

MONTANA
WATER LAW HANDBOOK

by
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CHAPTER 1. INTRODUCTION

The evolution of water law in Montana since territorial days in the last century has been like the evolution of civilization: slow, occasional spurts of progress, and finally, rapid change that boggles the mind of even an ardent follower of the law. In fact, during the decade of the 1970's, changes were wrought in Montana water law that many water law and water resource professionals thought impossible.¹ Not only was a permit and centralized filing system adopted for the first time, but machinery was set in motion that began the process of adjudicating prior water rights, and a procedure was established to "reserve" water that is unique in the nation.²

Coupled with recent radical changes in Montana's water law have been increasing pressures on our water resources. Potential energy development in the West, agricultural water needs, an increasing population, a growing recognition of environmental and instream values, claims by the federal government and Indian tribes, and demands by downstream states have all raised the specter of a massive "water grab" on Montana's most valuable renewable resource. Indeed, it was largely as the result of such pressures that the water

1. E.g., see Heman, *Water Rights Under the Law of Montana*, 10 Mont. L. Rev. 13, 23 (1949), wherein Mr. Howard W. Heman, then a practicing attorney in Choteau, Montana, said, "A comprehensive water code was introduced at the 1917 session of the Montana Legislature, but failed of passage. It is doubtful that future attempts will be more successful, for Montana has been the only state without such a code since 1919 and may prefer its decentralized system." The comprehensive water code envisioned by Mr. Heman was finally enacted in 1973.

2. Water Use Act of 1973, now codified in Title 85, Chapter 2, MCA, as amended by subsequent legislation.

law in Montana was finally brought into the 20th century.³

Because of the rapid change in the law, and the pressures placed upon the water resources in the state, a need has arisen, in the opinion of the author, for a publication which adequately explains the water law system now in effect in Montana, and which is designed for use primarily by professionals, including lawyers, engineers, hydrologists, and water rights specialists. It is recognized that many authoritative and still helpful sources of information on Montana water law have been published in the past, from law review articles to pamphlets by the Department of Natural Resources and Conservation (DNRC).⁴ And, as of this writing, a knowledgeable water law attorney in Bozeman is in the process of publishing a most useful water law book oriented toward the "nonprofessional"--the farmer, rancher, and everyday water user.⁵ However, there does not exist an up-to-date, comprehensive, legal treatment of Montana water law for the water rights practitioner. This handbook attempts to fill that void.

The author has drawn upon his years of experience as a state government lawyer/administrator specializing in natural resource law and policy and helping formulate the recent evolution of water law in the state, and now as a practicing attorney, in the completion of this handbook.

3. The author recognizes that there still exists a substantial number of groups and individuals that don't share the view that Montana's water law has been modernized or that change was even necessary. The author, however, makes no apologies for his own opinion on this subject.

4. Professor Al Stone at the University of Montana School of Law, who is probably Montana's foremost authority on water law, has written several law review articles and published other materials of considerable use to the practitioner. Most of these are listed in the Bibliography.

5. Sabol, Water and Water Rights in the State of Montana, in progress.

Hopefully, this experience has provided a unique knowledge and insight which will contribute to its usefulness and value. A conscientious attempt has been made to present the material contained herein as objectively as possible; where the author's opinion has intentionally crept in, it is so stated.

The contents are arranged in such a manner that one can find out basically what one needs to know about a particular subject by reading the applicable section or sections without reading the entire handbook. References are made to other sections where necessary. Forms, statutes, rules, etc., are provided in the back of the handbook for handy reference. However, the author cautions that novices to water law, and experienced professionals in complicated situations, should check the "Table of Contents" to be sure that all relevant material has been reviewed.

This handbook will be used in conjunction with a water law seminar sponsored by the State Bar of Montana in Missoula on October 23, 1981. Seminar participants were asked to submit outlines of their presentations in readable form for inclusion in the handbook--hence, the tab entitled "Seminar Outlines."

Finally, a "Bibliography" of water law material is also inserted at the back of this handbook. The water law practitioner should find this list useful in further research on a particular subject. In the author's opinion, the seven-volume set by Clark entitled Waters and Water Rights and published by the Allen Smith Company is now

the authoritative work on water law in general. In fact, the format of this handbook substantially follows the format of Clark's treatise to enable the water law practitioner to readily find his broader, more comprehensive treatment of a water law subject.

CHAPTER 2. THE APPROPRIATION DOCTRINE IN MONTANA

2.1. Historical Background and Statement of the Doctrine

It is often said that, to understand the present, one must first understand the past. This often trite statement cannot be closer to the truth than it is regarding understanding Montana's present water law.

As has been pointed out in "Chapter 1, Introduction," Montana's water law has undergone radical changes in recent years. These changes will be discussed in detail throughout this handbook. However, the basic, underlying foundation upon which Montana's water law rests remains unchanged. This foundation is known as the Appropriation Doctrine. The basic principles of the Doctrine still apply, even though significant changes have been made in the procedure to acquire a water right, change a water right, transfer a water right, or adjudicate a water right; procedure has changed, but not much of the substance. This fact must be kept in mind, particularly when considering the adjudication of water rights established before July 1, 1973 (hereinafter called "pre-July 1, 1973, water rights"), which is discussed in Chapter 6.

There are essentially two systems of water law in the United States--the riparian system and the appropriation system--both of which have their origins in common law. The riparian system, or Riparian Doctrine, never has applied in Montana, or at least it hasn't applied since 1865.⁶

6. "The doctrine that the first appropriator of water for mining purposes is

However, it applies in varying degrees in neighboring states, and therefore is mentioned to point out the contrast to Montana's water law system.

Under the Riparian Doctrine in its pure form, only owners of land adjacent to a stream (hence, "riparian" owners) can use water. All such landowners share the water regardless of when they first acquired the land, their use must be reasonable,⁷ and they each have an equal equal right to the water.

On the other hand, the Appropriation Doctrine, also called the Prior Appropriation Doctrine or the Colorado Doctrine, recognizes the priority of water rights, or the order in time in which they were originally acquired. In water-short periods, appropriators having earlier or prior (senior) rights can use the water first, before later (junior) appropriators. In addition, the limit or quantity of the appropriator's right depends upon the amount of water necessary for beneficial use, regardless of the amount of water in the stream or other source. These concepts will be discussed in more detail later in this Chapter.

entitled to the waters of a stream as against subsequent appropriators without material interruption in the flow thereof, or in quantity or quality, is fully recognized. ..and I apply this doctrine to the case in hand." *Atchison v. Peterson*, 1 Mont. 561, 569 (1892), aff'd, 87 U.S. 507 (1874). However, none of the parties in *Atchison* asserted riparian rights to water, nor did they in any other Montana Supreme Court case until 1921 in *Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921), when, after citing several statutes enacted by the Legislature and previous court decisions which ruled out the riparian doctrine in obiter dictum, the matter was emphatically laid to rest as follows: "Our conclusion is that the common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack statutes in 1865...." *Mettler*, at 170-71. The practitioner must be careful not to confuse riparian water rights with other riparian rights which do exist in Montana, such as rights to accretion, *Rode v. Rollwitz*, 60 Mont. 481, 199 P. 688 (1921), access, wharfage navigation, or recreation. See also *Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452, aff'd, 534 F.2d 1376, cert. denied, 429 U.S. 929 (1976), which held that the riparian landowners on Flathead Lake have a right of access to the lake, and the right to build docks to gain such access.

7. See, e.g., *Morris v. Bean*, 146 F. 423, aff'd, 159 F. 651, 221 U.S. 485 (1908) a

Water rights acquired under the Appropriation Doctrine are sometimes referred to as "appropriative rights." Appropriative rights are legally protected property rights, and may be either inchoate or perfected. But appropriative rights only give the holders thereof the right to use the water, not ownership of the water. Thus, appropriative rights are usufructuary in nature.⁸

It is commonly thought that the Appropriation Doctrine has its origin in the frontier days of mining in the West. This is only partly true. The early Spanish colonists in the Southwest and the first Mormons in Utah independently developed the rule or custom that the first person to use water had the first right to use it again from thence forward.' There is even some speculation that the Doctrine originally developed centuries earlier in the Middle East.¹⁰ However, the greatest impetus for the Doctrine came from the customs developed by miners during the California gold rush, who in turn may have acquired the same traditions of "mining freedom" from Germanic miners in the Middle Ages.

Whatever the actual origin of the Doctrine, it represented a practical approach to orderly water use in the early days of the West--it made no sense to require miners

federal court case involving water rights disputes between Montana and Wyoming appropriators.

8. See, e.g., *Allen v. Petrick*, 69 Mont. 373, 222 P. 451 (1924) (appropriator does not own water, but has right of ownership in its use only); *Brennan v. Jones*, 101 Mont. 550, 55 P.2d 697 (1936) (same). See also Mont. Const. of 1972, art. IX, sec. 3(3), which asserts ownership by the state of all surface, underground, flood, and atmospheric waters. Even before the 1972 Constitution was adopted, the state already owned the waters of the state. See *Marks v. Hilger*, 262 F. 302 (1920); *Mettler v. Ames Realty*, 61 Mont. 152, 201 P. 702 (1921); *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074 (1933) (waters are publici juris).

9. 1 Clark, *Waters and Water Rights*, sec. 15.1 (1967).

10. *Id.*

and irrigators to own land along streams before they could use water from them, and it seemed equitable to give the first person putting the water to use a superior right to that water. Eventually, the courts and Congress recognized such customs, and they grew into the status of enforceable law under our country's legal system.¹¹

Today, only the Appropriation Doctrine is applied by eight states: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. In all these states, there is a close relationship between the adoption of the Doctrine and the original development of those states through mining.

2.2. The Effect of the Water Use Act of 1973 and Other Statutes on the Doctrine

Like the other seven Western states that apply the Appropriation Doctrine, Montana has modified the Doctrine in its pure form. Statutes governing the calculation of the priority date of a water right, which waters are subject to appropriation, and the definition of "beneficial use," as well as court decisions on the "duty" of water (the amount of water necessary for a particular purpose), have all affected to one degree or another Montana's application of the Doctrine. All of these variations will be discussed in detail later in this chapter.

11. Act of 1866, 14 Stat. 251, 30 U.S.C. sec. 51. This Act recognized the customs and usages of the miners and confirmed appropriations of water on the public lands of the United States. It was followed by the Desert Land Act of 1877 which provided that settlers of Western lands could use water under the law of prior appropriation. 43 U.S.C. sec. 321; 19 Stat. 379.

The Water Use Act of 1973,¹² which basically establishes administrative procedures for acquiring, changing, and transferring water rights, has had some effect on the Doctrine. For example, the priority date of a water right acquired by permit under the Act (with some exceptions) is now the date an application for the permit is received by the administering agency, the Department of Natural Resources and Conservation.¹³ The Act also expanded the application of the Doctrine to waters not previously subject to it.¹⁴

Passage of this Act, however has not substantially impacted the Doctrine. If anything, the Water Use Act has actually made the Doctrine even more important because of the water rights adjudication system established initially in 1973 and subsequently modified in 1979. Pre-July 1, 1973, water rights (termed "existing rights" by the Act¹⁵), with some exceptions, must be claimed and adjudicated through a special system of water courts.¹⁶ In addition, the 1972 Montana Constitution provides that "[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed."¹⁷

12. Title 85, Chapter 2, MCA.

13. 85-2-404(2), MCA. See sec. 2.7. of this handbook for a detailed discussion.

14. 84-2-102(14), MCA. See secs. 2.3. and 3.2.2.2. of this handbook for a detailed discussion.

15. 85-2-102(7), MCA.

16. See Chapter 6 for a comprehensive explanation of the new adjudication system.

17. Mont. Const. of 1972, art. IX, 3(1). See sec. 6.3. herein for a discussion of the possible effect of this provision on unclaimed pre-July 1, 1973, rights.

Therefore, it is readily apparent that the Doctrine is not only alive and well, but has been given a new vigor.¹⁸ Pre-July 1, 1973, water rights cannot be claimed and adjudicated under the Water Use Act, and they cannot be "recognized and confirmed" under the Constitution, unless the nature of those rights is known--and their nature cannot be known unless the Appropriation Doctrine and its variations in Montana are thoroughly understood.

The remainder of this chapter is devoted to a description of the various aspects and ramifications of the Doctrine in Montana.

2.3. Waters Subject to Appropriation

Perhaps one of the most confusing areas of water law is determining what waters are subject to appropriation, i.e., from what waters an appropriator can acquire water rights. Litigation in this area has abounded over the years, and the result has been unscientific and artificial distinctions dividing water into different classes, some of which can be appropriated through water rights, and others which cannot. Different rules have been applied to surface waters, waters in a watercourse, ground waters, diffused surface waters, percolating waters, seepage, drainage, and waste waters, return flow, and flood waters. The Water Use Act now largely abolishes these distinctions regarding the acquisition of new water rights, but they remain concerning water rights

18. One noted water law authority states that "although the 1973 Water Use Act repealed most of the existing statutes and much of the prior case law, paradoxically, it made that pre-1973 law more important, more current, and more active than ever." Stone, Selected Aspects of Montana Water Law, D. . of Preface (1978).

with priority dates before July 1, 1973 (existing rights). An understanding of the old distinctions is important because Appropriation Doctrine law applies only to waters which are "appropriable," and only uses of appropriable water are protected as existing rights under the new adjudication system.

2.3.1. Surface Waters

The term "surface waters" is often misused and abused in water law. Unless qualified, the term usually means all sources of water on the surface of the earth, as distinguished from ground waters, or waters which are found beneath the earth's surface. Diffused surface water and, in most cases, seepage, drainage, and waste waters, return flow, and flood waters (discussed in secs. 2.3.3. and 2.3.5 through 2.3.7., infra) are also surface waters under this definition, but they are listed separately herein because many people think of them as separate categories of water distinct from surface water.

4

In general, until July 1, 1973, the effective date of the Water Use Act, one could acquire water rights only to surface waters which were part of a natural "watercourse." This result stemmed from early court cases which, in the opinion of the author, confused tort law with water rights law. Tort law, or the law of obstruction, provided that liability would be incurred for damages caused by building an obstruction in a watercourse, but not from building an obstruction outside of a watercourse to protect one's

property by repelling water onto another's property.¹⁹ Waters which had not yet reached a watercourse were called vagrant surface waters, or diffused surface water. This distinction was then applied to water rights law by the court's holding that water could be appropriated under the Appropriation Doctrine only if it came from a watercourse.²⁰

Defining a watercourse also became the subject of much litigation. In Popham v. Holloran, probably the leading case on the subject in Montana, the court said that a watercourse 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' [citing LeMunyon, n. 19], which channel may at times be dry, so long as, to the casual glance, it bears the unmistakable impress of the frequent action of water which has flowed through it from time immemorial.²¹

Note that the court referred to "mere surface water" as though this is water which is not part of a watercourse. In Montana, then, until July 1, 1973, water rights to waters on the surface of the earth could be acquired under the Appropriation Doctrine only by appropriation of watercourse waters, not other surface waters.

The Water Use Act of 1973 changed all this by adopting a definition of water so broad that it covers almost any

19. See, e.g., Fordham v. Northern Pacific Ry. Co., 30 Mont. 421, 76 P. 1040 (1904); LeMunyon v. Gallatin Valley Ry. Co., 60 Mont. 517, 199 P. 915 (1921); Tillinger v. Frisbie, 138 Mont. 60, 353 P.2d 645 (1960).

20. Popham v. Holloran, 84 Mont. 42, 275 P. 1099 (1929).

21. Id. at 450.

water found on the surface or in the ground.²² For a more thorough discussion, see sec. 3.2.2.2., infra.

2.3.2. Ground Waters

In the early days of the development of the Appropriation Doctrine, no mention was made of ground waters, or waters which are found beneath the earth's surface. Eventually, the courts analogized subterranean streams to surface flows and applied the Doctrine to that source of water as well; however, a different rule was applied to "percolating" waters, discussed more fully in sec. 2.3.4., infra.

Ryan v. Quinlan was the first case in Montana announcing that the Doctrine applied to ground waters, but only to subsurface water "flowing in defined channels reasonably ascertainable."²³ There was no presumption that any subsurface water, in whatever form it was found, was tributary to any stream (and therefore subject to appropriation); in fact, all underground water was presumed to be percolating water, and in order to take underground water out of the rules governing percolating water, it had to be shown that underground water flowed underground in a permanent, defined, and known channel.²⁴ As one can imagine, this burden was as substantial one, even with modern hydrological techniques.²⁵

22. 85-2-102(14), MCA.

23. Ryan v. Quinlan, 45 Mont. 521, 533, 124 P. 512 (1912).

24. Id.; McGowan v. U.S., 206 F. Supp. 439 (D. Mont. 1962).

25. See Perkins v. Kramer, 148 Mont. 355, 423 P.2D 587 (1966), in which Perkins was unable to prove that he was appropriating appropriable groundwater by collecting appropriable surface water in potholes, and then intercepting the water percolating from the potholes in drain ditches located lower. The court said Perkins had not met the burden of proving that the water intercepted by the drain ditches came from the potholes.

In 1961 the legislature enacted the state's first ground-water code, providing a filing and notice system for declaring and acquiring water rights to "ground water."²⁶ "Ground water" was defined to mean "any fresh water under the surface of the land" [emphasis added], and fresh water was defined to be "water fit for domestic, livestock or agricultural use."²⁷ Apparently, then, beginning on January 1, 1962 (the effective date of the ground water code), one could acquire water rights to any kind of ground waters, whether or not flowing in defined channels, so long as the water was fit for domestic, livestock, or agricultural use.²⁸ However, there have been no judicial determinations to date on the subject.

The 1961 ground-water code also provided that "the application of ground water to a beneficial use prior to January 1, 1962 is hereby recognized as a water right."²⁹ Literally interpreted, this means that uses of ground water which didn't flow in defined channels, and therefore didn't acquire the status of water rights (e.g., the Perkins case, n. 25), suddenly became retroactive water rights. This could hardly have been the result intended. Such an enactment would probably be unconstitutional since it would retroactively insert new water rights in with previously valid water rights, thereby adversely affecting the priority

26. 89-2911 et seq., R.C.M. 1947; remnants remain in 85-2-501 et seq., MCA.

27. 89-2911(a), R.C.Y. 1947; see current definition in 85-2-501(3), MCA.

28. Does this mean that "unfit" or unfresh water could not be appropriated? The answer seems to be that it could be appropriated, but one couldn't acquire a water right to it--an interesting result. For a discussion of the legal requirements to file on new appropriations of fresh ground water after January 1, 1962, see sec. 2.5.1.2.4.

29. 89-2912, R.C.M. 1947.

status of those rights and constituting an unconstitutional taking of property without due process of law. Nevertheless, the quoted statute presents an interesting problem that someday should be addressed.

As with surface water, the 1973 Water Use Act has probably settled the issue of what ground waters are now subject to appropriation by providing that water is "all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water...."³⁰ For a thorough discussion, see sec. 3.2.2.2., infra.

PRACTICE NOTE: There are situations in which an appropriation of water from the ground is actually an appropriation of surface water. Typical examples are wells or pits located along lakes and streams where the water seeps from those sources. Because different rules and laws apply to surface water and ground water, the practitioner should be familiar with the hydrology of the area in question.

2.3.3. Diffused Surface Water

As discussed in sec. 2.3.1., supra, diffused surface waters were not subject to appropriation under the Appropriation Doctrine until the Water Use Act of 1973 was enacted (or perhaps not until 1977--see discussion below). Diffused surface waters are defined as waters of short-lived flows and that "are spread over the ground and not concentrated or confined in channel flows of legal watercourses nor yet concentrated or confined in bodies of water conforming to the definition of lakes or ponds." They are:

30. 85-2-102(14), MCA.

waters which, in their natural state, occur on the surface of the earth in places other than water-courses or lakes or ponds. The diffused surface waters may originate from any natural source. They may be flowing, vagrantly over broad lateral areas or, occasionally for brief periods, in natural depressions, or they may be standing in bogs or marshes.³¹

In effect, diffused surface waters under Montana case law are any surface waters which haven't reached a watercourse. In addition, under prior law diffused surface waters were owned by the landowner upon whose land they occurred.³²

The rule that one could not acquire a water right to diffused waters can lead to unfair results, and creates vexing legal problems for the practitioner. For example, it is the common practice in Montana, particularly in some areas of the eastern part of the state, for farmers and ranchers to build short rows of dikes across their fields to capture **snowmelt** and rainfall (commonly called "free flow irrigation systems" or "spreader dikes"). Furrowing accomplishes the same result. Under the law pertaining before the Water Use Act, such systems captured diffused surface waters, and therefore no water rights could be acquired. This meant that someone uphill could put in a similar dike and intercept the **snowmelt** and runoff, thereby

31. *Doney v. Beatty*, 124 Mont. 41, 51, 220 P.2d 77 (1950). (So far as the author can ascertain, the appellant in this case is no relation.)

32. *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074 (1933).

adversely affecting the downhill uses. Or, as happened in Doney v. Beatty, n. 31, a user of diffused surface waters could adversely affect a downstream appropriator who had a senior water right from a watercourse into which the diffused waters would normally flow.

When the Water Use Act was enacted in 1973, it was thought that anyone desiring to appropriate diffused surface waters thereafter could do so by obtaining a permit from the Department of Natural Resources and Conservation, since appropriable waters were defined to include "all water of the state, surface and subsurface, regardless of its character or manner of occurrence..."³³ The Bureau of Land Management, however, took the position that diffused surface waters were still not subject to appropriation under the water rights laws and commenced constructing several reservoirs on BLM-managed lands without obtaining permits from the Department. In some cases, these reservoirs adversely affected downstream appropriators. The Department thereupon in 1977 obtained from the legislature an amendment to the statute which expressly included diffused surface waters as appropriable waters.³⁴

PRACTICE NOTE: The **most** difficult question to address under the diffused surface water rule is determining what to do under the Water Use Act, in respect to adjudication of pre-July 1, 1973, water rights (see Chapter 6) and acquiring

33. 89-867(1), RCM 1947, before amended in 1977.

34. Including diffused surface waters as appropriable waters, whether in 1973 or 1977, when they weren't previously, raises the interesting question of whether such a law may be unconstitutional as a taking of property without due process of law, since prior to 1973 (or 1977, whichever the case may be) diffused surface waters were the property of the surface landowner. The author is of the opinion that such would not be the case, since the statute only operates prospectively, and it is doubtful that a landowner could own waters which haven't even yet occurred on his land; ownership would attach only at the instant the diffused surface waters occur.

a new water right. Should uses of diffused water be claimed as water rights? Technically, they are not water rights, as discussed. Therefore, should one try to acquire a permitted right under the Act from the Department? The author is of the opinion that, as soon as the practitioner becomes aware of a situation as described herein, he should advise the client to claim a water right under the adjudication system (assuming the deadline hasn't passed--set for January 1, 1982, as of the date of this writing), and also to immediately make application for a permit (see Chapter 3), but to request that the Department delay processing the application until the status of the claim is determined by the water court. In this way, if the water court determines that the claim is invalid, the claimant will at least have an application pending for a new water right with a priority date as of the date of the application.

2.3.4. Percolating Waters

Percolating waters were apparently not subject to appropriation under the Appropriation Doctrine either, at least for many decades. This rule was first announced in Montana in the Ryan case.³⁵ Percolating waters are the subsurface counterpart of diffused surface waters, and are ground waters which are not flowing "in defined underground channels reasonably ascertainable."³⁶ Then in 1966, in Perkins v. Kramer,³⁷ the court seemed to judicially disapprove the rule by stating that the appropriation of waters percolating from potholes would result in a protectible water right; but this result was contingent upon the appropriator proving that the percolating waters actually reached the source of appropriation, which he couldn't do.³⁸ A federal court case, McGowan v. United States, provided further confusion.³⁹

35. Ryan v. Quinlan, 45 Mont. 521, 124 P.512, 19123.

36. Id. at 533.

37. Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966).

38. See n. 25, supra.

39. 206 F. Supp. 439 (D. Mont. 1962). See 24 Mont. L. Rev. 169 (1963) for an analysis of this case, arguing that McGowan misinterpreted Montana law.

As stated in sec. 2.3.2., supra, the ground-water code of 1961 probably abolished the percolating waters rule in Montana and opened such waters for acquisition of water rights, at least as to "fresh" waters. The Water Use Act quite clearly abolished the rule by providing that subsurface water, "regardless of its character or manner of occurrence," is appropriable water to which rights can be acquired.⁴⁰

PRACTICE NOTE: The practitioner will need to address the same legal problems in dealing with percolating waters as with diffused surface waters. See PRACTICE NOTE at sec. 2.3.3., supra. In fact, the problems may be even more acute, since it is at least arguable that one could have acquired water rights to percolating waters under the prior law, given a proper factual situation (that the percolating waters physically reached or would have reached the source of appropriation). But note that not all ground-water rights are required to be claimed in the adjudication system (see sec. 6.2., infra), or permitted under the permit system (see sec. 2.1.1.5., infra).

2.3.5. Seepage, Drainage, and Waste Waters

Seepage, drainage, and waste waters are sometimes treated differently from other classes of waters, and therefore are treated separately herein. In 1921, the Montana legislature amended prior statutory water law by specifically providing that "an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."⁴¹ Popham v. Holloran held that, before this amendment was made, no right could be acquired to such waters as against the owner who sought to recapture them, but, having passed beyond control of the owner, they became abandoned property and could be taken up and used by

40. 85-2-102(14), MCA.

41. 89-101, R.C.M. 1947, repealed by the Water Use Act.

the person first in the field. However, such waters could be appropriated only when they reached a watercourse or a drain ditch.⁴² The right to appropriate seepage and waste waters from a watercourse or drain ditch was not entirely without its problems, because the creator of the seepage or waste water could not be required to continue operating his system so that such waters would always be furnished.⁴³ Therefore, an appropriator of waste or seepage water from a watercourse or drain ditch took the risk that his supply might be cut off in the future.

Today, seepage, drainage, and waste waters are clearly subject to appropriation under the Water Use Act. And, the technicality that they could be appropriated only from a watercourse or drain ditch has, in the opinion of the author, been abolished, thereby enabling a potential appropriator to construct his own means of collecting such waters. However, as in the past, the acquisition of a right to such waters is only good as against a junior appropriator of the same water: the creator of such waters cannot be compelled to continue furnishing them.⁴⁴

2.3.6. Return Flow

Return flow, like seepage and waste waters, is unused

42. 84 Mont. 442, 275 P. 1099 (1929). *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862 (1935). See sec. 2.3.1. for a discussion of the term "watercourse." See also *Woodward v. Perkins*, 116 Mont. 46, 147 P.2d 1016 (1944), which held that seepage water along the bed of a stream belongs to the stream and may be appropriated.

43. *Popham v. Holloran*, 84 Mont. 442, 275 P. 1099 (1929); *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930); *O'Hare v. Johnson*, 116 Mont. 410, 153 P.2d 888 (1945).

44. In fact, waste of waters is now statutorily discouraged in 85-2-114, MCA, under which the Department can request court orders to prevent waste. "Waste" is defined as the "unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use." 85-2-102(13), MCA.

water that has moved through a water distribution system and has returned to the source of supply. However, return flow is sometimes thought of separately because, in the case of consumptive uses of water, it is water to which the appropriator who releases it may not have acquired a water right, in contrast to seepage and waste waters. In nonconsumptive cases, though, such as hydropower generation or placer mining, the appropriator does acquire a right to the water which is returned.

Return flow to which no consumptive water rights have been acquired is subject to appropriation under the Appropriation Doctrine; return flow from nonconsumptive water rights may also be reappropriated.⁴⁵ Under the prior law, however, as with seepage and waste water, return flow had to reach a watercourse before it could be appropriated. Today, the same rules of law apply, except that, in the opinion of the author, appropriation from a watercourse is no longer required.

Application of the law on return flow is more difficult than it would seem. This is mostly because of the problem of determining when water is return flow and when it isn't, or, in other words, when it is already appropriated. In the case of consumptive uses, if the water returned is actually part of the appropriator's original water right, but not yet used, or used previously and then not used for a period of time without abandonment, such appropriator may recapture

45. *Alder Gulch Consol. Mining Co. v. Hayes*, 6 Mont. 31, 9 P. 581 (1886); *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959 (1896); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909).

the return flow and put it to beneficial use.⁴⁶ This, of course, leads one into questions of due diligence and abandonment, discussed in secs. 2.5.1.2.1., 2.10.1. and 2.6.2.1. respectively, infra. If the water is not part of the original appropriation, then, of course, it is available for appropriation by others.

Another common problem arises today when a farmer or rancher desires to convert from a flood irrigation system to a sprinkler system, expand the acreage irrigated, but divert the same amount of water. In many cases, such conversion will reduce or eliminate the return flow. If so, the appropriator may be proposing to consume more water than he is entitled to under his water right. In such cases, a permit must be obtained from the Department for the increased amount.⁴⁷

2.3.7. Flood Waters

Without any doubt, flood waters are subject to appropriation under the same rules as ordinary surface waters.⁴⁸ Nevertheless, it is commonly thought that flood waters could not or cannot be appropriated, or that different rules apply to the appropriation of flood waters. Perhaps this misconception traces back to Quigley v. McIntosh, a case which expressly held that flood waters were subject to appropriation on adjudicated streams, but which

46. Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940).

47. The Department holds this same view. In fact, the Department has in the past taken a rather conservative position and advised appropriators in this situation to apply for permits in most cases, even when the appropriators probably had water rights sufficient for what they wanted to do. Note, however, that even when no permit is required, approval of a change in water right might be. See sec. 2.9. and Chapter 4 herein.

48. Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941). See sec. 2.3.1. for a discussion of the rules governing the appropriation of surface waters.

may have been interpreted erroneously⁴⁹ The myth should now be put to rest

Originally, of course, flood waters which had not reached a watercourse were not appropriable, receiving the same treatment and subject to the same rules as diffused surface waters, seepage, drainage, and waste water, and return flow.⁵⁰ Today that requirement is abolished.

2.4 Uses for Which Water Appropriated

Under the Appropriation Doctrine the beneficial use of water is the basis, measure, and limit of a water right. Or, put another way, water can be appropriated only for a beneficial use.⁵¹ The term "beneficial use" is operational--that is, it must be applied to each situation on a case-by-case basis. Generally, though, a beneficial use is any use of water which has positive benefits to the appropriator, and, over the years, statutes and courts have defined what uses are beneficial. Today, almost any use is beneficial, although there may still be uses which are not. See sec. 2.4.5., infra.

Other aspects of beneficial use are also discussed herein, including the concept of "duty," or the amount of water necessary for a particular purpose. See sec. 2.4.2. And, a distinction must be drawn between diversionary and nondiversionary uses, discussed in secs. 2.4.3. and 2.4.4. In some situations, some uses of water are "preferred" over

49. *Quigley v. McIntosh*, 88 Mont. 133, 290 P. 266 (1930). The appropriation of flood waters on adjudicated streams was, of course, governed by a special procedure, discussed at sec. 2.6.5.

50. *Popham v. Holloran*, 84 Mont. 442, 275 P. 1099 (1929).

51. *Toohy v. Campbell*, 24 Mont. 13, 60 P. 396 (1900); *Oscarson v. Norton*, 39 F.2d 610 (1930).

others, discussed in sec. 2.4.6. Finally, the uses of water for storage and for sale and lease are discussed in secs. 2.4.7. and 2.4.8.

2.4.1. Beneficial Use as the Basis, Measure, and Limit of the Right

An essential element of a water right under the Appropriation Doctrine is that the use of water must be for a beneficial purpose. Montana first adopted this concept in the statutes in 1885, although it was part of the common law before then.⁵² It is often said that beneficial use is the basis, measure, and limit of an appropriative water right. This means that the water right is limited by the amount of water that can be used beneficially. An Appropriation Doctrine water right therefore has an upper limit in terms of quantity of water that may be used. And, of course, the purpose of the use must always be beneficial.

Determining whether or not a particular use of water is beneficial is not difficult--practically any use is. The author has been unable to find any cases in Montana, court or administrative, in which a particular use has been **determined** not to be beneficial.⁵³ However, some have occurred in other jurisdictions, discussed at sec. 2.4.5.,

52. 89-802, RCM. 1947, mw repealed. For current law, see 85-2-301 MCA, wherein "[a] person may only appropriate water for a beneficial use." "Beneficial use" is defined at 85-2-102(2), MCA.

53. But see *Power v. Switzer*, 21 Mont. 523, 55 P. 32 (1898), holding that allowing waste waters from a domestic use to irrigate a hay field was not beneficial, because the appropriator didn't intend to irrigate the hay field when he originally made his appropriation. See also *Toohy v. Campbell*, 24 Mont. 13, 60 P. 396 (1900), which held that the use of water for timber raising was not a beneficial use, since the federal law didn't authorize raising timber on the land in question, and therefore the appropriator couldn't have legally intended such use. For cases holding that a use was beneficial, see *Sayre v. Johnson*, 33 Mont. 15, 81 P. 389 (1905), and *State ex rel. Silve v. District Court of Tenth Judicial Dist. in and for Judith Basin County*, 105 Mont. 106, 69 P.2d 972 (1937), both holding that irrigation of pasture land to increase the growth of grass was beneficial.

infra. Under today's law, a use is beneficial if it is a "use of water for the benefit of the appropriator, other **persons**, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses."⁵⁴ It is difficult to imagine any use of water under this definition that wouldn't be beneficial.⁵⁵

The more difficult problem, then, in dealing with the concept of beneficial use is determining the quantity of waters attached to an appropriative water right. In Montana, perhaps more so than in any other Appropriation Doctrine state, there are all kinds or types of water rights, derived in various ways. See **sec. 2.5.**, infra. But in **all** cases, these types of water rights are all limited by the amount of water needed and/or used for beneficial use. This is true even if the right, on paper, states a higher amount, and even if decreed.⁵⁶

There are several rules to remember when quantifying a water right by beneficial use, as follows:

- (1) The right is limited to the capacity of the appropriation facilities, even though the

54. 85-2-102(2), MCA.

55. But see 85-2-104, MCA, which expressly states that the use of water for the slurry transport of coal is not a beneficial use.

56. See, e.g., *Irion v. Hyde*, 107 Mont. 84, 81 P.2d 353 (1938), which held that the right of an appropriator may not be measured entirely by what was claimed in a notice of appropriation, but must be measured by beneficial use over reasonable periods; *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940), which limited decreed rights to the amount of water used at the time of the decree, even though this amount was less than provided in the original decree; and *Tucker v. Missoula Light & Water Co.*, 77 Mont. 91, 250 P. 11 (1926), which limited a decreed right to ditch capacity.

appropriator might need more;⁵⁷

(2) If the appropriator, after due diligence, actually uses less than the facilities will accommodate, then the right is measured by the amount actually used;⁵⁸

(3) The amount actually used is limited to the amount reasonably necessary (this concept is called "duty"--see sec. 2.4.2., infra);⁵⁹

(4) The right is limited by the appropriator's original intent, which may be determined from the amount claimed by a notice of appropriation or adjudicated in a decree;⁶⁰ and

(5) The water can be used only during the period of actual need, and then only within the periods of time established by the original appropriation.⁶¹

57. See, e.g., *Carron v. Wood*, 10 Mont. 500, 26 P. 388 (1891) (headgate capacity); *Conrow v. Huffine*, 48 Mont. 437, 138 P. 1094 (1914) (ditch capacity); *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937) (ditch capacity); *Gilcrest v. Bowen*, 95 Mont. 44, 24 P.2d 141 (1933) (facilities); *Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist.*, ___ Mont. ___, 36 St. Rep. 1403, 605 P.2d 1060 (1979) (capacity of diversion point); *Wheat v. Cameron*, 64 Mont. 494, 210 P. 761 (1922) (ditch capacity). See also 89-811, R.C.M. 1947, repealed.

58. See, e.g., *Conrow and Wheat*, supra, n. 57; *Federal Land Bank v. Morris*, 112 Mont. 445, 116 P.2d 1007 (1941); *Spaulding v. Stone*, 46 Mont. 483, 129 P. 327 (1913).

59. See, e.g., *Dern v. Tanner*, 60 F.2d 626 (D. Mont. 1932); *Allen v. Petrlick*, 69 Mont. 373, 222 P. 451 (1924); *Conrow*, supra, n. 57.

60. See, e.g., *Allen*, id. (right limited to amount claimed); *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912) (intent); *Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909) (intent); *Marks v. Hilger*, 262 F. 302 (1920) (decree).

61. See, e.g., *Dern*, supra, n. 59; (appropriator not entitled to appropriate water at all times to maintain wet ditches so water would flow during storms); *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940) (appropriator not entitled by decreed right to absolutely uninterrupted flow at all hours or days); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927) (evidence deemed sufficient to establish a right to appropriate only on certain dates); *Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909) (mining right can't be changed to use for irrigation exercised at different periods).

To state the application of these rules more simply, the quantity of water attached to a water right is limited in time and volume by the capacity of the appropriation facilities, actual use, actual need, or original intent, whichever is less.

Today, in the author's opinion, these rules are still firmly entrenched in our water law system. Under the Water Use Act, a permit must now be obtained in most cases for new water rights. A permit, however, only gives the permittee an inchoate right, a right which must still be perfected according to the terms of the permit. Once it is perfected, the appropriator is issued a Certificate of Water Right.⁶² The rules discussed above will be applied when the Department of Natural Resources issues the permit and certificate.

2.4.2. Duty of Water

"Duty of water" is the term used to describe the amount of water needed for a particular beneficial use. The higher the duty, the less water is needed. Obviously, the duty of water will vary from location to location, and will depend on several circumstances, including soil conditions, method of conveyance, topography, and climate. The general purpose of the rule of duty of water is to promote effective utilization and conservation of water, while at the same time reasonably accomplishing the purpose of use of the water.

In Montana the court has adopted a rule of thumb that

⁶². A certificate will not actually be issued for permitted appropriations until after the adjudication of existing water rights has been completed. 85-2-315(2), MCA.

one miner's inch of water per acre is about right for irrigation purposes.⁶³ But this standard may be varied where the evidence shows that different amounts are needed. In fact, in several instances the court has been more generous.⁶⁴ The system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the real standard, although a more economical method might be adopted.⁶⁵ As the Supreme Court has said: "Emphasis should be placed upon economy of use. But economy should not be insisted upon to such an extent as to imperil success."⁶⁶

There are no statutory standards of duty in Montana, although there are in many states. The Department, however, may set such standards in the permits it issues,⁶⁷ and the water courts must in effect adopt duty standards when they adjudicate existing rights under the adjudication system.⁶⁸ In addition, "waste" of water is discouraged.⁶⁹

2.4.3. Diversionary Uses

Diversionary uses of water are uses resulting from some man-made diversion of the water from the source of supply. At the beginning of the Appropriation Doctrine and through the decades thereafter, a physical diversion or impoundment

63. *Conrow v. Huffine*, 48 Mont. 437, 138 P. 1094 (1914).

64. See, e.g., *Allen v. Petrick*, 69 Wart. 373, 222 P. 451 (1924); *Boehler v. Boyer*, 72 Mont. 472, 234 P. 1086 (1925) (two miner's inches in rocky and gravelly soil); *Worden v. Alexander*, 108 Mont. 208, 90 P.2d 160 (1939).

65. *Worden*, id.

66. Id. at 380.

67. 82-2-312, MCA.

68. See Appendix Cc, the Preliminary Decree of existing water rights in the Powder River basin, which adopts standards of duty for that basin (1.5 acre-feet per 100 head of cattle per year, .75 acre-feet per acre for free flow irrigation systems that do not provide for ponding, and 1.5 acre-feet per acre per calendar year for rater spreading systems that allow for ponded coverage).

69. 85-2-114, MCA; 82-2-312, MCA.

of the water was required in order for one to acquire a water right. The same seemed to be true in Montana.⁷⁰ The reason for this rule is probably traceable to the notion of capture, emphasized in the early law.⁷¹

One case in Montana, Paradise Rainbow v. Fish and Game Commission, decided in 1966 before the Water Use Act was enacted, intimated that it might be possible under the proper set of facts for the public to have acquired an "instream" water right for recreational use of the water.⁷² In fact, one noted authority questions whether it was ever true that, to obtain a water right, there must be a diversion.⁷³ Indeed, hydropower generation is certainly a recognized use of water (which may involve a man-made facility, but not a diversion). And, cattle drinking straight from a stream has been recognized in Nevada as a valid right.⁷⁴ Therefore, it would seem that whether or not a diversion was required is still an unsettled question in Montana.

Whether or not a diversion is required under the new law (Water Use Act) is also unsettled. The Act seems to contemplate a diversion when it provides that a person may not appropriate water except as provided in the Act,⁷⁵ and defines "appropriate" to mean "divert, impound, or withdraw

70. See, e.g., *Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897); *Warren v. Senecal*, 71 Mont. 210, 228 P. 71 (1924); *Wheat v. Cameron*, 64 Mont. 494, 210 P. 761 (1922); *Sherlock v. Greaves*, 106 Mont. 206, 76 P.2d 87 (1938); 89-810, R.C.M. 1947.

71. 5 Clark, *Waters and Water Rights*, sec. 409.2 (1972).

72. 148 Mont. 412, 421 P.2d 717 (1966).

73. Stone, *Legal Background on Recreational Use of Montana Waters*, 32 Mont. L. Rev. 1, 13 (1971).

74. *Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 295 P. 772 (1931).

75. 85-2-301, MCA.

(including by stock for stock water) a quantity of water...." ⁷⁶ And, the Department of Natural Resources and Conservation has interpreted the Act in this manner. On the other hand, the Act was intended to carry forward existing law except where expressly amended, and existing law, as discussed above, may have allowed for nondiversionary water rights. It should also be noted that instream uses are expressly provided for in the case of reservations of water by subdivisions of government. ⁷⁷

2.4.4. Instream Uses

As noted in sec. 2.4.3., supra, Appropriation Doctrine law seems to require a diversion of water for one to obtain a water right. But, as also noted, some already recognized uses, such as hydropower generation, are sometimes nondiversionary, although still usually developed (such as by impoundment). And, if Montana follows Nevada precedent, stock watering directly from a stream will be recognized as a valid water right. ⁷⁸

Under today's law, political subdivisions of the state and state and federal agencies can acquire instream water rights through water reservations. ⁷⁹ The statutes are not entirely clear regarding whether private instream rights can be acquired. See discussion at sec., 2.4.3., supra.

PRACTICE NOTE: Instream stock-water uses may be claimed as valid water rights under the adjudication system now in progress. See Chapter 6. However, instream stock-water uses are exempt from the adjudication system. ⁸⁰

76. 85-2-102(1), MCA.

77. 85-2-316, MCA. See sec. 3.2.2.7. for detailed discussion.

78. Steptoe, supra, n. 74

79. Supra, n. 77.

80. 85-2-222, MCA.

2.4.5. Nonbeneficial Uses

No Montana court cases or administrative decisions have been found by the author which have determined that a particular use of water, per se, was not beneficial. Two cases held uses not to be beneficial because the uses were not within the appropriator's original intent--hence, not part of the water right. See n. 53. Given the definition of beneficial use in today's statutes,⁸¹ it is difficult to conceive of a use that would not be beneficial. The only use of water which is not beneficial under Montana law is the slurry transportation of coal, which use thus is expressly prohibited by the statutes.⁸²

It is possible, though, that some uses could be found to be nonbeneficial. An Idaho case found winter flooding to promote an icecap to provide moisture ~~retention~~ nonbeneficial.⁸³ It is not uncommon in Montana for farmers and ranchers to flood irrigate their fields in the late fall, thereby creating early moisture for growth after the spring thaw. Apparently, it is also a nonbeneficial use of water in California to flood out (exterminate) gophers and squirrels during the winter in a water short area.⁸⁴

2.4.6. Preferred Uses

A preferred use of water is a use of water that has a higher value than some other beneficial use of water--i.e.,

81. 85-2-102(2), MCA, defining beneficial use as "a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses."

82. 85-2-104, MCA.

83. Blaine County Inv. Co. v. Mays, 49 Idaho 766, 291 P. 1055 (1930).

84. Tulare Irrig. Dist. v. Lindsay-Strattnmre Irrig. Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935).

a higher preference has the first use of the water, regardless of its priority date. As can be seen, the concept of preferred uses is directly contrary to a pure form of Appropriation Doctrine water rights, which depend on their priority. See **sec. 2.1., supra**. In some instances, including in the statutes, certain beneficial uses are given "priority" over other uses. Technically, this terminology is incorrect--priority refers to the relative date of a water right, while preference refers to a higher valued use, regardless of priority.

Under modern law, there are really three general classes of preferences. The first is a true preference, in which a water right for a certain use may be exercised before any other rights, irrespective of those rights, and without compensation. Such rights exist in Montana, discussed in this section, **infra**. The second is a preferred use that is exercised by compensation to the owners of lower valued rights; in effect, the lower valued rights are condemned. This type of preference also exists in Montana. A third type of preference system exists where an administrative agency is given the discretion to choose among competing uses in granting applications for permits to use water, under legislative guidelines. Such a system does not exist in this **state**,⁸⁵ although the courts may have this authority in connection with "Murphy" rights. See **sec. 2.5.1.2.3., infra**.

85. Delegating to the Department the authority to deny permits if they are not in the "public interest" might have this effect. Such legislation has been introduced twice since 1973 and defeated. In 1979 legislation setting up a true preference system on the Yellowstone drainage was introduced and also defeated after passing the Senate.

It is commonly believed that in Montana domestic use of water has first preference. This belief is not true, at least not entirely. But preferences for some uses, under certain conditions, have been established in this state. The practitioner should be aware of these, as discussed below, since they do impose variations on Montana's "first in time, first in right" water right system.

Under 7-13-4405, MCA, cities and towns may condemn water rights for water supplies for municipal and domestic water systems. In addition, the Department can condemn water rights for the construction, operation, and maintenance of state-owned water projects.⁸⁶ The Montana Supreme Court, however, has held that at least in the case of cities and towns, the use must be shown in court to be a "more necessary" use.⁸⁷ Nevertheless, such powers in effect grant a type of preference, especially since the power to condemn water rights is not delegated under state law to anyone else.⁸⁸

When the ground water code was enacted in 1961, rights to surface water where the date of appropriation preceded January 1, 1962, were given "priority" over all prior or subsequent ground water rights.⁸⁹ This is a most interesting statute. On its surface, this provision

⁸⁶. 85-1-209(1), MCA.

⁸⁷ City of Helena v. Rogan, 26 Mont. 452, 68 P. 798 (1902); Carlson v. Helena, 39 Mont. 82, 102 P. 39 (1909); Cove Irrigation Co. v. Yellowstone Ditch Co., 139 Mont. 281, 362 P.2d 543 (1961).

⁸⁸. Unless, of course, water rights are condemned as an incident to the condemnation of land, a water right being an appurtenance. See sec. 2.8. See also 85-9-410, MCA, authorizing a conservancy district to condemn water rights as an incident to land condemnation.

⁸⁹. 89-2912, R.C.M. 1947, now repealed, but "existing rights" (including, presumably, preference rights) preserved by Mont. Const. of 1972, art. IX, sec. 3(1), and the Water Use Act, 85-2-101 et seq., MCA.

retroactively gives all surface water rights with priority dates before January 1, 1962, preference over all ground water rights with priority dates before January 1, 1962; all of a sudden, a surface water right with a December 31, 1961, priority date has preference over an 1866 ground water right, that it didn't have before. See sec. 2.3.2., supra. And, this is accomplished in "true preference" form. Obviously, this statute has serious constitutional problems, because water rights are (or can be) adversely affected by injecting unexpected and unknown water rights into the appropriation scheme--a taking of property without compensation. To the author's knowledge, the statute is totally ignored (probably because nobody knows about it). If it is ever tested in court, it is likely that the court will either rule it unconstitutional, or require the payment of compensation in its exercise.

Another provision of the current ground water statutes provides for the establishment of a preference system by order of the Board of Natural Resources and Conservation in "controlled ground water areas."⁹⁰ The preferences can be imposed on existing rights to withdraw ground water, with domestic and livestock uses having first preference. This provision is also of dubious constitutionality unless compensation is provided for adversely affected appropriative water rights. There is only one controlled ground water area in the state, near Terry, Montana, which was established before this provision was enacted.⁹¹

90. 85-2-507(4)(c), MCA.

91. See 89-2915, R.C.M. 1947, for former statute which gave domestic use first preference in a controlled ground water area.

In 1951, pursuant to a statute enacted in 1921,⁹² the legislature approved the impoundment of waters on the Clark Fork River in Montana by the Cabinet Gorge dam in Idaho. The approval included the condition that any "present or future appropriations of water in the watershed in the state of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam."⁹³ Irrigation and domestic uses on the Clark Fork drainage in Montana thus have preference of use over one water right for hydropower generation in Idaho. This provision also raises some interesting questions, too lengthy to discuss here.

There is a preference system now in effect on the Yellowstone River drainage. Under a statute enacted in 1974, reservations of water in the Yellowstone drainage by state and federal agencies and political subdivisions of the state were given a "preferred use" over water rights that might be acquired pursuant to certain applications for permits to appropriate water in the drainage having earlier priority dates.⁹⁴ The statute was a part of the so-called "Yellowstone Moratorium" which resulted from concerns that permit applications for industrial use of water in the Yellowstone drainage, if ultimately approved, would foreclose options for using the water for other purposes. In December 1978, the Board of Natural Resources and Conservation approved a series of water reservations which,

92. 85-1-121, MCA.

93. 85-1-122, MCA.

94. 85-2-603(2), MCA.

according to the statute, have preference of use over the rights to appropriate water pursuant to the permits. To date, none of the permits have been approved by the Department.⁹⁵

The only other preference system relates to "Murphy" **instream** water rights held by the Department of Fish, Wildlife, and Parks on certain "blue ribbon" trout streams. See **sec. 2.5.1.2.3.** for a discussion of these rights and their preference of use.

2.4.7. Storage

Both the 1889 and 1972 Montana Constitutions and the Montana statutes and case law have contemplated and encouraged the storage or impoundment of water. Art. 111, **sec. 15** of the 1889 Constitution, and Article IX, **sec. 3(2)** of the 1972 Constitution provide that reservoir sites "shall be held to be a public use." The effect of these provisions has been to provide that reservoir sites may be condemned by anyone constructing a reservoir; they do not mean that storage of water is a beneficial use per se.⁹⁶ Former **section 89-801, R.C.M. 1947**, provided that flood, seepage, and waste waters may be impounded in a **reservoir**,⁹⁷ and **section 85-2-305, MCA**, part of the Water Use Act, provides that anyone intending to appropriate water by means of a reservoir must obtain a permit from the Department.

95. The permit applications to which the preference applies are those for a flow rate greater than 20 cubic feet per second, or for the storage of 14,000 acre-feet or more. 85-2-602(1), MCA. There were seven applications; several have since been withdrawn.

96. *Farmers Union Oil Co. v. Anderson*, 129 Mont. 580, 291 P.2d 604 (1955).

97. See also 85-2-414 and 85-15-101, MCA, both of which contemplate reservoir construction. See also *Donich v. Johnson*, 77 Mont. 229, 250 P. 963 (1926) and *Jeffers v. Montana Power Co.*, 68 Mont. 114, 217 P. 652 (1923) for cases encouraging the storage of water.

There is some doubt whether mere storage of water, by itself, is a beneficial use, and therefore a water right. All the statutes and case law on the subject seem to require that the stored water must ultimately be put to some beneficial use, such as irrigation or hydropower generation, in order for a water right to exist. The use of stored water for recreation purposes, such as boating, fishing, swimming, and the raising of trout, would also probably fulfill this **requirement**.⁹⁸ It would seem most incongruous for one to have a water right for merely storing water, when the water isn't used for anything, or even intended for use. Of course, stored water may be put to beneficial use over a period of time by the exercise of "due diligence," " or within the period of time allowed by the Department in a permit.¹⁰⁰

A more difficult problem relates to the operation of storage reservoirs, or, more accurately, the rights and responsibilities of the reservoir owner under his water right. Obviously, as with any other appropriative water right, junior water rights in connection with storage must give way to water rights of senior appropriators. Thus, **junior** reservoir owners must release stored water to senior appropriators when they need water, but only to the extent that the "natural flows" of the stream are maintained: a **senior** appropriator cannot take advantage of "developed" water which increases the water supply beyond the natural

98. See, e.g., *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206 (1936) and *Paradise Rainbow v. Fish and Game Comm.*, 148 Mont. 412, 421 P.2d 717 (1966).

99. See sec. 2.5.1.2.1.

100. See sec. 3.2.2.5.5.

condition of the stream.¹⁰¹ On the other side of the coin, a senior right reservoir owner must also release "natural flow" waters to junior appropriators if the senior's water rights are fulfilled; a reservoir owner is not entitled to divert water to his reservoir to make up for seepage losses and evaporation and to keep a certain amount of water moving through the reservoir at a time when junior appropriators are being deprived of full or even partial use of their rights.¹⁰² This means that the reservoir owner must install an outlet at his dam.¹⁰³

Reservoir owners are entitled to construct and maintain reservoirs capable of holding more water than would be required for irrigation in any one year in order to retain an extra supply during wet years for use in dry years. The amount of this "carryover" supply, however, has not been precisely defined.¹⁰⁴ Federal Land Bank v. Morris¹⁰⁵ held that the reservoir owner may store the amount he has a right to use in any given year, and also any additional amount that others do not have the right to use and that would otherwise go to "waste." Furthermore, it seems fairly settled that a reservoir owner is entitled to only one filling of his reservoir per year.¹⁰⁶ The author is aware of several situations where dam owners fill more than once a

101. Gwynn v. City of Philipsburg, 156 Mont. 194, 478 P.2d 855 (1970); Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926).

102. Id. See also Whitcomb v. Helena Water Works Co., 151 Mont. 443, 444 P.2d 301 (1968).

103. Irion v. Hyde, 107 Mont. 84, 81 P.2d 353 (1938). The Department as a matter Of course requires such outlets in most of its reservoir permits, even if the expense substantially increases the cost of the reservoir construction.

104. Federal Land Bank v. Morris, 122 Mont. 445, 116 P.2d 1007 (1941).

105. Id.

106. Id.

year, a practice that probably could be enjoined by a junior appropriator. However, in a federal case which was reversed on jurisdictional grounds, it has been held that the Montana Power Company was entitled to continuous fillings throughout the year for its hydropower reservoirs on the Missouri River.¹⁰⁷

For more discussion of the rights of senior and junior appropriators, see sec. 2.7.2., infra.

Finally, although outside the scope of this book, it is worthy of note that reservoir owners bear a substantial burden for liability for damages in the operation and maintenance of their reservoirs.¹⁰⁸

2.4.8. Sale and Lease

Under the Appropriation Doctrine in Montana, water may be stored or otherwise appropriated and sold by the appropriator to water purchasers for beneficial use.¹⁰⁹ On the other hand, an owner of an appropriative water right who has no use for the water under his right cannot sell the unused water to other users.¹¹⁰ This makes sense, since under the Doctrine an appropriator not needing the water must make it available to junior appropriators (see sec. 2.4.1., supra); selling the unneeded water would subvert the

107. *Montana Power Co. v. Broadwater-Missouri Water Users Ass'n*, 50 F. Supp. 4, rev'd, 139 F.2d 998 (D. Mont. 1942).

108. See, e.g., *Richland County v. Anderson*, 129 Mont. 559, 291 P.2d 267 (1956); *Walsh v. East Butte Copper Mining Co.*, 66 Mont. 592, 214 P. 641 (1923); *Wilhite v. Billings & Eastern Montana Power Co.*, 39 Mont. 1, 101 P. 168 (1909). But see *Jeffers v. Montana Power Co.*, 68 Mont. 114, 217 P. 652 (1923).

109. Mont. Const. of 1889, art. III, sec. 15; Mont. Const. of 1972, art. IX, sec. 3(2); 85-2-415, MCA; *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912); *Sherlock v. Greaves*, 106 Mont. 206, 76 P.2d 87 (1938).

110. *Creek v. Bozeman Water Works Co.*, 15 Mont. 121, 38 P. 459 (1894); *Brennan v. Jones*, 101 Mont. 550, 55 P.2d 697 (1936); *Custer v. Missoula Public Service Co.*, 91 Mont. 136, 6 P.2d 131 (1931); *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927).

Doctrine. The distinction between selling water as a part of ~~the~~ right and selling water not needed under a right is a question of the original purpose of use--if an appropriator intended (or receives a permit) to appropriate and sell water, he may do so; if not, he may not. One caveat: the **purpose** of use can be changed from direct use to sale of the water, if the requirements of changing water rights are met. See **sec. 2.9.** and Chapter 4, infra.

Apparently, water can also be leased, although this is not a common practice. Both the 1889 and 1972 Constitutions refer to the "rent" of water,¹¹¹ as do the cases.¹¹² The same rules stated above for the sale of water would apply to the lease of water as well.

2.5. Acquisition of Water Rights

Until July 1, 1973, when the Water Use Act became effective, an appropriator could acquire (that is, initiate and obtain) a water right in Montana in several ways, governed either by common law or by statute. Indeed, the methods to acquire water rights were so numerous that today it is difficult to ascertain what kind of water rights an appropriator might own. The problem becomes particularly important when claims of those rights are made pursuant to the adjudication system now under way in Montana, discussed in Chapter 6, infra. Each method had its own peculiar rules: failure to comply with the rules sometimes resulted in no right at all, or in acquisition of a different type of right than the appropriator thought he was obtaining, which

^{111.} Supra, n. 109.

^{112.} McDonnell v. Huffine, 44 Mont. 411, 120 P. 792 (1912); Sherlock v. Greaves, supra, n. 109.

in turn sometimes resulted in loss of priority. After July 1, 1973, there has been only one way to acquire a new water right: compliance with the procedures specified in the Water Use Act. All of these methods are described in detail in the remainder of this section.

