The MONTANA LAW of WATER RIGHTS

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PREFACE

This statement of the Montana law of water rights was prepared as part of the revision of "Selected Problems in the Law of Water Rights in the West," which was issued in 1942 as Miscellaneous Publication 418 of the United States Department of Agriculture. The completed revision will comprise an overall discussion of water rights law for the 17 Western States. This overall discussion will be followed by separate statements for each of the States concerned. If practicable, the separate for each State is to be issued in advance of publication of the complete revision.

The study reported here was prepared by the author under a cooperative arrangement with the Office of the General Counsel of the United States Department of Agriculture. The Montana Agricultural Experiment Station cooperated with the Department by publishing the separate for this State.

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STATE WATER POLICY

The Territory of Montana was established May 26, 1864.[1]

The Enabling Act was approved February 22, 1889.[2] Montana was admitted to statehood by proclamation of the President November 8, 1889.[3]

The State constitution provides that:[4]

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

The use of water in Montana, according to the supreme court of the State, is vital to the prosperity of the people, and such use, even by an individual, to irrigate a farm, is so much a contributing factor to the welfare of the State that the people in adopting the constitution declared it to be a public use.[5] In view of the constitutional declaration that the use of water is a public use, every citizen has a right to divert and use water from a stream so long as he does not infringe the rights of others acquired by prior appropriation.[6] The use of the water must be made with some regard for the rights of the public.[7]

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[1] 13 Stat. 85.

[2] 25 Stat. 676. This act related likewise to the territories of Washington and Dakota.

[3] 26 Stat. 1551. The State constitution was adopted by the constitutional convention August 17, 1889 and was ratified at an election held October 1, 1889.

[4] Mont. Const., art. III, sec. 15.

[5] *Allen* v. *Petrick*, 69 Mont. 373, 377, 222 Pac. 451 (1924). It was stated in *Ellinghouse* v. *Taylor*, 19 Mont. 462, 466, 48 Pac. 757 (1897): "This state is an arid country, and water is essential to the proper tillage of its scattered agricultural valleys. With all this in view, it was expressly declared in our state's constitution that the use of water by private individuals for the purpose of irrigating their lands should be a public use."

[6] *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 554-555, 81 Pac. 334 (1905); *State ex rel. Reeder* v. *District Court*, 100 Mont. 376, 380, 47 Pac. (2d) 653 (1935).

[7] *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 187, 50 Pac. 416 (1897). The constitutional provision has been construed or cited in several other decisions of the supreme court: *Prentice* v. *McKay*, 38 Mont. 114, 118, 98 Pac. 1081 (1909); *Bailey* v. *Tintinger*, 45 Mont. 154, 175, 122 Pac. 575 (1912); *Con-*

The court has said also that "the state of Montana has by necessary implication assumed to itself the ownership, *sub modo*, of the rivers and streams of this state, * * * ."[8] The public policy of the State recognizes that a water right may be acquired by prior appropriation, that an appropriator derives his right from the State and not from the National Government, and that the use of waters flowing in natural streams in the State is subject to State regulation and control; and this policy is irreconcilable with the application of the riparian doctrine.[9] Furthermore:[10]

> The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses.

It is to the interest of the public that water be conserved.[11] And it is the policy not only of Montana, but of all western States, to require the highest and greatest possible duty from the waters of the State in the interest of agriculture and other useful and beneficial purposes.[12]

The water right does not include the right to waste the water.[13] But while there is no question that waste of public water resources must be minimized in the general interest, it is equally manifest that there is a vanishing point at which the possible waste of water would be more than overcome by the waste incidental to the abandonment of reasonably efficient diversion systems and their replacement by systems at expense neither warranted nor permitted by the benefit to be derived from the water.[14] Expressed differently, "economy should not be insisted upon to such an extent as to imperil success."[15]

Public policy, as expressed in the constitutional provision above quoted,

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row v. *Huffine*, 48 Mont. 437, 444, 138 Pac. 1094 (1914); *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 167-168, 201 Pac. 702 (1921).

As to the provision for storage of water: *Donich* v. *Johnson*, 77 Mont. 229, 239-240, 250 Pac. 963 (1926). The impounding of water in a reservoir for irrigation is an important and integral part of the State's economy; under the constitution, it is a public use: *Farmers Union Oil Co.* v. *Anderson*, 129 Mont. 580, 583, 291 Pac. (2d) 604 (1955). See *Richland County* v. *Anderson*, 129 Mont. 559, 564, 291 Pac. (2d) 267 (1955).

[8] *Smith* v. *Denniff*, 24 Mont. 20, 21-22, 60 Pac. 398 (1900).

[9] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 168-169, 170, 201 Pac. 702 (1921).

[10] *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900).

[11] *Donich* v. *Johnson*, 77 Mont. 229, 239, 250 Pac. 963 (1926); *Farmers Union Oil Co.* v. *Anderson*, 129 Mont. 580, 583, 291 Pac. (2d) 604 (1955). The court stated, in *Irion v. Hyde*, 110 Mont. 570, 582, 105 Pac. (2d) 666 (1940): "There is no question that one of the paramount needs of the semi-arid states is the conservation of water."

[12] *Worden* v. *Alexander*, 108 Mont. 208, 216, 90 Pac. (2d) 160 (1939).

[13] *Dern* v. *Tanner*, 60 Fed. (2d) 626, 628 (D. Mont., 1932).

[14] *State ex rel. Crowley* v. *District Court*, 108 Mont. 89, 97-98, 88 Pac. (2d) 23 (1939).

[15] *Allen* v. *Petrick*, 69 Mont. 373, 380, 222 Pac. 451 (1924); *Worden* v. *Alexander*, 108 Mont. 208, 216, 90 Pac. (2d) 160 (1939).

in the statutes, and in the court decisions of Montana, recognizes the value of water conservation through the storage and subsequent utilization of waters and encourages appropriations of water for that purpose. (See "The appropriative right—Elements of the right—Storage of water," below.)

A statute enacted in 1939 provides that:[16]

> It is hereby declared to be the policy of this State and necessary for the welfare of the State and its citizens, that the waters of this State and especially interstate streams arising out of the State, be investigated and adjudicated as soon as possible in order to protect the rights of water users in this State and negotiate interstate compacts in relation thereto, and that the State Water Conservation Board and State Engineer make investigations to secure necessary information and initiate and carry on actions therefor.

This declared policy is being implemented by the Montana Water Resources Survey, which is being conducted cooperatively by the State Engineer, State Water Conservation Board, and Montana Agricultural Experiment Station; by completion of the Yellowstone River interstate water compact; and by negotiations for interstate compacts relating to the waters of Columbia River and of Little Missouri River.

WATERCOURSES

CHARACTERISTICS OF WATERCOURSE

Elements of Watercourse

Definitions of watercourse approved by the Supreme Court of Montana include the following items:[17] The watercourse contains a channel cut by running water, with well-defined banks through which water flows for substantial periods of each year; and a living stream with defined banks and channel, not necessarily running at all times, but fed from other and more permanent sources than mere diffused surface water, which to the casual glance bears the unmistakable impress of the frequent action of water which has flowed through it from time immemorial. It contains substantial indications of the existence of a stream which ordinarily is a moving body of water, not including holes, gullies, or ravines in which mere diffused surface water from rain or melting snow at irregular periods is discharged from a higher to a lower level and which at other times are destitute of water.[18]

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[16] Mont. Laws 1939, ch. 185, sec. 1; Rev. Codes 1947, sec. 89-847.

[17] *Doney* v. *Beatty*, 124 Mont. 41, 45, 51, 220 Pac. (2d) 77, 79, 82 (1950).

[18] See also *Le Munyon* v. *Gallatin Valley Ry.*, 60 Mont. 517, 523, 199 Pac. 915 (1921); *Meine* v. *Ferris*, 126 Mont. 210, 212, 247 Pac. (2d) 195, 196 (1952). Where waters from storms, melting snow, and other sources, including vagrant fugitive waters, finally collect in a natural channel and thus lose their original character as seepage, percolating, surface, or waste waters, and flow with regularity from year to year, although the channel may be dry for the major portion of each year, such waters so flowing in the channel constitute a watercourse within the meaning of the law of water rights: *Popham* v. *Holloron*, 84 Mont. 442, 450-451, 275 Pac. 1099 (1929). See also *West Side Ditch Co.* v. *Bennett*, 106 Mont. 422, 431-433, 78 Pac. (2d) 78 (1938).

Collateral Questions Concerning Watercourses

Classification of overflow from watercourse

The following rule was adopted by the supreme court as the safest guide for the determination of the question as to whether overflow waters from a stream are part of a natural watercourse, or are diffused surface waters:[19]

> Whether the water from the overflow of streams is to be considered as still a part of the watercourse, or to be treated as surface water, shall depend upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current, or leaves the same never to return, and spreads out over the lower ground, it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, it is to be regarded as still a part of the stream. * * *

With respect to characteristics of diffused surface water see "Diffused surface waters," below.

Use of stream bed on one's land

The right of a landowner to utilize the bed of a stream on his own land for agricultural purposes depends under some circumstances upon the classification of the flow of the stream.[20] That is, if the stream in controversy is a natural watercourse, the landowner has no right to cultivate that part of its bed on his own land and thereby prevent the proprietors along the banks upstream from allowing the waters to flow down from their lands in the accustomed channel, unless the upstream proprietors have granted the lower proprietor the right or unless he has acquired it by prescription. If the stream channel, on the other hand, is only a passageway for the flow of diffused surface waters, the upper proprietors under the common-law rule adopted in Montana with respect to the flow of such waters do not have an easement in lower lands for flowage of the diffused waters thereon. (See "Diffused surface waters," below.)

An intentional artificial change that was made in the channel of Tongue River left the old channel abandoned and dry from bank to bank.[21] In rejecting a contention by an intervener, the Montana Supreme Court held that this change did not create any land in the river channel by either accretion or reliction.

PROPERTY RIGHTS IN WATER

Running water in a natural stream is *publici juris;* that is, it belongs to the public.[22] It is an elementary principle that the appropriator does not

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[19] *Fordham* v. *Northern Pacific Ry.*, 30 Mont. 421, 431, 76 Pac. 1040 (1904). See also *Wine* v. *Northern Pacific Ry.*, 48 Mont. 200, 207-208, 136 Pac. 387 (1913).

[20] *Campbell* v. *Flannery*, 29 Mont. 246, 250-251, 74 Pac. 450 (1903).

[21] *Helland* v. *Custer County*, 127 Mont. 23, 30, 256 Pac. (2d) 1085 (1953).

[22] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 162, 201 Pac. 702 (1921).

own the *corpus* of the water while it is running in the stream.[23] The right that the appropriator acquires is a right to the usufruct of the water, that is, a right of possession and use only. (See "The appropriative right—Property characteristics—Right of beneficial use," below.)

ESTABLISHMENT OF THE APPROPRIATION DOCTRINE

Legislation

The first legislative assembly of the Territory of Montana passed an act to protect and regulate the irrigation of land.[24] This act provided that any owner or holder of a possessory right or title to land on the bank or margin of a stream, or in the neighborhood of any stream, should be entitled to the use of the water of such stream for the purpose of irrigation, and to a right of way for his ditch, if necessary, over intervening property. Subsequent Territorial legislation recognized the doctrine of appropriation as applicable to all controversies respecting the right to the use of water for mining, manufacturing, agriculture, and other useful purposes, with modifications theretofore existing under local laws, rules, customs, and decisions of the Territorial supreme court. Both Territorial and State legislation have prescribed methods for the appropriation of water.[25] The provision in the State constitution concerning the use of appropriated water[26] is set out under "State water policy," above.

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[23] *Custer* v. *Missoula Public Service Co.*, 91 Mont. 136, 142, 6 Pac. (2d) 131 (1931). This principle has been stated in numerous cases with reference to many different circumstances. See *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 573, 39 Pac. 1054 (1895); *Norman* v. *Corbley*, 32 Mont. 195, 202, 79 Pac. 1059 (1905); *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 161-162, 201 Pac. 702 (1921); *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 578, 227 Pac. 68 (1924); *Tucker v. Missoula Light & Ry. Co.*, 77 Mont. 91, 101, 250 Pac. 11 (1926); *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 258-259, 17 Pac. (2d) 1074 (1933); *State ex rel. Mungas* v. *District Court*, 102 Mont. 533, 538, 59 Pac. (2d) 71 (1936). In some other cases the court has said that the appropriator acquires no title to the water. See *Chessman* v. *Hale*, 31 Mont. 577, 583-584, 79 Pac. 254 (1905); *Wallace* v. *Weaver*, 47 Mont. 437, 442, 133 Pac. 1099 (1913); *Allen* v. *Petrick*, 69 Mont. 373, 377, 222 Pac. 451 (1924); *Brennan* v. *Jones*, 101 Mont. 550, 567, 55 Pac. (2d) 697 (1936); *Sherlock v. Greaves*, 106 Mont. 206, 217-218, 76 Pac. (2d) 87 (1938). In one of the early cases, *Creek* v. *Bozeman Water Works Co.*, 15 Mont. 121, 128-129, 38 Pac. 459 (1894), the court stated that the right acquired by an appropriator in and to the waters of a natural stream was not an ownership of a running volume of the dimensions claimed, like the individual ownership of a chattel, or, as it might more aptly be termed, the common law.

[24] Bannack Stats., p. 367, approved January 12, 1865.

[25] A chronological account of Territorial and State legislation relating to acquirement of rights to the use of water is contained in the case of *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 166-168, 201 Pac. 702 (1921). A briefer summary is contained in *Bailey* v. *Tintinger*, 45 Mont. 154, 166-167, 122 Pac. 575 (1912). A historical statement of the development of the appropriation doctrine in Montana, repudiation of the riparian doctrine, and unsuccessful attempts to obtain a centralized system of control of water rights is given by Dunbar, Robert G., "The Search for a Stable Water Right in Montana," 28 Agricultural History 138-149 (1954).

[26] Mont. Const., art. III, sec. 15.

Court Decisions

Development of doctrine in mining areas

The appropriation doctrine in Montana apparently was developed primarily in the mining areas, prior to any legislation on the subject, as the result of local customs and rules of mining camps.[27] These mining customs and rules, according to the supreme court, had been introduced from similar developments in California, thus:[28]

> It is well known that the law itself had its origin in the customs of miners and others in California. These customs had ripened into well-recognized rules some considerable time before there was organized local government in that country and before there was any legislation upon the subject whatever, and these customs were subsequently recognized as having the force of law, by state and national legislation and by the decisions of courts. * * * These customs formed a part of our unwritten law, or, as it might more aptly be termed, the common law of this country as distinguished from the common law of England. * * *

The same court said, in another case,[29] that prior to the enactment on March 12, 1885, of the first statute prescribing the method of making an appropriation of water:

> * * * all appropriations were made pursuant to the rules and customs of the early settlers of California, which had been adopted in Montana territory and given the force of law, by recognition of the legislature (Bannack Statutes, Laws 1869-70, p. 57) and the courts. * * *

And a Federal court has said, with reference to conflicting claims to the waters of a stream that crosses the interstate boundary line between Montana and Wyoming, that:[30]

> Long before the enactment of any statute in the arid states or territories, the custom of taking water had ripened into the right to use it. * * *

The outstanding importance of mining in controversies relating to the use of water in Montana during the Territorial period is indicated by the preponderance of mining water-right cases that were decided in that period. Of the Montana Supreme Court decisions relating to water rights that were examined in the course of this study, 42 were rendered to 1900, inclusive. These include 13 decisions rendered by the Territorial supreme court during the approximate 20-year period from 1869 to 1889, inclusive, and 29 by the State supreme court in the 10-year period 1891 to 1900, inclusive. Of the 13 Territorial cases, 8 concerned rights of use of water for mining and for milling purposes connected with mining, 3 concerned irrigation, and 2 in-

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[27] *Stearns* v. *Benedick*, 126 Mont. 272, 274-275, 247 Pac. (2d) 656, 657 (1952).

[28] *Bailey* v. *Tintinger*, 45 Mont. 154, 166, 122 Pac. 575 (1912).

[29] *Maynard* v. *Watkins*, 55 Mont. 54, 55, 173 Pac. 551 (1918).

[30] *Morris* v. *Bean*, 146 Fed. 423, 426 (C.C.D. Mont., 1906). The Montana Supreme Court stated in 1952, in *Stearns* v. *Benedick*, 126 Mont. 272, 275, 247 Pac. (2d) 656, 657 (1952): "So in the various western states including Montana, the earliest statutes governing the appropriation of waters were enacted long after irrigation development had begun."

volved conflicts between mining and irrigation interests. On the other hand, 21 of the 29 ensuing State court cases were controversies over irrigation water rights and only 3 concerned mining and milling purposes solely.[31]

Recognition by the courts

The appropriation doctrine was recognized with respect to a claim of right to use water for mining purposes in the first decision rendered by the Montana Supreme Court in a water-right controversy.[32] In the second reported water-right case the supreme court stated that it was not necessary to determine therein "whether or not the doctrine of appropriation applies to ranchmen as well as to miners, concerning water rights, * * * ."[33] However, a decision rendered two years later sustained the right of an appropriator on the public domain for irrigation purposes, the decision being affirmed by the United States Supreme Court.[34]

In the same year (1872) the Territorial court, in a mining case, stated that the doctrine that the first appropriator of water for mining purposes was entitled to the waters of a stream as against subsequent appropriators without material interruption in the flow thereof, in either quantity or quality, was fully recognized, and that the proposition had been too long established in the mining region of Montana to be then called in question; and the United States Supreme Court affirmed this decision, holding that the right to water by prior appropriation had been recognized and established as the law of miners on the mineral lands of the public domain.[35]

According to the State supreme court in 1897, the right to appropriate water for mining and other useful purposes might be safely said to be settled as the law of all of the mining States of the West, and "It is certainly the settled rule in this state."[36] The appropriation doctrine "was born of the necessities of this state and its people;" and was intended by the constitution and statutes to be permanent in character, exclusive in operation, and to fix the status of water rights in the jurisdiction.[37] With reference to

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[31] Of the other 5 cases reviewed, 2 involved both irrigation and other purposes, 2 were conflicts between mining and irrigation, and one was a controversy between holders of mining and domestic water rights.

[32] *Caruthers* v. *Pemberton*, 1 Mont. 111, 117 (1869).

[33] *Thorp* v. *Woolman*, 1 Mont. 168, 171 (1870).

[34] *Gallagher* v. *Basey*, 1 Mont. 457, 460-462 (1872); affirmed, *Basey* v. *Gallagher*, 87 U. S. 670, 681-682, 685-686 (1875). The Supreme Court referred to the case of *Atchison* v. *Peterson*, 87 U. S. 507 (1874), recently decided with reference to rights of miners on the public domain, and stated that the views there expressed and the rulings made were equally applicable to the use of water on the public lands for the purposes of irrigation. "No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." (87 U. S. at 682).

[35] *Atchison* v. *Peterson*, 1 Mont. 561, 569 (1872); affirmed, *Atchison* v. *Peterson*, 87 U. S. 507, 510-516 (1874). A lengthy quotation from the Supreme Court decision is given below under "Repudiation of riparian doctrine."

[36] *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 185, 50 Pac. 416 (1897).

[37] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 170, 201 Pac. 702 (1921).

both Montana and Wyoming, the United States Supreme Court said in 1911 that:[38]

> The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory * * * , and is recognized by both States now. * * *

REPUDIATION OF THE RIPARIAN DOCTRINE

The Montana Supreme Court referred to riparian rights in several decisions beginning very early in the series of reported cases. Not until 1921, however, did that court have occasion to analyze the subject thoroughly and to render a decision in a controversy the determination of which required either the express recognition or express repudiation of the riparian doctrine.[39]

In its second reported decision with respect to controversies over water rights, the Territorial supreme court made certain references to the riparian doctrine, but held that under a statute that had been enacted, and in equity, the first settler who diverted water for irrigation purposes acquired the first right to the use of water on that stream.[40] The court stated that there were many reasons for holding that this statute recognized or established the doctrine of appropriation of water for irrigation, limiting, however, the right to appropriate water to persons owning land on the banks of the stream and also limiting the quantity of water to that necessary for irrigating his land; and that the permission given by the act to divert water for irrigation purposes where it damaged landholders below the point of diversion was incompatible with the common-law riparian doctrine.

The unsuitability of the riparian doctrine to the use of water for mining purposes on the public domain was discussed by the United States Supreme Court in a decision affirming a decision by the Territorial supreme court of Montana.[41] The Supreme Court stated that:

> By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such

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[38] *Bean* v. *Morris*, 221 U. S. 485, 487 (1911).

[39] For a historical statement of the development of the riparian-appropriation conflict in Montana and its settlement by the decision of the Montana Supreme Court in *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 201 Pac. 702 (1921), see Dunbar, *op. cit., supra*, footnote 25, at pp. 138-141.

[40] *Thorp* v. *Woolman*, 1 Mont. 168, 171-172 (1870). The statute in question (Bannack Stats., p. 367, approved January 12, 1865) provided that any owner or holder of a possessory right or title to land on the bank or margin or in the neighborhood of any stream should be entitled to the use of the water of such stream for the purpose of irrigation, and, if his land was too far removed from the stream to obtain access otherwise, he should have a right of way for the necessary ditch or ditches over the intervening property.

[41] *Atchison* v. *Peterson*, 87 U. S. 507, 510-513 (1874); affirming *Atchison* v. *Peterson*, 1 Mont. 561 (1872).

lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable, takes the land to the centre of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. * * *

This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories. * * *

This doctrine of right by prior appropriation, was recognized by the legislation of Congress in 1866. * * * 14 Stat. at L., 253.

The State supreme court said in 1897 that the common-law riparian doctrine had been departed from, if it ever had been recognized as the rule of law, in the gold mining States and Territories of the Northwest.[42] In 1899 the court stated that the suggestion that one of the parties had rights as a riparian holder could have no force as against another party who had made an appropriation for beneficial use under the statutes recognizing such right.[43] And in a decision rendered during the following year a number of comments were made concerning the riparian doctrine, such comments apparently being altogether *dicta* because they had nothing to do with the facts or issues involved.[44]

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[42] *Fitzpatrick* v. *Montgomery,* 20 Mont. 181, 185, 50 Pac. 416 (1897).

[43] *Haggin* v. *Saile,* 23 Mont. 375, 381, 59 Pac. 154 (1899).

[44] *Smith* v. *Denniff,* 24 Mont. 20, 21-23, 60 Pac. 398 (1900).

In 1921, for the first time in the judicial history of Montana, the supreme court rendered a decision in a case in which there was squarely presented for consideration a claim of riparian rights as against a claim of appropriative right.[45] The court reviewed the decisions it had rendered on the subject of riparian rights and stated that while in various cases observations had been made upon some phase or other of the riparian doctrine, an examination of the facts would disclose that the question of riparian rights had not been involved in any of them and that the comment made upon the subject by the court in every instance was purely *obiter dictum*. Therefore, the court felt entirely at liberty to treat the matter as one of first impression in the jurisdiction. After reviewing the Territorial and State legislation on water rights and construing the public policy of the State indicated by such measures with respect to the subject under review, the court concluded (at 61 Mont. 170-171) that:

> It is submitted that the policy established by the measures above is irreconcilable with the application of the doctrine of riparian rights even in the modified form in which that doctrine now prevails in the states adhering to the California rule; that our Constitution and statutes proceed upon the theory that artificial irrigation is absolutely necessary to the successful cultivation of large areas of land within the state; that the doctrine of appropriation was born of the necessities of this state and its people; and that it was intended to be permanent in its character, exclusive in its operation, and to fix the status of water rights in this commonwealth.
>
> 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; that it is unsuited to the conditions here; and that the complaint in this action does not state facts sufficient to entitle the plaintiff to relief.

The unequivocal declaration in *Mettler* v. *Ames Realty Co.* was sustained in a subsequent case in which certain parties, even though they could not claim a water right for irrigation purposes, did contend that they might use the waters of a stream for domestic use and for watering livestock—"the so-called natural purposes"—under claimed riparian rights, placing reliance for that contention upon the decision in the *Mettler* case.[46] The court said that:

> But counsel completely misapprehends the force and effect of that decision. It was there held that the doctrine of riparian rights has never prevailed in Montana since 1865; that the doctrine of appropriation has prevailed and does prevail now; that the doctrine of appropriation sanctions the right of an appropriator to use all of the waters of a stream to the exclusion of riparian proprietors, if the entire flow has been appropriated by him, subject only to his needs and facilities as therein explained.

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[45] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 157-158, 165, 166, 201 Pac. 702 (1921). Plaintiff owned lands contiguous to a stream and claimed that she was entitled to assert the common-law doctrine of riparian rights as against defendant, who held an appropriative right for irrigation purposes out of the same stream. Plaintiff brought action for an injunction against defendant because of the action of the latter in diverting the water away from the stream above plaintiff's lands and thereby depriving plaintiff of any use of the waters during the irrigation season.

[46] *Wallace* v. *Goldberg*, 72 Mont. 234, 244, 231 Pac. 56 (1925).

APPROPRIATION OF WATER

Waters Subject to Appropriation

Constitutional and statutory provisions

The State constitution provides that the use of all water appropriated or to be appropriated for beneficial use shall be held to be a public use, without differentiating between sources of appropriable supplies of water.[47]

The State statute, in prescribing methods for the appropriation of water, uses identical language with respect to appropriable waters in the two sections relating respectively to nonadjudicated and to adjudicated sources, each of which begins with the following language:[48]

> Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply * * * .

Another section provides that 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 that an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.[49] The matter of appropriating seepage and waste waters is discussed later (see "Waste, seepage, drainage, and return waters").

The supreme court has said that the statutory provision relating to the appropriation of water from adjudicated sources contemplates that one who seeks to make such an appropriation may do so without regard to whether the water he seeks to appropriate is "a part of the normal flow, or is flood or excess water in the stream."[50]

"Surplus water" as referred to in the statute requiring an appropriator to return to the stream water diverted in excess of his needs relates to water in excess of the quantity to which the appropriator at a particular time is entitled.[51]

Alternative sources of supply

The supreme court has held in several cases that where an appropriator has a prior right to the use of water from each of two sources of supply, and another party has a subsequent right to the use of one of those sources, the latter cannot, as of right, compel the prior appropriator to exhaust his rights in the source in which the junior appropriator has no right before resorting to the other source.[52] To allow that would result in interference

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[47] Mont. Const., art. III, sec. 15.

[48] Mont. Rev. Codes 1947, secs. 89-810 and 89-829.

[49] Mont. Rev. Codes 1947, sec. 89-801.

[50] *Quigley* v. *McIntosh*, 88 Mont. 103, 107-108, 290 Pac. 266 (1930).

[51] *Clausen* v. *Armington*, 123 Mont. 1, 17-18, 212 Pac. (2d) 440, 449-450 (1949). The statutory provision is sec. 89-805 of Mont. Rev. Codes 1947.

[52] *Norman* v. *Corbley*, 32 Mont. 195, 204-205, 79 Pac. 1059 (1905); *Boyd* v. *Huffine*, 44 Mont. 306, 310, 120 Pac. 228 (1911); *Wheat* v. *Cameron*, 64 Mont. 494, 502, 210 Pac. 761 (1922).

with the rights of junior appropriators not before the court, if there are any, to the waters of the first-named source, and would amount to an adjudication of the rights of persons not parties to the suit.

However, an appropriator is not permitted to appropriate all the water his lands require, first from one stream and then from another, and thereafter hold both rights as against subsequent appropriators.[53] Under such circumstances, said the court:

> He must elect to hold one or the other, as best adapted for his use; and where he abandons one right, relying on the other as sufficient for his needs, rights to the appropriation abandoned are lost, and reassertion of right to the abandonment appropriation, because of sale of the other right, merely amounts to a new appropriation. * * *

The distinction probably is that if an appropriator needs both sources for the satisfaction of the needs of his land, he may validly appropriate the water of both; but that if one source is adequate, he is not entitled to shift his diversions back and forth from one source to the other.

Who May Appropriate Water

General authorization

The sections of the water-rights statute providing procedure for the appropriation of water refer to "Any person hereafter desiring to appropriate * * * ."[54]

Early Territorial legislation authorized holders of possessory rights or title to lands to use the waters of streams in the neighborhood for irrigation.[55] According to the supreme court, this act apparently sought to limit the right to appropriate water for irrigation to those owning or possessing agricultural lands, the provision, however, being "omitted advisedly from the Codes of 1895 and 1907."[56] As brought out in the discussion of the "Relation of land to appropriation of water," below, the validity of an appropriation made for one's own use depends apparently upon the holding of at least a possessory interest in land in connection with which the water is to be used, the situation being otherwise in the case of appropriations made for the sale or rental of water. It may be noted that the section of the extant statute authorizing the diversion of natural stream flow in lieu of stored water applies to "Any person, persons, association or corporation, owning or in possession of lands susceptible of irrigation from any stream, * * * ."[57]

Alien

The supreme court held in 1892 that an alien could acquire title to a ditch and water right, "and hold the same until office found, against col-

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[53] *O'Shea* v. *Doty*, 68 Mont. 316, 320-321, 218 Pac. 658 (1923).
[54] Mont. Rev. Codes 1947, secs. 89-810 and 89-829.
[55] Mont. Bannack Stats., p. 367; Laws 1869-70, p. 57.
[56] *Bailey* v. *Tintinger*, 45 Mont. 154, 166, 175, 122 Pac. 575 (1912).
[57] Mont. Rev. Codes 1947, sec. 89-806.

lateral attacks by third persons other than the sovereign," and "in the absence of forfeiture by office found, may convey title to his grantee."[58]

Public service corporation

A public service corporation can make an appropriation of water in its own right, its appropriation being complete when it has fully complied with the statute and has its distributing system completed and is ready and offers to deliver water to users upon demand.[59] Related matters are discussed hereinafter under "Relation of land to appropriation of water—Private lands," "Completion of appropriation," and "The appropriative right—Elements of the right—Sale or rental of water."

United States

The water appropriation statute provides that the United States, acting by and through the Secretary of the Interior or his representative, may appropriate the water of streams or lakes within the State in the same manner and subject to the general conditions applicable to the appropriation of the waters of the State by individuals.[60]

The supreme court has stated that inherent in the public policy of the State is the principle that an appropriator derives his right from the State and not from the National Government; that the use of waters flowing in natural streams in the State is subject to State regulation and control; and that in order for the government of the United States to acquire the right to the use of waters flowing in streams in Montana, it must proceed as an individual to make an appropriation in compliance with the State laws.[61]

Waters on Indian reservations impliedly reserved by the United States Government for irrigation purposes on behalf of the Indians are held by the Government for such purpose and hence are not subject to appropriation by others. (See "Relation of land to appropriation of water—Indian reservation," below.)

Relation of Land to Appropriation of Water

It has been shown in discussing the qualifications of appropriators (see "Who may appropriate water") that the statutes of the Territory originally sought to limit the right to appropriate water to those owning or possessing agricultural land, and that that statutory provision subsequently was eliminated. It was shown also that the extant statutes do not prescribe qualifications of persons seeking to appropriate water, although there is a qualification relating to ownership or possession of land in the section relating to the right to substitute natural flow for storage water. The question of ownership or possession of land in relation to the acquirement of an appropriative right has been involved in a considerable number of decisions of the State supreme court.

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[58] *Quigley* v. *Birdseye*, 11 Mont. 439, 445-446, 28 Pac. 741 (1892).

[59] *Bailey* v. *Tintinger*, 45 Mont. 154, 177-178, 122 Pac. 575 (1912).

[60] Mont. Rev. Codes 1947, sec. 89-808.

[61] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 168-169, 201 Pac. 702 (1921).

Public domain

Appropriations of water on the public domain, in most cases for mining purposes and in some cases for irrigation, were made prior to any legislation by Congress on the subject. Congress, by the act of 1866,[62] recognized as against the United States the rights to the use of water for beneficial purposes that had vested and accrued by priority of possession on the public domain, and that were recognized and acknowledged by local customs, laws, and decisions of courts. It also thereby confirmed rights of way for ditches for such purposes; and by an amendment in 1870,[63] provided that all patents, pre-emptions, or homesteads should be subject to any vested or accrued water rights or rights of way for ditches acquired under or recognized by the Act of 1866. Probably most or all of the early water rights in Montana were acquired by appropriating the water on the public domain.[64]

Obviously, while any lands upon which intending appropriators planned to use water were a part of the public domain, the title remained in the United States and so the intending appropriator could acquire no more than a possessory interest in such lands. It is held, therefore, that in order to effectuate an appropriation of water for use on such public lands it is sufficient if the settler and claimant has a possessory interest which he holds in good faith, with a bona fide intention eventually to acquire title to such lands.[65]

With reference to the acquisition of appropriative rights on unsurveyed public lands by "squatters" who take possession in good faith, the supreme court stated in 1897 that:[66]

> A squatter or settler upon unsurveyed public lands of the United States has never been regarded as a trespasser. Such a possession of unsurveyed public land taken in good faith is clearly recognized in the general spirit of congressional legislation (see particularly acts granting government lands to railroads), and is always carefully protected by the courts. Of course, it is subservient to the United States government, or an actual

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[62] 14 Stat. 253, sec. 9 (July 26, 1866); U. S. Rev. Stat., sec. 2339.

[63] 16 Stat. 218 (July 9, 1870); U. S. Rev. Stat., sec. 2340.

[64] For a few decisions relating to such appropriations, see *Gallagher* v. *Basey*, 1 Mont. 457, 460-462 (1872), affirmed, *Basey* v. *Gallagher*, 87 U. S. 670, 681-684 (1875); *Atchison* v. *Peterson*, 1 Mont. 561, 569 (1872), affirmed, *Atchison* v. *Peterson*, 87 U. S. 507, 510-514 (1874); *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 185, 50 Pac. 416 (1897); *Smith* v. *Denniff*, 24 Mont. 20, 21, 60 Pac. 398 (1900); *Ryan* v. *Quinlan*, 45 Mont. 521, 531, 124 Pac. 512 (1912); *Galahan* v. *Lewis*, 105 Mont. 294, 300-301, 72 Pac. (2d) 1018 (1937). See also *State* v. *Quantic*, 37 Mont. 32, 54-55, 94 Pac. 491 (1908); *Prentice* v. *McKay*, 38 Mont. 114, 117, 98 Pac. 1081 (1909).

[65] *Wood* v. *Lowney*, 20 Mont. 273, 277-278, 50 Pac. 794 (1897).

[66] *McDonald* v. *Lannen*, 19 Mont. 78, 84, 47 Pac. 648 (1897). See also *St. Onge* v. *Blakely*, 76 Mont. 1, 18, 245 Pac. 532 (1926); *Wills* v. *Morris*, 100 Mont. 514, 531-532, 50 Pac. (2d) 862 (1935). It is stated in *Gilcrest* v. *Bowen*, 95 Mont. 44, 52, 24 Pac. (2d) 141 (1933), that "any person who occupies land, fences and improves it with the bona fide intention of acquiring title from the United States at some time, has such title as will support a water appropriation—in common parlance, a 'squatter's right' is sufficient— * * * ."

> or inchoate grantee of the government. But, as against all others, such a right, based though it be upon mere possession, is absolute. The settler may build and make other improvements upon the land. He has such a possession as to admit of the legal appropriation of a water right therefor. * * *

Several years later, the court emphasized the necessity of a bona fide intention upon the part of the "squatter," as follows:[67]

> We recognize that possessory rights upon the public domain will be protected, and that appropriations of water for the benefit of squatters' claims will be upheld, but such appropriations must always be for beneficial uses then existing, or contemplated in the future, and as against others, who have initiated rights, will not avail, where there is no actual possession held, and where it is evident none was claimed with a purpose of securing privileges and rights under the laws of the United States existing when the squatters went upon the unsurveyed tracts.

Indian reservation

Waters on an Indian reservation that have been impliedly reserved for irrigation purposes on behalf of the Indians are owned by the United States in trust for the benefit of the Indians and hence are not subject to appropriation by others. The United States Supreme Court held that by the agreement that resulted in the creation of Fort Belknap Reservation in Montana, there was such an implied reservation of water of the Milk River for irrigation purposes in favor of the Indians on that reservation.[68] The Court stated (at 207 U. S. 577) that:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. * * *

The Montana Supreme Court held to the same effect in a case involving waters on the Crow Creek Indian Reservation.[69]

State lands

The State of Montana, by legislation authorizing the appropriation of water of streams (first adopted by the Territory and continued by the State), has conferred upon any one the right to make a valid appropriation of water on unsold State lands.[70] An appropriation of water for use on State school land, leased by the irrigator from the State, was held not to be invalid because title to the land was not in the appropriator.[71]

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[67] *Toohey* v. *Campbell,* 24 Mont. 13, 19, 60 Pac. 396 (1900).

[68] *Winters* v. *United States,* 207 U. S. 564, 576-577 (1908).

[69] *Anderson* v. *Spear-Morgan Livestock Co.,* 107 Mont. 18, 25, 79 Pac. (2d) 667 (1938). See *Lewis* v. *Hanson,* 124 Mont. 492, 496-497, 227 Pac. (2d) 70 (1951).

[70] *Smith* v. *Denniff,* 24 Mont. 20, 22, 60 Pac. 398 (1900). The statute referred to was sec. 1880 and following of the Civil Code, now Rev. Codes 1947, secs. 89-801 and following. See also *Prentice* v. *McKay,* 38 Mont. 114, 117, 98 Pac. 1081 (1909).

[71] *Sayre* v. *Johnson,* 33 Mont. 15, 20, 81 Pac. 389 (1905).

Private lands

Water to be used by appropriator.—Fee simple title to land is not necessary to the acquirement of an appropriative right to use water in irrigating that land.[72] That is, the right to use water is a possessory one that may be obtained by appropriation for beneficial use, and hence may be owned without regard to the title to the lands upon which the water is to be used.[73] And so the bona fide intention required of an appropriator to apply the water to some useful purpose may comprehend a use upon "lands and possessions" other than those of the appropriator.[74]

However, if the appropriator does not own the land he intends to irrigate, at least rightful possession—that is, a possessory interest—is necessary to the acquirement by him of a valid water right; for if such appropriator has no land, or legal possession of land, he has nothing for which he can appropriate the water.[75] In stating that the use of water may be prospective and contemplated, the courts have said that this is so, provided, among other things, "there is a present ownership or possessory right to the lands upon which it is to be applied."[76]

The requirement of a possessory interest (in private land) is satisfied where one holds lands under contract for its purchase;[77] or where one is admittedly in rightful possession of land under a contract with its owner although the nature of the contract does not appear in the record;[78] or where land is rightfully held under rental or lease.[79]

Water to be sold or rented to others.—The supreme court has made a definite distinction in the matter of ownership or possession of land in the case of a corporation organized to sell or rent water.[80] The court pointed out that such a corporation does not own, control, or possess any land; that it cannot use water itself, for it has no land on which to use the water; and that after completion of its distribution system further acts must be per-

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[72] *Sayre v. Johnson,* 33 Mont. 15, 20, 81 Pac. 389 (1905); *Thomas* v. *Ball,* 66 Mont. 161, 166, 213 Pac. 597 (1923).

[73] *Toohey* v. *Campbell,* 24 Mont. 13, 17, 60 Pac. 396 (1900); *Hays* v. *Buzard,* 31 Mont. 74, 82, 77 Pac. 423 (1904); *St. Onge* v. *Blakely,* 76 Mont. 1, 18, 245 Pac. 532 (1926).

[74] *Smith* v. *Denniff,* 24 Mont. 20, 29, 60 Pac. 398 (1900).

