RCM 1947) sec. 89-802 has been repealed so it has no effect, except, perhaps on present and future litigation over pre-1973 abandonments, as in Holmstrom Land Co. v. Meagher County Newlan Creek Water Distr., 605 P.2d 1060 (Mont. 1980), reviewed in the preceding sub-section.

3. Probably the legislature did not intend to totally abolish the legal concept and continued application of the law of abandonment, even temporarily, although an argument to that effect can certainly be made. Probably, with no effective statute for the time being, the common law of abandonment should be used to bridge the gap. According to 1 CJS, Abandonment, p. 4, sec. 1, the common law of abandonment is defined as follows:

> "Abandonment" of property or a right is the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his ownership, possession, and control, and without vesting ownership in any other person.

That is essentially a statement of what our pre-1973 statute and cases provided. (See Stone, Are There Any Adjudicated Streams in Montana? 19 Mont. L. Rev., 19, 26, note 31 (1957).)

J. PUBLIC INTERESTS.

1. Montana materials relating to public uses of waters are fragmentary, and consist almost exclusively of code sections in several titles of MCA. Since Montana case law in the area is nearly non-existent, it is convenient to view the statutory materials(almost without cases) first, and then to provide a short statement of case law.

a. Statutory material

MCA sec. 85-1-111 states:

> Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation....

That leaves unsettled what recreational uses and liberties may be taken by the public under the word "navigation" used in this context.

Landowners bordering on navigable water are granted a license to build docks and wharves upon the "lands under water" belonging to the State of Montana (MCA sec. 85-16-101) and the public may use those docks and wharves as public ones, subject to a reasonable compensation for the use. (MCA sec. 85-16-102.) For the

purposes of this license to wharf out, "land under water" means land extending to the high-water mark, or to the meander line. (MCA sec. 85-16-104.)

That last code section does not assert State of Montana ownership under navigable waters to the high-water mark, but only means that if the state happens to own land to such a boundary, the license to build wharves on "land under water" extends to such lands.

The lands under the waters of the south half of Flathead Lake have been said to belong to the United States in trust for the Confederated Salish & Kootenai Tribes. (Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942); U.S. v. Pollmann, 364 F. Supp. 995 (1973); Confederated Salish & Kootenai Tribes v. Namen, 534 F.2nd 1376 (1976) adopting the opinion in 380 F. Supp. 452 (1974), cert. den. 429 U.S. 929 (1976); Confed. Salish & Kootenai Tribes v. Namen and the City of Polson, Civ. No. 2343; City of Polson and State of Montana v. Confed. S. & K. Tribes, Civ. No. 75-143-M; U.S. v. City of Polson and State of Montana, Civ. No. 77-70-M. The last three cases were decided by the federal District Court, Montana, in 1980, they are consolidated cases, and all are on appeal to the Ninth Circuit Court of Appeals.)

In State of Montana v. United States, 101 S. Ct. 1245 (1981) the United States Supreme Court held that the bed of

the Big Horn River belongs to the State of Montana, based on the Court's interpretation of the Treaties and because the Big Horn is a navigable waterway of the United States which was held in trust by the United States for the benefit of the future State of Montana, under the "equal footing" doctrine. Until Congress exercises control over the use of the navigable waters, the State of Montana may exercise control over such use (e.g. fishing and hunting) of the waters overlying Montana's bed of the river which flows through the Crow Indian Reservation.

The decision in Montana v. United States (supra) raises questions as to the ownership of the bed of the south half of Flathead Lake, because although the Ninth Circuit has spoken (see the string of cases cited above) the United States Supreme Court has not itself addressed this issue. It also leaves in doubt the ownership of the beds of navigable waters of the United States within all the other Indian reservations in the United States, where the Supreme Court has not determined the issue.

MCA sec. 70-1-202 asserts state ownership of all land below the water of a navigable lake or stream, but, pursuant to MCA sec. 70-16-201, the state only owns the beds between the low-water marks, and the private upland owner owns the strip between high and low water. (Gibson v. Kelly, 15 M. 417 (1895).)

Montana is nearly unique in adopting the foregoing rule. In nearly all other states public ownership of the beds under navigable waters extends to the high water mark. A bit of history explains the general rule. In England title to lands under tidal waters (to the high water mark) was an attribute of the sovereignty of the British Crown. After the Revolutionary War, the thirteen colonies assumed similar sovereignty. In a dispute over an oyster fishery off the coast of New Jersey, the Supreme Court held that this aspect of sovereignty had never been transferred by the colonies to the United States. (Martin v. Waddell, 41 U.S. 367 (1842).) So the thirteen colonies owned the beds of their navigable waters to the high-water mark. Later, a case arose involving rights in tidal waters of Mobile Bay in Alabama. Alabama was not ode of the thirteen colonies and original states. But in Pollard v. Hagan, 44 U.S. 212 (1845), the Supreme Court held that Alabama (and subsequent states) were admitted on an "equal footing" with the first thirteen, and hence Alabama had title to the beds of navigable waters within her boundaries, to the high water mark. Subsequently, the doctrine of navigability has been applied to inland, fresh, non-tidal waters, to transfer these beds to the states upon the admission of the state to the union. At the date of admission, the waters must have been "susceptible of being used, in their ordinary condition, as highways for

commerce, over which trade and travel are, or may be conducted in the customary modes of trade and travel on water...." (The Daniel Ball, 77 U.S. 557 (1870).) (See Stone, Public Rights in Water Uses, 1 WATERS AND WATER RIGHTS, 206-207 (R. Clark, ed., 1967).)

When settlers in Montana patented the uplands from the United States' public domain, they only received from the United States title to the high water mark. But by MCA sec. 70-16-201 and Gibson v. Kelly, 15 M. 417 (1895), Montana conceded to the settler title to the low-water mark. So far, the United States Supreme Court has considered it solely the business of the state, if a state wishes to so abandon land which had vested in the state for the benefit of the public. (Barney v. City of Keokuk, 94 U.S. 324, 338 (1876).)

The strip of land in question(between high and low water marks on navigable streams and lakes) had been held by the United States in trust for the people of the future state. Each new state acquired title to that land as a public trust from the United States. This raises the question of whether the state can transfer to a private owner more than the state itself has: a title free of the public trust, free of the right of the public to use that strip of land. In Illinois Central Ry. v. Illinois, 146 U.S. 387 (1892) it was held that the State of Illinois could not convey a large segment of the Chicago waterfront and harbor to private use.

This will be taken up (hereinafter) in consideration of cases in other (and neighboring) jurisdictions where there has been more development in case law.