2.5.1. Rights Acquired Before July 1, 1973

2.5.1.1. Use Rights

Under the Appropriation Doctrine as it originally developed, one could acquire a legally protectible water right by merely diverting the water and putting it to a beneficial use. Such rights are referred to as "use rights." No recording or filing of any kind was required. Acquisition of water rights in this manner quickly lead to confusion and disputes, since there was no record of existing rights. Consequently, most Western states, some in the last century with Wyoming being the first, established statutory permitting and recording systems to amass records of existing water rights. Montana took some initial steps attempting to document water rights, all of which generally failed and which are discussed infra. Use rights could be obtained in Montana until July 1, 1973, when that method was finally abolished.¹¹³

As one can imagine, permitting the acquisition of water rights by the use method for all those years now presents a rather serious problem, the magnitude of which was not realized until the adjudication of water rights was begun by the Department of Natural Resources and Conservation in the Powder River basin in southeastern Montana in 1974, pursuant

¹¹³. 85-2-301, MCA.

to the newly enacted Water Use Act. In that proceeding, some 60 to 70 percent of the water rights declared, and discovered by the Department, are use rights. This percentage is probably indicative of the situation in the rest of the state, except in areas where water rights were hotly contested and eventually adjudicated by the courts.

Use rights, of course, still exist, and must be claimed pursuant to the adjudication system now in progress. It is therefore important, given the number of these rights in the state, that the practitioner understands the nature of a use right.

There are two types of use rights in Montana--those established before 1885 (hereinafter called "pre-1885") and those established after (hereinafter called "post-1885"). The only difference between the two is the method of establishing their priority dates, discussed infra in this section. The essential elements of a use right were the completion of the appropriation facilities with reasonable diligence, diversion of the water, and the application of the water to a beneficial use.¹¹⁴ There is some question whether an actual "diversion" was required. See sec. 2.4.3., supra. See also sec. 2.4., supra, for a discussion of beneficial use in general. What was "reasonable diligence" is also uncertain. See sec. 2.5.1.2.1., infra.

2.5.1.1.1. Pre-1885

Prior to the 1885 legislative enactment of a posting and notice procedure for acquisition of water rights (see

114. Maynard v. Watkins, 55 Mont. 54, 173 P. 551 (1918); Midkiff v. Kincheloe, 127 Mont. 324, 263 P.2d 976 (1954); Morris v. Bean, 146 F. 423, aff'd, 159 F. 651 and 221 U.S. 485 (1908); Shammel v. Vogl, 144 Mont. 354, 396 P.2d 103 (1964); Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1950).

sec. 2.5.1.2.1., infra), a use right had a priority date as of the date physical work on the diversion facility was commenced. If the elements of the appropriation were met, i.e., facility completed with reasonable diligence, diversion of the water, and application to a beneficial use, the priority date would relate back to the time of commencement of the construction of the facility. This was called the "doctrine of relation back."¹¹⁵ If two potential appropriators were constructing diversion facilities at the same time, the one who commenced his facility first got the prior right, even if the other used the water first.¹¹⁶

PRACTICE NOTE: Claimants of pre-1885 water rights should try to determine priority dates according to the above rule, if at all possible, since the difference between the date of commencement of work on a facility and the date of first beneficial use of the water can be substantial, and therefore important if intervening rights exist.

2.5.1.1.2. Post-1885

Post-1885 use rights have different priority dates than pre-1885 use rights, i.e., their priority dates are calculated differently. The legislature, in 1885, enacted a statutory posting and notice procedure which regulated the acquisition of water rights. See sec. 2.5.1.2.1., infra. Twelve years thereafter, in a leading Montana water case, the statute was interpreted as establishing new rules for the application of the doctrine of relation back, discussed in sec. 2.5.1.1.1., supra. The court held that, thereafter,

115. *Woolman v. Garringer*, 1 Mont. 535 (1871); *Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897); *Maynard v. Watkins*, 55 Mont. 54, 173 P. 551 (1918); *Wright v. Cruse*, 37 Mont. 177, 45 P. 370 (1908). Under this rule it was presumed by the courts that commencing work on a ditch or other appropriation facility constituted sufficient notice to the world that an appropriator was on the scene, and thereafter everyone took water subject to such notice.

116. *Murray and Wright*, id.

only by complying with the statute could one take advantage of the doctrine, except that under the statute the priority date would then relate back to the date of posting notice.¹¹⁷

In addition, the courts said that the statutory procedure was not the exclusive method to acquire a water right, but that one could still acquire a right by use. However, since the statute regulated the doctrine of relation back, rights acquired thereafter without compliance with the statute would date from the date of first beneficial use of the water, not from the date of commencement of construction.¹¹⁸

2.5.1.2. Filed Rights

The term "filed rights" as used herein refers to water rights that could be obtained only by compliance with statutory procedures involving the filing of certain documents. Notices of appropriation filed pursuant to the 1885 statute described in **sec. 2.5.1.2.1., infra**, are the most common in this category, but there are others. Each of the types of filed rights is described below.

2.5.1.2.1. Notices of Appropriation--1885 Rights

In 1885 the Legislature enacted a statutory water right filing system essentially adopted from a similar system in **California**.¹¹⁹ The system involved the posting of a notice at the intended point of diversion, and the subsequent filing of a "notice of appropriation" with the county clerk and recorder. By compliance with the procedures set forth

117. *Murray*, id.

118. Id.; *Musselshell Valley Farming & Livestock Co. v. Cooley*, 86 Mont. 276, 283 P. 213 (1929); *Clausen v. Armington*, 123 Mmt. 1, 212 P.2d 440 (1950).

119. 89-810 to 812, R.C.M. 1947, repealed by the Water Use Act.

in the statutes, an appropriator acquired a water right dating from the date of posting the notice at the point of diversion. Water rights acquired under this system are variously referred to as "filed rights," "appropriative rights," and "statutory rights." All of these terms are somewhat misnomers, since there are other types of filed and statutory rights, and all rights acquired under the Appropriation Doctrine are appropriative rights. Herein, they will be referred to as "1885 filed rights."

Today, 1885 filed rights exist everywhere in the state. Other than use rights (see discussion at **sec. 2.5.1.1., supra**), they probably constitute the largest number of rights, and, of course, they must be claimed under the adjudication system in progress. Compliance with the statutes proved to be hazardous at times, and the hazards must be remembered when claiming such rights pursuant to the adjudication system. Because of these hazards and the substantial number of these rights, they deserve an extended discussion.

As enacted in 1885, and as it remained unchanged until its repeal in 1973 by the Water Use Act, the 1885 statutory procedure provided as follows:

- (1) A notice must be posted at the point of intended diversion stating the quantity of claimed, the purpose and place of intended use, the size and means of diversion, and the name of the appropriator;
- (2) Within 20 days after the date of appropria-

tion specified in the posting, a verified notice of appropriation must be filed with the county clerk and recorder in the county in which the appropriation is made, stating the same facts as contained in the posting, and also the name or description of the stream and a description of the point of diversion;

- (3) Within 40 days after posting the notice, the appropriator must proceed to "prosecute the excavation or construction" of the appropriation facilities; and
- (4) The appropriator must prosecute the construction with "reasonable diligence" to completion.¹²⁰

Although the language used in the law was seemingly mandatory, the Montana Supreme Court in Murray v. Tingley¹²¹ held that compliance with the above procedure was optional, and its basic purpose was to regulate the doctrine of relation back. See sec. 2.5.1.1.2., supra.

Before discussing compliance with the 1885 law itself, some basic rules should be noted relating to water rights acquired under it. The priority date of the right is the date of posting the notice. See sec. 2.5.1.1.2., supra. The water must be used for a beneficial purpose. See sec. 2.4.1., supra. The statute could not be used on "adjudicated" streams after 1921. See sec. 2.5.1.3., infra.

120. Id. See "Statutes and Rules" in back of this handbook for the complete text.

121. Supra, n. 115.

Failure to comply with the procedures resulted in a use right. See sec. 2.5.1.1.2., supra. In addition, the statute covered "waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply...."¹²² This apparently meant waters in a watercourse. See sec. 2.3.1, supra. A question arises regarding whether it also covered ground waters, since they are a "natural source of supply." The author is unaware of any filings made pursuant to the law for ground waters. In all probability, however, the law covers only surface waters under the doctrine of ejusdem generis.¹²³ A water right obtained under the statute could not exceed the amount claimed.¹²⁴ If the "ditch or flume" was inadequate to convey the amount of water claimed in the notice, the right was limited to the capacity of the ditch or flume.¹²⁵ And, the appropriation became complete when the ditch was completed, before water was actually put to use.¹²⁶

Appropriators attempting to come under the statute had to follow the outlined procedures fairly strictly in order to benefit by it. Several court cases arose which resulted in rights under the law being held invalid. In fact, if the notice of appropriation was executed or filed improperly, often it was held that the notice was void for all purposes, and could not be introduced as evidence.¹²⁷ This presents a

122. 89-810, RCM. 1947.

123. Aleksich v. Industrial Accident Fund, 116 Mont. 127, 151 P.2d 1016 (1944).

124. Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924).

125. 89-811, RCM. 1947. See also sec. 2.4.1.

126. Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

127. Supra, n. 124; Galahan v. Lewis, 105 Mont. 294, 72 P.2d 1018 (1937) (no evidentiary value in proving the amount or date of an appropriation). But see Sweetland v. Olson, 11 Mont. 27, 27 P. 339 (1891) holding that a notice filed before the statute authorizing it was enacted can be admitted as evidence of intent. But see also Gilcrest v. Bowen, 95 Mont. 44, 24 P.2d 141 (1933), stating, in obiter dicta, that this rule is dubious.

particularly difficult problem today when a claimant of a water right under the new adjudication system attempts to prove his rights by attaching an invalid notice to his claim. See **sec. 6.4.2., infra**. If the statute was complied with, however, the notice became prima facie evidence of the **facts** stated therein.¹²⁸

Posting the notice at the point of intended diversion was the first step. Proving that this was actually done for older water rights could be impossible, since the notice has probably vanished. Fortunately, the court decisions have surprisingly treated this condition lightly, or not at all. One case held that the date of appropriation stated in a valid notice (step 2) is prima facie presumed to be the date of **posting**.¹²⁹ This has the effect of presuming that there was a posting as of the date of appropriation, thereby giving the right a priority date. The author has found no Montana case dealing with the substance of the posted notice, or the location of its posting. This is probably because the notice of appropriation is treated as a kind of substitute for the posted notice--once a notice is filed, it's really not important whether or not there was a posted notice. One wonders, however, if many 1885 filed rights might be in jeopardy for the appropriator's failure to have made a posting, or to prove that it occurred.

The form and substance of the notice of appropriation has created substantially more **litigation**. Quite clearly,

128. 89-814, RCM. 1947; *Anderson v. Spear-Morgan Livestock Co.*, 107 Mont. 18, 79 P.2d 667 (1938); *Vidal v. Kensler*, 100 Mont. 592, 51 P.2d 235 (1935); *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862 (1935).

129. *Musselshell Valley Farming & Livestock Co. v. Cooley*, 86 Mont. 276, 283 P. 213 (1929).

the notice must state with a fair amount of precision the facts required in the statute, and it must be verified properly and recorded within the 20-day time period. If it's not, it will likely be invalid. Several cases have thrown out notices that weren't recorded on time.¹³⁰ In another case, the notice was verified by a notary public who also happened to be one of two partners in the firm making the appropriation, and the brother of the partner signing the notice. No good, said the court.¹³¹ In still another case, the notice didn't describe the land that was to be irrigated, and it was ruled inadmissible.¹³² A notice recorded by a successor to the original appropriator is also invalid, because the statement as to the date of appropriation is hearsay.¹³³ And, if the verification does not contain a statement that the matters and facts contained in the notice are true, as required by the statute, the notice is invalid.¹³⁴

Some notices with minor deficiencies have passed the courts' muster. A notice which specified two creeks, one a tributary to another, as the source of supply was held to be valid, although one couldn't tell from reading the notice how much water of the 2,500 miner's inches claimed came from each creek.¹³⁵ The court adroitly solved this problem,

130. See, e.g., *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451 (1924); and *Holmstrom Land Co., Inc. v. Meagher County Newlan Creek Water Dist.*, ___ Mont. ___, 36 St. Rep. 1403, 605 P.2d 1060 (1979).

131. *Supra*, n. 129.

132. *Stearns v. Benedict*, 126 Mont. 272, 247 P.2d 656 (1952). Although this case concerned a notice which was recorded before the 1885 law was enacted, the result would be the same for a post-1885 notice.

133. *Geary v. Harper*, 92 Mont. 242, 12 P.2d 276 (1932).

134. *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964).

135. *Floyd v. Boulder Flume & Merchantile Co.*, 11 Mont. 435, 28 P. 450 (1892).

apparently with no basis, by ordering that the appropriator take water from the tributary first, but only up to a total appropriation of 500 miners inches. Other cases, taken as a whole, stand for the proposition that notices containing dates of appropriation referring only to a month or year, but not the exact date, are valid, but that the last day of the period stated will be fixed as the date of appropriation.¹³⁶ Earlier dates can be fixed if there are no intervening rights.¹³⁷

There are only two Montana cases, both of them recent, involving the third step in perfecting an 1885 filed right, i.e., proceeding to prosecute the excavation or construction of the appropriation facility within 40 days.¹³⁸ In one case, the court held that actual on-site excavation or construction within the 40-day period was not required, but that the statute required a steady, ongoing effort in good faith to prosecute construction. Filing lawsuits, drilling test holes, securing licenses, and drawing up preliminary engineering plans are evidence of such a steady, ongoing effort in good faith for a large construction project.¹³⁹

The more difficult problem comes in ascertaining "reasonable diligence" in prosecuting to completion the construction of the ditch or other facility under the fourth

136. Missoula Light & Water Co. v. Hughes, 106 Mont. 355, 77 P.2d 1041 (1938); Vidal, supra, n. 128. See the Preliminary Decree on the Powder River basin in Appendix Cc for the application of the rule by the water master and water judge to declarations of existing water rights filed in that proceeding.

137. McDonald v. Lannen, 19 Mont. 78, 47 P. 648 (1897). The date of priority obviously doesn't matter if there are no intervening rights. However, this practice may prove to be very risky, where there are thousands of rights on a source of supply and the water is scarce, since there might be intervening rights miles away.

138. Montana Department of Natural Resources and Conservation v. Intake Water Co., 171 Mont. 416, 559 P.2d 1110 (1976); Holmstran Land Co., Inc. v. Meagher County Newlan Creek Water Dist., ___ Mont. ___, 36 St. Rep. 1403, 605 P.2d 1060 (1979).

139. Holmstrom, id.

step. Reasonable diligence, sometimes called "due diligence", is also a factor in perfecting a use right. See sec. 2.5.1.1., supra. However, there the term is usually used in connection with putting the water to use. Therefore, this discussion applies to both situations, although more litigation has arisen concerning 1885 filed rights.

Reasonable diligence depends upon the circumstances of each case.¹⁴⁰ The size and economics of the project seem to be the most important factors. But the cases are somewhat inconsistent. In one case the appropriator took 33 years to construct, during that period, a series of little dikes from the stream across his land--not a large project. The court held the appropriation valid (by use), but cut him off when a subsequent appropriator came along in the 33rd year.¹⁴¹ Taking 13 years was deemed too long in another case,¹⁴² but an equivalent length of time (exactly how long can't be determined from the case) was proper in a third.¹⁴³ It would seem to be reasonable diligence to take one and one-half years to construct a one and one-half mile ditch, and four years to build an eight-mile canal, as the court

140. Montana Department of Natural Resources and Conservation, *id.* The court quotes with approval the following from 6 Clark, Waters and Water Rights, sec. 514.1, at 308, 309: "What constitutes due diligence is a question of fact to be determined by the court in each case. Diligence does not require unusual or extraordinary effort, but it does require a steady application of effort--that effort that is usual, ordinary and reasonable under the circumstances. ... So long as the applicant prosecutes the construction of works in good faith with a steady effort, he shall be held to have prosecuted with diligence."

141. *Midkiff v. Kincheloe*, 127 Mont. 324, 263 P.2d 976 (1954). The issue of due diligence does not seem to be an important one in this case.

142. *Miles v. Butte Electric & Power Co.*, 32 Mont. 56, 79 P. 549 (1905), but the case may have turned on other points, e.g., that the appropriator didn't own the land he was irrigating, and was apparently speculating.

143. *Arnold v. Passavant*, 19 Mont. 575, 49 P. 400 (1897).

has so held.¹⁴⁴

A related problem is the question of due diligence in putting water to beneficial use once the facility has been constructed with due diligence under the statute. As noted previously, an appropriation under an 1885 filed right is deemed completed when the ditch or other appropriation works are completed, even if the water hasn't yet been put to beneficial use. However, water must eventually be put to use, with due diligence, or the right is lost. Whether the right is lost because it wasn't fully perfected, or by abandonment for nonuse is not clear. But, at least in the case of an appropriator who is in the business of selling water, the appropriation is complete when the appropriator is ready and able to sell the water, even if there are no takers.¹⁴⁵

The concept of due diligence must not be forgotten when claiming 1885 filed rights and use rights under the adjudication system now in progress. As can be seen from the discussion above, it is entirely possible, indeed likely, that many of these rights have not yet been fully utilized. Or, put another way, although such rights ultimately depend on beneficial use, the total beneficial use may not have been yet completed. The key factor is determining the intent of the original appropriator.¹⁴⁶ For example, if he intended to irrigate 1,000 acres, but only

144. *Anderson v. Spear-Morgan Livestock Co.*, 107 Mont. 18, 79 P.2d 667 (1938) and *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912), respectively.

145. *Bailey*, id. See also *Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist.*, ___ Mont. ___, 36 St. Rep. 1403, 605 P.2d 1060 (1979) and *Irion v. Hyde*, 107 Mont. 84, 81 P.2d 353 (1938).

146. *Bailey*, id.; *Smith v. Duff*, 39 Mont. 382, 102, P. 984 (1909).

500 have been irrigated to date, it is possible that an unperfected right to irrigate 1,000 acres exists, providing that due diligence has been exercised up to this point. Intent is ascertained by looking at the circumstances at the time of the original appropriation;¹⁴⁷ 1885 notices of appropriation are obviously important in determining such intent.

Due diligence considerations also arise when appropriators with existing water rights desire to expand their beneficial uses, such as by adding additional acreage for irrigation. In some cases the appropriator might be able to do so by utilizing his existing rights, rather than by obtaining a new permit from the Department of Natural Resources and Conservation.

PRACTICE NOTE: Given the tendency of the courts to rule in favor of due diligence, the practitioner should give serious consideration to relying on the concept in borderline situations. If in doubt, always lean on the side of due diligence when claiming existing water rights under the adjudication system.

2.5.1.2.2. Notices of Appropriation on State Water Projects

A hybrid of the 1885 filed rights law can be found in the case of state-owned water development projects. The state, acting through the former Water Conservation Board (the predecessor of the Department of Natural Resources and Conservation), was authorized to file a "declaration" or notice of its intention to store, divert, or control the unappropriated waters of a particular body, stream, or source of water with the county clerk and recorder, stating

147. Id.

essentially the same facts as required in the 1885 law. The right vested on the date of filing the declaration. The state was required to commence actual construction within four years from this date.¹⁴⁸

Many of these rights exist today on several of the state's water projects. Some were assigned to other entities.¹⁴⁹

2.5.1.2.3. Instream "Murphy" Rights

An unusual type of filed rights in Montana are the so-called "Murphy" rights which claim instream flows for the preservation of fish and wildlife habitat on certain blue ribbon trout streams.¹⁵⁰ The streams and the reaches covered were named in the statute providing for those rights.¹⁵¹

The law provided that these rights, similar to 1885 filed rights in form, were to be filed by the Fish and Game Commission. Several filings were actually made by the Commission. However, they differed in some respects.

First, as mentioned, they were made for instream beneficial uses. See sec. 2.4.4., supra. Secondly, they have "priority of right over other uses until the district court in which lies the major portions of such stream or streams shall determine that such waters are needed for a

148. 89-121, R.C.M. 1947, repealed by the Water Use Act; enacted in 1933.

149. See, e.g., Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., Mont. _____, 36 St. Rep. 1403, 605 P.2d 1060 (1979).

150. As far as the author can determine, this name originated from James Posewitz, a current and long-time employee of the Department of Fish, Wildlife and Parks. The name commemorates James E. Murphy, a lawyer in Kalispell and sponsor of the legislation creating the basis of the rights.

151. 89-301(2), R.C.M. 1947, now repealed; see compilers' notes in the 1977 Cumulative Supplement to Volume 6, Part 1 of the 1947 Revised Codes of Montana for a reprint of the statute.

use determined by said court to be more beneficial to the public."¹⁵² This provision appears to grant such rights preference of use over prior rights, which is of dubious constitutionality without compensation.¹⁵³ See sec. 2.4.6., supra. On the other hand, the district courts apparently could change such preference by finding another use more beneficial to the public. Whether this power was transferred to the water courts is an open question. See sec. 6.5.1., infra.

The filings made pursuant to the above statute stated the quantity of water claimed, as required by the statute.¹⁵⁴ However, it is the author's opinion that these rights, like all others, ultimately depend on need and beneficial use. See secs. 2.4.1. and 2.4.2., supra. It is possible, therefore, that the quantities claimed exceed actual need. Like all other pre-July 1, 1973, water rights (with irrelevant exceptions), they must be claimed under the adjudication system, described in Chapter 6, infra.

2.5.1.2.4. Ground Water Rights Acquired
from 1962 to 1973

The 1961 ground water code provided that "appropriations of ground water completed on and after January 1, 1962....must be based upon the filing provisions hereafter set forth...."¹⁵⁵ The code went on to provide for the optional filing of a notice of appropriation for such appropriations, and the apparently mandatory filing of a

¹⁵² Id.

¹⁵³ But see 89-801.1, R.C.M. 1947, which disclaimed any effect on existing water rights

¹⁵⁴ 89-801.2, R.C.M. 1947.

¹⁵⁵ 89-2912, R.C.M. 1947.

notice of completion, whether or not a notice of appropriation was filed.¹⁵⁶ If the appropriator filed a notice of appropriation and a notice of completion, his priority date related back (apparently to the date of the first notice, although this is not made clear); if only a notice of completion was filed, the appropriator was deprived of the right to relate back.¹⁵⁷ Within 90 days after filing a notice of appropriation, the appropriator must have commenced actual excavation, followed by diligent prosecution of the construction of the well. In the case of uses of ground water instituted before January 1, 1962, and diligently prosecuted to completion on or after that date, the date of appropriation related back to the date of commencement of construction, upon the filing of a notice of completion. Oil and gas wells appropriating water were exempt from the filing requirements if well logs were filed, and the date of appropriation in those cases was the date the notice of intention to drill was filed with the Oil and Gas Commission.¹⁵⁸

The filing of post-January 1, 1962, ground water uses by notices of completion was deemed to be mandatory by the Attorney General in an official opinion. If the notice was not filed, no right existed, according to the opinion. However, the appropriator could file a notice of completion under the Water Use Act and obtain a right dating as of the

19. "Until a notice of completion is filed with respect to my use of ground water instituted after January 1, 1962, my right to that use of water shall be recognized." 89-2913(e), R.C.H. 1947.

157. See secs. 2.5.1.1 .1. and 2.5.1.1.2. for an explanation of the doctrine of relation back.

158. 89-2913, R.C.M. 1947.

date of such filing.¹⁵⁹ The Attorney General's opinion was essentially enacted into law by the 1981 legislature by amendment to the Water Use Act.¹⁶⁰ The amendment provides that the priority date of the appropriation is the date a notice of completion is filed, as does the Attorney General's opinion, but such filings are defined as existing rights, which in 85-2-102(7), MCA, are defined as pre-July 1, 1973, water rights. The effect of this contradictory provision is not clear.

In spite of the Attorney General's opinion and the 1981 statutory amendment, the question of the statutory requirement to file on post-January 1, 1962, ground water appropriations remains unsettled. Ultimately, a court decision may be required.

PRACTICE NOTE: Appropriators of ground water after January 1, 1962, and before July 1, 1973 (when the law was changed by the Water Use Act; see Chapter 3, infra), should file a notice of completion with the Department of Natural Resources and Conservation on Form 602 (Appendix C) as soon as possible, and also file a claim under the adjudication system. In this manner, a right to use the water will be obtained one way or the other.

2.5.1.3. Court-Approved Rights on Adjudicated Streams

An exclusive procedure for obtaining water rights on adjudicated streams was enacted in 1921.¹⁶¹ Prior to that date, water rights could be acquired in the usual ways--an 1885 filed right, or a use right. See secs. 2.5.1.2.1. and 2.5.1.1., supra, respectively. Allowing appropriators to acquire water rights on adjudicated streams fostered

159. 36 Op. Atty. Gen. No. 99.

160. 85-2-306(2), MCA.

161. 89-829 through 89-838, R.C.M. 1947.

insecurity for those appropriators whose rights had previously been adjudicated,¹⁶² so the 1921 law was adopted requiring a post-adjudication appropriator to obtain court approval of the appropriation. Obtaining the court's approval amounted to a decreed right, and it was mandatory; failure to comply with the statute resulted in no water right.¹⁶³

The procedure was fairly elaborate. A petition was filed with the court which had to contain certain information about the proposed appropriation, together with a map or aerial photograph showing the proposed facilities. Other appropriators were served with process, and, after an opportunity for other appropriators to present evidence, the court made its decision. An approved water right was subject to prior decreed rights, and its priority date was the date of filing the petition, although the court could fix a later date "if the facts warrant."¹⁶⁴

There was no clear statutory definition of what was an adjudicated stream. If interpreted broadly, the statutes conceivably could have meant that the entire state was adjudicated. One noted authority wrote that the statutes were "outlandishly broad," and might have been void for vagueness.¹⁶⁵ No cases have been found in Montana which define when a stream was adjudicated. Because of this

162. "Experience had shown that after the rights of all the parties taking water from a stream had been adjudicated, a subsequent appropriator would appear upon the scene, tap the stream and ruthlessly take the water.. ." *Anaconda Nat. Bank v. Johnson*, 75 Mont 401, 410, 244 P. 141 (1926).

163. *Anaconda Nat. Bank*, id.; *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940); *Donich v. Johnson*, 77 Mont. 229, 250 P. 963 (1926); *Hanson v. South Side Canal Users' Ass'n*, 167 Mont. 210, 537 P.2d 325 (1975).

164. *Supra*, n. 161.

165. Stone, Are There Any Adjudicated Streams in Montana?, 19 Mont. L. Rev. 19, 24, 25 (1957).

situation, it is extremely difficult today to determine whether a stream was adjudicated, and consequently whether the court's approval was required. Literally thousands of water rights are assumed to be valid in the state which in fact may not be because of the lack of a definition of an adjudicated stream. It has been suggested that "the most apparent and probable basis of limiting the geographical extent of an adjudication is economic: the effect will be limited to the directly affected economic area."¹⁶⁶ Or, put another way, if an appropriation was likely to adversely affect an adjudicated right, the stream was probably adjudicated.

PRACTICE NOTE: In spite of the problem of determining when a stream was adjudicated, all appropriations on streams that might have been adjudicated should be claimed under the current adjudication process. The water courts will then be left with deciding the issue.

2.5.1.4. Rights on Yellowstone River
Tributaries from 1950 to 1973

In 1953 a statutory filing system was enacted for appropriations of water from the tributaries to the Yellowstone River which were apportioned by the Yellowstone River Compact.¹⁶⁷ See sec. 10.1.. infra. These tributaries are the Clarks Fork, Big Horn, Tongue, and Powder rivers. The law was enacted to aid in implementing the Compact by building a record of uses of water on such tributaries after the Compact went into effect (January 1, 1950). Anyone claiming an appropriative right to the use of any water of any of the four tributaries with a priority date after January 1, 1950, was required to file a written statement of

^{166.} Id., at 25.

^{167.} 89-904 to 916, R.C.Y. 1947; 85-20-102 to 121, MCA.

the right containing certain information with the state engineer (predecessor of the Department of Natural Resources and Conservation). Domestic uses, and stock water uses with reservoir capacities of 20 acre-feet or less, were exempt.

The law presents a most interesting problem to current claimants of water rights on these tributaries. The requirement to file was clearly mandatory. But the law only provided for a misdemeanor fine for failure to comply. No mention was made concerning whether or not a filing was required in order to acquire a water right. Very few of these filings were actually made. In light of Murray v. Tingley¹⁶⁸ and other cases, the law probably will not be held to have required such filing to obtain a water right, but this issue remains unresolved.

The requirement is still in effect, although it's still totally ignored. A good argument can be made that the law has been **impliedly** repealed by the Water Use Act, since that Act set up an exclusive method to acquire water rights.

PRACTICE NOTE: When in doubt, always file a claim under the current adjudication system. Since the statute of limitations is one year for **misdemeanors**,¹⁶⁸ there is no danger of admitting noncompliance with the above law by filing a claim. Therefore, claims for such uses should be filed.

2.5.1.5. Permits in Controlled Ground Water Areas

The 1961 ground water code required that permits must be obtained to appropriate ground water in a controlled ground water area.¹⁷⁰ Only one controlled ground water area has been established in Montana to date, near Terry,

168. 20 Mont. 260, 50 P. 723 (1897).

169. 45-1-205, MCA.

170. 89-2918, R.C.M. 1947.

effective November 1, 1967. Several permits have been issued. This permit requirement has been carried forward in the new law.¹⁷¹

2.5.1.6 Adverse Use, Prescription, Condemnation, and Transfer

Until July 1, 1973, it was also possible to acquire water rights by adverse use and prescription, by condemnation in certain cases, and by transfer. In all these cases, however, the right already existed, and therefore they are treated separately herein. See **secs. 2.10.2., 2.10.3.,** and Chapter 5, infra.

2.5.2. Rights Acquired after July 1, 1973

Effective on July 1, 1973, all of the foregoing methods of acquiring water rights were abolished, except the permit method in controlled ground water areas. From that date forward, new water rights could only be acquired by complying with the Water Use Act.¹⁷² Indeed, to remove any doubt and avoid another Murray v. Tingley¹⁷³ situation, the Act is quite emphatic: "After July 1, 1973, a person may not appropriate water except as provided in this chapter...A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive."¹⁷⁴

Pursuant to the Act, water rights can now be acquired in three ways:

¹⁷¹. 85-2-508, MCA.

¹⁷². 85-2-101 to 807, MCA.

¹⁷³. 20 Mont. 260, M.P. 723 (1897).

¹⁷⁴. 85-2-331, MCA. Temporary emergency appropriations are authorized by rule pursuant to 85-2-113(3), MCA. See ARM 36.12.105, "Statutes and Rules," in the back of this handbook. Temporary emergency appropriations do not become water rights.

- (1) by permit, which ripens into a certificate;
- (2) by filing a notice of completion; and
- (3) by water reservation.

Each of these methods is described in Chapter 3, infra.

2.6. Determination of Water Rights

Determination of water rights, as used herein, refers to the methods of ascertaining the existence and extent of water rights, once they are acquired. The methods vary from state to state. The principal methods in Montana are described in this section.

2.6.1. Rights Acquired Before July 1, 1973

The information resulting from the pre-July 1, 1973, methods of determining water rights is important because it can be used to prove the rights under the adjudication system now in progress. See sec. 6.4.2., infra. In fact, such information is often the only information in existence, other than written records of water rights acquired under the methods outlined in sec. 2.5., supra.

2.6.1.1. Adjudication; Decreed Rights

Adjudication of water rights has gone through a rocky history in Montana. It has been relied upon since the last century as the best and final method to determine water rights, particularly when disputes between water users have occurred. Evidence of our history of heavy reliance upon adjudication can be seen today in the mandatory adjudication system now in progress. Indeed, Montana is the only state that has attempted to adjudicate water rights through the courts statewide on a mandatory, simultaneous basis, even

though other adjudication methods are employed in other states with the same degree of certainty and at less total cost.¹⁷⁵

Montana's pre-1973 efforts have been less than successful. Although one would think that an adjudication on a stream would settle things, that was hardly the case. Appropriators not made parties to the adjudication proceedings were not bound by the decrees.¹⁷⁶ This meant that, even after several adjudications on the same stream, water rights were never finalized. And, as has been discussed in sec. 2.4.1., supra, the quantities of water decreed were not reliable, since beneficial use is the real measure of a water right; the courts often made "adjustments" to previous decrees.¹⁷⁷ There is even a serious problem in determining whether or not a stream was, or is, adjudicated. See sec. 2.5.1.3., supra.

Montana's first attempt at regulating adjudications came in 1885, when a statute was enacted authorizing the plaintiff in an adjudication case to make "any or all persons who have diverted water from the same stream or source, parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action."¹⁷⁸ Then, in 1905, the legislature provided that the decree was "prima facie

175. Wyoming's administrative adjudication system and Utah's optional court system are examples.

176. State ex rel. McKnight v. District Court of Fifth Judicial dist. in and for Beaverhead County, 111 Mont. 520, 111 P.2d 292 (1941).

177. For an excellent description of the unreliability of adjudications under the pre-1973 law, see Stone, Are There Any Adjudicated Streams in Montana?, 19 Mont. L. Rev. 19 (1957).

178. 89-815, RCM 1947.

evidence of the facts therein found" as against all persons appropriating or diverting any of the waters of the stream.¹⁷⁹ This was followed in 1907 when further laws were enacted attempting to define the effect of a decree on other appropriators.¹⁸⁰ None of these enactments were very successful in affecting new appropriators who came along after a decree was entered, so in 1921 an exclusive and mandatory procedure was adopted requiring new appropriators to obtain the district court's approval before diverting the water. See **sec. 2.5.1.3.3**, supra. Finally, in 1939 the state engineer was authorized to bring general adjudications on streams; he never did.

Since the Water Use Act repealed all the above procedures in 1973, and substituted a new adjudication system, the old law does not deserve extended discussion. However, there are hundreds of old decrees still in effect, which must be relied upon in claiming water rights under the current adjudication process. In addition, in many cases, these decrees are still enforced through the appointment of water commissioners, a system which was left intact by the Water Use Act.¹⁸¹

PRACTICE NOTE: The practitioner should be aware of the problems surrounding decreed rights, particularly in the current adjudication process and when questions arise in the administration of the decrees by the courts and water commissioners. See Professor Albert Stone's excellent law review article on the **subject**.¹⁸²

2.6.1.2. Declared Rights

The declaration of water rights was another way in

179. 89-839, RCM. 1947.

180. 89-840 to 844, RCM. 1947.

181. 85-5-101 et seq., MCA.

182. *Supra*, n. 177.

which water rights were determined. The process usually involved the filing of a document, which claimed the right. The difference between declarations and other kinds of filings is that a declaration was not required to acquire a water right, the water right already being in existence.

2.6.1.2.1. 1885 Declarations

As a part of the enactment of the 1885 filed rights procedure (see sec. 2.5.1.2.1., supra), a procedure was also adopted for the declaration of water rights acquired by common law (use) before 1885. Appropriators who had acquired such rights were in effect given the option of declaring their rights within six months from the enactment of the 1885 law. The declarations had to contain the same information and be verified in the same manner as an 1885 filed right (see sec. 2.5.1.2.1., supra). As with 1885 filed rights, the record became prima facie evidence of the statements therein.¹⁸³

Even though the law was not mandatory, the inducement for filing a declaration was the prima facie status the declaration obtained.¹⁸⁴ Many of these declarations were filed, and of course still enjoy that prima facie status. Presumably, the same rules as to the sufficiency of 1885 filed rights would apply to these declarations. See sec. 2.5.1.2.1., supra. Properly done and recorded, the declarations are most useful evidence of old water rights.

2.6.1.2.2. Ground Water Uses Before January 1, 1962

The 1961 ground water code provided that appropriators

¹⁸³. 89-813 to 814, R.C.M. 1947.

¹⁸⁴. *Salazar v. Smart*, 12 Mont. 395, 30 P. 676 (1892).

of ground water, including appropriations by subirrigation or other natural process, who put the water to beneficial use before January 1, 1962, could file a "declaration of vested ground water rights" with the appropriate county clerk and recorder.¹⁸⁵ Certain information was required to be stated in the declaration. The declaration did not have to be verified, but nonetheless it acquired a prima facie status of the statements therein when filed. Persons who filed water well logs pursuant to a 1957 law were deemed to have complied with the statute. Failure to file resulted in the appropriator having to maintain the burden of proving his unrecorded rights. By amendment to the original law, the deadline for filing these declarations was extended to January 1, 1966.¹⁸⁶

Thousands of these declarations were filed. Copies were also sent to the predecessor agency of the Department of Natural Resources and Conservation. These declarations are very useful evidence of pre-January 1, 1962, ground water rights.

PRACTICE NOTE: Under the current adjudication system, a claim of a pre-January 1, 1962, ground water right, not declared as provided above, will be given prima facie status. Even though domestic and stock water uses of ground water are not required to be claimed, the prima facie status accorded to claims for such uses is reason enough to file such claims. Otherwise, the appropriator will carry the burden of proving his ground water right at some future date. See sec. 6.2., infra.

2.6.1.3. Rights on Yellowstone River
Tributaries from 1950 to 1973

See sec. 2.5.1.4., supra, for a discussion of these

¹⁸⁵. 89-2913(h), RCM. 1947.

¹⁸⁶. One cannot find this amendment in the last (1977) supplement to the 1947 Revised Codes of Montana. See 1965 Mont. Laws, ch.21, sec. 1.

claims. Since it is probable that these filings amounted to only claims of water rights, rather than filings to acquire water rights, they are also listed herein. These filings were not given prima facie status by statute. However, they were verified, and the claimant swore that the matters and facts contained therein were true; this might have the effect of elevating the filings to a prima facie status. Hardly any of these filings were actually made.

2.6.1.4. Water Resources Surveys

In the late 1930's, the state engineer's office began a process of surveying water uses and water rights in Montana, county-by-county. The surveys of most counties are now completed, and are available at the offices of the Department of Natural Resources and Conservation. Although they have no official status, they are the best sources of information now available on 1885 filed rights and irrigation uses in those counties and have been frequently used by the courts in the past to adjudicate water rights.

2.6.2. Rights Acquired After July 1, 1973

With the enactment of the Water Use Act in 1973, the methods to determine water rights were substantially changed. Essentially, there is now only one method: adjudication. The adjudication process is triggered, however, by the filing of a claim, or a declaration before the current adjudication system was adopted in 1979. The former and current processes are discussed briefly in this section.

2.6.2.1. Declarations in Powder River Basin

The Water Use Act, as originally adopted in 1973, established an optional adjudication system to adjudicate pre-July 1, 1973, water rights (termed "existing rights" by the Act). Upon an order of the Department of Natural Resources and Conservation, holders of existing rights could be required to file verified declarations of their rights within one year on any source of water the Department determined. This process was initiated in the Powder River basin in 1974, and several thousand declarations were filed.¹⁸⁷

Declarations filed on the Powder River basin have now been incorporated into the current mandatory adjudication system. In fact, a preliminary decree of existing rights in the Powder River basin has even been issued by the water court. See Appendix Cc. As of the date of this writing, the decree is at the objection stage.

2.6.2.2. Adjudication

Today, a mandatory claim registration and court adjudication system, now in progress, is the primary method of determining pre-July 1, 1973, water rights. See Chapter 6 for a description of the system.

2.6.2.3. Administrative Determination

It is possible, under the administrative system set up by the Water Use Act for the processing of applications for permit and changes in water rights, for pre-July 1, 1973, water rights to be determined for limited purposes. This

187. 89-870 to 879, R.C.M. 1947. In 1975 an amendment was made to 89-872 which provided that the courts would issue the order to file declarations, not the Department. The Department petitioned the appropriate district courts to issue such orders in certain

comes about because pre-July 1, 1973, water rights are often involved in the administrative proceedings to decide whether a new water right by permit should be approved, or whether a water right change should be approved. Particularly in hearing situations on applications for permits or changes, the Department of Natural Resources and Conservation will issue orders making findings of fact and conclusions of law determining other water rights.

The exact effect of these determinations is not yet clear. It appears, however, that such determinations are only useful for the guidance of the agency; it is clear they are not actual adjudications binding on the courts.¹⁸⁸

See Chapters 3 and 4, respectively, for a description of the process of obtaining permits and changing water rights.

2.7. Priority

The heart of Appropriation Doctrine law is priority. Priority, or the date of the water right, entitles the appropriator to appropriate an amount of water to the full extent of the right, when he needs it and within his right, even though thereafter there would not be sufficient water to fill the needs of others who have later priorities. "The priority date is of paramount importance since it gives an appropriation its chief value."¹⁸⁹

Priority of appropriation confers superiority of right,

other areas of the state as well in the late 1970's, but the orders were never actually effective, for various reasons.

188. See, e.g., *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. 59, 332 P.2d 465 (1958), and *Wyoming v. Colorado*, 259 U.S. 419 (1922).

189. 5 Clark, *Waters and Water Rights*, see 410.1, at 119 (1972). See also *General Agriculture Corp. v. Moore*, 166 Mont. 510, 534, P.2d 859 (1975) ("...priority in appropriation of water is a valuable right...")

without reference to the character of the use.¹⁹⁰ However, the priority rights of an appropriator are limited to the natural condition of the stream at the time the appropriation is made, and he has no interest in improvements subsequently made which increase the supply of water flowing in it.¹⁹¹

2.7.1. First in Time, First in Right

As between appropriators, the first in time is first in right; an appropriator having an earlier priority date is entitled to exercise his right first, until his needs are fulfilled, but only to the extent of his right. (See previous sections in this chapter for discussions of the extent of appropriative water rights in Montana, and how the priority dates of water rights are acquired.) The principle of first in time is first in right was first codified in Montana in 1885;¹⁹² it remains in the statutes today.¹⁹³

2.7.2. Rights of Senior and Junior Appropriators

An appropriator having a priority date earlier than another appropriator is called a "senior" appropriator; the appropriator having the later priority date is the "junior" appropriator. Even though, as mentioned, the senior appropriator has the superior right, he does not have an absolute right to prevent changes in the rights of the other appropriators, or to a certain flow or level of water; if a senior appropriator can reasonably exercise his right, even

190. *Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921); *Meine v. Ferris*, 126 Mont. 210, 247 P.2d 195 (1952).

191. *Meine, id.*; *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.*, 34 Mont.

135, 85 P. 880 (1906); *Jones v. Hanson*, 133 Mont. 115, 320 P.2d 1007 (1958).

192. 89-807, R.C.M. 1947.

193. 85-2-401, MCA.

under slightly changed conditions, he is still protected.¹⁹⁴ But a senior appropriator is protected from appropriations or changes which adversely affect the exercise of his right.¹⁹⁵ The question of "adverse effect" is one of degree, and will depend upon the circumstances of each case.

Junior as well as senior appropriators have the right to insist that the stream remain in substantially the same condition as they found it. Thus, the law also protects junior appropriators from expanded uses by senior appropriators, and from changes in senior rights which would adversely affect junior rights.¹⁹⁶

A senior appropriator is entitled to the natural flow of the stream, including seepage, unaffected by artificial works of subsequent appropriators.¹⁹⁷ But a senior appropriator cannot demand that a junior appropriator cease exercising his right, if the water not appropriated by the junior appropriator would not reach the senior because of seepage or other natural causes.¹⁹⁸

It is quite common for appropriators to possess several

194. *Dem v. Tanner*, 60 F.2d 626 (D. Mont. 1932). For a codification of these rules under current law, see 85-2-401, MCA, wherein it is stated: "Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of stream flow or 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."

195. See, e.g., *Power v. Switzer*, 21 Mont. 523, 55 P. 32 (1898); *Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909); *State ex rel. Crowley v. District Court of Sixth Judicial District in and for Gallatin County*, 108 Mont. 89, 88 P.2d 23 (1939); *State ex rel. Reeder v. District Court of Fifth Judicial Dist. in and for Beaverhead County*, 100 Mont. 376, 47 P.2d 653 (1935); *State ex rel. Silve v. District Court of Tenth Judicial Dist. in and for Judith Basin County*, 105 Mont., 106, 69 P.2d 972 (1937); *Wallace v. Weaver*, 47 Mont. 437, 133 P. 1099 (1913).

196. See, e.g., *Columbia Min. Co. v. Holter*, 1 Mont. 296 (1871); *Dahlberg v. Lannon*, 84 Mont. 68, 274 P. 151 (1929); *Loyning v. Rankin*, 118 Mont. 235, 165 P.2d 1006 (1946); *Power*, supra, n. 195; *State ex rel. Nett v. District Court of Eighth Judicial Dist. in and for Cascade County*, 72 Mont. 206, 232 P. 204 (1925).

197. *Beaverhead*, supra, n. 191.

198. *Loyning*, supra, n. 196; *Raymond v. Winsette*, 12 Mont. 531, 31 P. 537 (1892); *Spaulding v. Stone*, 46 Mont. 483, 129 P. 327 (1913).

water rights. Each right held by an appropriator is separate and distinct from the others. This means that a junior right cannot be advanced by merging it with a senior right of the same appropriator; obviously, that would result in a change in the conditions of the source of supply.¹⁹⁹ On the other hand, a junior appropriator cannot compel a senior appropriator to stop exercising one right when the senior could just as easily get his water from another stream under another right.²⁰⁰ In addition, an agreement among appropriators to "rotate" the exercise of their water rights is permissible.²⁰¹

On streams where storage reservoirs exist, special problems arise as between junior and senior appropriators. See **sec. 2.4.7.**, supra, for a discussion of the relative rights of each.

2.7.3. Modifications to Priority System

Even though Appropriation Doctrine water rights carry priority dates, modifications to the system of priorities do occur. The most common modification is to give certain uses preference, usually imposed by statute. Preferred uses in Montana are discussed in **sec. 2.4.6.**, infra. Another modification results when water rights are rotated among users, discussed in **sec. 2.7.2.**, infra. Prorating supplies

199. *Park v. Park*, 45 Colo. 346, 101 P. 403 (1909).

200. *Norman v. Corbley*, 32 Mont. 195, 79 P. 1059 (1905); *Boyd v. Huffine*, 44 Mont. 306, 120 P. 228 (1911) (This case may have hinged on the fact that exercise of the second right required an expansion of use of the second right, possibly adversely affecting junior appropriators on the other stream). See also *Wheat v. Cameron*, 64 Mont. 494, 210 P. 761 (1922).

201. This may be true only where the statutes expressly authorize such practice, or where the courts order it. See 5 Clark, *Waters and Water Rights*, sec. 410.1, at 119, n. 15 (1972). It would seem, however, that a voluntary rotation agreement would be upheld if there is no interference with other water rights outside of the agreement.

in times of scarcity is a third method. No statutory basis exists for this practice in Montana, although proration agreements among water right holders has occurred in our state; it is a common practice in water distribution systems owned by water companies or water districts. However, in those situations the water rights are not usually prorated, but rather the contractual or distributive share rights are prorated.

2.8. Appurtenancy

Appropriation Doctrine water rights in Montana are appurtenant to land when they are used for beneficial purposes in connection with the land, and they pass with a conveyance of the land, even though not specifically mentioned, unless expressly reserved.²⁰² But an appurtenant water right, like all other appurtenances, may be severed from the land to which it is appurtenant.²⁰³

The rule of appurtenancy began in the last century by court decision, and has been carried forward today in the Water Use Act for new water rights acquired under the Act.²⁰⁴ It has been said that the Water Use Act repealed the appurtenancy rule--not so, since the rule was developed by the courts, and the Act's appurtenancy provision does not state that existing rights are no longer appurtenant. There is, however, now a requirement that a water right (pre- or

202. See, e.g., *Tucker v. Jones*, 8 Mont. 225, 19 P. 57 (1888) (water rights, being appurtenant, pass with a conveyance even if the conveyance does not mention the word "appurtenances"); *Sweetland v. Olsen*, 11 Mont. 27, 27 P. 339 (1891) (pass with a conveyance unless expressly reserved); *Adams v. Chilcott*, ___ Mont. ___, 36 St. Rep. 1238, 597 P.2d 1140 (1979); *MacLay v. Missoula Irr. Dist.*, 90 Mont. 344, 3 P.2d 286 (1931).

203. See, e.g. *Brennan v. Jones*, 101 Mont. 550, 55 P.2d 697 (1936); *Adam*, supra, n. 202.

204. 85-2-403(1), MCA.

post-July 1, 1973) may not be made appurtenant to other lands or severed from the land to which it is currently appurtenant without prior approval of the Department of Natural Resources and Conservation.²⁰⁵

Shares of stock in a corporation entitling the owner thereof to water from a distribution system owned by the corporation are also appurtenant to the land where the water is used.²⁰⁶ Changing the place of use from one tract to two tracts makes the right appurtenant to both tracts.²⁰⁷ But, if the appropriator doesn't own the land upon which the water is used, the right is not appurtenant to that land, and therefore does not pass with its conveyance.²⁰⁸

In many cases, water is not used in connection with land. For example, an instream water right for fish and wildlife purposes, such as under a water reservation (see sec. 2.4.4., supra), is not used in connection with the use of any land. Power generation purposes might be another example, although these rights would probably be appurtenant to land in most cases.

205. 85-2-403(3), MCA. The Department handles this approval provision by assuming that severing a water right from the land to which it is appurtenant, or making it appurtenant to other lands, amounts to a change in the place of use of the water right for which the approval of the Department must also be obtained. See 85-2-406, MCA, and Chapter 4 herein. If a change in place of use is approved, then the appurtenancy change is also approved, by implication. However, it is possible for a water right to be severed from its appurtenant land without changing the place of use, at least not immediately. For example, a farmer could sell his irrigated farm, reserving the water rights to himself (a severance), and then not use the water rights for years. The rights have been severed, but no change in place of use has occurred because the rights are not being exercised. Situations like this have basically been ignored by the Department because of the impracticality of policing the situation. Does failure to obtain the Department's prior approval void the transaction? See n. 308, *infra*. Failure to comply is a misdemeanor. 85-2-122, MCA.

206. *Schwend v. Jones*, 163 Mont. 41, 515 P.2d 89 (1973); *Yellowstone Valley Co. v. Associated Mortg. Investors*, 88 Mont. 73, 290 P. 255 (1930).

207. *Spaeth v. Emmett*, 142 Mont. 231, 383 P.2d 812 (1963). See also n. 205, *supra*.

208. *Warren v. Senecal*, 71 Mont. 210, 228 P. 71 (1924). Remember that the appropriator is the owner, assignee, or lessee of the water right.

2.9. Changes in Water Rights

Changes in water rights refer to changing some aspect of the water right, including changes in the point of diversion, place of use, purpose of use, place of storage, and method of appropriation and transmission. In general, such changes may be made without loss of priority if no material injury ("adverse affect") will result to other appropriators, including those with downstream junior priorities. This rule is now codified in the Water Use Act, wherein changes in the place of diversion, place of use, purpose of use, or place of storage must be approved by the Department of Natural Resources and Conservation, and the Department must approve the proposed change if it will not "adversely affect the rights of other persons."²⁰⁹

As discussed in sec. 2.7., supra, the change rule results from an attempt to protect an appropriator's priority. Once an appropriative right is acquired, the appropriator is entitled to demand that the conditions of the stream or other source of supply remain substantially unchanged so that his water right is protected; changes in other appropriators' water rights could result in changes in the condition of the source of supply as the appropriator found it when he began his appropriation. Of course, as has been discussed in previous sections, an appropriator is entitled only to the natural condition of the source of supply (he can't demand water developed by someone else

²⁰⁹. 85-2-402, MCA. See Chapter 4 for a description of the change approval process under current law. Montana's original change statute, enacted in 1885, provided as follows: "The person entitled to the use of water may change the place of diversion, if

which is not naturally part of the source of supply) less the appropriations of senior appropriators.

As one would expect, changes in water rights have led to much litigation, in Montana as elsewhere. Besides the general rule that other appropriators (junior or senior) may not be adversely affected (also called by various other names, such as "injured", "prejudiced", and "harmed") by a change, the following specific rules have also evolved:

- (1) Changes which do adversely affect other rights do not result in actual loss of the changed right;²¹⁰
- (2) An appropriator alleging injury by a change has the burden of proving the same;²¹¹
- (3) A water right cannot be changed so as to deprive other water right holders of water under their rights;²¹²
- (4) The general rule also applies to decreed rights;²¹³
- (5) A change so as to increase another appropriator's costs for paying for a water commissioner is not an adverse effect;²¹⁴

others are not injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated." 89-803, R.C.H. 1947.

210. Hansen v. Larsen, 44 Mont. 350, 120 P. 229 (1911).

211. Hansen, id.; Lokowich v. City of Helena, 46 Mont. 575, 129 P.2d 1063 (1913); Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 P.2d 370 (1933); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974). See sec. 4.2.3.

212. Head v. Hale, 38 Mont. 302, 100 P. 222 (1909). Obviously this practice would be an adverse effect on another appropriator.

213. McIntosh v. Grawley, 159 Mont. 72, 495 P.2d 186 (1972); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940). The same is true today under the Water Use Act. 85-2-402, MCA. See Chapter 4.

214. McIntosh, id.

- (6) Ordering an appropriator to install a measuring device so that he won't divert more water as the result of a change is sufficient to eliminate any possibility of adverse effect;²¹⁵
- (7) An appropriator cannot change his right so as to use more water than he is entitled to under his right (also called increasing the burden on the stream), but he can use more if he replaces the additional burden with water from another source;²¹⁶
- (8) Any change can be made without injury to upstream appropriators;²¹⁷
- (9) An upstream appropriator has no right to change the place of use so as to prevent return flow for use by a downstream appropriator;²¹⁸
- (10) A change in point of diversion cannot be made where it is shown that such change would render impossible a program of exchanging canal water for the natural flow of the stream, reducing by approximately 20 percent the amount

215. This rule would also be true when the Department approves a change under the Water Use Act. See sec. 4.2.4.

216. *Meine v. Ferris*, 126 Mont. 210, 247 P.2d 195 (1952); Thompson, supra, n. 211. Of course, replacement water may involve a change of another water right, or even a new water right.

217. *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206 (1936). This would seem to make sense, since a downstream appropriator can't affect an upstream appropriator. But what about the situation when a downstream appropriator expands his use, and then demands more water from upstream? If the downstream appropriator does not have the right to expand (see sec. 2.5.1.2.1., due diligence), then he cannot make such demand.

218. *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959 (1896). See discussion of return flow in sec. 2.3.6.

of water available to junior appropriators above the canal;²¹⁹

(11) Changes in purpose of use so as to consume more water, or use water at different times of the year, are not permitted;²²⁰ and

(12) A change of purpose of use to the sale of water from a direct use is permitted if there will be no adverse effect on other appropriators.²²¹

In addition to the above specific rules, there are other guidelines not yet enunciated by the Montana Supreme Court, some of which deserve mention. These other guidelines have been developed by the Department of Natural Resources and Conservation over the years in the administration of the Water Use Act and are applied by the Department when it acts upon a change application. They are as follows:

(1) Changing the point of diversion of a right so that ground water is appropriated, rather than surface water, or vice versa, is a questionable practice; in most instances this would amount to changing the source of supply which is not contemplated by the Appropriation Doctrine, but the hydrological connection between the two sources would have to be

219. Thompson, *supra*, n. 211. Apparently, exchanges of water are part of the binding conditions of the stream when junior appropriators arrive on the scene.

220. Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911). This amounts to increasing the burden on the stream. See number (7). See also sec. 2.4.1. for a discussion of period of use.

221. Sherlock v. Greaves, 106 Hoot. 206, 76 P.2d 87 (1938).

determined in each case;

- (2) Changing from a direct flow diversion to a storage appropriation is permissible, provided that the water right is not expanded; the same pattern established under the right must be followed under the change, including period of appropriation and water being appropriated;
- (3) Theoretically, the points of diversion of a water right can be changed to anyplace on the source of supply; this would mean that it is possible to move a water right from Dillon to Glendive (the source of supply being the Missouri drainage), and vice versa, provided as usual that no adverse effect occurs;²²²
- (4) Changing from flood to sprinkler irrigation, although more efficient, will usually involve expanding the acreage irrigated (a change in place of use), and an increase in the burden on the stream because the return flow is reduced (see sec. 2.3.6., supra); therefore, a water right will have to be acquired for the increased appropriation, unless it's within the existing water right through due diligence (see sec. 2.4.1., supra);²²³
- (5) It is doubtful whether water rights can be changed from an instream purpose of use,

222. See Spring Creek Irr. Co. v. Zollings, 58 Utah 90, 197 P. 737 (1921).

223. See n. 47, supra.

since it seems that a diversion is required in order to maintain an appropriative water right;²²⁴ and

- (6) Moving a well will usually be a change in the point of diversion; deepening a well will usually be a new appropriation, since it will be an appropriation from a new source of supply.

All of the above rules and guidelines have current application. Now, of course, changes in any water right must receive the prior approval of the Department. See Chapter 4 for a description of the change approval process.

2.10. Loss of Water Rights

This section describes the ways in which water rights could and can be lost by the appropriator through operation of law. In the cases of prescription and condemnation, the rights are acquired by someone else, these methods are therefore also listed as methods of acquiring water rights. See sec. 2.5., supra.

2.10.1. Abandonment and Forfeiture

The terms "abandonment" and "forfeiture" are sometimes used interchangeably. Technically, an abandonment requires intent to abandon; forfeiture does not.

