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1988 SUPPLEMENT MONTANA WATER LAW

Recent Changes and Current Trends Supplementing Montana Water Law for the 1980's

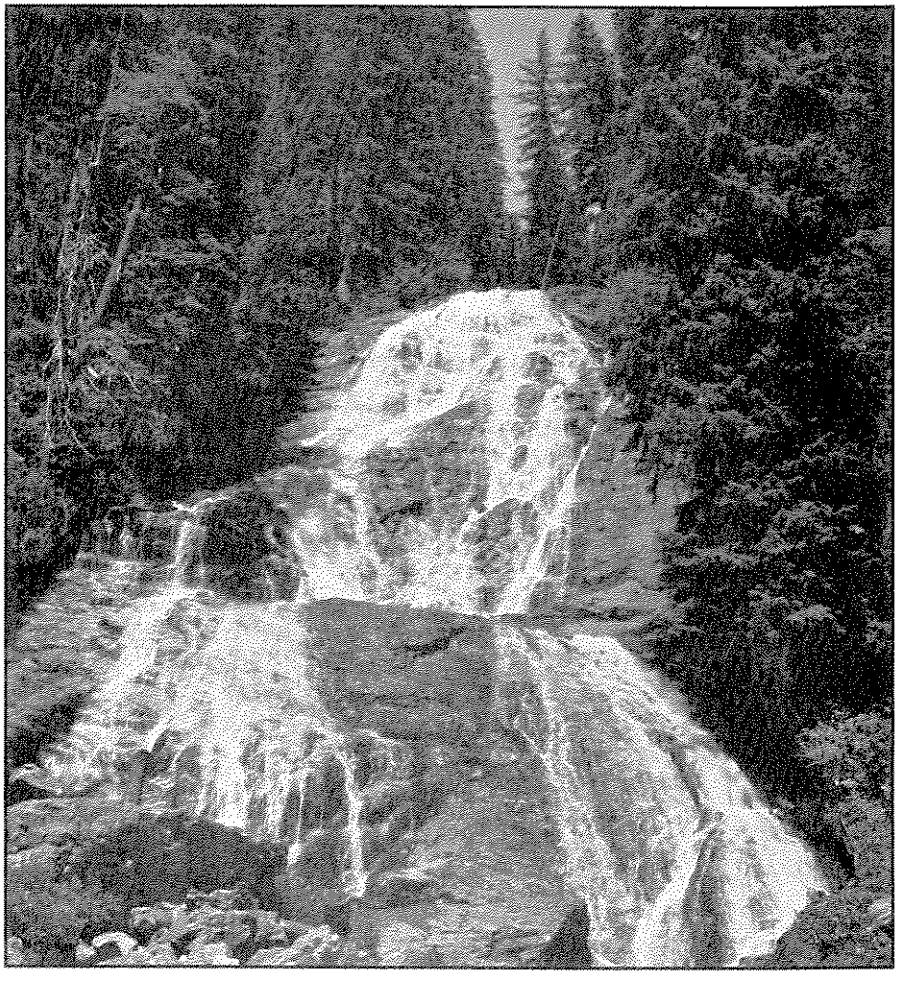

Photo Howard Skaggs

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PREFACE

Since the publication of the Parent Volume (Montana Water Law for the 1980's), there have been sufficient changes and additions coming from both the legislature and the Supreme Court, that it seemed necessary to add this supplement. The title to the Parent Volume is an unfortunate one, because all of the pre-1980 law contained therein remains the same, of course, and that is what the book is largely about. That is the reason why it merely requires a supplement to bring it current, rather than a rewritten volume.

The legislative changes in the criteria for permitting large appropriations, or changing the use or location of large water rights, and the new plan for leasing water are some of the most significant recent developments. The introduction of considerations of the public interest in the foregoing matters as well as the recognition of public rights of recreation and enjoyment of waters (without regard to "navigability" or title to the underlying beds and banks) aligns Montana with the position taken (almost unanimously) in other Western states. These matters deserve, and are given, substantial coverage in this Supplement.

As is the case of the Parent Volume, this Supplement is written not only for lawyers, but also for ranchers, farmers, foresters and others who have an interest in Montana water laws.

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MONTANA WATER LAW

Recent Changes and Current Trends.

Supplementing Montana Water Law for the 1980's

Page 4 Parent Volume, I. B.

A current and interesting illustration of the inconclusive nature of pre-1973 decrees as well as any decree rendered prior to a general adjudication under MCA Title 85, Part 2, is the claim of Rueben C. Pitsch in CASE 40A-48C In re the Adjudication of The Musselshell River and Tributaries Above Roundup. In 79 Ranch Co. v. Pitsch, 204 M. 426 (1983), infra, pp. 19, 20, the Montana Supreme Court decided that Pitsch had abandoned certain water rights. But in the Musselshell adjudication, Pitsch logically asserts that in this general adjudication the prior Supreme Court decree is neither conclusive nor res judicata, because there are other parties in this new proceeding. The prior case is asserted to be only prima facie evidence, to be considered along with other evidence leading to an independent determination by the Water Court of the validity of the claimed water rights. (At the time of this writing the case is only in the briefing stage in the Water Court.)

Page 7 Parent Volume. I. C.

The Supreme Court extended the deadline for filing claims from January 1, 1982 to 5:00 p.m., April 30, 1982. (Supr. Ct. Order No. 14833, Dec. 7, 1981.)

Page 8 Parent Volume. I. C.

1. The Water Courts also issue Temporary Preliminary

Decrees where federal or Indian rights preclude more finality at this time, or where the Water Court deems it desirable to make limited interlocutory rulings.

2. The present procedures of the Water Court and the Department of Natural Resources and Conservation ("Water Right Claim Examination Rules") were promulgated by the Montana Supreme Court in In Re Dept. of Nat. Res. & Conservation, 760 P.2d 1096 (1987) effective July 15, 1987. Public and official comment will be accepted until March 15, 1988, and the rules are subject to modification and change. They may be examined at the State Law Library and the U. of M. Law School Library, or copies may be obtained from the Water Court in Bozeman.

In its activities relating to these adjudications, the Department acts in a consultative capacity to the Water Court, entirely subject to the direction of the water judge.

3. Chapter 438, Laws, 1987 amends MCA § 85-2-234(5)(b) by removing some of the language that tended toward measuring rights (particularly irrigation rights) by volume as well as flow rates, and is retroactive to all decrees issued after April 30, 1982.

4. Chapter 651, Laws, 1987 was prefaced by a Statement of Intent directed to the Water Courts and the Department of Natural Resources and Conservation, indicating the basins that should receive priority adjudication efforts. The list fills a page and a half of H.B. 754.