MCA sec. 87-1-209 authorizes the Department of Fish, Wildlife and Parks to acquire lands and waters for various purposes, including protection of habitat, hunting, fishing, or trapping.

MCA sec. 85-1-112(1) provides that all lakes which have been meandered by U.S. surveyors, or which are navigable in fact, are public waters. MCA sec. 85-1-112(2) provides the same for streams. MCA sec. 87-2-305 provides:

> Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof, of the state of Montana, and all rivers, sloughs, and streams flowing through any public lands of the state, shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the high water flowlines or within the meander lines of navigable streams, shall be subject to the right of any person... to angle therein or along their banks to go upon the same for such purpose.

The foregoing statute is set forth almost completely because it appears to be a limitation on the concession to private ownership to low-water mark by MCA sec. 70-16-201 and Gibson v. Kelly (supra). Such a limitation of private ownership probably will be upheld, and will be considered (hereinafter) in connection with cases from other jurisdictions. One wonders whether "angling" will be taken as illustrative of the public's right of use, or a limitation. In that connec-

tion, it should be noted that in Gibson v. Kelly, 15 M. 417 (1895), the case which first stated Montana's peculiar rule regarding private ownership to low water, the court said:

> It is true that while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river and upon the strip in question.... (p. 423.)

RCM (1947) sec. 89-801(2), enacted in 1969, designated certain stream on which the (then) Fish and Game Commission could file for an appropriation for public purposes, in effect, to reserve streamflow on "blue ribbon" streams. Parts of the Rock Creek, Blackfoot, Madison, Gallatin, Big Hole and Yellowstone Rivers, and others were named in the Act, and the Commission did appropriate water tights.

Although RCM (1947) sec. 89-801(2) was repealed by the Water Use Act of 1973, the latter Act, as well as Art. IX, sec. 3 of the 1972 Constitution preserved all "existing tights." Public rights appropriated under the foregoing section by the Fish and Game Commission do therefore survive the repeal of the section.

The 1973 Water Use Act really replaced sec. 89-801(2) with a much broader provision. Montana became a leader nationally in 1973 by providing that any political sub-division or agency of the state or federal government could apply for an instream reservation of waters, in order to reserve waters for future uses or to maintain a minimum flow,

Level or quality of water. (MCA sec. 85-2-316.) This reservation provision is an extremely important addition to our water laws, because it looks ahead to the future needs of municipalities, agriculture, industry, human health, fish, wildlife, and the aesthetic and philosophical goal of preserving Living streams.

The first proceeding to provide such reservations affected the lower Yellowstone River Basin. Reservations were made for two irrigation districts, 14 conservation districts; the Montana Departments of State Lands, Natural Resources and Conservation, Health and Environmental Sciences, and Fish and Game (now Fish, Wildlife and Parks); the federal bureaus of Land Management and Reclamation; and eight municipalities. The Board of Natural Resources and Conservation adopted the final order for these reservations on December 15, 1978, conscientiously carrying out the policies and purposes of the law, granting reservations for more than three-fourths of the normally available flow of the Yellowstone River. Undoubtedly some entities could justifiably have been awarded more, and some less; and it may legitimately be contended that the total reservations should have been greater or less. The important point is that a far-seeing law, enacted in the long-term public interest, was conscientiously implemented.

Apparently the action of the Board (above) was frightening to some interest, for the section has been amended to limit the Board in making any reservations after May 9, 1979 "for maintenance of minimum flow, level, or quality of water...to a maximum of 50% of the average annual flow of record on gauged streams." MCA sec. 85-2-316(5).

Chapter 7, Part 2 of Title 75, MCA, enacted in 1975 protects lakeshores to twenty horizontal feet from high-water elevation. The protected lakes must have a surface area of 160 acres, or, if the local governing body chooses, the protection can extend to lakes as small as 20 surface acres. It requires a permit from the local governing body to alter or diminish the course, current, or cross-sectional area. The local body is to develop satisfactory regulations, in default of which, the Department of Natural Resources will establish regulations for any qualifying lake, upon petition by five owners, or 30% of the owners abutting the lake, whichever is the fewer, and then the Department may enforce its own regulations.

The chapter provides for a variance procedure, judicial enforcement and review, and penalties.

b. Montana cases.

> It would seem clear that a man has no right to fish where he has no right to be. So it is held uniformly that the public have no right

> to fish in a non-navigable body of water, the bed of which is owned privately.
> -Herrin v. Sutherland, 74 M. 587, 596 (1925).

That unfortunate and ill-considered statement represents the Montana Supreme Court's only attempt to deal with the rights of the public to make recreational use of waters over private lands.

The opinion is unfortunate because it necessarily restricts the public interest in public waters, contrary to the holdings in neighboring and non-neighboring states. It was ill-considered because the complaint alleged that defendant trespassed above the high-water mark on plaintiff's uplands; defendant entered a general demurrer, which of course was overruled, but incredibly, defendant refused to plead further. There was no trial, just a judgment essentially by default. Defendant appealed: The matter was submitted on briefs, without appearance of counsel, and appellant's brief was minimal. The Supreme Court was not called upon to give serious consideration to the issues and problems related to the foregoing quotation.

Justice Holloway, concurring in the affirmance of the trial court judgment, said "...the appeal does not merit serious consideration, but should be disposed of summarily...." (p. 602.) He was right, and the case

stands as a lone, weak precedent on the issue of public recreational rights in public waters covering private lands.

Gibson v. Kelly, 15 M. 417(1895) recognized private ownership to the low-water mark along navigable streams, but also that such ownership is limited by public rights of navigation and fishery.

In Paradise Rainbow v. Fish and Game Commission, 148 M. 412 (1966), the Commission asserted a water right in the public, acquired by the public's beneficial use of the stream for fishing. The Court found insufficient facts to support the Commission's argument, but offered some hope:

> Under the proper circumstances we feel that such a public interest should be recognized. This issue will inevitably grow more pressing as increasing demands are made on our water resources. An abundance of good trout streams is unquestionably of considerable value to the people of Montana.
>
> While the Commission's argument is plausible, we cannot yield to it, given the facts at hand....

The Hellgate Treaty, 12 Stat. 975, July 16,1855, ratified March 8, 1859, and proclaimed by President Buchanan April 18, 1859, bestows upon the Flathead, Salish and Kootenai Tribes "the exclusive right of taking fish in all the streams running through or bordering said reservation...as also the right of

taking fish at all usual and accustomed places, in common with the citizens of the Territory."