In Montana, until July 1, 1973, an appropriator could lose his water right through abandonment. Today, water rights can also be abandoned, but under certain statutory requirements, discussed infra.²²⁵ In addition, failure to

224. See secs. 2.4.3. and 2.4.4.

225. See 85-2-404, MCA.

claim a water right under the current adjudication system results in "a conclusive presumption of abandonment."²²⁶

Montana's original abandonment statute was enacted in 1885: it merely codified existing law by providing that a water right could be abandoned, and questions of abandonment were questions of **fact**.²²⁷ There are several Montana Supreme Court cases on the subject, but in only a few did the court uphold an **abandonment**.²²⁸ The difficulty was that an intent to show abandonment had to be proved,²²⁹ and the burden to prove the intent was on the party asserting an abandonment.²³⁰ Mere nonuse of the water was not sufficient evidence of intent to **abandon**,³³¹ even when the right wasn't used for ten years,²³² or for successive **three-**, seven-, and four-year periods and the original appropriator had left the **state**;²³³ neither is transfer of the water right²³⁴ or an abandonment of the ditch right sufficient evidence.²³⁵ An appropriator's filing of a notice of appropriation to acquire a new water right is likewise insufficient evidence of intent to abandon prior rights.²³⁶

The cases which have found an abandonment of a water

226. 85-2-226, MCA. This is really a forfeiture, since intent is not required, and there is no opportunity to rebut.

227. 89-802, R.C.M. 1947, repealed.

228. The author has found four, cited in ns. 236 to 240, *infra*.

229. See, e.g., *Featherv. Hennessy*, 43 Mont. 310, 115 P. 983 (1911); *Rodda v. Best*, 68 Mont. 205, 217 P. 669 (1923).

230. *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923).

231. *Sloan v. Glancy*, 19 Mont. 70, 47 P. 334 (1896).

232. *Rodda*, *supra*, n. 229; *Smith v. Hope Mining Co. of St. Louis*, 18 Mont. 432, 45 P. 632 (1896) (facility repaired during the ten-year period, however).

233. *Thomas*, *supra*, n. 230.

234. *McDonald v. Lannen*, 19 Mont. 78, 47 P. 648 (1897).

235. *Kleinschmidt v. Greiser*, 14 Mont. 484, 37 P. 5 (1894); *McDonnell v. Huffine*, 44 Mont. 411, 120 P. 792 (1912).

236. *Norman v. Corbley*, 32 Mont. 195, 79 P. 1059 (1905). This case could also be used for the proposition that applying for a permit under the Water Use Act is not evidence of intent to abandon prior rights, a question which frequently arises under the

right under Montana law are few and confusing. The first case, in 1874, declared that an an invalid conveyance of a water right results in its abandonment, although this case may not be good law.²³⁷ In the second case, an appropriation was made in 1883, and water was actually put to irrigation and domestic use. The ditches and flumes were then allowed to fall into disrepair and became filled up, so they would convey no water. They remained in this condition until shortly before the lawsuit was brought (1898). In addition, there was evidence that the successor to the right asserted in the lawsuit had made statements that she was making no claim to the right because her predecessor (her husband) made no claim.²³⁸ The third case held that an appropriator switching his use to another water right from another source exclusively for 12 years constituted an abandonment.²³⁹ The fourth and last case was decided in 1979, holding that 75 years of nonuse is sufficient to provide clear evidence of abandonment.²⁴⁰

The 1973 Water Use Act repealed the old code section on abandonment²⁴¹ and enacted a new one.²⁴² Under the new law, a water right is considered abandoned by nonuse and intent to abandon or by nonuse and intent not to comply with the terms and conditions of a permitted or certificated water

new law.

237. *Barkley v. Tieleke*, 2 Mont. 59 (1874). This case appears to confuse ditch rights with water rights.

238. *Goon v. Proctor*, 27 Mont. 526, 71 P. 1003 (1903).

239. *O'Shea v. Doty*, 68 Mont. 316, 218 P. 658 (1923).

240. *Holmstrom Land Co. v. Meagher* County Newlan Creek Water Dist., ___ Mont. ___, 36 St. Rep. 1403, 605 P.2d 1060 (1979). Actually, the right in this case was never used to the full extent of the notice of appropriation, so the court declared the unused portion abandoned. The situation is really one of a lack of due diligence in putting the water to beneficial use. See sec. 2.5.1.2.1.

241. 89-802, RCM. 1947.

242. 85-2-404, MCA. For the full text of the law, see "Statutes and Rules."

right; a prima facie presumption of abandonment is created upon ten successive years of nonuse when water is available to appropriate. However, this abandonment provision has no current application to pre-July 1, 1973, water rights; it applies only to permits and certificates at the present time. It will apply to pre-July 1, 1973, rights ("existing rights") only after they are adjudicated. Is there still an abandonment law applying to pre-July 1, 1973, rights? Probably so, since the law of abandonment in Montana originates from common law, and the 1885 statute which was repealed in 1973 only restated the common law.

PRACTICE NOTE: Claimants of water rights under the adjudication system may have their claims challenged due to an alleged abandonment. Remember that the objector (see sec. 6.5.6., infra) has the burden of proving the abandonment. See also sec. 6.4.4., infra.

2.10.2. Adverse Use and Prescription

Until July 1, 1973, water rights could also be lost through adverse use and prescription. Loss and acquisition of water rights by this method are now abolished.²⁴³ Questions of adverse use and prescription will arise in the future, but only rarely, as existing water rights are litigated, involved in administrative proceedings before the Department of Natural Resources and Conservation, or considered in the adjudication system now in progress. And, once the adjudication of existing water rights is completed, the question will no longer arise. The subject does not, therefore, deserve extended discussion.

There is a plethora of cases on the subject in Montana. This is probably true because adverse use could easily be

243. 85-2-301, MCA.

asserted in a water rights lawsuit. The practitioner should review the cases and articles listed in n. 244 for an explanation of the law if the need arises.²⁴⁴

2.10.3 Condemnation

In certain instances, water rights may be lost through condemnation. Under Montana law, only cities and towns and the Department of Natural Resources and Conservation may condemn water rights. See **sec. 2.4.6., supra**. Water rights might also be lost as an appurtenance to land condemned for some purpose. The federal government also undoubtedly has the power to condemn water rights pursuant to federal laws, a subject which is beyond the scope of this book.

It should also be noted that the power to condemn land for right-of-way for ditches and other means of conveying water has been delegated to anyone in Montana under the **Montana** Constitution. See Chapter 8, infra.

PRACTICE NOTE: If a client's land is being condemned for some purpose, such as a highway, the lawyer should be sure that any appurtenant water rights are not also being condemned. The best way to handle this is to expressly exempt any appurtenant water rights from the taking.

²⁴⁴. See Ettien, Water Rights: Prescriptive Right to the Use of Water in Montana, 3 Mont. L. Rev. 135 (1942) for a description of the cases and law as of 1940. For more recent cases, see *Firestone v. Bradshaw*, 157 Mont. 181, 483 P.2d 716 (1971); *Forrester v. Rock Island Oil & Refining Co.*, 133 Mont. 333, 323 P.2d 597 (1958); *Gwynn v. City of Philipsburg*, 1% Mont. 194, 478 P.2d 855 (1970); *Havre Irr. Co. v. Majerus*, 132 Mont. 410, 318 P.2d 1076 (1957); *Jones v. Hanson*, 133 Mont. 115, 320 P.2d 1007 (1958); *King v. Schultz*, 141 Mont. 94, 375 P.2d 108 (1962); *O'Connor v. Brodie*, 153 Mont. 129, 454 P.2d 920 (1969); *Smith v. Krutar*, 153 Mont. 325, 457 P.2d 459 (1969); *Stover v. Elliot*, 137 Mont. 135, 350 P.2d 585 (1960).

CHAPTER 3. ACQUISITION OF WATER RIGHTS

(SEMINAR OUTLINES: See Obtaining a New (post-July 1, 1973) Water Right, by Donald D. MacIntyre, Chief Legal Counsel, DNRC; Obtaining a New Right, by Laurence Siroky, Chief, Water Rights Bureau, DNRC; and the Hearing Process, by Matt Williams, Esq., Hearings Officer, Water Rights Bureau, DNRC; in "Seminar Outlines" in the back of this handbook.)

3.1. Historical Background

The historical background of acquiring water rights in Montana is described in detail in **sec. 2.5.**, supra. That section should be read for familiarity with the different methods by which water rights could be acquired before July 1, 1973, the effective date of the Water Use Act.²⁴⁵ In addition, Chapter 2, supra, describes the principles of the Appropriation Doctrine in Montana, including the concepts of beneficial use and priority, all of which should be reviewed by one unfamiliar with the water law in our state. The acquisition of new waters today depends to a substantial extent upon these concepts, as will be seen in the remainder of this chapter.

3.2 Statutory System--Water Use Act of 1973

Today, as discussed briefly in **sec. 2.5.2.**, supra, there is basically only one way to acquire a new water right in Montana, and that is by compliance with the mandatory requirements of the Water Use Act of 1973, as amended. In this section the statutory system for acquiring new water rights will be described and discussed.

Whether a new water right is necessary to acquire is a question that the practitioner and potential applicant will need to assess. Obviously, the answer to that question will

²⁴⁵ 85-2-101 to 807, MCA. The Water Use Act of 1973 has actually been amended several times but the Act remains substantially intact in the cited sections.

depend upon the actual water needs of the appropriator and the economics of each particular situation. In addition, however, it will depend upon the existing legal requirements of the Act, discussed infra. And in many cases, it will depend upon whether the appropriator already has, or can acquire, existing water rights to accomplish the same purpose.

Sometime in the future, most pre-July 1, 1973 water rights will be adjudicated under the adjudication system now in effect. See Chapter 6, infra. Even after that time, but particularly before then, a potential appropriator needs to understand the extent of the rights he already possesses. A review of Chapter 2 herein will acquaint one with the basic Appropriation Doctrine law on water rights in Montana, the foundation upon which all water rights in our state are based. Understanding this foundation will aid a potential appropriator, and the practitioner, in making the decision of whether or not to pursue the acquisition of a new water right.

Acquisition of a new water right under the Water Use Act (or subjecting oneself to it, depending upon one's point of view) can be a time-consuming process; in complicated situations it may take several months, or even years, to obtain a permit. It can also be costly if unanticipated delays are incurred or experts, such as lawyers and engineers, are needed. On the other hand, most applications are handled expeditiously with little delay, particularly in areas of the state where there are few water supply problems.

PRACTICE NOTE: In all cases, the author recommends that a potential applicant for a new water right first contact the Department of Natural Resources and Conservation for an assessment of the problems likely to be encountered. The Department staff best knows the water right and water resource situations in Montana. Its assistance will be most helpful before a final decision is made to apply. The Department has field staff in several areas. See back of Form 602, Appendix C. The local field office should be contacted first.

3.2.1. Purposes

The basic purpose of the Water User Act is to bring order to chaos.²⁴⁶ As noted in "Chapter 1. Introduction," Montana depended upon a decentralized and essentially unrecorded system of water rights for over a century. The situation eventually became unmanageable and potentially harmful to the state's interests, and a centralized system of water rights administration was adopted, with the Department of Natural Resources and Conservation as the administering agency. In addition, after a slow start, a statewide court adjudication system was instituted for pre-July 1, 1973, water rights. See Chapter 6. By requiring the adjudication of old water rights, and the documentation of new water rights through a centralized permit and certificate process, it was hoped that order out of chaos would result.

3.2.2. Administrative Practice and Procedure

3.2.2.1. General

In general, the Water Use Act establishes an administrative system for the acquisition of new water rights through the Department. The basic system is the acquisition of water rights by permit, but in certain cases

246. The Act is more charitable. See 85-2-101, MCA.

water rights can also be acquired by filing a notice of completion or by obtaining a water reservation. All these methods are described below.

The statutory method for acquiring a new water right is exclusive. In fact, the Act is quite emphatic:

After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person **may** only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is **exclusive**.²⁴⁷

Failure to comply with the provision is a **misdemeanor**.²⁴⁸ But an obviously more onerous effect is that the violator-appropriator simply has no water right.

3.2.2.2. Waters Subject to Appropriation

What waters can actually be appropriated under the Appropriation Doctrine of water rights has been the subject of much history. See **sec. 2.3., infra**. Distinctions were drawn between surface waters, diffused surface waters, watercourse waters, flood waters, waste water, seepage **water**, return flow, ground waters, percolating waters, etc. following definition:

'Water' means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffused surface water, and sewage **effluent**.²⁴⁹

Any water under this definition may be appropriated and a water right obtained for the same by compliance with the procedures set forth in the Act. Basically, if the water exists, it is subject to appropriation.

²⁴⁷. 85-2-301, MCA.

²⁴⁸. 85-2-122, MCA.

²⁴⁹. 85-2-102(14), MCA.

The 1972 Montana Constitution asserts that "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."²⁵⁰ The 1889 Constitution did not contain a similar provision. As mentioned in **sec. 2.3.**, infra, water has always been held to be publici juris, so this constitutional provision, in the opinion of the author, really did nothing except restate the existing law, except perhaps as to atmospheric waters. And, obviously the statement cannot be entirely true since large quantities of water are owned by the federal government for its withdrawn lands and in trust for Indian reservations.

Nevertheless, interesting comparisons can be made between the constitutional provision and the definition of water under the Water Use Act, quoted above. If the Constitution is to be interpreted as including only surface and ground waters of watercourses and underground channels, as did the Appropriation Doctrine law in Montana until 1973, then the Act goes beyond the Constitution in its coverage. In fact, the Act's definition of water is one of the broadest in the country. The reason for this is to eliminate the artificial distinctions drawn under prior law, **and** to legally recognize that all waters are in fact hydrologically connected.

PRACTICE NOTE: Technically, practically any kind of withdrawal, impoundment, diversion, or other appropriation of water for beneficial use is subject to the Act. Even certain farming practices, such as furrowing, impound runoff water. In some areas of the state, it is common practice to

250. Mont. Const. of 1972, art. IX, sec. 3(3).

construct little dikes across fields to catch runoff. See sec. 2.3., supra. Obviously, it would be impractical to obtain water rights for all these practices. The practical test is whether the appropriation might reduce waters available for other appropriators, present or future, and whether the appropriator needs a protectible water right.

3.2.2.3. Who May appropriate

The question of who may appropriate water under the Act is really one of whether the potential appropriator has a sufficient interest in the appropriation to have legal standing to acquire the water right. The question seldom arises, and therefore was not discussed in Chapter 2. But there have been instances under prior law where the appropriator was found not to have a sufficient interest to acquire a water right. The Law as developed then carries over under the new system. In addition, the Water Use Act limits applicants for water reservations to only governmental entities.²⁵¹ See sec. 3.2.2.7. 1., infra.

It has been held that, under the 1889 constitution, "every citizen has the right to divert and use" water.²⁵² The same would probably be true under the 1972 Constitution, since the cited section was carried over.²⁵³ But this statement is qualified by the general rule that an irrigator-appropriator must have some possessory right in the land being irrigated.²⁵⁴ A mere trespasser, for example, cannot acquire a water right to irrigate lands in which he has no interest, doesn't own, or doesn't lease.²⁵⁵

251. 85-2-316(1), MCA.

252. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334 (1905), citing Mont. Const. of 1889, art. III, sec. 15.

253. Mont. Const. of 1972, art. IX, sec. 3(1).

254. Gilcrest v. Bowen, 95 Mont. 44, 24 P.2d 141 (1933).

255. Phillips v. Coburn, 28 Mont. 45, 72 P. 291 (1903); Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935). A contrary rule developed for miners in the days of the early West, the courts reasoning that Congress sanctioned the use of water by such trespassers pursuant to the Act of 1866.

Questions also arise over the right of an appropriator to convey the water to the place of use. If he has no right to do so, the water right cannot be perfected. It has been held that a licensee of a ditch has sufficient interest in the ditch to acquire a water right. ²⁵⁶

The Department takes the position that it has no jurisdiction to decide such questions. Therefore, the Department will not inquire into questions of ditch rights or possessory interests in land of the appropriator. This position was upheld by the Board of Natural Resources and Conservation on applications for a permit and change approval in the days when that Board had statutory authority to hear appeals on water right decisions made by the Department.²⁵⁷ However, even if the Department will not inquire as to such questions, the issue may still arise if the appropriator fails to perfect a water right granted to the appropriator by permit because of inability to put the water to a beneficial use.

3.2.2. Uses for Which Water Appropriated

An appropriator may appropriate water only for a beneficial use under the Act.²⁵⁸ See sec. 2.4.. supra, for a detailed discussion of the concept of beneficial use. A beneficial use under the Act is defined as follows:

256. *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937). Obviously, if no access can be obtained for conveying the water to the place of use, the water right cannot be perfected.

257. Application Nos. 1-s41H and 98-c41H, *Cope-Morgan* appeal, decision of Board of Natural Resources and Conservation dated July 1, 1977. Although the Board no longer has the statutory authority to hear appeals of the Department's water rights decisions (such decisions are now appealed directly to court--see secs. 3.2.2.9. and 4.2.6.), this decision set a precedent for the Department on future questions of this nature.

258. 85-2-301, MCA.

'Beneficial use,' unless otherwise provided, means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.²⁵⁹

This rather broad definition means that practically any use of water would be beneficial. But see **sec. 2.4.5.**, supra. The use of water to slurry coal is expressly made a nonbeneficial use, which has the effect of prohibiting using water for that purpose.²⁶⁰

3.2.2.5. Permits

The primary method to acquire a new water right is by applying for and receiving a permit from the Department. In some cases, permits are not required, or may be acquired after-the-fact. See **sec. 3.2.2.5.2.**, infra. In all other cases, water may not be appropriated or construction even started until the permit is first obtained.²⁶¹ The steps involved are described below.

3.2.2.5.1. Application; Fees

Acquisition of a water right by permit is initiated by filing an application with the Department, called an "Application for Beneficial Water Use Permit." The application is made on Form 600 (Appendix A) or on Form 605 (Appendix E) for small stock pits and reservoirs (see **sec. 3.2.2.5.2.**, infra), which forms are available from any of the Department's field offices (see back of form 602,

²⁵⁹. 85-2-102(2), MCA.

²⁶⁰. 85-2-104, MCA. This use of water may be possible if the water does not come under the jurisdiction of the state, as may be the case regarding water held under a reserved water right for an Indian reservation.

²⁶¹. 85-2-302, MCA. Certain applications for ground water appropriations over 3,000 acre-feet per year require legislative approval. See 85-2-317, MCA.

Appendix C), or from the office of any county clerk and recorder.²⁶²

The forms are fairly easy to understand, although some familiarity is required with water measurement terms, water requirements (duty of water), and legal descriptions of land. A potential applicant can obtain assistance in filling out the form at any of the Department's field offices. An applicant when making out the application should also keep in mind the concepts of beneficial use and due diligence discussed in secs. 2.4. and 2.5.1.2.1., supra, because these concepts must be applied in acting upon the application, particularly if it is contested as described below. The application is given a priority date as of the date the Department receives it.²⁶³

A defective application will be returned by the Department for correction,²⁶⁴ with instructions to correct and return it to the Department within a certain number of days (not less than 30). Applications not corrected and returned within the time allowed will be given a new priority date as of the date of refiling, and applications not corrected and **refiled** within 18 months will be terminated.²⁶⁵

PRACTICE NOTE: A well thought out and prepared application will ultimately save the applicant expense and avoid delays. Even if there are no problems with the application and the proposed appropriation, a final decision by the Department can take several months. Complicated and controversial applications, or applications for appropriations that may adversely affect prior rights, will take even longer, in

262. Id.

263. 85-2-401(2), MCA. See sec. 2.7. for a discussion of the importance of priority.

264. Minor deficiencies can be corrected over the telephone or by letter.

265. 85-2-302, MCA.

some cases several years. But, in the author's experience, most delays are caused by ill-prepared applications and the failure of the applicant to adequately plan his appropriation. Assistance by the Department or other specialists is recommended before filing the application.

The fees for filing an application are established under the Act by the Board of Natural Resources and Conservation by rule.²⁶⁶ They vary according to the amount of water to be appropriated. See "Statutes and Rules" herein for the fees as of this writing, and also Form 613, Appendix L. The fees must accompany the application. In certain cases, an environmental impact statement(EIS) may have to be prepared on the application, pursuant to the Montana Environmental Policy Act.²⁶⁷ In such cases, which are rare, additional fees may be assessed by the Department to pay for the cost of the EIS.²⁶⁸

3.2.2.5.2. Exemptions

There are a few exemptions from the Act's requirements that a permit first be obtained before appropriating waters, listed briefly as follows:

- (1) Wells and developed springs outside controlled ground water areas and appropriating less than 100 gallons per minute (gpm);²⁶⁹
- (2) Small capacity (less than 15 acre-feet) reservoirs for livestock watering which are not

266. 85-2-113(1), MCA. See ARM 36.12.103. The rules adopted under the Water Use Act are undergoing revision at this writing. New rules, including new filing fees, should be adopted by the spring of 1982. Check the Montana Administrative Code for the latest version.

267. 75-1-101 et seq., MCA. See also rules adopted by the Board and Department in ARM 36.2.501 to 608.

268. See 85-2-124, MCA.

269. 85-2-306(1), MCA. See ARM 36.12.101 for the definition of "spring," which is really a definition of "developed spring." Note also that certain applications for ground water appropriations over 3,000 acre-feet per year must receive legislative approval. 85-2-317, MCA.

located on perennial flowing streams and are accessible to land possessed by the appropriator of 40 acres or larger;²⁷⁰

(3) Emergency appropriations;²⁷¹ and

(4) Water reservations.²⁷²

The first exemption, for wells and developed springs with a maximum appropriation of less than 100 gpm, covers the vast majority of new wells in Montana, although many irrigation wells will exceed 100 gpm. A typical household well will yield less than 20 gpm. The exemption does not apply within the boundaries of a controlled ground water area (see sec. 2.5.1.5., supra); at present there is only one such area, near Terry in eastern Montana.

Even though no permit need be obtained under this exemption, a "Notice of Completion" (Form No. 602, Appendix C) must still be filed with the Department within 60 days after beneficial use of the ground waters. The Department then uses the same review and correction procedure followed in the case of applications for permits, except the appropriator can't have more than six months to correct and **refile** the notice. The priority date of the water right under this exemption is the date of filing of the original notice; if the notice is **refiled** late, the priority date is the date of refile. There is a \$5.00 fee for filing the notice. Following the filing of a correct and complete Notice of Completion, the appropriator is automatically issued a "Certificate of Water Right" (see sec. 3.2.2.6.2.,

270. 85-2-306(3), MCA.

271. 85-2-306(4) and 85-2-113(3), MCA; ARM 36.12.105.

272. 85-2-316, MCA.

infra).

The second exemption is intended to accommodate ranchers who collect runoff water in small stock water impoundments or pits. The appropriator is still required to apply for an obtain a permit within 60 days after constructing the impoundment or pit, but he gets it automatically, after the fact. Application is made on a special form (Form 605, Appendix E). The priority date is apparently the date of application for the permit. These after-the-fact stock water permits can be revoked or conditioned later by the Department if the appropriation has or will adversely affect other water rights.

In the case of emergency appropriations, the third exemption, no water right is ever acquired. This is the only exemption under current law from the requirement to obtain a water right for new appropriations. The exemption recognizes the obvious impracticality of imposing a water right system on emergency appropriations. An emergency appropriation is defined as "the temporary beneficial use of water necessary to protect lives or property by reason of fire, storm, earthquake, or other disaster or unforeseen combination of circumstances which call for immediate action."²⁷³ It "does not include the use of water for the ordinary operation and maintenance of any trade or business."²⁷⁴ Thirsty crops due to a drought would not qualify; a burning field or forest would. A notification of

273. ARM 36.12.101(6).

274. ARM 36.12.105(2).

an emergency appropriations must be filed with the Department within 10 days. There are no forms available for this purpose. This notification requirement is usually ignored, although a violation of a rule of the Board is a misdemeanor.²⁷⁵

The fourth exemption for water reservations is an exemption by implication. The Act itself does not expressly make this exemption, although it expressly provides for the other three aforementioned exemptions. An appropriation of water can be made pursuant to an approved water reservation, without obtaining a permit,²⁷⁶ even though the Act prohibits that in 85-2-302, MCA. Under the rule that a special statute controls the general, reservations are exempt by implication. See sec. 3.2.2.7., infra, for a discussion of water reservations.

3.2.2.5.3. Criteria for Issuance

Once an Application for Beneficial Water Use Permit is accepted by the Department, a process begins which is designed primarily to protect prior (senior) rights. The permit systems of many states treat the protection of prior rights lightly, and permits are granted routinely. Even though a permit amounts to nothing more than an inchoate water right and a license by the state to proceed with an appropriation (see sec. 3.2.2.5.6., infra), Montana treats the protection of senior rights more seriously, especially after amendments were made to the Act in 1981 dealing with the burden of proof (see sec. 3.2.2.5.4., infra).

275. 85-2-122, MCA.

276. See 85-2-316, MCA.

The Department, upon receipt of a proper application, first determines if the proposed appropriation might "adversely affect the rights of other persons."²⁷⁷ The Department relies on its records and checks with nearby appropriators to make this determination. If the determination is made that water rights might be adversely affected, the Department then notifies appropriators and other parties of interest of the application by newspaper publication and by mail;²⁷⁸ if the Department determines otherwise, the notice procedure is skipped. In many cases the Department staff will attempt to obtain written statements from other nearby appropriators that they have no objection to the application, and otherwise attempt to settle potential problems with the application so that the notice stage can be bypassed. This is because the formal notice stage may trigger a hearing process that may delay the application for months. See sec. 3.2.2.8., infra.

If the application is formally noticed pursuant to the statute, the notice will state that persons may file an "Objection to Application" (Form 611, Appendix J) by a certain date. Objections must contain certain information required by statute, but the main purpose of an objection is to allege and show how the appropriation proposed in the application will adversely affect the objector's water rights.²⁷⁹

277. 85-2-307(1), MCA. "[R]ights of persons" is interpreted by the Department to mean only the water rights of other persons.

278. See 85-2-307(1), MCA, for the notification procedure.

279. See 85-2-308, MCA. The exact nature of an objection is still uncertain. The Department routinely dismisses objections by objectors who, in the opinion of the Department, have no "standing" to object. Such an objector might be the Department of Fish, Wildlife and Parks (DFWP) alleging an adverse effect on instream water rights held

PRACTICE NOTE: An objection to an application is akin to an answer in a lawsuit, although much more informal. It is not always necessary to state the water right or rights held by the objector, but a statement should always be made that the objector's water rights will be adversely affected, unless there is some other reason for the objection.

At this stage, the Department will continue to try to settle the objections informally, which takes several weeks. If an informal settlement is impossible, the application then goes to a formal contested case hearing. See sec. 3.2.2.8, infra.

Whatever route the application takes through the process, be it informal disposition without notice, informal disposition after notice, or formal disposition after hearing, the Department ultimately must decide whether or not to issue the permit. The governing statute is 85-2-311, MCA, which provides as follows:

The department shall issue a permit if:

- (1) there are unappropriated waters in the source of supply:
 - (a) at times when the water can be put to the use proposed by the applicant;
 - (b) in the amount the applicant seeks to appropriate; and
 - (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (2) the rights of a prior appropriator will not be adversely affected;
- (3) the proposed means of diversion, construction and operation of the appropriation works are adequate;
- (4) the proposed use of water is a beneficial use;

-he public. The Department takes the position that such rights don't exist, except for "Murphy" rights (see sec. 2.5.1.2.3.) and water reservations, both of which are held by the DFWP. The practice of dismissing objections at this stage is questionable, since the statute appears to provide for filing valid objections for practically any reason; the practice, however, is a practical way of weeding out specious objections and moving the application along.

- (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;
- (6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;
- (7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

As can be seen, the statute is fairly specific, although it is subject to some interpretation. Most of the criteria listed are easily determined, such as beneficial use. Availability of water and effect on prior rights are less susceptible of easy determination. In fact, given the lack of adequate records in Montana as to existing water rights, it is nearly impossible in many cases to determine whether the proposed appropriation will adversely affect senior rights, even after diligent inquiry by the Department.

The final decision by the Department to grant, deny, or condition an application must be made within 120 days after the application is last noticed, or within 180 days if a hearing is held. This time period can be extended by agreement of the applicant, and up to another 60 days in "extraordinary cases" by the Department.²⁸⁰

280. 85-2-310(1), MCA. These deadlines raise important and interesting legal questions yet to be answered. Oftentimes, the deadlines are impossible to meet. If they are not, what happens? Is the application automatically granted, or denied? Does the Department lose jurisdiction of the application? Can the Department be mandamus to act on it? Recently, two lawsuits have resulted over these questions, among others. At the time of this writing, one case resulted in a ruling that the time periods are only directory to the Department, and the only remedy if the time periods are not met is to mandamus the Department to act on the application; the decision was not appealed. Carey v. Montana Department of Natural Resources and Conservation, First Judicial District,

If the Department decides to approve the application in a modified form, to impose terms, conditions, or limitations, or to deny it, the applicant must be given an opportunity to be heard. This is done through the hearing process for those applications that are formally contested. See **sec. 3.2.2.8., infra**. In noncontested cases, the Department sends the applicant a Statement of Opinion (Form 612, Appendix K), after which the applicant can request a hearing.²⁸¹

3.2.2.5.4. Burden of Proof

Until recently, the question of burden of proof was a subject of much discussion, both within the Department and among applicants and objectors. Without discussing the various arguments and positions herein, suffice it to say that the issue was never really settled. There was law to support all sides.

Now, however, thanks to the last legislature at the behest of the Department, it is clear that the applicant now carries the burden of proving compliance with the criteria for issuance of a permit. In subsection (7) of 85-2-311, MCA, quoted in **sec.3.2.2.5.3., infra**, the applicant must prove the criteria by "substantial credible evidence," the burden usually applied in administrative proceedings.²⁸² The

Civil No. 43556 (1979). The other case held that the Department lost jurisdiction of a tardy application, but didn't rule on what effect that had; that case is now on appeal. *State ex rel. Wilson v. Department of Natural Resources and Conservation*, Docket No. 81-240, Montana Supreme Court. The Department takes the position decided in the first case.

Note that the time period for the Department to act on the application is computed from the last date of notice. In complicated or contested cases, it will take months just to reach that stage, thus giving the Department extra time.

281. 85-2-310(2), MCA.

282. Effective April 14, 1981; also applies to applications then pending before the Department.

burden is even heavier for applications for 10,000 acre-feet per year, 15 cubic feet per second, or more--the burden of "clear and convincing evidence."²⁸³

The effect of this burden will be interesting to observe. Given the lack of adequate records of water rights in this state, it might be nearly impossible for an applicant to prove by "substantial credible evidence" that he won't adversely affect prior rights. Indeed, in many cases, and even with good water right records, the only way to find out is to actually appropriate the water and see what happens. Since applications can be (in fact, must be) denied for failure to meet the burden,²⁸⁴ water development in Montana may be constrained, at least until existing water rights are adjudicated.

PRACTICE NOTE: Under the new law, an applicant should be prepared to present evidence of "nearby" existing water rights in the source of supply and stream-flow records. The services of hydraulic engineers may be needed. Testimony by witnesses that water remains undiverted (surplus) in most years during the proposed period of use may also be helpful. The Department can be of assistance in finding much of the information.

3.2.2.5.5. Terms and Conditions

Upon issuance of a permit, the Department has broad discretion to impose terms and conditions as a part of the permit,²⁸⁵ and it quite often does so. In fact, there are standard conditions the Department requires in all permits, such as time limits to complete the appropriation; time

283. 85-2-311(6), MCA.

284. See, e.g., *Cross v. Erickson*, 72 N.M. 73, 380 P.2d 520 (1963); *Reynolds v. Wiggins*, 74 N.M. 670, 397 P.2d 469 (1964); and *City of Roswell v. Berry*, 80 N.M. 110, 452 P.2d 179 (1969). These are all cases from the state of New Mexico, which requires the applicant to prove that there is unappropriated water and that no injury will result to others.

285. See 85-2-312, MCA.

Limits can be extended upon application (Form 607, Appendix G). The Department responds to the application for extension of time using Form 616, Appendix M. In the case of reservoirs, the Department usually requires the permittee to install an outlet, so that junior as well as prior rights are protected (see sec. 2.4.7., supra). Standard clauses that the permit is provisional (see next section, infra) and that it is subject to prior rights are also inserted. And, the appropriation usually contains restrictions on period of use.

See Appendix B for a typical permit currently being issued.

Failure to comply with the terms and conditions of a permit can result in its revocation, after notice and opportunity for hearing.²⁸⁶

3.2.2.5.6. Effect of Permit

An approved permit is not evidence of a perfected water right. Actually, it amounts to little more than a license from the state authorizing the permittee to proceed with an appropriation. It is not an adjudication of anyone's water rights. At best, it is an inchoate right, subject to further action by the permittee to perfect it.²⁸⁷

At the present time, all permits in Montana are

286. 85-2-314, MCA.

287. See Wyoming v. Colorado, 259 U.S. 419 (1922); United States v. Fallbrook Public Utility Dist., 165 F. Sup. 806, (S.D. Cal. 1958); Little Cottonwood Water Co. v. Kimball 76 Utah 243, 289 P. 116 (1930); Madera Irrig. Dist. v. All Persons, 47 Cal. 2d 681, 306 P.2d 886 (1947). But see also General Agriculture Corp. v. Moore, 166 Mont. 510, 574 P.2d 859 (1975), holding that a priority date established by the filing of a petition under the old law to acquire a water right on an adjudicated stream (see sec. 2.5.1.3.) is a "valuable right," and is an "existing right" as that term is used in Mont. Const. of 1972, art. IX. Does that make a priority date established by a permit application a "vested right"?

"provisional." ²⁸⁸ This means that they are subject to the adjudication of pre-July 1, 1973, water rights, which is currently underway. See Chapter 6. Once the adjudications are completed, "[t]he amount of the appropriation granted in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights...." ²⁸⁹ How this is going to be done is not clear, but it appears to be through the certificate process. See 85-2-315, MCA, and **sec. 3.2.2.6., infra**.

3.2.2.6. Certification

The final step in acquiring a water right under the Water Use Act is to obtain a "Certificate of Water Right." See Form 604, Appendix D, for a typical certificate. A certificate is evidence of a perfected water right; it is akin to a deed for land. It is issued upon completion of an **appropriation**. Although not stated expressly in the statute, the certificate in effect grants the certificate holder a water right within the parameters of his actual appropriation. This means that, if a permittee actually ends up using less water than authorized in the permit, he or his successor will get a certificate for only the amount used.

3.2.2.6.1. Surface Waters

No certificates will be issued under the Act until existing water rights are adjudicated. ²⁹⁰ In the meantime, however, a permittee for surface waters is still required to file a **"Notice of Completion of Water Development"** (Form

²⁸⁸ 85-2-313, MCA.

²⁸⁹ Id.

²⁹⁰ 85-2-315(2), MCA.

617, Appendix N) when the appropriation has been completed according to the terms of the permit. No fees are required.²⁹¹ When the adjudication of existing water rights is completed, certificates will be issued to all surface water permittees.

3.2.2.6.2. Ground Waters

As noted in **sec. 3.2.2.5.2., supra**, appropriators by wells and developed springs under 100 gpm outside controlled ground water areas automatically receive certificates upon the filing of a Notice of Completion of Groundwater Development (Form 602, Appendix C). All other ground water uses require permits, and certificates will be issued after the completion of the adjudication of existing water rights, the same as for surface water uses by permit. Presumably, certificates will also be issued for those ground water uses requiring legislative approval (see n. 261).

See Appendix D for a typical certificate on a ground **water** appropriation.

3.2.2.7. Water Reservations

Water reservations are a species of water rights.²⁹² In effect, they are really permits for large amounts of water which may be developed over extended periods of time, depending on the reservation. In fact, they should be thought of as permits in a legal sense, and, for those where the water has been put to actual beneficial use, as certificates.

Water reservations are unique to Montana; to date,

²⁹¹. But see n. 266.

²⁹². See ~~AM~~ 36.16.111.

water reservations have been approved only in the Yellowstone River Basin.²⁹³ Other states provide for setting aside or reserving water for certain purposes, but to the author's knowledge none do it quite the way Montana does--i.e., by actually making them water rights. The reason for making them protectible water rights was to subject them to the same kind of scrutiny as permit applications, and to give them greater legal standing in upcoming battles with downstream states and other potential appropriators interested in using Montana's water out of the state.

The purpose of a water reservation is to set aside or "reserve" large quantities of water for present or future beneficial use. In effect, they are a practical way (and one of the few ways) to implement a water plan. They are apparently the only way to acquire "instream" water rights. See sec. 2.4.4., supra.

Since only governmental entities may apply for reservations, they are discussed only briefly herein. See ARM 36.16.101 to 36.16.116 for the rules on water reservations.

3.2.2.7.1. Eligibility for Application

Only state and federal agencies and political subdivisions of the state, such as cities, conservation districts, and irrigation districts, may apply for reservations of water.²⁹⁴ This limitation was imposed because it was felt that governmental entities were more

293. Order of the Board of Natural Resources and Conservation, December 15, 1978, available at the Department.

294. 85-2-316(1), MCA.

likely to represent the "public interest" when such large quantities of water were set aside and dedicated for a particular purpose.

3.2.2.7.2. Application; Fees

Applications for water reservations are submitted to the Department, using Form 610, Appendix I. The information required to be contained in an application is quite specific and detailed. ²⁹⁵

A \$100 fee is charged per application, plus costs of processing the application, which can be substantial. ²⁹⁶

3.2.2.7.3. Administrative Processing

Applications for water reservations are processed in much the same way as applications for permits. However, the proceedings are more elaborate (because of the amount of water involved and the interest generated), and the Board of Natural Resources and Conservation, not the Department, makes the decision. Other differences are that the priority date of a reservation is the date the Board approves it, ²⁹⁷ and the criteria for approval are different. ²⁹⁸

3.2.2.7.4. Effect of Reservation

Being a water right (usually inchoate), a water reservation has essentially the same status as any other water right. It is subject to prior rights, and must be perfected to ripen into a fully protectible right. ²⁹⁹ Junior water rights are subject to it. ³⁰⁰ Since instream

^{295.} See ARM 36.16.104 to 106.

^{296.} 85-2-316(2), MCA; ARM 36.12.103(3).

^{297.} 85-2-316(8), MCA.

^{298.} 85-2-316(3), MCA.

^{299.} The Order approving water reservations in the Yellowstone River basin established time periods to complete plans and appropriations of the water.

^{300.} See 85-2-316(6), MCA.

water reservations have instantaneous beneficial use, they are instantly perfected. However, an instream reservation can be modified later by the Board under 85-2-316(10), MCA.

PRACTICE NOTE: Potential appropriators in the Yellowstone River basin should be aware of the existence of water reservations in that basin. In the case of irrigation uses, the potential appropriator might be able to obtain the needed water through his local conservation district, since the districts received water reservations for such uses.

3.2.2.8. Administrative Hearings

3.2.2.8.1. Conditions Prompting Hearings

When objections to permit and water reservation applications are received by the Department and cannot be settled informally, contested case hearings are required to be held before the action on the applications are taken.³⁰¹ The vast majority of permit applications never reach the hearing stage, although several hearings are still held each year. Because of the interest surrounding a water reservation application, the applicant can assume a hearing will be required in that case.

3.2.2.8.2. Procedure

Hearings on permit applications are conducted by a water rights hearing examiner of the Department. He may or may not be a lawyer. For several years, the Department has had a full-time water rights hearing examiner, but it sometimes appoints another employee of the Department to conduct the hearing.

Permit hearings are supposed to be held within 60 days from the date set by the Department for filing objections,³⁰² but this period is frequently extended by

³⁰¹. 85-2-309, MCA.

³⁰². Id.

agreement or motion.³⁰³ Hearings are conducted in accordance with the Montana Administrative Procedure Act (MAPA) and the rules adopted thereunder, "except that common law and statutory rules of evidence shall apply only upon **stipulation** of all parties to a proceeding."³⁰⁴

Generally, the hearings and proceedings thereunder are conducted informally. There are no set forms for pleadings, etc., as in court proceedings. The parties need not be represented by counsel, although it's a good idea, especially if the opposing side has counsel. They are usually held in a location convenient to the parties, after notice.

At the hearing, the hearing examiner attempts to gather evidence regarding the facts at issue, such as existing water rights and water availability. Much of this information is put into evidence by the Department water rights staff, who are usually not represented by an attorney. The hearing examiner may also require briefs on legal points and establish deadlines therefor.

After the hearing proceedings are concluded, the examiner will issue a proposed decision, which is served on all parties, and an opportunity to file written objection is given. Under current procedure, the examiner does not actually issue or deny the permit. Instead, the examiner's proposed decision may be adopted by the head of the Water Resources Division in the Department.

³⁰³. The legality of this practice is questionable. See n. 280.

³⁰⁴. 85-2-121, MCA. See 2-4-101 et seq., MCA for the Montana Administrative Procedure Act, and ARM 1.3.212 to 234 which are the Attorney General's Model Rules of

Hearings on water reservation applications are conducted under the Administrative Procedure Act as well, except they are conducted by the board. In the case of the Yellowstone water reservations, the Board appointed a special hearing examiner.

PRACTICE NOTE: If the practitioner becomes involved in an administrative hearing before the Department, he should contact the hearing examiner for information on the procedure. In addition, the practitioner should consult the Montana Administrative procedures Handbook by Roger Tippy which is available from the State Bar for a thorough discussion of administrative law practice, with sample forms and pleadings.

3.2.2.9. Judicial Review

In accordance with the Montana Administrative Procedure Act, final decisions of the Department or Board under the Water Use Act are reviewable in court. See MAPA for legal criteria. Since court review is confined to the record, it is important that an adequate record be made at the administrative level.

There is some question regarding where appeals from Department and Board decisions under the Water Use Act should be taken. See sec. 6.5.1., infra.

CHAPTER 4. CHANGES IN WATER RIGHTS

(SEMINAR OUTLINES: See same seminar outline materials as listed in Chapter 3.)

4.1. General

Under the Appropriation Doctrine, water rights may be changed if other water rights are not adversely affected. Changes include changes in point of diversion, place of use, place of storage, purpose of use, and method of transmission. Since July 1, 1973, changes in the place of use, point of diversion, place of storage, and purpose of use are required to be approved by the Department, and such changes must be approved if they will not "adversely affect" other rights.³⁰⁵ But the determination of whether a proposed change is really a change or a new appropriation, and whether the change will adversely affect other rights, is made by applying the prior law. Section 2.9., supra, should be reviewed for a discussion of the law that will apply under these circumstances.

4.2. Administrative Practice and Procedure

4.2.1. Application; Fees

The Water Use Act provides that "[a]n appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as ...approved by the department."³⁰⁶ Changes in all water rights, whether pre-July 1, 1973, or acquired after that date pursuant to

^{305.} 85-2-402, MCA.

^{306.} 85-2-4-2(1), MCA. Under 85-2-402(3), MCA, an appropriator may not change an appropriation of more than 15 cubic feet per second from agricultural use to industrial use. It is not clear whether an appropriator could change such an agricultural appropriation to a related use, such as mining, or to an unrelated use, such as hydropower generation and then to industrial.

the Water Use Act, are covered by this provision. This means that even old decreed rights and rights for which a permit has been issued, as well as all other water rights, come under the change approval law.

The statute does not say what happens if a change is made without the Department's approval, although failure to obtain the Department's approval is a misdemeanor.³⁰⁷ But an attempted change without such approval would probably be void ab initio or ineffective.³⁰⁸

The application for a change approval is made on Form 606 (Appendix F). A \$15 filing fee is required. In addition, in rare cases an environmental impact statement may have to be prepared, requiring fees to pay for the cost of preparing the statement.³⁰⁹

4.2.2. Protection of Other Rights

The primary purpose of obtaining the Department's **approval** for a change in a water right is to protect other water rights.³¹⁰ Theoretically, by requiring administrative approval, other rights will be protected, avoiding costly litigation such as has occurred in the past when changes were made unilaterally.

Under the Water Use Act, once an application for a

³⁰⁷. 85-2-122, MCA.

³⁰⁸. *Castillo v. Kurnemann*, ___ Mont. ___, No. 80-465 (September 29, 1981), a case involving 85-2-403(3), MCA, which requires Department approval prior to severing a water right from the land to which it is appurtenant, offers some support for this result. The holding of the court by implication (see dissent) results in a severance being either ineffective or void ab initio if it is not approved by the Department. The same result would seem to obtain for failure to obtain an approval for a change, under similar statutory language.

³⁰⁹. See 85-2-124, MCA.

³¹⁰. The statute uses the phrase, "the rights of other persons." 82-2-402(2), MCA. The Department interprets this to mean only the water rights of other persons. See n. 257, *supra*, and accompanying sec. 3.2.2.3., and n. 277, *supra*.

change is made to the Department, it undergoes basically the same processing as does an application for a permit. If the Department determines that the proposed change might adversely affect the rights of other appropriators, it notices the application, objections are received, and a hearing is held. And, as in the case of permit applications, the Department attempts to resolve differences over the proposed change before it actually reaches the formal hearing stage. See sec. 3.2.2.5., supra for a description of the permit application process.

4.2.3. Burden of Proof

Who has the burden of proof in a change application proceeding is less clear than in a permit proceeding, since there is no mention of burden in the statute. Several cases under the prior common law held that the burden fell on the party alleging injury to his water right.³¹¹ It would seem that this would also be the case under the Water Use Act where objections have been filed: the objector would have the burden of showing how he will be adversely affected by a change.³¹² But there is support for the proposition that the applicant must first show by a general negative that his proposed change will not interfere with the rights of others.³¹³ This would be true particularly where there are no objections.

311. See, e.g., *Hansen v. Larsen*, 44 Mont. 350, 120 P. 229 (1911); *Lokowich v. City of Helena*, 46 Mont. 575, 129 P. 1063 (1913); *Thrasher v. Mannix & Wilson*, 95 Mont. 273, 26 P.2d 370 (1933); *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972).

312. The Department takes the same position. Showing theoretical or technical injury alone will not suffice. *Thrasher and Hansen*, id.

313. *Ackerman v. City of Walsenburg*, 171 Colo. 304, 467 P.2d 267 (1970); *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484 (1935).

4.2.4. Terms and Conditions

The Department may approve the change subject to such terms and conditions it considers necessary to protect other rights.³¹⁴ It might even require the installation of measuring devices to ensure the appropriator does not divert more water under the change than the amount to which he is entitled.³¹⁵ And, limitations on the time allowed to complete the change can be imposed.³¹⁶ A change application is approved using Form 620 (Appendix P); when the change is completed, Form 618 (Appendix O) must be filed with the Department.

4.2.5. Administrative Hearings

Contested case administrative hearings on change applications are held in the same manner as hearings on permit applications, when objections are filed and they cannot be settled. See sec. 3.2.2.8., supra.

4.2.6. Judicial Review

Judicial review of Department decisions on changes may be taken in the same manner as permit decisions. See sec. 3.2.2.9., supra.

314. 85-2-402(4), MCA.

315. This would be consistent with *Donich v. Johnson*, 77 Mont. 229, 250 P. 963 (1926), *Edwards and Bank v. Morris*, 112 Mont. 445, 116 P.2d 1007 (1941), and *McIntosh v. Gravelev*, 72 Mont. 72, 495 P.2d 186 (1972), where the trial courts' impositions of measuring devices were upheld.

316. 85-2-402(4), MCA.

CHAPTER 5. TRANSFER OF WATER RIGHTS

5.1. General

A transfer of a water right usually refers to transferring the ownership of the right to another person or entity. In some instances the term has been used to describe a change in the water right, discussed in Chapter 4. But, properly speaking, a transfer indicates a conveyance, assignment, sale, lease, or other alteration in ownership, possessory interest, or contract right in the water right. Often, but not always, both a transfer and a change will be involved in the same transaction, but not always.

When used in connection with land, water rights are appurtenant to that land and run with the land unless expressly reserved therefrom. This has always been the rule in Montana, and is still the rule, for both pre-and post-July 1, 1973, water rights. See sec. 2.8., supra, and 85-2-403(1), MCA. Therefore, when land is transferred, the water rights appurtenant to that land are also conveyed, even though not specifically mentioned.³¹⁷ If land is subdivided and sold, and the appurtenant water rights are not reserved, then the water rights are divided and transferred in respective amounts to each tract in the same proportion that the number of acres irrigated on each tract bears to all the acres irrigated.³¹⁸ Obviously, the

317. But they must be appurtenant at the time the land is conveyed. Custer Consol. Mines Co. v. City of Helena, 52 Mont. 35, 156 P. 1090 (1916). A subsequent deed transferring a water right does not operate to sever the right from the Land where the land and appurtenances were transferred previously. Genes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936).

318. Spauth v. Emmert, 142 Mont. 231, 383 P.2d 812 (1963).

subdivision of irrigated land can create hundreds of little water rights, leading to much confusion.³¹⁹ And, to make matters worse, the purchaser may not even know he has acquired a water right with his piece of property; not knowing that he has a water right might lead to an abandonment of it. See sec. 2.10.1., supra.

Water rights may also be severed and transferred separate from the land, such as by assignment, sale, or lease.³²⁰ There is no particular form that such a transfer must follow. In fact, parol transfers of water rights in gross were upheld in equity as between parties when possessory interests in the public domain were transferred.³²¹ But because of legal uncertainties surrounding this practice, transfers of water rights by assignment, sale, or lease should always be in writing.³²²

5.2. Notice to and/or Approval of Department

Section 85-2-403(2), MCA provides as follows: "The person receiving the appropriation interest shall file with the department notice of the transfer on a form prescribed by the department." Whether this provision applies to pre-July 1, 1973, water rights is not clear, although it clearly applies to post-July 1, 1973, rights obtained by permit or certificate. The Department has interpreted it to apply to all water rights, including those dating before July 1, 1973. This is probably a correct reading of the

319. See the dissent in *Castillo v. Kunemann*, ___ Mont. ___, No. 80-465 (September 29, 1981) for a discussion of this problem.

320. *Adams v. Chilcott*, ___ Mont. ___, 36 St. Rep. 1238, 597 P.2d 1140 (1979)

321. *Geary v. Harper*, 92 Mont. 242, 12 P.2d 276 (1932); *St. Ogne v. Blakely*, 76 Mont. 1, 245 P. 532 (1926); *Cook v. Hudson*, 110 Mont. 263, 103 P.2d 137 (1940).

322. It need not be acknowledged, and language to "give and grant" the water right is sufficient. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 P. 1054 (1895).

law, particularly in view of the recent Castillo case.³²³

Notice to the Department of a transfer is made on Form 608, "Notification of Transfer of Appropriation Water Right." The Department acknowledges the notice on the back, Form 625, "Acknowledgement of Water Right Transfer." (These forms were being printed by the Department at the time of this writing, and were unavailable; see Appendix Q.)

A severance of a water right, whether or not involving a transfer, must be approved by the Department, as discussed in n. 308. Use Form 609, "Application to Sever and Sell Appropriation Water Rights" (Appendix H).

As required by the above-quoted section, anyone receiving an interest in a water right must file a notice with the Department. This means that anytime land is sold with appurtenant water rights, or the water right is otherwise transferred, such as by assignment, sale, lease, or descent, the person or entity receiving the interest in the water right is required to file a notice. The notice is filed on Form 625 (Appendix Q). The purpose of the statute is to maintain up-to-date records of owners of water rights. The statute is almost totally ignored.³²⁴

Under the transfer statute, the Department has no power to evaluate the transfer, or to deny it. It only files the notice in its records. However, many transfers will also involve severance of the water right from the land to which it is appurtenant, or a change in the water right, which do

³²³. See n. 308, *supra*.

³²⁴. There is no penalty for failure to file a notice of transfer, and, since the Department has no power to approve or deny a transfer, failure to file would probably not result in the transfer being ineffective or void. But, see PRACTICE NOTE in text.

require the approval of the Department.

PRACTICE NOTE: It is very important that the practitioner understand the statutory requirements to transfer water rights. A mere transfer of a water right, as discussed above, only has to be filed with the Department. Severance of a water right, selling a water right for other purposes (a change in purpose of use), making a water right appurtenant to other lands, and changing a water right all require the approval of the Department. If such approval is not obtained, the attempted severance or change is probably either ineffective or void ab initio. See sec. 2.8. for a discussion on appurtenancy and severance, and Chapter 4 for a discussion on changes in water rights under the Water Use Act.

5.3 Conveyance by Deeds, Etc.

Since water rights are appurtenant to land and run with the land, it is not necessary to specifically refer to water rights in the land conveyance instrument if the water rights are to be transferred with the land. In fact, it is inadvisable to refer to specific water rights by quantity or name because the conveying instrument may then be construed as reserving all other water rights, unless language to the contrary is expressed.³²⁵

From a buyer's/grantee's perspective, specific language referring to each water right being transferred may be desired, since the grantee might be able to have recourse the grantor if the grantor has insufficient title to the water rights. On the other hand, a grantor may not want to list and warrant title to the water rights, given the uncertain nature and status of water rights in Montana at the present time. Of course, after the adjudication of pre-July 1, 1973, water rights is completed, potential grantors will have much better evidence of their water

³²⁵. *Kofoed v. Bray*, 69 Mont. 78, 220 P. 532 (1923). *Lensing v. Day & Hansen Security Co.*, 67 Mont. 382, 215 P. 999 (1923).

rights.

PRACTICE NOTE: The following language is recommended to transfer all water rights through deed where the practitioner represents the seller/grantor: "Together with all and singular the tenements, hereditaments, appurtenances, and water and ditch rights, if any, thereunto belonging."

If practitioner represents the buyer/grantee, the following language should be used: "Together with all and singular the tenements, hereditaments, appurtenances, and water and ditch rights, thereunto belonging, including but not limited to the following water rights: (1).... (Number and list each water right separately, and refer to the lwater right by date, quantity, and document providing evidence of the right.)"

When water rights are reserved by the grantor, express language to that effect must be contained in the transferring instrument; otherwise, the rights will be transferred with the land.

PRACTICE NOTE: A reservation of all water rights should be worded as follows: "Reserving, however, unto grantor all water and ditch rights appurtenant to said land, including but not limited to the following water rights: (1)....(List each right separately, describing each by date, quantity, etc.) "

A reservation of only specific rights would be worded as follows: "Reserving, however, unto grantor the following described water rights: (1)...."

PRACTICE NOTE: Note that, in cases where a reservation of water rights is made, the grantor in effect is attempting to sever the rights from the land to which they are appurtenant. In these cases, the severance must be approved by the Department to make the severance effective. If the Department's approval is not obtained, the attempted severance is probably either ineffective or void ab initio, and apparently the water rights are still appurtenant and run with the land.³²⁶ Failure to obtain such approval apparently has no effect on the validity of the land transfer itself.

326. See Castillo v. Kunneman, ___ Mont. ___, No. 80-465 (September 29, 1981).

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

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CHAPTER 6. ADJUDICATION OF PRE-JULY 1, 1973, WATER RIGHTS

(SEMINAR OUTLINES: See Adjudication of Existing (pre-July 1, 1973) Water Rights, by Hon. W. W. Lessley, Chief Water Judge; Adjudication of Existing Rights, by Michael McLane, Adjudication Program Manager, DNRC; and Adjudication of Existing Rights, by Richard T. Munger, Rich Munger & Associates; in "Seminar Outlines" in the back of this handbook.)

6.1. Historical Background and Purpose

Efforts to adjudicate water rights through the courts began in the last century. Gradually, over the years thereafter, amendments and additions were made to existing statutory law on adjudication to make the adjudications more meaningful. But an adjudication system was never established to adjudicate all water rights in one proceeding that had finality. See sec. 2.6.1.1., supra.

Finally, in 1973 under the Water Use Act, an adjudication system was established to determine pre-July 1, 1973 water rights ("existing rights") on a drainage by drainage basis. The adjudication, triggered by an order of the Department of Natural Resources and Conservation, was begun in 1974 in the Powder River basin in southeastern Montana. After some six years' experience with the 1973 system, the legislature determined that the process was not advancing rapidly enough and was too costly to state government. The system was therefore scrapped, and a massive, statewide process, described herein, was initiated in 1979, but the work already done in the Powder River basin was incorporated therein.³²⁷ See sec. 2.6.2.1.. supra for a more thorough description of the 1973 system.

327. 85-2-212 and 222, MCA.

The purpose of the adjudication system now in effect (sometimes referred to as the Senate Bill 76 adjudication system, after the bill enacting it in 1979) is to determine pre-July 1, 1973, water rights on a reasonably accurate basis. It is felt that determination of such rights is necessary to document water use in Montana, and for the protection of water right holders.

6.2. Claim Filing Requirements; Exemptions

The current adjudication system was actually initiated by an Order of the Montana Supreme Court upon petition of the Attorney General.³²⁸ Pursuant to the statute, the Order requires that anyone asserting a claim to a water right with a priority date before July 1, 1973 file a claim of that right with the Department of Natural Resources and Conservation. The deadline for filing the claims was set in the Order for January 1, 1982.³²⁹ Notice of the Order is provided by publication, public notice, media, and with the property tax statements mailed in the fall of each year.³³⁰

The following water rights are exempt from the claim filing requirements, although they may be voluntarily filed:³³¹

- (1) Instream livestock uses;³³²
- (2) Instream domestic uses;³³³
- (3) Ground water livestock uses;³³⁴

³²⁸. 85-2-211 and 212, MCA.

³²⁹. See Appendix V for the Supreme Court order. The supreme court has statutory authority to extend the deadline to not later than June 30, 1983, upon petition of the Attorney General. As of this writing, the deadline has not been extended.

³³⁰. 85-2-213, MCA.

³³¹. 85-2-212 and 222, MCA.

³³². See sec. 2.4.4. There is some question whether such rights even exist in Montana.

³³³. It is difficult to conceive of an instream domestic use, except for a human drinking directly from or laundering clothes in a stream.

³³⁴. See secs. 2.3.2., 2.5.1.2.4, 2.5.1.5., and 2.6.1.2.2.

(4) Ground water domestic uses;³³⁵ and

(5) Rights declared under the Powder River basin adjudication initiated in 1974.³³⁶

All other pre-July 1, 1973, water rights are covered, including decreed rights (whether decreed before or after July 1, 1973), use rights, 1885 filed rights, and ground water irrigation rights.