5. On July 9, 1987, The Water Policy Committee issued a Request-For-Proposals to Study Montana's Water Rights Adjudication Process. In it, the Water Policy Committee expresses concern over serious disharmony and discord between the Water Courts, the DNRC, the Department of Fish, Wildlife and Parks, and other parties. The purpose of the study is to

ascertain whether the adjudication process is (a) fulfilling statutory mandates; and (b) sufficient to meet federal McCarran amendment requirements, Montana law, and other due process or separation of powers considerations. It says:

> The study should consider and make recommendations concerning: -the probable accuracy of the final decrees; -the probable timeline for completion of the adjudication process; -the relationship between the Water Courts and the DNRC; -the practices and procedures of the Water Courts; -the practices and procedures of the DNRC; and -the processing of late claims.

The document goes on to elaborate on issues and questions concerning current procedures. The very fact of this Request-For-Proposals, involving a year long study by one or more consultants, suggests that there is grave reason for concern.

Page 14 Parent Volume, I. E. 5.

MCA § 85-2-217 was amended by Ch. 667, Laws, 1985 to extend the suspension of adjudication and continue negotiations until 1987. It was amended again by Ch. 358, Laws, 1987, extending the authority of the Reserved Water Rights Compact Commission to continue negotiations with the Indian tribes until July 1, 1993.

Page 32 Parent Volume, III. B. 1.

LeMunyon v. Gallatin Valley Ry. Co., 60 M. 517 (1921) was based upon the court's construction of Revised Codes § 4362, now MCA § 69-14-240(1), requiring railroad corporations to construct and maintain "suitable ditches and drains...or to construct culverts or openings through such roadbed to connect with ditches or drains, or watercourses, so as to afford sufficient outlet to drain and carry off the water along such railroad...when required to remove and drain off water accumulated upon property adjacent to or upon the right of way whose natural channel or

outlet has been destroyed or impaired by the embankment of such railway so constructed as aforesaid...." (Emphasis added.) The court said that "natural channel or outlet" referred back to "ditches or drains, or watercourses", and so the former means the same as the latter. There being no "watercourse", "ditch", or "drain", the railroad was not required to provide culverts or openings.

The Le Munyon case was overruled in Formicove, Inc. v. Burlington Northern, Inc., 673 P.2d 469 (1983), wherein it was held that the legislative intent was to impose a greater burden on railroads than was imposed by the common law's "Common Enemy" doctrine. The court said: "Clearly the statute was intended to deal with impounded water of any kind, without regard to the nice distinction made between surface water and a watercourse...."

Page 35 Parent Volume. III.B. 3.

In Krieger v. Pacific Gas & Electric Co., 119 Cal. App.3d 137, 173 Cal. Rptr. 751 (1981), Krieger sued to enjoin P.G. & E. from lining a ditch on Krieger's property with gunite. The ditch had been an easement across public land, pursuant to the Act of July 26, 1866 (43 USCA § 661). Krieger had acquired a portion of the land, and P. G. & E. had acquired the easement and ditch.

The court said: "When Krieger's land was patented, the character and method of use of the easement was an open, earthen ditch.... This character and method of use fixed the extent of the servitude...." P.G.& E. could not unilaterally change it. Nor could guniting be considered "within the ambit of its 'secondary easement' to make necessary repairs." It would be an enlargement of the easement, and enjoinable, because it would

endanger the riparian vegetation which flourishes in the soil moistened by water percolating through the earthen walls of the ditch.

At times, Krieger placed a siphon in the ditch to obtain water. He was found to have no such right, but water which seeps out to him becomes his property.

The court did not find that Krieger had a water right, but that so long as P.G.& E. chose to burden Krieger's land with its easement, Krieger was entitled to the "benefit running therewith." The seepage is not a waste, for it is beneficial.

It is herein submitted that there was a water right in the landowner under the original ditch. It should make little difference whether his source of supply is P.G. & E.'s ditch, or the Stanislaus River from which the water comes. The case could appropriately have been decided as a water law case, rather than as one involving the wrongful enlargement of an easement.

At the very least the case provides a theory in addition to the one herein submitted whereby a landowner with an interest in waste, seepage or drainage water may be able to assert his right independently of the user from whom the water comes.

The Krieger case, and the Montana cases reviewed in the Parent Volume have implications adverse to the appropriator who has been using less than his nominal amount of water, and proposes to capitalize on that surplus through "water marketing".

Page 40 Parent Volume. III.B.5.

Another more recent Colorado case very similar to the Shelton Farms case, and with a similar result, is R.J.A., Inc. v. Water Users Ass'n of Distr. No. 6, 690 P.2d 823 (Colo., 1984). The claim for a developed water right was a reduction of losses from a marshy mountain meadow by removing underlying moss and eliminating a saturated, seepy condition. The claim was denied.

Page 44 Parent Volume. III.C 2.

The Parent Volume asks: "What interest in land, or access to water, must one have to make an appropriation?" This is an appropriate place to consider water uses developed by a lessee or tenant farmer. Hays v. Buzard, 31 M. 74 (1904) and Bullerdick v. Hermsmeyer, 32 M. 541, 553 (1905) are among the very few Montana cases in which a water right used upon non-federal land was held not to be appurtenant. The general rule is that water rights are appurtenant to the land on which the water is used. (MCA § 85-2-403(1); MCA § 70-15-105; Sweetland v. Olsen, 11 M. 17 (1891); Adams v. Chilcott, 597 P.2d 1140 (1979); Castillo v. Kunnemann, 197 M. 190 (1982); Hutchins, Water Rights Laws in the Nineteen Western States, v. I, pp.454 et seq. Typically, the tenant-

farmer leaves the area at the end of his tenancy with no intent to retain the water right. His future is elsewhere and he must get on with it. The landowner, then, will simply assume ownership of that water right by unchallenged possession and use, similar to what occurred in Cook v. Hudson, 110 M. 263, 276, 278 (1940), a case which relied upon title by occupancy pursuant to MCA §§ 70-1-110, 70-19-405 and 406. (Where the permit to appropriate, under the 1973 Water Use Act, was taken in the tenant's name, the landowner should notify the Department of Natural Resources and Conservation to record the name change.)