In U.S. v. Pollmann, 364 F. Supp., 995 (1973) the defendant was arrested for fishing in the south half of Flathead Lake (within the Indian reservation) without a recreational permit required by Tribal Ordinance 44A of February 14, 1969. Based on the doctrine of construing doubtful language in favor of Indians, the Court treated the south half of Flathead Lake as a "stream", and upheld the tribal ordinance so far as fishing is concerned. (Defendant was found not guilty, as he was found to have not "willfully and knowingly" violated the ordinance.)

In Confederated Salish and Kootenai Tribes v. Namen, 534 F.2d 1376 (1976) (adopting the opinion in 380 F. Supp. 452 (D. Mont., 1974)), cert. den. 429 U.S. 929 (1976), it was held that owners of land abutting the south half of Flathead Lake have federal common law riparian rights of access to the Lake, and the right to wharf out to gain access to those rights.

In State of Montana v. United States, 101 S. Ct. 1245 (1981), it was held that the bed of the Big Horn River belongs to the State of Montana, and the State may regulate hunting and fishing on that river within the boundaries of the Crow Indian Reservation. That

case, and some of its implications, are discussed in the early part of J. I., above.

2. Developments elsewhere which may be prophetic.

a. Lands bordering navigable or public waters.

In Illinois Central Railway v. Illinois, 146 U.S. 387 (18921, the State of Illinois had conveyed the shoreland and a large part of the bed of Lake Michigan in the Chicago harbor to the railroad. The U.S. Supreme Court held that such a vast conveyance was void because it was an abdication of the public trust under which Illinois had held title.

The California tidelands cases are affected by the "public trust" concept, and they are instructive. In California there are numerous tideland patents, conveying to private ownership the land beneath, or adjacent to navigable waters. Although some early cases held such grants invalid, they were confirmed, but subject to a public trust easement which rendered such private ownership a mere "naked title to the soil" in People v. California Fish Co., 138 Pac. 79 (Calif. 1913). Land ownership of such property was so meaningless (or "naked") that the land could be dredged to improve navigation without the consent of the owner and without paying him compensation. Newcomb v. City of Newport Beach, 60 P.2d 825

(Calif. 1936).

In the case of Marks v. Whitney, 491 P.2d 374 (Calif. 1971), Marks had acquired title to tidelands in Tomales Bay, Marin County, under an 1874 patent. In this action he sought, among other things, confirmation of his claimed right to fill and develop his tidelands. He was denied any such right. The court said:

> The tidelands embraced in these statutes extend from the Oregon line to Mexico.... The public uses to which the tidelands are subject are sufficiently flexible to encompass changing public needs....
>
> There is absolutely no merit in Marks' contention that as owner of the jus privatum under this patent he may fill and develop his property, whether for navigational purposes or not.... [He] owns "the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust therefore, to enter upon and possess the same for the preservation and advancement of the public uses, and to make such changes and improvements as may be deemed advisable for those purposes." (p. 381, the quoted part is quoted from People v. California Fish Co., supra.)

This holding could easily be transported to Montana, affecting the degree of ownership and uses of the strip of land between high and low water along our navigable lakes and streams -- or even along non-navigable bodies of water.

b. Non-navigable lakes.

In early cases involving the use of non-navigable lakes (where the bed is in private ownership) real property law was applied to confer upon the owner of a portion of the bed the exclusive right to the overlying waters. Consequently, one could not paddle his canoe around a lake (unless he owned the entire bed) without trespassing. (See Stone, Public Rights in Water Uses, 1 WATERS AND WATER RIGHTS, 218 (R. Clark, ed., 1967).)

Beginning with Beach v. Hayner, 207 Mich. 93, 173 N.W. 487 (1919) a "common use" rule gained recognition, whereby the several owners around a non-navigable lake had rights in common to use the entire lake surface.

Our neighboring state, Washington, has recently applied the "common use" rule, or mutual easements, in a number of instances. It first recognized the rule in Snively v. Jaber, 296 P.2d 1015 (Wash. 1956) on Angle Lake. A resort owner had permitted his guests to make nuisances of themselves, so he was enjoined for two years from permitting his guests to make use of the entire lake. After two years, the injunction was to be dissolved on a trial basis. The principle of "common use" was established.

Similarly, in Botton v. State, 420 P.2d 352, Wash. 1966) the Department of Fish and Game had

provided public access to Phantom Lake, but members of the public had made nuisances of themselves. So the Department was enjoined from permitting the public to use the lake until the Department presented a plan for the policing, regulating and controlling of the public. But the right of the public was confirmed, and when this author visited the lake on Dec. 8, 1980, it appeared that the Department had done a nice, tasteful development, with adequate public facilities and an attractive park between Pacific Highway, S. and the Lake, about a mile from Seatac Airport.

Bach v. Sarich, *445* P.2d *648* (Wash., *1968)* was a suit to enjoin construction of an apartment building which would extend out over Bitter Lake in Seattle. "Pending trial on the merits, defendant proceeded as rapidly as possible with construction of apartment No. 1 and the concrete slab to support it. The slab projects 130 feet and is 77 feet wide. Beneath it the lake is filled with dirt, and pilings of steel beams are used to support it." (p. 650.) The trial court granted the injunction and ordered the removal of all structures and fills. In affirming that injunction and order, the Washington Supreme Court said:

> All riparian owners along the shore of a natural, non-navigable lake share in common the right to use the entire surface of the lake for boating,

> swimming, fishing, and other similar riparian rights so long as there is no unreasonable interference of these rights by other respective owners.... (pp. 651-652.)

Wilbour v. Gallagher, 462 P.2d 232 (Wash. 1969)

applied the same rule to navigable waters in a peculiar situation, where the bed was privately owned. Lake Chelan had been dammed for power purposes, resulting in raising the lake level, at times twenty-one feet above its natural high water level. That resulted in inundating a part of defendant's land when the lake was filled to its new full-pool level. Defendant sought to fill in over his lands which were so submerged. The Court ordered the fills removed.

In that case, there was an extreme reduction in defendant's ownership capacity of his land, as a consequence of the raising of the lake level over his land.

c. Non-navigable streams.

The trend in Western states, including most of our next-door neighbors, has been in support of the public right to make recreational use of the bed and banks of non-navigable streams (i.e., where the bed and banks are privately owned) either by employing a liberal state definition of navigability, or simply by determining whether a given stream is public because

it is susceptible to substantial public use.

As stated by Johnson and Austin, Recreational Rights and Titles to Beds, 7 Nat. Res. J. 1 (1967), the word "navigability" is "chameleon in character" because it is used for different purposes, and can mean different things according to the purpose for which it is used.