PRACTICE NOTE: The determination of whether a use of water constitutes a water right can sometimes be very difficult. For the novice, a review of Chapter 2 herein is essential to aid in making that determination. When in doubt, always assume that a right exists, and claim it. If it isn't claimed, the right is forfeited. See sec. 6.3, infra. In the opinion of the author, exempted water rights should also be claimed. For the reasons, see sec. 6.4.4., infra.

6.3. Loss of Unclaimed Rights

Failure to file a claim of a water right as required by statute and the Order of the Montana Supreme Court "establishes a conclusive presumption of abandonment of that right." In other words, the right is forfeited and lost forever.³³⁷

6.4 The Claim

6.4.1. Forms

Claims of existing water rights are made on forms provided by the Department. The forms can be obtained at

335. Id. Domestic uses include ordinary household uses and watering a garden and lawn.

336. See sec. 2.6.2.1.

337. 85-2-226, MCA. This is a strangely worded statute. A conclusive presumption is one in which proof of a basic fact renders the existence of the presumed fact conclusive and irrebuttable. In this case, proof of the basic fact that a claim was not filed results in the right being abandoned. That a claim was not filed can obviously be easily proved by simply putting into evidence the claim filing records. The net result of this statute is to wipe out all water rights that were not claimed as required by law. Therefore, the rights are really forfeited, not abandoned. See sec. 2.10.1.

There is some question concerning the constitutionality of the statute. Essentially, the question is whether water rights can be extinguished by law. The cases have generally held that, with sufficient notice and an opportunity to be heard, due process requirements are met, and water rights can then be extinguished, much like a quiet title action on real property. See, e.g., *In re Willow Creek*, 74 Ore. 592, 144 P.505 (1914). Montana's adjudication and water system is patterned after Oregon's.

any of the Department's field offices or the offices of each county clerk and recorder.

There are four forms, as follows:

- (1) Form 76-S for stock water uses; see Appendix R;
- (2) Form 76-D for domestic uses; see Appendix S;
- (3) Form 76-1 for irrigation uses; see Appendix T; and
- (4) Form 76-0 for other uses; see Appendix U.

Each of these forms is fairly straight forward and easy to follow. The Department and the water courts have printed materials explaining how to complete the forms and document the water rights claimed, and these materials should be reviewed before filing the forms. Therefore, the forms themselves do not need extended discussion herein, but there are some general points that should be made.

Even though a single water right may exist for several uses (such as a multiple-use reservoir), each use must be claimed separately, using the appropriate form. This is required by a rule promulgated by the water courts.

The place of use of the water should also describe land that has not yet been irrigated, but which is included within the right as land that was originally intended to be irrigated. Questions of original intent and due diligence must be addressed when making this determination. See sec. 2.5.1.2.1., supra, and other applicable sections of Chapter 2 herein. The amount of water claimed should also reflect such future use.

The claim should not be notarized by an owner of the right, or by anyone having an interest either in the right or in an entity, such as a partnership or corporation, which is the owner of the right.³³⁸

Attachments should be numbered or lettered, and specifically referenced by such number or letter in the claim. If this is not done, there will be no way of knowing if an attachment has been lost.

6.4.2. Proof of Right

The key elements of the right claimed should always be documented by attachments. Key elements are priority date, amount of water (flow and volume), and place of use.

As described in the materials printed by the Department, there are many sources of information to document the right claimed. Much of the information would ordinarily be inadmissible in court. Although not expressly stated in the adjudication statutes, it is intended that the water courts be liberal in allowing ordinarily inadmissible evidence to be used.

As discussed in sec. 2.5.1.2.1., supra, improperly executed or filed norices of appropriation are inadmissible for all purposes in an ordinary court proceeding. In the author's experience, a high percentage of these old notices were not recorded within the 20 days required by law, and are therefore invalid. However, a use right might still exist, and the notice, although invalidly filed, is still an affidavit of the appropriator's intent and might be useful to document a use right. It remains to be seen whether the

³³⁸. See n. 131, supra, and accompanying text.

water courts will ignore the previous case law and allow invalid notices to be used as evidence of use.

Obviously, if a claim is objected to and is the subject of a hearing before the water court, additional proof of the right claimed may be needed. See sec. 6.5.4., infra.

6.4.3. Filing; Fees

The claims may be filed at any of the Department's field offices or at its main office in Helena. After a period of time, the Department will send the claimant an acknowledgment of filing, containing the information stated in the claim. The acknowledgment should be checked to make sure the Department has correctly entered the information on the claim into its computer. Upon request to the Department, the acknowledgment will also be sent to the practitioner assisting the claimant.

There is a \$40 filing fee required for each claim, up to a maximum of \$480 (12 claims) per claimant within the same water division (see sec. 6.5., infra). For a single development with several uses, exempt claims, if filed simultaneously, may be filed with only a \$40 fee.³³⁹

PRACTICE NOTE: It is advisable to file the claims with the Department by a letter of transmittal, with the practitioner keeping a copy in his files. In this way there is a record that the claims were filed, in the unlikely event they are lost by the Department. It is also advisable, of course, to keep copies of all claims filed, both for the claimant as well as the practitioner.

6.4.4. Prima Facie Status of Claims

A claim, once filed, constitutes prima facie proof of its content.³⁴⁰ This is a most important provision, and

³³⁹. 85-2-225, MCA.

³⁴⁰. 85-2-227, MCA.

essentially shifts the burden to prove that the facts stated in the claim are incorrect to an objector to that claim. See sec. 6.5.6., infra.

Because of this provision, it is the author's opinion that exempt water rights should also be filed. Then, if a dispute arises over the water right claimed, the owner thereof has already met his initial burden.

The prima facie status given claims may also be very useful in other circumstances as well, such as separate litigation involving the water rights claimed, or in administrative permit and change application proceedings before the Department. This, of course, assumes that the prima facie status is effective for all purposes, not just for the adjudication system.

5.5. Water Courts

To adjudicate existing water rights, four water divisions have been established, based on the major drainage basins of the state. Each division is presided over by a water judge.³⁴¹ The water judges, in conjunction with the Montana Supreme Court, have the ultimate overall control and direction of the adjudication process. See Appendices V to Bb for several of the orders already issued by the supreme court and the water courts.

By July 1, 1982, the water judges are required to appoint water masters who will actually do most of the work associated with the adjudication proceedings.³⁴² A water master has already been appointed for the adjudication of water rights in the Powder River basin. See Appendix Cc.

³⁴¹. 7-7-10? et seq., MCA

³⁴². 3-7-80? et seq., W

6.5.1. Jurisdiction and Venue

Even though the district courts have original jurisdiction over water rights litigation under the 1972 Constitution,³⁴³ the statutes provide that jurisdiction of the district courts "concerning the determination and interpretation of existing water rights is exercised exclusively" through the water divisions.³⁴⁴ Each water judge has jurisdiction over existing water rights only within the boundaries of his water division.³⁴⁵

Section 85-2-216, MCA, provides as follows:

All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in 85-2-212.

The net result of the statutes is to put all litigation concerning the determination and interpretation of existing water rights in the hands of the water courts. See sec.

7.2., infra.

6.5.2. Parties

Until objections to a preliminary decree of existing water rights are filed with the water court (see secs. 6.5.5. and 6.5.6, infra), the proceedings are essentially ex parte. After objections are filed, the claimants and the objectors are parties in the proceedings.

6.5.3. Pleadings and Procedure

The claim itself constitutes the initial pleading

343. Mont. Const. of 1972, art. VIII, sec. 4.

344. 3-7-501(1), MCA.

345. 3-7-501(2), MCA.

before the water court. Objections to the preliminary decree in effect become pleadings when they are filed.

It is not entirely clear whether the Montana Rules of Civil Procedure (M.R.Civ.P.) apply to water court proceedings. The statutes are silent on that point, although Rule 53 is referred to in connection with the duties of the water master,³⁴⁶ and objection hearings "shall be conducted as for other civil actions."³⁴⁷ In addition, 3-7-103, MCA provides that the Montana Supreme Court "may promulgate special rules of practice and procedure...." It has yet to do so, except for its order of April 9, 1981 (Appendix Cc). It is the author's understanding that the court is in the process of promulgating such rules.

Rule 1 of the M.R.Civ.P. provides that the Rules govern the procedure in the district courts. Because the water courts are really extensions of the district courts, and because of the references to the M.R.Civ.P. in the water adjudication statutes, it would seem that the M.R.Civ.P. do apply to water court proceedings by implication.

6.5.4. Proof of Right

The initial proof of a claimed water right is made by the claim itself and the attachments thereto. However, the water judge can order the Department to conduct field investigations of claims, and can accept other data submitted by the Department.³⁴⁸ In addition, the water judge can use any other additional data.³⁴⁹

³⁴⁶. 3-7-311(1) and 85-2-233(4), MCA.

³⁴⁷. 85-2-233(4), MCA.

³⁴⁸. 85-2-243 and 231(1)(b), MCA.

³⁴⁹. 85-2-231(1)(d), MCA.

Once objections are filed, the parties have the opportunity to present additional or contrary evidence of the water rights decreed. Whether the Rules of Evidence apply at this juncture is not clear either (see discussion above), although the adjudication proceedings are obviously intended to be conducted informally up to the preliminary decree stage so that any evidence of a water right can be used.

6.5.5. Preliminary Decree

Within 90 days after the deadline for filing claims, "or as soon thereafter as is reasonably feasible,"³⁵⁰ the water judge must issue a preliminary decree of existing water rights; preliminary decrees may be issued for subunits of a water division if necessary. The preliminary decree will be based on the claims, any additional data, and the report of the water master.³⁵¹ The preliminary decree must decree each existing water right in detail, listing such information as date of priority, rate and volume, purpose of use, place of use, and point of diversion, as well as the owner of the right.³⁵² See Appendix Cc for the Preliminary Decree on the Powder River basin (only partially reprinted due to its length) as an example of what the decrees will look like.

After issuance, a copy of the preliminary decree is sent to the Department. In addition, a "notice of availability" of the decree and an abstract of the disposition of a claimed right are sent to each claimant;

350. 85-2-231, MCA.

351. 85-2-231 and 3-7-311, MCA.

352. 85-2-231(3) and 85-2-234, MCA.

the decree itself is not sent. The notice of availability is also sent to holders of water use permits, applicants for permits, and other interested persons who request the notice. See Appendix Dd for the Notice of Availability of the Powder River basin decree.

Copies of the preliminary decree can be obtained from the water judge upon request and payment of the established fee therefor (\$65 for the Powder River basin decree).

PRACTICE NOTE: The practitioner representing a claimant or a potential objector to a preliminary decree should always obtain a copy of the entire decree. The cost is minimal, and without the decree, there is no way of knowing whether there may be other water rights which should be contested.

6.5.6. Objections

The adjudication process provides for the filing of objections to the preliminary decree by the Department, anyone named in the decree, or any other person "for good cause shown."³⁵³ It is at this stage that a claimant who is not satisfied with what he was decreed must object: otherwise, he will have lost any opportunity to contest the decree. This is also the stage where a claimant must object to any other water rights contained in the decree.

The statute says that anyone filing an objection "is entitled to a hearing thereon before the water judge."³⁵⁴ Then the same statute provides that, if "a hearing is requested, such request must be filed with the water judge

353. 85-2-233(1), WA. The statute is silent as to whether the objector must have standing to object. "Good cause shown" appears to require some kind of standing by "any other person." This reading of the law has been reinforced in the Order of the supreme court, Appendix Bb, and the Notice of Availability issued by the water court in the Powder River basin proceedings, wherein it is provided that "good cause shown" shall include: "A showing that one has a substantial reason for objecting, which means that the party has an interest that has been affected by the Preliminary Decree, and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting." See Notice of Availability, Appendix Dd.

354. 85-2-233(1), WA.

within 90 days after notice of entry of the preliminary decree." This time limit may be extended an additional 90 days for good cause shown upon application to the water judge.³⁵⁵ The law seems to contemplate that an objection is a request for a hearing, since no time limit is given for filing an objection where no hearing is requested. However, apparently an objector can waive his right to a hearing, and rely solely on the objection and any written briefs or evidence the objector is allowed to file. The same time limit would probably apply to such objections.³⁵⁶

The request for hearing (objection) must contain a precise statement of the findings and conclusions in the decree with which the objector disagrees, it must specify the paragraphs and pages containing such findings and conclusions, and it must state the specific grounds and evidence on which the objection is based.³⁵⁷ The Montana Supreme Court, pursuant to its authority under 3-7-103, MCA, has gone further and adopted a rule specifying the form of the objection and the information that must be contained in it. See Appendix Bb for the rule.

Once objections are received, the water court then sets a schedule for the hearings. Hearings may be individual or consolidated, and may be held by the water master on order of the water judge. According to 85-2-233(4), MCA, they are to be conducted "as for other civil actions." Whether the Montana Rules of Civil Procedure and the Rules of Evidence

355. 85-2-233(2), MCA.

356. See Notice of Availability, Appendix Dd, where the 90 day time period was adopted by the water court for all objections, and objectors were given the opportunity to either appear at the hearing or file a statement. This is consistent with 85-2-233(4), MCA. See also Appendix Bb, Order of the Montana Supreme Court.

357. 85-2-233(3), MCA.

apply is not clear. See sec. 6.5.3., supra.

6.5.7. Final Decree

On the basis of the preliminary decree and the hearings, a "final decree" is then issued by the water courts.³⁵⁸ In the unlikely event that no objections to the preliminary decree are filed, the preliminary decree automatically becomes final.

The statute is quite specific in requiring the type of information on each water right that must be stated in the decree.³⁵⁹ Every water right will be clearly defined and limited.

6.5.8. Appeals

Pursuant to 85-2-235, MCA, a final decree of a water court may be appealed to the Montana Supreme Court. However, appeal rights are limited. Only persons whose existing rights and priorities are determined in the final decree may appeal, and then only if they "requested a hearing and appeared and entered objections.."³⁶⁰ (emphasis added) or their rights were altered as a result of a hearing. The statute appears to require that objectors actually physically appear at the hearing, or be foreclosed from appealing. On the other hand, 85-2-233(4), MCA, provides that "[t]he water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement."

As in the cases of the application of the Montana Rules

³⁵⁸. 85-2-234(1), MCA.

³⁵⁹. See 85-2-234, MCA. The reason for this degree of specificity in the statute is to avoid problems that resulted from vague decrees of water rights under the prior law.

³⁶⁰. 85-2-235(2), MCA.

of Civil Procedure and the Rules of Evidence, the statute is silent on the question of the application of the Rules of Appellate Civil Procedure. All these rules apply by their own terms to district court proceedings; no mention is made of special court proceedings. However, the water courts are really extensions of the district courts, since the district courts have original jurisdiction of water cases, and the water adjudication statutes state that the water courts are exercising the jurisdiction of the district courts.³⁶¹ The question is a substantial one which must be resolved.

A question also arises whether an appeal can be taken by an appropriator whose water rights are decreed, who did not file any objections, and who feels aggrieved by alterations made to someone else's rights as the result of the hearings. For example, it is possible that a senior appropriator could be decreed more water after a hearing, to which the junior appropriator would then object.

The statute allows appeals by persons whose "rights as determined in the preliminary decree were altered as the result of a hearing requested by another person."³⁶² Under the example given above, an argument can be made that the junior appropriator's "rights" were "altered" vis-a-vis the senior's, thereby entitling the junior appropriator to an appeal.

PRACTICE NOTE: To preserve rights of appeal and play it safe, an objection to the preliminary decree should be made, a hearing should be requested, and the objector should appear personally or through his representative at the hearing.

361. Mont. Const. of 1972, art. VII, sec. 4; 3-7-501(1), MCA.

362. 85-2-235(2), MCA.

6.6. Certificates

After the final decree is issued, the Department is directed to send each person decreed a water right a Certificate of Water Right, the same certificates that are issued now for low-yield ground water appropriations.³⁶³ Presumably, the Department would delay issuing the certificates if appeals were taken.

6.7. Department Role

As can be seen from the above discussion, the Department plays a key role in the adjudication process. However, its role is basically ministerial, and it serves as the record keeping and data collecting arm of the water courts. Ultimately, the water courts and the Montana Supreme Court have overall control of the adjudication process.

The Department carries out an assistance role to the public in the process. Although the Department will not actually sit down with an appropriator and fill out claim forms, it can lead the claimant in the right direction, and help the claimant find information to document water rights.

³⁶³. 85-2-236, MCA.

1. The first part of the document is a list of the names of the persons who have been appointed to the various offices of the Board of Directors of the Corporation. The names are as follows:

CHAPTER 7. LITIGATING WATER RIGHTS

(SEMINAR OUTLINE: See Litigating Water Rights, by Bruce **Loble**, Esq., in "Seminar Outlines" in back of this handbook.)

7.1. Background

Chapter 2, secs. 2.5.1.3. and 2.6.1.1., supra, discussed the **history** in Montana of adjudication of water rights, and Chapter 6 discussed adjudications under the **current** law. At least in Montana, the adjudication of water rights has been and still is the same as litigating water rights, the subject of this chapter. But, as the practitioner knows, litigating water rights can involve much **more** than mere adjudication. Indeed, litigation over water rights may not even directly involve the adjudication of water rights, **although** it usually does.

The purpose of this chapter is to acquaint the practitioner with the general aspects of water rights litigation. It is not **intended** to be comprehensive, since other areas of law outside the scope of this book, such as civil procedure, rules of evidence, and trial practice, bear upon litigation.

7.2. Jurisdiction and Venue

Under the 1972 Constitution, the district courts have original jurisdiction of water cases.³⁶⁴ But the water **rights** adjudication statutes require **that** litigation involving "the determination and interpretation of existing water rights **shall** be brought before or immediately transferred to the water judge in the proper water division...."³⁶⁵ "The jurisdiction of each judicial

³⁶⁴. Supra, n. 361.

³⁶⁵. 85-2-216, MCA.

district concerning the determination and interpretation of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly."³⁶⁶ This means that any lawsuit involving the determination and interpretation of pre-July 1, 1973, water rights must end up in the appropriate water court, although it can be filed in the appropriate district court.³⁶⁷ All other water rights cases should be brought in the appropriate district court, and they will remain there.

When does a lawsuit involve "the determination and interpretation" of pre-July 1, 1973, water rights? Since the obvious intent of the statutes is to put all cases adjudicating pre-July 1, 1973, water rights exclusively in the water courts for consistency, the adjudication statutes should be consulted, particularly 84-2-234, MCA, which outlines the information on existing water rights which must be stated in a final decree of existing rights (see **sec. 6.5.7., supra**). If a lawsuit on its face will **result** or might result in determining the extent of an existing water right (a pre-July 1, 1973, right), such as its priority date, quantity, place and purpose of use, point of diversion, or ownership, then the lawsuit will probably involve its "determination and interpretation."

³⁶⁶. 3-7-501(1), MCA.

³⁶⁷. It is doubtful whether a water judge can "redelegate" such a case back to the district court, unless immediate action is necessary. See 3-7-213, MCA. See also 85-2-406(2), MCA, which provides that "[w]hen a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter, any party to the controversy may petition the district court for relief." Secs. 3-7-501(1) and 85-2-216, MCA, having been enacted later in time, supersede this section insofar as the "determination and interpretation" of existing water rights is concerned.

If 'the litigation' involves citizens of 'different states, and other jurisdictional requirements are met, actions relating to water rights may also be brought in the appropriate federal court.

7.3. Parties

Under prior law, general adjudication lawsuits could be initiated naming everyone on the Stream as a party. The Water Use Act, however, repealed the statutes providing for such general adjudications. It would seem that now only those persons who are directly involved in the particular water rights dispute can be named as parties.

7.4. Proof of Right

The proof of a water right is perhaps the most difficult aspect of water rights litigation. Unlike most lawsuits, the trial of a water rights case often requires evidence from a period of time which spans several decades, or even more than a century. This is because of the nature of a water right under the Appropriation Doctrine--an appropriative right depends on its priority, and the extent of the right depends on original intent and beneficial use. See Chapter 2.

Often evidence of the water right is simply unavailable. But if one searches enough, evidence of priority can be obtained from old filings, water resource surveys, aerial photographs, and other old records. The same sources of information for claiming a water right under the adjudication system should be reviewed and researched for a lawsuit involving old water rights. See see. 6.4.2., supra.

Proof of beneficial use (e.g., duty) often will necessitate the testimony of expert witnesses. These may be soil conservation service employees, agronomists, agricultural engineers, qualified consulting engineers, or other experts. Sufficient evidence may also be developed from the testimony of the irrigators themselves.³⁶⁸ Whoever the expert, it is important that he be familiar with water rights, water requirements, and water distribution systems.

After existing water rights are adjudicated by the water courts, questions of proof of such rights will diminish considerably. The Certificate of Water Right will be proof of the right. However, questions of abandonment, ownership, and changes in and expansion of the right will still arise.

7.5. Damages

Damages are frequently the subject of water rights litigation. In most cases, the subject arises out of an alleged interference with other water rights, such as a junior appropriator wrongfully withholding water from a senior appropriator. It also arises in flood, seepage, and pollution situations, not treated herein.

Initially, of course, a determination must be made whether there has been a wrongful interference with an appropriator's exercise of his water right, entitling that appropriator to maintain a damage action.³⁶⁹ This

³⁶⁸. It has been said that this character of testimony is of higher quality than the mere opinion of an expert; that it is the difference between practice and theory, between experience and observation and examination." Worden v. Alexander, 108 Mont. 208, 215, 216, 90 P.2d 160 (1939).

³⁶⁹. A determination that one is entitled to water entitles him to maintain a damage action. Harris v. Shontz, 1 Mont. 212 (1870).

determination will involve proof of the water rights involved, and application of the law of the rights of senior and junior appropriators. Therefore, a thorough understanding of Appropriation Doctrine law in Montana will be necessary. See Chapter 2 for a beginning.

Once a wrongful interference has been shown, then actual damages resulting from the interference must be determined. The plaintiff should be awarded his actual damages, but they must be proven with reasonable certainty.³⁷⁰ If crops are lost, then the value of those crops must be proven.³⁷¹

7.6. Injunctions

It is well settled that an appropriator is entitled to injunctive relief if his water rights are or will be wrongfully adversely affected.³⁷² But an interference must be proven. For example, an appropriation by an upstream junior appropriator cannot interfere with a downstream senior appropriator where the water wouldn't physically reach him.³⁷³ And, it has been held that the appropriator alleging interference must eliminate excessive transmission losses in his own system before he is entitled to an injunction.³⁷⁴

370. *Tucker v. Missoula Light & Water Co.*, 77 Mont. 91, 250 P. 11 (1926).

371. *Id.*

372. See, e.g., *Raymond v. Winsette*, 12 Mont. 531, 31 P. 537 (1892); see also 85-2-406(2), MCA.

373. *Raymond*, *id.*

374. *Dern v. Tanner*, 60 F.2d 626 (D. Mont. 1932).



CHAPTER 8. DITCH RIGHTS

8.1. General; Relationship to Water Rights

Ditch rights are rights of access across another's land to convey water. They may be mere licenses, or actual easements. In most cases, ditch rights are easements having the same legal status as any other easement, such as an easement for an access road.³⁷⁵

Both the 1889 and 1972 Montana Constitutions provided for the use of eminent domain, if necessary, to acquire ditch rights. The 1972 Montana Constitution provides as follows:

The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.³⁷⁶

Since the use of water is declared to be a public use under this language, rights of access to convey the water across the land of another may be acquired by condemnation proceedings.³⁷⁷

Like any other easement, ditch rights can be granted with the consent of the landowner. But whether the easement is acquired by grant or condemnation, the landowner must be compensated.³⁷⁸

Once acquired, ditch rights cannot be enlarged or changed materially without the consent of the landowner.

375. See, e.g., *Colarchik v. Watkins*, 144 Mont. 17, 393 P.2d 786 (1964); *Hughes v. King*, 142 Mont. 227, 383 P.2d 816 (1963); *Mannix v. Powell County*, 75 Mont. 202, 243 P. 568 (1926).

376. Mont. Const. of 1972, art. IX, sec. 3(2), adopted nearly verbatim from Mont. Const. of 1889, art. III, sec. 15.

377. *Prentice v. McKay*, 38 Mont. 114, 98 P. 1081 (1909).

378. *Allen v. Wampler*, 143 Mont. 486, 392 P.2d 82 (1964).

They are limited to the original nature of the enjoyment of the easement.³⁷⁹ But the ditch owner has the right to make necessary repairs to the ditch, even if that means taking adjacent soil of the servient tenement.³⁸⁰ And, as with other easements, a new landowner takes the property subject to the rights of the ditch owner.³⁸¹

It is important to note the distinction between ditch rights and water rights. Ditch rights are not the same as water rights; they are separate and distinct, and do not depend upon each other for their existence. They can be acquired and owned separately, and transferred separately.³⁸² This distinction, and the tendency to confuse the two, can lead to unintended results. For example, the acquisition of a ditch right is not evidence of an acquisition of a water right; the water right must also be acquired.³⁸³ See sec. 8.4.. infra.

8.2. Abandonment

Like other types of easements, ditch rights can be abandoned under proper circumstances. Since water rights and ditch rights are separate and independent of each other, however, the abandonment provision of the Water Use Act enacted in 1973 has no effect on ditch rights.³⁸⁴

³⁷⁹. *Babcock v. Gregg*, 55 Mont. 317, 178 P. 284 (1919); *Campbell v. Flannery*, 32 Mont. 119, 79 P. 702 (1905); *Clausen v. Amington*, 123 Mont. 1, 212 P.2d 440 (1950); *Hansen v. Galiger*, 123 Mont. 101, 208 P.2d 1049 (1949).

³⁸⁰. *Laden v. Atkeson*, 112 Mont. 302, 116 P.2d 881 (1941); *Dahlberg v. Lannen*, 84 Mont. 68, 274 P. 151 (1929).

³⁸¹. *Dahlberg*, *id.*; *Hansen*, *supra*, n. 379; *Cottonwood Ditch Co. v. Thom*, 39 Mont. 115, 101 P. 825, *aff'd.* in rehearing, 39 Mont. 115, 104 P. 281 (1909); *Lowry v. Carrier*, 55 Mont. 392, 177 P. 756 (1918).

³⁸². *Connolly v. Harrel*, 102 Mont. 295, 57 P.2d 781 (1936); *Harrer v. Northern Pac. Ry. Co.*, 147 Mont. 130, 410 P.2d 713 (1966); *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972); *MacLay v. Missoula Irr. Dist.*, 90 Mont. 344, 3 P.2d 286 (1931); *O'Connor v. Brodie*, 153 Mont. 129, 454 P.2d 920 (1969).

³⁸³. *Smith v. Krutar*, 153 Mont. 325, 457 P.2d 459 (1969).

³⁸⁴. See 85-2-404, MCA. See also *McDonnell v. Huffine*, 44 Mont. 411, 120 P. 792

8.3. Prescription

Ditch rights can also be acquired by prescription. However, since water rights can no longer be acquired in this manner, it is doubtful that the acquisition of ditch rights by adverse use and prescription has any practical effect.³⁸⁵

8.4 Transfer

Ditch easements can be transferred in the same manner as other easements. It is important, however, that the existence of ditch rights be recognized whenever a transaction takes place for the transfer of land and/or water rights. For example, a landowner who subdivides his land and sells off some of the tracts, but wants to retain other land for irrigation, should ensure that he reserves sufficient ditch rights to convey the water to his retained land. Conversely, a purchaser of a tract of land with appurtenant water rights will want to make sure he is conveyed the accompanying ditch rights.

(1912), which held that abandonment of a ditch right does not constitute abandonment of a water right, and vice versa.

³⁸⁵. For cases on acquisition of ditch rights by prescription, see *Glantz v. Gabel*, 66 Mont. 134, 212 P. 858 (1923); *Hays v. DeAtley*, 65 Mont. 558, 212 P. 296 (1922); *McDonnell v. Huffine*, 44 Mont. 411, 120 P. 792 (1912); *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930).

CHAPTER 9. FEDERAL-STATE CONFLICTS

(Note from author: It is intended that this chapter will be completed in a future supplement to this book. Because of current litigation now on appeal to the Ninth Circuit Court³⁸⁶ and rapidly changing developments in this area of water law, it is felt that a discussion of federal-state conflicts in water law will soon be obsolete. In the meantime, for an excellent review of problems and applicable law in this area, see Ladd, "Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan," 42 Mont. L. Rev. 267 (1981).)

³⁸⁶. The Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Adsit, No. 79-4887, et al. (9th Cir.).

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CHAPTER 10. INTERSTATE STREAMS

10.1. Yellowstone River Compact

In 1951 the Yellowstone River Compact³⁸⁷ was ratified Montana, and about the same time was also ratified by the states of Wyoming and North Dakota and by Congress. The compact, the only water resource compact to which Montana is a signatory state at the present time, allocated the waters of the Powder, Big Horn, Tongue, and Clarks Fork rivers, all tributaries to the Yellowstone River and originating in Wyoming, between the states of Montana and Wyoming. The allocations were made on a percentage basis of the unappropriated waters remaining after subtracting pre-January 1, 1950, water rights (and "supplemental rights" thereto) in each state.³⁸⁸

A Yellowstone River Compact Commission was established to administer the compact. Montana is a member, as are Wyoming and the United States of America; North Dakota is not. The commission has no real power, but it collects data on water use in each state and may adopt rules "which it may find necessary to carry out the provisions" of the compact.³⁸⁹ The commission has only recently begun to determine its exact role.

The compact is important for the purposes of this handbook because it established upper limits on the amount of water that may be appropriated from the four named tributaries in Montana. It is also important because it established certain procedures for appropriating water

387. 85-20-101, MCA.

388. Art. V, id.

389. Art. III, *supra*, n. 387.

across state lines, and for use outside the Yellowstone River basin.

Although the compact allocates the unappropriated water in the four tributaries, it has yet to be determined how much water on a quantity and volume basis is available for appropriation in Montana. This is because the pre-1950 water rights in Montana have not yet been quantified. The adjudication process now underway will largely solve that problem, except perhaps for certain federal and Indian reserved water rights. And, by that time the commission intends to have adopted a detailed method for calculating the unappropriated waters in each state. Until that time, the upper limit on appropriations from the four tributaries is not a practical problem, at least not any more than on any other stream in the state, except for very large appropriations.

Art. X of the compact prohibits the diversion of any water from the Yellowstone River basin "without the unanimous consent of all the signatory states." This has been interpreted by the commission and by the states to mean consent by the legislature of each state, or by some other body designatsd by each legislature. In Montana, that authority has recently been delegated to the Department of Natural Resources and and Conservation.³⁹⁰ A lawsuit challenging the constitutionality of Art. X has been pending in federal district court for several years.³⁹¹

Art. VII governs the procedure to be followed when

³⁹⁰ 35-2-801 to 807, MCA.

³⁹¹ Intake Water Co. v. Yellowstone Comm.

Civil No. 1184 (D. Mont.).

appropriations are made in one signatory state for use in another signatory state. Basically, duplicate filings are made in each state. There is some question about the priority date of a new water right under this procedure, a subject of litigation now on appeal.³⁹²

10.2. Other Interstate Streams

The other interstate streams flowing through Montana are not governed by any compact. Therefore, appropriators in Montana have no way of really knowing the upper limits of their appropriations before facing the risk of waters being unavailable due to downstream water rights. This problem is currently being addressed, but probably won't be resolved for several years.³⁹³

³⁹². State ex rel. Intake Water Co. v. Board of Natural Resources and Conservation, No. 81-209 (filed April 24, 1981).

³⁹³. See generally Ladd, Federal and Interstate Conflicts in Montana Waters Law: support for a State Water Plan, 42 Mont. L. Rev. 267 (1981).

1. The first step in the process of identifying a problem is to recognize that a problem exists. This is often done by comparing current performance with a desired state or goal. If there is a significant difference, a problem is identified.

2000

CHAPTER 11. INTERNATIONAL STREAMS

11.1. Boundary Waters Treaty of 1909

Partially as a result of a dispute between Canada and the United States over the use of the waters of the St. Mary and Milk rivers, both of which arise in Montana (but with the Milk flowing back into Montana and then to the Missouri), the two countries agreed to a treaty in 1909.³⁹⁴ Commonly referred to as the Boundary Waters Treaty of 1909, the treaty grants exclusive control to each nation over tributaries to "boundary waters" and upstream trans-boundary waters within each nation's territory. Each country has exclusive jurisdiction and control over the use and diversion of all waters on its own side of the international boundary which flow across the boundary or into boundary waters. However, under Art. II of the Treaty, an injury to a party on one side of the boundary by a diversion on the other side "shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs." The effect of this provision is to put the downstream injured party in the same position as someone injured at the upstream point of diversion, but a remedy is not always guaranteed because of problems of sovereign immunity (an upstream governmental diverter may be immune from suit in the country where the diversion takes place).

Art. VI of the treaty is the provision that really affects Montana. It apportions the waters of the St. Mary

³⁹⁴. Treaty between the United States and Canada Concerning Boundary Waters, Jan. 1909, 36 Stat. 2448.

and Milk rivers equally between the two countries, but "more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each." Pursuant to this provision, Canada has announced its intentions to divert further quantities of water from the Milk River while it flows through Canada. The Milk River is already one of the most heavily appropriated streams in Montana. In fact, consideration is currently being given to closing portions of it to further appropriation under legislation enacted in 1981.³⁹⁵

PRACTICE NOTE: It would behoove a potential new appropriator on the Milk River to think twice before initiating a water right application on that source. Chances are that eventually the water right, even if approved by the Department, would amount to nothing more than a "paper right."

11.2. Columbia River Treaty

After being referred to the International Joint Commission, which was created by the Boundary Waters Treaty of 1909 (discussed above), and prolonged negotiations, the Columbia River Treaty between Canada and the United States was concluded in 1961.³⁹⁶ It was later amended in 1964.

The Libby Dam was authorized under this treaty.³⁹⁷ The significant impact of the treaty to Montana, however, is its authorization to Canada to divert water from the Kootenai (spelled "Kootenay" in Canada) in Canada to another part of the Columbia River Basin, thus reducing the flow through Montana. In 1981 Canada may begin diverting up to

^{395.} See 85-2-321 to 323, MCA.

^{396.} Treaty of January 17, 1961 with Canada for the Co-operative Development of the Columbia River Basin, 44 U.S. Dept. of State Bull. 227 (1961); 15 U.S.T. & O.I.A. 1555, T.I.A.S. 5638.

³⁹⁷ Art. XII, id.

1,500,000 acre-feet per year from the river near Canal Flats, B.C. (north of Eureka, Montana), provided that the diversion does not reduce the stream flow immediately downstream to less than the natural flow or 200 cubic feet per second, whichever is less.³⁹⁸ Then, after 2021, but before 2061, Canada can exercise another option to divert any water that would flow in the Kootenai River across the international boundary near **Newgate**, B.C. (just north of Eureka and south of Canal Flats), but the diversion cannot reduce the flow immediately downstream below 2,500 cubic feet per second or the natural flow, whichever is less.³⁹⁹ Further, however, between 2041 and 2061, the diversion may reduce the flow to 1,000 cubic feet per second or the natural flow, whichever is less.⁴⁰⁰ In addition, Canada can divert water from the Columbia River basin into other basins for consumptive uses at any time. Consumptive uses are defined as uses for domestic, municipal, stock watering, irrigation, mining, and industrial purposes (excluding hydropower).⁴⁰¹

The net effect of the treaty on Montana is that it is possible that flows in the Kootenai River may be substantially diminished in the future. In addition, because of possible reductions in streamflow in the Columbia downstream from Montana, demands may be placed on Montana's water flowing into the Columbia (Kootenai and Clark Fork) by our downstream neighbors. At present these possibilities

398. Art. XIII(2), id.

399. Art. XIII(3), id.

400. Art. XIII(4), id.

401. Art. I(1)(e) and Art. XIII(1), id.

have little practical effect, but future development of water in the Kootenai and Clark Fork basins in Montana may be constrained.⁴⁰²

⁴⁰². It probably already is due to existing hydropower development.

APPENDIX LIST

<u>Appendix</u>	<u>Name</u>
A	Form No. 600, Application for Beneficial Water Use Permit
B	Form No. 601, Permit to Appropriate Water
C	Form No. 602, Notice of Completion of Ground-Water Development
D	Form No. 604, Certificate of Water Right
E	Form No. 605, Application for Provisional Permit for Completed Stockwater Pit or Reservoir
F	Form No. 606, Application for Change of Appropriation Water Right
G	Form No. 607, Application for Extension of Time
H	Form No. 609, Application to Sever and Sell Appropriation Water Right
I	Form No. 610, Application for Reservation of Water
J	Form No. 611, Objection to Application
K	Form No. 612, Statement of Opinion
L	Form No. 613, Fee Schedule for the Appropriation of Water in Montana
M	Form No. 616, Notice of Action on Application for Extension of time
N	Form No. 617, Notice of Completion of Water Development
O	Form No. 618, Notice of Completion of Change of Appropriation of Water Right
P	Form No. 620, Authorization to Change Appropriation Water Right

APPENDIX LIST (CONT'D)

Appendix

Name

Q	Form No. 608, Notification of Transfer of Appropriation Water Right, and Form No. 625, Acknowledgment of Water Right Transfer (not printed at the time of publication of this handbook)
R	Form No. 76-S, Stock Water Statement of Claim
S	Form No. 76-D, Domestic Statement of Claim
T	Form No. 76-1, Irrigation Statement of Claim
U	Form 76-0, Other Uses Statement of Claim
V	Water Rights Order of Montana Supreme Court dated June 8, 1979
W	Order of Water Courts dated November 9, 1979
X	Order of Water Courts dated June 24, 1980
Y	Order of Water Courts dated July 14, 1980
Z	Order of Water Courts dated August 6, 1980
Aa	Order of Water Courts dated March 11, 1981
Bb	Order of Montana Supreme Court dated April 9, 1981
Cc	Preliminary Decree in the Water Courts... Powder River Basin dated May 7, 1981
Dd	Notice of Availability of Preliminary Decree dated May 7, 1981

STATE OF MONTANA

DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

APPLICATION FOR BENEFICIAL WATER USE PERMIT

Note: Use one application for each source of supply or separate development. Check all appropriate boxes and fill in each blank line. If the question is not applicable in your case, enter NA (not applicable). If more space is necessary, attach additional sheets.

(Please type or print in ink)

1. Name of Applicant _____ Mailing Address _____ City or Town _____ State _____ Zip _____ Home Phone _____ Other Phone _____
2. Source of water supply _____ a tributary of _____ (stream name, if well, so indicate)
3. (a) Point of diversion ____ 1/4 ____ 1/4 ____ 1/4 Section _____, Township _____ N S, Range _____ E W, _____ County Additional points of diversion, if any ____ 1/4 ____ 1/4 ____ 1/4 Section _____, Township _____ N S, Range _____ E W, _____ County ____ 1/4 ____ 1/4 ____ 1/4 Section _____, Township _____ N S, Range _____ E W, _____ County (b) If water is not consumed, it will be discharged back into the same source: Yes <input type="checkbox"/> . No <input type="checkbox"/> . If no, explain and give the complete land description at the point of discharge: _____ ____ 1/4 ____ 1/4 ____ 1/4 Section _____ Township _____ N S Range _____ E W, _____ County
4 Description of water development (a) Diverting works Enclose all pertinent engineering data available. If not available, describe the horsepower rating of the pump and capacity in gallons per minute, size of ditches, flumes, dikes or other _____ _____ (b) Reservoir (if applicable) 1. Project will be an enlargement of an existing reservoir. Yes <input type="checkbox"/> . No <input type="checkbox"/> (If yes, complete both 3 and 4 below.) 2. Project will be a new reservoir. Yes <input type="checkbox"/> , No <input type="checkbox"/> . (If yes, enter NA in 3 below, and complete 4.) 3. Capacity of existing (old) reservoir when constructed _____ acre-feet 4. Capacity of new (proposed) reservoir _____ acre-feet. (c) Well Depth _____ feet (if applicable). (d) Project will be a developed spring Yes <input type="checkbox"/> . No <input type="checkbox"/> .

5. Proposed Construction

- (a) Desired starting date _____, anticipated completion date _____
(b) Estimated construction cost \$ _____

6. Amount of water, use to which it will be applied, and period of use.

Example:

7.8 cfs gpm up to 5.3 for IRRIGATION from April 15 to OCTOBER 15 inclusive
(Amount) (acre-feet) (use) (month-day) (month-day)
cts gpm up to _____ for _____ from _____ to _____ inclusive
(Amount) (acre-feet) (use) (month-day) (month-day)
cfs gpm up to _____ for _____ from _____ to _____ inclusive
(Amount) (acre-feet) (use) (month-day) (month-day)
cts gpm up to _____ for _____ from _____ to _____ inclusive.
(Amount) (acre-feet) (use) (month-day) (month-day)
Total amount requested _____ cfs gpm up to _____ acre-feet per year.

7. Description of proposed beneficial water uses

(a) Irrigation (if applicable)

- 1 Method of irrigation Flood ☐ Sprinkler ☐ If Flood, explain _____
2 Project will involve new irrigated land Yes ☐ No ☐
3 Project will involve supplemental water to existing irrigation Yes ☐ No ☐
4 Project will involve both new irrigated land and supplemental water to existing irrigation Yes ☐ No ☐ If yes the acreage must be entered on separate lines in the Table below, and identified on the map in Item 9, page 3
5. Acreage by land description. (Enter the number of acres to be irrigated in the appropriate quarter-section.)

Example:								Check Appropriate Block	
Sec.	Twp.	Rge.	NE 1/4	NW 1/4	SW 1/4	SE 1/4	Totals	New	Supplemental
7	13 N.	20 E	35		140	118	293	<input checked="" type="checkbox"/>	

								Check Appropriate Block	
Sec.	Twp.	Rge.	NE 1/4	NW 1/4	SW 1/4	SE 1/4	Totals	New	Supplemental

Total number of acres to be irrigated →

(b) Non irrigation use (if applicable)

- 1 Place of use of the water will be the same as location given in Item 3(a), page 1

Yes ☐ No ☐ If no, give the location _____ % _____ % _____ % Section _____,

Township N, Range W _____ County

- 2 Estimate the maximum number and type of livestock to be watered _____

Are there other locations where the same livestock are watered? - e r. No a

- 3 Name of municipality to be served _____

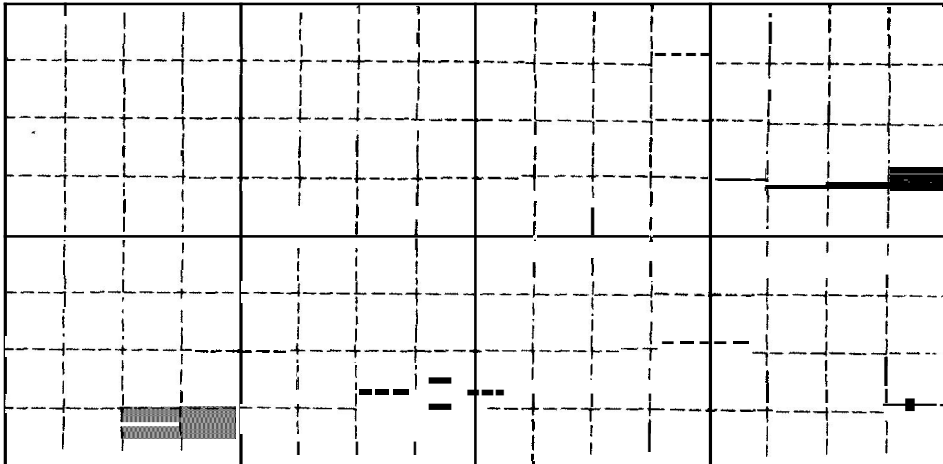
- 4 Number of families to be supplied _____

- 5 If water will be used for other purposes, describe. _____

8. Ownership

- (a) Property owner at the point of diversion _____
- (b) Property owner at the place of use _____
- (c) If either (a) or (b) above are other than the applicant describe the arrangement enabling the applicant to make this filing: _____

9. Map of proposed water development. Indicate clearly the point of diversion, place of use, and section, township, and range numbers. Show pertinent information concerning the development, such as dams, canals, ditches, pipelines, wells, etc. Use the largest, most convenient scale possible. If the map shown below is not adequate to describe your development, attach additional sheets.



10. Remarks.

11. THE APPLICANT CERTIFIES THAT THE STATEMENTS APPEARING HEREIN ARE TO THE BEST OF HIS KNOWLEDGE TRUE AND CORRECT

_____ (Signature)	_____ (Date)
_____ (Signature)	_____ (Date)
_____ (Signature)	_____ (Date)

Signature of applicant(s) must be exactly as in Item 1, page 1. If more than one applicant is shown, all must sign.

DEPARTMENT ENDORSEMENTS

APPENDIX A

P. 4

(This section is not to be filled in by Applicant)

Check When
Completed

ACTION TAKEN

1. Received by mail over counter in Department's office by _____
2. Date Received (priority): Day _____; Month _____; Year _____; Time _____
3. Recorded in, Book: _____ Page _____; By _____
4. Preliminary check by _____; Amt. of fee received \$ _____
Transmittal No. _____, Remarks _____
5. Application indexed by _____; Platted by _____
6. Application examined by _____, Type of Permit _____
7. Application returned for completion on _____; or corrected by office on _____
Date to be returned by Applicant _____
8. Corrected Application resubmitted to Department's office on _____
9. Priority of Application (see No. 2 above) brought down to _____
Reason: _____

10. Application approved for advertisement by _____
11. Notice of Publication prepared by _____; Proofed by _____
Date _____
12. Publication Proof Sheet proofed by _____; Date _____
13. Publication dates: From _____ To _____
14. Notice published in _____
15. Notice to water users prepared by _____; Proofed by _____
Date _____
16. Date Notice mailed to water users _____; Public agency with reserved waters _____
Others (specify) _____

17. Protests filed by _____

18. Date notice of hearing sent to Applicant _____; Objector(s) _____
19. Hearing held by _____, Place _____
Date _____
20. Date Statement of Opinion and notice of possible hearing sent _____
Sent by _____
21. Application field checked by _____; Date _____
22. Application recommended for (approval or denial) by _____
23. Application microfilmed by _____; Date _____
Roll No. _____ (Microfilm after Item 22 only)

REMARKS

(For Department Use Only)

FORM NO. 60 (1-79)

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Permit to Appropriate Water

THIS PROVISIONAL PERMIT TO APPROPRIATE WATER IS HEREBY ISSUED TO:

PATRICK C & JEAN P HOLLATZ
1011 AVENUE A
ILLINOIS MT 59102UPON FINDING THAT THE REQUIREMENTS OF SECTION 85-2-311 MCA
HAVE BEEN MET.

PERMIT NUMBER: 23395-643C

EFFECTIVE DATE: DECEMBER 08, 1979 AT 11:45 A.M.

SOURCE: UNNAMED TRIBUTARY OF STILLWATER RIVER

INITIAL AMOUNT: 150.00 GPM UP TO 15.00 AC-FT PER ANNUM

DIVERSION POINT: NESE SEC. 16 TWP. 055 RGE. 15E STILLWATER CO

PERIOD OF APPROPRIATION: JAN 01 - DEC 31

USE: 35.00 GPM UP TO 1.72 AC-FT (JAN 01 - DEC 31)
FOR DOMESTIC100.00 GPM UP TO 6.24 AC-FT (MAY 01 - SEP 30)
FOR IRRIGATION ON 3.00 ACRES

UP TO 6.84 AC-FT (JAN 01 - DEC 31)

FOR RECREATION

PLACE OF USE: NESE SEC. 16 TWP. 055 RGE. 15E STILLWATER CO

FOR DOMESTIC

NESE SEC. 16 TWP. 055 RGE. 15E STILLWATER CO
FOR IRRIGATION ON 3.00 ACRESNESE SEC. 16 TWP. 055 RGE. 15E STILLWATER CO
FOR RECREATION

DIVERSION MEANS: SPRING BOX

DESIGN: IF STREAM CAPACITY OF 0.1 AC-FT

** REQUIREMENTS FOR PERMIT HOLDER:
THE DIVERSION AND DISTRIBUTION WORKS FOR THIS APPROPRIATION SHALL BE
COMPLETED, AND WATER MAY BE USED, OR WITHIN ANY AUTHORIZED
EXTENSION OR FIVE YEARS THE NOTICE OF COMPLETION WITHIN ANY AUTHORITY.
E. OF
FORM 617, SHALL BE FILED ON OR BEFORE JULY 31, 1982.

** PRIOR RIGHTS:
THIS PERMIT IS SUBJECT TO ALL PRIOR EXISTING WATER RIGHTS IN THE SOURCE
OF SUPPLY. FURTHER, THIS PERMIT IS SUBJECT TO ANY FINAL DETERMINATION
OF EXISTING WATER RIGHTS, AS PROVIDED BY MONTANA LAW.

FAILURE TO COMPLY WITH ANY TERMS AND CONDITIONS HEREIN MAY RESULT IN
THE CANCELLATION OF THE WATER RIGHT GRANTED BY THIS PERMIT.

** TRANSFER TO NEW OWNER:
UPON A CHANGE IN OWNERSHIP OF ALL OR ANY PORTION OF THIS PERMIT,
PURSUANT TO SECTION 85-2-403, MCA, THE PERSON RECEIVING THE INTEREST
SHALL NOTIFY THIS DEPARTMENT ON A NOTIFICATION OF TRANSFER OF APPROPRIATION WATER RIGHT, FORM 608, (REVERSE OF THIS FORM)

WITNESS

PRC UNIT SUPERVISOR: THERESA McLAUGHLIN

DATE: OCTOBER 01, 1981 WATER RIGHTS BUREAU, WATER RESOURCES DIVISION

STATE OF MONTANA

For County Use Only

County of _____

Filed for Record this _____ day of _____, 19____

at _____ and Recorded in _____ on Page _____

of the Records of _____ County, State of Montana

By _____ Clerk and Recorder

APPENDIX B

FORM 10-10-77

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Permit to Appropriate Water

THIS PERMIT TO APPROPRIATE WATER IS HEREBY ISSUED TO:

PATICK C. JOSEPH BLUMITZ
011 17440
DELIVERED AT 1981

OPEN INSURE THAT THE REQUIREMENTS OF SECTION 84-2-311 MCA HAVE BEEN MET.

PERMIT NUMBER: 15385-0430

DATE OF PERMIT: DEC 08, 1979 AT 11:45 A.M.

EQUIPMENT: UNNAMED TERNARY OF STILLWATER RIVER

QUANTITY: 15.00 GPM UP TO 15.00 AC-FT PER ANNUM

PERMITTER: RES. SEC. 16 TWP. 05S RGE. 15E STILLWATER CO

PERMITTER'S ADDRESS: JAN 01 - DEC 31

USE: 15.00 GPM UP TO 15.00 AC-FT (JAN 01 - DEC 31)
FOR DOMESTIC

15.00 GPM UP TO 15.00 AC-FT (MAY 01 - SEP 30) ON 3.00 ACRES

UP TO 15.00 AC-FT (JAN 01 - DEC 31)
FOR RECREATION

PERMITTER'S ADDRESS: RES. SEC. 16 TWP. 05S RGE. 15E STILLWATER CO
FOR DOMESTIC

RES. SEC. 16 TWP. 05S RGE. 15E STILLWATER CO ON 3.00 ACRES

RES. SEC. 16 TWP. 05S RGE. 15E STILLWATER CO
FOR RECREATION

PERMITTER'S ADDRESS: SPRING BOX

PERMITTER'S OFF STREAM CAPACITY OF 0.1 AC-FT

** REQUIREMENTS FOR PERMIT HOLDER:

THE DIVERSION AND DISTRIBUTION WORKS FOR THIS APPROPRIATION SHALL BE COMPLETED AND WATER SHALL BE APPLIED TO BENEFICIAL USE AS SPECIFIED AND V. 10 OF 1000 MAY 01, 1982, OR WITHIN ANY AUTHORIZED EXTENSION OF TIME. THE NOTICE OF COMPLETION OF WATER DEVELOPMENT, FORM 617, SHALL BE FILED ON OR BEFORE JULY 01, 1982.

** RIGHTS NOTICE:

THIS PERMIT IS SUBJECT TO ALL PRIOR EXISTING WATER RIGHTS IN THE SOURCE OF SUPPLY. FURTHER, THIS PERMIT IS SUBJECT TO ANY FINAL DETERMINATION OF EXISTING WATER RIGHTS, AS PROVIDED BY MONTANA LAW.

FAILURE TO COMPLY WITH ANY TERM AND CONDITIONS HEREIN MAY RESULT IN THE LOSS OF THE WATER RIGHT GRANTED BY THIS PERMIT.

** TRANSFER TO NEW OWNER:

UPON A CHANGE IN OWNERSHIP OF ALL OR ANY PORTION OF THIS PERMIT, PURSUANT TO SECTION 84-2-403, MCA, THE PERSON RECEIVING THE INTEREST SHALL NOTIFY THIS DEPARTMENT IN A NOTIFICATION OF TRANSFER OF APPROPRIATION WATER RIGHT, FORM 600 (REVERSE OF THIS FORM)

[Signature]

[Signature]
PRC UNIT SUPVR: TERESA McLAUGHLIN

WITNESSES

DATE: OCTOBER 01, 1981 WATER RIGHTS BUREAU, WATER RESOURCES DIVISION

STATE OF MONTANA

(For County Use Only)

County of _____ ss.

Filed for Record this _____ day of _____, 19____

at _____ and Recorded in _____

on Page _____

of the Records of _____ County, State of Montana.

By _____

Deputy

Clerk and Recorder

Form No 602 R7/81

**NOTICE OF COMPLETION OF
GROUND-WATER DEVELOPMENT**For **ground-water** developments with a maximum use of
less than 100 gpm(Use Form 600, Application for Beneficial Water Use Permit for
undeveloped springs or appropriations of 100 gpm or more.)**IMPORTANT**

The right to the use of ground water is not automatic. Your priority will be determined by the date of filing this form. **STATE LAW REQUIRES THAT THIS FORM BE FILED BY THE WELL OWNER WITHIN 60 DAYS AFTER THE WATER HAS BEEN PUT TO BENEFICIAL USE.** Attach the proper filing fee, payable to the Department of Natural Resources and Conservation and submit to your area water rights field office as listed on the back side.

FOR DEPARTMENT USE ONLY

Notice No _____
 Date Received _____
 Time _____ A.M./P.M.
 Transmittal No _____
 Fee Received \$ _____
 Received By _____
 Refund Made _____

(Please type or print in ink)

1. NAME(S) _____
 MAILING ADDRESS _____
 CITY _____ STATE _____ ZIP _____
 HOME PHONE _____ OTHER PHONE _____

2. SOURCE OF GROUND WATER SUPPLY ☐ WELL ☐ DEVELOPED SPRING
 (excavation performed)
☐ PIT ☐ OTHER (describe) _____

3. DATE WATER PUT TO BENEFICIAL USE: _____
 NAME AND ADDRESS OF WELL DRILLER OR CONTRACTOR: (If applicant or other please indicate.)
 Name _____
 Address _____
 Maximum withdrawal _____ gallons per minute (as tested by driller)

Does this well replace an existing well? _____ Yes _____ No

If Yes, complete the following information pertaining to the existing (old) well.

Depth _____ ft. G.P.M. _____ Date drilled _____ month/day

If Yes, contact your area field office as you may be able to **file** a change in point of diversion and **retain** the priority date of the old well.

4. POINT OF DIVERSION: (Your legal land description may be obtained from your deed, county assessor, or clerk and recorder. Complete the following and attach an aerial photo or survey map showing the location of your well or development and your place of use, if available.)

L o t Block _____ Subdivision _____
 Government Lot _____ or _____ 1/4 _____ 1/4 _____ 1/4 Section _____
 TWP _____ N/S RGE _____ E/W County _____

5. PLACE OF USE: (If more than one place of use, attach additional sheets. If same as the point of diversion, CHECK ☐.)

Lot _____ Block _____ Subdivision _____
 Government Lot _____ or _____ 1/4 _____ 1/4 _____ 1/4 Section _____
 TWP _____ N/S RGE _____ E/W County _____

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

32 SOUTH EWING

HELENA MONTANA 59620

442-3952

DNRC

6. AMOUNT OF WATER. USE TO WHICH IT HAS BEEN APPLIED, AND PERIOD OF USE:

Total Rate Used: _____ gallons per minute

☐ DOMESTIC: (house, lawn, garden) No. of families supplied _____
No. of acres of lawn/garden irrigated _____

from _____ month/day to _____ month/day inclusive, of each year

☐ STOCK: Approximate maximum number and type of livestock _____

from _____ month/day to _____ month/day inclusive, of each year

☐ IRRIGATION: Total No. of acres irrigated _____
Type of crop _____

Amount of water used _____ acre-feet/year.
from _____ month/day to _____ month/day inclusive, of each year

☐ OTHER: Describe _____

Amount of water used _____ acre-feet/year or _____ Gal / day
from _____ month/day to _____ month/day inclusive, of each year

7. REMARKS: (Use this space for additional information, if needed, to describe development.)

8. THE APPROPRIATOR CERTIFIES THAT THE STATEMENTS APPEARING HEREIN ARE TO THE BEST OF HIS/HER KNOWLEDGE TRUE AND CORRECT.

(signature) (date)

(signature) (date)

SUBMIT THE COMPLETED FORM AND PROPER FILING FEE TO THE APPROPRIATE WATER RIGHTS BUREAU FIELD OFFICE, SERVING THE COUNTY IN WHICH THE DEVELOPMENT LIES, AS LISTED BELOW.

Montana Water Rights Bureau Area Field Offices

HELENA

32 South Ewing
Helena, Montana 59620
Phone: 449-3634
Serving: Deer Lodge, Powell,
Lewis and Clark, Broadwater,
Silver Bow, Jefferson and Beaverhead
Counties.

MISSOULA

2101 Bow Street
P.O. Box 5004
Missoula, Montana 59806
Phone: 721-4284
Serving: Missoula, Granite, Ravalli,
and Mineral Counties.