Most of the cases concerned with appurtenancy involve use of water on the public domain, and they hold that the water right is appurtenant to this land which was not owned by the developer: Tucker v. Jones, 8 M. 225, 231-2 (1888): McDonald v. Lannen, 19 M. 78, 85-86 (1897); Wood v. Lowney, 20 M. 273, 277 (1897); St. Onge v. Blakely, 76 M. 1, 14 (1926); Geary v. Harper, 92 M. 242, 248 (1926); Wills v. Morris, 100 M. 514, 530 (1935); and Cook v. Hudson, 110 M. 263, 278 (1940). Contra: Warren v. Senecal, 71 M. 210, 219 (1924); and Smith v. Deniff, 24 M. 20, 28-9 (1900). In Castillo v. Kunnemann, 197 M. 190 (1982), the Court held that MCA § 70-15-105 ("A thing is deemed to be incidental or appurtenant to land when it is by right used with the land....) applies to water rights.

Dept. of State Lands v. Pettibone, 702 P.2d 948 (Mont.,1985) involved persons holding grazing leases on state school lands, who had developed water rights. In the adjudication of the Powder River, the Water Court had held that the water rights belonged to these tenants. In reversing the Water Court, the Montana Supreme Court's opinion discusses the State's trust obligations regarding school lands, but bases its decision on the

rule of law "that an appropriative right becomes appurtenant to the land for the benefit of which the water is applied." (Citing Hutchins, Water Rights Laws in the Nineteen Western States, v. I, p. 455.) The Court said:

> This conclusion is consistent with the general rule that when title to irrigated property is passed, the water rights pass as an appurtenance unless specifically excepted. Section 85-2-403, MCA; Castillo v. Kunnemann (Mont. 1982), 642 P.2d 1029, [and other cites]. Respondents point to no authority explaining why the rule in regard to leases of land should be different than with the sale of land. We believe it should be the same--the parties to any such transaction may specifically effect a severance, but absent such, the water right remains appurtenant, following title. It does not make sense for each succeeding tenant to walk off with one water right after another.

As a physical matter, the tenant cannot take with him a well; the stream which is the source; the headgate works; nor the ditches or canals. The water right should remain appurtenant to these.

Page 50 Parent Volume, III.C.5.

The 1985 legislature made several significant changes regarding the appropriation of water.

a. MCA § 85-2-301 was amended by stating that only the Department of Natural Resources and Conservation may appropriate water by permit for transfer out of the major or discrete river basins (Clark Fork, Kootenai, St. Mary, Little Missouri, Missouri, and Yellowstone). (Subsec. (2)(a)(i).)

b. That section now prohibits the appropriation of water in excess of 4,000 acre feet a year and 5.5 cubic feet per second if that amount of water is to be consumed. (Subsec. 2(a)(ii).

c. Persons wishing to transport water out of the named basins, or to consumptively use more than the stated amount, may apply to lease water. Sub 2(b).

This latter Subsection refers to the new Water Leasing Program enacted in 1985 as MCA § 85-2-141. That code section places the leasing program under the Department, authorizes the Department to acquire water rights for leasing from reservoirs that have been adjudicated by at least a temporary preliminary decree; and from federal reservoirs. Only 50,000 acre feet of water may be leased, and only for a maximum period of 50 years, subject to extensions. If the lease is for a consumptive use in excess of 4,000 acre feet per year and 5.5 cubic feet per second, or if the effect of more than one application would constitute a probable significant environmental impact, the Department must require an environmental impact statement. Criteria for the Department to consider are set forth in the statute.

d. The 1985 legislature also modified the general criteria for issuance of a permit under MCA § 85-2-311, particularly subparagraph (2) thereof. For the issuance of permits for amounts in excess of 4,000 acre feet per year and 5.5 cubic feet per second the Department must consider (among other things), existing and projected demands including streamflow for aquatic life; the benefits to the applicant and the state (thus introducing public interest considerations); water quality and all significant environmental impacts. (Presumably such permits would not be for consumptive uses in that amount because of the proscription in § 85-2-301 (2)(a)(ii), mentioned above).

For use of water outside the State, additional criteria are added in MCA § 85-2-311(3), e.g., it must not be contrary to water conservation in Montana or detrimental to the public welfare. The items to be considered in determining the satisfaction of these requirements are (i) whether there are present or projected water shortages; (ii) whether the water in

question could alleviate such shortages; (iii) what water is available to the applicant in the receiving state; and (iv) the demands on applicant's supply in the receiving state.

Those four specific criteria, modifying the "water conservation" and "public welfare" generalities, appear to be for the purpose of passing federal Constitutional barriers expressed in Sporhase v. Nebraska, 458 U.S. 941 (1982). In that case, appellants transported groundwater from Nebraska to their adjacent properties in Colorado. Nebraska required a permit for such a transfer, and required that the transfer be (1) reasonable, (2) not contrary to conservation, (3) not otherwise detrimental to the public welfare, and (4) to a state which grants reciprocal rights to transport its groundwater to Nebraska. Colorado does not grant reciprocal rights, so appellants could not obtain Nebraska permits. The Supreme Court held that the first three of these criteria were not facially an unreasonable or impermissible burden on interstate commerce, but that the fourth criterion smacked of "economic protectionism" and had no legitimate conservation purpose, nor did it relate to the health and safety of Nebraskans. Moreover, it was more burdensome than the requirements for the issuance of a permit for water use in Nebraska.

Our Montana statute raises a question with respect to that last sentence. Does our statute unreasonably discriminate against, and burden interstate commerce? It is a nice question.

e. MCA § 85-1-317 prohibits the appropriation of groundwater in excess of 3,000 feet per year except pursuant to an act of the legislature. This does not apply to appropriations for municipal use, public water supplies, or for the irrigation of cropland owned and operated by the applicant.

f. MCA § 85-2-319 provides for either the legislature or the Department to close a basin or sub-basin which is already highly appropriated. The Department may so act only upon petition by 25% or 10, whichever is less, of the users in the source. The Department provides the form for the petition, which form will elicit the necessary qualifying information.

g. MCA § 85-2-321 enables the Department to suspend action on a class of applications, or close a source in the Milk River Basin. The subsequent code section provides for a hearing on any proposed suspension or closure prior to issuance of an order.

h. A June 15, 1987 district court decision raises some interesting questions and problems. The case is styled The United States of America and The Montana Power Co. v. The Montana Department of Natural Resources and Conservation, and Others, Lewis & Clark County, No. 50612. MCA § 85-2-311(1)(a) requires a determination that: "(a) there are unappropriated waters in the source of supply." Subsection (b) permits the Department to issue a permit only if "the water rights of a prior appropriator will not be adversely affected." (A similar restraint is placed on the Department in approving an application for any change in the use of a water right.)