"Navigability" to ascertain whether a state acquired ownership of the beds and banks of a body of water at the date of admission, has been discussed in section J. 1. (above.) It may be referred as as "navigabililty for title".

Navigability for commerce is also a federal question, but for this purpose the date of admission of a state to the union is not used, for "navigability, for the purpose of the regulation of commerce, may later arise...." U.S. v. Appalachian Electr. Power Co., 311 U.S. 377 (1940). This was the "New River Case", and held that if a stream could be made navigable for commerce by improvements, it could then become a part of the navigable waters of the United States.

State tests, rather than federal tests, determine "navigability" for public use. Some older cases did not recognize the different uses of "navigable", and applied a federal test of navigability to determine

the state's internal concern over public use. Other cases erroneously applied a state test for federal as well as state purposes. The latter cases, typically from the old Northwest Territory states, developed a "saw log" test, and other definitions more liberal than the Daniel Ball definition.

Other cases recognized that a state could develop its own test to determine the usability of a creek or a stream by the public. So there are a variety of state tests for this purpose. They have tended to look to the recreational potential of the body of water involved.

More recently there is a tendency to abandon the tool of defining "navigability" and simply direct the inquiry at whether the water is susceptible of substantial public use.

d. Some examples.

In N. Dak., Roberts v. Taylor, 181 N.W. 622 (1921, N.D.) used this test for public use: "...when the waters may be used for the convenience and enjoyment of the public, whether travelling on trade purposes or pleasure purposes." (p. 626.) (The court erroneously intended this test to apply for title purposes also.)

In Washington, a stream was considered navigable if it could float shingles. (Fortson Shingle Co. v. Skagland, *137* Pac. *304* (Wash., *1913.)*

In New Mexico, the United States built the Conchas Dam on the South Canadian River, taking title to private land for the damsite, but only a flowage easement for the reservoir waters, thus leaving the bed and banks of the reservoir in private ownership. In State v. Red River Valley Co., *182* P.2d *421 (N.* Mex. *1945)* it was held that since the waters were public waters, the public was entitled to the use and enjoyment of them regardless of the underlying land ownership.

A similar rationale guided the Wyoming court in Day v. Armstrong, *362* P.2d 137 *(Wyo., 1961).* Plaintiff sought a declaration of his right to float a non-navigable (for title purposes) portion of the North Platte River, across defendant's lands. The court reasoned that since the waters belong to the public, and the public has the right to have the waters flow in their natural channels over the defendant's land, there is an easement in favor of the public. And since the waters are not trespassing, they are available to public uses. "...the actual usability of the waters is alone the limit of the public's right to so employ them...." (p. *143.)* Unfortunately, the court did not recognize

that this rationale should lead to permitting wading, unconnected with floating, because the waters certainly are in contact with the privately owned bed. Human feet should be able to follow the public's right of way for the flowing waters.

In California, People v. Mack, 97 Cal. Rptr. *448* (1971) was an action to compel the defendant, a private landowner, to remove wires, fencing and bridges across Fall River. A mandatory injunction for removal was granted and affirmed. The court said:

> ...it is extremely important that the public not be denied use of recreational water by applying the narrow and outmoded interpretation of "navigability"... Nor is the question of title to the bed of Fall River relevant....
>
> The modern determination of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below the high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft.
>
> The federal test of navigability does not preclude a more liberal state test establishing a right of public passage whenever a stream is physically navigable by small craft.

In Southern Idaho Fish & Game Ass'n. v. Picabo Livestock, Inc. *528* P.2d *1295* (Ida. 1974), plaintiff sought a declaration of the rights of its members and the public to use the waters, bed, channels and banks

of Silver Creek for fishing and recreational purposes. The trial court said that the basic question of navigability is simply the suitability of a particular body of water for public use, ruling for plaintiffs. In affirming, the Idaho Supreme Court said:

> Appellant urges this Court to adhere to the test of navigability that is used in federal actions where title to stream beds is at issue. However, the question of title to the bed of Silver Creek is not at issue in this proceeding. This is not an action by the State of Idaho or respondent to quiet title to the bed of a navigable stream. It is an action to declare the rights of the public to use a navigable stream. The federal test of navigability involving as it does property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft.

Colorado is conspicuously out of line with the above state of authorities and trends. In People v. Emmert, 597 P.2d 1025 (1979), the Colorado Supreme Court affirmed a conviction for criminal trespass upon defendants who entered the headwaters of the Colorado River for a float trip, basing its decision on the fact that the bed of the river in that area was privately owned. It showed no recognition that there is a difference between ownership of subaqueous land, and use and control of overlying (public) waters.

For further discussion and citation of additional cases, many from the old Northwest Territory states (of

which Elder v. Delcour, 269 S.W.2d 17 (Mo., 1954) is a leading case), see Stone, Public Rights in Water Use, 1 WATERS AND WATER RIGHTS, 212-217 (Clark, ed., 1967).)

K. ADJUDICATION.

Post 1973 adjudication is discussed under section I in the beginning of this book. For more detailed discussion, see Stone, Are There Any Adjudicated Streams in Montana? 19 Mont. L. Rev. 19 (1957); Stone, The Long Count on Dempsey, 31 Mont. L. Rev. 1 (1969); and Stone, Montana Water Rights - A New Opportunity, 34 Mont. L. Rev. 57 (1973). These references deal with the pre-1973 situation which we will have to continue to deal with in the future.

L. ADMINISTRATION

A substantial amount of water rights administration is done simply by the water users themselves. This is true all over the state where there has been no litigation or adjudication of rights. And it is true in many areas where there have been adjudications.

MCA sec. 85-2-406(1) directs the district courts to supervise water distribution, including supervision of water commissioners appointed prior or subsequent to the 1973 Water Use Act. This section is applicable only where there is, or has been, litigation, and coordinates with MCA sec. 85-5-101 et seq, discussed below.

(Mont. 1979).)

M. WATER DEVELOPMENT PROGRAM.

Chap. #505 of the 1981 legislature creates a water development program to be administered by the Department of Natural Resources and Conservation. It authorizes an extensive system of loans and grants for the development of both public and private water projects and activities, including private hydro-electric development at state-owned water projects. The financing of these projects will come from the establishment of an earmarked Water Development Account; the allocation of a portion of the Coal Severance Tax proceeds; the allocation of a portion of the interest from the Resource Indemnity Trust Account (also from the Coal Severance Tax); authorization of Water Development Bonds; authorization of Coal Severance Tax Trust Fund Bonds; appropriation of income and interest from the Coal Severance Tax Trust; and lifting the interest ceiling on Water Conservation Revenue Bonds.