[75] *Tucker* v. *Jones,* 8 Mont. 225, 229, 19 Pac. 571 (1888). See *Gilcrest* v. *Bowen,* 95 Mont. 44, 49-50, 24 Pac. (2d) 141 (1933).

[76] *O'Shea* v. *Doty,* 68 Mont. 316, 320, 218 Pac. 658 (1923); *St. Onge* v. *Blakely,* 76 Mont. 1, 23, 245 Pac. 532 (1926).

[77] *St. Onge* v. *Blakely,* 76 Mont. 1, 18, 245 Pac. 532 (1926).

[78] *Smith* v. *Denniff,* 24 Mont. 20, 28-29, 60 Pac. 398 (1900). The court pointed out that the appropriator was admittedly in rightful possession of the land, the title to which was in another, and that his water right was legally acquired by an appropriation on the public domain, the appropriator conducting the water by means of a ditch over the public domain to the land he was occupying, where the water was actually used.

[79] *Hays* v. *Buzard,* 31 Mont. 74, 82, 77 Pac. 423 (1904); *Sayre* v. *Johnson,* 33 Mont. 15, 20, 81 Pac. 389 (1905).

[80] *Bailey* v. *Tintinger,* 45 Mont. 154, 175-178, 122 Pac. 575 (1912).

formed by those who are to become its customers and water users and who will place the water upon land. Such a corporation has a completed appropriation when it has fully complied with the statute and has its distribution system completed and offers to supply water to users on demand, even before any actual use is made of the water.

The appropriator of water for sale in *Bailey v. Tintinger* was a public-service corporation, and the right of an individual to appropriate water for sale or rental to others was not involved. However, the implication of the decision appears to be that the same principle would apply to an individual who appropriates water for sale or rental to others, under the statute recognizing such appropriations.[81] That is to say, it may be inferred from the court's reasoning that an appropriation for such purpose might be made, either by a landowner who appropriates water not only for use on his own land but also for delivery to neighbors for compensation, or by one who neither owns nor possesses irrigable land and has no intention of doing so but whose sole purpose is to provide water to farmers for irrigating their lands on payment of charges for the service.

Trespass on private land

The supreme court has held in several cases that an attempted appropriation of water is void if initiated in trespass upon private land.[82] The validity of an appropriation depends upon rightful diversion by lawful means.[83] The court has emphasized, however, that while a right cannot be initiated by trespass, a right by prescription may be acquired by adverse user of a ditch across the lands of another for the full period required by the statute of limitations.[84]

The view of the court that a vested appropriative right *exercised* by committing a trespass is not necessarily void, although it may not be asserted as against the owner of the land trespassed upon, has been thus stated:[85]

> We know of no rule of law which provides for the enforced abandonment of a vested water right as a penalty for exercising it as a trespasser. We have held that a water right initiated in trespass is invalid, and that

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[81] Mont. Rev. Codes 1947, secs. 89-823 to 89-826.

[82] *Smith* v. *Denniff*, 24 Mont. 20, 22, 60 Pac. 398 (1900); *Geary* v. *Harper*, 92 Mont. 242, 251, 12 Pac. (2d) 276 (1932). The court stated in *Prentice* v. *McKay*, 33 Mont. 114, 117, 98 Pac. 1081 (1909): "The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation * * * ; but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings." See also *Wills* v. *Morris*, 100 Mont. 514, 521, 50 Pac. (2d) 862 (1935); *Barr* v. *Rupp*, 100 Mont. 612, 617-618, 51 Pac. (2d) 1050 (1935).

[83] *Warren* v. *Senecal*, 71 Mont. 210, 220, 228 Pac. 71 (1924). "Mere use of water, even for a beneficial use, if made by trespass, would not constitute an appropriation."

[84] *Geary* v. *Harper*, 92 Mont. 242, 251, 12 Pac. (2d) 276 (1932).

[85] *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 295, 62 Pac. (2d) 206 (1936).

where it can only be exercised by committing a trespass, it may not be asserted as against the true owner of the land upon which the trespass is committed. * * *

As a result of the court's holding that a water right cannot be initiated in trespass, it developed the rule that if a valid appropriation is made on private lands, the appropriator must have acquired an easement in the lands; and that if such an easement is acquired, it must have been done by grant from the owner, by condemnation proceedings, or by prescription.[86] However, the circumstances of a later case led the court to limit the foregoing rule to the extent necessary to sanction appropriations made by licensees of the owners of lands utilized in acquiring the licensees' water rights.[87] The appropriations in this case had been made with only the verbal consent of the owner of the land on which the water was diverted, and of the ditch utilized in conveying the water, and were changed to another diversion point and another ditch when the landowner withdrew his consent. Hence, no easement was acquired, and at the same time no trespass was committed. Previous decisions concerning the necessity on the part of an intending appropriator of having an easement in lands utilized in the acquisition of his rights were examined, and the general expressions in those opinions concerning the lack of validity of rights in the absence of easements were limited to cases of trespass.

Rights of Way

Public domain

With reference to the Congressional legislation granting rights of way for ditches and canals across public lands in connection with appropriative water rights,[88] the Montana Supreme Court stated its belief that Congress recognized the necessity for the preliminary work of ditch construction and, by this legislation, confirmed in the person engaged in such work on unoccupied public lands a right of way even before his right to the use of water had actually vested and accrued, provided the work was prosecuted with reasonable diligence to completion for the purpose of applying the completed ditch to a beneficial use.[89] However, a vested interest in the

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[86] *Prentice* v. *McKay*, 38 Mont. 114, 118, 98 Pac. 1081 (1909). See *Smith* v. *Denniff*, 24 Mont. 20, 22, 60 Pac. 398 (1900). It was stated in *Scott* v. *Jardine Gold Min. & Mill. Co.*, 79 Mont. 485, 494-495, 257 Pac. 406 (1927): "It is settled law that one may not acquire a water right on the land of another without acquiring an easement in the land."

[87] *Connolly* v. *Harrel*, 102 Mont. 295, 297-301, 57 Pac. (2d) 781 (1936). It was held that valid appropriations had been made under a license from the landowner to use his ditch and point of diversion. In *Galahan* v. *Lewis*, 105 Mont. 294, 300, 72 Pac. (2d) 1018 (1937), also, it was held that a licensee had acquired a valid water right.

[88] 14 Stat. 253, sec. 9 (July 26, 1866); 16 Stat. 218 (July 9, 1870); now U. S. Rev. Stat., secs. 2339 and 2340.

[89] *Cottonwood Ditch Co.* v. *Thom*, 39 Mont. 115, 118, 101 Pac. 825, 104 Pac. 281 (1909). The predecessors of a mutual irrigation company prosecuted work on the ditch with reasonable diligence and completed it across the land acquired by defendant before he filed upon the land, but did not divert water

public lands for a right of way is not secured until the ditch is completed: hence land that passes from the Government to private ownership after work has been stopped on an uncompleted ditch is not subject to a right of way for the ditch.[90]

Where appropriations of water had been made after the passage by Congress of an act granting land to a railroad company, but before the lands were surveyed as part of the grant, such lands prior to the survey were a part of the public domain.[91] Hence one who went upon the lands for the purpose of appropriating water and constructing ditches was not a trespasser, but was acting within the right expressly granted to settlers by Congress.

Exercise of easements.—The supreme court stated that while it is well settled that the title of a patentee of public land is subject to easements for existing ditches recognized by Congressional legislation:[92]

> However, it is equally well settled that such ditch cannot be enlarged or materially changed by its owners without the consent of the patentee and his successors after the land on which the ditch was so constructed has been granted to another by patent from the government. * * *

The court has also held that while those who construct a dam and diversion ditch upon lands that then were public domain had the right to maintain and use the dam and ditch upon the land even after it was patented to others, they also had certain duties to perform in connection therewith, such as to maintain and use the ditch substantially as it was constructed upon the public domain.[93]

Private lands

Neither the United States nor the State of Montana—each of which has recognized the right of an individual to acquire the use of water by appropriation—has authorized, nor could authorize, one person to go upon the private property of another for the purpose of making an appropriation, without the consent of the landowner, except by condemnation proceedings.[94] As noted heretofore under "Trespass on private land," a valid appro-

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through the ditch until after the defendant had filed on his homestead and had gone into possession. As the ditch had been completed across the land and as plaintiff's predecessors had taken possession prior to defendant's filing, it was held that defendant took his homestead subject to the right of way for plaintiff's ditch.

[90] *Mannix* v. *Powell County*, 75 Mont. 202, 206, 243 Pac. 568 (1926).

[91] *Wills* v. *Morris*, 100 Mont. 514, 519-521, 50 Pac. (2d) 862 (1935).

[92] *Hansen* v. *Galiger*, 123 Mont. 101, 112, 208 Pac. (2d) 1049, 1055 (1949).

[93] *Clausen* v. *Armington*, 123 Mont. 1, 5-6, 11, 212 Pac. (2d) 440, 443-446 (1949). The owners of the works in this case failed to discharge their duties, said the court, when they did nothing to confine the ditch to its original capacity, and allowed the ditch to erode, widen, and deepen until it diverted substantially all the water in the creek, thereby depriving another appropriator of his right in excess of the quantity of water originally appropriated by those who constructed the works.

[94] *Prentice* v. *McKay*, 38 Mont. 114, 117, 98 Pac. 1081 (1909).

priation of water may be made on private lands not owned by the appropriator only if he has acquired an easement in the lands—acquired by grant from the owner, or by condemnation proceedings, or by prescription—or if he is acting under verbal permission or revocable license from the landowner.

A permanent right of way across the lands of another constitutes an "interest" in the real estate—an easement—the transfer of which under the statute of frauds must be in writing.[95] However, a license covering a right of way does not come within the provisions of the statute, and may be given by parol because it does not create an interest in the land. This temporary authority may be revoked at will, and the burden thus removed from the land at any time.

A maxim of the law is that when the use of a thing is granted, then—in the absence of language indicating a different intention on the part of the grantor—everything is granted by which the grantee may reasonably enjoy such use, that is, rights that are incident to something else that is granted.[96] On this maxim are founded the rules that: (1) One who has a right of way for a ditch across the land of another has a secondary easement allowing him to go upon the servient land and use so much thereof on either side of the ditch as may be required to make all necessary repairs and to clean out the ditch at all reasonable times. (2) Such secondary easement may be exercised only when necessary, and in such a reasonable manner as not to increase the burden on the servient tenement needlessly.[97]

But this secondary easement is limited to cleaning out and repairing the ditch. It does not authorize the owner of the ditch easement to enter adjacent lands beyond the defined limits of the right of way for the purpose of constructing an entirely new canal of substantially greater capacity than that of the old ditch.[98]

Eminent domain

The State constitution provides that the use of water appropriated for beneficial purposes "and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."[99] In view of this declaration, the right to appropriate water on the land of another may be acquired by condemnation proceedings.[100] The constitutional provision and the statute of 1891 regulating the manner in which rights of way for irrigation ditches

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[95] *Rentfro* v. *Dettwiler*, 95 Mont. 391, 397, 26 Pac. (2d) 992 (1933).

[96] *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 84, 290 Pac. 255 (1930).

[97] *Laden* v. *Atkeson*, 112 Mont. 302, 305-306, 116 Pac. (2d) 881 (1941).

[98] *Stalcup* v. *Cameron Ditch Co.*, 130 Mont. 294, 300 Pac. (2d) 511, 512. (1956).

[99] Mont. Const., art. III, sec. 15.

[100] *Prentice* v. *McKay*, 38 Mont. 114, 118, 98 Pac. 1081 (1909).

should be acquired were held not violative of the constitution of the United States.[101]

Giving full force to a statute granting the power of eminent domain, one person is not authorized by the mere force of such statute to go upon the lands of another, without his consent, and dig a ditch.[102] Before such a right can be exercised, it must be definitely ascertained by a proper proceeding in eminent domain. One can invoke the right to take private property from its owner against his will only pursuant to law, and by a rigorous compliance with the provisions of the enabling statute.[103]

In an action to condemn a right of way through the irrigation ditch of another, mere inconvenience, or some damage which may be compensated for by the person seeking the right of way, is not sufficient ground upon which to deny his prayer for judgment.[104]

Methods of Appropriating Water

Montana has no centralized State administrative procedure for the acquisition of appropriative water rights.[105] A procedure provided by statute now governs the appropriation of water from *adjudicated* streams or other sources of water supply, and must be followed in appropriating waters of adjudicated sources; and a separate statutory procedure applying to *unadjudicated* streams and other sources apparently is optional with the intending appropriator. The State Engineer, however, has no control in any case.

Nonstatutory: prior to 1885

Acts of appropriation.—Prior to the enactment on March 12, 1885, of the first statute prescribing the method of making an appropriation of water in Montana,[106] "all appropriations were made pursuant to the rules and customs of the early settlers of California, which had been adopted in Montana territory and given the force of law, by recognition of the legislature (Bannack Statutes, Laws 1869-70, p. 57) and the courts."[107] During such period:[108]

> A person acquired a right to the use of water by digging a ditch, tapping a stream, and turning the water into it, and applying the water so diverted to a beneficial use. This constituted a valid appropriation of water.

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[101] *Ellinghouse* v. *Taylor,* 19 Mont. 462, 466, 48 Pac. 757 (1897).

[102] *Emerson* v. *Eldorado Ditch Co.,* 18 Mont. 247, 258, 44 Pac. 969 (1896).

[103] *Glass* v. *Basin Min. & Concentrating Co.,* 22 Mont. 151, 155-156, 55 Pac. 1047 (1899).

[104] *Cocanougher* v. *Zeigler,* 112 Mont. 76, 79, 112 Pac. (2d) 1058 (1941). In this action plaintiff alleged that he had no other practicable means by which to convey water to his land, and stated that he was willing to pay any damage to defendant plus the cost of enlarging the ditch. Judgment given by the trial court for defendant was ordered reversed by the supreme court.

[105] See Dunbar, *op. cit., supra,* footnote 25, at pp. 142-149.

[106] Mont. Laws 1885, p. 130.

[107] *Maynard* v. *Watkins,* 55 Mont. 54, 55, 173 Pac. 551 (1918).

[108] *Murray* v. *Tingley,* 20 Mont. 260, 268, 50 Pac. 723 (1897).

Effect of voluntary formalities.—As there was no statute providing a method of appropriating water prior to 1885, necessarily there were no formalities of general application throughout the Territory.[109] Appropriations made in accordance with local customs were recognized by the courts as valid, provided they fulfilled the requisites noted in the immediately preceding paragraph.[110]

Various intending appropriators during this period posted notices of appropriation, even though not prescribed by statute. In one of its early cases the Territorial supreme court stated that the posted notices and the acts taken pursuant thereto were sufficient to put others on guard and to apprise them of the prior appropriation by the persons who performed such acts.[111] But declarations of claims of water rights, unaccompanied by acts of possession, were held wholly inoperative as against those who proceeded to acquire water rights by acts currently recognized as legally adequate.[112] Furthermore, the current rule is that declarations in notices of appropriation, filed voluntarily prior to the enactment of the statute authorizing such filing, are not admissible as evidence of the intention of the party, although there was an earlier holding to the contrary.[113]

Nonstatutory: effect of statute of 1885

Appropriation of water.—The legislature in 1885 provided a method of appropriating water which required posting and recording of a notice of appropriation, followed by certain steps necessary to complete the appro-

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[109] *Stearns* v. *Benedick*, 126 Mont. 272, 274-275, 247 Pac. (2d) 656 (1952).

[110] *Midkiff* v. *Kincheloe*, 127 Mont. 324, 328, 263 Pac. (2d) 976 (1953).

[111] *Woolman* v. *Garringer*, 1 Mont. 535, 544-545 (1872).

[112] *Columbia Min. Co.* v. *Holter*, 1 Mont. 296, 300 (1871); *Miles* v. *Butte Electric & Power Co.*, 32 Mont. 56, 66, 79 Pac. 549 (1905). See *Sweetland* v. *Olsen*, 11 Mont. 27, 31, 27 Pac. 339 (1891).

[113] The soundness of the holding in *Sweetland* v. *Olsen*, 11 Mont. 27, 31, 27 Pac. 339 (1891), to the effect that a declaration so voluntarily filed, although not sufficient in itself to establish a right, is admissible as evidence of the intention of the party, was questioned and the holding in effect was overruled in *Gilcrest* v. *Bowen*, 95 Mont. 44, 50-51, 24 Pac. (2d) 141 (1933). In the latter case the court stated that the declaration was in the same category as the declaration of intention to possess land which was held inadmissible in *Spellman* v. *Rhode*, 33 Mont. 21, 26, 81 Pac. 395 (1905). The language used by the court with respect to this matter in *Gilcrest* v. *Bowen* was quoted with approval and applied to the disposition of a filing, made in 1878, in *Peck* v. *Simon*, 101 Mont. 12, 18-19, 52 Pac. (2d) 164 (1935). In a case decided in 1952, *Stearns* v. *Benedick*, 126 Mont. 272, 275-276, 247 Pac. (2d) 656, 657-658 (1952), a notice recorded in 1869 claimed an appropriation of all the water of a creek to be diverted at a specified point. The ditch and land claimed by plaintiffs and the other parties were located more than a mile upstream from the specified diversion point. There was no evidence showing that the lands for which the 1869 notice was recorded were the lands now belonging to plaintiffs or that they had succeeded to the alleged water right. Hence the supreme court held that the trial court did not err in finding that the 1869 notice was wholly insufficient to initiate any right and that plaintiffs were not entitled to any water rights by virtue of the notice.

priation.[114] The supreme court has held that the legislature, by the enactment of this law, did not abolish the preexisting method of appropriating water by means of diversion and use.[115] The court was satisfied that the legislature did not intend that one who failed to comply with the statute, but who nevertheless actually had diverted water, could be deprived of it by another who complied with the statute at a time subsequent to the former's completed diversion. The essence of an appropriation—a completed ditch, actually diverting water, and putting it to a beneficial use—remained the same as it had been before. What the statute did, then, was to provide an additional and alternative method of making an appropriation, under which evidence of water rights would be preserved and the doctrine of relation back regulated.[116] (See "Completion of appropriation—Doctrine of relation," below.)

Recording of declarations of preexisting rights.—The statute of 1885 provided likewise that persons who theretofore had acquired rights to the use of water should file declarations thereof in the county records within six months, but that failure to comply with such requirements should not forfeit existing rights nor prevent a claimant from establishing his right in court. With respect to this provision, the supreme court stated that it would not be justified in holding that a water right alleged to have been actually acquired prior to the passage of the act by compliance with existing laws and customs could only have effect from and after the date of recording the same, in case such recording was made after the time fixed in the act for recording previously acquired water rights.[117]

Nonstatutory: current rule re unadjudicated waters

It seems to be settled in Montana that with regard to *unadjudicated* waters, a valid appropriation of water can be made now, as well as prior to 1885, where water actually is diverted and applied to beneficial use, even where there is no compliance with the statute.[118] (A separate, exclusive statute governs the appropriation of *adjudicated* waters, as noted below.)

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[114] Mont. Laws 1885, p. 130. This procedure, which is still in effect with respect to unadjudicated waters, as noted below, appears in Mont. Rev. Codes 1947, secs. 89-810 to 89-814.

[115] *Murray* v. *Tingley*, 20 Mont. 260, 268, 269, 50 Pac. 723 (1897).

[116] See also *Bailey* v. *Tintinger*, 45 Mont. 154, 171-172, 122 Pac. 575 (1912). The court stated, at 45 Mont. 170, that the statement in *Murray* v. *Tingley* to the effect that the essence of an appropriation—a completed ditch, actually diverting water, and putting it to a beneficial use—remained the same as it had been before, must have been intended to apply to one who after 1885 seeks to make an appropriation of water without complying with the statute, "and thus construed we agree with the statement entirely."

[117] *Salazar* v. *Smart*, 12 Mont. 395, 401-402, 30 Pac. 676 (1892). The court stated that if recorded in compliance with the provisions of the statute, the record of the facts in the verified statement would become *prima facie* evidence of such facts, and that this was an inducement to place declarations of such rights on record. It was emphasized that the statute itself provided that previously acquired water rights should not be forfeited by failure to record the same.

[118] *Vidal* v. *Kensler*, 100 Mont. 592, 594-595, 51 Pac. (2d) 235 (1935); *Clausen* v. *Armington*, 123 Mont. 1, 14, 212 Pac. (2d) 440, 447-448 (1949).

Statutory: adjudicated waters act of 1907

Requirements.—With respect to unadjudicated waters, the State statute provides that the appropriator shall post a notice at the point of intended diversion, shall file a notice of appropriation in the county records and begin construction within prescribed periods of time, and shall prosecute the appropriation diligently to completion.[119] The record so provided for, when duly made, is prima facie evidence of the statements therein contained.[120]

The statute provides further that failure to comply with the statutory requirements deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith; and that by compliance, the right of use relates back to the date of posting notice, which is the first step in the procedure.

This is the method of appropriation that was first prescribed by statute in 1885, as above noted.[121]

Purposes of statute.—The supreme court stated its belief that the purposes of the 1885 legislation were to preserve the right which the appropriator had theretofore; to provide an additional method of making an appropriation; to define with precision the conditions under which an appropriator could have the advantage of the doctrine of relation; and to prescribe the steps necessary to be taken to effect a complete appropriation of water.[122]

Statutory procedure not exclusive.—As noted above ("Nonstatutory: Effect of statute of 1885"), it appears to be well settled that a valid appropriation can be made of unadjudicated waters even where there is no compliance with the statute, where water actually is diverted and applied to beneficial use.[123]

Statutory: adjudicated waters — act of 1907

Procedure, superseded in 1921.—Procedure was provided in 1907 (super-

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[119] Mont. Rev. Codes 1947, secs. 89-810 to 89-814.

[120] As with any other prima facie showing, this may be rebutted: *Vidal* v. *Kensler*, 100 Mont. 592, 595, 51 Pac. (2d) 235 (1935).

[121] The supreme court has stated that a notice of appropriation should be liberally construed: *Floyd* v. *Boulder Flume & Mercantile Co.*, 11 Mont. 435, 437-438, 28 Pac. 450 (1892). In this case the notice was ambiguous in describing two branches of a stream from which water was taken and giving the total quantity of water taken but without designating the quantity taken from each branch. However, the notice was held sufficient to put all parties upon inquiry concerning the rights thus claimed to use for a common purpose the waters of both branches.

[122] *Bailey* v. *Tintinger*, 45 Mont. 154, 168-172, 122 Pac. 575 (1912). See also *Murray* v. *Tingley*, 20 Mont. 260, 269, 50 Pac. 723 (1897); *Musselshell Valley Farming & Livestock Co.* v. *Cooley*, 86 Mont. 276, 288, 283 Pac. 213 (1929).

[123] A Federal court stated, in *Morris* v. *Bean*, 146 Fed. 423, 427 (C.C.D. Mont., 1906), with reference to statutes enacted in the arid States and Territories after customs of taking water had ripened into rights to use it, that these statutes were never intended to destroy the right of appropriation by methods other than those defined by them.

seded by the act of 1921) for the appropriation of waters of sources that had been adjudicated, which included posting of notice; prosecuting the work to completion with reasonable diligence; filing with the court of the proper county, an application to have the ditch capacity determined; examination by an engineer; and order by the court after hearing of objections if any should be filed.[124]

Statutory procedure not exclusive.—As the supreme court construed this act, the legislature did not intend by its enactment to declare that one who failed to comply with the terms of the statute, but who in the absence of any conflicting adverse right nevertheless had actually impounded, diverted, and put the water to a beneficial use, should acquire no title thereby.[125]

Statutory: adjudicated waters — current procedure

Procedure, act of 1921.—In 1921 the legislature enacted a new law which replaced the procedure provided in 1907 for the making of an appropriation of water from a source of supply that had been adjudicated.[126]

Under the present procedure, the intending appropriator must (a) employ a competent engineer to make a survey of the proposed aqueduct, impounding dam or other work, or both; or (b) cause to be prepared an aerial photograph with drawing thereon showing this information, with appropriate descriptions. He must file a petition with the court of the county in which the water is to be appropriated, containing a declaration that the water right sought to be acquired shall be subject to the terms of any adjudication decree theretofore rendered by a court of competent jurisdiction adjudicating the waters of such source of supply or any body of water to which the same may be tributary. Parties who may be affected are made defendants. On the conclusion of the trial the court may enter an interlocutory or permanent decree allowing the appropriation subject to the terms of all prior decrees. Failure to comply with the statutory provisions deprives the appropriator of the right to use water as against a subsequent appropriator mentioned in or bound by a decree of the court. The 1957 amendment of § 89-829 contains the following proviso:

> * * * 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.

Exclusiveness.—Unlike the act of 1907, the 1921 statute provides the exclusive method of making an appropriation of water from an adjudicated stream or other source. Thus:[127]

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[124] Mont. Laws 1907, ch. 185. Superseded by Laws 1921, ch. 228.

[125] *Donich* v. *Johnson*, 77 Mont. 229, 246, 250 Pac. 963 (1926). The question as to whether the method provided by the 1907 law was intended to be exclusive had been reserved in *Anaconda National Bank* v. *Johnson*, 75 Mont. 401, 409, 244 Pac. 141 (1926), as the determination of that question was not necessary to the decision.

[126] Mont. Laws 1921, ch. 228. The extant procedure is set out in Mont. Rev. Codes 1947, §§ 89-829 (as amended by Laws 1957, ch. 179) to 89-844.

[127] *Anaconda National Bank* v. *Johnson*, 75 Mont. 401, 411, 244 Pac. 141.

> Unquestionably the legislature of 1921 intended that an appropriation of the waters of an adjudicated stream should not be made thereafter without a substantial compliance with the requirements of the statute then enacted. The method prescribed must be held to be exclusive.

One who thus appropriates water from an adjudicated stream is simply a junior appropriator, with the rights and disabilities of an appropriator whose right to use the water is subject to the superior rights adjudicated in the original decree.[128]

Character of stream flow.—The statute contemplates that one who seeks to appropriate the waters of an adjudicated stream, upon complying therewith, may do so without regard to whether the water he seeks to appropriate is a part of so-called normal flow, or is flood or excess water in the stream.[129]

Completion of Appropriation

A mere declaration of a claim to the use of water, unaccompanied by acts of possession, is not an appropriation.[130] Until a claimant is himself in a position to use the water, a water right does not exist in such a sense that the mere diversion of the water by another is a ground of action to recover the water or damages for its diversion. Nor does the mere diversion of water from a stream constitute a legal appropriation of the water.[131]

Determination of the circumstances of completion of an appropriation, and hence the time of its completion, is important with respect to the fixing of the date of priority. This is discussed below under "Doctrine of relation."

Nonstatutory appropriation

Prior to the enactment of the statute of 1885:[132]

> A person acquired a right to the use of water by digging a ditch, tapping a stream, and turning water into it, and applying the water so diverted to a beneficial use. This constituted a valid appropriation of water.

And after that enactment (20 Mont. at 269):

> The essence of an appropriation—a completed ditch, actually diverting water, and putting it to a beneficial use—remained the same as it had been before. * * *

(1926). This holding was followed and applied in *Donich* v. *Johnson,* 77 Mont. 229, 246, 250 Pac. 963 (1926).

128 *Quigley* v. *McIntosh,* 83 Mont. 103, 109, 290 Pac. 266 (1930).

129 *Quigley* v. *McIntosh,* 88 Mont. 103, 107-108, 290 Pac. 266 (1930).

130 *Miles* v. *Butte Electric & Power Co.,* 32 Mont. 56, 66-69, 79 Pac. 549 (1905). Plaintiff had never diverted the water he claimed to have appropriated, never had constructed any works of diversion or conveyance, never had possessed any property upon which the water could have been utilized. See also *Columbia Min. Co.* v. *Holter,* 1 Mont. 296, 300 (1871); *Sweetland* v. *Olsen,* 11 Mont. 27, 31, 27 Pac. 339 (1891).

131 *Power* v. *Switzer,* 21 Mont. 523, 529, 55 Pac. 32 (1898).

132 *Murray* v. *Tingley,* 20 Mont. 260, 268, 50 Pac. 723 (1897). This case involved appropriations made after 1885, but without compliance with the statute.

The immediately foregoing statement was reaffirmed 15 years later in *Bailey* v. *Tintinger,* in which it was construed as intended to apply to one who after 1885 seeks to appropriate water without complying with the statute, "and thus construed we agree with the statement entirely."[133] The court also said (at 45 Mont. 174) that in proceeding under the rules and customs of the early settlers whether before or after the enactment of the statute—that is, in making a nonstatutory appropriation—the intending appropriator "must take actual possession of the water."

The foregoing statements in *Bailey v. Tintinger* were made by way of illustration in the formulating of a rule with respect to the completion of a statutory appropriation (see "Statutory appropriation," below), which was the issue there involved. The statement that the essential elements of an appropriation made prior to the enactment of the 1885 statute were a completed ditch and application of the water to beneficial use has been repeated in several later cases.[134]

Actual diversion of water.—Parties who offered no proof of the diversion of water by them from a stream in which they claimed a right were held to have failed to establish an appropriation of the water; the court stating that one of the essential elements of the completed appropriation is the diversion of water.[135] However, this does not mean that a junior appropriator who has access to excess water discharged by a prior appropriator at a spillway must allow the water to flow back into the stream before he may lawfully take possession of the same under his own appropriation.[136]

Actual use of water.—The discussion of completion of nonstatutory appropriations in *Bailey* v. *Tintinger,*[137] while not necessary to the decision in that case, raises some question as to the relation of actual use of water to completion of an appropriation, particularly in the case of a nonstatutory appropriation for the sale of water to others (see "Appropriation for sale

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[133] *Bailey* v. *Tintinger,* 45 Mont. 154, 170, 122 Pac. 575 (1912).

[134] *Maynard* v. *Watkins,* 55 Mont. 54, 56, 173 Pac. 551 (1918); *Gilcrest* v. *Bowen,* 95 Mont. 44, 51, 24 Pac. (2d) 141 (1933); *Stearns* v. *Benedick,* 126 Mont. 272, 275, 247 Pac. (2d) 656, 657 (1952). In *Gilcrest* v. *Bowen* the court added that the intention of the appropriator was to be determined, among other things, from "the actual and contemplated use."

[135] *Sherlock* v. *Greaves,* 106 Mont. 206, 216, 76 Pac. (2d) 87 (1938). See also *Wheat* v. *Cameron,* 64 Mont. 494, 501, 210 Pac. 761 (1922), and *Warren* v. *Senecal,* 71 Mont. 210, 220, 238 Pac. 71 (1924), in each of which the court stated that "actual" diversion and beneficial use, existing or in contemplation, were necessary to an appropriation, both cases being cited in the case of *Sherlock* v. *Greaves.*

[136] *Clausen* v. *Armington,* 123 Mont. 1, 18, 212 Pac. (2d) 440, 450 (1949). In this case the junior appropriator diverted the water when and as it left the spillway of the senior appropriator, at two designated points on his own land. The senior appropriator claimed that after the water had gone over the spillway onto the junior appropriator's land, the latter must allow the water to flow back into the channel of the stream and then be diverted back again onto the junior appropriator's land. The court stated that such would be an idle, useless, and expensive procedure and unnecessary to the validity of the defendant's appropriation.

[137] *Bailey* v. *Tintinger,* 45 Mont. 154, 174, 122 Pac. 575 (1912).

or rental of water," below). That is, had it been necessary to decide the question, would the court, in fixing the date of completion of a nonstatutory appropriation made after 1885—and therefore the priority thereof—have held the right to be complete upon completion of the diversion and distribution works, coupled with a bona fide intention, made manifest, to apply the water to beneficial use within a reasonable time thereafter?

In a considerable number of decisions relating to nonstatutory appropriations, rendered both before and after the decision in *Bailey* v. *Tintinger*, the supreme court, in stating the circumstances connected with completed appropriative rights, has included words denoting actual application of the water to beneficial use.[138] The right of way for a ditch across public land was held to have vested as against one who made a homestead filing on the land after the ditch had been completed by prosecution of the work with reasonable diligence, but before any water had been conveyed through it; the court stating that the Congressional legislation of 1866 and 1870 confirmed the right of way in the person engaged in the construction of a ditch on unoccupied public land "before his right to the use of water has actually vested and accrued, * * * ."[139]

The implication of these repeated statements is that actual use of the

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[138] For decisions relating to appropriations made prior to 1885, see *Sweetland* v. *Olsen*, 11 Mont. 27, 31, 27 Pac. 339 (1891); *Wright* v. *Cruse*, 37 Mont. 177, 181, 95 Pac. 370 (1908); *Bielenberg* v. *Eyre*, 44 Mont. 397, 399-400, 120 Pac. 243 (1912); *Maynard* v. *Watkins*, 55 Mont. 54, 56, 173 Pac. 551 (1918); *Gilcrest* v. *Bowen*, 95 Mont. 44, 51, 24 Pac. (2d) 141 (1933); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 294, 62 Pac. (2d) 206 (1936).

For decisions involving appropriations made after the enactment of the statute of 1885 but not in compliance with the statute, see *Murray* v. *Tingley*, 20 Mont. 260, 261-262, 269, 50 Pac. 723 (1897); *Allen* v. *Petrick*, 69 Mont. 373, 384, 222 Pac. 451 (1924); *Anaconda National Bank* v. *Johnson*, 75 Mont. 401, 410, 244 Pac. 141 (1926); *Musselshell Valley Farming & Livestock Co.* v. *Cooley*, 86 Mont. 276, 290, 291, 283 Pac. 213 (1929); *Vidal* v. *Kensler*, 100 Mont. 592, 594-595, 51 Pac. (2d) 235 (1935); *Clausen* v. *Armington*, 123 Mont. 1, 14, 212 Pac. (2d) 440 (1949).

See also *Cruse* v. *McCauley*, 96 Fed. 369, 371 (C.C.D. Mont., 1899), in which the court stated that when a party makes manifest his intention to appropriate water he must follow up the intention within a reasonable time by making an actual appropriation of the same—"That is, by reducing the same to an actual possession."

And see *Oscarson* v. *Norton*, 39 Fed. (2d) 610, 613 (9th Cir., 1930), in which it is said that until appropriated water is put to a beneficial use, the appropriation is incomplete; and that while an inchoate right may not be defeated by an intervening appropriation so long as the holder exercises due diligence in applying the water after the construction of his diversion works, "it still remains true that to perfect the right, actual use is indispensable."

[139] *Cottonwood Ditch Co.* v. *Thom*, 39 Mont. 115, 117-118, 101 Pac. 825, 104 Pac. 281 (1909). The Congressional legislation referred to was 14 Stat. L. 253, sec. 9, and 16 Stat. L. 218, U. S. Rev. Stats., secs. 2339 and 2340. Construction work on the ditch in question was begun in June 1899 and completed before defendant's homestead filing was made in September 1900; in 1902 the builders of the ditch filed a written notice of appropriation of water to be carried through the ditch, and first conveyed water through the ditch across defendant's land in that year.

water is either important, or is essential, in arriving at a determination of the completion of a nonstatutory appropriation. It is true that prospective as well as immediate beneficial use of water has been recognized in determining the validity and extent of both statutory and nonstatutory appropriations, as noted below (see "The appropriative right—Elements of the right—Measure of the right"). But in no case examined in connection with the present study has the Montana Supreme Court specifically held a nonstatutory appropriation to have been complete upon the completion of the ditch or other means of diversion and conveyance, prior to *any* actual use of the water.

Statutory appropriation

The supreme court, in *Bailey* v. *Tintinger*, distinguished the acts needed to complete appropriations made pursuant to the statute of 1885 from those made without conforming to the statutory provisions.[140] It was stated that while an intending appropriator who proceeds under the rules and customs of the early settlers, whether before or after the enactment of the statute, must take actual possession of the water, nevertheless:

> * * * from one who proceeds under the statute, actual use of the water cannot be exacted as a prerequisite to a completed appropriation. The statute does not require it, but, on the contrary, makes provision, compliance with which is the equivalent of actual possession. * * *

The court then quoted from Wiel[141] to the effect that under the early methods of appropriating water in the West, the right to the water was not complete until the water was actually taken into one's possession, or rather, "until all work preparatory to the actual use of the water is completed." Continuing, the court stated that:

> Upon the theory thus advanced, the claimant who proceeds under the statute, and performs the acts required as set forth above, has a completed appropriation of water upon the completion of the work on his ditch, canal, or other means of diversion, even before the water is actually applied to a beneficial use. * * *

The court called attention to the Colorado rule, followed in some other States as well, to the effect that application of the water to a beneficial use is a necessary prerequisite to a completed appropriation, but declined to apply it to the completion of an appropriation made under the Montana statute.

Appropriation for sale or rental of water

The appropriative right that led to the court's extended discussion of completion in *Bailey* v. *Tintinger* was initiated in 1892, pursuant to the statute of 1885, the work thereunder being completed in 1895 or 1896, for

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[140] *Bailey* v. *Tintinger*, 45 Mont. 154, 174, 122 Pac. 575 (1912). See in this connection, *Anaconda National Bank* v. *Johnson*, 75 Mont. 401, 408-410, 244 Pac. 141 (1926); *Anderson* v. *Spear-Morgan Livestock Co.*, 107 Mont. 18, 29, 79 Pac. (2d) 667 (1938).

[141] Wiel, S. C., "Water Rights in the Western States" (3d ed.), vol. I, sec. 362, p. 388 (1911).

the purpose of providing water to others through the medium of a public-service corporation.[142] The court declined to follow the Colorado rule governing title to water rights under which corporations provide water to consumers. It was concluded (at 45 Mont. 177-178) that:

> * * * as to a public service corporation, its appropriation is complete when it has fully complied with the statute and has its distributing system completed and is ready and willing to deliver water to users upon demand, and offers to do so. The right thus obtained may be lost by abandonment or nonuser for an unreasonable time * * * , but cannot be made to depend for its existence in the first instance upon the voluntary acts of third parties—strangers to its undertaking. * * *

Hence, as the work in this instance was prosecuted with reasonable diligence, and as upon completion of the canal the company was in a position to offer (and did offer) the water to actual and prospective users, the appropriation was actually completed upon the completion of the canal and the right related back to the date when the notice of appropriation was posted.

Although the water right in *Bailey* v. *Tintinger* was based upon a statutory appropriation by a public-service corporation, the supreme court extended its discussion to appropriations for sale or rental made by others than such corporations. Attention was called to the statute of 1877 recognizing the acquirement of appropriative rights for the sale of water to others, not only by corporations, or by associations of persons, but by individuals. The court stated that if the Colorado doctrine—to the effect that actual application of water to a beneficial use is a necessary prerequisite of a completed appropriation—were to be invoked in Montana, then such an individual never could make his appropriation, for under the Colorado theory the water user and not the individual in question would be the appropriator. This would be the only consistent position to assume, said the court, if actual use is held to be a necessary step to completion of the appropriation. But such position was held inconsistent with the Montana act of 1877 relating to appropriation of water for sale or rental to others, which act was carried forward into subsequent compilations. (45 Mont. at 174-175.)

In no case examined in the present study did the Montana Supreme Court have occasion to decide a litigated question concerning the completion of an appropriation made by an individual for the sale or rental of water to others. The only expressions of the court on that subject that were noted are those above referred to in the opinion in *Bailey* v. *Tintinger*.

Doctrine of relation

The doctrine of relation—or relation back—is a widely used legal device by which the priority of an appropriation of water that satisfies certain requirements is dated from the first step taken in acquiring the right. It may be invoked in Montana as well as in other Western States.[143] If the

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[142] *Bailey* v. *Tintinger*, 45 Mont. 154, 174-179, 122 Pac. 575 (1912).