The District Judge discussed and analyzed the following code sections:

> 3-7-224(2) The chief water judge has jurisdiction over cases certified to the district court under 85-1-309 and all matters relating to the determination of existing rights within the boundaries of the state of Montana.
>
> 3-7-501(1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under 95-2-309 or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly. ....
>
> 3-7-501(3) The water judge for each division shall exercise

> jurisdiction over all matters concerning cases certified to the court under 85-2-309 or concerning the determination and interpretation of existing water rights within his division...that are considered filed in or transferred to a judicial district wholly or partly within the division.
>
> 85-2-309(1) If the Department determines that an objection...states a valid objection, it shall hold a public hearing...unless the Department certifies an issue to the district court for determination by a water judge under subsection (2)....
>
> (2)(a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the Department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing.... If the Department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the Department shall include its denial to certify as part of the record of the hearing.
>
> (b) Upon determination of the issues certified to it by the Department, the court shall remand the matter to the Department for further processing of the application under this chapter.

Now, back to MCA § 85-2-311(1) (a) & (b). The district Judge said:

> There is, in my view, only one way to determine if an unappropriated water right exists in a source of supply: decide how much water is available and how much of it has been appropriated. This obviously requires quantification of existing rights. There is, likewise, only one way to determine whether the water rights of prior appropriators will be adversely affected by additional appropriation. You must begin by determining what the water rights of the prior appropriators are. In either case, the need to determine existing water rights is inescapable and authority to make such a determination is, and has been since 1973, exclusively in the district or water courts.

His view is based upon the chief water judge's jurisdiction over "all matters relating to the determination of existing rights" (3-7-224(2)); "The jurisdiction of each judicial district concerning the determination and interpretation of...existing water rights is exercised exclusively by it through the water division" (3-7-501(1)); "The water judge...shall exercise jurisdiction over all matters...concerning the determination and interpretation of existing water rights...." (3-7-501(3)); and

the provision of MCA § 85-2-309 for certifying "all factual and legal issues involving the adjudication or determination of the water rights at issue" to the district court.

If this interpretation of the statutes stands, then in virtually every application for a permit or for a change in use, the Department will have to submit the matter to the district court, which in turn will defer to the water court for that division, and then the Department, the applicant, and any objectors or others of interest will have to await the decision of the water court. The district judge in the above case did not pretend that this wouldn't be a nightmare of delay and a halt to all proceedings for permits or changes of use.

But MCA § 3-7-224(2) doesn't say that the jurisdiction is exclusive, and may only contemplate the main adjudications under Part 2, Ch. 2, Tit. 85. MCA § 3-7-501(1) confers no jurisdiction, but is a limitation on the jurisdiction of judicial districts -- it must be exercised only through the water division. Subdivision (3) thereof pertains to matters filed in or transferred to a judicial district, and says that the water courts should exercise jurisdiction over those matters (and matters certified under § 85-2-309). There is nothing here to merit the view that any jurisdiction is exclusive.

MCA § 85-2-309 provides that "the Department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing", and if the Department doesn't so certify at the request of a party, the record shall show it. (Emphasis added.)

It appears to be perfectly sustainable that the Department may do what it seems it has to do as a practical matter:

determine on the basis of available facts and records whether there is unappropriated water available, and whether the rights of prior appropriators will be adversely affected. The Department may indeed go awry and make erroneous determinations of amounts and rights, but after it makes its order aggrieved persons may appeal to the district (water) courts.

The foregoing discussion will, in the course of time, become obsolete, because this matter will undoubtedly reach the Montana Supreme Court.

Page 55 Parent Volume, III. C. (Add a subparagraph 8: Eminent Domain.)

City of Missoula v. Mountain Water Co., No. 86-548, Montana Supreme Court, 1987, was an eminent domain proceeding by the City of Missoula to condemn the Mountain Water Co. system. Mountain Water is wholly owned by Park Water Co. of California; Park Water Co., in turn, is nearly wholly owned by Henry (Sam) Wheeler, also of California. The City passed an ordinance authorizing the purchase or condemnation under MCA §§ 7-13-4403 & 4404. The question of public ownership was submitted to the citizens in Sept., 1985 by a ballot initiative which passed. The City's effort to purchase the system was to no avail, so this suit was filed.

The City relied upon MCA § 7-5-4106 which authorizes condemnation:

> "...for establishing...any sewer, waterway, or drain ditch...or for any other municipal and public use. The ordinance authorizing the taking of private property for any such use is conclusive as to the necessity of the taking...."

The trial court and Supreme Court found that this applied to rights of way, and that "other muncipal and public use" was an ejusdem generis "catch-all". The Supreme Court quoted from

Political Code § 4800, Codes of 1895, but the current citations will be used here. MCA § 7-13-4404 provides that if the parties cannot agree on a sale of a water system, then the city may proceed in eminent domain under Tit. 70, Ch. 30. Sec. 111 thereunder requires the condemnor to show that the public interest requires the taking because (sub-par.(2)) it is necessary; or (sub-par. (3)) if the property is already put to a public use, that the proposed use is "a more necessary public use."

The Court saw the principal factor as "whether it is necessary to have the improvement operated by the City instead of by private industry", or "whether the proposed use is 'more necessary' than the present use": questions of fact for the trial court. The remainder of the case was a discussion of what the trial court must consider on remand, the Supreme Court having differed some with the emphasis that the trial court had placed on some factors, and with some factors considered and some omitted below. So the case was remanded for reconsideration of all relevant factors.

One dissent would have simply affirmed the trial court: that the City had not proven "necessity" and had lost.

A strong and disciplined second dissent would have reversed and directed the issuance of a preliminary condemnation order, based upon MCA § 7-5-4106 and the legal history of that section.

Page 61 Parent Volume, III. E. 8. (Following Luppold v. Lewis in the Parent Volume.)

In Salt River Valley Water Users' Ass'n. v. Kovacovich, 411 P.2d 201 (Ariz. 1968) the defendant had engaged in water-saving practices such as improvement of ditches and concrete lining of

ditches. He sought to irrigate additional land under his original appropriation. It was conceded in the agreed statement of facts that because of the water-saving practices, no more water would be used in irrigating the additional land than had been previously used on the previously irrigated lands. The Arizona Court said:

> ...conservation and more economical use of water is to be highly commended. However, commendable practices do not in themself [sic] create legal rights.
>
> This Court is of the opinion that the Doctrine of Beneficial Use precludes the application of waters gained by water conservation practices to lands other than those to which the water was originally appurtenant.... Beneficial use is the measure and limit to the use of water. The appellees may only appropriate the amount of water from the Verde River as may be beneficially used in any given year upon the land to which the water is appurtenant even though this amount may be less than the maximum amount of their appropriation.... [Their saving] inures to the benefit of other water users and neither creates a right to use the waters saved as a marketable commodity nor the right to apply same to adjacent property.... It is believed that any other decision would result in commencement of return to the very area of confusion and chaos which gave rise to the development and application of the concept of beneficial use.