GLASGOW

110 5th Street South, Room 106
P.O. Box 894
Glasgow, Montana 59230
Phone: 228-2561
Serving: Daniels, Dawson, Garfield,
McCone, Phillips, Richland,
Roosevelt, Sheridan and Valley
Counties.

BOZEMAN

Bozeman Professional Building
20 East Olive, Suite 1-D
Bozeman, Montana 58715
Phone: 5883136
Serving: Gallatin, Park and Madison
Counties.

HAVRE

Old Highway 2
P.O. Box 1828
Havre, Montana 59501
Phone: 265-5516
Serving: Blaine, Chouteau, Glacier,
Hill, Liberty, Pondera, Teton and
Toole Counties.

BILLINGS

1537 Avenue D, Suite 121
Billings, Montana 58101
Phone: 248-6540
Serving: Big Horn, Carbon, Stillwater,
Treasure, Yellowstone and
Sweet Grass Counties.

KALISPELL

3220 Highway 93 South
P.O. Box 860
Kalispell, Montana 59901
Phone: 7559288
Serving: Flathead, Lake, Lincoln and
Sanders Counties.

LEWISTOWN

613 NE Main Street
P.O. Box 438
Lewistown, Montana 59457
Phone: 538-7459
Serving: Cascade, Fergus, Golden
Valley, Judith Basin, Meagher,
Musselshell, Petroleum and
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MILES CITY

5 North Prairie
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Miles City, Montana 59301
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Serving: Carter, Custer, Fallon,
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Wibaux Counties.

FORM NO. 604-17-78

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION**Certificate of Water Right**

THIS CERTIFICATE OF WATER RIGHT IS HEREBY ISSUED TO:

ROBERT E. S. JOHNSON & MARILYN
7700 LAUREL DRIVE, BILLINGS, MT 59102
BILLINGS, MT 59101UPON FINDING THAT THE REQUIREMENTS OF SECTION 85-2-301 MCA
HAVE BEEN MET.

CREDIT/MAIL OF WATER RIGHT NUMBER: 71074-370

A : JANUARY 19, 1981 AT 10:01 A.M.

TOTAL AMOUNT: 50.00 GPM UP TO 17.48 AC-FT

DIVERSION POINT: SWSW SEC. 23 T4N. 01S. R. 7E. 25E YELLOWSTONE CO

SOURCE: GROUNDWATER WELL

USE: 50.00 GPM UP TO 17.48 AC-FT (0.71-107.11)
FOR IRRIGATIONPLACE OF USE: SWSW SEC. 23 T4N. 01S. R. 7E. 25E YELLOWSTONE CO
FOR IRRIGATION**** PRIOR RIGHTS:**
THIS CERTIFICATE IS ISSUED SUBJECT TO ALL PRIOR EXISTING WATER RIGHTS
IN THE SOURCE OF SUPPLY.**FAILURE TO COMPLY WITH ANY TERMS AND CONDITIONS HEREIN MAY RESULT IN
THE LOSS OF THE WATER RIGHT GRANTED BY THIS CERTIFICATE.****** TRANSFER TO NEW OWNER:**
UPON A CHANGE IN OWNERSHIP OF ALL OR ANY PORTION OF THIS CERTIFICATE,
PURSUANT TO SECTION 85-2-403, MCA, THE PERSON RECEIVING THE INTEREST
SHALL NOTIFY THIS DEPARTMENT ON A NOTIFICATION OF TRANSFER OF APPROPRIATION
WATER RIGHT, FORM 604.WITNESS: _____ WATER RIGHTS ANALYST: STEVE NASH
DATE: JUNE 16, 1981 WATER RIGHTS DIVISION, WATER RESOURCES DIVISION

STATE OF MONTANA

(For County Use Only)

County of _____ ss

Filed for Record this _____ day of _____, 19____
at _____ and Recorded in _____of the Records of _____ on Page _____
County, State of Montana

By _____ Deputy _____ Clerk and Recorder

APPLICATION FOR PROVISIONAL PERMIT FOR COMPLETED STOCKWATER PIT OR RESERVOIR

FOR DEPARTMENT USE ONLY

Application No. _____
Date Received _____, 19____
Time _____ a.m./p.m.
Transmittal No. _____
Fee Received \$ _____
Received By _____

(1) Maximum capacity is less than 15 acre-feet; (2) located on a non-perennial flowing stream; and (3) constructed on and accessible to a parcel of land that is 40 acres or larger and owned or under the control of the applicant. (A perennial flowing stream means one which historically has flowed continuously at all seasons of the year, during dry as well as wet years.) This form must be filed within 60 days after constructing the stockwatering pit or reservoir.

1. **NAME OF APPLICANT** _____

City or Town _____, State _____ Zip _____

Home Phone _____ Other Phone _____

2. SOURCE OF WATER SUPPLY

a tributary of _____

(stream name)

3. LOCATION OF PIT OR RESERVOIR (Describe the location to the nearest 10 acres):

_____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$, or Government Lot _____,

of Section , Township _____ N/S, Range _____ E/W, _____ County

4. TOTAL VOLUME OF COMPLETED PIT OR RESERVOIR DEVELOPMENT = _____ acre-feet.

(a) Compute total volume of pit: surface area _____, x maximum depth _____, x 0.5,
= _____ acre-feet.

(b) Compute total volume of reservoir: surface area _____ acres, x 0.4, x maximum water depth in feet at the dam, = _____ acre-feet.

5. PERIOD OF USE: ☐ January 1 to December 31

☐ Other (specify) _____ to _____
month/day month/day

month/day

month/day

Note: The maximum appropriation of water per year must be less than 15 acre-feet to qualify using this form. If 15 acre-feet or more, Form No. 600 must be used.

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

WATER RESOURCES DIVISION

32 SOUTH EWING

HELENA, MONTANA 69620

DNRC

6. PLACE OF USE:

Will the water be used at the same location as given for the pit or reservoir? (see item 3)

☐ Yes ☐ No If no, give the location:

_____ 1/4 _____ 1/4 _____ 1/4, or Government L o t ,

of S e c t i o n , Township _____ NIS, Range — EIW, _____ County

7. OWNERSHIP:

- (a) Number of acres owned where pit or reservoir is located _____
- (b) If you are not the owner of the property at the point of diversion or place of use, it is your responsibility to obtain the necessary easements and right-of-way. If State or Federal lands are involved, contact the appropriate agency since the water right may be applied for by them.

8. THE MAP:

A map showing the following must accompany this application. Failure to supply an accurate map constitutes an incomplete application and the application will be returned for completion. A copy of an A.S.C.S. aerial photo or a copy of a U.S.G.S. topographic map is sufficient. (Please use dark pencil or pen when writing on the map.)

- (a) Township and Range No.'s (d) Other Place of Use (such as location of any stock tanks)
- (b) Section Numbers and Corners (e) Applicant's Signature or Person preparing the Map
- (c) Pit or Reservoir Location

9. REMARKS: Provide any additional information that would help in explaining the completed pit or reservoir:

10. THE APPLICANT CERTIFIES THAT THE STATEMENTS APPEARING HEREIN ARE TO THE BEST OF HIS/HER KNOWLEDGE TRUE AND CORRECT.

_____/_____
 (signature) (date)

_____/_____
 (signature) (date)

SUBMIT THE COMPLETE APPLICATION FORM AND PROPER FILING FEE TO THE APPROPRIATE FIELD OFFICE NEAREST YOU. FIELD OFFICES ARE LOCATED IN: HELENA, MISSOULA, GLASGOW, BOZEMAN, HAVRE, BILLINGS, KALISPELL, LEWISTOWN, AND MILES CITY. (Check your local telephone directory for addresses and telephone numbers.)

NOTE Upon receipt of a correct and complete application form and proper filing fee, a Provisional Permit will be issued. The date of priority of the issued Permit will be the date the application form was received by the Department, and is junior to all other prior existing water rights in the source of supply. If other water users are being adversely affected by the pit or reservoir, the Department may, after a hearing, revoke the permit or require the Permittee to modify the pit or reservoir, and may further condition the permit to protect prior water users.

Form No 606 R11/79

APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT

INSTRUCTIONS

Use this form to apply for authorization to change the place of use point of diversion, purpose of use and/or place of storage of your existing water right, provisional permit or certificate of water right. Please attach accurate maps or drawings of your existing system(s) and the proposed change(s). Use additional sheets to expand or clarify any of the information requested. A \$15 filing fee payable to the Montana Department of Natural Resources and Conservation must be submitted with this form.

FOR DEPARTMENT USE ONLY

Application No. _____
 Date Received _____, 19____
 Time _____ AM/PM
 Received by _____
 Transmittal No. _____
 Fee Received \$ _____
 Check No. _____
 Refund _____

Name of Applicant _____

Street Address, Box No. or Rural Route _____

City or Town _____ State _____

Zip Code _____ Phone— _____ Other Phone _____

Type(s) of Change(s) requested ☐ place of use ☐ point of diversion
☐ purpose of use ☐ place of storage

Estimated Construction Period _____

The water right to be changed is: (check one and complete appropriate blanks)

- ☐ Provisional Permit (Issued by this Department) Permit No. _____
- ☐ Certificate (Issued by this Department) Certificate No. _____
- ☐ NOTICE OF APPROPRIATION filed with the Clerk and Recorder of _____
 County, Montana, as Document No. _____ in Book/Film No. _____
 of _____ at page _____
- ☐ DECREED RIGHT in Case No. _____ of _____ County.
 Name of the person(s) to whom originally decreed _____
 Amount decreed _____
- ☐ USE RIGHT (Not Recorded)
 Name of the person(s) who first put this water to a beneficial use: _____

 The date that this water was first used Month _____ Day _____ Year _____

What portion of the above claimed water right does the applicant own: _____

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

322 SOUTH Ewing

HELENA, MONTANA 59620

446-3862

DNRC

PAST USE OF WATER

(This concerns only the amount of water to be changed)

- 1 Source of water (name of stream, lake, etc. If well indicate the depth)
tributary to _____
- 2 Purpose of use: _____
☐ Livestock:
 Period of diversion From _____ To _____ Period of use From _____ To _____
 Number and Type of Livestock _____
 Amount of water used _____ (gpm/cfs) Volume _____ (acre-feet per year)
- ☐ Irrigation:
 Period of diversion From _____ To _____ Period of use From _____ To _____
 Number of acres _____ Type of crop _____
 Amount of water used _____ (gpm/cfs) Volume _____ (acre-feet per year)
- ☐ Other:
 Period of diversion From _____ To _____ Period of use From _____ To _____
 Amount of water used _____ (gpm/cfs) Volume _____ (acre-feet per year)
- 3 TOTAL AMOUNT OF WATER USED _____ (gpm/cfs) Volume _____ (acre-feet per year)
- 4 Period of storage, if applicable From _____ To _____ Capacity of reservoir _____
- 5 Point(s) of diversion:
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
- 6 Place(s) of use:
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
7. Remarks: _____

PROPOSED CHANGE

(Please Include maps or copies of aerial photographs, etc. to indicate the proposed change)

8. Purpose of use: _____
☐ Livestock:
 Period of diversion From _____ To _____ Period of use From _____ To _____
 Number and Type of Livestock _____
 Amount of water used _____ (gpm/cfs) Volume _____ (acre-feet per year)
- ☐ Irrigation:
 Period of diversion From _____ To _____ Period of use From _____ To _____
 Number of acres _____ Type of crop _____
 Amount of water used _____ (gpm/cfs) Volume _____ (acre-feet per year)
- ☐ Other:
 Period of diversion From _____ To _____ Period of use From _____ To _____
 Amount of water used _____ (gpm/cfs) Volume _____ (acre-feet per year)
9. TOTAL AMOUNT OF WATER USED _____ (gpm/cfs) Volume _____ (acre-feet per year)
10. Period of storage, if applicable From _____ To _____ Capacity of reservoir _____
- 11 Point(s) of diversion:
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
12. Place(s) of use:
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
 1/4 _____ 1/4 _____ 1/4 Section _____ Twp _____ N/S Rge _____ E/W _____ County _____
13. Remarks: _____

Signature of Applicant(s) _____

Date _____

Form No. 607 R11/79

APPLICATION FOR EXTENSION OF TIME

(in which to perfect an appropriation of water)

1. Permittee(s): _____

Address: _____

City: _____ State: _____ Zip: _____

Home Phone: _____ Other Phone: _____

2. Permit No. _____, filed with the Department of Natural Resources and Conservation

3. The reason(s) for requesting an extension of time is due to:

- ☐ Insufficient funds.
- ☐ Adverse weather conditions.
- ☐ The unavailability of contractors.
- ☐ Insufficient amount of time.
- ☐ Previous S.C.S. commitments preclude technical assistance needed to construct the project.
- ☐ Power supply or irrigation equipment unavailable to date.
- ☐ Other: (explain) _____
- _____
- _____
- _____
- _____

4. I HEREBY REQUEST THE DEADLINE FOR THE COMPLETION OF MY PROJECT BE EXTENDED
TO _____ 19____.Signature: _____ Date: _____
Permittee

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

32 SOUTH Ewing

HELENA, MONTANA 59601

449-3634

DNRC

Form No. 609 R4/80

APPLICATION TO SEVER OR SELL APPROPRIATION WATER RIGHT**INSTRUCTIONS**

Use this form to sever or sell all or a portion of any water right from the land to which it is appurtenant. Use additional sheets and attach maps to clarify or supplement any of the information provided. Return completed form and the required \$15.00 filing fee to the Montana Department of Natural Resources and Conservation. If you need assistance, call 449-3634.

FOR DEPARTMENT USE ONLY

Application No. _____
 Date Received _____ 19____
 Time _____ A.M./P.M.
 Received by _____
 Transmittal No. _____
 Fee Received _____
 Check No. _____
 Refund _____

(Please type or print in Ink)

A. OWNERSHIP (Water Right Owner):

1. Name(s) of Applicant(s) _____
 Street Address, Box No., or Rural Route _____
 City or Town _____ State _____
 Zip Code _____ Phone _____ Other Phone No. _____
2. Name(s) of person(s) receiving the water right interest _____
 Street Address, Box No., Rural Route _____
 City or Town _____ State _____
 Zip Code _____ Phone _____ Other Phone No. _____

B. TYPE OF WATER RIGHT TO BE SOLD OR SEVERED (Check one and complete appropriate blanks.)

1. ☐ Permitted Right (Issued by this Department) Permit No. _____
2. ☐ Certificate of Water Right (Issued by this Department) Certificate No. _____
3. ☐ Water right filed with the Clerk and Recorder of _____ County, Montana, as Document No. _____ in Book/Film No. _____ of _____ at Page No. _____. (Attach Certified Copy)
4. ☐ Decreed Right, Case No. _____ Name(s) of Person(s) to whom originally decreed _____ Amount decreed _____
5. ☐ Use Right (Not recorded): Name(s) of Person(s) who first put this water to a beneficial use _____ Date of First Use _____

C. ANTICIPATED DATE OF SELLING OR SEVERING APPROPRIATION WATER RIGHT HEREIN APPLIED FOR:

_____ (If available, please attach a copy of proposed agreement or contract.)

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

32 SOUTHEWING

HELENA, MONTANA 59601

449-3634

DNRC

D. PAST USE OF WATER

1. The source of water supply (name of stream, lake, etc. If well or spring, so indicate) _____
2. The amount of water used in the **past** has been:
Flow _____ cfs/gpm, Volume _____ (acre feet/year)
3. The period of **diversion** has been from _____ to _____
(month/day) (month/day)
4. The period of use has been from _____ to _____
(month/day) (month/day)
5. Water **is** currently diverted by means of (dam, ditch, pump, etc.)
Capacity or Size _____
6. Present point(s) of diversion:
1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____
1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____
7. Present place(s) of use:
1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____ County _____
A. 1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____ County _____
8. This water has been used for the following purposes:
Irrigation: Number of acres _____ Crops grown _____
Stockwater: Number and type of stock _____
Other (ie. industrial, municipal, recreational, etc.) _____

E. PROPOSED USE OF WATER

1. The amount of water right to be sold or severed will be:
Flow _____ cfs/gpm, Volume _____ (acre feet/year)
2. The period of **diversion** will be from _____ to _____
(month/day) (month/day)
3. The period of use will be from _____ to _____
(month/day) (month/day)
4. The water will be diverted by means of (dam, ditch, pump, etc.)
Capacity or Size _____
5. Proposed point(s) of diversion:
1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____ County _____
1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____ County _____
6. Proposed place(s) of use:
1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____ County _____
1/4 1/4 1/4 Section _____ Township _____ N/S. Range _____ E/W. _____ County _____
7. This water right will be used for the following purposes:
Irrigation: Number of acres _____ Crops grown _____
Stockwater: Number and type of stock _____
Other (ie. industrial, municipal, recreational, etc.) _____

F. Remarks:

O. 1. Signature(s) of person(s) severing or selling the water right interest:

Date _____

Date _____

2. Signature(s) of person(s) receiving the water right interest:

Date _____

Date _____

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

APPLICATION FOR RESERVATION OF WATER

NOTE: Pursuant to Section 89-890, R.C.H. 1947, only the state or any political subdivision or agency thereof, or the United States or any agency thereof, may apply to the board to reserve waters for existing or future beneficial uses, or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates. Pursuant to Section 89-8-107, R.C.M. 1947, the United States or any agency thereof may not apply for a reservation of water in the Yellowstone River Basin until the requirement; of Section 89-8-105, R.C.M., are met.

(Please type or print in ink)

1. Name of applicant _____
Mailing address _____
City or town _____ State _____ Zip code _____
Home phone _____ Other phone _____
2. Source of water supply _____
a tributary of _____
3. Use(s) to which reserved waters will be applied _____

4. Amount of water necessary for the reservation _____
(cubic feet per second and acre-feet per year)
5. Type of reservation:
 - A. Waters will be reserved in stream for beneficial use without any diversion.
Yes _____ No _____
 - B. Reservation requires construction of a storage or diversion facility to exercise the beneficial use. Yes _____ No _____
6. If a storage or diversion facility is necessary, the date by which reserved waters will be applied to a beneficial use _____
(month and year)
7. THE APPLICANT CERTIFIES THAT THE STATEMENTS APPEARING HEREIN ARE TO THE BEST OF HIS KNOWLEDGE TRUE AND CORRECT.

Signature of applicant _____ Date _____

(See reverse side for special instructions.)

SPECIAL INSTRUCTIONS
(Section 89-890, R.C.M. 1947)

The applicant must establish to the satisfaction of the board: (a) the purpose of the reservation, (b) the need for the reservation, (c) the amount of water necessary for the purpose of the reservation, and (d) that the reservation is in the public interest. If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

The applicant must submit and attach with this application a detailed report showing facts to support the items outlined in the previous paragraph.

A fee (refer to Form No. 613, Fee Schedule, for the correct filing fee) is required for filing and must accompany this application before it can be processed. The Department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the Department personnel, shall be paid by the applicant.

Please send this form when completed (attach supporting facts) and the proper filing fee to the following address:

Department of Natural Resources and Conservation
Water Resources Division
Water Rights Bureau
32 South Ewing
Aelena, MT 59601 Phone 406/449-3634

If you have questions or problems concerning this form, please request assistance from the Water Rights Bureau at the above address.

DEPARTMENT ENDORSEMENTS

(This section is not to be filled in by Applicant)

Check when completed	Action taken
1. _____	Received by mail over counter in Department's office by _____
2. _____	Date received: Day _____; Month _____; Year _____; Time _____
3. _____	Recorded in: Book _____; Page _____; by _____
4. _____	Preliminary check by _____; amount of fee received \$ _____ Transmittal No. _____. Remarks _____
5. _____	Application advertised -- additional information _____
6. _____	Hearing information: Date _____; Time _____ Location _____
7. _____	Board action _____
8. _____	Remarks _____

Form No. 611 R1/79

Application No. _____
For Department Use**OBJECTION TO APPLICATION**

NOTE:

This objection must be received by the Department on or before the deadline specified in the public notice.

(Please type or print in ink. If more space is needed, attach additional sheets)

- 1 Name of individual(s) or organization filing this objection

Name _____

Address _____

City _____ State _____ Zip _____ Phone _____

- 2 Application being objected to: Application No. _____

Name of applicant _____

Source of withdrawal (name of river, stream, reservoir, well, etc.) _____

- 3.
- State the basis of your objection.**
- Indicate the facts tending to show that there are no unappropriated waters in the proposed source, and/or that the proposed means of appropriation are inadequate, and/or that the property, rights or interests of the objectors would be adversely affected by the proposed appropriation and/or state any other objections to the proposed appropriation you consider pertinent (Section 85-2-308, M.C.A.).

NOTE: The Department shall, according to Section 85-2-311, M.C.A., issue a permit if there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the applicant, in the amount the applicant seeks to appropriate, throughout the period during which the applicant seeks to appropriate, if the rights of the prior appropriators will not be adversely affected, if the proposed means of diversion or construction are adequate, if the proposed use of water is a beneficial use, if the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved, and if an applicant for an appropriation of 10,000 acre-feet per year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of prior appropriators will not be adversely affected.

4. If the objection concerns possible effects on your water right(s), complete the following: (attach additional sheets if necessary)

a. Basis of your water right(s):

☐ Filed Appropriation county _____ Book _____ Page _____☐ Decreed Right Case No. _____ Person to whom decreed _____☐ Use Right: _____
Date of First Use _____☐ Permit: _____
Number _____☐ Certificate: _____
Number _____

Attach photocopies of any pertinent documents as evidence of your water right(s)

- b. Your source of water: _____
-
- (Name of river, stream, well, spring, etc.)

Point(s) of diversion:

_____ 1/4	_____ 1/4	_____ 1/4	Section _____	Township _____	N S Range _____	E W
_____ 1/4	_____ 1/4	_____ 1/4	Section _____	Township _____	N S Range _____	E W

Is (are) your point(s) of diversion upstream or downstream from the applicant's proposed point of diversion?
☐ Upstream ☐ Downstream

Describe your type and means of diversion. Include, if applicable, horse power rating and capacity in gallons per minute of pump, height and storage capacity of dams, size and capacity of headgates, size of canals, ditches, etc.

c. Amount of water, use to which you have applied it, and your period of use.

() Domestic: _____, _____ cfs up to _____
No. of Households (rate) gpm MI (acre-feet/year)

From _____ to _____, inclusive
(month day) (month day)

☐ Stock: _____, _____ up to _____
 No. and type (rate) cfs gpm Ml (acre-feet/year)

From _____ to _____, inclusive
(month-day) (month-day)

☐ Other: _____
(Describe industrial municipal etc.)

_____ cfs up to _____ (Describe industrial municipal, etc.)
 _____ gpm
 (rate) M.I. _____ (acre-feet/year)

From _____ to _____, inclusive
(month day) (month day)

Place of use: (Legal description for the above uses if different than your point of diversion.) _____

☐ Irrigation: _____ cfs _____ gpm _____ up to _____
(rate) (acre feet/year)

From _____ to _____, inclusive
(month day) (month day)

Place of Use: Enter the **Section, Township and Range** numbers, the number of acres **irrigated** in the appropriate **quarter-section**, total number of acres and the type of crop grown.

EXAMPLE:								
Sec.	Twp.	Rge.	NE¼	NW¼	SW¼	SE¼	Totals	Crop(s)
10	18N	3E			15	4	19	alfalfa

[illegible]

Total number of acres irrigated

Method of Irrigation	Sprinkler	Waterspread	Graded Border
----------------------	-----------	-------------	---------------

Contour Ditch Other, specify -- -

Attach map or sketch showing location of stream, your point of diversion, place of use and ditches, durns, etc.

5 Objector would agree to the issuance of the permit under the following conditions (State any conditions, modifications or criteria which would alter your position concerning this objection)

NOTICE: **THIS OBJECTION** MUST BE RECEIVED BY THE DEPARTMENT ON OR BEFORE THE DEADLINE SPECIFIED IN THE PUBLIC NOTICE.

SIGNATURE OF OBJECTOR(S) _____ DATE _____

Name and address of the individual preparing this form, if different from the objector:

Name (type or print) _____ Phone _____

Street or Box No. _____

City _____ State _____ Zip _____

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

32 SOUTH EWING HELENA, MONTANA 59601

448-3634

DNRG

Form No. 612 R10/75

Certified No. _____

NOTICE AND STATEMENT OF OPINION

STATE OF MONTANA
Department of Natural Resources and Conservation

Your Application for Beneficial Water Use Permit No. _____

will be ☐ denied☐ approved in modified form☐ approved upon terms, conditions, or limitations specified

as follows:

for the following reasons:

NOTICE: SECTION 89-884(2), RCM 1947, PROVIDES THAT A PERSON AGGRIEVED BY AN OPINION OF THE DEPARTMENT IS ENTITLED TO A HEARING BEFORE THE DEPARTMENT. A REQUEST FOR A HEARING MUST BE MADE WITHIN THIRTY (30) DAYS AFTER THIS NOTICE IS MAILED. THE SPECIFIED ACTION WILL BE TAKEN UNLESS A HEARING IS REQUESTED.

Chief, Water Rights Bureau_____
Date

I ☐ do, ☐ do not request a hearing._____
Signed_____
Date

Form No. 616 R11/79

1 2 3

NOTICE OF ACTION ON APPLICATION FOR EXTENSION OF TIME

Name of Permittee(s): _____

Address: _____

City: _____ State: _____ Zip: _____

Description of (Provisional, Interim) Permit # _____

Point of Diversion _____ 1/4 _____ 1/4 _____ 1/4, Sec. _____, T _____ N/S, R _____ E/W

Intended Place of Use _____

The request for additional time to perfect (Provisional, Interim) Permit has been:

☐ approved.☐ modified.☐ denied.☐ The Appropriation shall be perfected on or before _____, and a Form 617, Notice of Completion of Water Development, shall be filed on or before _____.☐ The terms of **this Interim** Permit shall be complied with on or before _____.Field Manager
Water Resources Division

Date _____

cc: Records
File**MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION****32 SOUTH Ewing****HELENA, MONTANA 59601****446-3634****DNRC**

Form No. 617 R4/80

Permit No. _____

NOTICE OF COMPLETION OF WATER DEVELOPMENT**This form must be filed by the permit holder on all completed water developments.**

The diversion and distribution works for this appropriation must have been completed and water applied to beneficial use on or before _____ 19_____, as specified in the permit or within any authorized extension of time. This Notice of Completion of Water Development, Form 617, shall be filed on or before _____ 1 9 .

(Please type or print in ink)

(I) (We) _____
Permit holder

Address _____

City _____ State _____ Zip _____

Home Phone No. _____ Other Phone No. _____

attest that the water development has been completed and water put to beneficial use. If the development was not fully developed as specified within the terms, conditions, orders, and limitations of Permit No. _____, give details of the appropriation as actually developed.

Signature: _____ Date: _____
PermitteeSignature: _____ Date: _____
PermitteeSignature: _____ Date: _____
Permittee

Subscribed and sworn before me, this _____ day of _____, 19____

Notary Public for the State of Montana

Residing at _____

My Commission expires _____

Send completed form to:

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION**32 SOUTH Ewing****HELENA, MONTANA 59601****449-3834****DNRC****NO FILING FEE REQUIRED**

Form No 618 R8/79

Permit No. _____

NOTICE OF COMPLETION OF CHANGE OF APPROPRIATION OF WATER RIGHT

This form must be filed by the **applicant** for each change in **the place of use, point of diversion, purpose of use and/or place of storage of an appropriation water right, authorized by this Department, within 60 days** after completion.

(Please type or print in ink)

(I) (We) _____

Applicant(s)

Address _____

City _____ State _____ Zip _____

Home Phone No. _____ Other Phone No. _____

hereby attest that the **change(s)** authorized on _____, 19____ under Application No. _____ (has) (have) been completed on _____, 19____ in accordance with the terms and subject to the conditions as authorized.

If the above-referenced Change of Appropriation Water Right was completed other than authorized, give details below:

Signature: _____

Applicant

Date: _____

Signature: _____

Applicant

Date: _____

Signature: _____

Applicant

Date: _____

Subscribed and sworn before me, this _____ day of _____, 19____

Notary Public for the State of Montana

Residing at _____

My Commission expires _____

Send completed form to.

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION**32 SOUTH EWING****HELENA, MONTANA 59601****446-3634****DNRC****NO FILING FEE REQUIRED**

Form No 620 R9/79

Application for Change No

AUTHORIZATION TO CHANGE APPROPRIATION WATER RIGHT

Pursuant to Section 85-2-402-MCA, the Department of Natural Resources and Conservation, through the office of the Administrator of the Water Resources Division, hereby authorizes the Change of Appropriation Water Right submitted by _____

The appropriation water right is _____

The source and point(s) of diversion(s) are _____

The purpose(s) and place(s) of use(s) are for _____

The Department hereby authorizes the change of the above-referenced water right as follows: _____

The diversion and distribution works for the above-referenced appropriation and for the change authorized shall be completed, and water shall be applied to beneficial use as specified above, on or before _____ or within any authorized extension of time. The Notice of Completion of Change of Appropriation Water Right, Form No. 618, shall be filed on or before _____

This authorization is subject to the following limitations, terms, conditions, and restrictions: _____

NOTICE: Failure to comply with any of the terms and conditions herein may result in the loss of the permitted right or the Authorization to Change hereby granted.

Water Resources Division

Date

Witness

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

32 SOUTH EIVING

HELENA, MONTANA 59601

449-3634

DNRC

(For County Use Only)

STATE OF MONTANA

County of _____ } ss

Filed for record this _____ day of _____
19____ at _____ and Recorded in _____
of the Records of _____ County State of Montana

By _____
Deputy

Clerk and Recorder

**STATEMENT OF CLAIM
FOR EXISTING WATER RIGHTS
STOCK WATER**
For the Water Courts of the State of Montana

1. Owner of Water Right _____ / _____ / _____
Last First Middle Initial
Co-Owner or Other Interest Owner _____ / _____ / _____

Address _____
City _____ State _____ Zip Code _____
Home Phone No. _____ Business Phone No. _____

2. Person completing form _____ / _____ / _____
Last First Middle Initial
Address _____
City _____ **State** _____ **Zip Code** _____
Home Phone No _____ **Business Phone No** _____

3. Uu: ☐ Stock water

4. Source of Water: (Check Only One)

☐ Spring Name _____

☐ Well Name _____

☐ Stream Name _____ Tributary of _____

☐ Lake Name _____ Stream _____

 Tributary of _____

☐ Reservoir Name _____ Stream _____

 Tributary of _____

5. Point of Diversion: County _____
 _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W
 Lot _____, Block _____, Subdivision _____

6. Means of Diversion, if applicable

☐ Pump _____ gallons per day

☐ Gravity Flow _____ gallons per day

☐ Direct _____ gallons per day

☐ Other: Explain _____ gallons per day

7. Total number of livestock served: _____

Type ☐ _____ cattle
(number)

☐ _____ horses
(number)

☐ _____ sheep
(number)

☐ _____ goats
(number)

☐ _____ other, explain _____
(number)

8. Place of use: County _____

Lot	Block	_____	1/4	Section	T	N/S	E/W
Lot	Block	_____	1/4	Section	_____	T	N/S R _____ E/W
Lot	Block	_____	1/4	Section	_____	T	N/S R _____ E/W
Lot	Block	_____	1/4	Section	_____	T	N/S R _____ E/W
Lot	Block	_____	1/4	Section	_____	T	N/S R _____ E/W

Subdivision _____

9. Flow rate claimed:

☐ cubic feet per second
☐ gallons per minute
☐ miner's inches

10. Volume claimed _____ acre feet per year

11. Period(s) of use: _____ to _____
Month Day Month Day12. Check one: ☐ Decreed Water Right Priority date or date of first use
☐ Filed Appropriation Right
 Hour _____ Month _____ Day _____ Year _____
☐ Use Water Right

13. Attach copies of the Decree, Record of Filing or Proof of Use Right

14. Attach copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion place of use, place of storage and conveyance facilities

15. Notarized Statement signed by claimant.

STATE OF MONTANA)

County of _____)

I, _____, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and that the matters and things stated there are true and correct.

Subscribed and sworn before me, this _____ day of _____, 19____.

Notary Public for the State of Montana

Residing at _____

My Commission expires _____

9. Flow mte claimed: _____
☐ cubic feet per second
☐ gallons per minute
☐ miner's inches

10. Volume claimed: _____ acre-feet per year

11. Period(s) of use: _____ / _____ to _____ / _____
 Month Day Month Day

12. Check one: ☐ Decreed Water Right ☐ Filed Appropriation Right ☐ Use Water Right
 Priority date or date of first use
 _____ / _____ / _____ / _____
 Hour Month Day Year

13. Attach copies of the Decree. Record of Filing or Proof of Use Right

14. Attach copies of aerial photographs, U S Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities

15. Notarized Statement signed by claimant.

STATE OF MONTANA)
) SS
 County of _____)

I, _____, having been duly sworn, depose and say that I
 being of legal age and being the claimant of this claim of existing water right, and the person whose name
 is signed to it as the claimant, know the contents of this claim and that the matters and things stated there
 are true and correct

Subscribed and sworn to before me, this _____ day of _____, 19 _____.

 Notary Public for the State of Montana

Residing at _____

My Commission expires _____

☐ Ditch

☐ Pipeline

☐ Other: Explain _____

9. Place of use and acres irrigated.

County _____

acres. _____ Lot. _____ Block. _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____, Section _____, T _____ N/S, R _____ W _____acres. _____ Lot. _____ Block. _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____, Section _____, T _____ N/S, R _____ E/W _____acres. _____ Lot. _____ Block. _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____, Section _____, T _____ N/S, R _____ E/W _____acres. _____ Lot. _____ Block. _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____, Section _____, T _____ N/S, R _____ E/W _____acres. _____ Lot. _____ Block. _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____ $\frac{1}{4}$ _____, Section _____, T _____ N/S, R _____ E/W _____

_____ Total acres. _____ Subdivision _____

10. Flow rate claimed: _____

- ☐ cubic feet per second
☐ gallons per minute
☐ miner's inches

11. Volume claimed: _____ acre-feet per year**12. Period(s) of use:** _____ / _____ to _____ / _____
Month Day Month Day**13. Check one:**

- ☐ Decreed Water Right
☐ Filed Appropriation Right
☐ Use Water Right

Priority date or date of first use

Hour _____ Month _____ Day _____ Year _____

14. Attach copies of the Decree, Record of Filing or Proof of Use Right**15. Attach copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities.****16. Notarized Statement signed by claimant.**

STATE OF MONTANA)
County of _____) ss.

I, _____, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Subscribed and sworn before me, this _____ day of _____, 19____.

Notary Public for the State of Montana

Residing at _____

My Commission expires _____

Form No. 76-O R2/80

**STATEMENT OF CLAIM
FOR EXISTING WATER RIGHTS
OTHER USES**
For the Water Courts of the State of Montana

1. Owner of Water Right _____ / _____ / _____
Last First Middle Initial

**Co-Owner or Other
Interest Owner** _____ / _____ / _____
Last First Middle Initial

Address _____

City _____ State _____ Zip Code _____

Home Phone No. _____ Business Phone No. _____

2. Person completing form _____ / _____ / _____
Last First Middle Initial

Address _____

City _____ State _____ Zip Code _____

Home Phone No. _____ Business Phone No. _____

3. Use: (Check Only One)

FR ☐ Fish Raceways

GE ☐ Geothermal

MN ☐ Mining

FW ☐ Fish & Wildlife

NV ☐ Navigation

PG ☐ Power Generation

CM ☐ Commercial

FP ☐ Fire Protection

RC ☐ Recreation

IN ☐ Industrial

AS ☐ Agricultural Spraying

OT ☐ Other

MC ☐ Municipal

OF ☐ Oil Well Flooding

Explain _____

4. Source of Water: (Check Only One)

☐ Spring

Name _____

☐ Well

Name _____

☐ Stream

Name _____

Tributary of _____

☐ Lake

Name _____

Stream _____

Tributary of — — _____

☐ Reservoir

Name _____

Stream _____

Tributary of _____

5. Point of Diversion: County _____

_____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W

Lot _____, Block _____, Subdivision _____

6. Means of Diversion:

☐ Well

☐ Pump

Capacity _____ gpm

☐ Headgate with ditch or pipeline

☐ Instream use

☐ Other

Explain _____

7. Means of Conveyance:

☐ Ditch

☐ Instream

☐ Pipeline

☐ Other: _____

8. **Place of Use:** County _____

☐ Instream ☐ City or Town ☐ Other: Explain _____

____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W

____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W

____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W

____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W

____ Lot, _____ Block, _____ 1/4 _____ 1/4 _____ 1/4, Section _____, T _____ N/S, R _____ E/W

Subdivision _____

9. **Flow rate claimed:** _____

☐ cubic feet per second

☐ gallons per minute

☐ miner's inches

10. **Volume claimed:** _____ acre-feet per year

11. **Period(s) of use:** _____ / _____ to _____ / _____

Month Day Month Day

12. **Check one:** ☐ Decreed Water Right ☐ Filed Appropriation Right ☐ Use Water Right

Priority date or date of first use

_____ / _____ / _____

Hour Month Day Year

13. **Attach** copies of the Decree. Record of Filing or Proof of Use Right,

14. **Attach** copies of aerial photographs. U.S. Geological Survey maps or such other documents **necessary** to show point of diversion, place of use, place of storage, and conveyance facilities.

15. **Notarized Statement signed by claimant.**

STATE OF MONTANA)

County of _____) ss

I, _____, having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Subscribed and sworn before me, this _____ day of _____, 19____.

Notary Public for the State of Montana

Residing at _____

My Commission expires _____

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14833

IN THE MATTER OF THE PETITION
OF THE STATE OF MONTANA FOR
AN ORDER REQUIRING THE FILING
OF STATEMENTS OF CLAIM TO THE
USE OF WATER IN MONTANA.

WATER RIGHTS ORDER

PER CURIAM:

A petition having been filed by the Attorney General of the State of Montana pursuant to Chapter 697, Laws of 1979, requesting, among other things, that this Court issue an order as provided therein within 10 days of the filing of his petition,

IT IS NOW ORDERED as follows pursuant to section 16, Chapter 697, Laws of 1979:

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ASANDONED. This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of uater arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the Department of Natural Resources and Conservation of the State of Montana no later than January 1, 1982. Claims for stock and individual as opposed to

APPENDIX V
p. 2

municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the order of the Department of Natural Resources and Conservation or a district court issued pursuant to sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are also exempt.

For further information, contact the Department of Natural Resources and Conservation, Helena, Montana, for a copy of the law and an explanation of it.

DATED this 8th day of June, 1979.

/s/ Frank M. Haswell
Chief Justice

/s/ John C. Sheehy

/s/ John Conway Harrison

/s/ Daniel J. Shea

/s/ Gene B. Daly
Justices

1 IN THE WATER COURTS OF THE STATE OF MONTANA, IN AND
2 FOR ALL OF THE DIVISIONS, UPPER MISSOURI, LOWER MISSOURI,
3 CLARK FORK, AND YELLOWSTONE
4 -----

5 IN RE THE MATTER OF)
6 CHECKING OF CLAIM FORMS BY THE)
7 DEPARTMENT FOR REGULARITY, AND)
8 FURTHER THE MATTER OF DISTRI-)
9 BUTION OF CLAIM FORMS RECEIVED.

10 ORDER

11 All of the Water Judges and Rhett C. Hurless and
12 Laurence Siroky, of the Department, having discussed the pro-
13 cedures to follow to comply with the mandate of SB 76, Chapter
14 677, as to the checking of regularity of claims.

15 ORDERED, that all claims received by the Department
16 will be checked on the following items: signature, notarization,
17 all blanks completed appropriately, proper fee attached, map
18 attached, copies of filings attached, proof of use right infor-
19 mation attached, proof of decreed right if no fee is attached.
20 If the claim form is incomplete, an attempt will be made to have
21 all the items on the form completed. The Department will
22 attempt to have claimant submit an amended claim form.

23 ORDERED, that after such check for regularity, the
24 claim forms will be microfilmed, and the microfilm copy will be
25 sent to the Clerk of Court's office in each county in each
26 water division and to the water rights field offices. The
27 original claims will be sent to the Clerk of Court's office in
28 each county of each water division to be filed and held under
29 the control and direction of the respective water judges.

30 ORDERED, that the information on the statement of the
31 claim forms as to name, point of diversion, place of use, and
32 stream or basin will be computerized to furnish reports to the

1 courts and the water for the Clerks of Court and the water
2 rights field offices.

3 ORDERED, that the presentation of claims to the water
4 judges will be done by type of right. That is, appropriation
5 right, decreed right, use right, and others.

6 ORDERED, that a \$40 filing fee will be charged for
7 voluntarily filed claims with exceptions as set out in SA 76
8 Chapter 693.

9 This Order is concurred in by the Water Judges,
10 Diane G. Barry, Bernard W. Thomas, and Robert M. Holter.

11 DATED this 9th day of November, 1979.

12
13
14 W. W. LESSLEY
15 Chief Water Judge

16 ccf The Honorable Mike Greeley
17 Attorney General
18 Capitol Building
19 Helena, MT 59601

20 Hon. Bernard W. Thomas, Water Judge
21 Lower Missouri River Basin
22 Blaine County Courthouse
23 Chinook, MT 59523

24 Hon. Robert M. Holter, Water Judge
25 Clark Fork River Basin
26 Lincoln County Courthouse
27 Gibby, MT 59923

28 Hon. Diane G. Barry, Water Judge
29 Yellowstone River Basin
30 Yellowstone County Courthouse
31 Billings, MT 59101

32 Laurence Siroky, Chief
Water Rights Bureau
32 South Wing
Helena, MT 59601

Robert C. Harless
Adjudication Program Manager
Water Rights Bureau
32 South Wing
Helena, MT 59601

Web: Gibby
Information Officer
Water Rights Bureau
32 South Wing
Helena, MT 59601

1980

1 IN THE WATER COURTS OF THE STATE OF MONTANA, IN AND
2 FOR ALL OF THE DIVISIONS, UPPER MISSOURI, LOWER MISSOURI,
3 CLARK FORK, AND YELLOWSTONE
4 -----

5
6 ORDER

7 The question of the Filing of Abstract of Decrees
8 certified by Abstractors instead of Clerks of Court has been
9 presented to this Bench by Carl Davis's letter of May 30, 1980
10 which is attached and made a part of this Order. After consul-
11 tation with Rhett Harless, Adjudication Program Manager of the
12 Water Right Bureau of the Department of Natural Resources and
13 Conservation and With my fellow water rights Judges, we have
14 agreed that such procedure is acceptable.

15 We particularly find this true because of the more
16 liberal view of the Montana Rules of Evidence and with Section
17 37-52-401, M.C.A.

18 "Any abstract of title to real estate certified
19 to be true and correct by any abstractor holding
20 a valid and subsisting certificate of authority
21 from the board, as herein provided, shall be
22 received by the courts of this state as prima facie
23 evidence of its contents under such rules as to
24 procedure as such courts may promulgate."

25 We require that Carl Davis or any others use gummed
26 address labels for information where duplication of effort
27 is a problem. The Department is willing to provide these
28 labels for a minimal cost for handling the problem, and we
29 have attached a copy of the proposed claim.

30 IT IS ORDERED, that photocopies of pertinent abstract
31 provisions with a certification of the abstractor as to its
32 acceptability in place of the Clerk of Court's making a certified
copy of the pertinent portion of each decree be allowed.

 IT IS FURTHER ORDERED, that photostatic copies of
claims used instead of the actual color keyed forms be adjusted
to the record system consisting of microfilming, computerization,

1 and safe storage for the use of gummed address labels for
2 information.

3 This Order is concurred by Judge Bernard W. Thomas,
4 Judge Robert M. Halter, and Judge Jack D. Shanstrom, Water
5 Judges of the respective divisions of the State of Montana.

6 DATED this 24th day of June, 1980.

7
8
9 W. W. LESSLEY, Chief Water Judge

10 CC: The Honorable Frank I. Haswell
11 Chief Justice of the Supreme Court
12 State Capitol
13 Helena, MT 59601

14 The Honorable Bernard W. Thomas
15 Water Judge
16 Lower Missouri River Basin
17 Blaine County courthouse
18 Chinook, MT 59523

19 Hon. Robert M. Holter, Water Judge
20 Clark Fork River Basin
21 Lincoln County Courthouse
22 Libby, MT 59923

23 Hon. Jack D. Shanstrom, Water Judge
24 Yellowstone Division, Park County Courthouse
25 Livingston, Montana 59047

26 Laurence Siroky, Chief
27 Water Rights Bureau
28 32 South Ewing
29 Helena, MT 59601

30 Rhett C. Hurless
31 Adjudication Program Manager
32 water Rights Bureau
33 32 South Ewing
34 Helena, Montana 59601

35 Wes Gibbs
36 Information Officer
37 Water Rights Bureau
38 32 South Ewing
39 Helena, MT 59601

40 John Scully, Esq.
41 Morrow, Sedivy, Olson & Scully
42 P. O. Box 1168
43 Bozeman, Montana 59715

APPENDIX Y

1 IN THE WATER COURTS OF THE STATE OF MONTANA, IN AND
2 FOR ALL OF THE DIVISIONS, UPPER MISSOURI, LOWER MISSOURI,
3 CLARK FORK AND YELLOWSTONE
4 -----

5 IN RE THE MATTER OF)
6)
7 AMENDMENT OF WATER ORDER DATED)
8 JUNE 24, 1980, RE FILING OF)
9 ABSTRACTS OF DECREES)
10 -----

11 ORDER

12 The Order of the Water Courts dated June 24, 1980,
13 is amended by deleting the last paragraph on Page 1, which
14 paragraph reads:

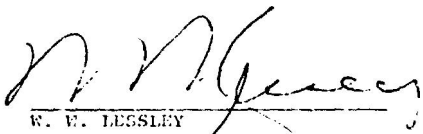
15 "IT IS FURTHER ORDERED, that photostatic
16 copies of claims used instead of the actual
17 color keyed forms be adjusted to the record
18 system consisting of microfilming, computer-
19 ization, and safe storage. For the use of
20 quipped address labels for information."

21 ORDERED, that the following paragraph will be
22 substituted for the deleted paragraph:

23 "IT IS FURTHER ORDERED, that photocopies of
24 pertinent abstracts of the pertinent portion
25 of each decree be allowed as acceptable in
26 place of the Clerk of Court's making a cer-
27 tified copy."

28 This amendment is concurred in by the Water Judges,
29 Jack D. Shanstrom, Bernard W. Thomas, and Robert E. Holter.

30 DATED this 14th day of July, 1980.

31 
32 W. E. LESSLEY
Chief Water Judge

cc: Hon. Frank I. Haswell
Hon. Robert E. Holter

APPENDIX Z

1 IN THE WATER COURTS OF THE STATE OF MONTANA, IN AND
2 FOR ALL OF THE DIVISIONS, UPPER MISSOURI, LOWER MISSOURI,
3 CLARK FORK, AND YELLOWSTONE
4 -----

6 O R D E R

6 : To clarify and to avoid confusion of the original'
7 Order and amendments, the Order of the Water Courts of June 24,
8 1980, is amended by adding the following paragraph after the
9 paragraph on Page 1, which begins "IT IS ORDERED that photo-
10 coppers of pertinent abstract provisions...":

11 "IT IS FURTHER ORDERED that photostatic
12 copies of claims not be used. Instead the
13 actual color-keyed claim forms will be used
14 to simplify the record system consisting of
15 microfilming, computerization, and safe
storage. The use of gummed address labels
is approved, and those labels will be pro-
vided by the Department upon request of
claimants for a minimal charge.

16 This Order is concurred in by Judge Bernard W. Thomas,
17 Judge Robert M. Holter, and Judge Jack D. Shanstrom, Water
18 Judges of the respective divisions of the state of Montana.

19 DATED this 6th day of August, 1980.
20
21

22 W. W. LESSLEY
23 Chief Water Judge

24 cc: The Honorable Frank I. Haswell
25 The Honorable Bernard W. Thomas
26 The Honorable Robert M. Holter
27 The Honorable Jack D. Shanstrom
28 Laurence Siroky
29 Rhett C. Hurless
30 Wes Gibbs
31 John Scully
32

1 IN THE WATER COURTS OF THE STATE OF MONTANA,
2 IN AND FOR ALL OF THE DIVISIONS, UPPER MISSOURI, LOWER MISSOURI,
3 CLARK FORK, AND YELLOWSTONE
4 -----

5 ORDER

6 Section 85-2-214 (2) MCA, 1979, provides:

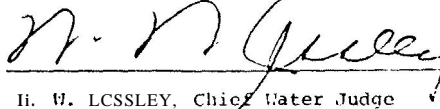
7 "The Water Judge can make any orders necessary to insure
8 timely and accurate compliance with the claim filing procedure."

9 It has come to the attention of the undersigned
10 that certain claimants have failed to specifically provide
11 information necessary to know as to source, point of diversion,
12 place of use, and in some instances priority of right. In
13 order to protect their water rights and insure timely and
14 accurate compliance with the claim filing procedure;

15 IT IS ORDERED that the attached letter should
16 be sent to those claimants who are failing to give accurate
17 information.

18 IT IS ORDERED that a copy of this order be
19 posted in all adjudication field offices.

20 DATED this 11th day of March, 1981.

21 
22 _____

23 H. W. LCSSLEY, Chief Water Judge
24
25
26
27
28
29
30
31
32

MONTANA WATER COURTS

STATE OF MONTANA

March 11, 1981

WATER JUDGES

Upper Missouri River Basin
Chief Judge W. W. Lessley
P.O. Box 1152
Bozeman, MT 59715

Lower Missouri River Basin
Judge Bernard W. Thomas
P.O. Box 918
Chinook, MT 59523

Clark Fork River Basin
Judge Robert M. Miller
Lincoln County Courthouse
Libby, MT 59623

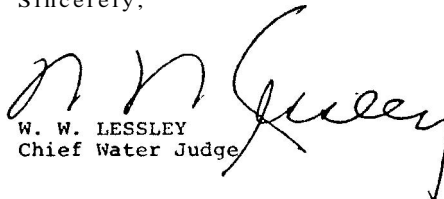
Yellowstone River Basin
Judge Jack D. Shanstrom
P.O. Box 415
Livingston, MT 59047

Dear Water Right Claimant:

In order to expedite the processing of your water right claim, it is necessary that you provide information to the Department of Natural Resources regarding that water right, and in particular the source, point of diversion, and place of use. If you fail to specifically provide that information, your claim will be delayed and it will be necessary for the Water Courts to personally field investigate that particular claim to insure accuracy. Hopefully with accurate and complete information many of those subsequent field investigations will be eliminated.

In any case in order to protect your water right, please submit the required information to the Department of Natural Resources immediately.

Sincerely,


W. W. LESSLEY
Chief Water Judge

IN THE SUPREME COURT OF THE STATE OF MONTANA

RE: RULES OF THE SUPREME COURT

O R D E R

PER CURIAM:

Pursuant to the power placed in this Court by section 3-i-103, MCA, the Court in consultation with the Water Judges of the State of Montana adopts the following rules for the filing of objections to Preliminary Decrees issued by the Water Courts pursuant to section 85-2-233, MCA.

"GOOD CAUSE" FOR THE FILING OF
OBJECTIONS TO THE PRELIMINARY DECREE

A person named in the Preliminary Decree or other persons for good cause shown, may object to the Preliminary Decree and request a hearing before the Water Courts of the State of Montana. For purposes of filing an objection "good cause shown" shall include:

(1) A showing that one has a substantial reason for objecting, which means that the party has an interest that has been affected by the Preliminary Decree, and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting.

PROCEDURE FOR OBTAINING EXTENSION
OF TIME FOR FILING OBJECTIONS

(1) An extension of the period for filing objections not to exceed ninety (90) days may be granted by the Water Judge for good cause shown. Application for extension shall be filed, in writing, with the Water Court, within the ninety (90) days as provided above. The application shall contain the following information in the sequence listed herein and shall be typed on 8 1/2" x 11" white paper:

- (a) Name, phone number, and address of party requesting extension;
- (b) A statement of the party's rights or interest that could be adversely affected;
- (c) A precise statement of the reasons why the objection could not be completed within the ninety (90) days prescribed above.

(2) For purposes of requesting an extension for the objection period, "good cause shown" shall include:

- (a) A precise statement of the party's rights or interest that could be adversely affected; and
- (b) A showing of one of the following:
 - 1. newly discovered facts or evidence giving rise to the objection

APPENDIX Bb
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which was not discoverable by due diligence and the development of that evidence will necessitate more than the remaining time allowed for objections;

11. any other reason where failure to extend the ninety (90) day objection period would result in an injustice.

PROCEDURE FOR FILING OBJECTIONS TO PRELIMINARY DECREE

- (1) The objection shall be entitled:

IN THE WATER COURTS OF THE STATE OF MONTANA

APPROPRIATE BASIN AND DIVISION

* * * * *

IN THE MATTER OF THE ADJUDICATION)	
OF THE EXISTING RIGHTS IN THE USE)	
OF ALL THE WATER, BOTH SURFACE)	NOTICE OF THE OBJECTION
AND UNDERGROUND, WITHIN THE)	TO THE _____
_____ DRAINAGE AREA,)	PRELIMINARY DECREE.
INCLUDING ALL TRIBUTARIES OF THE)	
_____ RIVER IN _____)	
_____ COUNTIES, MONTANA.)	

* * * * *

- (2) The objection shall contain:

- (a) Name, address, and phone number of party objecting;
- (b) All pertinent information on the right or rights as found in the Decree to which the party objects in the following sequence:
 - i. page number of decree
 - ii. claim number or declaration number
 - iii. priority date
 - iv. purpose of right
 - v. place of use
 - vi. acres irrigated
 - vii. source of right
 - viii. point of diversion
 - ix. means of diversion
 - x. period of use
- (c) A precise statement of any of the above findings to which the objector disagrees, including a statement of what the objector contends those findings should be;
- (d) A precise statement of any other findings and conclusions with which the objector disagrees citing the findings number, conclusions number, and page on which they are found;
- (e) A statement of the specific grounds and evidence on which the objection is based;
- (f) Name, address, and phone numbers of the claimant's personal representative or attorney, if any;
- (g) Copies of any maps, photos, reports, etc. to be used as evidence to support the objection.
*(Rule _____, Water Courts of Montana.)

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These rules are promulgated and adopted for use in the Water Courts pursuant to section 3-7-103, YCA. It is the intention of the Court to make the rule effective on the 30th day of April, 1981, and it is to apply to all objections filed in the Water Court on or after that date.

In order that members of this bench and bar may have an opportunity to familiarize themselves with the rule,

IT IS ORDERED that a copy of this Order be published in The Montana Lawyer published by the State Bar of Montana,

DATED this 9th day of April, 1981.

Frank L. Haswell
Chief Justice

John Lawrence Harrison

John C. Shuck
James J. Taylor
Mark B. [unclear]
Justices

APPENDIX Cc
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IN THE WATER COURTS OF THE STATE OF MONTANA
YELLOWSTONE DIVISION - POWDER RIVER BASIN

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE)
OF ALL THE WATER, BOTH SURFACE)
AND UNDERGROUND, WITHIN THE POWDER) PRELIMINARY DECREE
RIVER DRAINAGE AREA, INCLUDING ALL)
TRIBUTARIES OF THE POWDER RIVER IN)
CARTER, CUSTER, FALLON, PRAIRIE, AND)
POWDER RIVER COUNTIES, MONTANA)

O R D E R

After having reviewed the Water Master's report of **existing** rights in the Powder River drainage, the Court finds that the report meets the requirements for the preliminary decree set forth in 85-2-231(1), MCA. 1978. The Court being satisfied with the Findings of Fact and Conclusions of Law contained in the report, hereby

ORDERS that the Water Master's report (attached herein) and the abstracts of the individual water rights in the Powder River Basin (attached herein) be **adopted** as the preliminary decree for the Powder River Basin pursuant to Section 85-2-231(3), MCA. 1978.

DATED this 7 day of May, 1981. ORIGINAL SIGNED BY
Jack D. Shanstrom

JACK D. SHANSTROM
Water Judge
Yellowstone Division

IN THE WATER COURTS OF THE STATE OF MONTANA
YELLOWSTONE DIVISION - POWDER RIVER BASIN

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO WE USE)
OF ALL THE WATER BOTH SURFACE AND)
UNDERGROUND, WITHIN THE POWDER)
RIVER DRAINAGE AREA INCLUDING ALL)
TRIBUTARIES OF THE POWDER RIVER IN)
CARTER, CUSTER, FALLON, PRAIRIE AND)
POWDER RIVER COUNTIES, MONTANA.)

REPORT OF THE WATER MASTER
ON THE POWDER RIVER BASIN

Pursuant to Section 3-7-311(2), H.C.A. 1978, this report is submitted to the Honorable Jack Shanstrom, Water Judge of the Yellowstone Division of the Water Courts of the State of Montana, by Leanne Schraudner, Water Master for the Powder River Basin.

This report is based on the declarations of existing water rights filed in the Powder River Basin, the data submitted to the Water Courts by the Department of Natural Resources and Conservation (hereinafter referred to as Department) and any additional data obtained by the Water Courts pursuant to Section 85-2-231, H.C.A. 1978. This report includes a statement of general Findings of Fact and Conclusions of Law for the Powder River Basin followed by an abstract of the Water Master's recommendation for disposition of each declaration filed in the Powder River Basin. The general Findings outline the procedures and guidelines utilized by the Water Master to come to the Findings and Conclusions found in the abstract. Those Findings and Conclusions are based on the information submitted by the declarant and the Department. The information submitted by the Department also includes recommended standards, based on the Department's research, for flow rates, volume, etc., typical in the Powder River Basin.