In addition to the provisions for public and private developments, the Act specifically encourages development of state-tribal, state-federal, and state-tribal-federal water projects.

N. COORDINATION AND INTEGRATION OF GROUNDWATER AND SURFACE WATER.

1. MCA Sec. 85-2-102(14) provides: "'Water' means all

water...surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent." Thereafter, the 1973 Water Use Act, with rare exceptions does not distinguish groundwater (hereinafter mostly referred to as "GW") from surface water.

2. MCA sec. 85-2-301 et seq. provide for initiating new rights, and for the exclusive method of obtaining a permit, applicable to all. MCA sec. 85-2-306(1) provides an exemption for wells and developed springs of a capacity of less than 100 gallons per minute which are not within a controlled GW area, but even these persons must file a notice of completion within 60 days of completion, and their rights date from that filing.

One can speculate on the fate of the owner of a new well or developed spring outside a controlled GW area which has a capacity of less than 100 gpm, where the notice of completion is filed sometime after the expiration of 60 days. On the one hand, since its priority date would be the date of filing, giving recognition and effect to the late filing would frequently not prejudice anyone, and hardship would ensue if the right were not recognized. On the other hand, the statute is explicit that the claimant shall file within 60 days, and MCA sec. 85-2-301 says "a person may not appropriate water except as provided in this chapter...the

method prescribed by this chapter is exclusive."

Notwithstanding hardship to the tardy filer, there is a valid policy consideration opposing condoning the failure to promptly file. It is that such legal laxness would create another parallel to the recently repudiated "use right" for surface waters, developed in Murray v. Tingley, 20 M. 260 (1897). True, the GW right would not arise until the filing of a notice of completion, but such legal permissiveness in ignoring the statutory time limit removes much of the incentive to file until trouble or competition for water rights becomes apparent to the delinquent appropriator. Later prospective initiators of GW appropriations are entitled to record notice of prior rights so that they don't invest heavily in exploring and developing a GW appropriation, only to have the long withheld notice filed ahead of them.

For an appropriator of GW or a developed spring first used between January 1, 1962, and July 1, 1973, who did not file a notice of completion has an escape from the foregoing: S.B. # 176 of the 1981 legislature now enables such an appropriator to file a notice of completion effectively. But it doesn't help a person who first used the water after July 1, 1973.

S.B. # 176 also provides for departmental review of notices of completion, returning defective notices for correction or completion, and refiling within 30 days (or

within a further time as the department may allow, not to exceed 6 months) without loss of priority based on the filing of the defective notice of completion.

3. MCA sec. 85-2-401 establishes the rule of "first in time is the first in right," but the section also limits the scope of a GW right by providing that priority of appropriation does not include a right to the continuation of conditions of water occurrence, such as "the lowering of a water table, artesian pressure or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions."

4. MCA sec. 85-2-506, a part of the GW Code, provides for the designation or modification of controlled GW areas. It does not integrate surface water rights nor take into account at all the possible physical interrelationships. It probably should be broadened.

MCA sec. 85-2-507 provides for limiting withdrawals in controlled GW areas, and suffers from the same defects as the preceding section.

5. MCA sec. 85-2-509 provides for an administrative finding or priorities, commencing with the procedure for ascertaining existing rights to GW in subsec. (1).

In subsec. (2) of MCA sec. 85-2-509, it provides: "...all appropriators of GW or surface water in the particular controlled area, or subarea shall be included as

parties and notified in the manner provided in section 85-2-506."

But any reason or purpose for including surface water appropriators in the proceeding is subverted by a section which follows. MCA sec. 85-2-511 limits the scope of the administrative hearing to "determine the priority of rights and the quantity of groundwater." Surface water appropriators may legitimately feel that they have been joined merely as spectators.

That results in two distinct procedures for determining existing rights to GW: (1) general determinations and adjudications under S.B. # 76 (1979), MCA secs. 85-2-211 to 85-2-243 of the Water Use Act, which integrates both GW and surface water; and (2) proceedings under MCA secs. 85-2-509 and 85-2-511 of the GW Code to adjudicate GW separately. This seems unfortunate and likely to lead to future conflict and trouble. Consideration should be given to repealing these two GW Code sections.

6. Under MCA 85-2-508, new appropriations of GW within a controlled GW area are by permit under the 1973 Water Use Act. The language might be broadened to make clear that GW appropriations outside controlled GW areas are also to be acquired under the 1973 Water Use Act. This suggestion for addition to the section, as well as the section as it stands, are consistent with MCA sec. 85-2-301 et seq. which provide

for the acquisition of ground and surface waters under the 1973 Water Use Act.

7. MCA sec. 85-2-518 provides for GW supervisors. Again, there is no integration. The GW supervisors are under the Department of Natural Resources, while water commissioners are under the district judges and will apparently administer both surface and GW. If left unchanged, this will likely lead to future conflict and trouble.

IV. FEDERAL AND INDIAN RESERVED RIGHTS.

So much has been written about federal and Indian reserved rights since the Pelton Dam case (F.P.C. v. Oregon, 349 U.S. 435 (1955)) that it certainly behooves a writer to write but little, make it simple, and just try to point out what is fairly well settled and what is unsettled and unclear. Certainly no writer who does not sit on the U. S. Supreme Court can purport to unscrew the inscrutable. Moreover, policies of the Executive Branch are currently unformed but changing. In President Carter's Water Policy Statement of June 6, 1978, he recommended that if adjudication of reserved rights was necessary, it should be done in the federal courts. But Solicitor General William H. Coldiron told the Natural Resources Section of the Montana Bar Association on June 25, 1981, that the current policy of the Department of the Interior was that such adjudications should be carried on in the state courts. This, while the Department of Justice is appealing the dismissal of seven federal and Indian cases from Montana federal district courts, attempting to keep those adjudications in the federal, rather than the state courts. (See discussion in Division I of this paper.)

A. THE WINTERS CASE

Any discussion of this subject matter has to commence with the seminal case: Winters v. United States, 207 U.S.