It is regrettable to so discourage such conservation measures, and so it can be forcefully argued on the basis of policy that this decision is unwise or wrong. But the concern expressed in the last sentence quoted above is very real and very important. As has been pointed out, Montana water rights, whether acquired by use or pursuant to statute, and whether adjudicated prior to 1973 or not, are generally grossly inflated. (See Prentice v. McKay, Parent Volume.) The temptation to extend the use of surplus water (which should be left in the stream for subsequent appropriators who have relied upon it), or to capitalize on it by selling it, is great, and if allowed at all, will always be accompanied by allegations of great conservation and water-saving practices.

Under the 1973 Water Use Act any such change must be made with the permission of the Department of Natural Resources and Conservation (Castillo v. Kunnemann, 197 M. 190 (1982)) and it is herein submitted that the Department should follow the above case and Quigley v. McIntosh (see Parent Volume).

Page 64 Parent Volume. III.F.4.

In accord with the discussion in the Parent Volume, is Bagnell v. Lemery, 202 M.238 (1983).

Page 65 Parent Volume. III.G.1.

A rehearing was held in Castillo v. Kunnemann, 197 M. 190 (1982), in which the original opinion was reaffirmed. The Supreme Court held that an appurtenant water right will pass with a conveyance of the land, or to various parcels upon the subdivision of the land, but the grantee must then notify the Department of Natural Resources and Conservation of the change in ownership. Prior approval is not required, and the water right will remain appurtenant to the land to which it was appurtenant prior to the sale or subdivision. (MCA § 85-2-403(1) & (2).)

If, however, the Seller wishes to reserve appurtenant water rights from the sale or subdivision, that amounts to a "severance" and cannot be done without prior approval by the Department. An appurtenant water right cannot be made appurtenant to other land (even land of the same owner), sold for other purposes, or otherwise severed from the land to which it was appurtenant without prior approval by the Department. (MCA § 85-2-403(3).) But, curiously, if it is already severed, then it cannot be used without Departmental approval. Castillo, supra.

The Court also held that these statutes apply to water rights acquired before the Water Use Act of 1973.

Page 65 Parent Volume, III.G.1. (Add at end of this section.)

The 1985 legislature made substantial changes to MCA § 85-2-402 restricting changes in appropriation rights. To a large extent the changes parallel the changes in MCA § 85-2-311 governing the acquisition of a water right, discussed in III.C.5.d. of this supplement.

For changes in purpose or place of use of appropriations of 4,000 acre feet per year and 5.5 cubic feet per second or more, the same criteria are used as in MCA § 85-2-311, supra.

If the change will result in the consumptive use of 4,000 acre feet per year and 5.5 cubic feet per second or more, the Department of Natural Resources and Conservation must petition the legislature which may affirm the decision of the Department after one or more public hearings.

If the change will result in the use of the water outside the state, the criteria again follow those for initiating an appropriation for use outside the state, under MCA § 85-2-311, supra.

In the case of all changes involving 4,000 acre feet per year and 5.5 cubic feet per second or more, the Department must give notice and hold public hearings; the Department, or the legislature (if applicable) may impose terms, conditions, restrictions and limitations. (See also under III. G. 1, supra, the discussion of Castillo v. Kunnemann, preceding this discussion of MCA § 85-2-402.)

Page 71 Parent Volume. III.I.1.

A very significant development in the law of abandonment was made by the Montana Supreme Court in 79 Ranch, Inc. v. Pitsch, 204 M. 426 (1983). Rights were claimed in an appropriation made in 1893, but which hadn't been used since 1911 or 1913. The Court's ruling, and the strength of that ruling is shown in these quotes:

> Pitsch and 79 Ranch argue that the mere showing of nonuse even for a long period of time, is not sufficient to support a finding of abandonment. We disagree.
>
> Forty years of nonuse is strong evidence of an intent to abandon a water right, and, in effect, raises a rebuttable presumption of abandonment.
>
> When the appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases.
>
> As in Smith and Holmstrom, such a long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse. This conclusion is highly consistent with the fundamental policy that a water right does not mean possession of a quantity of water, but its beneficial use. (Emph. by the Court.)
>
> It should be noted that in section 85-2-404, MCA, the legislature has provided that ten successive years of nonuse while water was available creates a prima facie presumption of abandonment. This presumption will be applied after all existing water rights have been adjudicated under part 2 of Title 85, MCA. In our holding, here, we are simply recognizing this general, modern trend, and providing an approach for the determination of abandonment of water rights consistent with the express intent of our legislature.

There were two dissents based upon stare decisis, and an opinion concurring in the result, but questioning the finding of fact by the trial court with respect to reasonable diligence.

This case appears to be the law on abandonment in Montana. It doesn't specifically set forth a time period when the presumption will arise, but seems to suggest the ten year period of MCA § 85-2-404.

One further thought. MCA § 85-2-404(3) provides: "This

section does not apply to existing rights until they have been determined in accordance with part 2 of this chapter." Does that mean that the statutory ten year period will not commence to run on a water right until it has been through the adjudication process? It could at least as easily mean that as soon as adjudication is complete for a particular water right, the statute attaches, and prior non-use will then be counted in reaching the ten year period for the statutory presumption.

Regardless how that is settled, 79 Ranch Co. v. Pitsch, supra, applies to all water rights. (It should be noted that the conclusiveness of this decision, where other parties are involved in a general adjudication in the Water Courts under MCA Title 85, Part 2, is being seriously challenged in Rueben Pitsch's appeal in In re the Adjudication of the Musselshell River and Tributaries Above Roundup, # 40A-48C, supra, p. 1.)

Page 74 Parent Volume. III.J.1.a.

In Confederated Salish & Kootenai Tribes v. Namen, 534 F.2d 1376 (1976) the Ninth Circuit held that landowners riparian to Flathead Lake have common law riparian rights of access to the lake, and of wharfage to effectuate that access. The case is known as "Namen I." In Namen II (Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (1982), the tribes sought to enforce an ordinance they enacted in 1977 to regulate both existing and future structures on the bed and banks of the south half of Flathead Lake, as well as the manner in which non-Indians who own land bordering this navigable lake might exercise their riparian rights.

The Flathead Reservation was established by the 1855 Treaty of Hell Gate,; 12 Stat. 975, and was held to have included the

bed and banks of the south half of the lake by the Ninth Circuit in Montana Power Co. v. Rochester, 127 F.2d 189 (1942). By the Act of April 23, 1904, ch. 1495, 35 Stat 302, members of the tribes were authorized to obtain allotments. Other lands within the reservation were to be made available to non-Indians. Thus, most of that littoral land has come into non-Indian ownership.