Each abstract contains the Findings and Conclusions required by 85-2-231 and 85-2-234, M.C.A. 1978. An abstract of each individual right includes:

- (a) The name and post-office address of the owner of the right;

- (b) The **amount** of **water**, rate, and volume. included in the right;
- (c) The date of priority of the right;
- (d) The purpose for **which** the water included in the right is used;
- (e) The place of use and a description of the land, if any, to which the right is **appur-**
tenant;
- (f) The source of the **water** included in the right;
- (g) The place and **means** of **diversion**;
- (h) The inclusive **dates** during **which** the water is used each year;
- (i) Any other **information** necessary to fully define the nature and extent of the right;

FINDINGS OF FACT

I.

Pursuant to Section **89-870**, R.C.H. 1947 (**Recodified 85-2-201**, H.C.A. 1978, as **amended**; Repealed Section 37, Chapter 697, L. 1979). the Department, following an internal study selected the Powder River Basin (**map attached**) in Southeastern Montana and determined there **was** need for a **determination** of existing rights in that basin. An "existing right" **means** a right to the use of water which **would** be protected under the law as it existed prior to July 1, 1973. (Section **85-2-107(7)**, H.C.A. 1978.)

II.

The Department **issued** an **Administrative Order** pursuant to **89-872**, R.C.W. 1947 (**Recodified 85-2-203**, H.C.A. 1978, as **mended**; Repealed **Section 37, Chapter 697, L. 1979**), requiring that each person in the Powder claiming an **existing** water right for **surface** and ground water, **within** that basin, file a declaration of existing rights by February 1, 1975.

III.

In **compliance** with **89-872**, R.C.H. 1947 (**Recodified 85-2-203**, W.C.A. 1978, as **amended**; Repealed Section 37, Chapter 697, L. 1979), that Order **was** published in the Billings Gazette, Riles City Star, Powder River Examiner, Yellowstone Eagle, and Terry Tribune once a **week** for four (**4**) **consecutive weeks** during **December** 1973 and January 1974. A copy of the Order **was** served by certified **mail** upon each appropriator or his successor

in interest who had requested notice of the order. Additionally, a copy of the Order ~~was~~ served by certified ~~mail~~ upon each person owning or being possessed of lands **within** the Powder River Basin as **could** be ascertained **from** the land **ownership** records of the appropriate counties.

IV.

The Department reviewed available data including **approximately** 8530 declarations of existing rights. In **wst** cases the Department **interviewed** the declarant and **discussed** his claim with him. In **most** instances, the declarant had not **measured** his diversion **amounts** nor calculated **it** when preparing a declaration of his rights. Field **investigations** of the declarations **were** conducted after the interview when necessary to gather additional data.

In determining and verifying irrigated acres, the Department relied upon the **Montana** Water Resources Survey and U.S.D.A. aerial photon of the basin area taken in 1944, 1950, 1954, 1967 and 1968. A planimeter was **used** to determine the acreage irrigated **within** an outlined boundary on the 1967 and 1968 aerial photos.

The Department **compiled** data on **approximately** 45,000 acres of fully or partially irrigated Land, 3,700 **stockwater** reservoirs and 3,400 **groundwater wells** and developed **springs** used for **domestic** and stock **uses**. **In addition** to the 8,530 declarations **of** existing rights, the Department **recommended** the **issuance** of **approximately** 1,100 water rights that had been undeclared. **The compilation** of this data **was** submitted to the Water Courts **pursuant** to Section 85-2-243(4), H.C.A. 1978.

V.

OWNER OF THE RIGHT

A. As a rule the uater right is **issued** in the **name** of the appropriator of the uater **who** is generally also the declarant. However, in those instances **where** there is evidence of **a** change of **ownership**, the water right is issued in the **name** of the new **owner**. The Department **attempted** to **maintain** up-to-date records of the transfer of **ownership** of

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existing rights. However, it is possible that many persons have not notified the Department of the transfer of ownership, and in those cases the right is issued in the name of the declarant.

Where there is evidence of a sale of property on a contract for deed, the water right is placed in the name of the buyer. However the seller is acknowledged on the abstract.

B. Where a water source, generally a reservoir, is located on the borders of two property owners and the evidence indicates both parties appropriated water from the reservoir, the right is issued in the name of both parties as tenants in common.

C. (1) The Powder River Basin includes substantial portions of lands owned by the State of Montana, U.S. Department of Interior - Bureau of Land Management, and U.S. Department of Agriculture - Forest Service. These lands are not specifically reserved for livestock or irrigation purposes. Most of these lands are leased to individuals for grazing and occasionally irrigation purposes. In many instances the lessee appropriated water for stock or irrigation purposes. In some of these cases both the appropriator or lessee and the owner of the realty filed a declaration. Unless the evidence revealed other pertinent facts, the water right is issued in the name of the appropriator regardless of who holds title to the land.

(2) The policy expressed in C(1) above has been adopted on Montana State lands where the appropriation of water is for purposes other than irrigation. However, where the water is appropriated for irrigation purposes on state lands pursuant to Section 77-6-115, H.C.A. 1978, the right is issued in the name of the state. Section 77-6-115, M.C.A. 1978, requires permission from the Board of Land Commissioners for the acquisition of a water right in the name of the lessee for irrigation on state lands. There is no evidence that such permission had been secured by any declarants in the Powder River Basin.

(3) In many instances involving State of Montana lands, the state obtained a signed Affidavit from the lessee, who appropriated water on state lands, which acknowledged that the appropriator or lessee agreed to the issuance of the water right in the state's name. In those cases, the right is issued in the name of the state.

VI.

FLOW RATE

A. The flow rate in the abstracts represents a maximum rate of withdrawal from the underground supply and/or surface source, the limitation of the right being the quantity or volume of water actually diverted in acre-feet during a calendar year for beneficial purposes.

B. The Powder River Basin includes a large portion of water spreading systems located directly on ephemeral stream channels that utilize dikes and dams for diversion purposes. These appropriations generally divert the complete flow of the source during a run-off period and because of this a constant or consistent flow rate does not exist. The evidence submitted to the Court by the declarants and the Department does not include a flow rate in these cases, thus it is impossible to make a Finding regarding the flow rate for inflow to reservoirs and irrigation systems of this kind.

C. The flow rate on irrigation systems utilizing pumps is established by the information submitted by the declarant and the capacity of the pump.

D. The flow rate submitted by a declarant on a well or spring is generally accepted. Where no flow rate is available, the Water Master accepted the Department's standard of ten (10) gallons per minute as a reasonable flow rate for underground wells and springs in the Powder River Basin.

VII.

VOLUME

A. Based on the evidence submitted by the Department, it is found that an allowance of 1.5 acre-feet per year per household, which

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includes water for .25 acres of lam and/or garden is a reasonable volume for the domestic use of water. A volume of two acre-foot is allowed for each additional acre of lam or garden use.

B. Volumes for municipalities are based on the Department's recommended standard of 212 gallons per person per day.

C. In determining the amount of water required for stock watering purposes, the Water Master accepts the Department's standard of 1.5 acre-feet per one hundred (100) head of cattle per year as a reasonable amount. Equivalent adjustments are made to that standard where an instream stock declaration flows through several sections of land.

D. In determining water rights for stock watering purposes where the water is stored in a reservoir or dam, it is found that after allowing for carry over storage, seepage and evaporation losses that generally the water right encompasses the entire capacity or volume of the reservoir.

E. For irrigation purposes, the Water Master accepts the standards submitted by the Department. For those free flow irrigation systems that do not provide for ponding and substantial retention of water, it is found that .75 acre-feet per acre is a reasonable standard. For water spreading systems that allow for ponded coverage on the acreage but which rely on spring run-off or occasional thunderstorms, the maximum volume is found to be 1.5 acre-feet per acre per calendar year.

In those instances where more dependable sources of water are available for irrigation, crop requirements, diversion losses, soil type and other factors are considered in determining the amount of water actually beneficially used.

When a system allows more than one coverage of the acreage during a growing season, the volume of water is calculated one of two ways. When possible it is based on the soil water holding capacity and a reasonable efficiency rate for the type of system involved. Generally in this situation the amount diverted onto the fields is sufficient to fill

the soil profile **but** does not meet the net crop requirements. **However,** **volume** in **these** cases is also calculated on a net **crop requirement** basis. **considering** the particular climate region, and allowing a reasonable efficiency rate for the particular system. This **method** of calculating volume is **most** often used where a **system** receives three or more **coverages** during a **growing** season.

In all **cases where** the evidence varies **from** these standards, there are appropriate individual findings based on the evidence submitted.

VIII.

PLACE OF USE

Water rights are restricted to a defined place of use. In making those Findings, aerial photographs of the area, **investigative** field reports of the Department, and the information submitted by the **declarant** are **used**. The place of **use** is designated by legal land **description**. Where the **water** right is for irrigation purposes, it includes a designated **number** of acres. The **area irrigated** can be further defined by reference to the aerial photo included in the Court file.

IX.

SUPPLEMENTAL RIGHTS

In **many** cases, particularly where the water sources are less dependable, several sources supplement each other to supply water to the **same** acreage. This **acreage** is again described by legal land description and **more** definitely defined by reference to the aerial photos included in the Court file. The abstract **recognizes** the maximum contribution **from** each source; **however,** the **combined volume** from the sources is limited by the **beneficial use** made of the water sources, the type of irrigation **system,** and its degree of efficiency and dependability.

X.

PRIORITY USES

A. For all declarations submitted for water rights **from** undeveloped springs and stock use directly **from** a **stream,** October 1, 1883 is designated

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as the priority date based on historical data and records recognizing the prevalence of livestock in the area as of that date.

B. Where the evidence before the Water Master on priority dates included only a year, or only a year and a month, the last day of the year, and the last day of the month are assigned as a priority date. This policy is adopted to insure that those declarants who are less specific are not placed in a better position than those declarants who submitted complete dates.

C. Ground water wells and springs developed between January 1, 1962 and July 1, 1973 require that a Notice of Completion of Groundwater Appropriation by means of a Well (GW 2) or a Notice of Completion of Groundwater Appropriation without a Well (GW 3) be filed pursuant to Section 89-2913, R.C.H. 1947 (Repealed Section 46, Chapter 452, L. 1973). Where the declarants fail to make this filing, the priority date is established as the date of filing the Notice of Completion with the Department, or the date the declaration, (Form 605) was filed with the Department, whichever ever date is the earlier.

XI.

SOURCE OF WATER

Although some sources of surface water in the Powder River Basin have acquired several names, the source is generally designated in the abstract by the name given the source by the United States Geological Survey.

XII.

PLACE AND MEANS OF DIVERSION

The place and means of diversion are designated in the abstract. The place of diversion is specifically designated by legal land description. Where a declaration of a water right diverts water from a source outside the Powder River Basin, it is so designated and no right is granted. (In those cases parties should file their claims in the appropriate river basin prior to January 1, 1982, pursuant to Section 85-2-221, H.C.A. 1978.)

In a few cases declarations of existing rights were filed on water that was diverted from Wyoming near or on the Montana-Wyoming border for use in Montana. In those cases the right is issued pursuant to the Montana adjudication process, Title 85, Chapter 2, Part 2, M.C.A. 1978. The right appears in the abstract with a notation that the water is diverted in Wyoming.

XIII.

PERIOD OF USE

Host water uses in the Powder River Basin are intermittent throughout the entire year. The period of use for free flow and ponded water spreading irrigation, ranges from January 1 to December 31, as diversion results whenever a snow melt or rain shower occurs. Thus the period of use is generally designated as January 1 to December 31. Where the period of use could more accurately be determined a Finding reflecting those dates is included in the individual abstracts.

XIV.

PURPOSE

The purpose of each water right is described in the abstract, and includes such uses as stock watering, domestic, municipal, irrigation and other beneficial uses of water.

XV.

DECLARATION NUMBER

A number is assigned to the declaration at the time of filing the declaration. It is included in the abstract to aid declarants in referencing and researching their water rights.

Based upon the foregoing Findings of Fact, the Water Master makes the following:

CONCLUSIONS OF LAW

Pursuant to 85-2-231, M.C.A. 1978, the Water Courts have jurisdiction to issue a preliminary decree of the existing water rights in the Powder River Basin based on all the declarations of existing water rights filed,

the data submitted by the Department of Natural Resources and Conservation and any additional data obtained by the Water Judge.

II.

The Department gave proper notice of the filing of the **declarations**, and all other relevant substantive and procedural requirements of law and rule have been fulfilled.

III.

All pertinent substantive and procedural requirements of law were adhered to in the **review** of these declarations of existing water rights by the Water Courts of **Montana**.

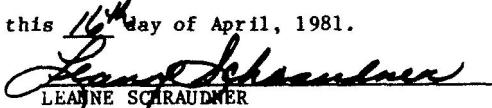
IV.

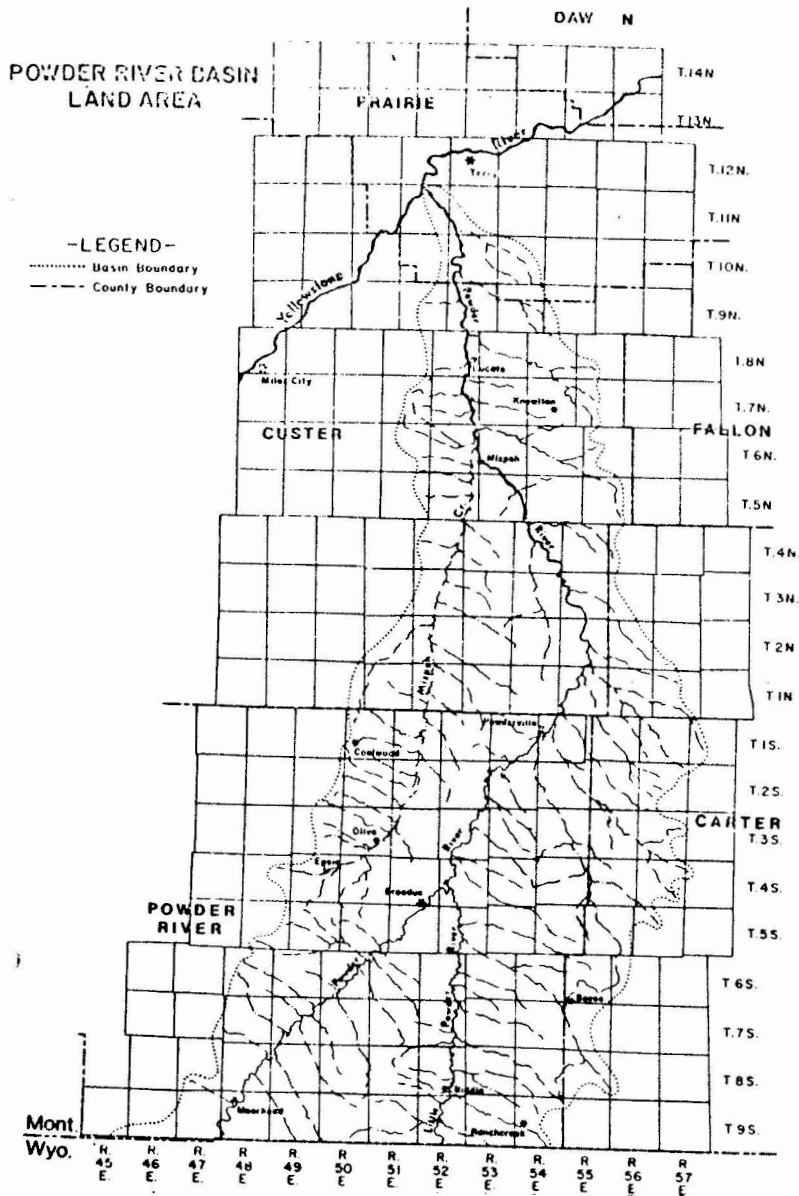
Abstracts of each Individual declaration of existing water right containing Findings and Conclusions for that declaration as required by **85-2-231**, MCA 1978 and **85-2-234**, MCA 1978, are hereby incorporated as a part of this report.

V.

This report meets the requirements for the preliminary decree as specified in **85-2-231**, MCA 1978. This report may **be** adopted as the preliminary decree pursuant to **85-2-231(3)**, MCA 1978.

RESPECTFULLY SUBMITTED this 16th day of April, 1981.


LEANNE SCHRAUDNER
Designated Water Master
Powder River Basin



05/06/81

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AIR BASTIAN STOCK CO
INL
BOX 703

EDGEMONT SD 57735

DECLARATION NUMBER	AMOUNT OF RATE	WATER VOLUME	PRIORITY DATE	PURPOSE OF RIGHT	RACE OF USE	ACRES IRRIGATED	SOURCE OF RIGHT	POINT OF DIVERSION	MEANS OF DIVERS	PERIOD OF USE
4814-	10.00 GPM	1.50 A/F	10-01-1883	STOCK	CU 06N 50E SEC. 03 NESE		DEVL SPRING	CU 06N 50E SEC. 03 NESE	SPRING BOX	01-01 12-31
4817-	3.00 GPM	1.50 A/F	10-01-1883	STOCK	CU 07N JOE SEC. 32 NESE		DEVL SPRING	CU 07N 50E SEC. 32 NESE	SPRING BOX	01-01 12-31
4820-	.50 GPM	.60 A/F	10-01-1883	STOCK	CU 07N SE SEC. 33 SCNE		DEVL WING	CU 07N 50E SEC. 33 SENE	SPRING BOX	01-01 12-31
4816-		19.80 A/F	12-31-1963	STOCK	CU 07N 50E SEC. 33 NWSE		STREVELL CREEK	CU 07N 50E SEC. 33 NWSE	DAM	01-01 12-31
4815-		12.20 A/F	12-31-1946	STOCK	CU 07N 50E SEC. 34 NWSE		*WED Tala N STREVELL CREEK	CU 07N JOE SEC. 34 NWSE	DAM	01-01 12-31
4871-		24.30 A/F	12-31-1946	STOCK	CU 06N 50E SEC. 05 NWSE		UNAMED TRIB STREVELL CREEK	CU 06N 50E SEC. 05 NWSE	DAM	01-01 12-31
4870-		7.20 A/F	12-31-1965	STOCK	CU 06N 50E SEC. 04 LOT 2		UNAMED TRIB STREVELL CREEK	CU 06N 50E SEC. 04 LOT 2	DAM	01-01 12-31
2458-	THE COURT FINDS NO RIGHT FOR THIS DECLARATION AS THE WATER IS DIVERTED FROM OUTSIDE THE POWDER RIVER BASIN.									
4812-	THE COURT FINDS NO RIGHT FOR THIS DECLARATION.									
4813-	THE COURT FINDS NO RIGHT FOR THIS DECLARATION.									
4818-	THE COURT FINDS NO RIGHT FOR THIS DECLARATION AS THE WATER IS DIVERTED FROM OUTSIDE THE POWDER RIVER BASIN.									
4819-	THE COURT FINDS NO RIGHT FOR THIS DECLARATION AS THE WATER IS DIVERTED FROM OUTSIDE THE POWDER RIVER BASIN.									

Jack D. Stanthorn
5-7-81

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NOTICE OF AVAILABILITY OF PRELIMINARY DECREE FOR THE POWDER RIVER
DRAINAGE OF MONTANA IN THE WATER COURTS OF THE STATE OF MONTANA
YELLOWSTONE DIVISION

NOTICE OF AVAILABILITY

Pursuant to Title 85, Chapter 2, Part 2, H.C.A. 1978, a Preliminary Decree **adjudicating** the water rights in the Powder River Drainage of Montana was entered on the 7 day of May, 1981.

If you filed a **statement** of claim or declaration of existing water right pursuant to the order of the Department of Natural Resources and Conservation or a district court pursuant to Section 8 and 9 of Chapter 452, **Laws** of 1973 or under Section 3 and 4 of Chapter 485, Laws of 1975, an abstract of the disposition of your claimed or declared existing right is attached to this Notice, along with a copy of the water **master's** report of general Findings of Fact and Conclusions of **Law** for the Powder River Basin, and an order signed by Water Judge Shanstran adopting that report and the abstracts of water rights as the Preliminary Decree for the Powder River Basin.

The Preliminary Decree of the Powder River Basin, State of Montana is available in its entirety **from** the Water Judge, Honorable Jack D. **Shanstrom**, of the Yellowstone Division. The cost of obtaining the total decree of **all** adjudicated water rights in the Powder River Basin is \$65.00. Persons interested in obtaining a copy of the entire decree should address checks to the Yellowstone Division Water Court, Judge Jack D. Shanstran, P.O. Box 436, Livingston, Montana 59047. Persons desiring further information regarding the Preliminary Decree may call **Leanne** Schraudner, the water **master** for the Powder River at 586-4364.

The adjudication of water rights in the State of **Montana** is based upon the principal of first **in** time, first in right. To help you understand the relative priority **of** your water rights as **compared** to all other rights in the source of supply, you should **review** the Preliminary Decree.

The entire decree is on file and may be reviewed from 8:00 a.m. to 5:00 p.m. Monday through Friday at the Clerk of Court's office in Powder River, Custer, Carter, Prairie, and Fallon Counties. Microfilm of the declarations filed in the Powder River and of the Department of Natural Resources and Conservation reports on those declarations are on file at the Clerk of Court's office, Custer County, in Miles City; the Clerk of Court's office, Powder River County in Broadus; the Department of Natural Resources and Conservation office in Miles City and in Helena.

PROCEDURE AFTER PRELIMINARY DECREE

The Preliminary Decree is not a final judgment of the water rights obtained therein. A person named in the Preliminary Decree or other persons for good cause shown, may object to the Preliminary Decree and request a hearing before the Water Court of the State of Montana, Yellowstone Division. For purposes of filing an objection "good cause shown" shall include:

* (1) A showing that one has a substantial reason for objecting, which means that the party has an interest that has been affected by the Preliminary Decree, and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting.

An objection and request for a hearing must be filed and received by the Water Court, Judge Jack D. Shanstrom, P.O. Box 436, Livingston, Montana 59047 on or before September 2, 1981.

*PROCEDURE FOR OBTAINING EXTENSION OF TIME FOR FILING OBJECTIONS

(1) An extension of the period for filing objections not to exceed ninety (90) days may be granted by the Water Judge for good cause shown. Application for extension shall be filed, in writing, with the Water Court, Judge Jack D. Shanstrom, within the ninety (90) days as provided above. The application shall contain the following information in the sequence listed herein and shall be typed on 8½" x 11" white paper.

- (a) Name, phone number, and address of party requesting extension;
- (b) A statement of the party's rights or interest that could be adversely affected;
- (c) A precise statement of the reasons why the objection could not be completed within the ninety (90) days prescribed above.

(2) For purposes of requesting an extension for the objection period, "good cause shown" shall include:

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- (a) A precise statement of the party's rights or interest that could be adversely affected;
and
- (b) A **showing** of one of the following:
 - i. **newly** discovered facts or evidence giving rise to the objection which was not discoverable by due diligence, and the development of that evidence will necessitate **more** than the **remaining** time allowed for objections;
 - ii. any other reason where failure to extend the ninety (90) day objection period would result in an injustice.

*PROCEDURE FOR FILING OBJECTIONS TO PRELIMINARY DECREE

- (1) The objection shall be entitled:

IN THE WATER COURTS OF THE STATE OF MONTANA

YELLOWSTONE DIVISION - POWDER RIVER BASIN

* * * * *

IN THE MATTER OF THE ADJUDICATION)	
OF THE EXISTING RIGHTS TO THE USE)	
OF ALL THE WATER, BOTH SURFACE)	NOTICE OF OBJECTION
AND UNDERGROUND, WITHIN THE POWDER)	TO THE POWDER RIVER
RIVER DRAINAGE AREA, INCLUDING ALL)	PRELIMINARY DECREE
TRIBUTARIES OF THE POWDER RIVER IN)	
CARTER, CUSTER, FALLON, PRAIRIE &)	
POWDER RIVER COUNTIES. MONTANA.)	

* * * * *

- (2) The objection shall contain:

- (a) Name, address, and phone number of party objecting;
- (b) All pertinent information on the right or rights as **found** in the Decree to which the party objects in the **following** sequence:
 - i. page number of decree
 - ii. claim number or declaration number
 - iii. priority date
 - iv. purpose of right
 - v. place of use
 - vi. acres irrigated
 - vii. source of right
 - viii. point of diversion
 - ix. means of diversion
 - x. period of use
- (c) A precise statement of any of the above findings to which the objector disagrees, including a **statement** of what the objector contends those findings should be;
- (d) A precise statement of any other findings and conclusions with which the objector disagrees citing the findings number, conclusions number, and page on which they are found;

- (e) A statement of the specific grounds and evidence on which the objection is based;
- (f) Name, address, and phone numbers of the claimant's personal representative or attorney, if any;
- (g) Copies of any maps, photos, reports, etc. to be used as evidence to support the objection.

PROCEDURE AFTER OBJECTIONS ARE FILED

All parties named in the Decree shall be notified that a hearing has been requested and the Water Judge of the Water Court of the Yellowstone Division shall fix a date when all parties who wish to participate in future proceedings must appear or file a statement. Hearings may be individual or consolidated and be conducted as for other civil actions. Rules regulating Water Court hearings and procedures will be available upon request from the Water Courts, 2304 West Main, Suite 7, Bozeman, Montana 59715.

A person whose existing rights and priorities are determined in the final decree may appeal the determination to the Montana Supreme Court if:

- (1) He requested a hearing and appeared and entered objections to the Preliminary Decree; or
- (2) His rights as determined in the Preliminary Decree were altered as the result of a hearing requested by another person.

The Department of Natural Resources and Conservation will on the basis of the final decree, issue a certificate of water right to each person decreed an existing right. The original of the certificate will be sent to the County Clerk and Recorder of the county where the point of diversion or the place of use is located for recordation. After recordation, the Clerk and Recorder shall send the certificate to the person to whom the right is decreed.

DATED this 7 day of May, 1981.

ORIGINAL SIGNED BY

John D. Shannon
WATER JUDGE

*Rules of the Supreme Court promulgated and adopted for the Water Courts by the Montana Supreme Court pursuant to 3-7-103, MCA. 1978, on the 9th day of April, 1981.

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1. The first part of the document is a list of names and their corresponding addresses. The names are listed in a column on the left, and the addresses are listed in a column on the right. The names are: John Doe, Jane Smith, and Bob Johnson. The addresses are: 123 Main St, 456 Elm St, and 789 Oak St.

Part 5 - Groundwater

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CHAPTER 2 SURFACE AND GROUNDWATER

Chapter **Compiler's** Comments

Temporary Water Resources Oversight Committee: Chapter 609, L. 1981, provided:

"Section 1. Water resources oversight committee - - establishment - - appointment - - organization. (1) There is established a water resources oversight committee.

(2) The speaker of the house and the committee on committees of **the** senate shall each appoint four members of **their** respective house to serve on the committee. No more than two members from each house may be from the same party.

(3) Committee members shall elect a chairman and vice-chairman from among their number,

(4) Committee members are entitled to compensation and expenses as provided in 5-2-30?.

Section 2. Function of the committee. (1) The water resources oversight committee shall work with and oversee the efforts of state agencies charged with the responsibility of developing and managing the state's water resources, including the water development program created under Senate Bill 409 in the 47th legislature. The committee shall keep informed of water development projects and activities requested under the water development program. The committee may study any other issues related to water development and conservation as its members consider important to the people of the state.

(2) The committee may make such recommendations to agencies and the legislature relating to water development and conservation programs and requests for grants and loans for projects and activities under Senate Bill 409 as it considers necessary. Such recommendations may include proposals for legislation.

(3) The committee may continue the work of the previous interim's water resources and adjudication oversight committee of overseeing the implementation of the water rights adjudication system provided for in Title 85, chapter 2.

Section 3. Committee assistance. The committee may arrange with the legislative council to receive support services subject to the limitations of funds available for that purpose.

Section 4. **Appropriation.** There is appropriated from the renewable resource development clearance fund account \$15,000 to the legislative council for the biennium ending June 30, 1983, for the purpose of supporting the activities of the water resources oversight committee.

Section 5. Effective and expiration date. This act is effective on July 1, 1981, and expires June 30, 1983."

Part 1

General Provisions

85-2-101. Declaration of policy and purpose. (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the water within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.

(2) A purpose of this chapter is to implement Article IX, section 3 (4) of the Montana constitution, which requires that the legislature provide for the administration, control* and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation* protection* preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization* development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities which store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of stream flows, and for groundwater recharge.

(4) Pursuant to Article IX, section 3 (1) of the Montana constitution, it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

History: En. Sec. 2, Ch. 452, L. 1973; R.C.M. 1947, 89-866.

85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert* impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency* to reserve water in accordance with 85-2-316.

(2) "Beneficial use", unless otherwise provided, means a use of water for the benefit of the appropriator* other persons* or the public, including but not limited to agricultural (including stock water), domestic* fish and wildlife* industrial* irrigation* mining* municipal, power, and recreational uses.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Declaration" means the declaration of an existing right filed with the department under section 3, Chapter 452, Laws of 1973.

(6) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(7) "Existing right" means a right to the use of water

which would be protected under the law as it existed prior to July 1, 1973.

(8) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir* or other body of surface water, and which is not a part of that surface water.

(9) "Permit^N" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 65-2-306 through 85-2-314.

(10) "Person" means an individual, association* partnership* corporation, state agency, political subdivision+ the United States or any agency thereof* or any other entity.

(11) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation* association, or group.

(12) "Slurry^A" means a mixture of water and insoluble material.

(13) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(14) "Water" means all water of the state surface and subsurface, regardless of its character or manner of occurrence* including but not limited to geothermal water, diffuse surface water* and sewage effluent.

(15) "Water division" means a drainage basin as defined in 3-7-102.

(16) "Water judge" means a judge as provided for in Title 3, chapter 7.

(17) "Water master" means a master as provided for in Title 3, chapter 7.

(18) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

History: En. Sec. 3, Ch. 452, L. 1973; amd. Sec. 1, Ch. 192, L. 1974; amd. Sec. 1, Ch. 435, L. 1975; amd. Sec. 1, Ch. 416, L. 1977; amd. Sec. 7, Ch. 460, L. 1977; R.C.M. 1947, 89-867; amd. Sec. 1, Ch. 327, L. 1979; amd. Sec. 1, Ch. 552, L. 1979; amd. Sec. 29, Ch. 697, L. 1979.

85-2-103. Measurement of water. (1) After July 1, 1899, a cubic foot of water (7.48 gallons) per second of time shall be the legal standard for the measurement of water in this state.

(7) Where water rights expressed in statutory or miner's inches have been granted, 100 statutory or miner's inches shall be considered equivalent to a flow of 2.5 cubic feet (18.7 gallons) per second, 200 statutory or miner's inches shall be considered equivalent to a flow of 4 cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by

any number of statutory or miner's inches.

(3) The provisions of this section shall not affect or change the measurement of water decreed by a court prior to July 1, 1899, but such decreed water shall be measured according to the law in force at the time such decree was made and entered.

History: (1) En. Sec. 1, p. 126, L. 1899; re-en. Sec. 4854, Rev. C. 1907; re-en. Sec. 7107, R.C.M. 1921; re-en. Sec. 7107, R.C.M. 1935; Sec. 89-817, R.C.M. 1947; (2) Ap. p. Sec. 2, p. 126, L. 1899; re-en. Sec. 4855, Rev. C. 1907; re-en. Sec. 7108, R.C.M. 1921; re-en. Sec. 7108, R.C.M. 1935; Sec. 89-818, R.C.M. 1947; Ap. p. Sec. 10, Ch. 185, L. 1907; re-en. Sec. 4877, Rev. C. 1907; re-en. Sec. 7132, R.C.M. 1921; re-en. Sec. 7132, R.C.M. 1935; Sec. 89-843, R.C.M. 1947; (3) En. Sec. 3, p. 126, L. 1899; re-en. Sec. 4856, Rev. C. 1907; re-en. Sec. 7109, R.C.M. 1921; re-en. Sec. 7109, R.C.M. 1935; Sec. 89-819, R.C.M. 1947; R.C.M. 1947, 89-817, 89-818, 89-819, 89-843(part).

85-2-104. Slurry transport of coal. (1) The legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state.

(2) The use of water for the slurry transport of coal is not a beneficial use of water.

History: En. Sec. 2, Ch. 552, L. 1979.

Compiler's Comments

Codification. Sec. 2, Ch. 552, L. 1979, provided: "It is intended that section 2 be codified as an integral part of Title 85, chapter 2, part 1, and the provisions of Title 65, chapter 2, apply to section 2."

85-2-105 through 85-2-110 reserved.

85-2-111. Department powers. The department way:

- (1) enter into agreements with federal, state, or local agencies necessary to carry out this chapter;
- (2) apply for, accept, administer, and expend funds? grants, gifts, and loans from the federal government or any other public or private source for the purposes of this chapter.

History: En. Sec. 4, Ch. 452, L. 1973; R.C.M. 1947, 89-868(2).

85-2-112. Department duties. The department shall:

- (1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the supreme court under 3-7-204;
- (2) prescribe procedures? forms, and requirements for applications, permits, certificates, declarations* claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any

application, declaration, claim of existing right, or other document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, declarations, claims of existing rights, applications, and other documents filed in its office under this chapter;

(4) cooperate with, assist, advise, and coordinate plans and activities with the federal, state, and local agencies in matters relating to this chapter;

(5) upon request by any person* cooperate with, assist, and advise that person in matters pertaining to measurement or filing declarations with the department or claims of existing rights with a district court under this chapter.

History: En. Sec. 4, Ch. 452, L. 1973; R.C.M. 1947, 89-863(1); amd. Sec. 30, Ch. 697, L. 1979; amd. Sec. 3, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Added "Subject to the powers and duties of the supreme court under 3-7-204" to (1).

Effective Date: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Approved April 3, 1981.

85-2-113. Board powers and duties. (1) The board may prescribe fees or service charges for any public service rendered by the department under this chapter* including fees for the filing of applications or for the issuance of permits and certificates. There shall be no fees for the filing of declarations or for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights.

(2) The board may adopt rules necessary to implement and carry out the purposes and provisions of this chapter. These rules may include but are not limited to rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this chapter to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices, except that the board may not require a meter on a water well outside of a controlled groundwater area or proposed controlled groundwater area unless the maximum yield of the well is in excess of 100 gallons a minute;

(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals and to file reports on appropriations; and

(d) regulate the construction, use, and sealing of

wells to prevent the waste, contamination, or pollution of groundwater.

(3) The board shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property.

History: En. Sec. 5, Ch. 452, L. 1973; amd. Sec. 1, Ch. 238, L. 1974; amd. Sec. 2, Ch. 485, L. 1975; R.C.M. 1947, 89-909; amd. Sec. 1, Ch. 292, L. 1979; amd. Sec. 31, Ch. 697, L. 1979.

85-2-114. Prevention of waste. (1) If the department ascertains* by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, or preventing water from moving to another person having a prior right to use the same, it may petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use; or

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take such steps as may be necessary to remedy the waste, unlawful use, or interference.

(2) The department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it, which notice shall be legal notice to all persons interested in the appropriation or distribution of the water-

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin such waste, unlawful use, or interference.

History: En. Sec. 33, Ch. 452, L. 1973; R.C.M. 1947, 89-897; amd. Sec. 32, Ch. 697, L. 1979.

85-2-115. Entry on land. Any employee or agent of the department authorized by the director may enter upon any land to carry out the purpose of this chapter, including but not limited to entry to make inspections the department considers necessary of proposed works, source of water, location of the proposed user construction of works, and other inspections to ascertain whether or not persons are complying with this chapter. The department or its agent shall give reasonable notice to the landowner of its intention to enter upon the land. The department is responsible for actual damages done to any property.

History: En. Sec. 34, Ch. 452, L. 1973; R.C.M. 1947, 39-898.

85-2-116. Legal assistance. (1) When requested by the department* the attorney general and the county attorneys within their respective Counties shall perform legal services and conduct legal proceedings necessary to carry out the purposes of this chapter. The department may also employ legal counsel to enforce this chapter and to conduct proceedings under it.

(2) If an appropriator who is a citizen of Montana becomes involved in a controversy to which any agency of the federal government or another state is a party, the department may in its discretion intervene as a party or provide necessary legal assistance to the citizen of Montana.

History: En. Sec. 359 Ch. 452, L. 1973; amd. Sec. 9, Ch. 460, L. 1977; R.C.M. 1947, 89-899.

85-2-117 through 85-2-120 reserved.

85-2-121. Administrative proceedings. The Montana Administrative Procedure Act governs administrative proceedings conducted under parts 1 through 4 of this chapter, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding.

History: En. Sec. 36, Ch. 452, L. 1973; amd. Sec. 13, Ch. 485, L. 1975; amd. Sec. 9, Ch. 416, L. 1977; R.C.M. 1947, 89-6-100.

85-2-122. Penalties. A person who violates or refuses or neglects to comply with 85-2-301, 85-2-402(1), and 85-2-403(3), any order of the department, or any rule of the board is guilty of a misdemeanor.

History: En. Sec. 37, Ch. 452, L. 1973; R.C.M. 1947, 89-8-101.

85-2-123. Deposit of fees and penalties. Except as provided in 85-2-124, all fees and penalties collected under this chapter shall be deposited in the state general fund. All penalties or fines imposed by any court for a violation of this Chapter shall be deposited in the general fund of the county where the court presides and shall be disposed of in the same manner as any other penalty or fine.

History: En. Sec. 38, Ch. 452, L. 1973; R.C.M. 1947, 89-8-102.

85-2-124. Fees for environmental impact statements. (1) whenever the department determines that the filing of an application (or a combination of applications) for a permit or approval under this chapter requires the preparation of an environmental impact statement as prescribed by the Montana Environmental Policy Act and the application (or combination of applications) involves the use of 10,000 or

more acre-feet per year or 15 or more cubic feet per second of water, the applicant shall pay to the department the fee prescribed in this section. The department shall notify the applicant in writing within 30 days of receipt of a correct and complete application (or a combination of applications) if it determines that an environmental impact statement and fee is required.

(2) Upon notification by the department under subsection (1), the applicant shall pay a fee based upon the estimated cost of constructing, repairing, or changing the appropriation and diversion facilities as herein provided. The maximum fee that shall be paid to the department may not exceed the fees set forth in the following declining scale: 2% of the estimated cost up to \$1 million; plus 1% of the estimated cost over \$1 million and up to \$20 million; plus 1/2 of 1% of the estimated cost over \$20 million and up to \$100 million; plus 1/4 of 1% of the estimated cost over \$100 million and up to \$300 million; plus 1/8 of 1% of the estimated cost over \$300 million. The fee shall be deposited in the earmarked revenue fund to be used by the department only to comply with the Montana Environmental Policy Act in connection with the application(s). Any amounts paid by the applicant but not actually expended by the department shall be refunded to the applicant.

(3) The department and the applicant may determine by agreement the estimated cost of any facility for purposes of computing the amount of the fee to be paid to the department by the applicant. The department may contract with an applicant for:

(a) the development of information by the applicant or a third party on behalf of the department and the applicant concerning the environmental impact of any proposed activity under an application;

(b) the division of responsibility between the department and an applicant for supervision over* control of, and payment for the development of information by the applicant or a third party on behalf of the department and the applicant under any such contract or contracts;

(c) the use or nonuse of a fee or any part thereof paid to the department by an applicant.

(4) Any payments made to the department or any third party by an applicant under any such contract or contracts shall be credited against any fee the applicant must pay hereunder. The department and the applicant may agree on additional credits against the fee for environmental work performed by the applicant at the applicant's own expense.

(5) No fee as prescribed by this section may be assessed against an applicant for a permit or approval if the applicant has also filed an application for a certificate of environmental compatibility or public need pursuant to the Montana Major Facility Siting Act, and the appropriation or use of water involved in the application(s) for permit or approval has been or will be studied by the department pursuant to that act.

(6) This section shall apply to all applications, pending or hereinafter filed, for which the department has

not* as of April 9, 1975, commenced writing an environmental impact statement- This section shall not apply to any application* the fee for which would not exceed \$2,500.

(7) Failure to submit the fee as required by this section shall void the application(s).

(8) The department may, in its discretion, rely upon the environmental studies* investigations, reports* and assessments made by any other state agency or any person* including any applicant, in the preparation of its environmental impact statement,

History: En. 89-8-102.2 by Sec. 1, Ch. 356, L. 1975; amd. Sec. 1, Ch. 117, L. 1977; R.C.M. 1947, 89-8-102.2.

85-2-125. Recovery of attorney fees by prevailing party. If a final decision of the department on an application for a permit is appealed to district court, the district court shall award the prevailing party reasonable attorney fees-

History: En. 89-3-100.1 by Sec. 11, Ch. 416, L. 1977; R.C.M. 1947, 89-8-100.1.

85-2-126 through 85-2-130 reserved.

85-2-131. Application for change of watercourse name.

(1) All applications for the change of name of any watercourse or natural source of water supply* including natural streams, dry coulees, springs, lakes, rivers, or creeks which lie wholly within the limits of one county must be made to the district court of the county where the watercourse or other natural source of water supply, the name of which is proposed to be changed, or some part thereof is situated. The petition must state in ordinary and concise language:

(a) a description of the watercourse or other natural source of water supply* the name of which is proposed to be changed, identifying the same as near as may be by natural monuments;

(b) the present name of the stream or other natural source of water supply and the name to which the petitioners desire the same to be changed* together with the reasons for the desired change of name;

(c) the names of all persons or corporations owning real estate abutting upon or water rights upon the same whose titles appear of record in the office of the county clerk and recorder in the county in which the watercourse or other natural source of water supply* or some part thereof, is situated.

(2) The petition must be signed by not less than 10 owners of real property abutting upon said watercourse or other natural source of water supply or owning water rights upon the same.

(3) The insufficiency of the petition in any of the above respects shall not be held to defeat the jurisdiction of the court.

History: En. Sec. 1, Ch. 101, L. 1911; re-en. Sec. 9968, R.C.M. 1921; re-en. Sec. 9968, R.C.M. 1935; R.C.M. 1947, 93-100-6.

85-2-132. Change of watercourse name -- public notice.
When such petition is filed in the district court* the court or the judge thereof shall designate some newspaper of general circulation in the county, such as is most likely to give all parties interested notice of the proceedings, and shall order that notice be published therein as hereinafter provided* and in his discretion he may require any other and further notice that to him may seem reasonable and shall fix a time at which objections to the granting of the petition for the change of name shall be heard. 4 copy of the petition* together with a notice of the time set for hearing objections thereto, shall be published in the newspaper designated by the court or judge for that purpose at least once a week for 4 successive weeks, and such other and further notice of the proceedings shall be given as the court or judge may in his discretion require.

History: En. Sec. 2, Ch. 101, L. 1911; re-en. Sec. 9969, R.C.M. 1921; re-en. Sec. 9969, R.C.M. 1935; R.C.M. 1947, 93-100-7.

85-2-133. Change of watercourse name -- hearing. At the time set for bearing or at any time prior thereto* objections may be filed by any person who can, in such objections, show to the court or judge good reason against such change of name. The application and the objections must be heard at such time as the court or judge may appoint. On hearing, the court or judge may examine on oath any of the petitioners, remonstrants* objectors, or other persons touching the application and may make an order changing the name or dismissing the application as to the court or judge may seem right and proper.

History: En. Sec. 3, Ch. 101, L. 1911; re-en. Sec. 9970, R.C.M. 1921; re-en. Sec. 9970, R.C.M. 1935; R.C.M. 1947, 93-100-8.

85-2-134. Change of watercourse name -- judgment to be filed with county clerk. If the change of name be ordered, a copy of the judgment, duly certified by the clerk of the court* shall be filed with the county clerk and recorder of the county in which the watercourse or other natural source of water supply is situated* and the clerk of the court shall, annually, in the month of January* make a return to the office of the secretary of state of all changes of names made in the district court of his county under this section.

History: En. Sec. 4, Ch. 101, L. 1911; re-en. Sec. 9971, R.C.M. 1921; re-en. Sec. 9971, R.C.M. 1935; R.C.M. 1947, 93-100-9.

Adjudication of Water Rights

~~85-2-201 through 85-2-210. Repealed.~~ Sec. 37, Ch. 697, L. 1979.

Compiler's Comments

Histories of Repealed Sections:

~~85-2-201.~~ En. Sec. 6, Ch. 452, L. 1973; R.C.M. 1947, 89-370.

~~85-2-202.~~ En. Sec. 7, Ch. 452, L. 1973; R.C.M. 1947, 89-871.

~~85-2-203.~~ En. Sec. 8, Ch. 452, L. 1973; amd. Sec. 1, Ch. 265, L. 1974; amd. Sec. 3, Ch. 485, L. 1975; R.C.M. 1947, 89-872.

~~85-2-204.~~ En. Sec. 9, Ch. 452, L. 1973; amd. Sec. 4, Ch. 485, L. 1975; R.C.M. 1947, 89-873.

~~85-2-205.~~ En. Sec. 10, Ch. 452, L. 1973; amd. Sec. 5, Ch. 485, L. 1975; R.C.M. 1947, 89-874.

~~85-2-206.~~ En. Sec. 11, Ch. 452, L. 1973; amd. Sec. 6, Ch. 485, L. 1975; amd. Sec. 2, Ch. 416, L. 1977; R.C.M. 1947, 89-875.

~~85-2-207.~~ En. Sec. 12, Ch. 452, L. 1973; amd. Sec. 7, Ch. 485, L. 1975; R.C.M. 1947, 89-876.

~~85-2-208.~~ En. Sec. 13, Ch. 452, L. 1973; amd. Sec. 3, Ch. 416, L. 1977; R.C.M. 1947, 89-877.

~~85-2-209.~~ En. Sec. 14, Ch. 452, L. 1973 R.C.M. 1947, 89-878.

~~85-2-210.~~ En. Sec. 15, Ch. 452, L. 1973; R.C.M. 1947, 89-879.

~~85-2-211. Petition by attorney general.~~ Within 20 days after May 11, 1979, the state of Montana upon relation of the attorney general shall petition the Montana supreme court to require all persons claiming a right within a water division to file a claim of the right as provided in 85-2-221.

History: En. Sec. 20, Ch. 697, L. 1979.

Compiler's Comments

Purpose. Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

Codification. Sec. 35, Ch. 697, L. 1979, provided: "(1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act.

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above* the code commissioner shall add to the MCA, if necessary* statutory language to convey the intent of this

section."

Because of rearrangement of the new material* Ch. 697 is now codified in Title 3, chapter 7; Title 85, chapter 2, parts 2 and 7; and 2-15-212.

Effective date. "This act is effective on passage and approval." kpproved May 11, 1979.

Severability. Section 36, Ch. 697, L. 1979, was a severability section.

85-2-212. Order by supreme court. (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

"WATER RIGHTS ORDER

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence shall be printed in not less than 12-point boldface type.) This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water* Every person, including but not limited to an individual* partnership* association* public or private corporation* city or other municipality, county* state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1983. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however* claims for such uses may be voluntarily filed* Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the order of the department of natural resources and conservation or a district court issued pursuant to sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are also exempt.

For further information, contact the department of natural resources and conservation* Helena* Montana, for a copy of the law and an explanation of it."

(2) Upon petition of the attorney general* the Montana supreme court shall issue the order called for in subsection (1) with a shorter claim filing period of not less than 1 year* subject to extension not beyond June 30, 1983, by the Montana supreme court upon petition of the attorney general* in those basins or subbasins where state adjudication jurisdiction is being or is likely to be challenged.

History: En. Sec. 16, Ch. 697, L. 1979.

85-2-213. Notice of order. To assure that all persons

who may claim an existing water right are notified of the requirement to file a claim of that right* the Montana supreme court shall give notice of the order as follows:

(1) It shall cause the order* printed in not less than 10-point type* to be placed in a prominent and conspicuous place in all daily newspapers of the state and in at least one newspaper published in each county of the state within 30 days after the Montana supreme court order as provided in 85-2-212 and in April of 1980, 1981, 1982, and 1983.

(2) It shall cause the order, in writing, to be placed in a prominent and conspicuous location in each county courthouse in the state within 30 days after the Montana supreme court order as provided in 85-2-212.

(3) It shall provide a sufficient number of copies of the order to the county treasurers before October 15, 1979, 1980, 1981, and 1982, and the county treasurers shall enclose a copy of the order with each statement of property taxes mailed in 1979, 1980, 1981, and 1982. In the implementation of this subsection+ the department shall provide reimbursement to each county treasurer for the reasonable additional costs incurred by the treasurer arising from the inclusion of the order required by this section. The department shall be reimbursed for such costs from the water right adjudication account created by 85-2-241.

(4) It shall provide copies of the order+ in writing* to the press services with offices located in Helena within 30 days after the Montana supreme court order as provided in 85-2-212, and in April of 1980, 1981, 1982, and 1983.

(5) It shall* under authority granted to the states by 43 U.S.C. 666, provide for service of the petition and order upon the United States attorney general or his designated representative.

(6) It may also in its discretion give notice of the order in any other manner that will carry out the purposes of this section.

(7) It may also in its discretion order that the department or the water judge assist the Montana supreme court in the carrying out of this section.

History: En. Sec. 17, Ch. 697, L. 1979.

85-2-214. Commencement of action. (1) The action for the adjudication of all existing water rights under this part+ part 7, and Title 3, chapter 7, is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in 85-2-212. As to each claim, the action is considered filed in the judicial district of the county in which the diversion is made or, if there is a claimed right with no diversion* in the judicial district of the county in which the use occurs.

(2) The water judge shall monitor the claim filing procedure for claims within his water division and make any orders necessary to assure timely and accurate compliance with the claim filing procedure.

History: En. Secs. 6, 20, Ch. 697, L. 1979.

85-2-215. Consolidation of matters. The water judge may consolidate all matters concerning the determination and interpretation of existing water rights within the water judge's division in any combination or groups of claims or matters for joint hearings or proceedings conducted by the water judge or water master in any location within the division. The water judge may make such consolidations as are necessary to administer the requirements of this part and part 7 in adjudicating claims of existing water rights.

History: En. Sec. 6, Ch. 697, L. 1979.

85-2-216. Venue for water rights determinations. All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in 85-2-212.

history: En. Sec. 6, Ch. 697, L. 1979.

85-2-217. Suspension of adjudication. While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating are suspended. The obligation to file water rights claims for those reserved rights is also suspended. This suspension shall be effective until July 1, 1985, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 1985, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 4, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Deleted *From the time of filing the petition required in 85-2-211 until July 1, 1982, and^w from the beginning of the section; substituted "proceedings" for "actions" before "to generally adjudicate" in the first sentence; substituted "and federal reserved water rights of those tribes and federal agencies which are negotiating^w for

"from 3 source of water in question under this part* in the first sentence; deleted *unless an action is commenced or is pending by or on behalf of an Indian tribe to adjudicate water from that source other than as provided for in Title 85, chapter 2. In such case, the suspension is maintained only if the action is dismissed or if the parties to the action stipulate to the suspension during coepect negotiations of all further proceedings in the action except the determination of jurisdictional issues and an order is so issued" after "are suspended" in the first sentence; added the last five sentences.

Effective Date: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Approved April 3, 1981.

85-2-218 through 85-2-220 reserved.

85-2-221. Filing of claim of existing water right. (1)
A person claiming an existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in 85-2-2129 shall file with the department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department.

(2) The department shall file a copy of each statement of claim with the clerk of the district court for the judicial district in which the diversion is made or, if there is a claimed right with no diversion* the department shall file a copy of the statement of claim with the clerk of the district court of the judicial district in which the use occurs-

History: En. Sec. 11, Ch. 697, L. 1979.

85-2-222. Exemptions. Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources and claims for rights in the Powder River Basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed-

History: En. Sec. 11, Ch. 697, L. 1979.

85-2-223. Public recreational uses. The department of fish, wildlife* and parks shall exclusively represent the public for purposes of establishing any prior and existing public recreational use in existing right determinations under this part* provided that the foregoing shall not exclude a federal governmental entity from representing the public for the purpose of establishing any prior and existing public recreational use in existing right determinations under this part. The foregoing shall not be construed* in any manner as a legislative determination of whether or not a recreational use scught to be established

prior to July 1, 1973, is or was a beneficial use.

History: En. Sec. 12, Ch. 697, L. 1979.

85-2-224. Statement of claim. (1) The statement of claim for each right shall include substantially the following:

- (a) the name and mailing address of the claimant;
- (b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;
- (c) the quantities of water and times of use claimed;
- (d) the legal description, with reasonable certainty* of the point or points of diversion and places of use of waters;
- (e) the purpose of user including? if for irrigation, the number of acres irrigated;
- (f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (c); and
- (g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) The claimant shall submit maps, plats, aerial photographs* decrees* or pertinent portions thereof, or other evidence in support of his claim. All maps, plats* or aerial photographs should show as nearly as possible to scale the point of diversion* place of use* place of storage, and other pertinent conveyance facilities.

History: En. Sec. 13, Ch. 697, L. 1979.

85-2-225. Filing fee. (1) Each claim filed under 85-2-221 or 85-2-222 must be accompanied by a filing fee in the amount of \$40, subject to the following exceptions:

- (a) the total filing fees for all claims filed by one person in any one water court division may not exceed \$480; and
- (b) no filing fee is required accompanying a claim of an existing right that is included in a decree of a Court in the state of Montana and which is accompanied by a copy of that decree or pertinent portion thereof.

(2) A claim that is exempt from the filing requirements of 85-2-221(1) but that is voluntarily filed must be accompanied by a filing fee in the amount of \$40. Exempt claims for a single development with several uses if filed simultaneously may be accompanied by a filing fee in the amount of \$40.

History: En. Sec. 18, Ch. 697, L. 1979; amd. Sec. 1, Ch. 253, L. 1981; amd. Sec. 5, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendments: Chapter 253 deleted "certified" before "copy" in (1)(b) and "or verified as otherwise ordered by the court" at the end of (1)(b).

Chapter 268 inserted "or 85-2-222- after "85-2-221" and substituted "must" for "shall" in (1); added subsection (2).

Effective Date: Section 2, Ch. 253, L. 1981, and sec. 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Both acts were approved April 3, 1981.

85-2-226. Abandonment by failure to file claim. The failure to file a claim of an existing right as required by 85-2-221 establishes a conclusive presumption of abandonment of that right.

History: En. Sec. 14, Ch. 697, L. 1979.

85-2-227. Claim to constitute prima facie evidence. A claim of an existing right filed in accordance with 85-2-221 constitutes prima facie proof of its content until the issuance of a final decree.

History: En. Sec. 15, Ch. 697, L. 1979.

85-2-228 through 85-2-230 reserved.

85-2-231. Preliminary decree. (1) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

- (a) the statements of claim before the water judge;
- (b) the data submitted by the department;

(c) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

(d) any additional data obtained by the water judge. The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible. This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree if such a decree is necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

(2) A preliminary decree may be issued for any hydrologically interrelated portion of a water division* including but not limited to a basin* subbasin, drainage, subdrainage, stream* or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

(3) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency whether or not it has been ratified by congress.

(4) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary

decree set forth in subsections (1) and (3), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied* he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

History: En. Secs. 22, 27, Ch. 697, L. 1979; amd. Sec. 6, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Deleted "within a reasonable time after the close of the filing period^a at the beginning of (1); inserted subsection (1)(c); added the material beginning with "The preliminary decree shall be issued . . ." in (1)(d); inserted subsection (2); substituted "approved by the legislature and the tribe or federal agency" for "agreed upon by the parties to the compact" in (3).

Effective Date: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Approved April 3, 1981.

Commissioner's Corrections: Because of rearrangement of sec. 27, Ch. 697, L. 1979, the Code Commissioner, 1979, added the words "negotiated under the provisions of part 7" to the last sentence in subsection (2).

85-2-232. Availability of preliminary decree. (1) The water judge shall send a copy of the preliminary decree to the department, and the water judge shall serve by mail a notice of availability of the preliminary decree to each person who has filed a claim of existing right, or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water Judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice of availability shall also be served upon those issued or having applied for and not having been denied a beneficial water use permit pursuant to Title 95, chapter 2, part 3, those granted a reservation pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the preliminary decree; Such certificate shall be conclusive evidence of due and legal notice of entry of decree-

(2) Any person may obtain a copy of the preliminary decree upon payment of a fee of \$20 or the cost of printing, whichever is greater, to the water judge.

History: En. Sec. 22, Ch. 697, L. 1979.

85-2-233. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a

person named in the preliminary decree* or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested? such request must be filed with the water judge within 90 days after notice of entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 90 days if application for the extension is made within 90 days after notice of entry of the preliminary decree-

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested- The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement- The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master* who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

History: En, Sec. 23, Ch. 697, L. 1979; am. Sec. 7, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Increased the additional time extension from 30 to 90 days in (2).

85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed* the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by 85-2-221 to file a claim for an existing right and of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973.

(3) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person named in the decree are based.

(4) For each person who is found to have an existing right, the final decree shall state:

(a) the name and post-office address of the owner of the right;
(b) the amount of water, rate, and volume, included in the right;
(c) the date of priority of the right;
(d) the purpose for which the water included in the right is used;
(e) the place of use and a description of the land, if any, to which the right is appurtenant;
(f) the source of the water included in the right;
(g) the place and means of diversion;
(h) the inclusive dates during which the water is used each year;
(i) any other information necessary to fully define the nature and extent of the right.

History: En- Sec. 24, Ch. 697, L. 1979.

85-2-225. Appeals from final decree. A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(1) he requested hearing and appeared and entered objections to the preliminary decree; or
(2) his rights as determined in the preliminary decree were altered as the result of a hearing requested by another person.

History: En- Sec. 25, Ch. 697, L. 1979.

85-2-236. Certificate of water right. When a final decree is entered, the water judge shall send a copy to the department. The department shall on the basis of the final decree issue a certificate of water right to each person decreed an existing right. The original of the certificate shall be sent to the county clerk and recorder of the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed.

History: En- Sec. 26, Ch. 697, L. 1979.

85-2-237 through 85-2-240 reserved.