564 (1908). By way of background, in 1874 Congress and the Senate "set apart for the use and occupation" of several Indian tribes a large tract of land, extending from the Dakotas to the crest of the Rockies, and from the Canadian border to the Missouri River, the Marias River, and up Birch Creek toward the crest of the Rockies. (Act of Apr. 15, 1974, V. 3., Ch. 96, of 18 Stat. 28.) Later, Congress approved an agreement between the U. S. Commissioners and the several Indian tribes affected by the 1874 Act, thus entering into a Treaty by which the Indians were to reside on several smaller, separate reservations, relinquishing the lands "not herein specifically set apart and reserved as separate reservations for them" and "reserving to themselves only the reservations herein set apart for their separate use and occupation." (Act of May 1, 1888, Ch. 213, 25 Stat. 114.) The Fort Belknap Reservation, between the Milk River and the Little Rocky Mountains, was one of these reservations carved out of the larger 1874 reservation.

Because of a need for water for an Indian irrigation project, the United States sued to enjoin an upstream water use from interfering with the flow of 5,000 miners' inches of water to the Fort Belknap Indian project. That was the start of Winters v. United States (supra.)

After some preliminary proceedings in both the federal district and circuit courts, the upstream non-Indian users

were enjoined from interfering "with the use of 5,000 inches of water of Milk River ...." *(143* F. *740* and 148 *F.* 684 (8th Cir., 1906).) This was appealed to the United States Supreme Court, which, on the one hand, said that the Indians reserved to themselves the water which they already had under the *1874* Act, and on the other hand, said:

> The power of the Government to reserve the water and exempt them from appropriation under the state laws is not denied, and could not be. That the government did reserve them we have decided, and for a use which would necessarily continue through years. This was done May 1, 1888 .... (Emphasis added.)
>
> - Winters v. U.S., *207.* U.S. 564, 577 (1908.)

An unsettled and controversial point is whether the Indians reserved the water which they already "owned", or whether the U. S. reserved the water for the Indians in 1888. In the former case, the Indian priority date may date from 1874, or may be from time immemorial; but if the United States reserved the water for the Indians, then their priority date would be 1888. The quantity of water reserved, in either case, is unsettled, but in the former case the argument is stronger that the Indian water rights are unquantifiable and "open ended", i.e., all the water that they may be able to use (sell or lease) for any purpose, at any time, with an incomparably superior priority. But if the U. S. reserved the water for the Indians in 1888, it raises questions of quantification:

what was the purpose of the reservation, and how much water for the future was reserved? (It should be kept in mind that the Winters case was not an over-all stream adjudication, but rather a simple suit to enjoin interference with the use of 5,000 inches of water. Just how much water the Indians might require and be entitled to in the future was not necessary to decide and was not decided.)

B. THE LOWER FEDERAL COURTS

None of the Treaties, Acts of Congress or Executive Orders which created Indian reservations specified what water rights were included, so all of those rights, thus far, are creatures of judicial implication, following the example and the precedent of the Winters case. The federal district and circuit courts have been struggling with the dimensions (priority and quantity) of the "Winters Doctrine" for over three-quarters of a century, reaching inconsistent results, none of which are definitive because only the United States Supreme Court or Congress can provide specific and definitive answers. These lower federal court cases are discussed and analyzed in many published works (e.g. Clyde, Indian Water Rights, 2 WATERS AND WATER RIGHTS, ch. 10 (Clark, ed., 1976).) Because we are awaiting a definitive settlement to the Indian reserved water rights questions, it would be superfluous to reiterate those discussions and citations to those cases here.

So it is for the United States Supreme Court or Congress to ultimately decide the priority and quantity of Indian reserved rights, and whether Indian reservations created by treaties have rights that are different and superior to those reservations created only by acts of Congress or by executive orders.

C. THE UNITED STATES SUPREME COURT.

The number of U. S. Supreme Court cases dealing with federal and Indian reserved water rights is not great, which is the principal reason that some matters may appear to be unsettled. The pertinent cases will be commented upon in what follows.

WINTERS v. U.S., supra, has already been stated. It involved a reservation created by treaty. Basically the Court simply could not believe that either Congress or the Indians intended the Indians to live on dry reservations and farm the land without any rights to water. Hence the injunction prohibiting interference with the Indians' use of 5,000 miners' inches of water.

U.S. v. POWERS, 305 U.S. 527 (1939) arose on the Crow reservation in Montana, when the United States sought to enjoin non-Indians from interfering with an Indian irrigation project constructed by the U. S. The reservation had been created by the Treaty of May 7, 1868. Commencing in 1901 allotments or tracts riparian to Lodge Grass Creek or the Little Big Horn River and their tributaries were made to Indian tribal members. These Indians patented their lands in 1906, and through conveyances, the lands came into the ownership of the non-Indian defendants.

The Court held that under the Treaty of 1868 waters were reserved (by implication, for there was no mention of

water rights in the Treaty) for the equal benefit of tribal members. The allotments conveyed the right to use a portion of the tribal waters, and this passed to the subsequent non-Indian owners. The Court gave no detail on the nature of the rights acquired from the Indian allottees - - it seemed to assume the full transfer of the Indian reserved right, but it did not hold this to be or not to be the case.

CALIFORNIA-OREGON POWER CO. v. BEAVER PORTLAND CEMENT CO., 295 U.S. 142 (1935) possibly should be mentioned here, although it is not a federal or Indian reserved rights case. When it was decided, and until the 1955 Pelton Dam case (infra) it was understood as holding that the Desert Land Act of 1877 had separated federal lands from the water on all those lands, and that title to each must be acquired separately: the land by patent from the U. S.; the water pursuant to state water rights law. Except for Indian reservations (which were neither involved nor discussed) this appeared to be the law for all lands and waters in the western states.

THE PELTON DAM CASE (F.P.C. v. OREGON, 349 U.S. 435 (1955)) involved an application by a predecessor of the Portland General Electric Co., to which the Portland General Electric Co. succeeded. The application was to the Federal Power Commission, for a permit to build the Pelton

Dam on the Deschutes River (not found to be navigable) in Oregon. Because of Oregon's concern over the effect of such a dam on anadromous fish (salmon and steelhead) and other concerns, Oregon opposed issuance of the license. The dam was to be located partly on federal lands reserved for a power site, and partly on the Warm Springs Indian Reservation but also reserved for a power site.

The Court held that Oregon's laws could not prevent the United States from licensing a dam on reserved lands of the United States. It said, in effect, that the Desert Land Act's separation of land and water had no application to federal reserved lands (lands not open to settlement.) Hence all such reserved lands were free from state water laws. It raised the spectre of Winters Doctrine rights for all federal reserved lands. If this extrapolation of what the Court said is true, then it involves over half the land in some western states, for it includes National Forests, BLM lands, National Parks and Monuments, Military Reservations and other reserved lands of the United States. And if true, the amount of the newly revealed federal reservation water rights could not readily be imagined. It certainly challenged the view of western water rights that had appeared to be confirmed by the Beaver Portland Cement case (supra.) And ultimately, Arizona v. California (infra) demonstrated this extrapolation was true.