Namen II reaffirms that the bed and banks of the south half of Flathead Lake belong to the United States in trust for the Indians. It distinguishes the Big Horn case (Montana v. United States, 450 U.S.544 (1981), see next paragraph in Parent Volume) partly because the Hell Gate Treaty describes the northern boundary of the reservation to run from "a point due west from the point halfway in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide...." whereas the Treaties of Laramie which create the Crow Reservation do not refer to the bed of the Big Horn River. The Big Horn case held that the bed of the Big Horn River, within the Crow Reservation, belongs to the State of Montana. Namen II also found that the Flathead fishery was important to the tribes - - more so than the Big Horn fishery was to the Crows.

These reasons led the court in Namen II to "hold that the Tribes have the authority to apply Ordinance 64A to regulate the riparian rights of non-Indians owning land within the Flathead Reservation." Persons who feel oppressed by any such ordinances or regulations, fees or penalties can appeal to the Tribal Court.

These issues appear to be settled with finality, because the United States Supreme Court denied certiorari. (459 U.S. 977 (1982), two justices dissenting.)

Page 77 Parent Volume, III.J.l.a. (Following cite to the Illinois Central case.)

Two California cases have directly dealt with this issue. In State v. Superior Court of Lake County, 625 P.2d 239 (Calif.,1981), some people named Lyon owned along the shore of Clear Lake, a navigable lake. When Lyon applied for a permit to repair a levee to reclaim some marshlands that lay between high and low water mark, the Fish and Game Comm. asserted ownership by the State of California of the land below high water. So Lyon filed this action against the State to quiet title.

The Calif. Civil Code § 830 is the same as MCA § 70-16-201 (formerly RCM (1947) § 67-712). In construing its own code section, the California Supreme Court said (p. 248):

> In this connection, we note that two states which adopted a statute similar to section 830 as part of the Field Code, interpret their enactments as conveying title to riparian owners to the low water mark in navigable, nontidal waters. (Mont. Rev. Codes 1947, §67-712, Herrin v. Sutherland (1925) 74 Mont. 587, 241 P. 328, 331; N.D.Cent code, §47-01-15; Hogue v. Bourgois (N.D. 1925) 71 N.W.2d 47, 52.)
>
> We conclude, therefore, that Lyon has title to the low water mark of Clear Lake.
>
> We come, then, to the question whether the grant of lands between high and low water made by section 830 to riparian landholders is free of the trust described in City of Berkeley. It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust. Instead, unless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public....
>
> ....
>
> In our view, Illinois Central Railroad Company v. Illinois (1892) 246 U.S. 387...which we described in City of Berkeley as the "seminal case on the scope of the public trust doctrine" [cite omitted] settled the issue. It held very clearly that the applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact.
>
> ....
>
> In Marks v. Whitney (1971) 491 P.2d 374, we held that, although early cases had expressed the scope of the public's

> right in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state.
> ....
> Nothing in the language of section 830 requires a conclusion that riparian landholders take free of the public's rights in the lands between low and high water in navigable lakes and streams. We conclude, therefore. that Lyon's title to such lands is impressed with the public trust.

The other case is a companion case, decided on the same day as the Lyon case. It is so similar, that it will be treated much more briefly. It is State v. Superior Court of Placer County, 625 P.2d 256 (Calif.,1981), in which the Fogartys owned land along the shore of Lake Tahoe. The State Lands Commission proposed to record claims to lands between high and low water on navigable lakes. The Fogartys filed for declaratory relief and inverse condemnation, alleging ownership of the strip of land.

Essentially the decision in the case was preempted by the Lyon case (above), so the discussion of law was minimal. The court determined to use the lake level as it had long existed after being raised by a dam, rather than the original natural lake level. It also discussed various matters relating to the public's interest. But finally, the Fogartys own the strip of land, but their ownership is burdened by the public's superior interest.

These two cases are directly applicable to Montana.

Galt v. State Dept. of Fish, Wildlife and Parks, 731 P.2d 912 (Mont.,1987) (to be discussed later), in considering the constitutionality of some of the provisions of the "Stream Access" law (MCA Tit. 23, Part 3), imposed some restrictions on the public's use of the beds and banks. In connection with the foregoing discussion of the two California cases which bear upon MCA § 70-16-301, Justice Sheehy's dissent may provide a straw in

the wind. He first referred to the 1933 law which describes the waters where the beds and banks up to high water or even to the meander lines are usable by the public for fishing. (MCA § 87-2-305.) He then said:

> The definition by the legislature in 1933 of the right to use the streambeds up to the high water mark for the purpose of fishing is an indirect recognition of the legislature that § 70-16-301, MCA, is not worth the paper it is written on insofar as it applies to the streambeds between high water marks on navigable streams.

Page 81 Parent Volume, III.J.1.a.(6). (Following cite to MCA § 85-2-316(5).

The 1985 legislature eliminated future reservations "to maintain a minimum flow, level, or quality of water" for the following rivers and their tributaries: (a) Clark Fork; (b) Kootenai; (c) St. Mary; (d) Little Missouri; (e) Missouri; and (f) Yellowstone. That covers the state and emasculates the first subsection of that code section, which was noted and hailed throughout the West for its specific recognition of instream flows and water quality.

Subsection (4) requires that any reservation be in "the public interest." The 1985 legislature defined that term as it will be applied to applications for an order reserving water for transport out of the state: it simply copied the restrictions against appropriation permits for transport out of state, contained in MCA § 85-2-311(3)(b) & (c) (discussed above). In brief, they concern water conservation; presence of projected water shortages; whether the subject water could alleviate shortages; availability of water in applicant's state; and the demands on applicant's supply in his state.

Ch. 197, Laws, 1987 amends MCA § 85-2-316 by providing that

water may be reserved only in the basin where it is reserved, unless water for use outside that basin is not reasonably available under the water leasing program.

Ch. 535, Laws, 1987 amends MCA § 85-2-331 to require agencies of the state and federal government to file for reservations of water in the Missouri River by July 1, 1989, except that applications for reservation of water below Ft. Peck Dam must be filed by July 1, 1991. The Board shall make its final determinations on reservations above Ft. Peck by Dec. 31, 1991, and below Ft. Peck by Dec. 31, 1993.

Page 83 Parent Volume. III.J.1.b. (Following the Paradise Rainbows case.)