[143] See Heckathorn, James, "The Doctrine of Relation Back in Montana Water Law," XII Mont. Law Rev. 87-97 (1951).

circumstances are such that the doctrine of relation may not be invoked, the date of priority is fixed, not as of the time of taking the first step, but as of the time of completion of the appropriation.

Determination of not only the circumstances of completion of an appropriation but also the time of completion is important in fixing the date of priority; for, said the Montana Supreme Court:[144]

> We doubt whether a party could ever invoke the doctrine of relation until his appropriation was completed; and we are led irresistibly to the conclusion that, before the statute makes applicable the doctrine, a completed appropriation must have been effected.

Doctrine of relation: nonstatutory appropriation

Prior to enactment of 1885 statute.—The fixing of the date of priority of an appropriation made prior to the enactment of the 1885 statute, by relation back to the time of beginning work on the means of diversion and conveyance of the water, depended upon the matter of diligence on the part of the appropriator in undertaking and consummating his appropriation. The rule has been expressed as follows:[145]

> For years before the statute was enacted the rule of law was "that the appropriation of water by persons who prosecute the work on their ditch with reasonable diligence dates back to the commencement of the work." * * *
>
> Therefore, as between two persons digging ditches at the same time, and prosecuting work thereon, with reasonable diligence, to completion, the one who first began work had the prior right, even though the other had completed his first. This was the doctrine of "relation back."

In 1908 the State supreme court had occasion to apply the principle of the doctrine of relation with respect to three appropriations that had been made in the autumn of 1882, prior to the enactment of the Territorial statute.[146]

Since enactment of 1885 statute.—The 1885 statute provided an exclusive method by which an intending appropriator could obtain the benefits

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[144] *Bailey* v. *Tintinger*, 45 Mont. 154, 171, 122 Pac. 575 (1912).

[145] *Murray* v. *Tingley*, 20 Mont. 260, 268, 50 Pac. 723 (1897). See also *Bailey* v. *Tintinger*, 45 Mont. 154, 171, 122 Pac. 575 (1912); *Maynard* v. *Watkins*, 55 Mont. 54, 56, 173 Pac. 551 (1918); *Gilcrest* v. *Bowen*, 95 Mont. 44, 51, 24 Pac. (2d) 141 (1933).

[146] *Wright* v. *Cruse*, 37 Mont. 177, 181-183, 95 Pac. 370 (1908). Work on the South Fork ditch was begun about September 1, 1882, on the Half-breed ditch about September 5, 1882; on the Welch ditch not later than October 1, 1882. Work on all three ditches was prosecuted with reasonable diligence to completion and actual use of the water, and the Welch ditch was completed before either of the others. Applying the doctrine of relation, the priorities all related back to the commencement of the work, and so the South Fork ditch was given the first priority and the Half-breed ditch the second priority, both being prior to the appropriation of the Welch ditch. In *Woolman* v. *Garringer*, 1 Mont. 535, 544 (1872), the work on a ditch of considerable magnitude was held to have been performed "with such reasonable diligence as would undoubtedly make the appropriation date and relate back to the commencement of the same, * * * ."

of the doctrine of relation, as noted immediately below. Hence the priority of a nonstatutory appropriation made after the 1885 enactment is fixed as of the date of completion rather than the date of initiating the appropriation.[147]

Doctrine of relation: statutory appropriation

Unadjudicated waters.—While the statutory method of appropriating water from an unadjudicated source is not the exclusive method of making such an appropriation, and while failure to follow the statute does not result in forfeiture of the claimed right (see "Methods of appropriating water," above), nevertheless compliance with the statute is important with regard to the doctrine of relation back on due compliance with the statute.[148] That is to say, the statutory procedure is the exclusive procedure by which an intending appropriator can obtain the advantage of the doctrine of relation and thus have his priority fixed as of the time of taking the first step in making the appropriation—the date of posting the notice; and one who seeks to avail himself of such doctrine since the enactment of the 1885 statute can do so only by a compliance with the statutory requirements.[149]

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[147] In *Anaconda National Bank* v. *Johnson,* 75 Mont. 401, 408-410, 244 Pac. 141 (1926), an intending appropriator had filed a notice of appropriation in 1917 but had not prosecuted the work with reasonable diligence to completion, as required by the statute. "As he did not proceed with his construction with reasonable diligence he lost the right of relation back. That right being lost, if he had then completed his work and made a beneficial use of the water his right would be held to bear the date of the completed appropriation."

[148] *Vidal* v. *Kensler,* 100 Mont. 592, 594-595, 51 Pac. (2d) 235 (1935).

[149] *Murray* v. *Tingley,* 20 Mont. 260, 269, 50 Pac. 723 (1897); *Bailey* v. *Tintinger,* 45 Mont. 154, 168-170, 122 Pac. 575 (1912); *Musselshell Valley Farming & Livestock Co.* v. *Cooley,* 86 Mont. 276, 288, 283 Pac. 213 (1929); *Midkiff* v. *Kincheloe,* 127 Mont. 324, 328, 263 Pac. (2d) 976 (1953). See *Maynard* v. *Watkins,* 55 Mont. 54, 55-56, 173 Pac. 551 (1918). A Federal court, in *Morris* v. *Bean,* 146 Fed. 423, 427 (C.C.D. Mont., 1906), cautioned that the various statutes enacted in the States and Territories of the arid West originally regulating the appropriation of water were not enacted for the purpose of enabling the appropriator to claim the doctrine of relation back, because that was the rule prior to any legislation upon the subject if the work was prosecuted with reasonable diligence. The effect of these statutes, said the court, was "to deny the power of an appropriator who fails to file the notice required, to claim as of the date of the beginning of his work; the penalty for such failure being to limit the right to the time when the water is actually applied and used." That is to say, the statutes did not enable the claiming of the doctrine, but provided a method of regulating that doctrine by compliance with the statutes.

The Montana Supreme Court stated in one case that while there was some evidence tending to show that the appropriator did not work continuously on the construction of his ditch during the year 1895, nevertheless in view of the length and size of the ditch, the evidence did not warrant an implied finding to the effect that he did not proceed with reasonable diligence, and that the trial court should have found that the essential elements of a statutory appropriation existed and should have awarded the water right as of the date of posting the notice of appropriation: *Anderson* v. *Spear-Morgan Livestock Co.,* 107 Mont. 18, 29, 79 Pac. (2d) 667 (1938).

For cases in which the doctrine of relation was not invoked because of

Adjudicated waters.—The statute that regulates the acquirement of rights to the use of adjudicated water supplies provides that the court, by interlocutory decree awarding the appropriation, may prescribe the conditions under which the work necessary to the complete appropriation shall be done and the time within which it must be completed.[150] Upon full compliance, the court is to enter its decree establishing the appropriation and fixing the date of priority which, if the appropriator has been diligent in complying with the court order, is the date of filing the petition. If the facts warrant, the court may fix a later date.

Diligence

Reasonable diligence is required in the making of an appropriation. This applies to the prosecution and completion of work on the means of diversion and distribution of water.[151] It also applies to the work of putting land under cultivation and irrigation and applying the water to beneficial use.[152]

What constitutes reasonable diligence depends upon the circumstances of each case, and its determination in connection with the nonstatutory appropriations was a matter that was within the sound discretion of the courts.[153] A farmer struggling for a livelihood, who cultivates his land and uses water to irrigate it as fast as he is able to provide the means, may not be guilty of any unreasonable delay in the application of his water to a useful purpose.[154] But in determining the question of reasonableness the effect upon later appropriators must be taken into account.[155]

The magnitude of an undertaking will be considered in determining whether the work of construction was completed within a reasonable time.[156]

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lack of diligence, defective notice of appropriation, or other failure to comply with the statute, see *Cruse* v. *McCauley*, 96 Fed. 369, 372-373 (C.C.D. Mont. 1899); *Allen* v. *Petrick*, 69 Mont. 373, 384, 222 Pac. 451 (1924); *Anaconda National Bank* v. *Johnson*, 75 Mont. 401, 408-410, 244 Pac. 141 (1926); *Oscarson* v. *Norton*, 39 Fed. (2d) 610, 613 (9th Cir., 1930); *Clausen* v. *Armington*, 123 Mont. 1, 14, 212 Pac. (2d) 440 (1949).

[150] Mont. Rev. Codes 1947, sec. 89-834.

[151] *Smith v. Duff*, 39 Mont. 382, 387-388, 102 Pac. 984 (1909); *Maynard* v. *Watkins*, 55 Mont. 54, 56, 173 Pac. 551 (1918); *Anderson* v. *Spear-Morgan Livestock Co.*, 107 Mont. 18, 29, 79 Pac. (2d) 667 (1938).

[152] *Smith* v. *Duff*, 39 Mont. 382, 389, 102 Pac. 984 (1909); *Wheat* v. *Cameron*, 64 Mont. 494, 507-508, 210 Pac. 761 (1922); *Allen* v. *Petrick*, 69 Mont. 373, 376, 222 Pac. 451 (1924).

[153] *Morris* v. *Bean*, 146 Fed. 423, 427 (C.C.D. Mont., 1906).

[154] *Arnold* v. *Passavant*, 19 Mont. 575, 580-581, 49 Pac. 400 (1897).

[155] *Cruse* v. *McCauley*, 96 Fed. 369, 372 (C.C.D. Mont., 1899). The court stated that in considering what would be reasonable diligence the court would perhaps not be controlled by any arbitrary rule but would consider the circumstances confronting an approriator of water. "A court should consider, however, that in a new country, subject to settlement, a proposed locator of water rights should not be guilty of any unnecessary delay in perfecting his appropriation. The rights of newcomers should be considered."

[156] *Bailey* v. *Tintinger*, 45 Mont. 154, 178-179, 122 Pac. 575 (1912).

But where a delay of more than 20 years occurs after the initiation of an appropriation:[157]

> It would require courage to contend that after such lapse of time the water covered by the "appropriation" could now for the first time be applied to a beneficial use, and to a use not originally contemplated, and that upon such application the appropriation could be held to relate back to 1908.

Gradual or progressive development

An appropriator is not required, in order to establish the full amount of his intended appropriation, to apply the water on all lands covered by the appropriation at the same time. That is to say, the right of gradual development meets with judicial approval in this as in other jurisdictions, provided of course that the eventual development is within the original intention of the appropriator and that it is carried to eventual completion with reasonable diligence under all of the circumstances. Hence, within the foregoing limitations, the fact that development has not been completed by bringing all lands of the appropriator under irrigation at the time subsequent appropriations are initiated does not, by reason of that fact alone, defeat or impair the first appropriator's right or cause a postponement of the date of priority.[158] This matter is discussed further hereinafter in connection with the "Measure of the right" of an appropriation under "The appropriative right—Elements of the right."

THE APPROPRIATIVE RIGHT

Property Characteristics

Right of beneficial use

It is an elementary principle of water law, as noted heretofore (see "Property rights in water"), that running water in a natural stream belongs to the public and that the appropriator therefore does not own the *corpus* of the water while in the stream from which he makes his diversion.

The right that the appropriator acquires is a right to the usufruct of the water—a right of possession and use only.[159] A water right, said the supreme court, "may be defined to be the legal right to use water."[160] And the use of

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[157] *Oscarson* v. *Norton*, 39 Fed. (2d) 610, 613 (9th Cir., 1930).

[158] *Kleinschmidt* v. *Greiser*, 14 Mont. 484, 497, 37 Pac. 5 (1894); *McDonald* v. *Lannen*, 19 Mont. 78, 82-83, 47 Pac. 648 (1897), as modified by *Smith* v. *Duff*, 39 Mont. 382, 388-390, 102 Pac. 984 (1909); *Arnold* v. *Passavant*, 19 Mont. 575, 580-581, 49 Pac. 400 (1897). Cases on the measure of an appropriative right as affected by a prospective or contemplated use are cited in the discussion of "The appropriative right—Elements of the right—Measure of the right," below.

[159] *Columbia Min. Co.* v. *Holter*, 1 Mont. 296, 300 (1871); *Custer Consolidated Mines Co.* v. *Helena*, 52 Mont. 35, 40, 156 Pac. 1090 (1916); *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 162, 201 Pac. 702 (1921); *Brennan* v. *Jones*, 101 Mont. 550, 567, 55 Pac. (2d) 697 (1936).

[160] *Smith* v. *Denniff*, 24 Mont. 20, 21, 60 Pac. 398 (1900).

the water must be a beneficial use—that is, the appropriation must be made and the water used thereunder for some useful or beneficial purpose[161]—which under certain circumstances may be prospective or contemplated. (See "Elements of the right—Measure of the right," below.)

Right of property

The appropriative right as property.—The supreme court has stated on a number of occasions that the appropriative water right is property.[162] And title to a substantive property right cannot be adjudicated through the medium of a contempt proceeding.[163]

Real property: general rule.—The appropriative water right, while "not land in any sense,"[164] is a usufruct that partakes of the nature of real estate.[165]

Real property: exception to the rule.—The Montana Supreme Court held in 1908 that an appropriative water right—under which water was being distributed to the City of Helena and its inhabitants for their consumptive use—for the purposes of taxation must be considered personal property.[166]

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[161] Mont. Rev. Codes 1947, sec. 89-802; *Creek* v. *Bozeman Water Works Co.*, 15 Mont. 121, 128-129, 38 Pac. 459 (1894); *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 186, 50 Pac. 416 (1897); *Power* v. *Switzer*, 21 Mont. 523, 529, 55 Pac. 32 (1898); *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900); *Conrow* v. *Huffine*, 48 Mont. 437, 444, 138 Pac. 1094 (1914). Other cases are cited below under "Elements of the right—Measure of the right."

[162] In *Hansen* v. *Larsen*, 44 Mont. 350, 353, 120 Pac. 229 (1911), the court said: "The rule is recognized everywhere that the right to the use of water, duly appropriated, is property, and when once acquired cannot be lost except by the modes prescribed by law." See also *Moore* v. *Sherman*, 52 Mont. 542, 545, 159 Pac. 966 (1916); *Lensing* v. *Day & Hansen Security Co.*, 67 Mont. 382, 384, 215 Pac. 999 (1923); *Wills* v. *Morris*, 100 Mont. 514, 523, 50 Pac. (2d) 862 (1935); *Brennan* v. *Jones*, 101 Mont. 550, 567, 55 Pac. (2d) 697 (1936); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 294, 62 Pac. (2d) 206 (1936); *Cook* v. *Hudson*, 110 Mont. 263, 281, 103 Pac. (2d) 137 (1940).

[163] *State ex rel. Zosel* v. *District Court*, 56 Mont. 578, 581, 185 Pac. 1112 (1919); *State ex rel. Reeder* v. *District Court*, 100 Mont. 376, 380, 47 Pac. (2d) 653 (1935).

[164] *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 578, 227 Pac. 68 (1924); *Brady Irr. Co.* v. *Teton County*, 107 Mont. 330, 333-334, 85 Pac. (2d) 350 (1938).

[165] *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 572, 39 Pac. 1054 (1895). An action to ascertain, determine, and decree the extent and priority of the right to the use of water partakes of the nature of an action to quiet title to real estate: *Whitcomb* v. *Murphy*, 94 Mont. 562, 566, 23 Pac. (2d) 980 (1933); *Sain* v. *Montana Power Co.*, 5 Fed. Supp. 792, 793 (D. Mont., 1934), 84 Fed. (2d) 126, 127 (9th Cir., 1936), 20 Fed. Supp. 843, 846 (D. Mont., 1937); *State ex rel. Reeder* v. *District Court*, 100 Mont. 376, 380, 47 Pac. (2d) 653 (1935); *Missoula Light & Water Co.* v. *Hughes*, 106 Mont. 355, 363, 77 Pac. (2d) 1041 (1938).

[166] *Helena Water Works Co.* v. *Settles*, 37 Mont. 237, 239-240, 95 Pac. 838 (1908).

In the following year the same court said, in another case relating to taxation, that:[167]

> Viewed as independent property rights, ditches and the right to use the water conveyed by them are property subject to taxation; but, when made appurtenant to lands, they have no independent use. So situated and used, the value of this species of property enters as an element into the value of the *corpus* or principal estate to which it is attached or appurtenant, and bears its proportionate burden of taxation by the added taxable value which it gives to the principal estate. * * *

Summing up this situation, a water right, while partaking of the nature of real estate, is not land in any sense and, when considered alone and for the purpose of taxation, is personal property; but when considered otherwise, it is not subject to taxation independently of the land to which it is appurtenant.[168]

Easement.—An appropriative right is in the nature of an easement in gross.[169] It has been classified also as an incorporeal hereditament, in contrast with the riparian right—a corporeal hereditament.[170]

Right to have water flow to point of diversion.—The appropriator owns an easement in the stream from which he diverts water, and in its tributaries above his point of diversion, which consists of the right to have the water flow from the head of the stream and from the head of each tributary above his point of diversion, in sufficient quantity to the head of his ditch or place of diversion, and to have it of such quality as will meet his needs as protected by his water right.[171]

Appurtenance to land

Public lands.—The Montana Supreme Court has held that the water right of a settler on public lands of the United States may become appurtenant to such lands even before the settler obtains title to the lands, thus:[172]

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[167] *Hale* v. *County of Jefferson*, 39 Mont. 137, 142, 101 Pac. 973 (1909). See also *State ex rel. Schoonover* v. *Stewart*, 89 Mont. 257, 273, 297 Pac. 476 (1931).

[168] *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 578, 227 Pac. 68 (1924); *Brady Irr. Co.* v. *Teton County*, 107 Mont. 330, 333-334, 85 Pac. (2d) 350 (1938).

[169] *Smith* v. *Denniff*, 24 Mont. 20, 27, 60 Pac. 398 (1900); *Mussellshell Valley Farming & Livestock Co.* v. *Cooley*, 86 Mont. 276, 288, 283 Pac. 213 (1929); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 292-294, 62 Pac. (2d) 206 (1936).

[170] *Smith* v. *Denniff*, 24 Mont. 20, 21, 26-27, 60 Pac. 398 (1900). See also *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 82, 290 Pac. 255 (1930); *Sain* v. *Montana Power Co.*, 20 Fed. Supp. 843, 846 (D. Mont., 1937).

[171] *Helena* v. *Rogan*, 26 Mont. 452, 469-470, 68 Pac. 798 (1902). See also *Howell* v. *Johnson*, 89 Fed. 556, 559 (C.C.D. Mont., 1898); *Smith* v. *Denniff*, 24 Mont. 20, 26-27, 60 Pac. 398 (1900); *Kelly* v. *Granite Bi-Metallic Consolidated Min. Co.*, 41 Mont. 1, 12, 108 Pac. 785 (1910).

[172] *Cook* v. *Hudson*, 110 Mont. 263, 278, 103 Pac. (2d) 137 (1940). See also *McDonald* v. *Lannen*, 19 Mont. 78, 86, 47 Pac. 648 (1897); *Geary* v. *Harper*, 92 Mont. 242, 248, 12 Pac. (2d) 276 (1932).

> There are textwriters who lay down the rule that a water right taken out to irrigate public lands is not appurtenant to such lands except where and until the appropriator brings the land to patent, but lapses with the sale or release of the squatter's right, but the rule is to the contrary in this jurisdiction. * * *

Whether an appropriative right becomes appurtenant to public lands on which the water is used by the appropriator probably depends upon the circumstances of the case, as in case of such use on private lands not owned by the appropriator.[173]

Private lands.—The general rule is that a water right acquired by appropriation, and used for a beneficial and necessary purpose in connection with a given tract of land, is an appurtenance thereof.[174] The supreme court, in a case decided in 1904, said that:[175]

> This court has held for many years, by a uniform line of decisions, that a water right is appurtenant to the land upon which it is used. Whatever doubts may exist as to the correctness of this ruling, many conveyances have been made in reliance upon it, and it has therefore become a rule of property, and the doctrine of *stare decisis* must apply.

It is recognized, however, that under some circumstances the water right may not be appurtenant to the land on which the water is being used.[176] This question arose at the turn of the century in a case in which a person rightfully in possession of land belonging to a railroad appropriated water on the public domain and conducted the water to the railroad land for use thereon.[177] The court called attention to the fact that legal title to the land

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[173] See the discussion in *Smith* v. *Denniff*, 24 Mont. 20, 26-27, 60 Pac. 398 (1900), concerning a hypothetical case in which one has a possessory right to government riparian land and makes an appropriation of water for use on that land. See also *Warren* v. *Senecal*, 71 Mont. 210, 219, 228 Pac. 71 (1924), concerning a possible use of water on a homestead to which another obtained patent, although the evidence in the case did not show such use.

[174] *Tucker* v. *Jones*, 8 Mont. 225, 231-232, 19 Pac. 571 (1888); *Sweetland* v. *Olsen*, 11 Mont. 27, 29, 27 Pac. 339 (1891); *Beatty* v. *Murray Placer Min. Co.*, 15 Mont. 314, 316, 39 Pac. 82 (1895); *Sloan* v. *Glancy*, 19 Mont. 70, 76, 77, 47 Pac. 334 (1897); *Lensing* v. *Day & Hansen Security Co.*, 67 Mont. 382, 384, 215 Pac. 999 (1923); *Hogan* v. *Thrasher*, 72 Mont. 318, 332, 233 Pac. 607 (1925); *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 82, 290 Pac. 255 (1930); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931). A water ditch cannot be appurtenant to another water ditch: *Donnell* v. *Humphreys*, 1 Mont. 518, 525 (1872).

[175] *Leggat* v. *Carroll*, 30 Mont. 384, 387, 76 Pac. 805 (1904).

[176] The water right is in the nature of an easement in gross, which according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto: *Smith* v. *Denniff*, 24 Mont. 20, 24, 60 Pac. 398 (1900); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931).

[177] *Smith* v. *Denniff*, 24 Mont. 20, 28-29, 60 Pac. 398 (1900). This decision was rendered on rehearing, the holding of the supreme court on the original hearing being reversed. The court had held on the original hearing that the water right, having been appropriated for the express purpose of irrigating this railroad land, and having been actually used continuously and being necessary to the cultivation and enjoyment thereof, was an appurtenance to the land; and that none but the owner of the land might convey or sell the appurtenance: *Smith* v. *Denniff*, 23 Mont. 65, 67-68, 57 Pac. 557 (1899).

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[174] *Tucker* v. *Jones*, 8 Mont. 225, 231-232, 19 Pac. 571 (1888); *Sweetland* v. *Olsen*, 11 Mont. 27, 29, 27 Pac. 339 (1891); *Beatty* v. *Murray Placer Min. Co.*, 15 Mont. 314, 316, 39 Pac. 82 (1895); *Sloan* v. *Glancy*, 19 Mont. 70, 76, 77, 47 Pac. 334 (1897); *Lensing* v. *Day & Hansen Security Co.*, 67 Mont. 382, 384, 215 Pac. 999 (1923); *Hogan* v. *Thrasher*, 72 Mont. 318, 332, 233 Pac. 607 (1925); *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 82, 290 Pac. 255 (1930); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931). A water ditch cannot be appurtenant to another water ditch: *Donnell* v. *Humphreys*, 1 Mont. 518, 525 (1872).

[175] *Leggat* v. *Carroll*, 30 Mont. 384, 387, 76 Pac. 805 (1904).

[176] The water right is in the nature of an easement in gross, which according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto: *Smith* v. *Denniff*, 24 Mont. 20, 24, 60 Pac. 398 (1900); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931).

[177] *Smith* v. *Denniff*, 24 Mont. 20, 28-29, 60 Pac. 398 (1900). This decision was rendered on rehearing, the holding of the supreme court on the original hearing being reversed. The court had held on the original hearing that the water right, having been appropriated for the express purpose of irrigating this railroad land, and having been actually used continuously and being necessary to the cultivation and enjoyment thereof, was an appurtenance to the land; and that none but the owner of the land might convey or sell the appurtenance: *Smith* v. *Denniff*, 23 Mont. 65, 67-68, 57 Pac. 557 (1899).

upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right, for such an appropriator may have a bona fide intention to use the water beneficially on lands or possessions of someone else. It was stated (at 24 Mont. 29) that title to the water right and ditch therefore vested in the appropriator, which precluded the possibility of their passing to the railroad company, the owner of the land, as appurtenances to the land, without a conveyance in writing.

Claims that water rights had become appurtenant to certain lands or other properties have been denied under various other circumstances. In one case the court said that:[178]

> In order that anything should become appurtenant to land, such thing must be acquired by the owner of the land, or the person contesting such ownership must so have conducted himself in relation thereto as to be estopped from so contesting. * * *

In other cases, where water was used on land not owned by the appropriator, and there was no showing of any intention on his part to make the water right appurtenant to the land, appurtenance was held not to have resulted.[179] Likewise, it has been held that a water right used on rented land does not become appurtenant to that land in the absence of an intention on the part of the holder of the water right to make it so appurtenant.[180]

It thus appears that the question as to whether a water right is appurtenant to the land on which the water is used is a question of fact.[181] And the supreme court has held that one who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances.[182]

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[178] *Leggat* v. *Carroll*, 30 Mont. 384, 387, 76 Pac. 805 (1904).

[179] In *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 553, 81 Pac. 334 (1905), the appropriator used water on lands owned by his wife as well as on his own lands. The court said: "This use by him upon the lands of Mrs. Foster did not necessarily make the waters, or any part of them, appurtenant thereto. He had the title to the use of the water, and it was appurtenant to the lands owned by him; she had title to the lands, and there is nothing in the record to indicate an intention on the part of Foster to make these waters, or any portion of them, appurtenant to his wife's lands." In *Pew* v. *Johnson*, 35 Mont. 173, 180, 88 Pac. 770 (1907), the court held that where a landowner used on his land certain water by permission of the adjoining landowner, such use of the water could not and did not make it appurtenant to the land of the first landowner.

[180] *Hays* v. *Buzard*, 31 Mont. 74, 82, 77 Pac. 423 (1904). The court stated that if the water right should become by operation of law appurtenant to the rented land in the absence of an intention on the part of the appropriator, "then by using a water right upon leased lands the owner would incur the risk of losing it. The right was originally acquired upon the public domain. If the title to the land in no wise affects the title to the water right, the fact that it has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance."

[181] *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 84, 290 Pac. 255 (1930).

[182] *Smith* v. *Denniff*, 24 Mont. 20, 29, 60 Pac. 398 (1900).

Separability from land to which initially appurtenant.—It has been held in numerous cases that "A water right is not an inseparable appurtenance to land in Montana."[183] As shown below, a water right may be conveyed independently of the land to which it is appurtenant, or may be reserved from a conveyance of such land.

Conveyance of title

The appropriative right is subject to conveyance. In fact, in a case in which certain parties who owned water rights and placer-mining lands covenanted among themselves that none of them should sell his interest in the water rights or make any compromise or settlement with anyone attempting to obtain possession of them, except with the written consent of all the others, the supreme court held that such a contract was against public policy.[184]

Appurtenant water right passes with conveyance of land.—It is the rule that appurtenances of land pass by a deed for the land without being specially mentioned;[185] and so a water right that is necessary to the cultivation, use, and enjoyment of land is an appurtenance of the land and passes in a deed to the land even without the use of the word "appurtenances," just as certainly as if it had been described in express terms in the deed itself.[186] It is said in other cases that the appurtenant water right passes without mention of the right.[187]

The intention of the parties in conveying a water right (or any other property), so far as the same has been lawfully expressed, must control the courts in a construction of the instrument by which the property is conveyed.[188] In the absence of language indicating a different intention on the

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[183] *Kofoed* v. *Bray*, 69 Mont. 78, 84, 220 Pac. 532 (1923). See also *Sweetland* v. *Olsen*, 11 Mont. 27, 29, 27 Pac. 339 (1891); *Lensing* v. *Day & Hansen Security Co.*, 67 Mont. 382, 384, 215 Pac. 999 (1923); *Hogan* v. *Thrasher*, 72 Mont. 318, 332, 233 Pac. 607 (1925); *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 84, 290 Pac. 255 (1930); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931); *Brennan* v. *Jones*, 101 Mont. 550, 567, 55 Pac. (2d) 697 (1936); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 293-294, 62 Pac. (2d) 206 (1936).

[184] *Ford* v. *Gregson*, 7 Mont. 89, 93-94, 98, 14 Pac. 659 (1887). The court stated that if any one of these parties, or his legal representative, should refuse to give his consent in writing, it would tie up the sale of the water rights of the others forever. Such contract, said the court, "is certainly against public policy. And especially is this case in a country like this, in which water is necessary for so many industrial pursuits."

[185] *Hogan* v. *Thrasher*, 72 Mont. 318, 332, 233 Pac. 607 (1925).

[186] *Tucker* v. *Jones*, 8 Mont. 225, 231-232, 19 Pac. 571 (1888). As to what passes with a conveyance of a ditch, see *Donnell* v. *Humphreys*, 1 Mont. 518, 529-530 (1872).

[187] *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 84, 290 Pac. 255 (1930); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931).

[188] *Lensing* v. *Day & Hansen Security Co.*, 67 Mont. 382, 384, 215 Pac. 999 (1923).

part of the grantor, everything essential to the beneficial use and enjoyment of the property conveyed is to be considered as passing by the conveyance.[189] When the deed conveying title to land does not specify the particular appurtenant water right alleged to have been conveyed with the land, or to what extent the use of water was appurtenant to it, extrinsic evidence must be resorted to in order to establish the fact.[190]

Conveyance of land with appurtenances.—A conveyance of land "with appurtenances" operates without any further express grant of a water right to convey to the grantee a water right appropriated, owned, and used by the grantor and necessary for the proper irrigation of the land granted.[191] Where a water right intended to be conveyed with land is stated in the deed in express terms, the grantee takes that only which is expressly conveyed and does not take any additional water rights by implication.[192]

Reservation of water right in conveyance of land.—A water right may be reserved from a grant of land to which the right is appurtenant.[193] But in a conveyance of land an appurtenant water right passes with the land unless expressly reserved.[194]

Conveyance of water right apart from land.—A water right may be disposed of either in connection with or separate and apart from the land on which the water is used.[195] The fact that the water right is appurtenant to the land does not alter the principle, for, said the supreme court:[196]

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[189] *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 84, 290 Pac. 255 (1930).

[190] *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 550, 81 Pac. 334 (1905).

[191] *Tucker* v. *Jones*, 8 Mont. 225, 231-232, 19 Pac. 571 (1888); *Sweetland* v. *Olsen*, 11 Mont. 27, 29, 27 Pac. 339 (1891); *Beatty* v. *Murray Placer Min. Co.*, 15 Mont. 314, 316, 39 Pac. 82 (1895); *Sloan* v. *Glancy*, 19 Mont. 70, 76, 47 Pac. 334 (1897). In *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 303-304, 62 Pac. (2d) 206 (1936), a desert land entryman, by quitclaim deed on July 17, 1897, conveyed the desert land entry together with all appurtenances to a certain party, and on August 23, 1897, gave the same grantee a quitclaim deed purporting to convey the water right only. In response to an argument that by the second conveyance the water right was severed from the land, the court held that the first conveyance of the desert land entry, including the appurtenances, conveyed any water rights theretofore enjoyed by the grantor, and that the fact that a subsequent deed was executed could add nothing to the conveyance theretofore made. As to claims of conveyance of water rights held to be not appurtenant to the lands conveyed, see *Hays* v. *Buzard*, 31 Mont. 74, 77, 82, 77 Pac. 423 (1904); *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 553, 81 Pac. 334 (1905).

[192] *Kofoed* v. *Bray*, 69 Mont. 78, 84, 220 Pac. 532 (1923).

[193] *Kofoed* v. *Bray*, 69 Mont. 78, 84, 220 Pac. 532 (1923); *McClay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931).

[194] *Sweetland* v. *Olsen*, 11 Mont. 27, 29, 27 Pac. 339 (1891); *Lensing* v. *Day & Hansen Security Co.*, 67 Mont. 382, 384, 215 Pac. 999 (1923); *Kofoed* v. *Bray*, 69 Mont. 78, 84, 220 Pac. 532 (1923); *Hogan* v. *Thrasher*, 72 Mont. 318, 332, 233 Pac. 607 (1925); *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.* 88 Mont. 73, 84, 290 Pac. 255 (1930); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931).

[195] *Smith* v. *Denniff*, 24 Mont. 20, 29, 30-31, 60 Pac. 298 (1900); *Lensing* v.

> The owner of land with an appurtenant water right may, by appropriate conveyance, convey the land to one person and the water right to another. * * *

Once a water right is acquired for the use of water on land to which the holder of the water right does not have title, the owner of the water right cannot be deprived thereof by a conveyance of the land by the landowner.[197]

Water right not enlarged by conveyance.—The appropriative right is not enlarged by conveyance to another, for the grantor can convey only the use to which he has title.[198] One who purchases a water right independently of the land to which it was theretofore appurtenant, said the court, does not thereby enlarge or extend the right; and one who so purchases such a right is entitled to do only those things that the original owner of the water right might have done.[199]

Formalities of conveyance

Unacknowledged and unrecorded transfers.—In a case decided in 1895,[200] a contract for the transfer upstream of prior appropriative rights in exchange for water brought from another stream had been signed, but not acknowledged or recorded. This instrument was held good as a conveyance between the parties to the contract, and not void as against upstream junior appropriators who would have benefited by a declaration that the prior rights had been abandoned by reason of an attempt to transfer them by an unrecorded conveyance. In reaching this conclusion the court questioned and held not applicable the doctrine of the early case of *Barkley* v. *Tieleke*,[201]

Day & Hansen Security Co., 67 Mont. 382, 384, 215 Pac. 999 (1923); *Kofoed* v. *Bray*, 69 Mont. 78, 84, 220 Pac. 532 (1923); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931); *Brennan* v. *Jones*, 101 Mont. 550, 567, 55 Pac. (2d) 697 (1936); *Sherlock* v. *Greaves*, 106 Mont. 206, 217-218, 76 Pac. (2d) 87 (1938).

[196] *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 84, 290 Pac. 255 (1930).

[197] *St. Onge* v. *Blakely*, 76 Mont. 1, 18, 245 Pac. 532 (1926).

[198] *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 573, 39 Pac. 1054 (1895).

[199] *Brennan* v. *Jones*, 101 Mont. 550, 567, 55 Pac. (2d) 697 (1936); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 293, 62 Pac. (2d) 206 (1936); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353-354, 3 Pac. (2d) 286 (1931).

[200] *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 572-581, 39 Pac. 1054 (1895). The upstream junior appropriators had claimed that the lower appropriators had abandoned their rights because of the contract and that the purported grantee who was to provide water in exchange had acquired none of such rights by any pretended purchase. The court held that a statute declaring that a conveyance of real estate not recorded should be deemed void as against a subsequent purchaser of the same real estate whose conveyance was first duly recorded was not applicable, because an appropriator of water subsequent to a conveyance of the use of the same water by an owner thereof to his grantee was not "such a buyer of the same real estate" as contemplated by the statute. He "does not buy at all. He appropriates under certain rules of statute and decision, and thus obtains title."

[201] *Barkley* v. *Tieleke*, 2 Mont. 59, 62-65 (1874). In this case the appropriator of water through two ditches conveyed the ditches by unsealed and un-

frequently cited as holding that an attempt to transfer an appropriative right by an imperfect conveyance operates as an abandonment of the right.[202] In the instant case the court emphasized that there had been no abandonment by the prior appropriators of their rights; they had conveyed, "by an instrument in writing sufficient for the purpose, the use of the water for a valuable consideration." This was not evidence that the parties intended to abandon the use of the water that they had appropriated. On the contrary, in making the conveyance in question, "Their acts indicated precisely the contrary intention."

Oral conveyances by settlers on the public domain.—In 1897, in *Mcdonald* v. *Lannen*, the supreme court specifically repudiated—with respect, at least, to appropriations made by settlers on unsurveyed public lands of the United States—the principle that abandonment follows as a necessary result of a verbal transfer of an appropriative right.[203] The court stated

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acknowledged paper writings to certain persons, who conveyed them in like manner to plaintiff's grantors, who took possession prior to the appropriation and construction of the defendants' ditch. After the construction of defendants' ditch, those to whom the original ditches had been conveyed by mere paper writings, conveyed the ditches to plaintiff by deeds in legal form. The court said: "The conveyance or transfers of the property to plaintiff's grantors alone was not sufficient under our statute to convey the property to them; but the attempt so to do by imperfect conveyances, if it did not operate as an absolute or equitable conveyance, clearly operated as a surrender or an abandonment of their right, title and interest acquired by appropriation,* * * * * * If the conveyances to plaintiff's grantors did not in fact transfer such an interest as entitled them to all the rights of their grantors, then the right was abandoned, and the possession thereof taken by plaintiff's grantors was as much an original appropriation of the waters of Indian creek as if they had originally constructed the first ditches to divert the same." But this transfer to plaintiff's grantors and their taking of possession antedated the construction of defendants' ditch and defendants' appropriation therethrough. The court expressed its conviction that the defendants, when they located and constructed their ditch, did so with reference to and with full knowledge of the prior rights of the ditches of plaintiff's grantors; and held that the possession of the earlier ditches vested in the plaintiff such an equitable interest as enabled him to maintain the present action for an injunction against interference by defendants with his possession.

[202] The Montana Supreme Court itself said later, in *McDonald* v. *Lannen*, 19 Mont. 78, 84, 47 Pac. 648 (1897), with respect to *Barkley* v. *Tieleke*: "The language of the territorial court in that case was, substantially, that where an appropriator of a water right transfers it by an imperfect or verbal conveyance he thereby abandons it, and his transferee in possession is to be regarded, not as a successor in interest, but only as an appropriator by recapture, and therefore as debarred from availing himself of the date of his predecessor's appropriation."

[203] *McDonald* v. *Lannen*, 19 Mont. 78, 83-86, 47 Pac. 648 (1897). It was stated that *Barkley* v. *Tieleke* had been decided with reference to mining water rights and ditches considered by themselves, rather than with reference to the mining claims to which they were appurtenant, and that whether or not the court in that case meant to establish a precedent to be applied to agricultural water rights was extremely doubtful. The court said, at 19 Mont. 86: "Different rules apply to the acquisition of title to mining claims from those applicable to agricultural. The right to the possession of a mining claim comes only from a valid location which is a grant." In *Featherman* v. *Hen-*

that squatters or settlers on unsurveyed public lands never had been regarded as trespassers, and that it never had been held in Montana that a squatter could not transfer the possession of his claim and the improvements thereon verbally. On the contrary, said the court, he unquestionably could make such transfer, the transferee whom he put in possession becoming his successor in interest. To hold that this is true of a real estate claim and not true of a water right incidental and appurtenant thereto "is wholly unreasonable." As to the abandonment theory, of which the court now strongly disapproved,[204] it was said that by transferring his possession of land and water right, a settler certainly abandons any intention he may have had of obtaining patent to the land, but that "a mere failure to execute a deed in no wise justifies the inference that he intends to throw away his honest buyer's rights as well as his own." It was concluded that one who takes possession of a settler's claim and appurtenant water right under verbal transfer is the successor in interest of the original appropriator; that he does not take title to the water right by recapture, but can avail himself of his predecessor's priority.

The water rights under discussion in *McDonald* v. *Lannen* had been acquired on unsurveyed public lands of the United States. It was contended in a case decided later in the same year that the doctrine of that case was controlling only where there had been a verbal sale of improvements and water rights on unsurveyed ground.[205] The court held that there was no reason for any such distinction, and that the holding in *McDonald* v. *Lannen* was equally applicable to claims of rights initiated by occupancy and by filing on surveyed lands.