THE COLORADO RIVER CASE (ARIZONA v. CALIFORNIA, 373 U.S. 546 (1963)) was the adjudication of the water rights to the lower Colorado River, geographically involving principally Arizona, California and Nevada. (Several irrigation districts, cities, the State of New Mexico, National Forests, Parks, Memorials and Bureau of Land Management lands were involved incidentally.) Each of the three principal states was vying for as large an apportionment of the waters of the lower Colorado as it could get. But the United States was involved on behalf of five Indian reservations in the three states, as well as asserting water rights for non-Indian federal reservations consisting of the Lake Mead National Recreation Area, two Wildlife Refuges, and Boulder City, Nevada. None of the Indian reservations was created by treaty; they were created by an Act of Congress and numerous Executive Orders, and the other federal non-Indian reservations (above) were all created by Executive Orders.

The Court reaffirmed the Winters case, saying:

> The Court in Winters concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. Winters has been followed by this Court as recently as 1939 in United States v. Powers. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian

> Reservations were created.... (p. 600.)
> (Emphasis of the text is added.)

And as to quantity, the Court said:

> We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. (p. 601.)

Thus the Court assigned a priority date and quantified the Indian reserved water rights, relying upon Winters, a treaty reservation case for these non-treaty Indian reservations.

The decree in Arizona v. California came out a year later (376 U.S. 340 (1964),) and two examples will serve to show how the Court handled both the Indian reservations and the other federal reservations:

> (1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;
>
> ....
>
> (6) The Lake Mead National Recreation Area in annual quantities reasonably necessary to fulfill the purposes of the Recreation Area, with priority dates of March 3, 1929 for land reserved by the Executive Order of said date (No. 5105), and April 25, 1930 for lands reserved by the Executive Order of said date (No. 5339);
> ....

So both federal and Indian reserved rights were treated essentially indistinguishably with respect to both quantification and assignment of priority dates, (In a subsequent

Supplemental Decree (58 L.Ed 2d 627 (2979)) the Court said that the use of "irrigable acres" was a means of determining quantity "but shall not constitute a restriction of the usage of them to irrigation or other agricultural application.")

It may well be that Arizona v. California has furnished us with the answers to most of the questions that have been said to be unsettled and uncertain. It seems to have done so at least for non-treaty Indian reservations and other federal reservations, and its claim to be following the Winters treaty reservation case strongly suggests that there is no difference between treaty and non-treaty reservations.

CAPPAERT v. UNITED STATES, 426 U.S. 128 (1976) involved a non-Indian federal reservation, Devil's Hole National Monument, which was reserved by order of President Truman to preserve a species of small fish, commonly known as "pupfish". Cappaert owned a ranch in the vicinity of Devil's Hole, and subsequent to the Executive Order creating the Monument, Cappaert commenced pumping groundwater, which lowered the water level in Devil's Hole, and threatened the existence of the pupfish. The Court enjoined Cappaert from withdrawing water in amounts that would imperil the pupfish, saying:

> When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date

> of the reservation and is superior to the rights of future appropriators.... The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams. Colorado River Water Cons. Dist. v. United States, 424 **U.S.** 800, 805 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 522-523 (1971); Arizona v. California, 373 **U.S.** 546, 601 (1963); FPC v. Oregon, 349 **U.S.** 435 (1955); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 564 (1908).

The language of the Court is significant, and supports the view that Arizona v. California settled all of the important questions. The long string of citations at the end of the quote, showing the cases upon which the Court relied in Cappaert is at least equally significant, for it includes three Indian treaty reservation cases, one non-treaty Indian reservation case, and two non-Indian federal reservation cases, all without any difference or distinction among them.

Also of significance is the statement of the Court:

> The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.

This last statement, when taken with the prior quotation with its citations, suggests that federal and Indian reserved water rights do not involve liberally generous amounts of water.

UNITED STATES v. NEW MEXICO, 238 U.S. 696 (1978) involved the adjudication by the courts of New Mexico of the Rio Mimbres, which originates in the Gila National Forest,

winds its way for more than 50 miles past privately owned lands, and disappears in a desert sink just north of the Mexican border. The issue was the quantity of water reserved for the Gila National Forest. The United States claimed for the Forest water for recreation, aesthetics, wildlife-preservation and cattle grazing (based on the Multiple Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. sec. 528 et seq.) in addition to the water needed for securing favorable conditions of water flows and to furnish a continuous supply of timber (the only two purposes mentioned in the Organic Administration Act of June 4, 1897, 30 Stat. 11, 16 U.S.C. sec. 473 et seq.)

The Court denied the United States all of the broader claim, and limited the water rights for the Gila National Forest to the two purposes stated in the earlier act. Although this was not an Indian water rights case, the Court cited and relied upon the Winters case, Arizona v. California, and Cappaert v. U.S., again indiscriminately using a treaty, non-treaty, and non-Indian case without distinction. Further, the Court said:

> The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorizes him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert, 426 U.S. at 138 (emphasis added.) See Arizona v. California, 373 U.S. 546, 595 - 601 (1963); United

> States v. District Court for Eagle County, 401 U.S. 520, 522-523 (1971); Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976). While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." Cappaert, 426 U.S. at 141. See Arizona v. California, 373 U.S. at 600-601; District Court for Eagle County, 401 U.S. at 523.... (All emphases by the Court itself.)

Clearly, the same comments and speculations made in discussing Arizona v. California and the Cappaert cases are equally applicable here. In fact, the view emerges, that although the lower federal courts have been inconsistent and confused, the foregoing review tends to demonstrate that the United States Supreme Court has been quite consistent, and delivering answers which are not being heard.

U.S. v. DISTRICT COURT OF EAGLE COUNTY, 401 U.S. 520 (1971) and U.S. v. DISTRICT COURT FOR WATER DIVISION NO. 5, 401 U.S. 527 (1971) move our subject matter from the substance of federal and Indian reserved rights to the question of jurisdiction, or what courts may adjudicate those rights. Neither of these cases involved Indian reserved rights, but both included federal reserved rights, the Eagle County case involving the White River National Forest, and the Water Division No. 5 case involving the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre National Forests. Both suits commenced in Colorado state courts, the United States was served with notice, and in

both suits the United States moved to be dismissed, asserting that the McCarran Amendment (43 U.S.C. sec. 666) does not constitute consent to have adjudicated in a state court the reserved water rights of the United States. The Colorado trial courts denied the motions to dismiss, and the Colorado Supreme Court agreed. Petition for certiorari was granted by the U.S. Supreme Court, and in these two decisions it declared that the United States was subject to the jurisdiction and adjudications of state courts in adjudications of water rfghts, including federal reserved water rights.