Since the Parent Volume was written, much has happened in the area of public recreational, environmental, ecological and aesthetic rights in inland (mostly non-navigable for title purposes) waters. The case that has done most to set the "tone" for the 1980's is "The Mono Lake" case: National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Calif., 1983). Much has been written about that case, but those writings will not be reviewed here. The importance of the case, however, warrants a review of the case itself, which is what follows, largely without editorial comment.

Mono Lake is a moderately large and beautiful navigable lake, just East of Yosemite National Park and the Sierra, at a natural altitude of 6,416 feet. Although its waters are much more saline and alkaline than seawater because it has no outlet, the five non-navigable tributaries flowing into it, largely from snowmelt in the Sierra, are pristine freshets and cascades. In 1940 the Calif. Water Resources Board's predecessor granted the

Los Angeles Dept. of Water & Power (hereafter DWP) a permit to appropriate virtually the entire flow of four of the five tributaries. DWP promptly constructed facilities to take about half of that flow for its Owens Valley aqueduct which transports that water along with other waters of the Owens River Valley nearly 300 miles South to the Los Angeles area. As a consequence, the lake level has dropped, and its area has diminished, with various adverse effects upon habitat and wildlife, particularly waterfowl (but not coyotes). In 1970 DWP completed a second diversion, and commenced taking the entire amount of water allowed by its permit, accelerating the aforementioned adverse effects.

The Audubon Society filed suit in Mono County do enjoin such large diversions, based on the values of Mono Lake as a part of a public trust. Los Angeles sought a change of venue to a more neutral forum, so the suit was removed to the next neighboring county: Alpine County, the least populous county in the state. The U.S. Department of Interior had become a party, so the suit was transferred to the federal district court in Sacramento. The latter court requested that the state courts determine the relationship between the public trust doctrine and the water rights system. The Alpine Court entered summary judgment against plaintiffs, and plaintiffs petitioned the California Supreme Court for a writ of mandate to review that decision.

The California Supreme Court embraced the public trust doctrine as it had in coastal cases, saying: "It is, however, well settled in the United States generally and in California that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams." (p. 719, with a long string of citations.) After further discussion: "We

conclude that the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries." (p. 721.)

The state as trustee was held to have a duty of continued supervision; and "parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." (p. 721.) "Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (p. 724.)

The Court then discussed the California water rights system, and recognized that the system's co-existence with the public trust doctrine was essential to meet the diverse needs and interests in water resources, specifically including the state's dependence "upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values." (p.727.) But "an appropriative rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests." (p. 728.) "It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested rights bar such reconsideration." (p. 729.) Finally (pp. 732):

> Restating its question, the federal court asked: [C]an the plaintiffs challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiffs...[argue] that the water diversion and uses authorized thereunder are not 'reasonable or beneficial' as required under the California water rights system?' We

> reply that the plaintiffs can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin....
>
> This opinion is but one step in the eventual resolution of the Mono Lake controversy. We do not dictate any particular allocation of water....

At this writing the case is still pending. The ultimate result, though presently uncertain, seems likely to be a reduction (not an elimination) of the amount of water that Los Angeles can now and in the future take under its 1940 permit, perhaps by a subsequent revision of its permit.

Montana has seen a good deal of activity in this area since the Parent Volume was published. The principal cases are the "Curran" or "Dearborn case" (Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont., 1984)), and the "Hildreth" or "Beaverhead case" (Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088 (Mont., 1984)).

In the Curran case, some members of the Coalition, attempting to float the Dearborn River, had experienced interference and harassment from Curran or his agents. Curran owns land through which the Dearborn flows. The case required the Montana Supreme Court to determine the rights of Curran and the public to use the river, its bed, and its banks. The Supreme Court applied the federal Daniel Ball test to determine the navigability of the Dearborn. Citing federal circuit court cases, the Court found the stream navigable because of a history of floating logs and railroad ties. It therefore found that title to the bed (at low water) was in the State of Montana, in trust for use by the public. The Court went on to consider state law and tests for navigability, saying: "Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title

purposes." The test: "...whether the waters owned by the State under the Constitution are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant."

"The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters." These rights of the public were held to extend to the high water mark, notwithstanding private ownership to the low water mark under MCA § 70-16-201.

There was one dissent, saying (1) there were genuine issues of fact, making summary judgment improper; and (2) if the Dearborn is navigable (for title) then the case should have been resolved under existing law without need to find that recreational use and fishing made it navigable.

The Hildreth case, supra, presented similar facts on a different stream, but in this case the district court had not reached the issues of federal navigability for title purposes. It had held the river to be navigable for recreational use and so the public had the right to recreate up to the high water mark. The district court had used a "pleasure boat" test, but the Supreme Court found this unnecessary and improper, saying:

> We have not limited the recreational use of the State's waters by devising a specific test. As we held in Curran, supra, the capability of use of the waters for recreational purposes determines whether the waters can be so used. The Montana Constitution clearly provides that the State owns the waters for the benefit of its people. The Constitution does not limit the waters' use. Consequently, this Court cannot limit their use by inventing some restrictive test.
>
> Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters

themselves."

The Court held that title was irrelevant, and that the public had use rights up to the high water mark, and where necessary, the right to portage around obstacles by the least obtrusive means available. (This last point would seem to go without saying, because of the well established doctrine of secondary easements. That is, an easement holder has a right to further burden the servient tenement, beyond the specific terms of his easement, in order to obtain the benefits of the easement itself. (Dahlberg v. Lannen, 84 M. 69 (1929); Laden v. Atkeson, 112 M. 302 (1941); O'Connor v. Brodie, 153 M. 129 (1969).)

There were two dissenting opinions stating that the conflicts between recreational users and landowners is a policy matter that should have been left to the legislature, rather than initiating the recreational use test in Curran and here; and that there were issues of fact which should have gone to a jury.

The dissent in the Curran case points up the curious part of that case: that once the Court had decided navigability for title, the State owned the bed of the stream, so the public's right to use it was settled at that point. The Court might then have reached the issue whether Curran owned the strip between high and low water in trust, under the public trust doctrine, for the benefit of the people.

The Hildreth case is not subject to the same comment, because no finding concerning title was made. So the Court was faced with the issue of public use regardless whether the State or the riparian owner owned the bed. The decision aligns Montana with all of the Western states that have ruled on the issue of public use of waters over privately owned beds and banks, except

Colorado. (See discussion of other jurisdictions in Parent Volume.)

(Although the Parent Volume deals with cases and statutes separately, recent developments make it desirable to treat the "Stream Access Law" and the Galt case together at this point.)