The rule applies to mining claims and appurtenant water rights, as well as to possessory rights and improvements upon agricultural lands.[206]

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nessy, 42 Mont. 535, 540, 113 Pac. 751 (1911), the court referred to these expressions and said: "But we cannot see any substantial reason for the distinction."

[204] The statement is made, at 19 Mont. 85-86: "We cannot comprehend the logic of the language in *Barkley* v. *Tieleke*, which is claimed generally to hold, if it does, and the decision of the supreme court of California, rendered in 1872 (see *Smith* v. *O'Hara*, 43 Cal. 373), which does hold, that an appriator of a water right by verbal transfer abandons it, and therefore divests his transferee, to whom he has honestly intended to surrender the property, of all rights of priority he himself acquired therein. The error seems to lie in the failure to properly distinguish in this connection the true sense of the word 'abandon.'"

[205] *Wood* v. *Lowney*, 20 Mont. 273, 277-278, 50 Pac. 794 (1897).

[206] *Featherman* v. *Hennessy*, 42 Mont. 535, 539-540, 113 Pac. 751 (1911). Contention had been made that conveyances of placer claims and water rights were void and within the statute of frauds because made orally, not in writing. The court held that the contesting party was a stranger to the conveyances and had not since been brought into privity with any of the parties thereto, and being a stranger, he could not be heard to object to them. "It is true that in *McDonald* v. *Lannen*, *supra*, this court used expressions which would indicate that a different rule applies to mining claims and appurtenant rights from that which applies to mere possessory rights and improvements upon agricultural lands not held by formal entry. But we cannot see any substantial reason for the distinction."

The rule applies likewise regardless of whether the transfer by the settler is made for a consideration or without consideration.[207] It seems to be well settled that the following rule applies in Montana:[208]

> Agreements respecting improvements erected by the vendor upon public lands in which he has no permanent interest are not within the statute of frauds (27 C. J. 197, and cases cited); and this court is committed to the doctrine that a settler upon public lands of the United States may convey his right therein, with water rights thereto appurtenant, orally and with or without consideration, to one who thereupon takes immediate possession thereof. * * *

Privity between claimant and original appropriator

One who claims title to a water right initiated by another must show privity of estate with the latter in order to avail himself of the original priority, otherwise he cannot "tack" his own title onto that of his predecessor. The Montana Supreme Court has held consistently to the principle that:[209]

> The mere possession by one person of a water right originated by another does not show such privity. In order to make good his claim to the right as of the date at which it was initiated, the possessor must show some contractual relation between himself and the original appropriator, or privity with him under the laws of succession. Otherwise the initiation of the right will be fixed as of the date at which possession was taken.* * *

The fact that the present holder of the right repaired and uses the ditches of the original appropriator does not alter the principle.[210]

Mortgage

The assignee of the mortgagee of a water right used in connection with land not owned by the mortgagor—who had done nothing to make the water right appurtenant to the land—was held entitled to the appropriative right notwithstanding a claim by the possessor of the land that the water right had become by operation of law appurtenant to that land.[211] On the other hand, if a water right is appurtenant to land, a mortgage of the land with the appurtenances covers the incorporeal hereditaments annexed to the realty, and also such physical property, or rights to or in connection

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[207] *St. Onge* v. *Blakely*, 76 Mont. 1, 14, 245 Pac. 532 (1926).

[208] *Geary* v. *Harper*, 92 Mont. 242, 248, 12 Pac. (2d) 276 (1932). See also *Gilcrest* v. *Bowen*, 95 Mont. 44, 49, 52, 24 Pac. (2d) 141 (1933); *Wills* v. *Morris*, 100 Mont. 514, 531-532, 50 Pac. (2d) 862 (1935); *Connolly* v. *Harrel*, 102 Mont. 295, 300, 57 Pac. (2d) 781 (1936); *Cook* v. *Hudson*, 110 Mont. 263, 278, 103 Pac. (2d) 137 (1940).

[209] *Kenck* v. *Deegan*, 45 Mont. 245, 249, 122 Pac. 746 (1912). See *St. Onge* v. *Blakely*, 76 Mont. 1, 19, 245 Pac. 532 (1926); *Gilcrest* v. *Bowen*, 95 Mont. 44, 56, 24 Pac. (2d) 141 (1933); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 290, 62 Pac. (2d) 206 (1936). See also the effect of the transactions in *Federal Land Bank* v. *Morris*, 112 Mont. 445, 448-450, 116 Pac. (2d) 1007 (1941).

[210] *Head* v. *Hale*, 38 Mont. 302, 308, 100 Pac. 222 (1909).

[211] *Smith* v. *Denniff*, 24 Mont. 20, 28-31, 60 Pac. 398 (1900).

with it, as are used with and for the benefit of the land and are reasonably necessary for its proper enjoyment.[212]

Dedication

One of the essential elements of a dedication of the use of water to the public is an offer on the part of the owner of the property evincing his intention to dedicate.[213]

Relation to ditch right

Separable ownerships of ditch and water right.—Water rights and ditch rights are separable, and proof of ownership in a ditch does not establish any right to the use of the water running therein.[214] And so an award of a right to the use of the waters of a stream does not restrict the diversion through any particular diversion channel, although the name of the ditch or channel used is frequently included in order to identify the particular right awarded. The supreme court has stated in another case that:[215]

> We have held repeatedly that water rights and ditch rights are separate and distinct property rights. One may own a water right without a ditch right, or a ditch right without a water right. * * * It is elsewhere held that the revocation of a license to build a ditch does not necessarily affect the rights to the water carried by the ditch. * * *

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[212] *Yellowstone Valley Co.* v. *Associated Mortgage Investors, Inc.*, 88 Mont. 73, 82, 290 Pac. 255 (1930). In this case plaintiff had mortgaged his land, together with water rights, and assigned to the mortgagee stock certificates in a mutual irrigation company. The mortgage was foreclosed and the properties were bid in at sheriff's sale. The sheriff's deed described the lands, but did not mention the appurtenances or the water, water rights, or shares of stock. Plaintiff commenced this action to recover the shares of stock. It was held that the mortgage was a first lien on the land and also on the appurtenant water rights represented by the shares of stock. By reason of the foreclosure, the plaintiff had no right, title, or interest in either the land or the water stock.

[213] *Sherlock* v. *Greaves*, 106 Mont. 206, 212-213, 217, 76 Pac. (2d) 87 (1938). Plaintiffs, as owners of rights to the use of waters of Crow Creek, brought this action to enjoin the residents of a town from diverting or using water diverted from the creek in alleged violation of the rights of plaintiffs. For many years the residents of the town, with the consent of the owners of the ditches that passed near the town, diverted water from the ditches for the irrigation of lawns and gardens and for domestic use. Later water for the town was obtained from a certain ditch for which the users in the town paid either in services or money to the owners of the ditch, who likewise owned certain water rights in Crow Creek. The court held that as against these plaintiffs, there was no common-law dedication.

[214] *Missoula Light & Water Co.* v. *Hughes*, 106 Mont. 355, 364-365, 77 Pac. (2d) 1041 (1938).

[215] *Connolly* v. *Harrel*, 102 Mont. 295, 300-301, 57 Pac. (2d) 781 (1936). See *McDonnell* v. *Huffine*, 44 Mont. 411, 422, 423, 120 Pac. 792 (1912); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 355, 3 Pac. (2d) 286 (1931). Compare the early case of *Donnell* v. *Humphreys*, 1 Mont. 518, 529-530 (1872), in which the court stated that "he who grants a thing is supposed to, and does grant that without which the grant is worthless, and he who grants a ditch is supposed to grant not only the excavated channel, but also his rights to the water by which it is supplied and made valuable."

Effect of abandonment of ditch or water right.—The supreme court ha said that "so far distinct are the water rights and ditch rights that the aban donment of one does not necessarily imply an abandonment of the other."[21

Elements of the Right

Priority of right

First in time, first in right.—It is provided by statute that "As between appropriators the one first in time is first in right."[217] This maxim, other wise expressed as "priority of appropriation confers superiority of right," applies without reference to the character of the use made or to be made of the water, whether such use be "natural" or "artificial."[218] It also applies equally to rights to the use of running water of streams and to rights to the "storage and use of flood or waste water."[219]

Date of priority.—The determination of the date of priority of an appropriative right, and the effect of the doctrine of relation upon such determination, are discussed under the title "Completion of appropriation—Doctrine of relation," above.

The possessor of an appropriative right originated by another must show some contractual relation or privity with him to be entitled to succeed to the original date of priority. Otherwise he takes only by recapture, with the effect of a new appropriation with priority as of the time of such taking. See "Privity between claimant and original appropriator," above. See also the discussion of "Formalities of conveyance" in relation to succession to the original date of priority.

Measure of the right

Holders of appropriative rights may claim that the quantities of water to which their rights relate shall flow down the stream to the headgates of their ditches, and "are entitled to nothing more."[220]

The quantity of water to which the right relates, and to which the holder is entitled in preference to subsequent appropriators, is determined not only by the capacity of the ditch (which is simply one of the limiting factors), but by the time when the appropriator dug his ditch, his diligence in applying the water to a beneficial use, the extent of the use made by him, his needs, and the circumstances surrounding all these acts.[221]

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[216] *McDonnell* v. *Huffine,* 44 Mont. 411, 423, 120 Pac. 792 (1912).

[217] Mont. Rev. Codes 1947, sec. 89-807.

[218] *Mettler* v. *Ames Realty Co.,* 61 Mont. 152, 159-160, 169, 201 Pac. 702 (1921); *Meine* v. *Ferris,* 126 Mont. 210, 216, 247 Pac. (2d) 195, 198 (1952).

[219] *Federal Land Bank* v. *Morris,* 112 Mont. 445, 456, 116 Pac. (2d) 1007 (1941).

[220] *Kelly* v. *Granite Bi-Metallic Consolidated Min. Co.,* 41 Mont. 1, 12, 108 Pac. 785 (1910).

[221] *Smith* v. *Duff,* 39 Mont. 382, 389, 102 Pac. 984 (1909).

The appropriative right is "a right with certain restrictions and limitations."[222] The water must be used "with some regard for the rights of the public," and not in a way that would result "in such a monopoly as to work disastrous consequences to the people of the state." And the United States Supreme Court has said that the right must be exercised "within reasonable limits," that is, with reference to the general condition of the country and the necessities of the people, "and not so as to * * * vest an absolute monopoly in a single individual."[223]

Capacity of ditch a limiting factor.—Attention has been called to the fact that in the early days of irrigation in the Territory and State, extravagant quantities of water were awarded the litigants by the courts, and that:[224]

> In instances more water was awarded than some of the ditches of the litigants ever would carry; in others much greater quantities of water than the litigants ever did or could use beneficially. In some cases the courts were not to blame. The litigants tried to get all they could. * * *

The supreme court originally adopted the rule of ditch capacity as the measure of the appropriative right, having stated in the first reported water-right case that the measure of the right in litigation would be the amount of water that the ditch would convey from the creek without running over its banks.[225] However, in 1891 a case was decided in which recognition was given also to the quantity of water needed by the appropriator for the uses for which it had been appropriated, that qualification having been included in an instruction to the jury.[226] And in a number of subsequent decisions, both the needs of the appropriator and the facilities for diverting and conveying water to the place of use have been considered in arriving at the measure of the appropriative right.[227]

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[222] *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 186-187, 50 Pac. 416 (1897).

[223] *Basey* v. *Gallagher*, 87 U. S. 670, 683 (1875).

[224] *Allen* v. *Petrick*, 69 Mont. 373, 378, 222 Pac. 451 (1924).

[225] *Caruthers* v. *Pemberton*, 1 Mont. 111, 117 (1869).

[226] *Carron* v. *Wood*, 10 Mont. 500, 504, 26 Pac. 388 (1891). The instruction to the jury was: "The extent of the appropriation of water is determined by the capacity of his head-gate and ditches, and the quantity of water required by the appropriator for the uses for which it may be appropriated." The controversy was over the reference to headgate, the contention being that the test was what the ditch would carry. The supreme court held that the statement that the capacity of headgate and ditches must be considered in determining the quantity to which the appropriator was entitled was free from error.

See the discussion in *McDonald* v. *Lannen*, 19 Mont. 78, 82-83, 47 Pac. 648 (1897), concerning the relation of ditch capacity to the extent of the appropriative right, and the disapproval in *Smith* v. *Duff*, 39 Mont. 382, 388-390, 102 Pac. 984 (1909), of the implication of the statement in *McDonald* v. *Lannen* and the view of the later court as to a proper limitation upon the statement.

[227] See *Sayre* v. *Johnson*, 33 Mont. 15, 18-19, 81 Pac. 389 (1905); *Gilcrest* v. *Bowen*, 95 Mont. 44, 56, 24 Pac. (2d) 141 (1933); *Galahan* v. *Lewis*, 105 Mont. 294, 297-298, 72 Pac. (2d) 1018 (1937); *Quigley* v. *McIntosh*, 110 Mont. 495, 505-506, 103 Pac. (2d) 1067 (1940).

The current rule has been stated as follows:[228]

> The appropriator's need and facilities, if equal, measure the extent of his appropriation. * * * If his needs exceed the capacity of his means of diversion, then the capacity of ditch, *etc.*, measures the extent of his right. * * * If the capacity of his ditch exceeds his needs, then his needs measure the limit of his appropriation. * * *

This rule has been restated in a number of decisions and appears to be well settled in Montana.[229] Obviously, one cannot make beneficial use of any quantity of water in excess of the capacity of his ditch; and so, as the right is limited by the extent of beneficial use (existing or contemplated), the appropriator cannot acquire a right to more water than his ditch will carry.[230]

Needs of appropriator.—In determining the needs of the appropriator for water—one of the criteria by which the extent of his right is to be measured[231]—the court will consider, among other things, the topography and character of the land.[232]

Entire flow of stream.—The doctrine of appropriation sanctions the right of an appropriator to the use of all the waters of a stream, to the exclusion of all junior claimants, if the entire flow of the stream is within the limits of his particular appropriative right as measured by the standards

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[228] *Bailey* v. *Tintinger*, 45 Mont. 154, 178, 122 Pac. 575 (1912). The court stated also, at 45 Mont. 163, that the appropriator's right was not to be limited by the capacity of his canal while out of repair, unless that condition had existed for such length of time as to indicate an intention to claim no more water than the canal in that condition would carry.

[229] In *Conrow* v. *Huffine*, 48 Mont. 437, 444, 138 Pac. 1094 (1914), the court stated: "After the use has been installed, however, if the capacity of the ditch exceeds the amount required for reasonable use, the necessity for the use, and not the size of the ditch, is the measure of the extent of the right. * * * The tendency of recent decisions of the courts in the arid states is to disregard entirely the capacity of the ditch and regard the actual beneficial use, installed within a reasonable time after the appropriation has been made, as the test of the extent of the right."

See also *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 159, 201 Pac. 702 (1921); *Wheat* v. *Cameron*, 64 Mont. 494, 501-502, 210 Pac. 761 (1922); *Jacobs* v. *Harlowton*, 66 Mont. 312, 320, 213 Pac. 244 (1923); *O'Shea* v. *Doty*, 68 Mont. 316, 320, 218 Pac. 658 (1923); *Tucker* v. *Missoula Light & Ry. Co.*, 77 Mont. 91, 101, 250 Pac. 11 (1926); *Peck* v. *Simon*, 101 Mont. 12, 21, 52 Pac. (2d) 164 (1935).

[230] *Wheat* v. *Cameron*, 64 Mont. 494, 502, 210 Pac. 761 (1922); *Galahan* v *Lewis*, 105 Mont. 294, 297-298, 72 Pac. (2d) 1018 (1937).

[231] In *Cook* v. *Hudson*, 110 Mont. 263, 282-283, 103 Pac. (2d) 137 (1940) it is said: "It is a fundamental principle of water right law that a prior right may be exercised only to the extent of the necessities of the owner of such prior right * * *." In *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900): "He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes." In *Dern* v. *Tanner*, 60 Fed (2d) 626, 628 (D. Mont., 1932): " * * * the right in water is limited to reasonable necessity and use, and none for waste."

[232] *Kleinschmidt* v. *Greiser*, 14 Mont. 484, 496, 37 Pac. 5 (1894); *Irion* v *Hyde*, 107 Mont. 84, 95-96, 81 Pac. (2d) 353 (1938).

recognized by the supreme court.[233] When the quantity of water to which the first appropriator of the water of a stream is entitled has been determined with reference to his needs and facilities for handling the water, the measure of his right to divert the water is made to depend, not upon the average quantity of water flowing in the stream, but upon the greatest quantity.[234]

Beneficial use.—The appropriation of water must be for some useful or beneficial purpose.[235] Consequently, the appropriative right is measured not only by the needs of the appropriator for water with which to irrigate the land for which he acquired the right, or to accomplish some other purpose of use of water, but also by the beneficial use that he actually made (within a reasonable time), which may have been less than his needs. That is, the right is limited to the quantity of water actually applied by the appropriator in consummating the useful or beneficial purpose for which the appropriation was made.[236] This limitation to beneficial use, in determining the extent of an appropriation, exists regardless of any attempt to appropriate a greater quantity of water.[237]

The importance of the limitation of the appropriative right to beneficial use has been thus stressed by the supreme court:[238]

> If comparison between the principles regulating the appropriation and use of water is permissible it may be said that the principle of beneficial use is the one of paramount importance.

If, after the appropriation is made, conditions change and the necessity for the original beneficial use diminishes, then to the extent of the lessened necessity the appropriator no longer has the use for that additional quantity of water and the change inures to the benefit of subsequent appropriators having need for it.[239]

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[233] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 159, 201 Pac. 702 (1921); *Wallace* v. *Goldberg*, 72 Mont. 234, 244, 231 Pac. 56 (1925); *Meine* v. *Ferris*, 126 Mont. 210, 216, 247 Pac. (2d) 195, 198 (1952); *Marks* v. *Hilger*, 262 Fed. 302, 304 (9th Cir., 1920).

[234] *Sayre* v. *Johnson*, 33 Mont. 15, 18-19, 81 Pac. 389 (1905). The court said: "In other words, if the plaintiff had need for three hundred inches of water, and his ditch would carry that amount, he was entitled to have his appropriation fixed at that amount. If that amount is ever in the stream during the irrigation season, plaintiff will get it." See also *Wallace* v. *Weaver*, 47 Mont. 437, 446, 133 Pac. 1099 (1913).

[235] Mont. Rev. Codes 1947, sec. 89-802; *Power* v. *Switzer*, 21 Mont. 523, 529-530, 55 Pac. 32 (1898).

[236] See *Allen* v. *Petrick*, 69 Mont. 373, 376, 222 Pac. 451 (1924); *Toohey* v. *Campbell*, 24 Mont. 13, 17-18, 60 Pac. 396 (1900); *Conrow* v. *Huffine*, 48 Mont. 437, 444, 138 Pac. 1094 (1914); *Galahan* v. *Lewis*, 105 Mont. 294, 298, 72 Pac. (2d) 1018 (1937).

[237] *Jacobs* v. *Harlowton*, 66 Mont. 312, 319, 213 Pac. 244 (1923); *O'Shea* v. *Doty*, 68 Mont. 316, 320, 218 Pac. 658 (1923). In *Power* v. *Switzer*, 21 Mont. 523, 529, 55 Pac. 32 (1898), it is said: "But the mere diversion of a quantity of water from a stream is not a legal appropriation of it."

[238] *Allen* v. *Petrick*, 69 Mont. 373, 377, 222 Pac. 451 (1924).

[239] *Conrow* v. *Huffine*, 48 Mont. 437, 444-445, 138 Pac. 1094 (1914); *Huffine* v. *Miller*, 74 Mont. 50, 52, 237 Pac. 1103 (1925).

Economical use.—The court has added to the element of beneficial use the further limitation of economy of use; but it is to be applied within reasonable limits.[240] That is to say, the objective of a determination of the duty of water is the quantity necessary to irrigate not only economically, but successfully, the tract of land to be irrigated. Emphasis should be placed upon economy of use, said the court, but not "to such an extent as to imperil success."

Hence, in determining the quantity of water to be awarded to an appropriator, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as a standard, even though a more economical method might be adopted; for "an appropriator cannot be compelled to divert according to the most scientific method known."[241]

However, the appropriative right does not confer upon the holder the privilege of letting the water run to waste.[242]

Prospective or contemplated beneficial use.—The fact that the development of an irrigation project may be gradual, if consistent with the circumstances, without impairment of the appropriative right or postponement of priority in favor of subsequent appropriators, has been indicated above (see "Completion of appropriation"). It appears to be well settled in Montana that, within certain limitations, the beneficial use which serves as a measure of the appropriative right may be prospective or contemplated, as well as immediate, if consummated with reasonable diligence.[243] The rule has been stated by the court without reference to the nonstatutory or statutory method of acquiring the right, and has been applied to appropriations made in both ways.

This principle, and its important limitations, have been expressed as follows:[244]

> It is not requisite that the use of water appropriated be made immediately to the full extent of the needs of the appropriator. It may be prospective and contemplated, provided there is a present ownership or possessory right to the lands upon which it is to be applied, coupled with a *bona fide* intention to use the water, and provided that the appropriator proceeds with due diligence to apply the water to his needs. * * *

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[240] *Allen* v. *Petrick*, 69 Mont. 373, 376, 380, 222 Pac. 451 (1924).

[241] *Worden* v. *Alexander*, 108 Mont. 208, 215, 90 Pac. (2d) 160 (1939).

[242] *Atchison* v. *Peterson*, 87 U. S. 507, 514 (1874); *Custer* v. *Missoula Public Service Co.*, 91 Mont. 136, 145, 6 Pac. (2d) 131 (1931); *Dern* v. *Tanner*, 60 Fed. (2d) 626, 628 (D. Mont., 1932).

[243] *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900); *Smith* v. *Duff*, 39 Mont. 382, 389, 102 Pac. 984 (1909); *Bailey* v. *Tintinger*, 45 Mont. 154, 175, 122 Pac. 575 (1912); *Wheat* v. *Cameron*, 64 Mont. 494, 501, 508, 210 Pac. 761 (1922); *O'Shea* v. *Doty*, 68 Mont. 316, 320, 218 Pac. 658 (1923); *Warren* v. *Senecal*, 71 Mont. 210, 220, 228 Pac. 71 (1924); *Gilcrest* v. *Bowen*, 95 Mont. 44, 51, 24 Pac. (2d) 141 (1933); *Quigley* v. *McIntosh*, 110 Mont. 495, 505-506, 103 Pac. (2d) 1067 (1940). Contemplated storage: *Donich* v. *Johnson*, 77 Mont. 229, 259, 250 Pac. 963 (1926).

[244] *St. Onge* v. *Blakely*, 76 Mont. 1, 23, 245 Pac. 532 (1926).

The privilege, however, is not accorded "for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses."[245]

Intention of appropriator.—The intention of the claimant of an appropriative right is an important factor in determining the validity of the appropriation.[246] It bears directly upon the determination of the quantity of water to be awarded to the appropriator,[247] and upon the lawful place of use of the water.[248]

Of course the intention itself is not sufficient, and a mere declaration of a claim unaccompanied by acts of possession is not an appropriation.[249] To be effectual as against other parties the intention "must be carried into actual execution with all reasonable diligence, by some known and tangible means, and at some designated point."[250]

The supreme court stated in 1938 that:[251]

> The rights of the parties were not to be measured entirely by what they claimed in their appropriation notices. They were to be measured and gauged by their beneficial use over a reasonable period of time after they initiated the appropriations. * * *

The intention must be *bona fide*.[252] As stated by the supreme court:[253]

> If our statute does not by express terms, it does by fair implication, require that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. * * * The law will not encourage anyone to play the part of the dog in the manger, and therefore the intention must be *bona fide* and not a mere afterthought. * * *

When the beneficial use of the water covered by an appropriation is not immediate, but prospective or contemplated, the intention of the party becomes of prime importance, because the privilege of making contemplated

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[245] *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900).

[246] *Power* v. *Switzer*, 21 Mont. 523, 530, 55 Pac. 32 (1898); *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900); *Smith* v. *Duff*, 39 Mont. 382, 387, 102 Pac. 984 (1909). See *Oscarson* v. *Norton*, 39 Fed. (2d) 610, 613 (9th Cir., 1930).

[247] *Power* v. *Switzer*, 21 Mont. 523, 530, 55 Pac. 32 (1898); *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900).

[248] *Spokane Ranch & Water Co.* v. *Beatty*, 37 Mont. 342, 351, 96 Pac. 727, 97 Pac. 838 (1908).

[249] *Miles* v. *Butte Electric & Power Co.*, 32 Mont. 56, 66, 68-69, 79 Pac. 549 (1905); *Sweetland* v. *Olsen*, 11 Mont. 27, 31, 27 Pac. 339 (1891).

[250] *Columbia Min. Co.* v. *Holter*, 1 Mont. 296, 300 (1871).

[251] *Irion* v. *Hyde*, 107 Mont. 84, 95-96, 81 Pac. (2d) 353 (1938).

[252] *Smith* v. *Denniff*, 24 Mont. 20, 29, 60 Pac. 398 (1900); *Miles* v. *Butte Electric & Power Co.*, 32 Mont. 56, 68-69, 79 Pac. 549 (1905); *Wheat* v. *Cameron*, 64 Mont. 494, 508, 210 Pac. 761 (1922); *O'Shea* v. *Doty*, 68 Mont. 316, 320, 218 Pac. 658 (1923); *St. Onge* v. *Blakely*, 76 Mont. 1, 23, 245 Pac. 532 (1926).

[253] *Bailey* v. *Tintinger*, 45 Mont. 154, 178, 122 Pac. 575 (1912).

beneficial use of water is accorded only so long as there is a *bona fide* intention to make the contemplated use. It is therefore necessary to ascertain the claimant's intent; and this is done from an examination of his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof.[254]

For example, the intent of one who appropriated water in 1868, as to the then present and contemplated use of the water diverted in that year, was held to have never reached beyond the purpose of irrigating a tract of 25 acres then enclosed, and not to have extended to the additional area within a larger tract taken up in 1876 and embracing the former enclosure and possessory claim.[255]

In another case, not to exceed 12 acres had been irrigated by the predecessors in interest of respondents prior to a certain year.[256] The record did not show when the maximum area of land was irrigated, whether before or after appellants' appropriation. The court stated that unanswered questions that must be determined upon further proceedings were (1) what were the intentions of the first user when he made his appropriation; (2) how large was his ditch; (3) how much land did he possess, and upon how much land did he contemplate using the water; (4) how soon did he carry out his contemplated use, and to what extent; and (5) what diligence did he employ? If the first appropriator for 20 years prior to appellants' appropriation never had irrigated in excess of 12 acres of land, his prior right would be confined to enough water to irrigate that land. "The court would say that was all he ever intended to use, deducing his intentions from his acts during that long period of time." (39 Mont. at 389).

It is provided by statute that records of appropriations of water from sources that have not been adjudicated, when properly made as provided in the statute, "shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained."[257] As stated heretofore, declarations in notices of appropriation that had been filed voluntarily prior to the enactment of the statute authorizing such filings have been held not admissible as evidence of the intention of the claimant. (See "Methods of appropriating water—Nonstatutory: Prior to 1885.")

Inasmuch as an award in a decree of adjudication could cover prospective or future needs only if intention in that regard was manifested, the

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[254] *Toohey* v. *Campbell*, 24 Mont. 13, 17-18, 60 Pac. 396 (1900); *Wheat* v. *Cameron*, 64 Mont. 494, 501, 210 Pac. 761 (1922); *Gilcrest* v. *Bowen*, 95 Mont. 44, 51, 24 Pac. (2d) 141 (1933).

[255] *Toohey* v. *Campbell*, 24 Mont. 13, 18, 60 Pac. 396 (1900). It was held that his rights up to 1876 must be limited to a quantity of water necessary to irrigate what he then had in actual possession, which amounted to no more than 25 acres.

[256] *Smith* v. *Duff*, 39 Mont. 382, 387-389, 102 Pac. 984 (1909).

[257] Mont. Rev. Codes 1947, sec. 89-814. The records to be received as prima facie evidence are provided for in secs. 89-810 and 89-813, relating, respectively, to new appropriators and to persons "who have heretofore acquired rights to the use of water."

decree could not have contemplated prospective use if no issue regarding that additional use was shown in the case.[258]

Carrying out of intention.—When the intention of the claimant has been ascertained, then the limitation of the quantity of water necessary to effectuate that intent can be applied according to the acts, diligence, and needs of the appropriator.[259]

Diligence on the part of the appropriator is necessary in consummating his prospective beneficial use, for his right will be limited to that quantity within the amount claimed which the appropriator has needed and which within a reasonable time he has applied to a beneficial use.[260]

The effect of failure to carry out an original intention was evidenced in a case in which a party succeeded to the water right of one who originally intended to irrigate his entire squatter's right of 160 acres, but who fenced only 80 acres of the land, title to the other 80 acres being obtained subsequently by patent by a third party.[261] There was no privity between the patentee of the unfenced 80 acres and the original settler, or between the patentee and the successor of the original settler; hence, the patentee did not

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[258] *Quigley* v. *McIntosh*, 110 Mont. 495, 505-506, 103 Pac. (2d) 1067 (1940). The court stated: "The mere fact that all the lands to which the additional use of water has been applied were included within the description in the pleadings at the time of the decree, in no manner furnishes basis for, or justifies, the extended use in the absence of recitals in the pleadings and decree and proof in the record that the appropriations were made in anticipation of future needs, and a showing in this proceeding that there has been reasonable diligence since the decree in developing such needs." It was further stated, at 110 Mont. 509-510, that the failure of the court to specify in the decree the acreage to be irrigated or the time of flow or volume of water could not "expand the early water rights beyond the beneficial uses claimed and proved, or to remove the well-established limitation of the appropriator's right to waters actually taken and beneficially applied. * * * one using a certain number of inches but an insignificant amount of water to irrigate a garden patch cannot as against intervening appropriators expand his use of it to irrigate a complete ranch. * * * The mere fact that the decree awarding a water right in miners' inches or other flow measurement fails to describe the acreage actually irrigated or the time of flow or the volume of water actually used, cannot serve to remove all limitations upon its use in point of time or volume, and thus substantially to expand the early appropriations, to the detriment of subsequent appropriators. If a decree had that effect, there would be few adjudicated streams in the state in which any but the first few appropriations would be of any substantial value."

[259] *Power* v. *Switzer*, 21 Mont. 523, 530, 55 Pac. 32 (1898); *Toohey* v. *Campbell*, 24 Mont. 13, 17, 60 Pac. 396 (1900).

[260] *Smith* v. *Duff*, 39 Mont. 382, 387-388, 389, 102 Pac. 984 (1909); *Allen* v. *Petrick*, 69 Mont. 373, 376-377, 222 Pac. 451 (1924); *St. Onge* v. *Blakely*, 76 Mont. 1, 23, 245 Pac. 532 (1926); *Irion* v. *Hyde*, 107 Mont. 84, 95-96, 81 Pac. (2d) 353 (1938); *Quigley* v. *McIntosh*, 110 Mont. 495, 506, 103 Pac. (2d) 1067 (1940).

[261] *Gilcrest* v. *Bowen*, 95 Mont. 44, 56-57, 24 Pac. (2d) 141 (1933). The successor of the original appropriator succeeded to the 80 acres that had been fenced, and to the water right therefor.

obtain any portion of the original water right. Furthermore, the successor of the original settler obtained only enough water for the 80 acres that had been fenced and reduced to possession prior to making the appropriation, for that was the extent of the right actually acquired by the original settler even though he originally intended to irrigate the entire 160 acres.

The effect of possession of land in carrying out the claimant's intention to make prospective or contemplated use of water has been referred to under the title "Relation of land to appropriation of water."

Conveyance losses.—The appropriative right includes losses of water by evaporation and seepage in conveying the water from the point of diversion to the place of use, and the appropriator must make allowance for such losses in making his appropriation.[262] But the appropriator is bound to the use of reasonable care in constructing and maintaining his appliances to the end that water be not unnecessarily wasted, and no excess above his actual beneficial use can be diverted from the source of supply to cover unreasonable losses in transit.[263]

Surplus above beneficial requirements.—An appropriator has no right to divert more water than is necessary for his use,[264] regardless of whether he has a right, under decree or otherwise, to the diversion of a greater quantity than his necessities call for at any particular time.[265] If he does divert water in excess of his actual and necessary use at any time, he is required by statute to return the surplus water to the stream.[266] It is a fundamental principle of water right law, said the supreme court, that a prior right may be exercised only to the extent of the necessities of the owner of the right and when devoted to a beneficial purpose within the limits of the right.[267]

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[262] *Caruthers* v. *Pemberton*, 1 Mont. 111, 117 (1869); *Wheat* v. *Cameron*, 64 Mont. 494, 501-502, 210 Pac. 761 (1922).

[263] *Dern* v. *Tanner*, 60 Fed. (2d) 626, 628 (D. Mont., 1932).

[264] *Conrow* v. *Huffine*, 48 Mont. 437, 444-445, 138 Pac. 1094 (1914); *Clausen* v. *Armington*, 123 Mont. 1, 17-18, 212 Pac. (2d) 440, 449-450 (1949).

[265] *Tucker* v. *Missoula Light & Ry. Co.*, 77 Mont. 91, 101-102, 250 Pac. 11 (1926).

[266] Mont. Rev. Codes 1947, sec. 89-805.

[267] *Cook* v. *Hudson*, 110 Mont. 263, 282-283, 103 Pac. (2d) 137 (1940). The supreme court has held in numerous cases that the appropriator has no right to the possession of waters in excess of his beneficial use and that subsequent appropriators are entitled to the surplus. See *Creek* v. *Bozeman Water Works Co.*, 15 Mont. 121, 128-129, 38 Pac. 459 (1894); *Talbott* v. *Butte City Water Co.*, 29 Mont. 17, 26-27, 73 Pac. 1111 (1903); *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 554-555, 81 Pac. 334 (1905); *Spokane Ranch & Water Co.* v. *Beatty*, 37 Mont. 342, 351-352, 96 Pac. 727, 97 Pac. 838 (1908); *Smith* v. *Duff*, 39 Mont. 382, 389-390, 102 Pac. 984 (1909); *Featherman* v. *Hennessy*, 43 Mont. 310, 316, 115 Pac. 983 (1911); *Wallace* v. *Weaver*, 47 Mont. 437, 442, 133 Pac. 1099 (1913); *Huffine* v. *Miller*, 74 Mont. 50, 52, 237 Pac. 1103 (1925); *Tucker* v. *Missoula Light & Ry. Co.*, 77 Mont. 91, 101-102, 250 Pac. 11 (1926); *Galiger* v. *McNulty*, 80 Mont. 339, 356, 357, 260 Pac. 401 (1927); *Custer* v. *Missoula Public Service Co.*, 91 Mont. 136, 143-145, 6 Pac. (2d) 131 (1931); *Dern* v. *Tanner*, 60 Fed. (2d) 626, 628 (D. Mont., 1932); *Clausen* v. *Armington*, 123 Mont. 1, 17-18, 212 Pac. 440, 449-450 (1949).

Duty of water.—The long-established policy of the supreme court with reference to the measure of the duty of water was reaffirmed in a case decided in 1952.[268] This was to the effect that while in Montana there is no statute definitely regulating the duty of water, the rule generally observed by the courts in fixing the amount of water required for economical use is to allow one inch per acre unless the evidence discloses that a greater or lesser quantity is required, the question being one of fact and never to be considered a question of law for the courts. The trend of the later decisions has been said to be that the requirements of the lands for adaptable crops should measure water requirements under appropriative rights in the particular locality.[269]

Determination of duty of water.—The objective of the trial court in fixing the quantity of water in a decree should be the ascertainment of the quantity necessary not only for economical but for successful irrigation.[270] Ample water was available for the early settlers in Montana, and extravagant quantities were used; furthermore, extravagant quantities were awarded in early court decrees. In the language of the court (at 69 Mont. 379-80):

> A fundamental error into which the early day courts fell was the result of their failure to appreciate what has been termed the duty of water; that is, the extent to which and the manner in which the water should be used by the appropriator. In determining the duty of water the court should ascertain the quantity which is essential to irrigate economically but successfully the tract of land to be irrigated. Emphasis should be placed upon economy of use. But economy should not be insisted upon to such an extent as to imperil success. * * *

In one case the supreme court refused to give controlling weight to the expert testimony of certain witnesses who had had no personal experience with the lands in question, their testimony being at variance with that of farmers of long experience in local irrigation, saying (at 108 Mont. 215) that:[271]

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[268] *Stearns* v. *Benedick*, 126 Mont. 272, 276-277, 247 Pac. (2d) 656, 658 (1952). The prima facie measure of one inch per acre was approved in *Conrow* v. *Huffine*, 48 Mont. 437, 445-446, 138 Pac. 1094 (1914). It was followed in *Wills* v. *Morris*, 100 Mont. 514, 530, 50 Pac. (2d) 862 (1935), in which most of the evidence was to the effect that that quantity was necessary for the lands in litigation. In *Worden* v. *Alexander*, 108 Mont. 208, 213-216, 90 Pac. (2d) 160 (1939), most of the awards averaged two miner's inches to the acre which the supreme court believed to be sustained by the preponderance of the evidence.

[269] *Federal Land Bank* v. *Morris*, 112 Mont. 445, 452-453, 116 Pac. (2d) 1007 (1941). In this case the findings of the trial court of three acre-feet per acre were sustained.

[270] *Allen* v. *Petrick*, 69 Mont. 373, 377-380, 222 Pac. 451 (1924).

[271] *Worden* v. *Alexander*, 108 Mont. 208, 213-216, 90 Pac. (2d) 160 (1939). Most of the awards averaged 2 miner's inches to the acre, which the supreme court believed to be sustained by the preponderance of the evidence. Nearly all of the witnesses, who were farmers with long experience in the irrigation of their particular tracts, stated that in their opinion 2 inches of water was necessary for beneficial and successful irrigation, and some of them testified that 2½ and even 3 inches in certain cases were necessary. The court referred to the fact that three qualified irrigation engineers had testified that only 1 inch per acre was required for successful and economical irrigation, but stated

> While, in determining the weight of the evidence in this case, we should consider the interest of the parties, we should also consider the fact that the engineers were employed by the appellants herein, and in their testimony would likely favor the parties by whom they were employed.

Point of measurement of water.—The water to which an appropriator is entitled is measured at the place at which it is diverted from the stream or other source of supply.[272] As noted above under "Conveyance losses", the appropriator is entitled to an allowance for reasonable losses in the conveyance of his water from the point of diversion to the place of use.

Period of use of water

A court decree awarded the right to use certain waters through one ditch from May 1 to November 1 of each year, and through another ditch from May 1 to July 15 of each year.[273] This award was sustained by the supreme court, which stated that the trial court undoubtedly had the right to fix both the quantity of water and the date when the same might be used; there being no difference in principle between appropriations of waters measured by time and those measured by volume.

Place of use of water

The intention of the appropriator in making his appropriation is important in determining the lawful place of use of water under his right. (See "Measure of the right—Intention of appropriator," above.)

Diversion out of watershed.—In the course of placer mining, water sometimes was diverted from one stream and taken across a divide into the watershed of another stream for use in working placer-mining claims there.[274] This practice was lawful, because in the operation of the appropriation doctrine it was held to be immaterial whether the lands to which the waters were applied were within or outside the watershed of the stream from which the waters were taken.[275] In various decrees of water rights, the appropriators were authorized to take the waters out of the watershed for use on outside lands.[276]

The supreme court in some instances has used caution in discussing the

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that these engineers had had no personal experience with the lands in question.