THE MARY AKIN CASE (COLORADO RIVER WATER CONSERVANCY DISTR. v. UNITED STATES, 424 U.S. 808 (1976) completes a circle, for it returns the discussion back to Section I.E. of this book. Because of that discussion, it is only necessary here to reiterate that the Mary Akin case held that Indian reserved water rights are also subject to the jurisdiction of stare courts in water right adjudications. (There is also concurrent federal court jurisdiction.)

In light of the discussion herein of the Colorado River, Cappaert and New Mexico cases, it is appropriate to note that in this Akin case the Supreme Court commenced its discussion of federal and Indian reserved rights again without distinction or recognition of any difference:

The reserved rights of the United States extend to Indian reservations, Winters v. United States, 207 U.S. 564 (1908) and other federal lands, such as national parks and forests, Arizona v. California, 373 U.S. 546 (1963). (p. 805)

D. ADMINISTRATION.

The McCarran Amendment of 1952 provides:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances; Provided, That no judgment for costs shall be entered against the United States in any such suit. (43 U.S.C. sec. 666(a).)

We have already seen in Eagle County, Water Division No. 5 and the Mary Akin cases (supra) that water rights for federal and Indian reservations are amenable to state court adjudication under the language: "(a) Consent is given to join the United States...in any suit (1) for the adjudication of rights to the use of water...." Does the next phrase make such reservation water rights amenable to state administration, by reading: "(a) Consent is given to join the United States...in any suit... (2) for the administration of such rights..."?

Unitary administration of water rights is a principal purpose of the McCarran Amendment. It would therefore appear appropriate for state water courts to not only adjudicate, but also administer water rights within reservations, regardless of the ownership of the right.

Yet, in the recent case of Colville Confederated Tribes v. Walton, 647 F. 2d 42 (decided June 1, 1981) the Ninth Circuit Court of Appeals voided the Washington state water right held by a non-Indian owner of land within the Colville reservation. The Court dismissed the McCarran Amendment without a reason or discussion, but simply with the words:

> Nor do we preceive the McCarran Amendment, 43 U.S.C. sec. 666, as expanding the state's regulatory powers over water on a federal reservation.

The court relied upon F.P.C. v. Oregon, 349 U.S. 435 (1955), but that case ignored the McCarran Amendment completely in ousting the state of jurisdiction over waters within a federal reservation.

Walton had acquired his land from an Indian allottee, so the court held that Walton succeeded to the portion of the Indian grantor's reserved water right, provided that Walton put it to use diligently. Non-use by Walton would result in loss of the unused remainder of his Indian reservation water right. The court did not say where that part of Walton's reserved water right would go. Perhaps it would revert back to the Tribe. That question remains open.

As to administration, the court held that

> the state has no power to regulate water in the No Name System and the [State of Washington] permits are of no force and effect.

If this holding is limited to the peculiar facts of the Walton case, it will provide unitary administration of water rights through the Tribe: No Name Creek is a spring-fed creek flowing only 1,000 acre feet in an average year, and terminates after a short distance in Omak Lake, which has no outlet. The whole closed system is within the Colville Reservation.

But if the holding is not so limited, then it appears to frustrate a substantial part of the intent of the McCarran Amendment, and has deep implications for all non-Indian water rights within reservations in Montana. In a footnote at the end of the case, the court said

> State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertainties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated. (p. 54.)

E. CONCLUSION.

The foregoing discussion of United States Supreme Court cases leads toward the conclusion that federal, and both treaty and non-treaty Indian reservations have water rights which date from the date of the creation of each such reservation, in an amount sufficient for the purposes and uses of the reservation, e.g. maintenance of water levels for the preservation of pupfish, or the irrigation of the irrigable acres within the reservation. If the Supreme Court's New Mexico case (supra) is a guide, then the purposes of each reservation, and the quantity of water needed for those purposes, are to be determined as of the date of the creation af the reservation.

It is settled that all of these rights may be adjudicated in state courts as well as federal courts.

The Colville case (supra) raises the question of who should administer these water rights, and in the quoted footnote, it pleads for a definitive decision from the U.S. Supreme Court. It is to be hoped that the plea will succeed. The conclusions arrived at here are only based upon what the Supreme Court has done in the past, not what it will hold in the next case.

APPENDIX

I. SOME PHYSICAL FACTS

A. Occurrence of water:	Million acre feet	% of fresh water
1. Oceans	1,060,000,000	
2. Total fresh water	33,016,084	100%
a. Polar ice & glaciers	24,668,000	75.72 %
b. Hydrated earth minerals	336	0.001%
c. Lakes	101,000	.31 %
d. Rivers	933	.003%
e. Soil Moisture	[3,302]	.01 %
f. Groundwater		
(1) To 2,500 ft	3,648,000	11.05 %
(2) 2,500' to 12,500'	4,565,000	13.83 %
3. Hydrologic cycle (annual):		
a. Precipitation on land	89,000	
b. Stream runoff	24,460	

(The foregoing is from Table, p. 12, Ackerman and Lof, TECHNOLOGY IN AMERICAN WATER DEVELOPMENT, Resources for the Future, Inc., published and copyrighted, 1959, by the Johns Hopkins University Press, Baltimore, Md. 21218, and printed with permission.)

II. The 40 states average about 30 inches per year, but with great variation.

III. Montana outflow-runoff:

River:	Station:	Av. cfs.	Acre feet per year
Clark Fork	Heron	19,940	14,400,000
Kootenai	Libby	11,860	8,586,000
Yellowstone	Sidney	11,810	8,550,000
Missouri	Wolf Point	9,170	6,640,000

(From Comm. Print No. 4, Senate Select Comm. on Water Resources, p. 51.)

IV. SOME COMPARISONS:

	Acre feet per year	Acre feet storage:
Colo. R. aver. virgin flow at Lee Ferry, 1922-67 (Meyers & Tarlock WATER RESOURCE MGMT., p. 461, Fdn. Press, 2d ed., 1980.)	13,700,000	64,000,000
Missouri R. at Kansas City	40,500,000	85,000,000
Columbia R. at mouth	181,000,000	61,000,000
Sacramento R. at Sacramento	17,400,000	
San Joaquin R. at Vernalis (betw. Tracy & Modesto.)	3,440,000	

INDEX

a-f