85-2-241. Water right adjudication account. There is established a water right adjudication account in the earmarked revenue fund of the state treasury- 411 fees collected under this section and 85-2-232 shall be deposited in the account to pay the expenses incurred by the State for administering this part, part 7, and Title 3, chapter 7.

History: En- Sec. 18, Ch. 697, L. 1979.

85-2-242. Expenses to be borne by state. All expenses incurred by the state as a result of this part, part 7, and

Title 3, chapter 7, are to be paid from the water right adjudication account in the earmarked revenue fund established in 85-2-241. Expense; include but are not limited to the salaries and expenses of personnel, equipment* office space, and other necessities incurred in administering this part, part 7, and Title 3, chapter 7. If sufficient revenue is not available from the earmarked revenue fund, the expense shall be paid from the state's general fund.

History: En. Sec. 19, Ch. 697, L. 1979.

85-2-243. Department assistance to water judges. The department* subject to the direction of the water judge* shall, without cost to the judicial districts wholly or partly within his water division:

(1) provide such information and assistance as may be required by the water judge to adjudicate claims of existing rights;

(2) establish information and assistance programs to aid claimants in the filing of claims for existing rights required by 85-2-221;

(3) conduct field investigations of claims that the water judge in consultation with the department determines warrant investigation; and

(4) provide the water judge with all information in its possession bearing upon existing rights* including all declarations filed with and all information gathered by the department with respect to existing rights in the Powder River Basin.

History: En. Sec. 21, Ch. 697, L. 1979.

Part 3

Appropriations, Permits* and Certificates of Water Rights

85-2-301. Right to appropriate. After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession* prescription, or estoppel. The method prescribed by this chapter is exclusive.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; and. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(1).

85-2-302. Application for permit. Except as otherwise provided in (1) and (2) of 85-2-306, a person may not appropriate water or commence construction of diversion* impoundment* withdrawal* or distribution works therefor except by applying for and receiving a permit from the

department. The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 18 months* the priority date of the application shall be the date of refiling the application with the corrections with the department. An application not corrected within 18 months shall be terminated.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 9, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-890(2).

85-2-303. Permit for conversion of nonproductive oil or gas well. A person who desires to convert a nonproductive oil or gas well to a water well may do so immediately but shall file a notice of completion or apply for a permit* depending on the maximum yield of the well, as otherwise provided in this chapter. The date of appropriation shall be the date of filing the notice of completion or the application for a permit.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(6).

85-2-304. Appropriation by state board of land commissioners. The state board of land commissioners may, through the department of natural resources and conservation, at its discretion, appropriate any available waters for use upon state lands and authorize the construction of irrigation works for these lands. The appropriation shall be made in the same way and under the same laws as those governing the appropriation of water by individuals.

History: En. Sec. 2, Ch. 85, L. 1905; re-en. Sec. 2254, Rev. C. 1907; re-en. Sec. 1965, R.C.M. 1921; amd. Sec. 3, Ch. 280, L. 1965; amd. Sec. 113, Ch. 253, L. 1974; R.C.M. 1947, 81-2018.

85-2-305. Appropriation permit for reservoir. A person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed in this chapter.

History: En. Sec. 25, Ch. 452, L. 1973; R.C.M. 1947,

85-2-306. Exceptions to permit requirements. (1)

Outside the boundaries of a controlled groundwater area* a permit is not required before appropriating groundwater by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute. Within 60 days of completion of the well or developed spring and appropriation of the groundwater for beneficial use* the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice* the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects* if the notice is corrected* completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed* the priority date of appropriation shall be the date of refileing a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation* the clerk and recorder shall send the certificate to the appropriator. The date of filing of the notice of completion is the date of priority of the right.

(2) An appropriator of groundwater by means of a well or developed spring* first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion* as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion* as provided in subsection (1) of this section, with the department to perfect the water right. The priority date of the appropriation shall be the date of the filing of a notice as provided in subsection (1) of this section. An appropriation under this subsection is an existing right, and a permit is not required; however* the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of less than 100 gallons per minute* the department shall issue a certificate of water right.

(3) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is from a source other than a perennial flowing stream, and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger. 4s

used in this subsection, a perennial **flowing** stream means a stream which historically has flowed continuously at all seasons of the **year, during** dry as well as wet years. **However,** within 60 days after constructing the impoundment or pit, the appropriator shall apply for a **permit** as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit. **If** the department determines after a hearing that the **rights of other appropriators have been or will be** adversely affected* it may revoke the permit or require the permittee to modify the impoundment or pit and **may** then make the permit subject to such **terms, conditions* restrictions*** or limitations it considers necessary to protect the rights of other appropriators.

(4) A person **may** also appropriate water without applying for or **prior** to receiving a permit under rules adopted by the board under 85-2-113.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 9, Ch. 435, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 11 Ch. 470, L. 1977; R.C.M. 1947, 89-840(5), (7); amd. Sec. 1, Ch. 30, L. 1981; amd. Sec. 1, Ch. 160, L. 1981; amd. Sec. 1, Ch. 357, L. 1981.

Compiler's Comments

1981 Amendments: Chapter 30 inserted "and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger" in the middle of (3).

Chaoter 160 substituted "within 60 days after" for "before" in the third sentence of (3); inserted the fourth sentence in (3); substituted "after a hearing" for "after processing the application" in the last sentence of (3); substituted "it may revoke the permit or require the permittee to modify the impoundment or pit and may then make" for "it may require the applicant to modify the construction of the impoundment or pit and issue" in the last sentence of (3).

Chaoter 357 inserted "or developed spring" after "well" in two places in (1); substituted "maximum appropriation of less than 100 gallons per minute" for "maximum yield of less than 100 gallons a minute" in the first sentence of (1); inserted "with the department" after "notice of completion" in the second sentence of (1); substituted "the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it" for "the department shall automatically issue a certificate of water rights" in the third sentence of (1); inserted the fourth* fifth, and sixth sentences i (1); inserted subsection (2).

Applicability: Section 2, Ch. 30, L. 1981, provided: "This act applies to applications pending with the department on the effective date of this act, as well as

applications filed with the department after the effective date of this act."

Subsection (1), sec. 7, Ch. 357, L. 1981, provided: "Subsection (2) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306] applies to all notices of completion filed with the department after July 1, 1973."

Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

Effective Date: Section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

85-2-307. Notice of application. (1) Upon receipt of a proper application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice in a newspaper of general circulation in the area of the source once a week for 3 consecutive weeks. Before the last date of publication* the department shall also serve the notice by first-class mail upon an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation. A notice shall also be served upon any public agency that has reserved waters in the source under 85-2-316. The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation. The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(2) The notice shall state that by a date set by the department (not less than 30 days or more than 60 days after the last date of publication) persons may file with the department written objections to the application.

(3) The requirements of subsections (1) and (2) of this section do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons.

History: En. Sec. 17, Ch. 452, L. 1973; amd. Sec. 9, Ch. 495, L. 1975; R.C.M. 1947, 89-881; amd. Sec. 2, Ch. 357, L. 1981.

Compiler's Comments

1981 Amendment: substituted "first-class" for "certified" before "mail" in the second sentence of (1).

Effective Date: Section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

85-2-308. Objections. (1) An objection to an application must be filed by the date specified by the department under **85-2-307(2)**.

(2) The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source* that the proposed means of appropriation are inadequate* that the property* rights, or interests of the objector would be adversely affected by the proposed appropriation* or the objector may state any other objections to the proposed appropriation he considers pertinent-

History: En. Sec. 18, Ch. 452, L. 1973; R.C.M. 1947, 39-882.

85-2-309. Hearings on objections. If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit* it shall hold a public hearing on the objection within 60 days from the date set by the department for the filing of objections, after serving notice of the hearing by certified mail upon the applicant and the objector. The department may consolidate hearings if more than one objection is filed to an application. The department shall file in its records proof of the service by affidavit of the department-

History: En. Sec. 19, Ch. 452, L. 1973; R.C.M. 1947, 39-883.

85-2-310. Action on application. (1) The department shall grant, deny, or condition an application for a permit in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received- However* in either case the time may be extended upon agreement of the applicant* or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases* not more than 60 days upon order of the department- If the department orders the time extended* it shall serve a notice of the extension and the reasons therefor by certified mail upon the applicant and each person who has filed an objection as provided by **85-2-308**.

(2) However* an application may not be approved in a modified form or upon terms, conditions* or limitations specified by the department or denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application but the department is of the opinion that the application should be approved in a modified form or upon terms, conditions, or limitations specified by it or that the application should be denied, the department shall prepare a statement of its opinion and the reasons therefor- The department shall serve a statement of its opinion by certified mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor within 30 days after

the notice is mailed. The notice shall further state that the application will be modified in a specified manner or denied* unless a hearing is requested.

(3) The department may cease action upon an application for a permit and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for any of these reasons shall be accompanied by a statement of the reasons for which it was returned* and there shall be no right to a priority date base upon the filing of the application. Returning an application pursuant to this subsection shall be deemed a final decision of the department.

History: (1), (2) En. Sec. 20, Ch. 452, L. 1913; amd. Sec. 10, Ch. 485, L. 1975; amd. Sec. 5, Ch. 416, L. 1977; Sec. 89-884, R.C.M. 1947 (3) En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; Sec. 89-880, R.C.M. 1947; R.C.M. 1947, 89-880(3), 89-884; amd. Sec. 3, Ch. 357, L. 1981.

Compiler's Comments

1981 Amendment: substituted "objections have been received" for "hearing is held" after "if no" in the first sentence of (1); inserted "or objections have been received-after "if a hearing is held" at the end of the first sentence of (1).

Applicability: Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

Effective Date: Section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

85-2-311. Criteria for issuance of permit. The department shall issue a permit if:

(1) there are unappropriated waters in the source of supply;

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably

with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

History: En. Sec. 21, Ch. 452, L. 1573; amd. Sec. 1, Ch. 156, L. 1975; amd. Sec. 1, Ch. 307, L. 1977; amd. Sec. 6, Ch. 416, L. 1977; R.C.M. 1947, 89-835; amd. Sec. 4, Ch. 357, L. 1981.

Compiler's Comments

1981 Amendment: Substituted "diversion, construction* and operation of the appropriation works" for "diversion or construction" in (3); Substituted "and" for "or" after "a year or more" in (6); added subsection (7).

Applicability: Subsection (2), sec. 7, Ch. 357, L. 1981, provided: "Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 357, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981."

Effective Date: Section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

85-2-312. Terms of permit. (1) The department may issue a permit for less than the amount of water requested* but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, and it may issue temporary or seasonal permits. A permit shall be issued subject to existing rights and any final determination of those rights made under this chapter.

(2) The department may limit the time for commencement of the appropriation works* completion of construction* and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered* and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee* the department may in its discretion reasonably extend time limits.

(3) The original of the permit shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation* and a copy shall be kept in the office of the department in Helena. After recordation* the clerk and recorder shall send the permit to the permittee.

History: En. Sec. 22, Ch. 452, L. 1973; R.C.M. 1947, 39-386.

~~85-2-313. Provisional permit.~~ A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation grantea in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree. A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 445, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 39-830(4).

~~85-2-314. Revocation of permit.~~ If the work on an appropriation is not commenced, prosecuted* or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be revoked. If the permittee fails to show sufficient cause, the department may revoke the permit.

History: En. Sec. 23, Ch. 452, L. 1973; R.C.M. 1947, 89-887.

~~85-2-315. Certificate of water right.~~ (1) Upon actual application of water to the proposed beneficial use within the time allowed* the permittee shall notify the department that the appropriation has been properly completed. The department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder in the county wherein the point of diversion or place of use is located for recordation* and a duplicate shall be kept in the office of the department in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator.

(2) Except as provided in 85-2-313, a certificate of

water right in a particular source may not be issued prior to a general determination under part 2 of this chapter of existing rights in that source.

History: En. Sec. 24, Ch. 452, L. 1973; R.C.M. 1947, 99-388.

85-2-316. Reservation of waters. (1) The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow* level* or quality of water throughout the year or at such periods or for such length of time as the board designates.

(2) Upon receiving an application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, shall be paid by the applicant. In addition* a reasonable proportion of the department's cost of preparing an environmental impact statement shall be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

(3) The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

- (a) the purpose of the reservation;
- (b) the need for the reservation;
- (c) the amount of water necessary for the purpose of the reservation;

(d) that the reservation is in the public interest*

(4) If the purpose of the reservation requires construction of a storage or diversion facility* the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

(5) The board shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the board.

(6) After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters or may, with the approval of the board, issue the permit subject to such terms and conditions it considers necessary for the protection of the objectives of the reservation-

(7) Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for such use with the district, and the district

upon approval of the application must inform the department of the approved use- The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations* complete any feasibility study requested by the districts within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort* within its staffing and budget limitations, to develop a plan.

(8) A reservation under this section shall date from the date the order reserving the water is adopted by the board and shall not adversely affect any rights in existence at that time.

(9) The board shall, periodically but at least once every 13 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board may extend, revoke or modify the reservation.

(10) The board may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level* or quality of water, so as to reallocate such reservation or portion thereof to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water shall not adversely affect the priority date of the reservation* and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

(11) Nothing in this section vests the board with the authority to alter a water right that is not a reservation.

History: En. Sec. 26, Ch. 452, L. 1973; amd. Sec. 11, Ch. 485, L. 1975; amd. Sec. 7, Ch. 416, L. 1977; R.C.M. 1947, 89-890; amd. Sec. 1, Ch. 639, L. 1979; amd. Sec. 1, Ch. 186, L. 1981; and. Sec. 6, Ch. 357, L. 1981.

Compiler's Comments

~~1981 Amendments:~~ Chapter 186 inserted "when requested by the districts" before "for rendering technical and administrative assistance" in (7); inserted "preparation and" before "processing of such applications" in the middle of (7); added last two sentences of (7).

Chapter 357 added the last sentence of (2).

Applicability: Subsection (3), sec. 7, Ch. 357, L. 1981, provided: "Section 6 [sec. 6, Ch. 357, L. 1981, amending 85-2-316] applies to applications pending before the board on April 14, 1981, as well as applications filed with the board after April 14, 1981."

1981 Effective Date: section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

1979 Effective Date: Section 29 Ch. 689, L. 1979, provided: "This act is effective on passage and approval." Approved May 9, 1979.

85-2-317. Limitation on appropriation of ground water.

(1) After May 7, 1979, no application for a permit to appropriate ground water in excess of 3,000 acre feet per year may be granted, except pursuant to an act of the legislature permitting the specific appropriation.

(2) Subsection (1) applies to any permit to appropriate ground water for which application has been made but which has not been granted as of May 7, 1979.

(3) This section does not apply to appropriations by municipalities for municipal use or to appropriations for public water supplies as defined in 75-6-102 or to appropriations for the irrigation of cropland owned and operated by the applicant.

(4) Any person* association* corporation* or other entity that applies for a permit to appropriate ground water, singularly or collectively, for the purpose of circumventing this section is punishable by a fine not exceeding \$5,000.

History: En. Secs. 2, 4, Ch. 631, L. 1979.

Compiler's Comments

Effective date: Sec. 5, Ch. 631, L. 1979, provided: "This act is effective on passage and approval." Approved May 7, 1979.

85-2-318. Water right appropriation account. There is established a water right appropriation account in the earmarked revenue fund of the state treasury. All fees collected as provided in 85-2-113 shall be deposited in the account to help pay the expenses incurred by the department for administering this part, part 1, part 4, and part 5 of chapter 2, Title 85.

History: En. Sec. 5, Ch. 357, L. 1981.

Compiler's Comments

Codification Instruction: section 8, Ch. 357, L. 1981, provided: "Section 5 [85-2-318] is intended to be codified as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, apply to section 5."

Effective Date: Section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

85-2-319 and 85-2-320 reserved.

85-2-321. Milk River Basin -- suspension of action on permits -- proposal. (1) In Order to balance the need for the continued development of Montana's water and for protection of existing rights in the Milk River Basin, the department may suspend action on a class of applications or may close a source in the basin and refuse to accept a class of applications, or both, for a permit under this part to appropriate from that source in the basin.

(2) Suspension or closure* or both, may only be proposed by the department.

(3) The proposal must state the source in the basin and class of applications for which suspension or closure, or both* is being proposed and any of the following allegations:

(a) that the frequency of occurrence of unappropriated waters is such that:

(i) any new appropriation from the source for the class of applications will adversely affect the rights of a prior appropriation from the source; or

(ii) any new appropriation from the source for the class of applications will interfere unreasonably with another planned use or development for which a permit has been given or for which water has been reserved in the source; or

(b) that significant disputes or enforcement problems regarding priority of rights or amounts or duration of water in use by appropriators are in progress or will arise-

History: En. Sec. 1, Ch. 524, L. 1981.

Compiler's Comments

1981 Title: The title to SB 199 (Ch. 524, L. 1981) read: "An act to allow the department of natural resources and conservation to suspend action on applications and to close a source within the Milk River Basin to applications for a permit to appropriate water in the basin under certain conditions; and providing an immediate effective date."

Effective Date: section 5, Ch. 524, L. 1981, provided: "This act is effective on passage and approval." approved April 29, 1981.

Codification Instruction: Section 4, Ch. 524, L. 1981, provided: "Sections 1 through 3 [85-2-321 through 85-2-323] are intended to be codified as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, apply to sections 1 through 3."

85-2-322. Hearing -- order. (1) The department shall conduct a hearing on the proposed suspension or closure* or both. Notice of the hearing must be published at least once in each week for 3 successive weeks* not less than 30 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The department shall serve by mail a copy of the notice and proposal not less than 30 days before the hearing

upon each person or public agency known from the examination of the records of the department to be a claimant, appropriator* or permit holder of water in the source.

(2) The department may by order suspend action on and shall close the source and refuse to accept a class of applications if it finds on the basis of the hearing that there is substantial evidence in support of the allegations required by 85-2-321 to be contained in the proposal.

(3) As part of fulfilling the requirements of 2-4-623, the order must define the source and must state the class of applications to which the suspension or closure, or both, applies.

(4) Upon adoption of the order, the department shall refuse to accept any application for a permit under this part for the class of application for which closure is ordered under this section and 85-2-321. If the order suspends action on pending applications, the department shall notify the applicant that action on his application is suspended.

(5) Upon notice under 85-2-307 of intent to combine the hearings under 85-2-309 with the hearings under this section, the department may suspend action on pending applications of the class until the hearing is conducted under this section and, as part of its final order, may grant, deny, or condition the applications under 85-2-306(2), 85-2-310, and 85-2-311 or continue the suspension under this section.

History: En. Sec. 2, Ch. 524, L. 1981.

85-2-323. Request to modify suspension -- order. (1) A person or public agency may request that an order be modified or revoked. The request must contain allegations supported by substantial evidence showing that the criteria in 85-2-311 can be met for an application or a class of applications from the source. If not so supported, the department may reject the request without a hearing.

(2) The department may by order after a hearing modify or revoke any order made as provided in 85-2-321 and 85-2-322 upon such notice and in such manner as is reasonable under the circumstances.

History: En. Sec. 3, Ch. 524, L. 1981.

Part 4

Utilization of Water

85-2-421. Priority. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence such as the increase or decrease of streamflow or 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.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department* except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-310(3), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, shall be determined as provided in part 2 of this chapter.

history: En. Sec. 27, Ch. 452, L. 1973; R.C.M. 1947, 89-891; amd. Sec. 33, Ch. 697, L. 1979.

85-2-402. Changes in appropriation rights. (1) an appropriator may not change the place of diversion, place of user purpose of use* or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons* notice of the proposed change shall be given in accordance with 85-2-307. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-303(2), and hearings shall be held in accordance with 85-2-309.

(3) An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural use to an industrial use.

(4) The department may approve a change subject to such terms, conditions* restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions* restrictions* and limitations of the change approval are not complied with* the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

History: En. Sec. 28, Ch. 452, L. 1973; amd. Sec. 3, Ch. 238, L. 1974; amd. Sec. 1, Ch. 338, L. 1975; amd. Sec. 8, Ch. 416, L. 1977; R.C.M. 1947, 89-892.

85-2-403. Transfer of appropriation rights. (1) The right to use water under a permit or certificate of water right shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.

(2) The person receiving the appropriation interest shall file with the department notice of the transfer on a

form prescribed by the department.

(3) Without obtaining prior approval from the department* an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant* sell the appropriation right for other purposes or to other lands* or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons* notice of the proposed change shall be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2) and hearings shall be held in accordance with 85-2-309.

History: En. Sec. 29, Ch. 452, L. 1973; amd. Sec. 4, Ch. 236, L. 1974; R.C.M. 1947, 39-893.

85-2-404. Abandonment of appropriation right. (1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions? the appropriation right shall, to that extent* be deemed considered abandoned and shall immediately expire.

(2) If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and condition, for a period of 10 successive years and there was water available for his user there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.

(3) This section does not apply to existing rights until they have been determined in accordance with part 2 of this chapter.

History: En. Sec. 30, Ch. 452, L. 1973; R.C.M. 1947, 89-894.

85-2-405. Procedure for declaring appropriation rights abandoned. (1) When the department has reason to believe that an appropriator may have abandoned his appropriation right under 85-2-404 or when another appropriator in the opinion of the department files a valid claim that he has been or will be injured by the resumption of use of an appropriation right alleged to have been abandoned* the department shall petition the district court which determined the existing rights in the source of the appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned.

Proceedings under this section shall be conducted in accordance with the Montana Rules of Civil Procedure, and appeal shall be taken in accordance with the Montana Rules of Appellate Civil Procedure.

(2) At the hearing, the burden of proof shall be on the department which must establish by a preponderance of the evidence that the appropriation has been abandoned under 85-2-404.

(3) The determination of the court shall be appended to the final decree. The department shall keep a copy of the determination in its office in Helena.

History: En. Sec. 31, Ch. 452, L. 1973; R.C.M. 1947, 89-895.

85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the issuance of the final decree.

(3) A controversy between appropriators from a source which has been the subject of a general determination of existing rights under part 2 of this chapter shall be settled by the district court which issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree. In cases involving permits issued by the department* the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy shall be appended to the final decree and a copy shall be filed with the department. The department shall be served with process in any proceeding under this subsection, and the department may, in its discretion* intervene in the proceeding.

History: En. Sec. 32, Ch. 452, L. 1973; amd. Sec. 12, Ch. 485, L. 1975; R.C.M. 1947, 89-896; amd. Sec. 34, Ch. 697, L. 1979.

85-2-407 through 85-2-410 reserved.

85-2-411. Water turned into natural channels. Water appropriated under an existing right or pursuant to this chapter may be turned into the natural channel of another

stream or from a reservoir into the natural channel and withdrawn or diverted at a point downstream for beneficial use* but the waters of that stream may not thereby be diminished in quantity or deteriorated in quality to the detriment of a prior appropriator. Water stored in a reservoir under an existing right or pursuant to this chapter which is turned into a natural channel for withdrawal or diversion and beneficial use downstream shall not be considered a part of the natural flow of that stream.

History: En. 89-891.1 by Sec. 1, Ch. 1231 L. 1974; R.C.M. 1947, 89-891.1.

85-2-412. Return of surplus water to stream. In all cases where, by virtue of prior appropriation, any person may have diverted all the water of any stream or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream, and there shall, at any time, be a surplus of water so diverted* over and above what is actually and necessarily used by the prior appropriator* such person shall be required to turn and cause to flow back into the stream such surplus water. Upon failure to do so within 24 hours after demand being made upon him in writing, to his person or at his place of abode, by any person having a right to the use of such surplus water, the person so diverting the same shall be liable to the person aggrieved for the damage resulting therefrom, in such sum as may be determined by court.

history: En. Sec. 1, p. 521 L. 1879; re-en. Sec. 731, p. 562, 5th Div. Rev. Stat. 1879; re-en. Sec. 1239, 5th Div. Comp. Stat. 1887; amd. Sec. 1884, Civ. C. 1895; re-en. Sec. 1, Ch. 56, L. 1907; Sec. 4344, Rev. C. 1907; re-en. Sec. 7097, R.C.M. 1921; re-en. Sec. 7097, R.C.M. 1935; R.C.M. 1947, 89-805.

85-2-413. Diversion of natural flow of waters -- when permitted. Any person owning or in possession of lands susceptible of irrigation from any stream* the waters of which are so diminished by prior appropriations that a sufficient amount of water for the irrigation of his lands cannot be obtained from the natural flow of the stream, who shall construct a reservoir or shall purchase or lease water from a reservoir owned by the department or another or shall otherwise acquire an interest in such reservoir or in water stored therein, which is so located that because of natural or other obstacles the water impounded therein cannot be conducted to the lands which he desires to irrigate, may, provided the stored water can be discharged into the stream in such a manner that it can be used beneficially by prior appropriators* divert the natural flow of the stream for the irrigation of his lands in lieu of an equal amount of stored water; provided* however* that such exchange can be made without injury to said prior appropriators.

History: En. Sec. 1, Ch. 39, L. 1937; amd. Sec. 155, Ch. 253, L. 1974; R.C.M. 1947, 89-806.

85-2-414. Conduction of water. The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs* or embankments to a sufficient height to make the same available for the use intended* and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use. If it is necessary to conduct the water across the right-of-way of any railroad* it shall be the duty of the owners of the ditch or flume to give 30 days* notice in writing to the owner or owners of such railway of their intention to construct a ditch or flume across the right-of-way of such railroad* the point at which the ditch or flume will cross the railroad* and the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fail to appear and attend at the time and place fixed in said notice* it shall be lawful for the owner or owners of the said flume or ditch to construct the same across the right-of-way of such railroad without further notice to said owner or owners of the railroad.

History: En. Sec. 1894, Civ. C. 1995; re-en. Sec. 4857, Rev. C. 1907; re-en. Sec. 7110, R.C.M. 1921; re-en. Sec. 7110, R.C.M. 1935; R.C.M. 1947, 89-820.

85-2-415. Owners of water to sell surplus. Any person having the right to use* sell, or dispose of water and engage in using, selling, or disposing of the same who has a surplus of water not used or sold or any person having a surplus of water and the right to sell and dispose of the same is required, upon the payment or tender to the person entitled thereto of an amount equal to the usual and customary rates per inch or cubic foot of water per second, to convey and deliver to the person the surplus of unsold water or so much thereof for which the payment or tender has been made and shall continue to convey and deliver the same weekly so long as the surplus of unused or unsold water exists and the payment or tender is made as aforesaid.

History: En. Sec. 1, p. 406, L. 1877; re-en. Sec. 742, 5th Div. Rev. Stat. 1879; re-en. Sec. 1263, 5th Div. Comp. Stat. 1887; re-en. Sec. 1897, Civ. C. 1595; re-en. Sec. 4860, Rev. C. 1907; re-en. Sec. 7113, R.C.M. 1321; re-en. Sec. 7113, R.C.M. 1935; amd. Sec. 6, Ch. 460, L. 1977; R.C.M. 1947, 89-823.

85-2-416. Duty of purchaser to dig ditches. Any person desiring to avail himself of the provisions of 85-2-415 must, at his own cost and expense* construct or dig the necessary flumes or ditches to receive and convey the surplus water so desired by him and pay or tender to the person having the right to the user sale, or disposal

thereof an amount equal to the necessary cost and expense of tapping any gulch, stream* reservoir* ditch, flume, or aqueduct and putting in gates, gauges, or other proper and necessary appliances usual and customary in such cases, and until the same shall be done, the delivery of the surplus water shall not be required as provided in 85-2-415.

History: En. Sec. 2, p. 406, L. 1877; re-en. Sec. 743, 5th Div. Rev. Stat. 1879; re-en. Sec. 1264, 5th Div. Comp. Stat. 1887; re-en. Sec. 1890, Civ. C. 1895; re-en. Sec. 4861, Rev. C. 1907; re-en. Sec. 7114, R.C.M. 1921; re-en. Sec. 7114, R.C.M. 1935; R.C.M. 1947, 89-824.

85-2-417. Enforcement of right to surplus. Any person constructing the necessary ditches* aqueducts, or flumes and making the payments or tenders hereinbefore provided is entitled to the use of so much of the surplus water as said ditches* flumes, or aqueducts have the capacity to carry and for which payment or tender is made and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same.

History: En. Sec. 3, p. 406, L. 1877; re-en. Sec. 744, 5th Div. Rev. Stat. 1879; re-en. Sec. 1265, 5th Div. Comp. Stat. 1887; re-en. Sec. 1899, Civ. C. 1895; re-en. Sec. 4862, Rev. C. 1907; re-en. Sec. 7115, R.C.M. 1921; re-en. Sec. 7115, R.C.M. 1935; R.C.M. 1947, 89-825.

85-2-418. Purchaser cannot sell surplus water. Nothing in 85-2-415 through 85-2-417 shall be so construed as to give the person acquiring the right to the use of water, as therein provided* the right to sell or dispose of the same after being so used by him or prevent the original owner or proprietor from retaking, selling and disposing of the same in the usual and customary manner after it is so used as aforesaid.

History: En. Sec. 4, p. 407, L. 1877; re-en. Sec. 745, 5th Div. Rev. Stat. 1879; re-en. Sec. 1266, 5th Div. Comp. Stat. 1887; re-en. Sec. 1900, Civ. C. 1895; re-en. Sec. 4863, Rev. C. 1907; re-en. Sec. 7116, R.C.M. 1921; re-en. Sec. 7116, R.C.M. 1935; R.C.M. 1947, 89-826.

Part 5

Groundwater

85-2-501. Definitions. Unless the context requires otherwise, in this part the following definitions apply:

(1) "Aquifer" means any underground geological structure or formation which is capable of yielding water or is capable of recharge.

(2) --"Bureau" means the Montana state bureau of mines and geology provided for in 20-25-211.

(3) "Groundwater" means any fresh water beneath the

land surface or beneath the bed of a stream, lake, reservoir or other body of surface water and which is not a part of that surface water.

(4) "Groundwater area" means an area which, as nearly as known Facts permit, may be designated so as to enclose a single and distinct body of groundwater which shall be described horizontally by surface description in all cases and which may be limited vertically by describing known geological formations should conditions dictate this to be desirable.

History: En. Sec. 1, Ch. 237, L. 1961; amd. Sec. 16, Ch. 280, L. 1965; amd. Sec. 1, Ch. 307, L. 1971; amd. Sec. 40, Ch. 452, L. 1973; amd. Sec. 167, Ch. 253, L. 1974; amd. Sec. 8, Ch. 460, L. 1977; R.C.M. 1947, 89-2911(part); amd. Sec. 1, Ch. 561, L. 1979.

85-2-502. Administrative rules. The board may prescribe and the department shall enforce reasonable rules concerning and providing for inspection and entry for that purpose by the department* the circumstances under which the construction of weirs or other measuring devices may be required* and such other similar matters as are required by and consistent with the administration of this part.

History: En. Sec. 21, Ch. 237, L. 1951; amd. Sec. 177, Ch. 253, L. 1974; R.C.M. 1947, 89-2931.

85-2-503. Controlled groundwater subareas. For purposes of administration* large groundwater areas may be divided into convenient administrative units known as subareas.

History: En. Sec. 1, Ch. 237, L. 1961; amd. Sec. 16, Ch. 280, L. 1965; amd. Sec. 1, Ch. 307, L. 1971; amd. Sec. 40, Ch. 452, L. 1973; amd. Sec. 167, Ch. 253, L. 1974; amd. Sec. 8, Ch. 460, L. 1977; R.C.M. 1947, 89-2911(part).

85-2-504. Standards for determining fresh water. Fresh water shall be considered to be water fit for domestic, livestock, or agricultural use. The department* after notice and hearing, may fix definite standards for determining fresh water in any controlled groundwater area or subarea of the state.

History: En. Sec. 1, Ch. 237, L. 1961; amd. Sec. 16, Ch. 280, L. 1965; amd. Sec. 1, Ch. 307, L. 1971; amd. Sec. 40, Ch. 452, L. 1973; amd. Sec. 167, Ch. 253, L. 1974; amd. Sec. 8, Ch. 460, L. 1977; R.C.M. 1947, 89-2911(part).

85-2-505. Waste and contamination of groundwater prohibited. (1) No groundwater may be wasted. The department shall require all wells producing waters which contaminate other waters to be plugged or capped. It shall also require all flowing wells to be so capped or equipped with valves that the flow of water can be stopped when the water is not

being put to beneficial use. Likewise* both flowing and nonflowing wells shall be so constructed and maintained as to prevent the waste* contamination, or pollution of groundwater through leaky casings, pipes, fittings, valves* or pumps either above or below the land surface* provided* however* in the following cases the withdrawal or use of groundwater shall not be construed as waste under this part:

(a) the withdrawal of reasonable quantities of groundwater in connection with the construction* development, testing, or repair of a well or other means of withdrawal of groundwater;

(b) the inadvertent loss of groundwater owing to breakage of a pump, valve* pipe, or fitting, if reasonable diligence is shown by the person in effecting the necessary repair;

(c) the disposal of groundwater without further beneficial use that must be withdrawn for the sole purpose of improving or preserving the utility of land by draining the same or that must be removed from a mine to permit mining operations or to preserve the mine in good condition;

(d) the disposal of groundwater used in connection with producing, reducing, smelting, and milling metallic ores and industrial minerals or that displaced from an aquifer by the storage of other mineral resources.

(2) The department at any time may hold a hearing on its own motion or upon petition signed by a representative body of users of groundwater in any area or subarea to determine whether the water supply within such area or subarea is used in compliance with this part.

History: En. Sec. 16, Ch. 237, L. 1961; amd. Sec. 173, Ch. 253, L. 1974; amd. Sec. 47, Ch. 460, L. 1977; P.C.M. 1947, 89-2926.

85-2-506. Controlled groundwater areas -- designation or modification. (1) The board may designate or modify controlled groundwater areas as provided in this part.

(2) Designation or modification of an area of controlled groundwater use may be proposed to the board by the department on its own motion or by petition signed by at least 20 or one-fourth of the users (whichever is the lesser number) of groundwater in a groundwater area wherein there are alleged to be facts showing:

(a) that groundwater withdrawals are in excess of recharge to the aquifer or aquifers within such groundwater area;

(b) that excessive groundwater withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the groundwater area;

(c) that significant disputes regarding priority of rights, amounts of groundwater in use by appropriators* or priority of type of use are in progress within the groundwater area; or

(d) that groundwater levels or pressures in the area in question are declining or have declined excessively.

(3) When such a proposal is thus made, the board shall fix a time and place for a hearing, which time shall not be less than 90 days from the making of the proposal. The place for the hearing shall be within or as close as practical to the controlled groundwater area.

(4) The department shall publish a notice of the hearing* setting forth therein:

(a) the names of the petitioners;

(b) the description by legal subdivisions (section* township, range) of all lands included in or proposed to be included in the groundwater area or subarea;

(c) the purpose of the hearing; and

(d) the time and place of the hearing where any interested person may appear, either in person or by attorney, file written objections to the granting of the proposal* and be fully heard.

(5) Such notice of hearing shall be published at least once in each week for 3 successive weeks not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the groundwater area or subarea is located*. The department shall also cause a copy of the notice, together with a copy of the petition, to be served by mail, not less than 30 days before the hearing, upon each well driller licensed in Montana whose address is within any county in which any part of the area in question is located; upon each person or public agency known from an examination of the records in the department's office to be a claimant or appropriator of groundwater in the area in question (claimant or appropriator meaning one who diverts, impounds, or withdraws groundwater and not merely one who uses or obtains groundwater from another who diverts, impounds* or withdraws groundwater); upon the bureau; and upon the mayor or chairman of the governing body of each incorporated municipality located in whole or in part within the proposed groundwater area. The department may also serve notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled groundwater area. The petition need not be served on any petitioner. A copy of the notice* together with a copy of the proposal, shall be mailed to each person at his last-known address, and such service shall be complete upon depositing it in the post office* postage prepaid, addressed to each person on whom it is to be served. Publication and mailing of such notice as prescribed herein, when completed, shall be deemed to be sufficient notice of such hearing to all interested persons.

History: En. Sec. 4, Ch. 237, L. 1961; amd. Sec. 168, Ch. 253, L. 1974; R.C.M. 1947, 89-2914; amd. Sec. 2, Ch. 561, L. 1979.

Compiler's Comments

Severability. Sec. 4, Ch. 561, L. 1979, was a severability clause.

85-2-507. Limiting withdrawals -- modification of order. (1) At the time set for the hearing* the board shall proceed to hear oral and written evidence relevant to the designation or modification of the controlled groundwater area presented by the bureau* the department* and any other interested party. A full record shall be kept of all evidence taken at the hearing. The procedure shall be such as to secure a full, fair, and orderly proceeding and to permit all relevant evidence to be received. The common-law and statutory rules of evidence shall apply only upon stipulation of all parties.

(2) After the conclusion of the hearing, the board shall make written findings and an order. The board shall by order declare the area in question to be a controlled groundwater area if the board finds on the basis of the hearing that:

(a) the public health, safety* or welfare requires a corrective control be adopted; and

(b) (i) there is a wasteful use of water from existing wells or undue interference with existing wells;

(ii) any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water or groundwater by others; or

(iii) the facts alleged in the petition as required by 85-2-506(2) are true.

(3) The order shall define the boundary of the controlled groundwater area and shall indicate which of the groundwater aquifers located within the area in question are included within the controlled groundwater area. Any number of groundwater aquifers which wholly or partially overlie one another may be included in the same controlled groundwater area.

(4) The order may include the following corrective control provisions:

(a) a provision closing the controlled groundwater area to further appropriation of groundwater, in which event the department shall thereafter refuse to accept any applications for beneficial water use permits to appropriate groundwater located within such controlled area;

(b) a provision determining a permissible total withdrawal of groundwater in the controlled area by day, month* or year and permitting the board to apportion such permissible total withdrawal among the appropriators holding valid rights to the groundwater in the controlled area in accordance with the relative dates of priority of such rights;

(c) a provision according preference* without reference to relative priorities* to withdrawals of groundwater in the controlled area for domestic and livestock purposes first and thereafter to withdrawals for other beneficial purposes* including but not limited to agricultural, industrial, municipal (other than domestic), and recreational purposes* in such order as the board considers advisable under the circumstances;

(d) a provision reducing the permissible withdrawal of groundwater by any appropriator or well in the controlled

area;

(e) ~~when~~ two or ~~more~~ wells in the controlled area are used by the same appropriator* a provision adjusting the total ~~permissible~~ withdrawal of groundwater by the appropriator or a provision forbidding the use of one or ~~more~~ such wells;

(f) a provision requiring and specifying a system of rotation of use of groundwater in the ~~controlled~~ area;

(g) provisions making such additional ~~requirements~~ as are necessary to protect the public ~~health, safety,~~ and welfare in accordance with the intent* purposes* and requirements of this part and the laws of the state.

(5) (a) If at the conclusion of the hearing the board finds that sufficient facts are not available to designate or modify a permanent ~~controlled~~ groundwater area* the board may by ~~order~~ designate the area in question to be a temporary controlled groundwater area- Such order may include ~~the~~ corrective control provisions contained in subsection (4). A temporary controlled groundwater area shall be designated as such for a period not to exceed 2 years from the date of the ~~board's~~ order ~~designating~~ the temporary controlled ~~groundwater~~ area. The board ~~may~~, for sufficient cause* ~~extend~~ the time period for an additional 2 ~~years~~, and in this case all groundwater appropriators in the controlled groundwater area shall be notified of the ~~extension~~.

(b) ~~During~~ the 2-year period* the department shall ~~commence~~ studies necessary to obtain the facts needed to assist in the designation or modification of a permanent controlled ~~groundwater~~ area. Facts gathered ~~during~~ the study period shall be presented at a hearing prior to the designation or modification of a permanent controlled groundwater ~~area~~. All parties appearing at the first hearing shall be ~~served~~ notice of this hearing by mail at least 30 days prior to the ~~date~~ set for the ~~hearing~~. The service shall be ~~complete~~ upon deposit of notice at the post office* postage prepaid, addressed to each person on whom service is to be made. ~~Mailing~~ of the notice* when ~~completed~~, shall be considered to be sufficient notice of the ~~hearing~~ to all persons directly affected. The department shall file in its records proof of service by its own affidavit. The hearing shall be conducted by the board in the ~~manner~~ of the first hearing* and the board shall ~~make~~ written ~~findings~~ of fact and conclusions of law and issue an order ~~according~~ to the provisions set forth in subsections (1) ~~through~~ (4). In the event the department does not ~~complete~~ the necessary study in the 2-year period or extension thereof* the temporary controlled ~~groundwater~~ area designation will terminate ~~at~~ the end of the 2-year period or extension.

(6) The department may enforce the order and ~~bring~~ an action for an injunction in a district court of a district in which all or part of the area affected is located* in addition to all other remedies.

(7) The order of the board shall be published and mailed by the department in the manner ~~and~~ for the length of time as prescribed by 85-2-506 for the publication and

mailing of the notice of hearing, except that a copy of the written findings and order of the board shall be mailed instead of a copy of the proposal and* except further* that a copy of the order, together with a copy of the written findings, shall be mailed to each petitioner at his last-known address. The department shall file a copy of the order with the county clerk of each county within which any part of the controlled groundwater area lies, and the county clerk shall record the order without fee. The department shall file in its records proof of service by its own affidavit or service. Upon publication and mailing of such order as prescribed herein, the order shall be final and conclusive unless an appeal therefrom is taken.

(8) The board may by order suspend, modify, or revoke any order made as provided in this section upon such notice and in such manner as is reasonable under the circumstances. A copy of each suspension, modification, or revocation shall be served or filed and recorded as provided for orders in subsection (1).

(9) While a matter is pending before the board, the department may restrict further development of the subarea,

History: En. Sec. 5, Ch. 237, L. 1941; amd. Sec. 41, Ch. 452, L. 1973; amd. Sec. 169, Ch. 253, L. 1974; R.C.M. 1947, 89-2915; amd. Sec. 3, Ch. 561, L. 1979.

85-2-508. Controlled groundwater areas -- permits to appropriate. A person may appropriate groundwater in a controlled area only by applying for and receiving a permit from the department in accordance with part 3 of this chapter. The department may not grant a permit if the withdrawal would be beyond the capacity of the aquifer or aquifers in the groundwater area to yield groundwater within a reasonable or feasible pumping lift (in the case of pumping developments) or within a reasonable or feasible reduction of pressure (in the case of artesian developments),

History: En. Sec. 8, Ch. 237, L. 1961; amd. Sec. 43, Ch. 452, L. 1973; amd. Sec. 172, Ch. 253, L. 1974 R.C.M. 1947, 89-2918.

85-2-509. Administrative finding of priorities. (1) The department, at its discretion, or any person claiming a right to withdraw groundwater (whether or not from a controlled area) may initiate a hearing by the department for the ascertainment of all existing rights to the use of the groundwater in the ground area or subarea involved. The department shall produce at the hearing a map showing and describing all the lands included in the groundwater area or subarea and copies of all data upon which any prior designation or modification order was based. The waiving or assignment of rights by mutual agreement for either temporary or extended periods shall not modify or cancel the relative priorities of the rights.

(2) After January 1, 1962, in a hearing for the

ascertainment and finding of priorities involving rights to the use of **groundwaters**, all appropriators of **groundwater** or of surface water in the particular controlled **area** or subarea shall be included as **parties** and notified in the manner provided in **85-2-506**.

History: En. Sec. 6, Ch. 237, L. 1961; amd. Sec. 170, Ch. 253, L. 1974; R.C.M. 1947, 89-2916(1), (3).

~~85-2-510. Production of water from oil and gas wells -- hearings -- jurisdiction of board of oil and gas conservation.~~ Within any designated or modified controlled groundwater area or subarea wherein oil and/or gas wells produce either fresh? brackish? or saline water associated with oil and gas, the volume of production of which is dependent entirely on the oil and/or gas **withdrawals**, such production of water shall be under the prior jurisdiction of the board of oil and gas conservation- Hearings pertaining to the **production**, use? or disposal of water from those wells shall be held by that board in accordance with the procedures established by that board- The department may petition the board of oil and gas conservation for hearings in regard to those operations* and it shall be notified by the board of oil and gas conservation of those hearings instigated by other parties when those hearings involve operations within a controlled groundwater area or subarea.

History: En. Sec. 6, Ch. 237, L. 1961; amd. Sec. 170, Ch. 253, L. 1974; R.C.M. 1947, 89-2916(2).

~~85-2-511. Scope of administrative hearing.~~ (1) In a hearing For the ascertainment and finding of priorities to the use of groundwater? the department in its finding and order shall **confirm, modify, alter*** or amend any prior order designating and modifying the boundaries of the groundwater area or subarea involved? as the evidence justifies; shall determine the priority of rights and the quantity of groundwater to which each appropriator who is a party to the proceedings is entitled in the particular groundwater area or subarea; and shall find and determine any other **matter** necessary to the ascertainment of priorities of such **existing rights to groundwater**. It may also determine the level below which the groundwater may not be drawn by appropriators. The department shall act in administering and enforcing **the order**, as provided in **85-2-507**.

(2) A copy of the order shall be recorded in the office of the clerk and recorder of each county in which the particular groundwater area or subarea is located- If the order is not appealed? the order of the department shall be final and conclusive when it is published and sailed as provided for orders issued under **85-2-507**.

History: En. Sec. 7, Ch. 237, L. 1961; amd. Sec. 42, Ch. 452, L. 1973; amd. Sec. 171, Ch. 253, L. 1974; R.C.M. 1947, 89-2917.

85-2-512. Investigations. (1) The department shall compile information for the purpose of enabling it to comply with this part. In compiling this information* the department shall make use of investigations, technical personnel* surveys* and information available from the Montana bureau of mines and geology, the United States geological survey* the board of oil and gas conservations the depart nt of health and environmental sciences* and any other private, state* or governmental agency.

(2) In addition to the foregoing, the department may request specific investigations by the preceding public agencies where desired information is not otherwise available.

History: En. Sec. 23, Ch. 237, L. 1961; amd. Sec. 179, Ch. 253, L. 1974; R.C.M. 1947, 89-2933.

85-2-513. Administration of oaths and subpoena of witnesses. The department may administer oaths and issue subpoenas for the attendance of witnesses in any investigation, hearing, or proceeding held by it.

History: En. Sec. 24, Ch. 237, L. 1961; amd. Sec. 180, Ch. 253, L. 1974; R.C.M. 1947, 89-2934.

85-2-514. Inspection of wells. The department, the state bureau of mines and geology, or the department of health and environmental sciences may enter on the property of any appropriator where a well is situated* at any reasonable hour of the day, for the purpose of investigating any matters in connection with this part.

History: En. Sec. 17, Ch. 237, L. 1961; amd. Sec. 174, Ch. 253, L. 1974; R.C.M. 1947, 89-2927.

85-2-515. Information available to public. Such information as is required or secured under the provisions hereof shall constitute public records and as such shall be available to the public at all reasonable times-

History: En. Sec. 18, Ch. 237, L. 1961; R.C.M. 1947, 89-2928.

85-2-516. Well logs. Within 60 days after any well is completed, the driller shall file with the department a well log report on a form provided by the department at its offices and at the offices of the county clerk and recorders. The department may return the report for refileing if it is incomplete or incorrect* The department shall provide a copy of the complete and correct well log to the Montana bureau of mines and geology.

History: En. 89-2928.1 by Sec. 44, Ch. 452, L. 1973; amd. Sec. 175, Ch. 253, L. 1974; R.C.M. 1947, 89-2928.1.

85-2-517. Reports by water well drillers. The forms,

reports* and information required to be filed by this part are in **addition** to all other reports and **information** which the drillers of water wells in the state are required by law to file with agencies of the state.

History: En. Sec. 19, Ch. 237, L. 1961; amd. Sec. 48, Ch. 460, L. 19773 R.C.M. 1947, 89-2929.

85-2-518. Groundwater supervisors. The department may appoint one or more groundwater supervisors for each designated controlled area and may appoint one or more groundwater supervisors at large. Within their respective jurisdictions and under the direction of the department, the groundwater supervisors and supervisors at large shall supervise the withdrawal of groundwater and the carrying out of orders issued by the department.

History: En. Sec. 22, Ch. 237, L. 1961; amd. Sec. 178, Ch. 253, L. 1974; R.C.M. 1947, 89-2932.

85-2-519. Hearings before the board. (1) A person who is aggrieved by a final decision of the department under this part is entitled to a hearing before the board.

(2) The Montana Administrative Procedure Act governs administrative proceedings under this part.

History: En. 89-2934.1 by Sec. 45, Ch. 452, L. 1973; amd. Sec. 181, Ch. 253, L. 1974; R.C.M. 1947, 89-2934.1.

85-2-520. Penalties. Any person who violates or refuses or neglects to comply with any provision of this part or of any order or rule promulgated by the department or the board or who commits waste shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$25 or more than \$250 for each offense-

History: En. Sec. 26, Ch. 237, L. 1961; amd. Sec. 182, Ch. 253, L. 1974; R.C.M. 1947, 89-2936.

Part 6

Yellowstone River Basin

85-2-601. Statement of legislative findings and policy. The legislature, noting that appropriations have been claimed* that applications have been filed for, and that there is further widespread interest in making substantial appropriations of water in the Yellowstone River basin* finds that these appropriations threaten the depletion of Montana's water resources to the significant detriment of existing and projected agricultural, municipal* recreational* and other uses and of wildlife and aquatic habitat. The legislature further finds that these appropriations foreclose the options to the people of this state to utilize water for other future beneficial purposes* including municipal water supplies* irrigation systems, and

minimum flows for the protection of existing rights and aquatic life. The legislature* pursuant to its mandate and authority under Article IX of the **Montana constitution**, declares that it is the policy of this state that before these proposed appropriations are acted upon, existing rights to water in the Yellowstone basin **must** be accurately determined for their protection and that reservations of water within the basin must be established as rapidly as possible for the preservation and protection of existing and future **beneficial** uses.

History: En. 89-8-103 by Sec. 1, Ch. 116, L. 1974; R.C.M. 1947, 89-8-103.

85-2-602. Definitions. Unless the context clearly requires otherwise, in this part the following definitions apply:

(1) (a) "Application" means an application for a permit under part 3 of this chapter to appropriate surface water from any source of supply within the basin for either or both of the following purposes:

(i) a reservoir with a total planned capacity of 14,000 acre-feet or more; or

(ii) for a flow rate greater than 20 cubic feet of water per second.

(b) The term also includes an application for approval under R5-2-402 to change the purpose of use.

() "Basin" means the Yellowstone River basin-

(3) "Reservation" means a reservation of water provided for by 85-2-316.

History: En. 89-8-104 by Sec. 2, Ch. 116, L. 1974; R.C.M. 1947, 89-8-104(Intro.), (2) thru (4).

85-2-603. Suspension of action. (1) The department may not grant or otherwise take any action on an application until one of the following first occurs:

(a) The board of natural resources and conservation makes a final determination on the applications for reservations of water in the basin filed before January 1, 1977, in accordance with 85-2-316;

(b) A final determination of existing rights has been made in the source of supply in accordance with part 2 of this chapter; or

(c) January 1, 1970; however* if a court stays or enjoins the continuance of proceedings on any pending application for reservation of water in the basin filed before January 1, 1977, and such stay or injunction prevents the board from making a final determination on such application before January 1, 1978, the court shall extend this date by the length of delay incurred. The court may not extend this date beyond January 15, 1979.

(2) A reservation established before such application for permit is granted is a preferred use over the right to appropriate water pursuant to the permit* and the permit* if granted* shall be issued subject to that preferred use.

History: En. 89-8-105 by Sec. 3, Ch. 116, L. 1974;
amd. Sec. 1, Ch. 26, L. 1977; R.C.M. 1947, 89-8-105.

~~85-2-604. When department may suspend action.~~ The department may suspend action on applications not meeting the definition of application in 85-2-602 if it determines* after a public hearing conducted under the contested case procedures of the Montana Administrative Procedure Act, that the cumulative impact of those applications, if granted, would be contrary to the policies and purposes of this part. If the department suspends action on such applications* the provisions of 85-2-603 apply.

History: En. 89-8-106 by Sec. 4, Ch. 116, L. 1974;
R.C.M. 1947, 89-8-106.

~~85-2-605. Reservations.~~ The department may apply for reservations and shall, as rapidly as possible* assist other appropriate state agencies and political subdivisions in applying for reservations within the basin- the United States or any agency thereof may apply for reservation of water in the basin under 85-2-316 for beneficial use of that water in the state of Montana. Particular emphasis shall be given to applications to reserve water for agricultural, municipal* and minimum flow purposes for the protection of existing rights and aquatic life.

History: En. 89-8-107 by Sec. 5, Ch. 116, L. 1974;
amd. Sec. 10, Ch. 416, L. 1977; R.C.M. 1947, 89-8-107.

~~85-2-606. Application of part.~~ This part applies to applications currently pending with the department, as well as applications filed with the department after March 11, 1974.

History: En. 89-8-108 by Sec. 6, Ch. 116, L. 1974;
R.C.M. 1947, 89-8-108.

~~85-2-607. Utility facilities.~~ This part does not apply to applications to appropriate water for use by a Utility facility for which a certificate of environmental compatibility and public need is granted pursuant to the Montana Major Facility Siting Act.

History: En. 89-8-109 by Sec. 7, Ch. 116, L. 1974;
R.C.M. 1947, 89-8-109.

~~85-2-608. Certain changes of use allowed.~~ Notwithstanding any provision of this part* the department may approve a change of purpose of use to agricultural* irrigation, domestic, and municipal uses if it determines that the change is not contrary to the policies and purposes of this part.

History: En. 89-8-110 by Sec. 8, Ch. 116, L. 1974;
R.C.M. 1947, 89-8-110.

Part 7

Indian and Federal Water Rights

~~85-2-701. Legislative intent.~~ Because the water and water rights within each water division are interrelated* it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore* it is the intent of the legislature that the attorney general's petition required in ~~85-2-211~~ include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.

History: En. Sec. 27, Ch. 697, L. 1979.

Compiler's Comments

Purpose. Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

Codification. Sec. 35, Ch. 697, L. 1979, provided: "(1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act.

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85r chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above, the code coomissioner shall add to the MCA, if necessary9 statutory language to convey the intent of this section."

because of rearrangement of the new material, Ch. 697 is now codified in Title 3, chapter 7; Title 85, chapter 2, parts 2 and 7; and 2-15-212.

Effective date. "This act is effective on passage and approval." Approved May 11, 1979.

Severability. Section 36, Ch. 697, L. 1979, was a severability section.

~~85-2-702. Negotiation with Indian tribes.~~ (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under ~~85-2-701~~. Compact proceedings shall be commenced by the commission. The commission shall

serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The Compact is effective and binding upon all parties upon ratification by the legislature of Montana, any affected tribal governing body, and the congress of the United States.

(3) Upon its approval by the Montana legislature and the tribe or federal agency, the terms of a compact must be included in the preliminary decree as provided by 85-2-231. However, if approval of the state legislature and tribe or federal agency has not been accomplished by July 1, 1985, all federal and Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 60 days. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other filings,

History: En. Sec. 27, Ch. 697, L. 1979; and. Sec. 8, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Added subsection (3).

Effective Date: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Approved April 3, 1981.

Commissioner Correction: Because of rearrangement of sec. 27, Ch. 697, L. 1979, the Code Commissioner, 1979, changed "The compact commission" to "The reserved water rights compact commission, created by 2-15-212," in subsection (1).

85-2-703. Negotiation with federal government. The compact commission may also enter into separate negotiations with the federal government for the conclusion of compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state. The terms and conditions of such negotiations shall be the same as provided in this section for negotiations with Indian tribes.

History: En. Sec. 27, Ch. 697, L. 1979.

85-2-704. Termination of negotiations. The commission or any other party to the negotiations may terminate negotiations by providing notice to all parties 33 days in

advance of the termination date- On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 60 days of the termination of negotiations.

History: En. Sec. 27, Ch. 697, L. 1979; and- Sec. 9, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Added the last sentence.

Part 8

Diversions from the Yellowstone River Basin

Part Compiler's Comments

1981 Title: The title to S8 243 (Ch. 581, L. 1981) read: "An act to delegate authority to the department of natural resources and conversation to authorize diversions from the Yellowstone River basin under Article X of the Yellowstone River Compact, section 85-20-101, MCA, on behalf of the state of Montana; providing for legislative review; and providing an effective date."

Codification Instruction: Section 8, Ch. 581, L. 1981, provided: "This act is intended to be codified as a new part in Title 85, chapter 2, and the provisions of Title 85, chapter 29 apply to this act."

Severability: Section 9, Ch. 581, L. 1981, was a severability section.

Effective Date: Section 10, Ch. 581, L. 1981, provided: "This act is effective on passage and approval." Approved May 1, 1981.

85-2-801. Definitions. Unless the context requires otherwise, in this part the following definitions apply:

- (1) "Basin" means the Yellowstone River Basin.
- (2) "Compact" means the Yellowstone River Compact provided for in 85-20-101.

History: En- Sec. 1, Ch. 581, L. 1981.

85-2-802. Authority to approve diversions. The department may consent on behalf of the state of Montana to diversions of water from the basin pursuant to Article X of the compact, including diversions of water allocated under the terms of the compact to the other signatory states of Wyoming and North Dakota.

History: En. Sec. 2, Ch. 581, L. 1981.

85-2-803. Legislative review. (1) A diversion of water from the basin pursuant to Article X of the compact consented to by the department under the provisions of this part may not be made until one of the following occurs? whichever is later:

(a) the legislature ratifies the first determination of the department to consent to a diversion of water from the basin pursuant to Article X of the compact; or

(b) July 1, 1983.

(2) A decision by the department to disapprove a diversion of water is not subject to legislative approval.

History: En. Sec. 3r Ch. 581, L. 1981.

~~85-2-304. Application -- notice -- objections -- hearing.~~ (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion* construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the proposed means of diversion, construction* and operation are adequate;

(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(c) the applicant intends to comply with the compact.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in subsections (1) and (2) of 85-2-307.