[272] *Caruthers* v. *Pemberton*, 1 Mont. 111, 117 (1869); *Kleinschmidt* v. *Greiser*, 14 Mont. 484, 498, 37 Pac. 5 (1894); *Wheat* v. *Cameron*, 64 Mont. 494, 501-502, 210 Pac. 761 (1922).

[273] *Galiger* v. *McNulty*, 80 Mont. 339, 354, 260 Pac. 401 (1927).

[274] See, for example, *Galiger* v. *McNulty*, 80 Mont. 339, 348-349, 260 Pac. 401 (1927); *Mannix & Wilson* v. *Thrasher*, 95 Mont. 267, 268, 26 Pac. (2d) 373 (1933).

[275] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 159, 168, 201 Pac. 702 (1921); *Meine* v. *Ferris*, 126 Mont. 210, 216, 247 Pac. (2d) 195, 198 (1952).

[276] See *Spokane Ranch & Water Co.* v. *Beatty*, 37 Mont. 342, 351, 96 Pac. 727, 97 Pac. 838 (1908); *Hansen* v. *Larsen*, 44 Mont. 350, 351-352, 120 Pac. 229 (1911); *Thrasher* v. *Mannix & Wilson*, 95 Mont. 273, 277-278, 26 Pac. (2d) 370 (1933).

right to take waters out of the watershed. In one case, in which the right had been acquired many years previously, it was said that:[277]

> Waters primarily belong in the watershed of their origin, if there is land therein which requires irrigation. * * * Courts have many times sustained such foreign appropriation, and perhaps each case would be determined upon its own individual merit. It is sufficient here to say that the right to the use of this water for placer mining purposes by the appellants has been sustained, but it may be appropriate to remark that the burden placed upon the water should not be added to, to the detriment of appropriations made for irrigating lands within the area of the stream from which the water is diverted. * * *

And it was stated in an earlier case that a decree that did not specifically authorize the prior appropriator to take the water permanently from the watershed must not be construed as giving that right.[278] But to entitle one to object to the taking of water out of a watershed, the objector must be an appropriator in the original watershed who claims that he is injured by the diversion.[279]

Purpose of use of water

Equal rights for beneficial purposes.—So long as the use of water made under an appropriative right is a beneficial one, no distinction is made between appropriations for different useful purposes, and no appropriator for any one useful purpose has any preference or superior right (other than with respect to priority of appropriation) to an appropriator for any other useful purpose.[280]

Mining.—As noted heretofore ("Establishment of the appropriation doctrine—Court decisions"), the use of water for mining purposes was the most important purpose for which water was appropriated in the earliest days in Montana Territory, and the appropriation doctrine apparently was developed primarily in the mining areas. Controversies over mining water rights constituted the bulk of the early cases decided by the Territorial supreme court. Disputes involving irrigation water rights that reached the supreme court became relatively more numerous later.

Irrigation of cropped land.—It has also been noted in discussing the

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[277] *Galiger* v. *McNulty*, 80 Mont. 339, 356, 260 Pac. 401 (1927).

[278] *Spokane Ranch & Water Co.* v. *Beatty*, 37 Mont. 342, 351-352, 96 Pac. 727, 97 Pac. 838 (1908).

[279] *Carlson* v. *Helena*, 43 Mont. 1, 2, 6-7, 114 Pac. 110 (1911). In this case the City of Helena had a decreed right to the use of water, the decree providing that the city was entitled to use the same beyond and without the watershed of the creek. The suit was brought by a taxpayer, against the city, to enjoin the city from taking further proceedings to procure a water supply. As the plaintiff was not one of the subsequent appropriators, he could not make the complaint that the diversion by the city might injuriously affect someone who had a right to the use of waters of the creek subsequent in point of time to the rights owned by the city.

[280] *Basey* v. *Gallagher*, 87 U. S. 670, 681-682 (1875); *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 186-187, 50 Pac. 416 (1897); *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 159-160, 201 Pac. 702 (1921).

establishment of the appropriation doctrine that the Territorial supreme court, in its second reported water-rights decision, reserved the question as to whether or not the doctrine of appropriation applied to "ranchmen as well as to miners, concerning water rights."[281] It was settled shortly afterwards, in a decision that was affirmed by the United States Supreme Court, that the doctrine applied to any beneficial use, including irrigation.[282]

Irrigation of uncultivated land.—The supreme court has stated that "The irrigation of pasture land is a beneficial use."[283]

Swimming pool; propagation of fish.—Testimony introduced in one case was to the effect that water had been used to fill a depression, forming a lake or pond which was used as a swimming pool and perhaps to some extent for the propagation of fish.[284] The supreme court stated that if it were assumed to be the fact that the parties in question "did nothing more with the water diverted than to use it for the purpose of maintaining a swimming pool or fish pond, it is not clear that such a use would not be a beneficial use and hence the basis of a valid appropriation."

Storage of water

Public policy.—The State constitution provides that the use of all water appropriated and to be appropriated for beneficial use, and rights of way for conduits, "as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."[285] (See "State water policy," above.)

The Montana Supreme Court has stated that it is to the interest of the

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[281] *Thorp* v. *Woolman,* 1 Mont. 168, 171 (1870).

[282] *Gallagher* v. *Basey,* 1 Mont. 457 (1872); affirmed, *Basey* v. *Gallagher,* 87 U. S. 670 (1875). The decision of the Territorial supreme court did not in any way stress the fact that the water right for irrigation might be different from the water right for mining, but simply upheld the appropriation of water for irrigation purposes on the public domain. The United States Supreme Court, however, stated: "No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." (87 U. S. at 682.)

[283] *State ex rel. Silve* v. *District Court,* 105 Mont. 106, 112, 69 Pac. (2d) 972 (1937). The supreme court cited *Sayre* v. *Johnson,* 33 Mont. 15, 19, 81 Pac. 389 (1905), in which it had been stated, in answer to a contention that the use of water for irrigating land devoted to grazing purposes was not beneficial: "But the evidence does show that by irrigation the amount of grass for pasture is greatly increased. If the respondent should cut the grass for hay, it would hardly be contended that the use of the water was not then beneficial, within the meaning of the statute; and if so, it can hardly be that the question whether the use is a beneficial one can be made to depend upon the particular manner in which respondent feeds the grass procured by the irrigation. While the statute has failed to define the terms 'useful' or 'beneficial,' as used in this connection, we are of the opinion that the use by respondent comes within the meaning of those terms as they are employed."

[284] *Osnes Livestock Co.* v. *Warren,* 103 Mont. 284, 300-302, 62 Pac. (2d) 206 (1936).

[285] Mont. Const., art. III, sec. 15.

public that water be conserved, and that the construction and maintenance of reservoirs for the conservation of flood waters and other waters that would go to waste is of very high public importance.[286] The court cited the constitutional provision noted immediately above, and observed that the right to impound and store water has been recognized repeatedly in the Montana court decisions, as well as by statutes.[287]

Appropriations for storage of water.—The State water-rights statute provides that "an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."[288]

Counsel insisted in one case that reservoirs should not be permitted in the course of or at the headwaters of adjudicated streams, but the supreme court refused to accept that argument.[289] In 1948 the court said that:[290]

> It is of course elementary that a natural depression may be utilized as a reservoir if no one is injured thereby. * * *

Storage appropriations have been recognized in other cases as well.[291]

Reservoirs must be so constructed and used as not to disturb the rights of prior appropriators, and in an action between prior appropriators and a subsequent reservoir user the burden is cast upon the latter to show that by the constuction, maintenance, and use of the reservoir he does not interfere with the rights of the prior appropriators.[292] But the utmost that prior appropriators may rightfully demand is that he who constructs and uses a reservoir shall not interfere with their use of the natural flow in the stream to the extent of their appropriations.[293] In the case just cited, the supreme

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[286] *Donich* v. *Johnson*, 77 Mont. 229, 239-240, 250 Pac. 963 (1926) .In *Jeffers* v. *Montana Power Co.*, 63 Mont. 114, 139-140, 217 Pac. 652 (1923), it was held that the impounding of the waters of Madison River in a reservoir and their transportation through the river channels for a lawful purpose was authorized by statute and was done in accordance therewith; hence it was a lawful business and not a nuisance *per se*. In *Perkins* v. *Kramer*, 121 Mont. 595, 599-600, 198 Pac. (2d) 475 (1948), the supreme court stated that: "It is in the public interest that all land in the state susceptible to irrigation should be irrigated. * * * If plaintiff can prove his allegations he can show that by his system of storing water he can irrigate some of his land with waters which otherwise run to waste and without injury to anyone."

[287] See the recent cases of *Richland County* v. *Anderson*, 129 Mont. 559, 564, 291 Pac. (2d) 267 (1955); *Farmers Union Oil Co.* v. *Anderson*, 129 Mont. 580, 583-584, 291 Pac. (2d) 604 (1955).

[288] Mont. Rev. Codes 1947, sec. 89-801.

[289] *Donich* v. *Johnson*, 77 Mont. 229, 240, 250 Pac. 963 (1926).

[290] *Perkins* v. *Kramer*, 121 Mont. 595, 599, 198 Pac. (2d) 475 (1948).

[291] *Ryan* v. *Quinlan*, 45 Mont. 521, 528, 534, 124 Pac. 512 (1912). As to storage in relation to the utilization of diffused surface waters, see *Doney* v. *Beatty*, 124 Mont. 41, 46-52, 220 Pac. (2d) 77, 80-82 (1950).

[292] *Donich* v. *Johnson*, 77 Mont. 229, 240, 241, 250 Pac. 963 (1926); *Allendale Irr. Co.* v. *State Water Conservation Board*, 113 Mont. 436, 440-441, 127 Pac. (2d) 227 (1942).

[293] *Kelly* v. *Granite Bi-Metallic Consolidated Min. Co.*, 41 Mont. 1, 10-12, 108 Pac. 785 (1910).

court held that so long as the volume of the stream to which prior appropriators are entitled is maintained at their headgates by the flow from tributaries entering the stream below the storage dams of upstream appropriators, the latter are under no obligation to discharge any water from their reservoirs for the benefit of these prior downstream appropriators.

Extent of storage water right.—Certain reservoirs had been constructed and maintained with the intention of holding more water than required for irrigation in any one year, for the obvious purpose of storing an extra supply during wet years for use in dry years.[294] The court reviewed the relevant constitutional and statutory provisions and court decisions, as well as the practice of impounding water in reservoirs in the placer mining days in Montana and the subsequent construction of reservoirs for irrigation, built usually near the headwaters of streams. A Colorado decision[295] was quoted with approval, and conclusions with respect to the extent of storage water rights were expressed as follows (at 112 Mont. 456):

> We are satisfied that the laws of Montana that apply to the acquisition of running water equally apply to the storage and use of flood or waste water, and the doctrine of "first in time, first in right" applies to both.
>
> Generally, and briefly, in this state what are the reservoir rights of any person? We would say that, in any year, to store for use in that or succeeding years what he has a right to use, and also any additional amounts that others would not have the right to use, and that would otherwise go to waste, seems to cover the situation in this case.

Sale or rental of water

The right to appropriate water for sale or rental to others is recognized by the State constitution and statutes,[296] and likewise has been recognized by the courts.[297] The time of completion of such an appropriation has been discussed heretofore under "Appropriation of water—Completion of appropriation."

One section of the statute, recognizing appropriations of water for sale or rental, provides that the statutory sections dealing with relations between the seller and purchaser of water shall not be so construed as to prevent the original owner or appropriator from retaking, selling, and disposing of water in the usual and customary manner, after it has been used by the consumer.[298] The supreme court has stated that that section can have no

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[294] *Federal Land Bank* v. *Morris*, 112 Mont. 445, 454-456, 116 Pac. (2d) 1007 (1941).

[295] *Windsor Res. & Canal Co.* v. *Lake Supply Ditch Co.*, 44 Colo. 214, 98 Pac. 729 (1908).

[296] Mont. Const., art. III, sec. 15; Mont. Rev. Codes 1947, secs. 89-823 to 89-826.

[297] *Bailey* v. *Tintinger*, 45 Mont. 154, 175-179, 122 Pac. 575 (1912); *Sherlock* v. *Greaves*, 106 Mont. 206, 218, 76 Pac. (2d) 87 (1938).

[298] Mont. Rev. Codes 1947, sec. 89-826, referring to secs. 89-823 to 89-825. It is also provided that nothing therein shall be so construed as to give the person acquiring the right to use water so purchased, the right to sell or dispose of the same after being so used by him.

application "to water which, within legal contemplation, has been abandoned by its disappearance in the soil, and which through seepage and percolating channels reaches the waters of a natural stream."[299]

An appropriator who has made sufficient use of water to which he is entitled to answer the purpose of his appropriation has no right to take any remaining waters, not used for the purpose of his appropriation, and sell them to other parties, thus depriving junior appropriators of their right to use the same.[300]

The value of a water right has been held to be a proper item of value to be considered in fixing the rates of a public utility for the sale of power, inasmuch as it is a part of the production system of the utility company.[301]

Relative Rights of Senior and Junior Appropriators

Rights of senior appropriators

The doctrine of prior appropriation sanctions the right of an appropriator to the use of all the waters of a stream, to the exclusion of junior appropriators, if the entire flow of the stream has been validly appropriated by him, the only limitations upon the extent of his appropriation being his needs and facilities for making use of the water.[302] He is entitled to the use of such waters, as against subsequent appropriators, "without material interruption in the flow thereof, or in quantity or quality."[303] The United States Supreme Court, in discussing the right and the remedy of the prior appropriator, stated that:[304]

> What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all con-

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[299] *Rock Creek Ditch & Flume Co.* v. *Miller,* 93 Mont. 248, 264, 17 Pac. (2d) 1074 (1933).

[300] *Creek* v. *Bozeman Water Works Co.,* 15 Mont. 121, 131, 38 Pac. 459 (1894); *Galiger* v. *McNulty,* 80 Mont. 339, 357, 260 Pac. 401 (1927).

[301] *Tobacco River Power Co.* v. *Public Service Commission,* 109 Mont. 521, 532, 98 Pac. (2d) 886 (1940).

[302] *Mettler* v. *Ames Realty Co.,* 61 Mont. 152, 159, 169, 201 Pac. 702 (1921); *Meine* v. *Ferris,* 126 Mont. 210, 216, 247 Pac. (2d) 195, 198 (1952). A Federal court said, in *Marks* v. *Hilger,* 262 Fed. 302, 304 (9th Cir., 1920): "It is established in Montana that the prior appropriator of water is entitled to the use of all the water in the stream to satisfy his appropriation, whether such water come from seepage or from the water naturally flowing in the stream." Or, said the court, the waters to which the prior appropriator is entitled may "come from waters which run into the stream by rains, snows, springs, or seepage."

[303] *Atchison* v. *Peterson,* 1 Mont. 561, 569 (1872); affirmed, *Atchison* v. *Peterson,* 87 U. S. 507 (1874).

[304] *Atchison* v. *Peterson,* 87 U. S. 507, 514-515 (1874), affirming the decision of the Territorial court, same title, 1 Mont. 561 (1872).

troversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. * * * But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

It is said to be well established that subsequent appropriators take with notice of the conditions existing at the time of their appropriations, and are chargeable with knowledge of such conditions with reference not only to the amount of the rights of prior appropriators, but also their existing diversion systems, the latter being entitled to protection in reasonable means of diversion as against junior appropriators. (See "Protection of the appropriative right—Means of diversion," below.)

The extent to which an appropriator of water from two separate sources for use on the same land may utilize the water of both sources as against a junior appropriator from one of them is noted above under "Appropriation of water—Waters subject to appropriation."

Rights of junior appropriators

The right of the prior appropriator is limited to the receipt at his point of diversion of water in the quantity and of the quality concerning which he made his appropriation: and regardless of the diversions made upstream by junior appropriators, the prior appropriator has no ground for complaint if he receives the water to which he is entitled whenever he has occasion to use it.[305]

Surplus above needs of senior appropriators.—The prior appropriator is required to return to the stream from which he made his diversion all water in excess of his actual needs at any particular time,[306] and the junior appropriators are entitled to the use of such surplus waters in the order of their priorities. A subsequent appropriator not only may recover damages if the prior appropriator fails to release the surplus water within 24 hours after demand therefor, as the cited statute provides, but he may compel a prior appropriator to release for his use water which the prior appropriator does not need for his own beneficial purposes.[307] That is to say, if there is

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[305] *Kelly* v. *Granite Bi-Metallic Consolidated Min. Co.*, 41 Mont. 1, 10-12, 108 Pac. 785 (1910); *Featherman* v. *Hennessy*, 42 Mont. 535, 542, 113 Pac. 751 (1911); *Donich* v. *Johnson*, 77 Mont. 229, 240, 250 Pac. 963 (1926).

[306] Mont. Rev. Codes 1947, sec. 89-805.

[307] *Gans & Klein Investment Co.* v. *Sanford*, 91 Mont. 512, 522, 8 Pac. (2d) 808 (1932); *Clausen* v. *Armington*, 123 Mont. 1, 17-18, 212 Pac. (2d) 440, 450 (1949).

a surplus above the needs of the prior appropriator, according to the Montana Supreme Court:[308]

> * * * Another may appropriate without regard to the consent of the prior appropriator. Subject to the rule of priority, later comers may make appropriations, each in succession being required to respect the appropriations of all who came before him. Later appropriations may be made of the surplus over what has been appropriated by prior appropriators, or of any use that does not materially interfere with prior appropriators, says Mr. Wiel. * * * a subsequent appropriator may use the water of the stream, to the use of which a prior appropriator is entitled, when the prior appropriator does not need it. * * *

The supreme court stated in another decision that:[309]

> It is a fundamental principle of water right law that a prior right may be exercised only to the extent of the necessities of the owner of such prior right and when devoted to a beneficial purpose within the limits of the right. When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right or rights in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator or appropriators give way to his superior claim. * * *

Continuance of conditions at time of junior appropriation.—The junior appropriator is entitled to have the water flow in the stream in the same manner as when he initiated his junior right, and may insist that prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water.[310] This rule is frequently applied in connection with claims of junior appropriators that they are entitled to a continuance of return-flow conditions resulting from diversions by upstream prior appropriators that existed when the junior rights were initiated. (See "Waste, seepage, drainage, and return waters—Return waters—Dependence of downstream appropriators," below.)

Enlargements by senior appropriators.—Actual enlargements of an appropriative right—that is, use made in excess of actual or contemplated irrigation consummated within a reasonable time after initiating the appropriation—cannot affect the priorities of junior appropriators that have attached to the source of supply after the initiation of the senior right and before the making of the enlargements. That is to say, while an appropriator is allowed a reasonable time for the development of his project, and so is not necessarily restricted to the development completed at the time a junior appropriation is made (see "Appropriation of water—Completion

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[308] *Custer* v. *Missoula Public Service Co.*, 91 Mont. 136, 143-145, 6 Pac. (2d) 131 (1931).

[309] *Cook* v. *Hudson*, 110 Mont. 263, 282-283, 103 Pac. (2d) 137 (1940). See also *Quigley* v. *McIntosh*, 88 Mont. 103, 108-109, 290 Pac. 266 (1930). Nor may an appropriator sell such excess waters to other parties so that it will deprive junior appropriators of their rights thereto: *Brennan* v. *Jones*, 101 Mont. 550, 567, 55 Pac. (2d) 697 (1936).

[310] *Spokane Ranch & Water Co.* v. *Beatty*, 37 Mont. 342, 351-352, 96 Pac. 727, 97 Pac. 838 (1908); *Smith* v. *Duff*, 39 Mont. 382, 389-390, 102 Pac. 984 (1909).

of appropriation—Gradual or progressive development," above), nevertheless he cannot extend the use of water to additional lands not under actual or contemplated irrigation at the time his right was decreed, to the injury of subsequent appropriators.[311] But if no injury results to an appropriator from an enlargement of use by others, he has no ground for complaint.[312]

Effect of losses of water in stream channel

Notwithstanding heavy losses in the channel of the stream from which water is diverted, the appropriator is entitled to have the stream flow to his point of diversion so long as he can make beneficial use of the quantity that reaches his headgate and that is within his appropriation. A Federal court stated, in a controversy between certain residents of Montana on the one hand and of Wyoming on the other, that:[313]

> In the abstract there would be more people benefited by allowing the defendants to take all the water. Its flow through a sandy and gravelly stretch of something like eight or ten miles, and perhaps farther, is, in a measure, a waste, but equity does not consist in taking the property of a few for the benefit of the many, even though the general average of benefits would be greater. * * *

If the diversion by an upstream junior appropriator does not interfere with the downstream senior appropriator's right to make his lawful beneficial use of water, then the upstream appropriator may make the diversion; and this would be the case if the flow of the water would not reach the prior appropriator's headgate even if not interrupted by the upstream diversion.[314] The supreme court stated in *Raymond* v. *Wimsette*,[315] one of the fairly early cases dealing with this subject, that:

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[311] *Quigley* v. *McIntosh*, 110 Mont. 495, 505, 103 Pac. (2d) 1067 (1940). The court said, at 110 Mont. 510: " * * * one using a certain number of inches but an insignificant amount of water to irrigate a garden patch cannot as against intervening appropriators expand his use of it to irrigate a complete ranch." An incomplete decree "cannot serve to remove all limitations upon its use in point of time or volume, and thus substantially to expand the early appropriations, to the detriment of subsequent appropriators. If a decree had that effect, there would be few adjudicated streams in the state in which any but the first few appropriations would be of any substantial value." See *Midkiff* v. *Kincheloe*, 127 Mont. 324, 328-329, 263 Pac. (2d) 976 (1953).

[312] In *Thrasher* v. *Mannix & Wilson*, 95 Mont. 273, 277-278, 26 Pac. (2d) 370 (1933), defendant was entitled by decree to use certain waters outside the watershed of Gold Creek and was asserted to have brought additional lands under irrigation. The court held that as plaintiffs' lands were all either within the watershed of Gold Creek, or, if outside, at a higher elevation than the lands of defendant—so that there was no opportunity for the former to enjoy the benefits from return waters from irrigation of the defendant's lands —there could be no injury to plaintiffs from the new use.

[313] *Morris* v. *Bean*, 146 Fed. 423, 435-436 (C.C.D. Mont., 1906).

[314] *Leonard* v. *Shatzer*, 11 Mont. 422, 426-427, 28 Pac. 457 (1892); *Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.*, 34 Mont. 135, 141, 85 Pac. 880 (1906); *Ryan* v. *Quinlan*, 45 Mont. 521, 531-532, 124 Pac. 512 (1912); *Loyning* v. *Rankin*, 118 Mont. 235, 249, 165 Pac. (2d) 1006 (1946).

[315] *Raymond* v. *Wimsette*, 12 Mont. 551, 560-561, 31 Pac. 537 (1892).

> One of the primary facts upon which the water right is founded, and without which it cannot exist, is the power of the appropriator to utilize the water which he claims for some lawful and beneficiary purpose. Would it not, therefore, be unreasonable, and contrary to the theory of the law governing the subject under consideration, to hold that although experience of many years, and actual demonstration, confirm the proposition that none of the water in controversy could, if left in the stream, reach plaintiff's place of diversion, at a distant point below, still defendant should be restrained from the use thereof on the ground of plaintiff's prior claim to the water of said stream, at the place of his diversion? In our judgment, such holding would be entirely contrary to the spirit, if not the letter, of the law; and there is not, even in the letter of the law, anything tending to such a doctrine. * * *

The court went on to caution against a loose application of this principle generally, as follows:

> But these observations should not be miscontrued or misapplied, so as to allow wrongful diversion or diminution of the waters of a stream, on the pretense that the water so diverted would be lost, unless it can be shown that by a long course of experience, and not as the occasional result of some unusually dry season, none of the waters in controversy would, if allowed to remain in the stream, reach the prior appropriator's point of diversion.

And the court has since emphasized that the evidence to the effect that the water reaching the downstream prior appropriator would be of no benefit must be such as to warrant a judgment allowing the upstream appropriator to withhold the water.[316] The burden of proof in such cases is discussed immediately below.

Burden upon junior appropriator.—The supreme court has said that:[317]

> It is well settled that a subsequent appropriator attempting to justify his diversion has the burden of proving that it does not injure prior appropriators. * * *

Junior appropriators cannot prove that their diversions will not in any case harm the downstream prior appropriators simply by evidence as to the flow of water at the upstream dam or a short distance below it. The court stated (at 110 Mont. 581-582) that:

> The only possible proof of such non-interference would be evidence, (1) that in spite of defendants' diversion there is actually available at the plaintiffs' point of diversion all the water for which they then have a beneficial use up to the limit of the appropriation; or (2) that if insufficient water is available there defendants' storage or diversion of water did not contribute to that result. * * *

The upstream junior appropriator who claims that his diversion does not reduce or limit the receipt of water to which a downstream appropriator is entitled thus has the burden of showing affirmatively that under all the con-

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[316] *Geary* v. *Harper,* 92 Mont. 242, 249, 12 Pac. (2d) 276 (1932).

[317] *Irion* v. *Hyde,* 110 Mont. 570, 581-582, 105 Pac. (2d) 666 (1940). Burden upon subsequent storage claimant: *Donich* v. *Johnson,* 77 Mont. 229, 241, 250 Pac. 963 (1926); *Allendale Irr. Co.* v. *State Water Conservation Board,* 113 Mont. 436, 440-441, 127 Pac. (2d) 227 (1942).

ditions his diversion does not have that effect. The court went on to say (at 110 Mont. 584) that:

> Possibly defendants can prove that plaintiffs have received their full appropriation in spite of defendants' taking of water. Or it may be that in a particular instance defendants can show that the rainfall was sufficiently slight and the stream bed sufficiently dry that no water would reach plaintiffs whether or not the defendants impounded or diverted water at their dam; and in that event defendants' acts would not be detrimental to plaintiffs. This is the limit of the meaning attributable to the court's statement on this question in *Raymond* v. *Wimsette*, * * *.

Nothwithstanding the enunciation of the principle, the supreme court has held in at least two cases that where the evidence tends to show that the waters of Stream A would not, even if uninterrupted, reach Stream B, the junior appropriator whose diversion is located on Stream A is *prima facie* entitled to make use of the water if such use does not interfere with the use by senior appropriators of the natural flow in Stream B; and the burden then is upon the latter to show that, if uninterrupted, the waters of Stream A would reach Stream B by a defined channel either on the surface or underground.[318]

Protection of the Appropriative Right

Protection on stream channel

The United States Supreme Court stated in 1875[319] that ever since the California decision in *Tartar* v. *Spring Creek Water & Min. Co.*[320] 20 years earlier, "it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. * * * and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced." The appropriator is entitled to protection in the use of natural increases in the water supply to which his right attaches.[321] And he is entitled to the protection of his right on an interstate stream, as well as on a source of supply confined wholly within the boundaries of a single State.[322]

Protection on tributary sources of supply

The right of the appropriator extends to water flowing in tributaries of the stream to which his right attaches, above his point of diversion,[323] and

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[318] *Ryan* v. *Quinlan*, 45 Mont. 521, 531-532, 124 Pac. 512 (1912); *Loyning* v. *Rankin*, 118 Mont. 235, 249, 165 Pac. (2d) 1006 (1946).

[319] *Basey* v. *Gallagher*, 87 U. S. 670, 683 (1875).

[320] *Tartar* v. *Spring Creek Water & Min. Co.*, 5 Calif. 395 (1855).

[321] *Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.*, 34 Mont. 135, 139-141, 85 Pac. 880 (1906).

[322] *Morris* v. *Bean*, 146 Fed. 423, 429-431 (C.C.D. Mont., 1906); *Bean* v. *Morris*, 159 Fed. 651, 654-655 (9th Cir., 1908); *Bean* v. *Morris*, 221 U. S. 485, 487-488 (1911).

[323] *Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.*, 34 Mont. 135, 141, 85 Pac. 880 (1906); *Marks* v. *Hilger*, 262 Fed. 302, 304 (9th Cir., 1920); *Loyning* v. *Rankin*, 118 Mont. 235, 247, 165 Pac. (2d) 1006 (1946).

this right extends from the head of each such tributary down to his point of diversion.[324] As stated by a Federal court:[325]

> Tributary waters, branches, are inseparable parts of the main stream, and with it are subject to common appropriation and control in so far as reasonably necessary in irrigation as in navigation. The first may not be diverted to the impairment of prior rights in the last. The proprietor of the trunk owns the branches, and safety of the first requires protection of the last. * * *

The supreme court has stated that "Under the rule in Montana the question of whether one stream or other source of water supply is a tributary of another is one of fact."[326] The right of protection extends only to waters of a tributary that reach the appropriator during the time he has need of the water.[327]

Circumstances under which an appropriator might claim a right of protection with respect to tributaries flowing into the stream below his point of diversion were thus stated by the supreme court:[328]

> He also has the right to require appropriators subordinate to him and his water right, who have appropriated and who take water from the stream or its tributaries below his point of diversion, to forbear using such water when such use will deprive appropriators prior to him, downstream, of the use of water to which they are entitled; otherwise he might be required to forbear the use of water to which he is entitled in order to supply the appropriator first in order of priority. * * *

Quantity and quality of the water

The appropriator is entitled to have his right protected so that he may have water at his headgate in sufficient quantity and of such quality as to meet his needs as covered by his water right.[329]

The interruption in flow of the water, the diminution of quantity, or the deterioration in quality, must be material in order to constitute an invasion of the rights of the prior appropriator; and these are matters of fact.[330]

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[324] *Helena* v. *Rogan*, 26 Mont. 452, 469-470, 68 Pac. 798 (1902).

[325] *Dern* v. *Tanner*, 60 Fed. (2d) 626, 628 (D. Mont., 1932). See also *Ryan* v. *Quinlan*, 45 Mont. 521, 531, 124 Pac. 512 (1912). The question of seepage as tributary to a watercourse is discussed below under "Waste, seepage, drainage, and return waters—Waste and seepage waters."

[326] *Loyning* v. *Rankin*, 118 Mont. 235, 246, 165 Pac. (2d) 1006 (1946).

[327] In *Leonard* v. *Shatzer*, 11 Mont. 422, 426-427, 28 Pac. 457 (1892), it was held that one could not claim the flow of a spring which in its natural state did not reach the stream during the irrigation season. In *Anderson* v. *Spear-Morgan Livestock Co.*, 107 Mont. 18, 29-30, 79 Pac. (2d) 667 (1938), it was held that where the testimony of all witnesses showed that only in time of flood did water from a certain creek flow into another creek, such evidence did not justify the court in finding that the first creek was a tributary of the second one.

[328] *Helena* v. *Rogan*, 26 Mont. 452, 470, 68 Pac. 798 (1902).

[329] *Helena* v. *Rogan*, 26 Mont. 452, 469-470, 68 Pac. 798 (1902).

[330] *Atchison* v. *Peterson*, 87 U. S. 507, 514-515 (1874); *Montana Co.* v. *Gehring*, 75 Fed. 384, 388 (9th Cir., 1896).

The views of the United States Supreme Court on this matter as expressed in an early decision have been quoted under "Relative rights of senior and junior appropriators," above.

Means of diversion

An appropriator is entitled to protection in a reasonable means of diversion, as against diversions by junior appropriators.[331] The junior appropriators in this case contended that the prior appropriator's vested interest was only in the use of the quantum of water appropriated by him without reference to his means or manner of diversion, however reasonably efficient; that not reasonable efficiency, but absolute efficiency was required. The supreme court could not assent to this theory "without doing violence to the entire principle of water rights by appropriation." The court stated that 100 percent efficiency could be furnished by no means of diversion, and certainly by none financially available to the average water user.

It was agreed by the court in the *Crowley* case that waste of water resources must be minimized in the general interest. This, however, does not extend to the abandonment of reasonably efficient diversion systems and the necessity of installing other systems "by which the last drop may be taken from the stream." The right of the appropriator is to divert and use water, not merely to have it left in the stream bed.

Junior appropriators consequently are chargeable with knowledge of existing conditions, with reference not only to the quantities of water to which prior appropriators are entitled, but also their existing diversion systems. The holders of junior rights cannot later argue that they are limited by the amount but not the means of prior appropriations, however reasonably efficient under the circumstances.

Remedies for infringement

The appropriator is entitled to enjoin the continuance of an unlawful act that materially interferes with the exercise of his own water right; but whether or not an injunction is justified will depend upon the circumstances of the particular case. The United States Supreme Court, in a case involving a complaint by downstream appropriators that certain upstream appropriators of water for mining purposes were discharging materials into the stream that obstructed the flow of water and deteriorated it in quality and value, stated that:[332]

> The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied. * * *

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[331] *State ex rel. Crowley* v. *District Court*, 108 Mont. 89, 97-98, 88 Pac. (2d) 23 (1939).

[332] *Atchison* v. *Peterson*, 87 U. S. 507, 514, 515 (1874). See also *McCauley* v. *McKeig*, 8 Mont. 389, 392-394, 21 Pac. 22 (1889).

> But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

The Court reviewed the circumstances relating to the alleged pollution of the water diverted into the lower ditches and concluded (at 87 U. S. 516) that:

> The injury thus sustained, and which is only to a limited extent attributable to the mining of the defendants, if at all, is hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their valuable mining claims. The defendants are also responsible parties, capable, according to the evidence, of answering for any damages which their mining produces, if any, to the plaintiffs. Under these circumstances we think there was no error in the refusal of the court below to interfere by injunction to restrain their operations, and in leaving the plaintiffs to their remedy, if any, by an action at law.

If an injury to a prior appropriator caused by the acts of a junior appropriator is not such as to justify an injunction—which would cause the junior appropriator to cease operations—but does cause some injury, the remedy of the prior appropriator is in damages.[333]

The appointment of a water commissioner for an adjudicated stream, under the statute,[334] is a special statutory remedy that is not exclusive, but is merely cumulative.[335] It does not prevent one whose water right has been impaired from maintaining an action for damages.

Inchoate right

An inchoate right is entitled to protection as long as it is kept in good standing.[336]

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[333] *Atchison* v. *Peterson*, 1 Mont. 561, 569-570 (1872); affirmed, 87 U. S. 507 (1874). For a case involving measure of damages for loss of a crop, see *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. 741 (1892).

[334] Mont. Rev. Codes 1947, sec. 89-1001 and following.

[335] *Tucker* v. *Missoula Light & Ry. Co.*, 77 Mont. 91, 97-99, 250 Pac. 11 (1926).

[336] *Oscarson* v. *Norton*, 39 Fed. (2d) 610, 613 (9th Cir., 1930). The court stated: "True, this inchoate right may not be defeated by an intervening appropriation so long as the holder thereof, after the construction of his diversion works, exercises due diligence in making such application of the water; but it still remains true that to perfect the right, actual use is indispensable."

EXERCISE OF THE APPROPRIATIVE RIGHT

Diversion and Distribution Works

Ditch rights

Water rights and ditch rights are separate and distinct property rights, which may be owned and disposed of together or separately. (See "The appropriative right—Property characteristics—Relation to ditch right.")

Adjudications of water rights are adjudications of the waters of the source of supply, and not of the means of diversion.[337] The court said that an award of a right to the use of water does not restrict the diversion through any particular diversion channel, although the ditch is frequently named to identify the right awarded.

The conveyance of a tract of irrigated land with its appurtenances also conveys the ditch, as well as the water right, necessary to the cultivation, use, and enjoyment of the land, just as fully as though the grantor had described it in express terms in the deed itself.[338] This was said by the court to be the established law in Montana.

Title to an irrigation ditch may be obtained by prescription, even though the claimant to the easement never owned water rights but depended for use of the ditches upon water leased or otherwise acquired from year to year.[339]

Use of natural channel to convey water

Appropriated waters generally.—A section of the water-rights statute

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[337] *Missoula Light & Water Co.* v. *Hughes,* 106 Mont. 355, 364-365, 77 Pac. (2d) 1041 (1938).

[338] *Sloan* v. *Glancy,* 19 Mont. 70, 76, 47 Pac. 334 (1897). In one of the earliest of the Montana water-rights cases, *Donnell* v. *Humphreys,* 1 Mont. 518, 525, 529-530 (1872), the court said that a water ditch never could become appurtenant to another ditch of like character and pass as an incident thereto; but that one who grants a ditch is supposed to grant not only the excavated channel but also his right to the water by which it is supplied, and that if this supply comes from a second ditch, the conveyance of the first ditch, by general words, would carry the second ditch as part and parcel of the first. With respect to a claim of interest in a ditch and right of way as an easement in the land, the court stated in *Mannix* v. *Powell County,* 75 Mont. 202, 205, 243 Pac. 568 (1926): "It is elementary that an easement can be created, granted or transferred only by operation of law, or by an instrument in writing, or by prescription * * *." As to taxation of irrigation ditches, see *Hale* v. *County of Jefferson,* 39 Mont. 137, 142, 101 Pac. 973 (1909).

[339] *McDonnell* v. *Huffine,* 44 Mont. 411, 423, 120 Pac. 792 (1912). The right to maintain and operate a headgate to divert water may be acquired by prescription: *Gibbs* v. *Gardner,* 107 Mont. 76, 81, 80 Pac. (2d) 370 (1938). A right to maintain a ditch acquired by prescription does not carry the right to enlarge the ditch, change its course materially, or make a new ditch over the servient estate, because a right by prescription is no more subject to variation than one created by deed: *Babcock* v. *Gregg,* 55 Mont. 317, 320, 178 Pac. 284 (1918). Compare *Stalcup* v. *Cameron Ditch Co.* 130 Mont. 294, 295-296, 300 Pac. (2d) 511, 512 (1956).

provides that appropriated water may be turned into the channel of another stream, or from a reservoir into a stream and mingled with its waters, and then reclaimed, but that in so reclaiming it, water appropriated by another shall not be diminished in quantity nor deteriorated in quality.[340]

The supreme court has applied this provision in several cases. Certain parties were held entitled to divert from a slough a quantity of water equal to that turned into the slough by them, but it was emphasized that by changing their systems of cultivation or irrigation they could not take out more than their input.[341] The limitation in the statute was applied also in a case in which a district discharged waters into a stream and thereby impaired the quality of waters of a prior appropriator for domestic purposes.[342] The court has also said that:[343]

> * * * by no stretch of construction can this section be held to contemplate the right of one to take from the flow of a stream an increase caused solely by percolation resulting from irrigation upon adjacent lands.

Stored water conveyed in unadjudicated streams.—In 1957 the legislature enacted a statute providing for the regulation of conveyances of stored water through natural stream channels, on petition of the reservoir owners or operators.[344] The provisions of this act apply to unadjudicated streams only. The section (§ 9) that provides for the repeal of conflicting legislation contains a proviso that nothing in the act shall be deemed to repeal § 89-804 of the Montana Revised Codes of 1947.

The owner or operator of a reservoir in which water is stored for irrigation purposes, who desires to use the natural channel of an unadjudicated stream to convey the stored water to the place or places of use, may file a petition to that effect in the district court of any county in which any part of the channel is located. The jurisdiction obtained by the court extends to other counties as well. The court holds a hearing, at which any person whose property rights may be affected may appear and file written objections, and at which testimony may be taken. If satisfied with the statements

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[340] Mont. Rev. Codes 1947, sec. 89-804.

[341] *Meine* v. *Ferris*, 126 Mont. 210, 217, 247 Pac. (2d) 195, 198 (1952).

[342] *Missoula Public Service Co.* v. *Bitter Root Irr. Dist.*, 80 Mont. 64, 68-69, 257 Pac. 1038 (1927). The district argued that the water it deposited never reached the high-water mark of the stream and that it had the right to use the channel unless it exceeded that capacity. The court held that the maxim "one must so use his own rights as not to infringe on the rights of another" applied to the circumstances of this case.

[343] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 262, 17 Pac. (2d) 1074 (1933). See also *State ex rel. Mungas* v. *District Court*, 102 Mont. 533, 538-539, 59 Pac. (2d) 71 (1936). It is said in *Perkins* v. *Kramer*, 121 Mont. 595, 599, 198 Pac. (2d) 475 (1948), that a natural depression may be utilized as a reservoir if no one is injured thereby. For some other points concerning the use of a natural channel, see *Campbell* v. *Flannery*, 29 Mont. 246, 250-251, 74 Pac. 450 (1903); *Wallace* v. *Weaver*, 47 Mont. 437, 442, 133 Pac. 1099 (1913).

[344] Mont. Laws 1957, ch. 114; codified as Mont. Rev. Codes 1947, §§ 89-857 to 89-864.

in the petition, the court enters a decree granting the right petitioned for, and appoints one or more water commissioners, whose compensation is paid by the petitioner, to distribute the stored waters properly. Penalties are provided for interference with the commissioners in the discharge of their duties.

In a letter to the author dated September 24, 1957, Fred E. Buck, State Engineer of Montana, advises that this measure was passed at the request of the Montana State Water Conservation Board. Its primary purpose is to protect the Board in utilizing natural stream beds as delivery channels for waters stored in the Board's many reservoirs.

Efficiency of Practices

Diversion and distribution of water

The diversion works of an appropriator must be reasonably efficient under the circumstances, but there is no requirement of absolute efficiency that inures to the benefit of a subsequent appropriator.[345] An appropriator cannot be compelled to divert his water according to the most scientific method known.[346] But although the user is not bound to extraordinary diligence in his means of diversion and use, and may proceed according to local custom, he is bound to the exercise of reasonable care in the construction and maintenance of his appliances to the end that others be not unnecessarily deprived of the use of the water.[347]

Method of use of water

In determining the question as to the duty of water—that is, the quantity of water to be awarded an irrigator in the adjudication of his water right—the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as a standard, even though a more economical method might be adopted.[348] The question of duty of water in relation to the measure of an appropriative right has been discussed heretofore under "The appropriative right—Elements of the right."

Rotation in Use of Water

In a case in which plaintiff and defendants had rights to the use of certain waters flowing in a common ditch from a reservoir owned in common, defendants being located closer to the supply and very little water

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[345] *State ex rel. Crowley* v. *District Court*, 108 Mont. 89, 97-98, 88 Pac. (2d) 23 (1939).

[346] *Worden* v. *Alexander*, 108 Mont. 208, 215, 90 Pac. (2d) 160 (1939).

[347] *Dern* v. *Tanner*, 60 Fed. (2d) 626, 628 (D. Mont., 1932). In this case it was stated that certain parties used the water more than 5 miles from the point of diversion and conveyed the water thereto in open and in part poorly constructed and maintained ditches, involving excessive evaporation and seepage losses. "In places their ditch is little or no more than an injuriously wide and shallow brook. They who ask equity must do equity, so, before any injunction in their behalf, this defect must be remedied and any others likewise."

[348] *Worden* v. *Alexander*, 108 Mont. 208, 215-216, 90 Pac. (2d) 160 (1939).

frequently getting to plaintiff, the supreme court stated (at 25 Mont. 339) that:[349]

> Considering the relations of the parties to the contract under which they were to use the water, the findings against the defendants, the evidence in the case, and the obscure nature of the report of the testimony, we cannot say that the court did not do equity in its decree declaring that the plaintiff should have the sole use of the water during two certain consecutive days of each week. This works no hardship to the defendants, as it gives them the use of the water more than two-thirds of the time.

Exchange of Water

A statute authorizes owners or possessors of lands susceptible of irrigation from a stream in which there is no surplus water available, who have rights in reservoirs from which water cannot be conducted to their lands, to discharge the stored water into the stream in exchange for equal quantities of natural flow, provided that the exchange can be made without injury to prior appropriators.[350]

An exchange of appropriative rights for natural flow diverted from one stream into another stream—involving a conveyance of water rights by an unrecorded deed—was approved by the court in a case decided in 1895.[351]

Claims of the right to take natural flow in exchange for return seepage waters are discussed hereinafter under "Waste, seepage, drainage, and return waters—Return waters—Claim of equivalent diversion for return flow."

Changes in Exercise of Rights

A statute provides that:[352]

> 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.

Point of diversion

The general rule.—It is the well settled rule that one entitled to the use

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[349] *Anderson* v. *Cook*, 25 Mont. 330, 331-335, 338-339, 64 Pac. 873, 65 Pac. 113 (1901).

[350] Mont. Rev. Codes 1947, sec. 89-806.

[351] *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 560-565, 572, 39 Pac. 1054 (1895). The earliest appropriators, downstream, contracted with an upstream ditch company to grant to the company their prior water rights in exchange for water brought into the stream from another stream above their headgates. Other water users on the stream claimed that by this conveyance, which was neither acknowledged nor recorded, the prior appropriators had abandoned their rights, in which event the contesting parties would have benefited from the transaction. The supreme court held that there was no abandonment, and that the instrument was sufficient to grant the usufruct of the water to the upstream ditch company.

[352] Mont. Rev. Codes 1947, sec. 89-803.

of water may change the point of diversion if other appropriators are not thereby injured.[353] Such a change does not affect the validity of the appropriation.[354]

Injury from change.—The supreme court said in 1946 that:[355]

> It is well established in this state that a prior appropriator may not change the place of diversion of water so as to injure junior appropriators. * * *

Consequently, in cases in which the change caused or threatened to cause injury to others—such as transferring the point of diversion upstream above the headgate of a junior appropriator—the right to make such change has not been sustained.[356]

Burden of proof.—The party who affirmatively alleges injury as the result of a controverted change of the place of diversion thereby assumes the burden of proving such injury.[357] Proof that such change prejudices the rights of others entitled to the use of the water is fatal to the right to make the change.[358] But if the objecting party cannot show injury, he has no ground of complaint.[359]

Place of use

The general rule.—An appropriator has the right to change the place of use of the water so long as the change does not injuriously affect other appropriators.[360]

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[353] *Head* v. *Hale*, 38 Mont. 302, 308, 100 Pac. 222 (1909); *Sain* v. *Montana Power Co.*, 20 Fed. Supp. 843, 848 (D. Mont., 1937); *Galiger* v. *McNulty*, 80 Mont. 339, 357, 260 Pac. 401 (1927); *Thrasher* v. *Mannix & Wilson*, 95 Mont. 273, 276, 26 Pac. (2d) 370 (1933). In *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 573, 39 Pac. 1054 (1895), the court stated that one has a right to change the place of diversion of water, and did not add any qualification. However, it was stated shortly thereafter that the use of water in this case was not enlarged or extended by the change and that the grantors conveyed, and could convey, only the use which they owned.

[354] *Wheat* v. *Cameron*, 64 Mont. 494, 501, 210 Pac. 761 (1922); *Thomas* v. *Ball*, 66 Mont. 161, 166, 213 Pac. 597 (1923); *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 355, 3 Pac. (2d) 286 (1931); *Peck* v. *Simon*, 101 Mont. 12, 20, 52 Pac. (2d) 164 (1935).

[355] *Loyning* v. *Rankin*, 118 Mont. 235, 247, 165 Pac. (2d) 1006 (1946). See *Lokowich* v. *Helena*, 46 Mont. 575, 577, 129 Pac. 1063 (1913).

[356] *Columbia Min. Co.* v. *Holter*, 1 Mont. 296, 299-300 (1871). See *Quigley* v. *McIntosh*, 110 Mont. 495, 506, 103 Pac. (2d) 1067 (1940).

[357] *Lokowich* v. *Helena*, 46 Mont. 575, 577, 129 Pac. 1063 (1913); *Thrasher* v. *Mannix & Wilson*, 95 Mont. 273, 276, 26 Pac. (2d) 370 (1933).

[358] *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 355, 3 Pac. (2d) 286 (1931).

[359] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 158, 201 Pac. 702 (1921); *Sain* v. *Montana Power Co.*, 20 Fed. Supp. 843, 848 (D. Mont., 1937).

[360] *Whitcomb* v. *Murphy*, 94 Mont. 562, 565, 23 Pac. (2d) 980 (1933); *Carlson* v. *Helena*, 43 Mont. 1, 6-7, 114 Pac. 110 (1911). In *Smith* v. *Denniff*, 24 Mont. 20, 24, 60 Pac. 398 (1900), the court said that: "A legal appropriator of water may change the place of its use, and may use the water for other purposes than that for which it was originally appropriated. * * * The

The appropriative right is not impaired by the making of a change in the place of use.[361] Even an injurious change, though subject to challenge by the injured party, does not affect the validity of the appropriative right.[362] And the fact that the person making such change does not own the land on which he uses the water does not affect the right of appropriation.[363]

Injury from change.—The rule is that the place of use may not be changed to the prejudice of other appropriators.[364]

The right to change the place of use of water has been refused by the courts in cases in which it was shown that injury to other appropriators would result, such as in the case of precluding lower appropriators from continuing to use waters after having been used by appropriators upstream.[365] Injunction has been issued to restrain appropriators from changing the place of use of the water to the detriment of subsequent appropriators.[366]

Burden of proof.—The burden is upon the party who insists that a

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right thus acquired to take water from or over the land of another is therefore in the nature of an easement in gross * * * , which, according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto."

[361] *Wheat* v. *Cameron,* 64 Mont. 494, 501, 210 Pac. 761 (1922); *Maclay* v. *Missoula Irr. Dist.,* 90 Mont. 344, 355, 3 Pac. (2d) 286 (1931).

[362] *Hansen* v. *Larsen,* 44 Mont. 350, 353, 120 Pac. 229 (1911). The court said "The statute does not expressly or by implication declare that a change in the place or character of the use, even though such change does affect the rights of others adversely, shall impair the right in any respect whatever. Such change might give rise to an action for damages or justify the issuance of an injunction, but it does not impair the right itself."

[363] *Maclay* v. *Missoula Irr. Dist.,* 90 Mont. 344, 355, 3 Pac. (2d) 286 (1931).

[364] *Lokowich* v. *Helena,* 46 Mont. 575, 577, 129 Pac. 1063 (1913). It is stated in *Gassert* v. *Noyes,* 18 Mont. 216, 223, 44 Pac. 959 (1896): "This view, we think, is in accordance with the authorities, as well as reason and justice."

In the earliest decision of the supreme court relating to a change in place of use, it was held that prior appropriators for mining purposes had the right to extend the ditch and to change the place of use and take the water to any other point to the extent of their appropriation, even though the subsequent appropriators downstream were thereby precluded from the use of the waste waters from the prior appropriators' mining operations which otherwise would have gone down the stream to their headgate: *Woolman* v. *Garringer,* 1 Mont. 535, 542-543, 544 (1872). The court relied upon *Davis* v. *Gale,* 32 Calif. 26 (1867), in which the rule respecting change of place of use was stated without the limitation that the change must not injuriously affect the rights of others. That important limitation became recognized later in California, as well as in Montana and other Western States.

[365] *Alder Gulch Con. Min. Co.* v. *Hayes,* 6 Mont. 31, 37-38, 9 Pac. 581 (1886); *Gassert* v. *Noyes,* 18 Mont. 216, 223, 44 Pac. 959 (1896). And see *Spokane Ranch & Water Co.* v. *Beatty,* 37 Mont. 342, 351-352, 96 Pac. 727, 97 Pac. 838 (1908).

[366] *Mannix & Wilson* v. *Thrasher,* 95 Mont. 267, 271, 26 Pac. (2d) 373 (1933).

change in place of use has affected him adversely, to allege and prove the facts.[367] One who is not injured by a change in the place of use has no ground of complaint.[368]

Purpose of use

The general rule.—An appropriator has the right to change the purpose of use of his water, so long as the rights of other appropriators are not injuriously affected thereby.[369] Many changes in purpose of use were made in the earlier days, particularly from mining to irrigation as a consequence of the "playing out" of the placer-mining claims and the growth of agricultural development under irrigation in the State.[370]

A change in the use of water—for example, from mining to agriculture, or vice versa—does not affect the validity of the appropriative right:[371]

> This has been the rule in this jurisdiction from early territorial days * * * , and since 1885 has been so declared by statute * * *.

This is the case, even though the change affects the rights of others adversely and therefore is actionable.[372]

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[367] *Hansen* v. *Larsen,* 44 Mont. 350, 353, 120 Pac. 229 (1911); *Lokowich* v. *Helena,* 46 Mont. 575, 577, 129 Pac. 1063 (1913). The court stated in *Hansen* v. *Larsen* that the restrictions in the statute are matters of defense.

[368] In *Osnes Livestock Co.* v. *Warren,* 103 Mont. 284, 302, 62 Pac. (2d) 206 (1936), the change of place of use could be made without injury to the complaining appropriator because his place of diversion was above all the points of diversion of the other party. In *Carlson* v. *Helena,* 43 Mont. 1, 6-7, 114 Pac. 110 (1911), the objecting party was a taxpayer in the City of Helena and not one of the subsequent appropriators, and consequently was not entitled to object to the transfer of water on the part of the city.

[369] *Power* v. *Switzer,* 21 Mont. 523, 530, 55 Pac. 32 (1898);*Head* v. *Hale,* 38 Mont. 302, 308, 100 Pac. 222 (1909); *Galiger* v. *McNulty,* 80 Mont. 339, 357, 260 Pac. 401 (1927). The court in *Head* v. *Hale* referred to the statutory authorization, but stated that even in the absence of this statutory declaration the rule would be the same.

[370] For some cases in which the mining right was changed to irrigation, see *Meagher* v. *Hardenbrook,* 11 Mont. 385, 28 Pac. 451 (1891); *Head* v. *Hale,* 38 Mont. 302, 100 Pac. 222 (1909); *Hansen* v. *Larsen,* 44 Mont. 350, 120 Pac. 229 (1911). Mining and agricultural to municipal: *Spokane Ranch & Water Co.* v. *Beatty,* 37 Mont. 342, 96 Pac. 727, 97 Pac. 838 (1908). Milling to irrigation: *Featherman* v. *Hennessy,* 43 Mont. 310, 115 Pac. 983 (1911).

[371] *Thomas* v. *Ball,* 66 Mont. 161, 166, 213 Pac. 597 (1923).

[372] *Hansen* v. *Larsen,* 44 Mont. 350, 353, 120 Pac. 229 (1911). The rule was applied in *Peck* v. *Simon,* 101 Mont. 12, 20, 52 Pac. (2d) 164 (1935), as against a contention that when the owners of certain mining water rights ceased using them for that purpose and devoted them to the irrigation of agricultural lands, it was in effect a new appropriation, and that their appropriations for such latter purposes should be dated from the date they commenced to use the water for agricultural purposes. It was held in this case, at 101 Mont. 21, that after the change of use from mining to agriculture the actual use of the water for irrigation purposes should be the measure of the appropriation, inasmuch as the appropriator's needs and facilities measure the extent of his appropriation unless his needs exceed the capacity of his facilities, in which case the capacity measures the extent of the right.

Injury from change.—The character of use may not be changed to the prejudice of other appropriators.[373] The right to change the purpose of use does not extend to the sale of excess water, above the appropriator's beneficial use, to other parties for other purposes.[374]

A change of use from mining, a nonconsumptive use, to agriculture, a consumptive use, to the injury of downstream appropriators, is not permissible under the statute, because it will deprive these later appropriators of water which they have been using and upon which they have been depending for maintenance of their rights.[375] But where the use of water for mining purposes is made downstream from the places of use by junior appropriators for agricultural purposes, these junior appropriators are not injured by any change in the use of the water from mining to agriculture.[376]

Burden of proof.—The burden of proving that a change is injurious rests upon the one who insists that the change affects him adversely.[377]

LOSS OF WATER RIGHTS

The statute governing the appropriation of water provides that when

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[373] *Lokowich* v. *Helena*, 46 Mont. 575, 577, 129 Pac. 1063 (1913); *Mannix & Wilson* v. *Thrasher*, 95 Mont. 267, 270-271, 26 Pac. (2d) 373 (1933). See *Gassert* v. *Noyes*, 18 Mont. 216, 223, 44 Pac. 959 (1896). The early case of *Woolman* v. *Garringer*, 1 Mont. 535, 543 (1872), stated with approval a rule that a prior appropriator may change the use for which he first appropriated the water without losing his priority, relying upon *Davis* v. *Gale*, 32 Calif. 26 (1867), no mention being made of the now well-recognized limitation that no injury be inflicted upon the rights of others; and the statement was approved in *Meagher* v. *Hardenbrook*, 11 Mont. 385, 390, 28 Pac. 451 (1891). See also *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 573, 39 Pac. 1054 (1895); *Smith* v. *Denniff*, 24 Mont. 20, 24, 60 Pac. 398 (1900); *Hays* v. *Buzard*, 31 Mont. 74, 81, 77 Pac. 423 (1904). The limitation of the rule has been stated more generally in the later cases.

[374] *Creek* v. *Bozeman Water Works Co.*, 15 Mont. 121, 131, 38 Pac. 459 (1894); *Galiger* v. *McNulty*, 80 Mont. 339, 357, 260 Pac. 401 (1927).

[375] *Head* v. *Hale*, 38 Mont. 302, 307-308, 100 Pac. 222 (1909). In *Featherman* v. *Hennessy*, 43 Mont. 310, 316-317, 115 Pac. 983 (1911), an appropriator acquired a right to the use of 1,500 inches of water for milling purposes in 1883, the waters flowing back into the creek below the mill, and in 1905 he diverted 90 inches of that quantity for irrigation. The appropriator was decreed the right to 1,500 inches for operating his mill subject to a change to some other use without injury to any other party, and was also allowed 90 inches of the amount for irrigation with right dating from the change to irrigation in 1905. This judgment was sustained by the supreme court, the change from milling to agricultural purposes of the 90 inches in 1905 being such a change of the original use as to result in a consumption of the quantity so diverted to the new use, and therefore amounted to a new appropriation.

[376] *Peck* v. *Simon*, 101 Mont. 12, 20, 52 Pac. (2d) 164 (1935).

[377] *Hansen* v. *Larsen*, 44 Mont. 350, 353, 120 Pac. 229 (1911). In *Lokowich* v. *Helena*, 46 Mont. 575, 577, 129 Pac. 1063 (1913), it is said that while one may not change the character of use to the prejudice of other appropriators, "it does not follow that any such change is to be taken, *in limine*, as prejudicial. On the contrary, the burden is on the party claiming to be prejudiced by such change, to allege and prove the facts."

the appropriator or his successor in interest "abandons and ceases to use the water" for the purpose for which it was appropriated, the right ceases.[378] There is no provision for statutory forfeiture solely by reason of nonuse of water for a prescribed period of years.

A water right that is fully perfected is a property right of which the owner can be divested only in some legal manner.[379]

Abandonment

Essential elements

Intent and relinquishment of possession.—The abandonment of a water right is a question of fact, to be determined as other questions of fact, from the acts and intention of the party who is alleged to have abandoned the rights in controversy.[380] It is necessary that the intent to abandon the right and the relinquishment of possession must coincide. As said by the supreme court:[381]

> To constitute abandonment there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use * * * . * * * neither an intention to abandon nor nonuser is sufficient; the union of both is indispensable to constitute abandonment * * * .

Thus abandonment is a mixed question of intent and act.[382]

Intent.—Abandonment is a matter of intention;[383] and there can be no abandonment without an intent to abandon the right, even though work may be suspended on construction of facilities for application of the water to use.[384]

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[378] Mont. Rev. Codes 1947, sec. 89-802. See *Conrow* v. *Huffine*, 48 Mont. 437, 444, 138 Pac. 1094 (1914). In *Huffine* v. *Miller*, 74 Mont. 50, 52, 237 Pac. 1103 (1925), the court stated that: "Appropriators of water cannot maintain a valid claim to an amount of water in excess of the beneficial use to which it is applied, and when the appropriator or his successor ceases to use the water for such beneficial purpose, the right ceases."

[379] *St. Onge* v. *Blakely*, 76 Mont. 1, 14, 245 Pac. 532 (1926); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 294, 62 Pac. (2d) 206 (1936).

[380] *Meagher* v. *Hardenbrook*, 11 Mont. 385, 389, 28 Pac. 451 (1891); *Power* v. *Switzer*, 21 Mont. 523, 529, 55 Pac. 32 (1898); *Haggin* v. *Saile*, 23 Mont. 375, 381, 59 Pac. 154 (1899); *Featherman* v. *Hennessy*, 42 Mont. 535, 540, 113 Pac. 751 (1911); *Thomas* v. *Ball*, 66 Mont. 161, 166, 213 Pac. 597 (1923); *Federal Land Bank* v. *Morris*, 112 Mont. 445, 453, 116 Pac. (2d) 1007 (1941).

[381] *Thomas* v. *Ball*, 66 Mont. 161, 167, 213 Pac. 597 (1923).

[382] *Tucker* v. *Jones*, 8 Mont. 225, 230, 19 Pac. 571 (1888); *Gassert* v. *Noyes*, 18 Mont. 216, 219, 44 Pac. 959 (1896); *St. Onge* v. *Blakely*, 76 Mont. 1, 14, 245 Pac. 532 (1926); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 294, 62 Pac. (2d) 206 (1936); *Irion* v. *Hyde*, 107 Mont. 84, 91, 81 Pac. (2d) 353 (1938).

[383] *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 576, 577, 39 Pac. 1054 (1895); *Smith* v. *Hope Min. Co.*, 18 Mont. 432, 438, 45 Pac. 632 (1896); *Norman* v.*Corbley*, 32 Mont. 195, 203, 79 Pac. 1059 (1905).

[384] *Atchison* v. *Peterson*, 1 Mont. 561, 565 (1872), affirmed, 87 U. S. 507 (1874); *Tucker* v. *Jones*, 8 Mont. 225, 230, 19 Pac. 571 (1888); *Gassert* v. *Noyes*,

Hence, "An abandonment must always be voluntary."[385] And so, after an appropriation of water has been completed, "the courts will not lightly decree an abandonment of a property so valuable in a semi-arid region such as this * * *."[386]

Establishment of abandonment

Controlling facts and circumstances.—The facts and circumstances in the case are to be examined in arriving at the pertinent acts and the intention of a party alleged to have abandoned a water right.[387] Hence a voluntary nonuser of water by a purchaser of a water right, with no intention to resume the use thereof, and without the assertion of possession or title for a number of years after purchase—particularly where such purchaser had permitted the water to be used by others adversely for a period of years—warranted an inference of abandonment. In another case, where an appropriator had allowed his ditches and flumes to deteriorate to such an extent that they would not convey water, and where his successor in interest had disclaimed on several occasions any right acquired by her predecessor, it was held that the evidence was sufficient to support a finding of abandonment of whatever right had been acquired.[388]

Nonuser for a considerable period of time may be some evidence of an intention to abandon the water right.[389] But mere lapse of time is not enough, because:[390]

> The circumstances must be such as to justify an inference of intention to abandon; in other words, to leave the property to be taken by any other person who chooses to do so. * * *

Burden of proof.—The loss of a water right by abandonment or otherwise is a serious matter in the West. Therefore,[391]

> The authorities are all of one accord in holding that the party claiming abandonment has the burden of proving his contention by a preponderance of the evidence, and that to establish abandonment the evidence to that effect should be clear and definite. * * *

Circumstances not constituting abandonment

Intent not established.—In view of the vital importance of the element of intent to abandon a water right, the inability to prove intent is one of

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18 Mont. 216, 219, 44 Pac. 959 (1896); *Wood* v. *Lowney*, 20 Mont. 273, 278, 50 Pac. 794 (1897); *Moore* v. *Sherman*, 52 Mont. 542, 546, 159 Pac. 966 (1916); *Rodda* v. *Best*, 68 Mont. 205, 214, 217 Pac. 669 (1923).

[385] *Morris* v. *Bean*, 146 Fed. 423, 434 (C.C.D. Mont., 1906); *St. Onge* v. *Blakely*, 76 Mont. 1, 14, 245 Pac. 532 (1926); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 294, 62 Pac. (2d) 206 (1936).

[386] *Thomas* v. *Ball*, 66 Mont. 161, 167, 213 Pac. 597 (1923).

[387] *Haggin* v. *Saile*, 23 Mont. 375, 381, 59 Pac. 154 (1899).

[388] *Goon* v. *Proctor*, 27 Mont. 526, 528, 71 Pac. 1003 (1903).

[389] *Thomas* v. *Ball*, 66 Mont. 161, 168, 213 Pac. 597 (1923); *St. Onge* v. *Blakely*, 76 Mont. 1, 15, 245 Pac. 532 (1926).

[390] *Featherman* v. *Hennessy*, 42 Mont. 535, 540-541, 113 Pac. 751 (1911).

[391] *Thomas* v. *Ball*, 66 Mont. 161, 168, 213 Pac. 597 (1923).

the usual causes of failure to establish an abandonment. This runs through the topics discussed immediately below. For example, where the holder of a water right abandoned his inchoate rights in the land on which the water was first used, whatever presumption might otherwise have been indulged in that he intended to abandon his right to the water was overturned by the fact that he used the water continuously on other land.[392] Resumption of the use of water is some evidence that the owners did not intend to abandon the right by failing to employ it during the immediately preceding years; and sale of a water right for a valuable consideration is some evidence that the right has not been abandoned.[393] Likewise, a permissive use of water immediately negatives any idea of abandonment.[394] In one of the earliest water-right cases the Territorial court stated that when work on a certain mining ditch was suspended there was no intention to abandon; that the subsequent sale for a valuable consideration showed the property to be valuable; and that there was in fact no abandonment of possession—hence no abandonment of the ditch within the meaning of the law.[395]

Mere nonuser.—Although failure to use water for a considerable time may be evidence of an intention to abandon the water right, mere lapse of time during which there is a nonuser, unless there is an intent to relinquish the right, does not constitute an abandonment.[396] If any principle of the law of water rights can be considered settled, said the court, this one is.[397] And the fact that the period of nonuse exceeds the period prescribed by the statute of limitations does not alter the principle.[398]

Two examples of the effect of nonuser upon claimed abandonments of water rights may be cited. In one instance there had been nonuse for nine years; but whatever force that may have had in showing an intention to abandon the water right, that force was wholly offset by other evidence tending to show that the holder did not intend to abandon the right so as to leave, in the opinion of the court, not even a conflict of testimony.[399] And in a case in which it was contended that the right claimed had been abandoned and lost by nonuser between 1882 and 1896, the court stated that the evidence merely showed the nonuser of the water while the owners were

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[392] *Hays* v. *Buzard*, 31 Mont. 74, 80-81, 77 Pac. 423 (1904).

[393] *Thomas* v. *Ball*, 66 Mont. 161, 168, 213 Pac. 597 (1923).

[394] *Irion* v. *Hyde*, 107 Mont. 84, 91, 81 Pac. (2d) 353 (1938).

[395] *Atchison* v. *Peterson*, 1 Mont. 561, 565 (1872); affirmed, 87 U. S. 507 (1874).

[396] *Tucker* v. *Jones*, 8 Mont. 225, 230, 19 Pac. 571 (1888); *Gassert* v. *Noyes*, 18 Mont. 216, 219, 44 Pac. 959 (1896); *Sloan* v. *Glancy*, 19 Mont. 70, 77, 47 Pac. 334 (1897); *Featherman* v. *Hennessy*, 42 Mont. 535, 540, 113 Pac. 751 (1911); *Musselshell Valley Farming & Livestock Co.* v. *Cooley*, 86 Mont. 276, 295, 283 Pac. 213 (1929).

[397] *Moore* v. *Sherman*, 52 Mont. 542, 546, 159 Pac. 966 (1916). Immediately preceding this statement, it was said that: "There was nonuser for ten years, but nonuser does not constitute abandonment."

[398] *Thomas* v. *Ball*, 66 Mont. 161, 168, 213 Pac. 597 (1923); *St. Onge* v. *Blakely*, 76 Mont. 1, 15, 245 Pac. 532 (1926).

[399] *Smith* v. *Hope Min. Co.*, 18 Mont. 432, 438-439, 45 Pac. 632 (1896).

laboring under certain disabilities, and the resumption of the use when possession was secured by those in a position to use the water.[400] Hence the fact that other parties in the meantime had acquired junior rights in no manner affected the owner's right to resume the use of his property.

Conveyance of water right.—Abandonment is the giving up of a thing absolutely without reference to any particular person or purpose.[401] In other words, there can be no such thing as abandonment to particular persons or for a consideration; and so the conveyance of a water right is not an abandonment of the right, particularly as the intent of the grantor obviously is to convey the right to his grantee and not to abandon it.[402]

Nor does the conveyance of a water right by deed or other written instrument that lacks the formalities of acknowledgement and recording prescribed by law for the conveyance of title to real estate, operate as an abandonment of the water right.[403] The sale or release of the right of a squatter to land on the public domain does not operate as an abandonment of the appropriative water right, unless the squatter abandons the water right as well.[404] And a cancellation of a desert entry does not operate as an abandonment of a completed water right used in connection with that land.[405] These matters have been discussed heretofore from the standpoint of formalities of conveyance under "The appropriative right—Property characteristics."

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[400] *St. Onge* v. *Blakely,* 76 Mont. 1, 14-15, 245 Pac. 532 (1926).

[401] *Norman* v. *Corbley,* 32 Mont. 195, 203, 79 Pac. 1059 (1905).

[402] *Middle Creek Ditch Co.* v. *Henry,* 15 Mont. 558, 576-577, 39 Pac. 1054 (1895). The execution of a mortgage cannot be successfully urged as an abandonment of the water right: *Smith* v. *Denniff,* 24 Mont. 20, 30, 60 Pac. 398 (1900).

[403] *Middle Creek Ditch Co.* v. *Henry,* 15 Mont. 558, 576-581, 39 Pac. 1054 (1895); *McDonald* v. *Lannen,* 19 Mont. 78, 83-86, 47 Pac. 648 (1897). In *Middle Creek Ditch Co.* v. *Henry,* at 15 Mont. 577, the court said: "In the case at bar the evidence is that the parties did not intend to abandon the use of the water which they had appropriated. Their acts indicated precisely the contrary intention. They conveyed, by an instrument in writing sufficient for the purpose, the use of the water for a valuable consideration. This is not an abandonment." And in *McDonald* v. *Lannen,* at 19 Mont. 86, the court said: "By transferring his possession of land, together with a water right appurtenant thereto, a settler certainly does abandon any intention he may have had of personally acquiring a government patent to the property by a compliance with the United States statutes. But a mere failure to execute a deed in no wise justifies the inference that he intends to throw away his honest buyer's rights as well as his own. He personally, and any grantee from him with notice, would be estopped, as intimated in *Barkley* v. *Tieleke,* from reasserting his rights as against his purchaser. Why, then, should a stranger to his title be allowed a greater privilege; a stranger, too, not in privity with the United States government itself?" These cases effectively overruled the principle (if it is correct to say that a principle was so established) in *Barkley* v. *Tieleke,* 2 Mont. 59, 64, 65 (1874), to the effect that an attempt to transfer a water right by an improper conveyance operates as a surrender or abandonment of the right acquired by appropriation.

[404] *Cook* v. *Hudson,* 110 Mont. 263, 278, 103 Pac. (2d) 137 (1940).

[405] *Hays* v. *Buzard,* 31 Mont. 74, 80-81, 77 Pac. 423 (1904); *Osnes Livestock Co.* v. *Warren,* 103 Mont. 284, 294, 62 Pac. (2d) 206 (1936).

Insufficient water supply.—The Montana Supreme Court held that:[406]

> Abandonment is of course a question of fact, and the mere fact that during a period of years, there was insufficient water capable of being reservoired to irrigate lands, and only enough to water the stock, certainly does not present a question of abandonment. The evidence does not at all support abandonment, either in act or intention, * * *

And a Federal court held that cessation of use of water because of unlawful diversions upstream on the part of other water users, which prevented the water from reaching the parties entitled to it, did not work an abandonment.[407] The court stated that an abandonment must always be voluntary, and does not result from an enforced discontinuance of the use of water.

Other circumstances.—So far distinct are water rights and ditch rights relating to use of the same water that the abandonment of one does not necessarily imply an abandonment of the other; so an abandonment of a water right does not, of itself, operate as an abandonment of a claim to a ditch right.[408] Nor does the fact that a person diverts water from time to time through different ditches, and at one time or another abandons a certain ditch, constitute an abandonment of his water right or any part thereof.[409] It has been shown above ("Exercise of the appropriative right —Changes in exercise of rights") that a change in the point of diversion, place of use, or purpose of use does not impair the water right in any way.

While a water right initiated in trespass is invalid, and while, if its exercise depends upon the commission of a trespass, a water right may not be asserted as against the true owner of the land trespassed upon, nevertheless:[410]

> We know of no rule of law which provides for the enforced abandonment of a vested water right as a penalty for exercising it as a trespasser. * * *

An early mining ditch owned by several parties had been used for some years and then abandoned, one of the owners later recapturing a part of the water formerly used for mining and putting it to use for irrigating his land.[411] It was held to be well settled that one tenant in common might preserve the entire estate or right held in common; and that it would seem to follow from analogy that one tenant in common might preserve a part of the common estate or right. And so:

> In the peculiar case of water rights it would appear to be so with more force, because the right can only be preserved by both the use, and the necessity for the use, for some beneficial purpose; so that a tenant in

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[406] *Federal Land Bank* v. *Morris*, 112 Mont. 445, 453, 116 Pac. (2d) 1007 (1941).

[407] *Morris* v. *Bean*, 146 Fed. 423, 434 (C.C.D. Mont., 1906).

[408] *McDonnell* v. *Huffine*, 44 Mont. 411, 423, 120 Pac. 792 (1912).

[409] *Kleinschmidt* v. *Greiser*, 14 Mont. 484, 495, 37 Pac. 5 (1894).

[410] *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 295, 62 Pac. (2d) 206 (1936).

[411] *Meagher* v. *Hardenbrook*, 11 Mont. 385, 390, 28 Pac. 451 (1891).

common, in preserving this right, can only preserve it to such extent as he can use it.

Effect of abandonment

Upon the abandonment of a water right, the water so lost becomes *publici juris* again, subject to recapture.[412] Where an appropriator abandons a right and thereafter reasserts his right to the abandoned appropriation, it amounts to a new appropriation.[413] By the same reasoning, the taking of possession of a relinquished water right by one not in privity with the original appropriator or his lawful successor in interest, constitutes the initiation of a new right with priority as of the date of beginning the new use, regardless of the fact that the present claimant may have repaired and used the original ditches.[414] (See the discussion of attempted "tacking" of title onto titles of predecessors with whom no privity of interest is shown, under "The appropriative right — Property charateristics — Privity between claimant and original appropriator," above.)

Adverse Possession and Use

Applicability to appropriative right

The supreme court has said:[415]

> That the right to the use of water for irrigation or other lawful purposes may be lost by one and acquired by another by prescription is settled beyond controversy in this jurisdiction. * * *

The right to the use of a ditch across the lands of another may be acquired by adverse user,[416] and this may come about even though the claimant to the easement does not own the water right under which water is carried in the ditch, but depends for the use of the ditch upon water leased or otherwise acquired from year to year.[417]

Upon the perfection of the prescriptive right, an antecedent grant of the asserted right is presumed by law.[418]

The supreme court held in 1894 that findings by a trial court that certain claimants had acquired water rights by prescription and also by ap-

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[412] *Barkley* v. *Tieleke*, 2 Mont. 59, 64 (1874).

[413] *O'Shea* v. *Doty*, 68 Mont. 316, 320-321, 218 Pac. 658 (1923).

[414] *Head* v. *Hale*, 38 Mont. 302, 308, 100 Pac. 222 (1909).

[415] *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 577, 227 Pac. 68 (1924). See also *State* v. *Quantic*, 37 Mont. 32, 54, 94 Pac. 491 (1908); *Custer Consolidated Mines Co.* v. *Helena*, 52 Mont. 35, 40-41, 156 Pac. 1090 (1916); *Zosel* v. *Kohrs*, 72 Mont. 564, 574, 234 Pac. 1089 (1925); *Gibbs* v. *Gardner*, 107 Mont. 76, 81, 80 Pac. (2d) 370 (1938); *Cook* v. *Hudson*, 110 Mont. 263, 282, 103 Pac. (2d) 137 (1940); *Stearns* v. *Benedick*, 126 Mont. 272, 278, 247 Pac. (2d) 656, 659 (1952).

[416] *Geary* v. *Harper*, 92 Mont. 242, 251, 12 Pac. (2d) 276 (1932).

[417] *McDonnell* v. *Huffine*, 44 Mont. 411, 423, 120 Pac. 792 (1912).

[418] *State* v. *Quantic*, 37 Mont. 32, 54-55, 94 Pac. 491 (1908); *Boehler* v. *Boyer*, 72 Mont. 472, 476, 234 Pac. 1086 (1925).

propriation were inconsistent, the distinction being important with respect to the priority that would apply to the water right in question.[419]

One may not rely upon an unlawful act of the judge or of any water commissioner appointed by him to distribute decreed water in order to establish a claimed right by adverse possession.[420]

Elements of prescriptive right

In order to perfect a prescriptive right to the use of water, the use must have been open and notorious, adverse and hostile, exclusive, continuous and uninterrupted, under a claim of right, for the period prescribed by the statute of limitation of actions to recover real property.[421]

Open and notorious use.—The supreme court has said that while the authorities use both of the words "open" and "notorious," the use of either would seem to be sufficient, as they are practically synonymous when used in this connection.[422] The court also has used the word "visible" in relation to the adverse use of a ditch.[423]

Adverse and hostile use.—In order that the use of water be adverse, the claim must be hostile to that of the person against whom it is asserted.[424] The use of the water must be an invasion or infringement of the claimed right of the rightful owner—that is, the claimant against whom the right is asserted—which the owner may at any time assert but fails to do so until the full statutory period has passed.[425]

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[419] *Johnson* v. *Bielenberg*, 14 Mont. 506, 507, 37 Pac. 12 (1894). The trial court had found that Herman Johnson had appropriated 150 inches in 1866, and that Peter Johnson and Patrick Quinlan had, since 1867, used adversely 100 of these 150 inches but also that they had obtained this 100 inches by having appropriated the same in 1867. If Johnson and Quinlan had obtained the right by prescription, their right was prior to that of Herman Johnson, but if they had obtained it by appropriation, it was junior. Subsequently, in *State* v.*Quantic*, 37 Mont. 32, 54-55, 94 Pac. 491 (1908), the court quoted from Long on Irrigation, sec. 89, first edition, which was based upon *Smith* v. *Hawkins*, 110 Calif. 122, 42 Pac. 453 (1895), regarding distinctions between acquiring a water right by appropriation and acquiring such a right by prescription.

[420] *Lamping* v. *Diehl*, 126 Mont. 193, 203, 246 Pac. (2d) 230, 235 (1952).

[421] *Talbott* v. *Butte City Water Co.*, 29 Mont. 17, 26, 73 Pac. 1111 (1903); *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 554, 81 Pac. 334 (1905); *Smith* v. *Duff*, 39 Mont. 374, 378, 102 Pac. 981 (1909); *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 577, 227 Pac. 68 (1924); *Boehler* v. *Boyer*, 72 Mont. 472, 480, 234 Pac. 1086 (1925); *Irion* v. *Hyde*, 107 Mont. 84, 88, 81 Pac. (2d) 353 (1938); *Lamping* v. *Diehl*, 126 Mont. 193, 203, 246 Pac. (2d) 230, 235 (1952).