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector to an application under subsection (1) shall state his name and address and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana are not for a beneficial use of water;

(b) the property* **rights**, or interests of the objector **would be** adversely affected by the proposed diversion or ultimate use of the water;

(c) the proposed means of diversion* **construction**, and operation are not adequate;

(d) ~~the~~ diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water **right**, a **permit**, or a reserved water right;

(e) the diversion and ultimate use of the water **will** exceed the allocated share under the **compact** of any signatory **state**; or

(f) the diversion and ultimate **use** of the water are not in the public interest of Montana.

(6) The objector to an application under subsection (2) shall state his **name** and address and facts **tending** to show that:

(a) the property* **rights*** or interests of the objector **would be** adversely affected by the proposed diversion or ultimate use of the water;

(b) the proposed means of diversion* **construction**, and operation are not adequate; or

(c) the diversion and ultimate use of the water will exceed the allocated share **under** the compact of any signatory state.

(7) If the department receives an objection to **an application**, it shall hold a hearing **on** the application within **60** days **from** the date set by the department for filing **objections**. Service of notice of the hearing must be made by certified mail upon the applicant and the objector.

(8) The hearing shall be conducted under the contested case procedures of the **Montana** Administrative Procedure Act in Title 2, chapter 4, part 6.

History: En. Sec. 4, Ch. 581, L. 1981.

~~85-2-805. Criteria for approval -- terms.~~ (1) The department **may** issue its approval of a diversion of water allocated to Montana under the terms of the compact or **unallocated** compact water diverted in Montana **if**:

(a) ~~the~~ diversion and the ultimate use of the water in **Montana** are for a beneficial use of water;

(b) the diversion and ultimate use of water **will** not adversely affect the water rights of other persons;

(c) the ~~Dropped~~ means of diversion* **construction** and operation **are** adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments **for** which a water right has been established or a **permit** has been issued or for which water has been reserved;

(e) the diversion and ultimate use of water **will** not exceed the allocated share under the compact of any of the signatory **states**;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(3) the applicant signs an agreement to comply with

the laws of the signatory states to the compact in constructing, operating, and maintaining all facilities associated with the diversion and ultimate use of the water.

(2) The department may approve a diversion of water allocated to North Dakota or Wyoming or unallocated compact water diverted in North Dakota or Wyoming if the diversion will not adversely affect the property, rights, or interests of an appropriator located in Montana and if the diversion and ultimate use of water will not exceed the allocated share under the compact of any of the signatory states*

(3) The department may approve a diversion subject to such terms* conditions, restrictions* and limitations as it considers necessary to meet the applicable criteria listed in subsection (1) or (2).

History: En. Sec. 5, Ch. 581, L. 1981.

~~85-2-806. Combined proceeding.~~ The department, upon petition by the applicant, may consider and act upon any application for diversion of water from the basin filed pursuant to the provisions of this Part in conjunction with any board proceedings involving the siting of a facility or associated facilities conducted under the provisions of Title 75, chapter 20, part 4, as amended? or in conjunction with any departmental proceeding involving the issuance of a permit or approval of a change conducted under Title 65, chapter 2, as amended* if in the opinion of the department consideration of both applications in the same proceeding will better enable the board and department to fulfill their functions* duties* and responsibilities under the provisions of Title 75, chapter 20, part 4, or Title 85, chapter 2, and this part* The department's consent to the diversion of Montana water out of the basin for ultimate use in a facility as defined in Title 75, chapter 20, shall be contingent upon the department's issuance of a Certificate for the facility in accordance with Title 75, chapter 20. The department's consent shall terminate 10 years after the date of issuance of the consent unless the board issues the certificate for the facility in accordance with Title 75, chapter 20, and approval of North Dakota and Wyoming is secured in accordance with Article X of the compact or unless consent is extended by the department.

History: En- Sec. 6, Ch. 581, L. 1981.

~~85-2-807. Department authorized to appear in administrative and legal proceedings.~~ The department may appear on behalf of the state of Montana in proceedings before the legislatures and administrative agencies of the other signatory states to the compact and in legal proceedings commenced in federal or state court within the other signatory states involving the consent of such signatory states to diversions of water from the basin under Article X of the compact and any other laws or rules of such signatory states applicable to such diversions to the extent necessary to protect the interests and the citizens of Montana in those proceedings.

History: En. Sec. 7, Ch. 581, L. 1981.

CHAPTER 7

WATER COURTS

Part 1 -- Water Divisions

Section

- 3-7-101. Water **divisions.**
- 3-7-102. Water divisions **boundaries.**
- 3-7-103. Promulgation of rules and prescription of forms-

Part 2 -- Water Judges

- 3-7-201. Designation of water Judge-
- 3-7-202. Term of office.
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Part 1

Water Divisions

3-7-101. Water divisions. To adjudicate existing water rights water divisions are established as defined in 3-7-102. A water division shall be presided over by a water judge.

History: En. Sec. 1, Ch. 697, L. 1979.

Compiler's Comments

Purpose. Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

Codification. Sec. 35, Ch. 697, L. 1979, provided: "(1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act.

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above, the code commissioner shall add to the MCA, if necessary, statutory language to convey the intent of this section."

Because of rearrangement of the new material* Ch. 697 is now codified in Title 3, chapter 7; Title 85, chapter 2, parts 2 and 7; and 2-15-212.

Effective date. "This act is effective on passage and approval.* Approved May 11, 1979.

Severability. Section 36, Ch. 697, L. 1979, was a severability section.

3-7-102. Water divisions boundaries. There are four water divisions whose boundaries are formed by the natural divides between drainages and the borders of the state of Montana and which are described as follows:

(1) The Yellowstone River Basin water division consists of those areas drained by the Yellowstone and Little Missouri Rivers and any remaining areas in Carter county.

(2) The lower Missouri River Basin water division consists of those areas drained by the Missouri River from below the mouth of the Marias River and any remaining areas in Glacier and Sheridan Counties.

(3) The upper Missouri River Basin water division consists of those areas drained by the Missouri River to below the mouth of the Marias River.

(4) The Clark Fork River Basin water division consists of the areas drained by the Clark Fork River, the Kootenai River* and any remaining areas in Lincoln County.

History: En. Sec. 2, Ch. 697, L. 1979.

3-7-103. Promulgation of rules and prescription of forms. As soon as practicable the Montana supreme court may

promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water judge and the department of natural resources and conservation.

History: En. Sec. 10, Ch. 697, L. 1979; and. Sec. 16, Ch. 575, L. 1981.

Compiler's Comments

1981 Amendment: Added "of natural resources and conservation" at the end of the section.

3-7-201. Designation of water judge. (1) A water judge shall be designated within 30 days after May 11, 1979, for each water division by a majority vote of a committee composed of the district judge from each single judge judicial district and the chief district judge from each multiple judge judicial district, wholly or partly within the division. Except as provided in subsection (2) and 3-7-213, a water judge must be a district judge or retired district judge of a judicial district wholly or partly within the water division.

(2) A district judge or retired district judge may sit as a water judge in more than one division if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit.

(3) A water judge when presiding over a water division, presides as district judge in and for each judicial district wholly or partly within the water division.

History: En. Sec. 1, Ch. 697, L. 1979; and. Sec. 11 Ch. 80, L. 1981.

Compiler's Comments

1981 Title: The title to Ch. 80, L. 1981 (SB 94) read: "An act to provide that a water judge may be a retired district judge; to provide that a water judge may resign; and to permit a district judge or retired district judge to sit as a water judge in more than one division when called by the chief justice or another water judge."

1981 Amendment: Inserted the exception in (1) and inserted "or retired district judge"; in (2) inserted "or retired district judge" and "if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit".

Effective Date: Section 6, Ch. 80, L. 1981, provided: "This act is effective on passage and approval." Approved March 18, 1981.

3-7-202. Term of office. The term of office for water judges is from the date of initial appointment as provided in 3-7-201 to June 30, 1985. After June 30, 1985, the term of office of a water judge is 4 years, subject to continuation of the water divisions by the legislature.

History: En. Sec. 9, Ch. 697, L. 1979.

~~3-7-203. Vacancies.~~ If a vacancy occurs, it shall be filled in the manner provided in 3-7-201 for the initial designation of a water judge- A vacancy is created when a water judge dies, resigns* retires* is not elected to a subsequent term* forfeits his judicial position* is removed, or is otherwise unable to complete his term as a water Judge.

History: En- Sec. 8, Ch. 697, L. 1979; and Sec. 2, Ch. 80, L. 1981.

Compiler's Comments

1981 Amendment: Inserted 'resigns' near middle of section and substituted "water judge^m" for 'district judge^m'-

~~3-7-204. Supervision and administration by supreme court.~~ (1) The Montana supreme court shall supervise the activities of the water judges* water masters, and associated personnel in implementing this chapter and Title 85, chapter 2, part 21

(2) The supreme court shall pay the expenses of the water judges and the salaries and expenses of the water judges' staffs and the salaries and expenses of the water masters and the water rasters' staffs* from the water rights adjudication account established by 85-2-241. 'Salaries and expenses* as used in this section include but are not limited to the salaries and expenses of personnel, the cost of office equipment and office space, and such other necessary expenses as may be incurred in the administration of this chapter and Title 85, chapter 2, part 2.

History: En. Sec. 1, Ch. 268, L. 1981.

Compiler's Comments

Codification Instruction: Section 10, Ch. 268, L. 1981, provided: "Section 1 is intended to be codified as an integral part of Title 3, chapter 7, part 2, and the provisions of section 1 apply to Title 3, chapter 7."

Effective Date: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval-" Approved April 3, 1981.

3-7-205 through 3-7-210 reserved-

~~3-7-211. Appointment of water commissioners.~~ The water Judge of each water division may appoint and supervise a water commissioner as provided for in Title 85, chapter 5.

History: En. Sec. 6, Ch. 697, L. 1979.

~~- - 12. Enforcement of final decree.~~ The water judge of each water division may enforce the provisions of a final decree issued in that water division as provided in 85-2-234.

History: En. Sec. 6, Ch. 697, L. 1979.

~~3-7-213. Designation of alternate judge.~~ The water

judge may designate any other district judge or retired district judge to preside in his absence on his behalf as water judge for the **immediate** enforcement of an existing decree or the ~~immediate~~ granting of extraordinary relief as ~~may~~ be provided for by law upon an allegation of irreparable harm.

History: En. Sec. 6, Ch. 697, L. 1979; and. Sec. 3, Ch. 80, L. 1981.

Compiler's Comments

1981 Amendment: Inserted "or retired district Judge"; deleted "within the water division" following "district judge"^a*

3-7-214 through 3-7-220 reserved.

3-7-221. Appointment of chief water judge -- term of office. (1) The chief justice of the Montana supreme court shall appoint a chief water judge from among the district judges serving or retired as of the **time of appointment**.

(2) The term of office of the chief water judge is from the date of initial appointment until June **30, 1985**. After June **30, 1985**, the ~~term~~ of office is 4 years, subject to continuation of the water divisions by the legislaturer

History: En. Sec. 1, Ch. 442, L. 1981.

Compiler's Comments

Initial Appointment: Section 5, Ch. 442, Lo 1981, provided: "The chief justice of the **Montana** supreme court shall make the initial **appointment** of a chief water judge on or before January 4, 1983."

3-7-222. Salary -- office space. (1) The chief water judge is entitled to receive the ~~same~~ salary and expense allowance as provided for district judges in **3-5-211**.

(2) The office of the chief water judge shall be at the location that the chief justice of the **Montana** supreme court shall designate. The Montana supreme court shall provide in its budget for the salary, expenses, and office and staff requirements of the chief water judge, **which money** may be appropriated by the legislature from the water rights adjudication account.

History: En. Sec. 2, Ch. 442, L. 1981.

3-7-223. Duties of the chief water judge. The chief water judge shall:

(1) coordinate with the department of natural resources and conservation in compiling information submitted on water claim forms under Title **85**, chapter **2**, part **2**, to assure that the **information** is expeditiously and properly compiled and transferred to the water judge in each water division.

(2) assure that the water judge in each water division moves without unreasonable delay to enter the **required** preliminary decree; and

(3) assure that any contested or conflicting claims are tried and adjudicated as expeditious^{1y} 3s possible.

History: En. Sec. 3, Ch. 442, L. 1981.

3-7-224. Jurisdiction of chief water judge. (1) The chief water judge may, at the discretion of the chief justice of the Montana supreme court, also serve as water judge for one of the water divisions.

(2) The chief water judge has jurisdiction over all matters relating to the determination of existing water rights within the boundaries of the state of Montana.

(3) With regard to the determination of existing water rights, the chief water judge has the same powers as a district judge. He may issue such orders, on the motion of an interested party or on his own motion, as may reasonably be required to allow him to fulfill his responsibilities.

History: En. Sec. 41 Ch. 442, L. 1981.

-- 01. Appointment of water masters -- removal. (1) The water judge in each water division shall appoint at least one water master and may appoint more than one water master.

(2) A water master may be appointed after July 1, 1980, and must be appointed on or before July 1, 1982.

(3) In appointing a water master, the water judge shall consider a potential master's experience with water law, water use, and water rights-

(4) A water master shall serve at the pleasure of the water judge and may be removed by the water Judge.

History: En. Sec. 3, Ch. 697, L. 1979; and. Sec. 2, Ch. 258, L. 19810

Compiler's Comments

1981 Amendment: Substituted "at least one^m" for "a" in (1); added "and may appoint more than one water master^m" at the end of (1).

Effective Date: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Approved April 3, 1981.

3-7-302. Salary, expenses, and retirement of water masters. (1) The water judges shall set a uniform salary for water masters. Water masters shall receive expenses as provided in 2-18-501 through 2-18-503.

(2) A water master shall participate in the Montana Public Employees* Retirement System established in Title 19, chapter 3

(3) The salary and expenses of a water master shall be paid from the water right adjudication account established in 85-2-241.

History: En. Sec. 4, Ch. 697, L. 1979.

3-7-303 through 3-7-310 reserved.

3-7-311. Duties of water masters. (1) The water master has the general powers given to a master by **M.R.Civ.P., Rule 53(c)**.

(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the water judge meeting the requirements for the preliminary decree as specified in **85-2-231**.

(3) After a water judge issues a preliminary decree* the water master shall assist the water judge in the performance of the water division's further duties as ordered by the water judge.

History: En. Sec. 5, Ch. 697, L. 1979.

3-7-401. Definitions. For the purposes of this part, the following definitions apply:

(1) **"Proceeding"** includes prehearing, hearing* appellate review, or other stages of adjudication conducted by the water master or water judge.

(2) **"Fiduciary"** includes such relationships as executor* administrator, trustees or guardian.

(3) **"Financial interest"** means ownership of a legal or equitable interest, however small, or a relationship as director, advisor* or other active participant in the affairs of a party, except that:

(a) ownership in a mutual or common investment fund that holds securities is not a financial interest in such securities unless the judge or water master participates in the management of the fund;

(b) an office in an educational* religious? charitable, fraternal* or civic organization is not a financial interest in securities held by the organization;

(c) the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(d) ownership of government securities is a financial interest in the issuer only if the outcome of the proceeding could substantially affect the value of the securities-

History: En. Sec. 7, Ch. 697, L. 1979.

3-7-402. Disqualification of water judge or master.

(1) A water judge may disqualify himself or the water master in any proceeding or pertinent portion thereof in which his or the water master's impartiality might reasonably be questioned,

(2) A water judge may also disqualify himself or the water master in the following circumstances:

(a) if he or the water master has a personal bias or prejudice concerning a party of personal knowledge or disputed evidentiary facts concerning the proceeding;

(b) if in private practice he or the water master served as a lawyer in the matter in controversy or a lawyer with whom he or the water master previously practiced law served during such association as a lawyer concerning the

matter or the judge or the lawyer has been a material witness concerning it;

(c) if he or the water master has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) if he or the water master knows that he or the water master individually or as a fiduciary, or his or the water master's spouse or minor child residing in his or the water master's household has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding; or

(e) if he or the water master or his or the water master's spouse or a person within the third degree of relationship to any of them (as calculated according to 72-11-101 through 72-11-105) or the spouse of such a person:

(i) is a party to the proceeding or an officer, director, or trustee of a party;

(ii) is known by the judge or water master to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's or water master's knowledge likely to be a material witness in the proceeding.

(3) A water judge should inform himself about his and the water master's personal and fiduciary financial interests and make a reasonable effort to inform himself about the personal financial interests of his and the water master's spouse and minor children residing in his or the water master's respective household.

History: En. Sec. 7, Ch. 697, L. 1979.

3-7-403. Waiver of disqualification. A water Judge may accept from the parties to the proceeding a waiver of any ground for disqualification if it is preceded by a full disclosure on the record of the basis for disqualification.

History: En. Sec. 7, Ch. 697, L. 1979.

3-7-404. Procedure exclusive. The procedure for disqualification of a water judge or water master specified in this section is exclusive unless otherwise specifically altered by the Montana supreme court.

History: En. Sec. 7, Ch. 697, L. 1979.

3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly.

(2) No water judge may preside over matters concerning the determination and interpretation of existing water rights beyond the boundaries specified in 3-7-102 for his division except as provided in 3-7-201 and 3-7-213.

(3) The water judge for each division shall exercise jurisdiction over all matters concerning the **determination** and interpretation of existing water rights within **his** division as specified in **3-7-102** that are considered filed in or transferred to a judicial district wholly or partly within the division.

History: En. Secs. 1, 6, Ch. 697r L. 1979; and. Sec. 4, Ch. 30, Lo 1981.

Compiler's Comments

1981 Amendment: Added the exception at the end of (2).

3-7-502. Jurisdictional disputes. Whenever a question arises concerning which **water judge shall** preside over adjudication of a matter concerning the determination and interpretation of existing **water rights**, the question shall be settled by the water judges **involved**.

History: En. Sec. 2, Ch. 697, L. 1979.

89-801. (7093) What waters may be appropriated. The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

89-802. (7094) Appropriation must be for a **useful** purpose—abandonment. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

89-803. (7095) Point of diversion may be changed--change of **use**. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

89-810. (7100) Notice of appropriation. Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has not been an adjudication of the right to use the waters, or some part thereof, must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

1. The quantity of water claimed, measured as hereinafter provided;
2. The purpose for which it is claimed and place of intended use;
3. The means of diversion, with size of flume, ditch, pipe, or aqueduct, by which he intends to divert it;
4. The date of appropriation;
5. The name of the appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county clerk of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion of such stream, with reference to some natural object or permanent monument. The notice shall be verified by the affidavit of the appropriator or some one in his behalf, which affidavit must state that the matters and facts contained in the notice are true.

89-811. (7101) Diligence in appropriating. 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, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

89-812. (7102) Effect of failure. A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this chapter the right to the use of the water shall relate back to the date of posting the notice.

89813. (7103) Record of declaration. Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this chapter, file in the office of the county clerk of the county in which the water right is situated, a declaration in writing, except notice be already given of record as required by this chapter, or a declaration in writing be already filed as required by this section, containing the same facts as required in the notice provided for record in section 89-810 of this chapter, and verified as required in said last-mentioned section, in cases of notice of appropriation of water; provided, that a failure to comply with the requirements of this section shall in nowise work a forfeiture of such heretofore acquired rights, or prevent any such claimant from establishing such rights in the courts.

89-814. (7104) Record prima facie evidence. The record provided for in sections 89-810 and 89-813, when duly made, shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

89-815. (7105) Rights settled in one action. In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source, parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same kind is asked by parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint.

89-829. (7119) Procedure for appropriating waters of adjudicated streams. (1) Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has been an adjudication of rights between appropriators or claimants, as contemplated in section 89-839, shall:

(a) employ a competent engineer to make a survey of the ditch, or aqueduct, whereby the water is to be conveyed from the source of supply, or the dam or other work whereby the water is to be impounded, or both; or

(b) cause to be prepared an aerial photograph with a drawing thereon showing the course of the proposed ditch or aqueduct, or the location of the proposed dam or other work, or both, together with a description of the course of said ditch or the location of said dam attached thereto; and the appropriators shall file with the clerk of the court in the county in which the water is appropriated a petition giving the amount of water sought to be appropriated, a description by name or otherwise of the watercourse or body from which he intends to appropriate the water, and a general description of the ditch or aqueduct, stating its size, length, and capacity, showing the proposed means of appropriation and use of the water, and also the place of use thereof. If the means of appropriation be a reservoir by which the water is to be impounded, the petition shall state the location and size thereof, together with the contemplated manner of its construction and the means of conveying the water to the place of contemplated use, and the contemplated use.

(2) There shall be filed with the petition a map or aerial photograph as ~~hereinbefore~~ provided showing the point of, and means of diversion, and the course of the ditch or aqueduct to its terminus, and if a reservoir, the ~~contour~~ line thereof, the height and width of the dam, the point and means of discharge therefrom, and the spillway. If the appropriator shall intend to mingle the waters appropriated from one stream with another, or shall intend to deposit the waters impounded in a reservoir into a stream, he shall so state.

(3) The appropriator shall declare in his petition that the water rights south by him shall be subject to, and that in the use thereof he shall be bound by the terms of any decree theretofore rendered by a court of competent jurisdiction adjudicating the waters of such river, stream, ravine, coulee, spring, lake, or other natural source of supply, or, any body of water to which the same may be tributary, provided that water stored in a reservoir pursuant to an appropriation hereunder which is subsequent to an adjudication of waters in a flowing stream when so released from storage shall not be considered as a part of the natural flow of said adjudicated stream.

(4) The appropriator shall, as near as may be, give the names of all appropriators or claimants who have, or appear to have, rights in the source of supply, from which the appropriation is sought, and whose rights may be in anywise affected by the appropriation, and in the petition the petitioner shall be named as plaintiff, and all other parties as defendants.

89-830. (7120) Summons--issuance and service. Upon the filing of the petition, the clerk shall issue a summons in the same form as the summons in a civil action, and a copy of the petition shall be served upon each defendant at the time of serving the summons. Service shall be made as in civil actions and service may be made by publication as provided in sections 93-3013 to 93-3015.

89-831. (7121) Appearance--default--decree. If any defendant shall not appear within twenty days after the service of summons upon him, it shall be deemed by the court that he has no objection to the court granting the appropriation sought by the plaintiff, and the defendant so failing to appear shall be deemed in default. Any defendant may appear by motion, demurrer, or answer, as in civil action. The procedure in civil actions shall be followed in all proceedings under the terms of this act; provided, that when the pleadings are settled the court shall summarily proceed to try and determine the case. Evidence may be offered by the parties as in civil actions. At the conclusion of the trial, the court may enter an interlocutory or permanent decree allowing the appropriation sought, either in whole or in part, subject to all prior rights as adjudicated, and subject to the terms of all prior decrees, or may make any other order deemed proper in the premises. If no objections are filed the court shall enter such decree as the facts warrant.

89-832. (7122) Decree subject to prior adjudicated rights. If the defendants, or any of them, do not appear, their adjudicated rights which are prior in time to plaintiff's right shall in nowise be affected by the court's order. The court shall in every case, if an appropriation be awarded plaintiff, provide that the same shall be subject to all adjudicated rights which are prior in time to plaintiff's rights, and the plaintiff shall be bound by the terms of all prior decrees with respect to water rights in the proper order of his priority as if he had been a party to the decree originally.

89-833. (7123) Scope of **decree—diversion of waters to another stream.** If the **water** awarded the appropriator **by** the decree **is** to be taken from one stream or source of **supply** and turned into another stream or **watercourse**, and there mingled with the waters **flowing** therein, the court shall make provision in the decree regulating the same, to the end that the **water** appropriated by others shall not be diminished or deteriorated in quantity by the additional burden placed upon the stream or watercourse. The court may provide that the appropriator shall provide all necessary **measuring** devices so that the water turned **in by** him from another stream, **reservoir**, or other source of **supply** and the water **taken** by him may be ascertained at any time and all times, and may provide that he shall leave in the stream or watercourse a percentage of the water turned in by him to bear a proportion of the loss caused by seepage and evaporation in passage. **The** court shall have a **wide** discretion in ascertaining and determining the facts in all cases under **the provisions** of this act in order that the rights of all parties may be protected.

89-834. (7124) Decree to govern conditions of performance of work. The court may provide by interlocutory decree awarding the appropriation, the condition under which the ditch, aqueduct, dam, or other work, **necessary** to the complete appropriation, shall be done and the time within which the same **shall** be completed until the conditions imposed are complied with. Upon a full compliance with the terms prescribed by the **court**, it shall enter its order and decree establishing the appropriation and **fixing** the date thereof, which, if the appropriator shall have been diligent in complying with the court order, shall be the date of the filing of the petition. The court may **fix** a later date if the facts warrant.

89-835. (7124.1) Adjudicating rights of persons not party to **decree.** At any time after the entry of any decree, any person, not a party to **such** decree, who, prior to the entry of such decree, had or claimed a valid water right upon **the** stream or source of supply affected by such decree, or **who** subsequent to the entry of such decree has made a **valid** appropriation of water from said stream or source of water supply affected by **such** decree, may petition the court **which** entered such decree for an order making him a party to such decree and establishing his right thereunder, and in relation to the other rights affected by such decree. Upon filing such petition, such notice shall be given and procedure had as is provided in sections 89-829 to 89-834.

89-836. (7125) Penalty for **wrongful** diversion of adjudicated **waters.** Any person not a party, or privy, to a decree adjudicating the **waters** of a river, stream, ravine, coulee, spring, lake or other natural source of **supply**, the same having been adjudicated, who shall divert the water thereof when the same **shall** be needed by another, without first complying **with the** terms of this act, shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than one thousand **dollars.**

89-837. (7126) **Penalty** for noncompliance with act. Failure to comply with the provisions of this act deprives the appropriator of the right to **use** any water of such stream, or **other source** of supply, as against any subsequent appropriator mentioned in or bound by a decree of the court.

89-838. (7127) Recording copy of **final** decree. A certified copy of the **final** decree of the court shall be filed with the county clerk, who shall make a record thereof as is provided therefor in section 89-816.

89-839. (7128) Effect of decree upon subsequent appropriations. Whenever there shall have been an adjudication of the rights between appropriators or claimants to any stream or any other water supply in this state, in any district court of the state, or the United States court, in an action prosecuted in good faith between such appropriators or claimants to determine their respective rights to the use of such waters, and which decree is based upon evidence introduced, and not upon stipulations or admissions of the parties, such adjudication and decree, or certified copies thereof, shall, as against all persons appropriating or diverting any of the waters of the said stream or other water supply, after the date of such decree, in an action relating to such waters, be prima facie evidence of the facts therein found, determined, and decreed, respecting the rights of parties to said action to the use of the waters of said stream or other water supply.

89-840. (7129) Appropriations of water subject to prior decrees adjudicating rights. All water hereafter appropriated by any person, association, company, or corporation, after the passage of this act, from any stream, creek, spring, canyon, river, or ravine in this state, in which the water rights therein have been adjudicated and decreed prior to the passage of this act, and a decree of a court of competent jurisdiction entered therein, shall be subject to such decree.

89-841. (7130) Nonadjudicated streams not affected. In all streams, creeks, springs, canyons, rivers, and ravines, in which the water rights therein have not been adjudicated by a court of competent jurisdiction, water shall be appropriated in the same manner as provided by law at the time of the passage of this act.

89-842. (7131) Appropriations pending litigation subject to decree. At such time as there may be legal proceedings instituted by the owner or owners of any water right or water rights in any stream, spring, creek, canyon, river, or ravine, before any court of competent jurisdiction, all subsequent appropriations made in any such streams, creeks, springs, canyons, rivers, or ravines will be subject to such suit as may be instituted and shall not date prior to the date of the beginning of said suit, and will be subject to the rulings and decisions thereunder.

88844. (7133) Effect of decree. Any person or persons appropriating water under the provisions of this act shall be subject to, bound by, and shall comply with any decree of court adjudicating the waters of such stream, or any stream of which the same may be a tributary or feeder, as fully and to the same extent as if said person or persons were original parties to the action wherein the said decree is made and entered, and any water commissioner or commissioners, appointed by the court to distribute waters under any decree, shall have jurisdiction over and shall distribute any waters appropriated under the provisions of this act, according to priority.

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SEMINAR OUTLINES

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ADJUDICATION OF EXISTING

(pre-July 1, 1973)

WATER RIGHTS

by **Honorable W. W. Lessley**
Chief Water Judge

- I. Birth of Water Courts. Chapter 697 (SB 76) becomes the law.
 - A. Why - Present records non-existent in use rights; adjudication records missing (fire - flood); adjudication rights uncertain; appropriation rights - "hurry-up" on 20-day limit. Federal attitude indicates water is a state problem (The Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation vs. Tongue River Water Users Association, joint opinion of Judges Battin and Hatfield).
 - B. What - Elater Court system. Judicial means and method to bolster adjudication process; judges - water master - advisory and investigative staff (engineers) - complete use of computer method. Adjudication is identification and quantification, not reallocation.
 - C. When - estimated 200,000 claims. Powder River 8500 claims (8 months) less than 10 years.

II. Act Revising and Clarifying HB 667.

- A. More than one water master may be appointed in each division
- B. **May** appoint after July 1, 1980; must appoint before July 1, 1982.
- C. Supervision of adjudication of Indian water rights until July 1, 1985.
- D. And filing of Indian rights suspended until July 1, 1985
- E. Water judge may issue interlocutory decree if necessary.

III. Legislation to Streamline Chapter 697 (SB 76)

A. Chapter 80

1. Creating personnel to "man" the water courts.
2. Water judge to sit in more than one division.
3. Making it effective now.

B. Chapter 442, statutory creation of a chief water judge.

1. Appointment by Chief Justice; term from appointment (Jan. 4, 1983) to June 30, 1985.
2. After term is 4 years.
3. Salary.
4. Office.
5. Supreme Court budget for this office salary, space and expenses.
6. Duties of water judges - chief judge, coordinate with DNRC. Same power as district judge in water.
7. Assume expeditious work in program.

IV. Pre-preliminary/Interlocutory Decrees.

- A. Claims sent to water courts on selected river basin.
- B. Claims sorted by computer.
 - 1. Major source.
 - 2. Tributaries of major source.
- C. Courts review claims utilizing DNRC personnel
 - 1. Check source of right - decree, filed, use.
 - 2. Aerial photo used to:
 - a. check place of use -- acreage irrigated.
 - b. source - supplemental rights.
 - c. point of diversion, diversion means, where possible
 - 3. Volumes, flow rates, reviewed in light of court requested data in basin regarding historical use, crop consumptive water use, soil types, climatic region.
 - 4. Court reviews documentation priority date utilizing decrees, information acquired regarding river basin, claims.
 - 5. Court reviews legal questions.
- D. Field investigations conducted as necessary to resolve problem claims.
- E. Preliminary/Interlocutory decree issued based on claims, review procedure, all other data submitted and requested by courts -- changes made as appropriate.

V. Procedure after Issuance of Preliminary Decree.

A. Notice of availability of preliminary decree sent to:

1. All parties filed claim; also includes individual abstract of water right.
2. All parties issued water rights; also includes individual abstract of water right.
3. Parties issued or having applied and have not been denied a permit.
4. Parties with reservations.
5. Other interested persons who request notice.

- entire decrees available at cost or available for review on film at all Clerks of Court offices in the drainage basin, appropriated DNRC field offices, the water courts.

- if you, as counsel, want a notice of availability of decree sent to you, you must formally request notice to be sent, designate your name, client's name, your interest, appropriate basin.

- B. 1. Review preliminary decree: 90 days to file objections/request hearings on any water right issued/denied in preliminary decree.
2. 90-day extension granted for filing objections if application for extension is made within 90 days after notice of entry of preliminary decree.

C. Notice of all objections/requests for hearing sent to all parties named in preliminary decree.

1. Review of entire objection available at all Clerks of Court offices in adjudicated drainage, appropriate DNRC field office, Clerk of Water Court office.
2. Notice of intent to appear at any hearing must be filed 45 days after receipt of notice of objections and requests for hearings.

VI. Preliminary Hearing--Pre-Hearing--Consolidation.

- A. Scheduled after notice of intent to appear filing period closes.
- B. Hearings: Governed by rules of civil procedure except where special rules promulgate by Supreme Court in conjunction with the water courts.
- C. Final decree issued on the basis of hearings, that affirm or modify the preliminary decree. If no request for a hearing is filed within time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as final decree.

VII. Appeals: from final decree.

- A. A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:
1. He requested a hearing and appeared and entered objections to the preliminary decree; or
 2. His rights as determined in the preliminary decree were altered as a result of a hearing requested by another person.

VIII. Water Resources Oversight Commission, Chapter 609.

- A. Purpose: Work with and oversee state agencies developing and managing our water resources; continue work of oversight adjudication committee.
- B. Speaker of House and Senate committee on committees. Four members from House and Senate; no more than two members from each of same party.
- C. The great importance of continuance and stability of a water policy - is achieved by creation and operation of the oversight committee.

IX. Where are we?

A. Staffing and location.

B. Powder River

C. Madison River.

D. Gallatin River.

E. Sage Creek.

F. Mill Creek.

G. Dempsey Creek.

H. Rest of state.

ADJUDICATION OF EXISTING RIGHTS

Michael McLane
Program Manager, Adjudication
Water Rights Bureau
Department of Natural Resources
and Conservation

The general adjudication of (pre-1973) existing water rights on more than a piecemeal basis was mandated in the new constitution, subsequently enacted by the legislature by the Water Use Act, and later amended in 1979 by Senate Bill 76. The adjudication of water rights requires the marriage of the legal, engineering and technical talents of the Courts of Montana and the Department of Natural Resources. Following is a detailed discussion of the claim forms and the Department's role:

I. Role of the DNRC in the Adjudication Process (85-2-243 MCA)

- (A) Provide information and assistance to aid claimants in filing.
 - 1. 9 field office locations
 - 2. Workshops in local areas
 - 3. Instructions and brochures available
 - 4. Sources for maps, aerial photos, etc.
- (B) Provide information and assistance as required by the water judge to adjudicate existing rights.
 - 1. Collect claims
 - 2. Microfilm claims
 - 3. Prepare indexes by source, place of use, use, or
 - (a) use computer
 - 4. Order and sectionize aerial photos
 - 5. Review court selected claims
 - (a) procedures being developed
 - 6. Other duties as directed by the court
- (C) Conduct field investigations of claim that the water judge in consultation with the department determines warrant investigation.
 - 1. Conduct field measurements and/or interviews with the claimant as directed by the court.
 - 2. Extent and exact procedure will be established during the adjudication of claims.

(D) Provide the water judge with all information in its possession bearing upon existing rights.

1. Provide Water Resources survey information
2. Provide information on changes, sever-sales, transfers of existing water rights

II. Claim Forms.

(A) General.

1. Pleading before the court
2. One claim for each use and each source and each different priority date

(B) Irrigation Claim Form.

1. Discuss what is needed item by item
2. Map -- what's needed
3. Proof of use documents

(C) Stock Claim Form

1. Discuss items unique to this form
2. Map
3. Proof of use
4. Voluntary claim if for groundwater
5. Instream use - voluntary claim
6. Stock Reservoirs - must claim

(D) Domestic Claim Form.

1. Discuss items unique to this form.
2. Map
3. Proof of use
4. Voluntary claim if for groundwater
5. Groundwater developments since January 1, 1962

(E) Other Claim Form

1. One claim for each source and each use
2. Discuss item unique to this form

(F) Irrigation District Form

1. Used by irrigation districts, Assoc. for multiple places of use

III Where to file and fees

(A) DNRC central or field offices

1. Brochure gives address and phone numbers

(6) File by January 1, 1981.

(C) Fees

1. \$40 per claim
2. \$480 max. fee per major drainage
3. Voluntary claim
4. Use of fee
5. Decreed rights

Adjudication of Existing Rights by Richard T. Munger,
Rich Munger and Associates

I. WATER RIGHTS - How are they found?

A. Decreed and Appropriative Rights - Procedures taken to gather necessary information

1. Abstracts and Real Estate Tax Notices
2. Title Company Records
3. Water Resources Survey Publications
 - a. Water Rights Bureau Field Office field notes and irrigation maps
4. Clerk and Recorder records search
5. Clerk of the District Court records search
6. Aerial Photographs
 - a. S.C.S./A.S.C.S. Field offices
7. Field Investigation
 - a. Discussion with Claimants
 - b. Photographs

B. "Use" Rights - Procedure taken to gather necessary information

1. Abstracts and Real Estate Tax Notices
2. Title Company Records
3. Aerial Photographs
 - a. S.C.S./A.S.C.S. Field Offices
4. Libraries or Montana Historical Society
5. Field Investigation
 - a. Discussion with Claimants
 - b. Photographs
 - c. Existing records identifying dates of first use
 - d. Statements of use (Affidavits)

II. CLAIM PACKAGE - Accuracy is Important!

- A. Claim Form - typewritten for clarity
- B. Mapping - clear identification of point(s) of diversion, place of use, and conveyance system - color coding is helpful
- C. Copy of Declaration, Notice or Decree
 1. Identify Book and Page Number on Declaration and Notice
 2. Identify Case Number, Plaintiff(s) and Defendant(s) and appropriate portion of Findings on the Decree - Certification is helpful
- D. Other Documentation - Don't be bashful!
 1. Photographs
 2. Records of system construction cost
 3. Water measurement records
 4. Etc., etc.

III. STUMBLING BLOCKS - Be careful!

- A. Abstract Examination
 - 1. Beware of grantor's reservation of water in conveyance
- B. Boundary change
 - 1. Change of County boundaries - transcription of records
- C. Water Resources Survey Publications
 - 1. Information generally covers irrigation only
 - 2. Water use since survey publication _____
- D. Filed Notice of Appropriation
 - 1. .Timely filed - **becomes** "use" right?
- E. Courtesy to State and County Officials
 - 1. They are a source for a wealth of information
- F. Filing Deadline
 - 1. Client acceptance - can you complete the **job** in time?

OBTAINING A NEW (post-July 1, 1973) WATER RIGHT

(By Donald D. MacIntyre)*

A. **WHEN** IS A NEW RIGHT REQUIRED?

§85-2-301, M.C.A., RIGHT TO APPROPRIATE:

Pursuant to Article IX of the Montana Constitution, the legislature has declared that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial use as provided in Chapter 2 of Title 85, M.C.A. (See **85-2-101**).

Specifically, 85-2-301 provides as follows:

"After July 1, 1973, a person may not appropriate water except as provided in this Chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including adverse use, adverse possession, prescription, or estoppel. The method prescribed by this Chapter is exclusive."

(Emphasis added).

1. **"July 1, 1973"**

a. General Agriculture Corp. v. Moore, 166 M. 510, 534 P.2d 859 (1975): Plaintiff who filed petition prior to July 1, 1973, seeking to appropriate surplus waters from

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an adjudicated stream has "existing rights" when 1972 Constitution which provided that all existing rights to the use of any waters for any useful or beneficial purpose are recognized and confirmed went into effect, and amended complaint filed after effective date of Water Use Act was not subject to dismissal on ground that action was abated by repeal of water use act under which the petition was filed.

b. Montana Department of Natural Resources and Conservation v. Intake Water Co., 171 M. 416 (1976):

(i) "proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted", under pre-1973 water use act, is not confined to the commencement of actual on-site excavation or construction of the diversion works.

(ii) due diligence vs. a valid appropriation

c. After July 1, 1973, where the questions of prior filing under pre-1973 water use act and due diligence are not a consideration, appropriation may only be made through the permit process.

2. "Appropriate Water"

a. Article IX, §3(3), Constitution of Montana. All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

b. §85-2-102(14)

Water means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

c. §85-2-102(1)

To divert, impound or withdraw (including by stock for stock water) a quantity of water, or in the case of a public agency, to reserve water.

d. Storage v. direct flow

3. "Beneficial Use"

a. Definition - §85-2-102(2)

A use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

b. Exceptions-beneficial use

1. Slurry transport of coal - §85-2-104

2. Drainage

c. Exceptions and Limitations - permit requirement

1. 85-2-306

a. well or developed spring under 100 gal/min.

b. well or developed spring, first put to use between January 1, 1962 and July 1, 1973

- c. impoundment or pit less than 15 acre-feet on a source other than a perennial flowing stream, and accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.
- d. Temporary emergency appropriations **neces-**sary to protect lives and property.
- e. 85-2-317 limitation on appropriation of groundwater in excess of 3000 acre feet per year.

4. "Exclusive **Method**"

- a. pre-1973 method
- b. post-1973 permit system
- c. **Department's** access to court
 - 1. Civil
 - 2. Misdemeanor
- d. affected water users' access to court

5. Priority **§85-2-401** .

- a. first in time, first in right
- b. priority does not include the right to prevent changes by later appropriators in the condition of water occurrence if the prior appropriator can reasonably excuse his water right under the changed conditions.
- c. priority dates from date of filing of an application
 - 1. material change in application

6. . Abandonment

- a. pre-1973 v. post-1973 law

Castillo v. Kunnemann (1981)

B. WHEN IS A CHANGE REQUIRED?

§85-2-402, provides that an appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted by law and approved by the department.

1. Changes

- a. adversely affected test

- b. pre-1973 v. post-1973

water rights

Castillo v. Kunnemann (1981)

- c. change in a permit use

(i) after put to a beneficial use

(ii) prior to being put to a beneficial use

- d. limitation on agricultural use to industrial use

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2. Transfer of Appropriation Right

- a. pass with conveyance of land

- b. notice of transfer

3. Sever and Sell

- a. department approval

- b. adverse affect test

- c. Castillo v. Kunnemann (1981)

OBTAINING A NEW RIGHT

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The Water Use Act which became effective provided for an exclusive method for appropriation of water, a centralized record system, and a system for the general determination of existing water rights in the State of Montana. Following is a detailed discussion of the forms and specific procedures used to provide an orderly system to appropriate water:

I. Preparing the Application for Provisional Water Use Permit

- (A) Forms and assistance available at Water Rights Field Offices.
Forms available from County Clerk and Recorders.
- (B) Some preparation work needed before completing the forms:
 - (1) legal assessment of existing rights, right-of-way, etc.
 - (2) engineering - rate, volume.
- (C) Completion of the Form itself:
 - (1) must be complete and accurate.
 - (2) rate and volume based on actual need and intended use.
 - (3) use USG quad map or aerial photo to locate place(s) of use and points of diversion.
 - (4) go over form items 1 - 11.
 - (5) application fee.
- (D) Incomplete applications:
 - (1) correspondence with attorney or applicant.
 - (2) 30 days up to 18 months to complete an application.
 - (a) bona fide application.
 - (b) right-of-way.
- (E) Environmental impact analyzed:
 - (1) EIS prepared by DNRC.
 - (2) fee assessed if necessary.
 - (3) schedule 85-2-124, MCA.

II. Processing of Applications by DNRC

- (A) Public notice in newspaper of local circulation:
 - (1) once a week for three weeks.
 - (2) waiver notice.

- (B) Individual Notice to Water Rights of record:
 - (1) first class mail
- (C) 30-60 day objection period:
 - (1) Objection form, filed with DNRC
- (D) If no objections - permit issued:
 - (1) provisional permit recorded with county clerk and recorder.
 - (2) construction can start.
 - (3) Notice of Completion filed.
- (E) If objections are filed:
 - (1) meeting of applicant and objectors at DNRC field office
 - (a) not a hearing or pre-hearing.
 - (b) conditions on permits issued in the past.
 - (c) clear explanation of the application by applicant.
 - (d) criteria 85-2-311, MCA outlined.
 - (e) date of hearing decided.
- (F) Negotiation between applicant and objector:
 - (1) stipulation between objector and applicant
 - (2) DNRC can veto any stipulation if criteria can't be met.
 - (3) allow about 30 days.
- (G) Hearing:
 - (1) held within 90 days from last date of objection.
 - (2) applicant proves by substantial credible evidence (1981).
 - (a) water available.
 - (b) beneficial use - not for coal slurry.
 - (c) other rights not adversely affected.
 - (d) proposed means of diversion, construction and operation are adequate.
 - (e) no interference with other planned uses or reservations.
 - (f) applications greater than 15 cfs and 10,000 acre-feet.
 - (1) clear and convincing evidence of no adverse affect on prior appropriators.
 - (3) If there is insufficient facts to make a decision, the application will be denied.
 - (4) Groundwater use greater than 3,000 gpm.
 - (a) must be approved by the legislature.
- (H) Terms of the Permit:
 - (1) conditions.
 - (2) time limit for construction.
 - (a) extensions of time.

- (I) Revocation of the Permit:
 - (1) violation of the conditions.
 - (2) appropriation not commenced, prosecuted or completed.
- (J) Certificate of a Water Right:
 - (1) perfected right.
 - (2) issued by DNRC after general adjudication.

III. Discussion of Other Forms

- (A) Form 608 - Transfer:
 - (1) change in name *only*.
 - (2) file with DNRC.
- (B) Form 605 - Application for Provisional Permit for Stockwater Pit or Reservoir (85-2-305(3), MCA)
 - (1) used for only:
 - (a) stockwater pits or reservoirs less than 15 acre-feet, and
 - (b) on tracts greater than 40 acres, and
 - (c) on non-perennial streams.
 - (2) applications made to DNRC within 60 days after construction.
 - (3) permit automatically issued.
 - (4) permit may be revoked or modified if found at a hearing it is necessary to protect the rights of other appropriators.
- (C) Form 602 - Notice of Completion of Groundwater Development of less than 100 gpm:
 - (1) file with DNRC within 60 days of completion of the development.
 - (2) must make application for Provisional Permit within a controlled groundwater area.
 - (3) Certificate issued by DNRC.
 - (4) Notices of Completion for groundwater uses started between January 1, 1962 and July 1, 1973.

Changes of Water Right

I. Preparing the Application for Change

- (A) Description of right to be changed.
- (B) Description of past use.
 - (1) attach copy of the water right claim.

- (C) Description of proposed change:
 - (1) change all or portions.
 - (2) priority date of changed water right.
- (D) application fee:

II. Processing of Change Application

- (A) Notice and hearing similar to permit application:
 - (1) waive notice
- (B) Criteria - no adverse affect to existing water rights:
 - (1) includes both junior and senior water rights.
 - (2) burden on objector to show adverse affect.
 - (3) burden on applicant - no enlargement of water right and proof of the right.
 - (4) change to sprinkler from flood.
 - (5) Ag to industrial use greater than 15 cfs.
- (C) Authorization issued:
 - (1) conditions and limitations.
 - (2) time limit to complete the change.
- (D) Revocation:
 - (1) cause-violation of condition or limits.
- (E) Denial of Change Application:
 - (1) not an adjudication of the water right - only denial of the change proposed.
- (F) Notice of Change to Water Courts

THE HEARING PROCESS *

Hearings on applications for new water use permits or requests for authorizations to change existing water rights are exercises of the Department's "quasi-judicial" administrative authority. Such being the case, the constitutional due process trappings of oral testimony, exclusivity of record, and ~~cross-examination~~ are always relevant backdrop concepts. These concerns are statutorily focused within the procedural guise of the Montana Administrative Procedures Act. The trial-type ~~oradversarial~~ nature of the "contested case" provisions thereof should make most attorneys feel ~~comfortable~~.

The statutes ~~governing~~ the change of water rights and the acquisition of new water use ~~permits~~ provide the matrix for the ~~evidentiary~~ determinations, although it is apparent that these statutory provisions are based on ~~common~~ law notions of appropriation. Application of these principles may breed technical hydrological issues that an attorney must be generally familiar with.

A. The Nature of the Inquiry

- (1) ~~New~~ Water Use Permits
 - (a) impact on existing uses
 - (b) impact on subsequent uses
- (2) Changes of Existing Water Rights
 - (a) ~~new~~ appropriations vs. change
 - (b) ~~impact~~ on existing uses

B. Form of Proceeding - "Contested Case" Provisions of MAPA

- (1) "Formal" Contested Case
 - (a) exclusivity of record
 - (b) right of cross-examination
 - (c) testimony
- (2) "Informal" Contested Case
 - (a) no right of cross-examination

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C. Evidence

- (1) ~~Common~~ law and statutory rules of evidence do not apply except upon agreement **of** all parties
 - (a) constitutional due process concerns
 - (b) "reliable, probative and substantial evidence"
- (2) Official Notice
 - (a) expert interpretation vs. generation **of** additional data

D. Department's Evidentiary Role

- (1) Presence of Department personnel; representing the "public interest"
- (2) Department personnel inspections and reports

E. Mechanics

- (1) Hearings held at places convenient to the parties
- (2) ~~Hearing~~ held with notice and at times convenient to the parties

F. Developing the Case

- (1) Discovery available
 - (a) Department's "file"
- (2) "Summary" dispositions
- (3) Subpoena power
- (4) Where to go for technical assistance
- (5) Pre-hearing conferences

G. Proposal for Decision - The ~~Quasi~~ End-Product

- (1) Right to except or object
- (2) Final Order

H. Appeal Process

WATER RIGHTS LITIGATION

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Background

Water right litigation in Montana began shortly after Montana became a territory. The first water right case decided by the Supreme Court of Montana Territory was in 1869. Water right litigation has been ongoing ever since.

Water right litigation basically involves a search for history. The key element of litigation, *i.e.*, establishing the date of appropriation, usually requires assembling evidence that is 50 - 100 years old.

Not only is the evidence of ancient vintage, but so is the applicable law. As Professor **Al** Stone succinctly stated in the Preface of his book, Selected Aspects of Montana Water Law:

"For one to cope with Montana water law, **it** is essential at the outset to recognize that although the 1973 Water Use Act repealed most of the existing statutes and much of the prior case law, paradoxically, **it** made that **pre-1973** law more important, more current, and **more** active than ever. That is because 'existing rights' were expressly preserved by the 1972 Constitution and the 1973 Water Use Act; the latter Act defined such rights as one 'which would be protected under the law as **it** existed prior to July 1, 1973'. **It** follows that pre-1973 rights (or claims) are to be governed by pre-1973 law, just as though there had been no new Constitution nor any new water right law. Since the overwhelming **number** of claims and rights to Montana water predates 1973, the important, current and active law applicable to them is the law prior to the 1973 Water Use Act. That Act only repeals prior law for rights initiated after July 1, 1973."

Although the Montana Legislature has enacted a broad statutory procedure to adjudicate the existing water rights in Montana, usually referred to as the Senate Bill 76 water right adjudication procedure the principles discussed herein will be just as applicable in the litigation created under Senate Bill 76 as before its enactment.

When is litigation permitted?

- a. Litigation has been commenced and is presently ongoing through the SB 76 claim form process. (85-2-214, MCA)
- b. If a water distribution controversy arises upon a source of water in which existing rights have not been determined according to the procedures outlined in SB 76, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the issuance of the final decree. (85-2-406(2), MCA)
- c. When a water distribution controversy arises between appropriators on a source which has been the subject of a general determination of existing rights under the SB 76 claim form process, then the controversy is to be settled by the district court which issued the final decree. (85-2-406(3), MCA)

Jurisdiction

- a. Although a party to a water controversy is to petition the district court for relief, the water judge for the water division of that particular district court has "exclusive jurisdiction concerning the determination and interpretation of existing water rights." (3-7-501, MCA)
- b. The water judge may designate any other district judge within the water division to preside in his absence for the immediate enforcement of an existing decree or the immediate granting of extraordinary relief upon an allegation of irreparable harm. (3-7-213, MCA)

Preparing the case

- a. There are three types of a water right
 - (1) A notice of appropriation of water right filed in the Clerk and **Recorder;s** office.
 - a) A notice of appropriation must comply with the provisions of Section 89-810 and 89-813, R.C.M. 1947, (repealed 1973) or it is not competent evidence to prove extent or priority date of a water right. Holmstrom Land Co. v. Meagher

County Newlan Creek Water District and Ward Paper
Box Co., et.al., Mont. _____, 605 P.2d 1060
(1979)

- b) Proper compliance with these repealed statutes allows an appropriator the opportunity to relate the priority date back to the date of appropriation.

(2) Use right.

- a) A use right is initiated by the actual diversion of the water and the application of the water to a beneficial use. The priority is dated from the first beneficial use of the water.
- b) Evidence to prove the first use of the water generally is obtained through the testimony of elderly witnesses. Aerial photos can also be useful.

(3) Adjudicated water rights.

- a) Examine the decree carefully because an objective examination of a water right decree will periodically reveal that the water right claims of a current water user cannot be traced to the original decree.
- b) A water right established by a decree is not conclusive upon a party who was not a party to the adjudication. Sherlock v. Greaves, 106 Mont. 206, 214, 76 P.2d 87 (1938)

- b. Research and determine the existence of the water rights of your client and the adverse party using SB 76 claim forms, abstracts, water right indexes and decrees.

- c. Trace your client's chain of title as well as the title of all adverse parties.

- (1) Compare names of predecessors in interest to index of water right appropriators.
- (2) Establish privity of title with original appropriator.
- (3) The general rule is that a water right passes as an appurtenance to the transfer of the land unless expressly reserved or previously severed.
- (4) It is not unusual for water rights to be severed from the land.
- (5) CAVEAT: The recent case of Castillo, et.al. v. Kunnemann held that an owner of an existing water right must seek the approval of the Department of Natural Resources and Conservation pursuant to Section 85-2-403, MCA, before severing the water right from the land to which it was historically appurtenant. Therefore, any

attempted severance of a water right after July 1, 1973 without first obtaining the consent of the Department of Natural Resources and Conservation appears to be void. Cause No. 80-465, decided September 29, 1981.

- d. Do not rely upon your client's speculation as to the existence and source of his water right. Make your own determination to confirm your client's knowledge.
- e. Examine Water Resource Survey and the base line data which was used to prepare those surveys.
- f. Obtain aerial photos and maps of the irrigated areas.
- g. Make an inspection of the irrigated acreage of your client and that of the adverse party, preferably during the irrigation season.
 - (1) Prepare a drawing of the irrigation systems.
 - (2) Take plenty of photographs of ditches, headgates, place of use, constricted points in the conveyance system, etc.
 - (3) Use portable dictation equipment.
 - (4) Note any waste of water, increases in irrigated acreage and increases in the usage of water especially since July 1, 1973.
 - a) The exclusive method of acquiring a water right after July 1, 1973, is through the permit process of the 1973 Water Use Act.
 - b) Any enlargement of a water right after 1973 without a DNRC permit is therefore susceptible of challenge.
- h. Use an expert witness such as a hydrologist, soil scientist or agricultural engineer.
 - (1) Will testify as to the quantity of water needed, efficiencies of use, capacity of ditches and headgates.
 - (2) Landowner can testify as to these facts but expert testimony can be very persuasive. For example, see Gwynn v. City of Phillipsburg, 156 Mont. 194, 478 P.2d 855 (1971) and Holmstrom, supra.
- i. Determine existence of affirmative defenses.
 - (1) Abandonment.
 - (a) Requires relinquishment of possession and intent not to resume beneficial use. (Shammel v. Vogel, 144 Mont. 354, 396 P.2d 103 (1964))

- (b) Although the general rule is that mere nonuse is not usually sufficient to **establish abandonment**, seventy-five years of nonuse will provide clear evidence of abandonment. (Holmstrom, supra)
- (2) Adverse Possession or Prescriptive Right. (King v. Schultz, 141 Mont. 94, 375 P.2d 108 (1962))
 - (a) Continuous for statutory period.
 - (b) Exclusive (uninterrupted, peaceable).
 - (c) Open.
 - (d) Under claim of right.
 - (e) Hostile and an invasion of another's rights which he has a chance to prevent.

Temporary restraining orders:

- a. Almost all water right litigation usually begins with a petition for a temporary restraining order (**TRO**) filed during the early irrigation season.
- b. A hearing must be held within 10 days or the TRO expires by its own **terms**. (27-19-316, MCA)
- c. A TRO usually is the plaintiff's best friend and a defendant's worst enemy as it is almost impossible to adequately prepare for a show cause hearing within a 10-day period.
 - (1) The defendant often is forced to choose between making his appearance at the hearing with inadequate preparation or requesting a postponement of the hearing to a later date and suffering the intermittent damages created by the loss of water.
 - (2) Therefore, if a client brings a TRO proceeding into your office, do not wait very long to determine whether or not you are in a position to work on the lawsuit. **If** you cannot act immediately, you are not doing your client or yourself any service.
- d. Before a party may have an injunction he must submit proof of the right to use a specified quantity of water. Lewis v. Hanson, 124 Mont. 492, 498, 227 P.2d 70 (1951)
- e. In the event that the plaintiff is unsuccessful in its petition for a TRO and a party is wrongfully enjoined or restrained, then the wronged party can obtain damages sustained including reasonable attorney's fees. Marta v. Smith, 38 St.Rptr. 28 (1980).

Water Commissioner:

- a. The owners of 15% of the water rights of an adjudicated stream can petition for appointment of a water commissioner to distribute decreed rights and the rights established pursuant to the SB 76 process. (85-5-101, MCA)
- b. The water commissioner must keep a daily record of the amounts of water distributed to each water user and file a monthly summary with the clerk of court. (85-5-107, MCA)
- c. Any person dissatisfied with the distribution of water by the water commissioner can file a complaint with the district court. (85-5-301, MCA)
- d. A hearing will be held and if found to be necessary, the judge will give the water commissioner proper instructions to distribute the water or he will appoint another commissioner. (85-5-301, MCA)
- e. A dissatisfied water user's action is a summary proceeding and the only inquiry that can be pursued is to determine whether the allocation of water was in accordance with the existing decree. (Allen v. Wampler, 143 Mont. 486, 392 P.2d 82 (1964).
- f. So long as a party has all the water his necessity requires or his ditches will carry, it is immaterial that he has a right under decree or otherwise, to a greater flow from the creek. (Whitcomb v. Helena Water Works, 151 Mont. 443, 448, 444 P.2d 301 (1968)

The Key element in future litigation:

- a. The determination of the extent an "existing right" will be protected under the Law as it existed prior to July 1, 1973.

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