[422] *Smith* v. *Duff*, 39 Mont. 374, 378, 102 Pac. 981 (1909).

[423] *Glantz* v. *Gabel*, 66 Mont. 134, 141, 212 Pac. 858 (1923).

[424] *Morris* v. *Bean*, 146 Fed. 423, 433 (C.C.D. Mont., 1906).

[425] *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 554,555,81 Pac.. 334 (1905). See also *Featherman* v. *Hennessy*, 42 Mont. 535, 541, 113 Pac. 751 (1911); *Boehler* v. *Boyer*, 72 Mont. 472, 476, 234 Pac. 1086 (1925). The water must be used "adversely and against their rights": *Irion* v. *Hyde*, 107 Mont. 84, 93, 81 Pac. (2d) 353 (1938). The use must "be detrimental to the one whose title and rights are said to have been destroyed": *Woodward* v. *Perkins*, 116 Mont. 46,

To constitute an invasion of the right of the prior appropriator, he must be deprived of the water when he has actual need of it.[426] And the invasion of the right of the owner must be of such character as to enable him at any time during the statutory period to maintain an action against the adverse user.[427]

The supreme court has said that:[428]

> The right by adverse user, or prescription, is acquired, in some measure, by an invasion of the rights of others—it bears a sort of kinship, by refined descent, to the "possession by bow and spear" of an earlier time; it is based upon a positive assertion of right in and by the water user in derogation of the rights of everyone else. * * *

It follows that a use of water may be open and notorious and still not be adverse.[429] And as a necessary consequence, proof of the use of water during the statutory period of limitations, standing alone, is not sufficient to prove title to the water right by adverse possession.[430]

Permissive use distinguished.—A use of water that is made with the permission of the rightful owner of the water right is not adverse to the claim of such owner.[431] Permissive use ordinarily negatives "any idea or possibility" of adverse use.[432] Where the claimant has shown an open, visible, continuous, and unmolested use of the land of another for the period of time necessary to acquire title by adverse possession, the use will be presumed to be under a claim of right and not by license of the owner; and in order to overcome this presumption, the burden is upon the owner to show that the use was permissive.[433]

Revocation of permission.—Even though a use of water may have been permissive in the first instance, nevertheless if thereafter exercised under

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54, 147 Pac. (2d) 1016 (1944). In *St. Onge* v. *Blakely*, 76 Mont. 1, 16-17, 245 Pac. 532 (1926), the court distinguished between the character of proof required to establish adverse use of water and adverse use of real estate.

[426] *Talbott* v. *Butte City Water Co.*, 29 Mont. 17, 26-27, 73 Pac. 1111 (1903).

[427] *Talbott* v. *Butte City Water Co.*, 29 Mont. 17, 26, 73 Pac. 1111 (1903); *Chessman* v. *Hale*, 31 Mont. 577, 584, 79 Pac. 254 (1905); *Smith* v. *Duff*, 39 Mont. 374, 379, 102 Pac. 981 (1909); *Featherman* v. *Hennessy*, 42 Mont. 535, 541, 113, Pac. 751 (1911);*Boehler* v. *Boyer*, 72 Mont. 472, 480, 234 Pac. 1086 (1925); *Zosel* v. *Kohrs*, 72 Mont. 564, 577, 234 Pac. 1089 (1925); *Irion* v. *Hyde*, 107 Mont. 84, 95, 81 Pac. (2d) 353 (1938).

[428] *Smith* v. *Duff*, 39 Mont. 374, 378, 102 Pac. 981 (1909).

[429] *Cook* v. *Hudson*, 110 Mont. 263, 282, 103 Pac. (2d) 137 (1940).

[430] *Smith* v. *Duff*, 39 Mont. 374, 378-379, 102 Pac. 981 (1909); *St. Onge* v. *Blakely*, 76 Mont. 1, 16, 245 Pac. 532 (1926); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 297-298, 62 Pac. (2d) 206 (1936); *Irion* v. *Hyde*, 107 Mont. 84, 94, 81 Pac. (2d) 353 (1938).

[431] *Crawford* v. *Minnesota & Montana Land & Improvement Co.*, 15 Mont. 153, 158, 38 Pac. 713 (1894).

[432] *Irion* v. *Hyde*, 107 Mont. 84, 92, 81 Pac. (2d) 353 (1938).

[433] *Glantz* v. *Gabel*, 66 Mont. 134, 141, 212 Pac. 858 (1923). The court said: "This rule is sustained by the great weight of authority."

a claim of right, the original character of the use does not prevent the acquisition of a prescriptive right.[434] But in order to initiate the acquisition of a prescriptive right after exercise of the right has been made under permission of the rightful owner, there must be some change of condition, that is, notice of some definite character on the part of the adverse users to the rightful owner that the permission was repudiated and that the adverse users were establishing a right antagonistic and adverse to that of the rightful owner. The character of notice necessary is discussed below in connection with the element of claim of right.

Exclusive use.—In order to constitute an invasion of the right of an appropriator, he must be excluded from the exercise of his right by the claimant of a right by adverse use.[435] If the supply of water is sufficient for the needs of all parties who claim rights in the same source of supply, there is no infringement of the right of anyone by anyone else.[436] If the appropriator is not deprived of any water to which he is entitled at any time he requires the use of water, he has no such ground for complaint as to start the statute of limitations running.[437]

The Montana Supreme Court has stated that:[438]

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[434] *Irion* v. *Hyde,* 107 Mont. 84, 92, 95, 81 Pac. (2d) 353 (1938).

[435] Note that in *Irion* v. *Hyde,* 107 Mont. 84, 88, 81 Pac. (2d) 353 (1938), the supreme court used the term "exclusive" as synonymous with "uninterrupted, peaceable." However, in *Stearns* v. *Benedick,* 126 Mont. 272, 277-278, 247 Pac. (2d) 656, 659 (1952), rights were decreed to have been established by adverse possession where all the water had been taken during the late summer and fall and used each year from a given date "continuously, openly, notoriously and adversely *to the exclusion of all others* and to the detriment of plaintiffs." [Emphasis supplied.] A good approach seems to have been taken by the Idaho Supreme Court in *Brossard* v. *Morgan,* 7 Idaho 215, 219, 61 Pac. 1031 (1900), wherein it is said that to bar the claim of a prior appropriator to the use of water appropriated by him on the ground of continuous adverse user by a junior appropriator, "the former must be excluded from such use by the latter."

[436] *Boehler* v. *Boyer,* 72 Mont. 472, 476, 234 Pac. 1086 (1925); *Zosel* v. *Kohrs,* 72 Mont. 564, 577, 234 Pac. 1089 (1925); *Woodward* v. *Perkins,* 116 Mont. 46, 54, 147 Pac. (2d) 1016 (1944).

[437] *Norman* v. *Corbley,* 32 Mont. 195, 202-203, 79 Pac. 1059 (1905); *Smith* v. *Duff,* 39 Mont. 374, 379-382, 102 Pac. 981 (1909); *Featherman* v. *Hennessy,* 42 Mont. 535, 541-542, 113 Pac. 751 (1911); *St. Onge* v. *Blakely,* 76 Mont. 1, 16-17, 245 Pac. 532 (1926); *Galiger* v. *McNulty,* 80 Mont. 339, 358-359, 260 Pac. 401 (1927); *Irion* v. *Hyde,* 107 Mont. 84, 93, 81 Pac. (2d) 353 (1938).

In *Hays* v. *DeAtley,* 65 Mont. 558, 562-563, 212 Pac. 296 (1923), which involved a claim of prescriptive right to the use of a ditch in which the claimant claimed a right to the extent of one-half of its capacity only, the court said: "But the term 'exclusive' as employed by the courts in enumerating the elements of prescription does not mean that no one else may use the ditch except the plaintiff, the claimant of the easement. It means no more than that his right to use it does not depend on the like right in others. Plaintiff's use may have been exclusive within the meaning of the rule even though defendants used the ditch, so long as their use did not interfere with the use by plaintiff."

[438] *Talbott* v. *Butte City Water Co.,* 29 Mont. 17, 26-27, 73 Pac. 1111 (1903).

> No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator, unless such use deprives the prior appropriator of it when he has actual need of it. To take the water when the prior appropriator has no use for it, invades no right of his, and cannot even initiate a claim adverse to him. * * *

It is said also that the statute of limitations "never runs upon a scrambling possession."[439]

Continuous and uninterrupted use.—The possession of the claimant of a prescriptive right must be undisturbed throughout the statutory period in order to establish a right by adverse possession.[440]

The supreme court stated that:[441]

> While it is true that some courts in enumerating the elements necessary to acquire title by prescription declare that the possession must be peaceable, they mean nothing more than that it must be continuous—that is, that it must not be interrupted by the owner of the servient estate. * * *

Continuous use does not necessarily imply constant or incessant use.[442] Hence the fact that the use was made only during the irrigation season does not mean that it was not continuous within the rule. The court said (at 66 Mont. 142) that:

> If plaintiff and his predecessors used the ditch whenever needed, as they did, without regard to the rights of others, the requirements of the rule were met. * * *

Claim of right.—The use of the water by the adverse claimant must be made under a claim of right, which must be hostile to that of the person against whom it is asserted.[443]

Where the claimant has shown open, continuous, and unmolested use of the land of another for the period of the statute of limitations, "the use will be presumed to be under a claim of right, and not by license of the owner."[444] Where the conduct of prescriptive claimants is such as to indi-

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[439] *Morris* v. *Bean*, 146 Fed. 423, 433 (C.C.D. Mont., 1906); *Bullerdick* v. *Hermsmeyer*, 32 Mont. 541, 554, 81 Pac. 334 (1905). In the latter case it was said that the evidence showed that during many of the years following 1888, plaintiff used the waters of the stream exclusively, but also showed that during the years when the defendants cultivated their lands and needed water, they used it to the extent deemed necessary. "At best, during many of the years from 1888 to the bringing of this action, the possession was a scrambling one, and the use by any of the parties was not so continuously and exclusively adverse for the statutory period as to create a right thereunder."

[440] *Cook* v. *Hudson*, 110 Mont. 263, 281-282, 103 Pac. (2d) 137 (1940); *Morris* v. *Bean*, 146 Fed. 423, 433 (C.C.D. Mont., 1906).

[441] *Hays* v. *DeAtley*, 65 Mont. 558, 561, 212 Pac. 296 (1923).

[442] *Glantz* v. *Gabel*, 66 Mont. 134, 142, 212 Pac. 858 (1923). This case involved a prescriptive right to the use of a ditch, but the same principle would apply to the use of water.

[443] *Morris* v. *Bean*, 146 Fed. 423, 433 (C.C.D. Mont., 1906).

[444] *Glantz* v. *Gabel*, 66 Mont. 134, 141, 212 Pac. 858 (1923).

cate a recognition of a paramount right in others, there can be no basis for a finding of adverse possession by such claimants.[445]

Notice of claim.—In order to make good a claim of title by prescription grounded on adverse possession, the adverse claim must have been brought home to all whose rights the claim infringed.[446]

Counsel argued in one case that inasmuch as a water right is a mere right to the use of water, possession of it in any manner capable of giving notice is impossible.[447] The supreme court disagreed, stating that although there may be difficulties in the way of proof, a use of water can be made that is enough to put a purchaser upon notice. In holding in another case that adverse use cannot be initiated without notice of some definite character, the court said that:[448]

> We do not hold that it was absolutely necessary that defendants should have served actual notice upon plaintiffs that they were taking the water adversely and against their rights, but it was necessary that defendants' use be adverse and hostile to the right of plaintiffs. * * *

And the adverse use must have been of such character as to deprive the owners of the superior right of the benefit of their use of the water in such substantial manner as to notify them that their rights were being invaded. Necessarily a subsequent appropriation of water is not notice of an adverse claim.[449]

Payment of taxes.—The supreme court in 1924 examined the section of the statute providing that adverse possession of land should not be considered established unless the claimants had occupied the land during the statutory period and had paid all taxes levied against the land during such period, and concluded that the section was not open to the construction that, before any one might acquire title to the whole or a part of a water right by adverse possession, he must pay all taxes upon the land to which the water right is appurtenant for the full statutory period.[450]

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[445] *Sherlock* v. *Greaves*, 106 Mont. 206, 216, 76 Pac. (2d) 87 (1938). In *Custer Consolidated Mines Co.* v. *Helena*, 52 Mont. 35, 42-43, 156 Pac. 1090 (1916), it is said: "The possession of real property which will amount to notice of an unrecorded grant thereof must be under such grant, must be unequivocal, inconsistent with the title of the apparent owner of record, and of such a character that an intending purchaser could, by following up the inquiry, learn of the unrecorded grant."

[446] *Cook* v. *Hudson*, 110 Mont. 263, 282, 103 Pac. (2d) 137 (1940). "One who never told anyone of his adverse claim to another's right must show possession of such character as to give the owner notice of his hostile claim."

[447] *Custer Consolidated Mines Co.* v. *Helena*, 52 Mont. 35, 40-41, 156 Pac. 1090 (1916).

[448] *Irion* v. *Hyde*, 107 Mont. 84, 92-94, 81 Pac. (2d) 353 (1938). See also *Smith* v. *Duff*, 39 Mont. 374, 379, 102 Pac. 981 (1909); *Zosel* v. *Kohrs*, 72 Mont. 564, 577, 234 Pac. 1089 (1925).

[449] *Sherlock* v. *Greaves*, 106 Mont. 206, 216, 76 Pac. (2d) 87 (1938).

[450] *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 578, 227 Pac. 68 (1924). The court said that the water right, while it partakes of the nature of real estate, is not land in any sense, and when considered alone and for the purpose of taxation is personal property; but when considered otherwise it is not subject to taxation independently of the land to which it is appurtenant.

The statutory requirement as to payment of taxes is applicable only if taxes have been levied.[451]

Statute of limitations.—Courts of equity, by analogy, apply the statute of limitations relating to the possession of real estate to the establishment of a prescriptive right to the use of water.[452] Adverse use for any period of time short of the period required by the statute of limitations is not sufficient to establish a prescriptive right.[453]

Burden of proof

The Montana Supreme Court has said that:[454]

> It is settled law in this state that the burden of proving adverse user of water rests upon the party alleging it. * * *

Where the use of water is such that a presumption arises that it is under a claim of right and not by license of the owner, then in order to overcome this presumption the burden is upon the owner to show that the use was permissive.[455]

Measure of the prescriptive right

A water right acquired by prescription is limited by the character and extent of the user during the period requisite to acquire the right.[456] The right by prescription is no more subject to variation than one created by deed.[457]

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[451] *Helland* v. *Custer County*, 127 Mont. 23, 30-32, 256 Pac. (2d) 1085 (1953).

[452] *Morris* v. *Bean*, 146 Fed. 423, 433, (C.C.D. Mont. 1906); *State* v. *Quantic*, 37 Mont. 32, 54, 94 Pac. 491 (1908); *Cook* v. *Hudson*, 110 Mont. 263, 281, 103 Pac. (2d) 137 (1940).

[453] *Galiger* v. *McNulty*, 80 Mont. 339, 358-359, 260 Pac. 401 (1927).

[454] *Irion* v. *Hyde*, 107 Mont. 84, 88, 81 Pac. (2d) 353 (1938). See *Lamping* v. *Diehl*, 126 Mont. 193, 203, 246 Pac. (2d) 230, 235 (1952). It was said in *Boehler* v. *Boyer*, 72 Mont. 472, 480, 234 Pac. 1086 (1925): "In order to support the finding of adverse user by Boyer, it was incumbent upon him to prove by a preponderance of the evidence, not only that his use was open, notorious, continuous, adverse and exclusive, under claim of right, for the statutory period of ten years, but that the prior appropriator, the appellant, had actual need of the water during that period, and that the use was such that, during all of that period, appellant could have maintained an action against him for so using the water." A Federal court said in *Morris* v. *Bean*, 146 Fed. 423, 434 (C.C.D. Mont. 1906): "The burden is upon the defendants to bring themselves within the statute, and the proof must be clear before a prescriptive right will be enforced." See also *Smith* v. *Duff*, 39 Mont. 374, 378, 102 Pac. 981 (1909); *Custer Consolidated Mines Co.* v. *Helena*, 52 Mont. 35, 41, 156 Pac. 1090 (1916); *St. Onge* v. *Blakely*, 76 Mont. 1, 16, 245 Pac. 532 (1926).

[455] *Glantz* v. *Gabel*, 66 Mont. 134, 141, 212 Pac. 858 (1923).

[456] *Chessman* v. *Hale*, 31 Mont. 577, 584, 79 Pac. 254 (1905).

[457] *Babcock* v. *Gregg*, 55 Mont. 317, 320, 178 Pac. 284 (1918). Hence the right to maintain a ditch acquired by prescription did not carry with it the right to enlarge the ditch, change its course materially, or make a new ditch over the servient property. See *Stalcup* v. *Cameron Ditch Co.*, 130 Mont. 294, 295-296, 300 Pac. (2d) 511 (1956).

Estoppel

An appropriator may be estopped from asserting his water right as against parties who have been misled by his inequitable conduct.[458]

To constitute an estoppel by silence or acquiescence, it must appear that the party to be estopped was bound in equity and good conscience to speak, and that the party claiming estoppel relied upon the acquiescence and was misled thereby to change his position to his prejudice.[459] The supreme court has stated in several cases that mere silence cannot work an estoppel; that to be effective for this purpose the person to be estopped must have had an intent to mislead or a willingness that another should be deceived, and the other must have been misled by the silence.[460] Hence constructive fraud underlies every equitable estoppel.[461]

It follows that unless there is some degree of turpitude—such as misleading statements or acts, or concealment of facts by silence, with the result that the other party is induced or led by the words, conduct, or silence of the appropriator to do things that he otherwise would not have done—a court of equity will not estop one from asserting his title where the effect is to forfeit his property and transfer its enjoyment to another.[462]

Estoppel is difficult to establish. It was said by a Federal court that:[463]

> It is safe to say that few cases of this character have been tried where the defense of estoppel has not been interposed with result uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not be allowed to do so, because they knew that the defendants were building up their improvements, and relying upon the use of the water to maintain them. An all-sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it, the one side is as much estopped as the other.

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[458] *Fabian* v. *Collins*, 3 Mont. 215, 229, 231 (1878). Parties who knew that certain mining claims could not be worked successfully without water, and that a certain ditch and water of a gulch were included in deeds to which they acted as witnesses, but who did not disclose that they or anyone else had any claim to the water, were held to have been estopped from speaking as against the parties who acquired the deeds, because they should have asserted their claim to the water when the deeds were executed.

[459] *Sherlock* v. *Greaves*, 106 Mont. 206, 217, 76 Pac. (2d) 87 (1938).

[460] *Moore* v. *Sherman*, 52 Mont. 542, 548, 159 Pac. 966 (1916); *Scott* v. *Jardine Gold Min. & Mill Co.*, 79 Mont. 485, 495-496, 257 Pac. 406 (1927); *Sherlock* v. *Greaves*, 106 Mont. 206, 217, 76 Pac. (2d) 87 (1938).

[461] *Moore* v. *Sherman*, 52 Mont. 542, 547, 159 Pac. 966 (1916).

[462] *Kramer* v. *Deer Lodge Farms Co.*, 116 Mont. 152, 174-175, 151 Pac. (2d) 483 (1944).

[463] *Morris* v. *Bean*, 146 Fed. 423, 434 (C.C.D. Mont., 1906).

ADJUDICATION OF WATER RIGHTS

Statutes

In any action for the protection of water rights, the plaintiff has statutory authority to make any or all persons who have diverted water from the same source, parties to the action.[464] The court in one judgment may settle the relative priorities and rights of all of the parties.

At the direction of the State Water Conservation Board, the State Engineer may bring action to adjudicate the waters of any stream, or of any stream and its tributaries, in any county traversed by the stream.[465] The State Engineer or any party to an adjudication may apply for a referee or referees to take testimony. The State Engineer, upon direction of the Board or of the court, may make hydrographic surveys and perform other services in obtaining data essential to the proper understanding of the relative rights involved. Such surveys, reports, maps, and plats are to be furnished to the judge or referee, and may be introduced as evidence in the proceedings. The costs and expenses incurred in carrying out these provisions are to be paid by the Board. The referee may hold hearings and take testimony, and shall make a report containing findings of fact but not conclusions of law, to be submitted to the court. The parties are allowed to file objections or exceptions to the report. The court is authorized to render judgment to the same extent as if all testimony had been taken directly by the court.

In case of a dispute over rights to divert and use the water of an irrigation ditch owned by a partnership, tenants in common, or corporation, any partner, tenant in common, or stockholder may commence an action to determine the rights of the respective parties, and may ask for the appointment of a water commissioner to handle the distribution of the water during the pendency of the action.[466] (See "Administration of water rights and distribution of water," below.)

Jurisdiction of Courts

Where a river and its tributaries flow in more than one county, the district court of any one of those counties has jurisdiction to adjudicate the water rights of the whole watershed system.[467] However, the first one of those courts that acquires jurisdiction retains it for the purpose of disposing of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.

Title to a water right cannot be tried in a contempt proceeding, but must

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[464] Mont. Rev. Codes 1947, sec. 89-815.

[465] Mont. Rev. Codes 1947, secs. 89-848 to 89-855.

[466] Mont. Rev. Codes 1947, sec. 89-1017.

[467] *State ex rel. Swanson* v. *District Court,* 107 Mont. 203, 206-207, 82 Pac. (2d) 779 (1938). The court cited *Whitcomb* v. *Murphy,* 94 Mont. 562, 23 Pac. (2d) 980 (1933), in which at 94 Mont. 566, it had been held that the court of the county in which a main stream flowed had jurisdiction to adjudicate the water rights on a tributary in another county.

be determined in a civil action to which others interested may be made parties.[468] The supreme court has stated that:[469]

> Neither the commissioner nor the court was empowered to decide in a summary proceeding that relator had no rights in the waters of the stream. As we have already indicated, that matter could be determined only by an appropriate action at law or in equity, after due notice, when the parties might be heard in the usual way. To hold otherwise, or to permit in a summary proceeding the determination of such a substantive property right would constitute the taking of property or property rights without due process of law. * * *

ADMINISTRATION OF WATER RIGHTS AND DISTRIBUTION OF WATER

No State administrative authority has control over the exercise of water rights and distribution of water in Montana. The distribution of water with respect to rights that have been adjudicated is handled by commissioners appointed by the courts.

Distribution of Adjudicated Waters by Commissioners

A statute provides that upon application of the owners of at least 15 percent of water rights affected by a decree or decrees of adjudication, the judge of the district court having jurisdiction of the subject matter, at his discretion, may appoint one or more commissioners to admeasure and distribute to the parties bound by the decree or decrees the water to which they are entitled according to their respective rights so fixed.[470] The State Water Conservation Board, or any person or corporation operating under contract therewith, or any other owner of stored waters, may petition the court to have such stored waters distributed by the water commissioners. The commissioner has power to arrest persons interfering with the distribution of water made by him.

The supreme court has held that the water commissioner has authority only to measure water according to the rights fixed by the decree, and that he is not given complete and exclusive jurisdiction to control the stream as such, regardless of whether all rights have been adjudicated.[471] The court has held also that the water commissioner appointed pursuant to the statute has duties and authority prescribed by the statute, and:[472]

> He only has authority to distribute the water to the parties "according to their rights as fixed by such decree or decrees." * * * The law

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[468] *State ex rel. Zosel* v. *District Court,* 56 Mont. 578, 581, 185 Pac. 1112 (1919).

[469] *State ex rel. Reeder* v. *District Court,* 100 Mont. 376, 382-383, 47 Pac. (2d) 653 (1935).

[470] Mont. Rev. Codes 1947, secs, 89-1001 to 89-1016.

[471] *State ex rel. Reeder* v. *District Court,* 100 Mont. 376, 382, 47 Pac. (2d) 653 (1935).

[472] *Quigley* v. *McIntosh,* 110 Mont. 495, 499-500, 103 Pac. (2d) 1067 (1940).

> does not give him complete and exclusive jurisdiction to control the stream as such * * * ; nor is it simply his duty to distribute certain quantities of water to the parties without reference to the purposes, uses and needs adjudicated in the decree.
>
> It then becomes obvious that the decree must be the yardstick by which the commissioner shall proceed, and, of necessity, must likewise constitute the yardstick for the consideration of instructions given to him by the court. It is, therefore, necessary to look to the controlling provisions of the decree for the authority of both court and commissioner. * * *

With respect to the administration of decrees not complete in all particulars, the court said (at 110 Mont. 510-511) that:

> * * * in construing a decree which is lacking in certain elements or obscure or uncertain in meaning, reference may be made to the pleadings, judgment roll, or entire record of the case. * * *

Distribution of Water from Ditch

Reference has been made heretofore ("Adjudication of water rights") to the statute relating to suits brought to settle rights in irrigation ditches owned by partnerships, tenants in common, or corporations, and authorizing the party bringing the action to ask for the appointment of a water commissioner to apportion the water during pendency of the action.[473] When the rights of the parties in the action have been adjudicated, the judge of the court having jurisdiction, upon application of the owners of at least 10 percent of the waters, may at his discretion appoint a water commissioner to divide the water according to the rights so adjudicated. In case the waters of the stream from which the ditch makes its diversion have been adjudicated and a water commissioner has been appointed to administer the rights on the stream, such commissioner may be directed by the judge or court to distribute the waters of the ditch according to the decree relating to the ditch.

Montana Water Resources Survey

In conformance with the policy expressed by the legislature in 1939 that the water resources of the State, especially those of interstate streams arising out of the State, be investigated and adjudicated as soon as possible,[474] a Water Resources Survey of the State of Montana was initiated in that year and is being continued steadily, county by county. Work was commenced in 1940, with initial financing by the Works Project Administration and the State.[475] It is being continued with funds made available by the legislature

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[473] Mont. Rev. Codes 1947, secs. 89-1017 to 89-1024.

[474] Mont. Laws 1939, ch. 185, sec. 1; Rev. Codes 1947, sec. 89-847. This section is quoted in full under "State water policy," above. See also "Interstate and international matters—Rights to the use of water of interstate streams—State policy as to adjudication of rights," below.

[475] Dunbar, *op. cit., supra,* footnote 25, pp. 148-149. Professor Dunbar credits Fred E. Buck, Montana State Engineer, and O. W. Monson, Head of the Department of Agricultural Engineering, Montana State College, with submitting this proposal to the Works Project Administration for a statewide survey, recordation, and mapping of the State's water resources. He terms it

to the State Engineer, and in cooperation with the State Water Conservation Board and the Montana State Agricultural Experiment Station. The latest of the county reports[476] states that work has been completed and reports are now available for the following counties: Big Horn, Broadwater, Carbon, Custer, Deer Lodge, Gallatin, Golden Valley, Jefferson, Lewis and Clark, Madison, Meagher, Musselshell, Park, Rosebud, Silver Bow, Stillwater, Sweet Grass, Treasure, Wheatland, and Yellowstone.

The detailed survey for each county results in the compilation of a comprehensive inventory of appropriated and decreed water rights as they apply to land and other uses. "The historical data contained in these reports can never become obsolete. If new information is added from time to time as new developments occur, the records can always be kept current and up-to-date."[477]

The origin and purpose of the Montana Water Resources Survey are stated by Professor Dunbar in the Lewis and Clark County report as follows:[478]

> When Montana began to negotiate the Yellowstone River Compact with Wyoming and North Dakota in 1939, the need for some definite information concerning our water and its use became apparent. The Legislature in 1939 passed a bill (Ch. 185) authorizing the collection of data pertaining to our uses of water and it is under this authority that the Water Resources Survey is being carried on. The purpose of this survey is six fold: (1) To catalogue counties, in the office of the State Engineer, all recorded, appropriated and decreed water rights including use rights as they are found; (2) to map the lands upon which the water is being used; (3) to provide the public with pertinent water right information on any stream, thereby assisting in any transaction where water is involved; (4) to help State and Federal Agencies in pertinent matters; (5) to eliminate unnecessary court action in water right disputes; (6) and to have a complete inventory of our perfected water rights in case we need to defend these rights against the encroachments of lower states.

INTERSTATE AND INTERNATIONAL MATTERS

Appropriation in One State for Use in Another State

A statute enacted in 1921 requires the approval of the Montana Legislature for the appropriation of water in that State for use outside the Montana

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essentially a program of historical research, in which its workers investigate the origins of water rights, dates of filing and construction, extent of appropriations, and present water uses. When the records are completed for the 56 counties, he says, Montanans will have a unique record of their water rights in a central office in Helena. This will be Montana's first and only inventory of its water rights.

[476] "Water Resources Survey, Lewis and Clark County, Montana." Montana State Engineer's Office, June 1957. Letter of transmittal, Fred E. Buck, State Engineer, to Governor J. Hugo Aronson.

[477] *Idem*, p. 5.

[478] *Idem*, Foreword, by Robert G. Dunbar, Professor of History, Montana State College, pp. 3-4.

State boundaries.[479] In 1937 the legislature authorized such appropriations by the State of Wyoming for use in that State, valid only when the Montana State Water Conservation Board should issue certificates of appropriation therefor, and effective only in the event that Wyoming should enact reciprocal legislation granting similar rights to Montana for diversions within Wyoming.[480] The statute authorizes the Board to cooperate with State officials of Wyoming in the control of water and water rights on interstate streams.

Rights to the Use of Water of Interstate Streams

Extent of right and jurisdiction of court

Rights to the use of waters of Sage Creek, which crosses the interstate boundary between Montana and Wyoming, have been involved in controversies in the Federal courts between citizens of the two States. It is held that the right of the appropriator to have the stream flow to his point of diversion does not stop at the State line, and that the Federal court in Montana has jurisdiction to protect an appropriative right acquired under Wyoming laws by a Wyoming citizen against infringement by citizens of Montana.

It was held in *Howell* v. *Johnson*, decided in 1898,[481] that an appropriator who had acquired a water right on public lands of the United States under and by virtue of the laws of Wyoming could come into the Federal Circuit Court in Montana to enforce the same. The court held that the rights of the appropriator rested upon the laws of Congress in recognizing appropriative rights on the public domain where authorized by the laws, customs, and court decisions of the State where the appropriation was made; hence the legislative enactment of Wyoming was only a condition which brought the law of Congress into force. Under the recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of the stream as he appropriated flow down to his point of diversion, the water users in Montana, according to the allegations in the bill, were violating this rule. The court stated that if that was the case the defendants should be enjoined, and so overruled their demurrer.

In a later case—*Morris* v. *Bean*[482]—which eventually reached the

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[479] Mont. Rev. Codes 1947, sec. 89-846. It is provided that no waters in the State shall ever be appropriated, diverted, impounded, or otherwise restrained or controlled while in the State for use outside its boundaries, except pursuant to an act of the legislature.

[480] Mont. Rev. Codes 1947, sec. 89-809.

[481] *Howell* v. *Johnson*, 89 Fed. 556, 558-559 (C.C.D. Mont., 1898). The case was heard on demurrer to a bill to enjoin the diversion of water by defendants.

[482] *Morris* v. *Bean*, 123 Fed. 618, 619 (C.C.D. Mont., 1903). "Nothing has occurred in this case to change the views of the court expressed in *Howell* v. *Johnson, supra.*"

United States Supreme Court, the same Federal Circuit Court that had decided *Howell* v. *Johnson* approved the views therein expressed to the effect that one who has acquired a right to the waters of a stream flowing through public lands by prior appropriation, in accordance with the laws of the State where the appropriation is made, is protected in such right by the acts of Congress as against subsequent appropriators, even though the latter withdraw the water within the limits of a different State.

When the proceeding in *Morris* v. *Bean* was being conducted on the merits of the case, the court refused to sustain a contention that because Sage Creek was an interstate stream, it was not competent for the courts to interfere with the sovereignty of one State by permitting a citizen of another State to assail collaterally that which it had recognized by its laws.[483] That contention, it was held, ignored the right to appropriate water that was recognized by both States. The appropriation also had the sanction of the Federal Government, the owner of both land and water, and so the artificial line drawn between the two Territories, created by Congress, could not debar one from the exercise of a right so universally recognized. The court held, therefore, that it had jurisdiction.

The Circuit Court of Appeals of the Ninth Circuit affirmed the decision of the Circuit Court in *Morris* v. *Bean*, thus upholding its jurisdiction and reaffirming the principle that an appropriator on an interstate stream is entitled to have his appropriation protected against junior diversions upstream even though made in another State.[484] And the United States Supreme Court, in affirming the decision, stated that:[485]

> The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory * * *, and is recognized by both States now. Before the state lines were drawn of course the principle prevailed between the lands that were destined to be thus artificially divided. Indeed, Morris had made his appropriation before either State was admitted to the Union. The only reasonable presumption is that the States upon their incorporation continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed. * * *

State policy as to adjudication of rights

The Montana Legislature in 1939 declared it to be the policy of the State that the waters of the State and especially those of interstate streams arising out of the State be investigated and adjudicated as soon as possible to protect local water rights and negotiate interstate compacts relating thereto.[486]

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[483] *Morris* v. *Bean*, 146 Fed. 423, 429-431 (C.C.D. Mont., 1906).

[484] *Bean* v. *Morris*, 159 Fed. 651, 654-655 (9th Cir., 1908).

[485] *Bean* v. *Morris*, 221 U. S. 485, 487-488 (1911).

[486] Mont. Rev. Codes 1947, sec. 89-847. The State Water Conservation Board and State Engineer were to make investigations and act thereupon.

This declaration is quoted in full under "State water policy," above. Implementation of the policy by the Montana Water Resources Survey is discussed under "Administration of water rights and distribution of water," above, and by the negotiation of compacts relating to waters of interstate rivers noted under "Interstate water compacts," below.

Interstate water compacts

Implementation of the State water policy referred to immediately above (see "State policy as to adjudication of rights") by the negotiation of interstate compacts involves a completed compact relating to the waters of Yellowstone River, and two unperfected compacts with respect to the Columbia and Little Missouri Rivers.

Yellowstone River Compact.—In 1951 the States of Motana, North Dakota, and Wyoming, with the consent of Congress, entered into a compact relating to the waters of Yellowstone River and its tributaries other than waters within or waters that contribute to the flow of streams within Yellowstone National Park.[487]

Stated purposes of the compact are: To remove causes of controversy as to the waters of the Yellowstone River and its tributaries. To provide for the equitable division and apportionment of these waters. To encourage the beneficial development and use of the waters. To acknowledge that in future projects or programs for the regulation, control, and use of water in the Yellowstone River Basin, the great importance of water for irrigation in the signatory States shall be recognized.

Authorized but unperfected compacts: (1) *Columbia River.*—In 1952 Congress gave its consent to the negotiation by the States of Idaho, Montana, Oregon, Washington, and Wyoming of a compact providing for the equitable apportionment of the waters of Columbia River and its tributaries, and in 1954 added the States of Nevada and Utah.[488]

The compact commissioners agreed upon and signed a compact at Port-

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[487] In 1937 Congress authorized the States of Montana and Wyoming to enter into such a compact: 50 Stat. 551, approved August 2, 1937. In 1940 this was amended to include North Dakota and to extend the time limit for signing: 54 Stat. 399, approved June 15, 1940. Further extensions were: 58 Stat. 117, approved March 16, 1944; and finally 63 Stat. 152, approved June 2, 1949.

The compact was signed by the compact commissioners of the three States at Billings, Montana, December 8, 1950. Ratifications by the legislatures of the three signatory States were as follows: Mont. Laws 1951, ch. 39, February 13, 1951; N. Dak. Laws 1951, ch. 339, March 7, 1951; Wyo. Sess. Laws 1951, ch. 10, January 27, 1951. The consent of Congress to the signed and ratified compact, with its complete text, is in 65 Stat. 663, approved October 30, 1951.

[488] 66 Stat. 737, approved July 16, 1952; 68 Stat. 468, approved July 14, 1954. Conditions imposed in the 1952 act are that a representative of the United States, appointed by the President, shall participate in the negotiations, and that the compact shall not be effective until ratified by each of the States and approved by Congress.

land, Oregon, January 15, 1955. In March of that year the compact was ratified by the legislatures of only Idaho, Nevada, and Utah.[489]

Subsequently, August 6, 1956, the commissioners tentatively adopted a number of changes in the text that had been signed in January 1955.[490] A second compact was signed at Spokane, Washington, December 4, 1956. This has not been ratified by any of the State legislatures.

Renegotiations with respect to the Columbia River Compact were begun in 1957 and are still under way.

Authorized but unperfected compacts: (2) *Little Missouri River.*—In the late summer of 1957, Congress authorized the negotiation of a compact relating to the Little Missouri River.[491] The title of the act reads as follows:

> An Act granting the consent of Congress to the States of Montana, North Dakota, South Dakota, and Wyoming to negotiate and enter into a compact relating to their interest in, and the apportionment of, the waters of the Little Missouri River and its tributaries as they affect such States, and for related purposes.

Although the act authorizes the States to compact with respect not only to an equitable apportionment of the waters, but also their interests in the development, protection from pollution, and use of the water resources of the river and its tributaries, the House Committee on Interior and Insular Affairs suggested that it might be wise for the States to limit the compact to the apportionment of water and defer at this time, so far as the compact is concerned, the matter of development of water resources.[492]

On January 10, 1958, Major General John S. Seybold, Ret., was appointed as the representative of the United States to participate in the forthcoming negotiations among the States with respect to the authorized Little Missouri River Compact.[493]

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[489] Idaho Laws 1955, ch. 185. Nevada Stats. 1955, ch. 67. Utah Laws 1955, ch. 163.

[490] U. S. Dept. Interior, "Documents on the Use and Control of the Waters of Interstate and International Streams—Compacts, Treaties, and Adjudications," p. 299 (1956).

[491] 71 Stat. 466, approved August 28, 1957. Conditions are: A representative of the United States, appointed by the President, shall participate in the negotiations as chairman. The compact is not binding until ratified by the legislatures of each of the respective States and consented to by Congress. The authority granted in the act expires four years from the date of enactment.

[492] United States Code, Congressional and Administrative News, 85th Congress, First Session, 1957, No. 14, p. 3035; House Committee Report, dated July 31, 1957. The same suggestion with respect to the scope of the compact was made in the Report of the Department of the Army, May 14, 1957: *Idem.*

[493] Letter to General Seybold from President Eisenhower dated January 10, 1958.

International Treaty:

Canadian Boundary Waters

By reason of its location on the Canadian border, and the crossing of the border by several streams, Montana is interested in and affected by the Canadian Boundary Waters Treaty, which was entered into between the United States and Great Britain in 1909-10. Article VI of the treaty deals with the apportionment and management of the waters of St. Mary and Milk Rivers and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan.

The text of the treaty as set out in the Statutes at Large of Congress carries the following title:[494]

> Treaty between the United States and Great Britain relating to boundary waters between the United States and Canada. Signed at Washington, January 11, 1909; ratification advised by the Senate, March 3, 1909; ratified by the President, April 1, 1910; ratified by Great Britain, March 31, 1910; ratifications exchanged at Washington, May 5, 1910; proclaimed, May 13, 1910.

DIFFUSED SURFACE WATERS

CHARACTERISTICS

Diffused surface waters are waters which, in their natural state, occur on the surface of the earth in places other than watercourses or lakes or ponds.[495] 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. The essential characteristics of such waters are that their flows are short-lived and that the waters are spread over the ground and not concentrated or confined in channel flows of regular watercourses nor in bodies of water conforming to the definition of lakes or ponds. (See "Watercourses—Characteristics of watercourse," above.)

DRAINAGE AND OBSTRUCTION OF FLOW

The Montana Supreme Court adopted the common-law rule by which liability for the obstruction of diffused surface waters is measured.[496] That is to say, the lower landowner owes no duty to the upper landowner to refrain from obstructing the flow upon his land; each may appropriate all the diffused surface water that falls upon his premises; and the one is under no obligation to receive from the other the flow of any such water, but may

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[494] 36 Stat. 2448. The text is also set out, with notes, in "Documents on the Use and Control of the Waters of Interstate and International Streams," *op. cit., supra,* footnote 490, at p. 379.

[495] *Doney* v. *Beatty,* 124 Mont. 41, 51, 220 Pac. (2d) 77, 82 (1950).

[496] *Le Munyon* v. *Gallatin Valley Ry.,* 60 Mont. 517, 523-525, 199 Pac. 915 (1921).

in the ordinary prosecution of his business and the improvement of his premises, by embankments or otherwise, prevent any portion of the diffused surface water coming from higher premises from flowing upon his land. Each landowner, therefore has the right to protect his land from the flow of diffused surface water.

As noted under "Watercourses—Characteristics of watercourse," above, the owner of land upon which a natural watercourse exists may not, by cultivating the portion of the stream bed on his land, prevent upstream proprietors from allowing the waters to flow downstream from their lands in the accustomed channel unless he has acquired the right by grant or prescription. If the stream channel, however, is only a passageway for the flow of diffused surface waters, the upper proprietors have no easement for the flowage upon lower lands under the common-law rule as adopted in Montana. Under the civil law rule they have an easement therefor that cannot be interfered with or enjoined.[497]

RIGHTS OF USE

A section of the statute relating to the appropriation of water provides that an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.[498] Hence, to the extent that diffused surface waters under a given set of circumstances may be classified as flood, seepage, or waste waters, this statute provides a method of appropriating them to one's own use.

Owners of lands on which diffused surface water originating from melting snows or rains collects or stands at times in low places, depressions, potholes, and shallow basins, have the right to capture and impound such diffused surface drainage while it is on their own lands and farms for use thereon.[499] The owners of lands at lower elevations cannot make a valid appropriation of such waters for use on their lower lands in the absence of a watercourse having a marked channel and defined banks through which the waters might reach the lower lands.

SALVAGED AND DEVELOPED WATERS

SALVAGED WATERS

One who actually salvages waters that otherwise would go to waste is entitled to the use of such waters.

An irrigator diverted water from a stream in times of excess flow or

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[497] See *Campbell* v. *Flannery*, 29 Mont. 246, 250-251, 74 Pac. 450 (1903).

[498] Mont. Rev. Codes 1947, sec. 89-801.

[499] *Doney* v. *Beatty*, 124 Mont. 41, 50, 220 Pac. (2d) 77, 82 (1950). In an earlier case involving liability for the obstruction of diffused surface waters, the court stated that each landowner may appropriate all the diffused surface water that falls upon his own premises: *LeMunyon* v. *Gallatin Valley Ry.*, 60 Mont. 517, 523-525, 199 Pac. 915 (1921).

outside of the irrigation season when not needed to fill the requirements of water users having decreed rights in the stream, which he diverted into potholes for use as reservoirs.[500] The water sank into the ground in the potholes and apparently collected in a low area in which the irrigator dug drain ditches for discharging the water into the stream. He claimed the right to redivert an equivalent quantity from the stream, but was restrained from doing so. However, several years later he asked relief from the judgment on the ground that in consequence of his having stored no waters in the potholes since the issuing of the injunction, no water had appeared in the low place from which he had been draining it, and that such water as he formerly had placed in the potholes now ran to waste.[501] The plaintiff alleged that he was now able to furnish demonstrative proof that the waters picked up in the drains were waters placed in the potholes. The supreme court stated that notwithstanding its previous decision, it was in the public interest that all land in the State susceptible to irrigation should be irrigated. Hence, if plaintiff could prove his allegations he could show that by his system of storing water he could irrigate some of his land with waters that otherwise would run to waste and without injury to anyone. Accordingly the trial court's order sustaining a demurrer to the complaint was overruled.

DEVELOPED WATERS

Rights of Use

The rights of one who makes an appropriation of the waters of a stream are limited to the natural condition of the stream and are not enlarged by subsequent improvements made by another which increase the supply of water flowing in the stream.[502] If other parties have added to the waters naturally flowing in the stream, and by their own exertions have increased the available supply, such parties have the first right to take the increase and use it for any proper purpose.[503]

It is not sufficient, in claiming the right to use waters on the ground that the claimant has developed them, that the asserted increase in water

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[500] *Woodward* v. *Perkins*, 116 Mont. 46, 51-53, 55, 147 Pac. (2d) 1016 (1944). The water commissioner allowed the irrigator to redivert from the stream a quantity of water equivalent to the flow from the drain ditches less an allowance of not over 10 percent for channel loss.

[501] *Perkins* v. *Kramer*, 121 Mont. 595, 597-600, 198 Pac. (2d) 475 (1948). The court stated, at 121 Mont. 600: "The doctrine of res judicata, if applicable, does not prevent the court from correcting manifest error in its former judgment. * * * When the prior decision is by a divided court, as here, * * * the court will the more readily depart from it, if erroneous."

[502] *Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.*, 34 Mont. 135, 139-141, 85 Pac. 880 (1906); *State ex rel. Zosel* v. *District Court*, 56 Mont. 578, 580, 185 Pac. 1112 (1919).

[503] *Smith* v. *Duff*, 39 Mont. 382, 391, 102 Pac. 984 (1909). See *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 261-262, 17 Pac. (2d) 1074 (1933); *State ex rel. Mungas* v. *District Court*, 102 Mont. 533, 538-539, 59 Pac. (2d) 71 (1936); *West Side Ditch Co.* v. *Bennett*, 106 Mont. 422, 433, 78 Pac. (2d) 78 (1938).

supply is occasioned by the mere removal of obstructions which accelerates the flow.[504] The increase must be actual, and must constitute a new or independent source of supply—a supply that otherwise would not have been flowing in the stream. And so water that is drained artificially into a stream from irrigated lands or from a swamp, but which would have found its way into the stream even without the drain, the only purpose of which is to facilitate movement of the waters to their natural outlet, is not developed water and cannot be claimed as such.[505]

Burden of Proof

The burden of proof rests upon one who asserts that he has developed a supply of water and that he is not intercepting the supply to which his neighbor is rightly entitled.[506] The obligation is thus expounded by the supreme court:[507]

> The burden thus made to rest upon the one who claims such developed supply includes also the obligation to establish by satisfactory proof the amount which he has developed, especially so when he has mingled his alleged new supply with that to which another is entitled, for he cannot justify an interference with a right which he does not question. While he may be entitled to the use of the natural channel of the stream out of which the prior appropriation has been made, or to change it, in order to serve his own convenience or save expense, he cannot for this reason impose any additional burden upon the prior appropriator. When he comes to divert from it his developed supply he must make his diversion in such a way as not to interrupt or diminish the natural flow, and must at his peril take no more than he is entitled to.

Proceeding for Establishment of Right

A right to the use of developed water as against prior appropriators cannot be established in a contempt proceeding, for title to property cannot be tried in such an action.[508] Such a right must be determined in a civil action to which others interested may be made parties.

Status on Abandonment

Developed waters abandoned into a stream inure to the benefit of appropriations from that stream in order of priority.[509]

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[504] *State ex rel. Zosel* v. *District Court,* 56 Mont. 578, 581, 185 Pac. 1112 (1919);*Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.,* 34 Mont. 135, 140, 85 Pac. 880 (1906).

[505] *Smith* v. *Duff,* 39 Mont. 382, 392-393, 102 Pac. 984 (1909); *Spaulding* v. *Stone,* 46 Mont. 483, 489-490, 129 Pac. 327 (1912); *West Side Ditch Co.* v. *Bennett,* 106 Mont. 422, 433, 78 Pac. (2d) 78 (1938).

[506] *Smith* v. *Duff,* 39 Mont. 382, 391, 102 Pac. 984 (1909); *Woodward* v. *Perkins,* 116 Mont. 46, 51, 147 Pac. (2d) 1016 (1944); *Kramer* v. *Deer Lodge Farms Co.,* 116 Mont. 152, 173, 151, Pac. (2d) 483 (1944).

[507] *Spaulding* v. *Stone,* 46 Mont. 483, 488-489, 129 Pac. 327 (1912).

[508] *State ex rel. Zosel* v. *District Court,* 56 Mont. 578, 581, 185 Pac. 1112 (1919).

[509] *Dern* v. *Tanner,* 60 Fed. (2d) 626, 627-628 (D. Mont., 1932).

WASTE, SEEPAGE, DRAINAGE, AND RETURN WATERS

WASTE AND SEEPAGE WATERS

Rights of Owners of Lands of Origin

Not tributary to watercourse

The proprietor of land has the right to use the land as he pleases, and has the right to change the flow of the waste waters thereon in the reasonable employment of his own property, subject to the limitation that the use be made without malice or negligence.[510] The owner of the right to use the water—his private property while in his possession—may collect and recapture it before it leaves his possession.[511] And so the landowner cannot be compelled by the user of water wasting from his land to continue the conditions resulting in waste of the water, or be prevented from draining his land in such manner as to cut off the flow from the user.[512]

Tributary to watercourse

The supreme court has stated, in cases in which seepage waters drained naturally into watercourses, that the mere fact that such water has its source on land owned by certain parties does not of itself necessarily give those parties the exclusive right to the water so as to prevent others from acquiring rights therein under the laws of the State.[513] Seepage water that has its rise along the bed of a stream and that forms a natural accretion hereto belongs to that stream as part of its source of supply.[514] As said by a Federal Court:[515]

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[510] *Newton* v. *Weiler*, 87 Mont. 164, 179-180, 286 Pac. 133 (1930). It was held that defendant might not maliciously or arbitrarily change the flow of the waste waters to the injury or detriment of plaintiff in the enjoyment of her appropriation of the waste water, particularly where, as here, some of the waste waters came from lands not belonging to defendant. The supreme court was unable to determine from the record whether the defendant acted maliciously or arbitrarily in turning the waste water from its course onto plaintiff's land and thereby deprived the latter of its use, and stated that upon the case being remanded, further evidence might be taken to enable the court to make a finding. "If it is practicable for plaintiff to capture the waste waters at the point where they were formerly received by her without substantial damage to defendant, she should be given the right to do so."

[511] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 268, 17 Pac. (2d) 1074 (1933).

[512] *Popham* v. *Holloron*, 84 Mont. 442, 449-450, 275 Pac. 1099 (1929).

[513] *Quinlan* v. *Calvert*, 31 Mont. 115, 119, 77 Pac. 428 (1904); *West Side Ditch Co.* v. *Bennett*, 106 Mont. 422, 431, 78 Pac. (2d) 78 (1938); *Woodward* v. *Perkins*, 116 Mont. 46, 53, 147 Pac. (2d) 1016 (1944).

[514] *Woodward* v. *Perkins*, 116 Mont. 46, 53, 147 Pac. (2d) 1016 (1944). See *Beaverhead Canal Co.* v. *Dillion Electric Light & Power Co.*, 34 Mont. 135, 139-141, 85 Pac. 880 (1906). See also *Dern* v. *Tanner*, 60 Fed. (2d) 626, 627-628 (D. Mont., 1932).

[515] *Marks* v. *Hilger*, 262 Fed. 302, 304 (9th Cir., 1920).

It is established in Montana that the prior appropriator of water is entitled to the use of all the water in the stream to satisfy his appropriation, whether such water come from seepage or from the water naturally flowing in the stream. * * *

After release by landowner

The owner of land on which waste water arises has no right to its use after it leaves his land and gets beyond his physical control.[516] Hence appropriators for mining purposes who allow water to drain away from their land after its use in placer mining have no longer any jurisdiction over the water or ownership of it, and an attempt on their part to sell any further right of use in the water is wholly void because they have nothing to sell.[517]

After water has been turned back by the appropriator into the channel from which it was diverted, without any intention of recapture, after having been used and answering the purposes of the first appropriator, it thereby becomes *publici juris*.[518]

Rights of Users of Waste and Seepage Waters

Appropriability of waste and seepage waters

The statute relating to the appropriation of water provides that "an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."[519]

Prior to the enactment of this statute, which was in 1921, there was no legislation authorizing the appropriation of flood, seepage, and waste waters as such.[520] Waste water that had passed beyond the control of the owner of the land on which it arose became "abandoned personalty" which could be taken up and used by the person first in the field.

Since the enactment of the statute, however, a valid appropriation may be made of the waste waters flowing to one's land from the land of another.[521]

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[516] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 268, 17 Pac. (2d) 1074 (1933).

[517] *Galiger* v. *McNulty*, 80 Mont. 339, 357-358, 260 Pac. 401 (1927).

[518] *Woolman* v. *Garringer*, 1 Mont. 535, 545 (1872).

[519] Mont. Rev. Codes 1947, sec. 89-801.

[520] *Popham* v. *Holloron*, 84 Mont. 442, 449, 275 Pac. 1099 (1929).

[521] *Newton* v. *Weiler*, 87 Mont. 164, 179, 286 Pac. 133 (1930). "Waste waters may be appropriated in this state. * * * Here it is shown that plaintiff made a valid appropriation of the waste waters flowing to her land from the land of defendant." Although the statute provided that such an appropriation might be made by impounding in a reservoir, and although the supreme court referred to that statute, nevertheless in this case there was no mention of a reservoir or impounding of the waste waters in litigation; apparently they were simply taken into a ditch on defendant's land and thence onto the plaintiff's land.

Water that has left the possession and control of the owner of the land on which it rises becomes waste and is subject to appropriation by others: *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 268, 17 Pac. (2d) 1074 (1933); *Wills* v. *Morris*, 100 Mont. 514, 536, 50 Pac. (2d) 862 (1935).

Rights as against owners of lands of origin

An appropriation of waste water is restricted in the sense that its usefulness depends upon the continuance of the conditions that give rise to the waste—a continuance that is voluntary on the part of the owner of the land on which the waste originates. The user of waste water prior to enactment of the statute acquired no such usufruct right in the water as to entitle him to compel the continuation of the condition furnishing him with water, or to prevent the owner of the land from draining his land in such a manner as to cut off the flow.[522] And apparently the right of an appropriator under the statute as against the owner of the land on which the waste originates is no greater than that of a taker prior to the statute.

While the proprietor of the land on which waste waters rise may change the flow of the waste waters thereon in the reasonable enjoyment of his own property, he may not maliciously or arbitrarily change the flow to the injury of the lower landowner who has made an appropriation of the waste water.[523]

Status on Collecting in Natural Channel

The rules with respect to rights to the use of waste and seepage waters, as such, apply only while they are "outlawed" and before they reach or form a stream flowing in a natural channel.[524] After such waters, even though inconsiderable, collect in a natural channel and flow therein with regularity from year to year, although the channel may be dry for the major portion of each year, such waters are a proper subject of appropriation. Thus:[525]

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[522] *Popham* v. *Holloron,* 84 Mont. 442, 449-450, 275 Pac. 1099 (1929). The court emphasized that these rules with respect to "surface or waste" water applied while the water was "outlawed" and before it reached or formed a stream flowing in a natural channel, whereupon it would lose its character as vagrant fugitive water.

In one of the earliest of the water-right cases, *Woolman* v. *Garringer,* 1 Mont. 535, 545 (1872), the supreme court stated that users of waste water could acquire no more than a mere privilege of use of the water, or at most but a secondary and subordinate right to the right of the first appropriators, and only such as might be terminated by their action at any time, unless the water had been discharged by the first appropriators with no intention of recapture.

[523] *Newton* v. *Weiler,* 87 Mont. 164, 179-180, 286 Pac. 133 (1930).

[524] *Popham* v. *Holloron,* 84 Mont. 442, 449-451, 275 Pac. 1099 (1929).

[525] *Rock Creek Ditch & Flume Co.* v. *Miller,* 93 Mont. 248, 260, 17 Pac. (2d) 1074 (1933). See also *State ex rel. Mungas* v. *District Court,* 102 Mont. 533, 539, 59 Pac. (2d) 71 (1936); *West Side Ditch Co.* v. *Bennett,* 106 Mont. 422, 431-432, 78 Pac. (2d) 78 (1938). And see *Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.,* 34 Mont. 135, 139-141, 85 Pac. 880 (1906).

In *Dern* v. *Tanner,* 60 Fed. (2d) 626, 627 (D. Mont., 1932), water flowing from a tunnel in Coal canyon was claimed by defendants as developed water and by plaintiffs as seepage from Coal canyon and foreign waters discharged by them into Coal canyon. This the court held immaterial; if not lost by prescription, the waters had been reclaimed below for many years and thereby appropriated. "That the waters of Coal are of volume too scanty of themselves to be available to plaintiffs and Mueller does not defeat their appropriation. Separate waters thus unavailable may be legally appropriated if united and serviceable."

Where vagrant, fugitive waters have reached a natural channel, and thus have lost "their original character as seepage, percolating, surface, or waste waters," they serve to constitute a part of the watercourse, and are subject to appropriation. * * *

DRAINAGE WATERS

Discharged into Watercourse

Marsh waters consisting of percolation and seepage from higher lands artificially drained into a watercourse, but which would have found their way into the watercourse even without the drain ditch—which simply facilitated their movement—are subject to appropriation as a part of the watercourse.[526]

Collected in Drain Ditch on One's Land

Waters derived principally from seepage from higher land, collected in a drainage ditch on lower land, have been held subject to appropriation by the owner of such lower land as against an appropriation on a stream the holder of which had failed to show that the landowner's appropriation in any way interefered with his rights.[527]

The drainage ditch in *Wills* v. *Morris*, just cited, had been constructed with the consent of the landowner, who continuously thereafter made use for irrigation purposes of the water collected in the ditch. There was no evidence to the effect that if the seepage waters were not collected in the drain and not utilized therefrom the waters of the stream would have been augmented above their existing flow. The court emphasized the fact that the diversion and appropriation of the water out of the drain had been made after the waters had left the lands upon which they arose. Such waters when collected in the drainage ditch were held subject to appropriation, and the appropriation was held valid.

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[526] *West Side Ditch Co.* v. *Bennett*, 106 Mont. 422, 431-434, 78 Pac. (2d) 78 (1938). The court held that the fact that seepage water arises on one's land does not, of itself, necessarily give the landowner the exclusive right thereto. In this case, plaintiff had appropriated water from the watercourse in 1900; predecessors of defendant in 1901 built a drainage system to drain the waters into the channel; and in 1925 defendant appropriated water from the watercourse and contended that plaintiff's appropriation should be limited to the natural flow of the channel to the exclusion of the water added from the drainage ditch. The waters so drained were held subject to appropriation in 1900 when plaintiff applied them to a beneficial use, whereas defendant had not attempted to make any beneficial use of any of the waters for 24 years after the drain had been installed. In contemplation of law, the drainage system amounted to but a change of the channel of the creek.

[527] *Wills* v. *Morris*, 100 Mont. 514, 533-536, 50 Pac. (2d) 862 (1935). See also *Galahan* v. *Lewis*, 105 Mont. 294, 301-302, 72 Pac. (2d) 1018 (1937), in which it was held that the evidence was sufficient to support a finding that a water right, in favor of the holder of a tract of land on which a drainage ditch tributary to a slough had been constructed, had been obtained to the use of the water accumulated in the drainage ditch.

Disposal of Drainage Water

The requirements that one must so use his own rights as not to infringe the rights of another applies to the disposal of waste water by constructing a drainage ditch with an outlet on the land of someone else.[528]

RETURN WATERS

Abandoned by User of Original Flow

Water released by an appropriator without any intention of recapture, after having been used and having answered his purposes, thereby becomes *publici juris* and subject to appropriation.[529]

Dependence of Downstream Appropriators

Return flow from irrigation and other uses of water play an important part in the water supply of downstream appropriators in many irrigated valleys. Downstream users, particularly if junior in right, depend upon the continuance of return flow from upstream diversions for the maximum enjoyment of their appropriative rights. Therefore, changes in the place of use of appropriated water have been denied by the courts in various cases because the taking of the water elsewhere would deprive downstream diversions of the essential return flow. The Montana Supreme Court expounded this principle in the early years of statehood as follows:[530]

> The right acquired by an appropriator in and to the waters of a natural stream is not ownership of a running volume of the dimensions claimed, like the individual ownership of a chattel, so that it may be transferred corporally and carried away, but the right acquired by the appropriator is the right *to use* a certain quantity for necessary and beneficial purposes, such as supplying household needs, and the carrying on of some useful industry; and, when such want is supplied, or the use is subserved, all the rest of the creek, and all that returns thereto after such use, is subject to appropriation and use by another for some beneficial purpose. The same volume of water may, therefore, in its flow down the creek, supply many persons, even though the first appropriator claims the whole volume, and can, at times, or even constantly, use the same for

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528 *O'Hare* v. *Johnson*, 116 Mont. 410, 418-419, 153 Pac. (2d) 888 (1944). It was not reasonable or necessary, said the court, for the upper landowners in ridding their lands of waste waters to cast some of the water upon the lower lands and ruin them. It was both possible and feasible for the upper landowners to dispose of all the waste waters without discharging any upon the lower land; all they needed do was to conduct the waters to a large drainage and irrigation ditch then in use and available for the purpose. Furthermore, a tract of land may not be legally reclaimed at the expense of the destruction of another tract without compensation.

529 *Woolman* v. *Garringer*, 1 Mont. 535, 545 (1872).

530 *Creek* v. *Bozeman Water Works Co.*, 15 Mont. 121, 128-129, 38 Pac. 459 (1894). For other cases in which proposed changes in place of use and purpose of use have been denied because of this condition, see *Alder Gulch Con. Min. Co.* v. *Hayes*, 6 Mont. 31, 37-38, 9 Pac. 581 (1886); *Gassert* v. *Noyes*, 18 Mont. 216, 223, 44 Pac. 959 (1896); *Spokane Ranch & Water Co.* v. *Beatty*, 37 Mont. 342, 351-352, 96 Pac. 727, 97 Pac. 838 (1908); *Head* v. *Hale*, 38 Mont. 302, 307-308, 100 Pac. 222 (1909).

some industrial purpose, because such use does not usally swallow it, but leaves it available to others. But by such an appropriation the first appropriator does not acquire a preemption of the whole creek, so that he, or his successor, may, after enjoying the use of it for some beneficial purpose, convey the creek away and cut off subsequent appropriators. Therefore a subsequent right to use the same water, or so much of it as returns to the creek, and to use the waters of the creek when the first is not using the same, may be acquired. * * *

Claim of Equivalent Diversion for Return Flow

Two decisions—one by the Montana Supreme Court and one by the United States Court of Appeals—have involved claims of appropriators that they were entitled to divert water in excess of their decreed appropriations as compensation for return flow from their lands during the period of such excess diversions.

State case

In the State case, an appropriator had been adjudged guilty of contempt for opening his headgates and using water after the commissioner had closed them for the benefit of prior appropriators.[531] The appropriator undertook to show that his use of the water did not impair the right of any prior appropriator; that by means of early irrigation of his land there was created upon his land a subterranean storage system from which, during the later irrigation season, as much water as he was using through his ditches seeped back to the stream; and that this condition prevailed at the time of the alleged contemptuous action.

The supreme court stated that for the purpose of exonerating himself from a charge of contempt, and for that purpose only, it was competent for the appropriator to show that by his own efforts he had developed an independent source of supply and that the quantity of water used by him did not exceed the amount so developed.

Federal case

The Federal case was also a contempt proceeding.[532] The appropriator had a decreed right for 15 inches of water from a creek flowing through his land, but claimed the right to divert a much larger quantity. His position was that in the beginning of the season when there was an abundance of water he diverted such quantities that his lands became saturated and discharged considerable seepage into the stream later in the season; in exchange for this seepage he claimed the right to divert water from the creek to the extent of the capacity of his ditches.

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[531] *State ex rel. Zosel* v. *District Court*, 56 Mont. 578, 580-581, 185 Pac. 1112 (1919). Although the appropriator could prove development of the water in order to exonerate himself from the charge of contempt, he could not, in this proceeding, establish his right to the use of the so-called developed water as against prior appropriators, because title to property cannot be tried in a contempt proceeding. If the appropriator had acquired the right to which he laid claim, he must have it determined in a civil action to which others interested might be made parties.

[532] *Marks* v. *Hilger*, 262 Fed. 302, 303-306 (9th Cir., 1920).

The trial court had noted the difficulty of proving the extent to which seepage operates in adding to the flow of a stream. The court of appeals held that the prior appropriator is entitled to the use of all the water flowing in the stream system above the head of his ditch, regardless of where the waters come from, specifically including seepage water. Therefore, it was concluded that the appropriator had no right to take from the stream more water than had been decreed to him, and that he could not justify his action upon the ground that he had benefited the lower appropriators or had given them the equivalent of what he had taken.

Return Flow from Foreign Waters

An appropriator who diverts waters from one watershed to another for the purpose of placer mining, and who thereupon releases the waters so that they flow into a natural channel, no longer has any jurisdiction over or title to such waters and cannot make a valid contract of sale of such waters.[533]

Nor does the owner of land on which return flow from foreign water feeds a spring that is one of the sources of a watercourse have any right to the use of such water as against prior appropriators of water from the watercourse thus augmented by the return flow.[534]

A case decided in 1933 involved conflicting claims to the return flow from foreign waters based upon appropriations made in 1888.[535] Water had been appropriated out of Gold Creek in 1864 and taken across a divide to the watershed of Pioneer Creek and there used for placer-mining purposes. After such use the waters flowed into Pioneer Creek, which was a tributary of Pikes Peak Creek, and on down to the junction of Pikes Peak Creek with Gold Creek. On April 30, 1888 appellants appropriated water

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[533] *Galiger* v. *McNulty*, 80 Mont. 339, 357-358, 260 Pac. 401 (1927). The court stated that after these foreign waters had served the purpose of their appropriation and could not drain back into the stream from which diverted, they became waste, fugitive, and vagrant water and subject to be treated as such. The original appropriators had no longer any jurisdiction over the waters, and did not own the corpus of the water; hence they had nothing to sell, and their attempted sale of the water or the right to use the same was wholly void.

[534] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 258-268, 17 Pac. (2d) 1074 (1933). In this case the flow from a spring which was one of the sources of Wyman Creek increased materially as the result of the irrigation of neighboring lands with water brought from another watershed. The court held that when the water had escaped from the land on which it was applied and had become part of the flow of the spring, which was a source of the stream, such water became a part of that stream and was *publici juris*, and therefore was subject to appropriative rights on the stream and not to any right of the owner of the land to recapture the water. In another case, which was an outgrowth of the *Rock Creek* case, return waters had collected in a draw which was a tributary of Wyman Creek, and so were held to be waters of that watercourse even though brought originally from another watershed: *State ex rel. Mungas* v. *District Court*, 102 Mont. 533, 538-541, 59 Pac. (2d) 71 (1936).

[535] *Mannix & Wilson* v. *Thrasher*, 95 Mont. 267, 271-272, 26 Pac. (2d) 373 (1933).

from Pikes Peak Creek and conveyed it across Gold Creek for agricultural purposes. On June 1, 1888 the owners of three ditches that diverted water from Gold Creek above the crossing of appellants' ditch built a ditch from Pioneer Creek below the discharge of the 1864 waters and conveyed such waters over to Gold Creek above the diversions of their three ditches. Respondents, who controlled these three ditches, claimed that as the water of Gold Creek that was taken to Pioneer Creek for mining purposes did not leave the Gold Creek watershed, it was subject to recapture as Gold Creek water by those having appropriations from Gold Creek in the order of their priorities.

The supreme court held that when such Gold Creek water was deposited in Pioneer Creek, it was as much beyond the reach of the respondents until the construction of their cross ditch as if Pioneer Creek were entirely without the Gold Creek watershed. The rights of respondents to such water flowing in Pioneer Creek did not come into being until the date of their appropriation through the cross ditch. Hence their appropriation of the water flowing in Pioneer Creek was junior to the earlier appropriation made by the appellants of such water flowing down Pioneer Creek into Pikes Peak Creek.

Special Statutory Authorization

The Water Conservation Act provides, with reference to the State Water Conservation Board, that "the board may reclaim and possess all waters furnished or supplied by it seeping or overflowing from the previous place of use."[536] The Board constructed a project for impounding waters of a watercourse and taking them over the divide into another valley for distribution and use there.[537] Plaintiff contended that since all the appropriators in the valley had a vested right to take all of the waters flowing in the stream according to their several priorities, the foregoing provision of the statute was invalid.

The supreme court held that the water of the project was not present in that valley and constituted no part of the plaintiff's vested right when the statute was passed, and that it was not apparent why the legislature could not have constitutionally encouraged the introduction of alien water into a watershed by a provision of that kind. Hence, the court concluded that the defendants were within their rights in taking credit for reflow of project water.

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[536] Mont. Rev. Codes 1947, sec. 89-122.

[537] *Allendale Irr. Co.* v. *State Water Conservation Board*, 113 Mont. 436, 439, 449, 127 Pac. (2d) 227 (1942). The court stated that most of the argument on this point was devoted to the difficulty of identifying the return flow so as to establish the extent of the defendants' right; but that this was a matter of proof, and while possibly not susceptible of exact mathematical demonstration, the court was not prepared to say that it was so difficult of approximate proof as to be virtually impossible.

SPRING WATERS

The water-rights statute provides that the right to the use of the unappropriated water of certain sources including springs may be acquired by appropriation.[538]

An appropriator of the water of a stream has the right to the flow of a spring subsequently appearing in the bed of a tributary as a result of natural causes.[539] However, if the flow would not reach the diversion point of such appropriator during the dry season, it may be appropriated during such period by others. Furthermore, an appropriator on a stream cannot claim the flow of a spring which in its natural state does not reach the stream during the irrigation season.[540]

The fact that marshes, the water from which naturally flows into natural watercourses, are located on one's land does not, of itself, necessarily give the owner an exclusive right to the use of the water so as to prevent others from acquiring appropriative rights therein.[541] An increase in the flow of a spring which is one of the sources of a watercourse on which appropriative rights have been established—the increase resulting from the irrigation of higher lands—does not belong to the company supplying the irrigation water or to the owner of the land on which the spring rises.[542]

A claim to the right of a spring in one instance was held to have been lost by abandonment.[543]

GROUND WATERS

DEFINITE UNDERGROUND STREAM

Applicable Rules of Law

Subsurface water flowing in defined channels that are reasonably ascer-

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[538] Mont. Rev. Codes 1947, sec. 89-801.

In *Hilger* v. *Sieben*, 38 Mont. 93, 95-99, 98 Pac. 881 (1909), a finding by the trial court that a specific quantity of water disappeared in the bed of a surface stream and by means of a well-defined subterranean channel flowed to plaintiff's land, where it appeared in the form of a spring, was held to be sustained by the evidence, but a new trial was ordered because the supreme court was not satisfied with the finding relating to the appropriation of the spring water by the plaintiff.

[539] *Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.*, 34 Mont. 135, 140-141, 85 Pac. 880 (1906).

[540] *Leonard* v. *Shatzer*, 11 Mont. 422, 426-427, 28 Pac. 457 (1892).

[541] *Quinlan* v. *Calvert*, 31 Mont. 115, 119, 77 Pac. 428 (1904); *West Side Ditch Co.* v. *Bennett*, 106 Mont. 422, 431, 78 Pac. (2d) 78 (1938).

[542] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 256-268, 17 Pac. (2d) 1074 (1933). The court held that such increase was not developed water, and that when the waters escaped from the irrigated lands and reached the spring they became tributary to the stream which it supplied.

[543] *Goon* v. *Proctor*, 27 Mont. 526, 528, 71 Pac. 1003 (1903).

tainable is subject to the same rules as water flowing in surface streams.[544] There is no presumption that any subsurface water, in whatever form it may be found, is tributary to any stream, and the one who asserts this to be a fact has the burden of proving his assertion. In *Ryan* v. *Quinlan*, above cited, the court indicated its belief that this might be established by circumstantial evidence, but stated that the evidence must have so much of substance and probative value as would reasonably exclude the contrary hypothesis. (45 Mont. at 534.)

Subflow of Surface Stream

The subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules.[545]

PERCOLATING WATERS

Rights of Use

In the very few decisions in which rights of use of percolating waters have been discussed by the Montana Supreme Court, the rule of ownership by the owner of the overlying land, subject to the limitation that the use be made without malice or negligence, has been acknowledged or conceded. The only comprehensive statement concerning rights of use of natural percolating waters appears in a case decided in 1912, wherein it is stated that:[546]

> It has been settled by a long line of decisions that percolating water is not governed by the same rules that are applied to running streams. "The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. * * * We think the prac-

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[544] *Ryan* v. *Quinlan*, 45 Mont. 521, 531, 533-534, 124 Pac. 512 (1912). In this case the water of a surface stream constituting the overflow from a lake disappeared at a point about 1,500 feet from the outlet of the lake and 3,625 feet from a creek to which defendants claimed that the lake was tributary. Evidence introduced by plaintiff tended to show the lack of any surface channel or indication of an underground channel connecting the lake with the creek. The supreme court held that a prima facie case had been made that the overflow did not find its way into the creek, and that the burden then was cast upon defendants to show that, if uninterrupted, the flow found its way into the creek by a defined channel either upon the surface or underground.

In *Hilger* v. *Sieben*, 38 Mont. 93, 94-99, 98 Pac. 881 (1909), the trial court had found that 100 inches of water disappeared in the sand and gravel of a stream channel emerging from the canyon in which the stream rose, the disappearance being some distance from plaintiff's ranch, followed a well-defined subterraneon channel to the ranch, and reappeared as a spring. The supreme court considered the evidence sufficient to warrant the finding, but ordered a new trial because it was not satisfied with the finding relating to the appropriation of the spring water by the plaintiff.

[545] *Smith* v. *Duff*, 39 Mont. 382, 390, 102 Pac. 984 (1909).

[546] *Ryan* v. *Quinlan*, 45 Mont. 521, 532-533, 124 Pac. 512 (1912).

> tical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land as one of its natural advantages, and in the eye of the law a part of it; and we think we are warranted in this view by well-considered cases." (*Chatfield* v. *Wilson*, 28 Vt. 49.) The rule, though variously stated, is recognized by the courts both of England and in this country. * * *

Then followed a long list of cases, which, however, included the California case of *Katz* v. *Walkinshaw*,[547] which repudiated the absolute-ownership rule of percolating waters and adopted the doctrine of correlative rights. Continuing, the court stated (at 45 Mont. 533) that:

> The result of it is that the proprietor of the soil, where such water is found, has the right to control and use it as he pleases for the purpose of improving his own land, though his use or control may incidentally injure an adjoining proprietor. The general rule thus stated is subject, however, to the same limitation as the use of the land itself, viz., that embodied in the maxim, "*Sic utere tuo ut alienum non laedas*," or, as is said in some of the cases, the use must be without malice or negligence. This seems to be in accord with the current of decisions in the United States.

The foregoing statement in *Ryan* v. *Quinlan* was made in order to demonstrate that percolating waters were not subject to the law of watercourses. The controversy was not between owners of adjoining land under which water was percolating. It arose over the conflicting claims of appropriators of surface waters, plaintiff claiming that the stream which he had appropriated was not tributary to another stream on which defendants held rights superior to his. The only bearing that percolating waters had on the case was the question as to whether the upper stream, on disappearing from the surface, constituted a defined underground stream thence to the lower surface stream, or on the other hand became in legal contemplation percolating waters. The supreme court stated that the conclusion of the trial court that the lake water reached the creek was based upon speculation rather than upon substantive evidence, hence the findings could not be allowed to stand. A new trial was directed, at which the parties could produce additional evidence concerning the physical situation if they desired to do so.

The rule of ownership of percolating waters stated in *Ryan* v. *Quinlan*, whether dictum or not, apparently is accepted by the Montana Supreme Court as the rule in that State. In 1933 the court stated that:[548]

> Conceding that percolating waters are owned by and are subject to the control of the owner of the land (*Ryan* v. *Quinlan*, supra; *Spaulding* v. *Stone*, 46 Mont. 483, 129 Pac. 327, 329), when they escape and go into other land, or come into another's control, the title of the former owner thereto is gone. * * *

Here again the controversy was not between adjoining landowners, but was over the right to the increase in flow from a spring occasioned by irrigation

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[547] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[548] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 256-260, 17 Pac. (2d) 1074 (1933). The quotation is at 93 Mont. 260.

of higher lands, the spring being the principal source of supply of a stream on which defendants held prior appropriative rights. Plaintiff was the irrigation company furnishing the water which, by percolation through the soil from the irrigated land, caused the flow of the spring to increase. Plaintiff was held to have lost control of the water when it escaped from the irrigated lands. And in an even more recent case, which involved water deposited in potholes which thereafter disappeared entirely into the earth, the supreme court said that:[549]

> When that happens, it loses its character as flow water and is no longer subject to the regulations of law which govern while it is capable of direction and control. Its identity and its ownership then become the same as that of the soil of which it forms a part. (*Ryan* v. *Quinlan*, 45 Mont. 521, 532, 124 Pac. 512.) * * *

Tributary to Stream

As noted above, the Montana Supreme Court held that, conceding that percolating waters are owned by and are subject to the control of the owner of the land in which they are found, when they escape and go into other land or come into another's control the title of the former owner thereto is gone.[550] Such water, on joining a natural stream, is a part of the stream and is *publici juris*, subject to appropriation.

The supreme court stated in 1944 that if seepage forms from ground saturated with percolating water placed in the ground artificially by means of having been diverted into potholes from which the water sinks into the ground, the seepage thereby produced is subject to the same rules as to appropriation as is any seepage from one's land.[551] It was further stated that by a series of decisions the court had adhered to the view that the ownership of land where water has a source does not necessarily give the exclusive right to such waters to the landowner, and that:

> Seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to that stream as part of its source of supply, same as feeder springs. An appropriator on the stream has the right to all such tributary flow even as against the owner of the land. * * *

RECORDS OF WATER WELLS

In 1957 the Montana legislature enacted a statute providing for the filing of records of water wells.[552] According to a letter to the author from Fred E. Buck, Montana State Engineer, dated September 24, 1957, the

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[549] *Woodward* v. *Perkins*, 116 Mont. 46, 52, 147 Pac. (2d) 1016 (1944).

[550] *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 256-257, 260, 268-269, 17 Pac. (2d) 1074 (1933). Waste and seepage water that reaches and forms a stream flowing in a natural channel constitutes a watercourse, subject to appropriation. See "Waste and seepage waters—Status on collecting in natural channel," under "Waste, seepage, drainage, and return waters," above.

[551] *Woodward* v. *Perkins*, 116 Mont. 46, 52, 53, 147 Pac. (2d) 1016 (1944).

[552] Mont. Laws 1957, ch. 58; codified as Mont. Rev. Codes 1947, § 89-3101.

purpose of this legislation is to perpetuate a record of priorites when and if the time arrives to adjudicate the rights of any particular aquifer.

The statute requires every person, firm, or corporation digging or drilling a water well of any type to file a permanent record thereof in the office of the county clerk and recorder, on a form to be furnished by the State Bureau of Mines and Geology. The report covers ownership and location of the well, proposed use of the water, and details of drilling and characteristics of the well and the ground water supply. Copies of the original county record are furnished to the State Bureau of Mines and Geology and the State Engineer.

CASES CITED

MONTANA SUPREME COURT

Other States

Federal

United States Supreme Court