The Curran and Hildreth cases were decided by the trial court in December, 1982, and were pending before the Montana Supreme Court during the 1983 legislative session. That session entertained a number of proposals and bills in an attempt to deal with the landowner-recreationist issue legislatively. Some seemed intended to pre-empt the Court; some to give guidance to the Court. Agreement could not be reached during the 1983 session, so an interim legislative subcommittee was appointed to study, report, and make recommendations for legislation to the 1985 session. The Committee met promptly, and conscientiously proceeded, but its work was itself preempted by the Curran decision in the Spring, and the Hildreth decision in the summer of 1984.

The Curran and Hildreth cases did not answer all questions between landowners and recreationists. (E.g., What is the "high water mark"? Can the permissible uses be categorized according to a classification of streams? Where portage around barriers is necessary, can some specific control be placed upon portage routes?) So the 1985 legislature undertook to fill in, and define. Ultimately it reached and passed a compromise, known as the "Stream Access" law MCA § 23-2-301 et seq. (which has to do with stream use, not obtaining access). (It is, incidentally, Part 3 of Title 23, so one wonders whether the above citation may

be changed to MCA § 23-3-301.)

In summary, the Stream Access law excludes lakes from its effects, and divides streams into Class I waters which are, roughly, those which would pass as navigable under federal tests for commerce and title; and Class II waters which are "all surface waters that are not class I waters". The "ordinary high-water mark" is where the physical characteristics change, seen as lack of terrestrial vegetation or agricultural value below the line. "Recreational use" is inclusive of water-related pleasure activities. Except as noted below, "waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters."

Activities excluded (unless with landowner's permission) are: motorized vehicles; use of waters in stock ponds, private impoundments, or diversions (e.g. ditches); and the use of the streambed as a right-of-way when there is no water therein. The list also excluded big game hunting except by long bow or shotgun; overnight camping within 500 yards of, or in sight of, a dwelling (whichever is less); and placement of permanent or seasonal objects such as duck blinds or boat moorages within 500 yards or in sight of a dwelling (whichever is less). These last three items, then, would permit (regardless of landowner's permission): hunting by long bow or shotgun; camping beyond the specified distances; and location of permanent or seasonal objects beyond the specified distances. These last three items, however, were ruled to be an unconstitutional invasion of the property rights of the landowners in Galt v. State Dept. of Fish, Wildlife and Parks, 731 P.2d 912 (1987) (the Galt case) which soon will be discussed.

The foregoing paragraph applies to all waters. With respect

to Class II waters, activities proscribed are: all big game hunting, camping, placement of seasonal objects, and activities which are not primarily water-related pleasure activities.

The Fish and Game Commission is empowered to adopt rules for safety and the protection of public and private property, including procedures for restricting uses. The law contains elaborately bureaucratic procedures for establishing portage routes around artificial obstructions, (and placed costs on the landowner, but that was also thrown out by the Galt case).

Galt v. State Dept. of Fish, Wildlife and Parks, 731 P.2d 912 (1987) was an action brought to have the statute declared unconstitutional as an invasion of, as well as a taking of private interests without compensation. The district court upheld the constitutionality of the act in its entirely, granting summary judgment.

On appeal, the Montana Supreme Court, speaking through Justice Morrison held:

> The public has a right of use up to the high water mark, but only such use as is necessary to utilization of the water itself. We hold that any use of the bed and banks must be of minimal impact.
>
> ....
>
> Overnight camping is not always necessary for utilization of the water resource itself. The public can float and fish many of our rivers without camping overnight. The statute is overbroad in giving the public right to a recreational use which is not necessary for the public's enjoyment of its water ownership. The same can be said of constructing permanent objects between high water marks. Although duck blinds may be necessary for enjoying the ownership interests in certain large bodies of water, the right to construct permanent improvements on any commercially navigable stream does not follow.
>
> Big game hunting as authorized by § 23-1-302(d), between high water marks, is not permitted under any circumstances because it is not a necessary part of the easement granted the public for its enjoyment of the water. Further, although the recreational user has a right to portage around obstructions minimally impacting the adjoining landowner's fee interest, there can be no responsibility on behalf of the landowner to pay for such portage route....

> ....Landowners...have their fee impressed with a dominant estate in favor of the public. This easement must be narrowly confined so that impact to beds and banks owned by private individuals is minimal....
>
> Accordingly, we find § 23-2-302(d), and (f), MCA, to be unconstitutional. Further, we find § 23-2-311(3)(e), MCA, to be unconstitutional insofar as it requires the landowner to bear the cost of constructing a portage route around artificial barriers.

The Court found the balance of the Statute constitutional, and that the unconstitutional parts were severable.

Chief Justice Turnage concurred, but expressed disagreement with resorting to the Public Trust Doctrine to find a right to the use of surface waters for recreational purposes. He pointed out that the Doctrine is not express in the Montana Constitution, and unnecessary for reaching the result obtained. He concluded:

> If the State of Montana is to be considered a trustee over waters of this State, or a trustee over any other property, under a Public Trust Doctrine, then the States must be held to the standard that applies to all trustees which standard requires that the trustee must own legal title to the property over which trust power is sought to be exercised.

Justice Gulbrandson, specially concurring, "...would also hold that § 23-2-301(12), MCA, which defines 'surface waters' as including 'the bed and its banks up to the ordinary high water mark' is unconstitutional as applied to Class II waters. He particularly disagreed that the public has the right to use the bed and banks up to the ordinary high water mark, and concluded:

> It is my opinion that where the State has title to the streambed, it may legislate, within the limits of declared public policy, the use of the streambed. Where the title to the streambed is privately owned, the State has no legal authority to legislate use of the bed and banks of that stream without paying just compensation through lawful eminent domain proceedings.

Justice Hunt dissented, saying that the Court decided the unconstitutionality of particular code sections which were not before the Court - - the issues involved the entire statute and

were res judicata [stare decisis?] under Curran and Hildreth. He also reviewed some of the legislative history of the Act, and concluded:

> In my opinion, the District Court correctly concluded that the very point decided in Curran and Hildreth is the issue in this case and that § 23-2-302, MCA was the legislation that constitutionally responded to these opinions and it was left with nothing to do but grant defendant's motion for summary judgment.

Justice Sheehy also dissented, concurring in the Hunt dissent, and saying that the legislature properly interpreted Curran and Hildreth. Referring to Class I streams, he objected to referring to the public's interest up to high water mark as merely an easement:

> ....As to Class I streambeds, the concept of a mere easement right in the public must fail. The state has title.
> ....
> .... The definition by the legislature in 1933 of the right to use the streambeds up to the high water mark for the purpose of fishing is an indirect recognition of the legislature that § 70-16-301 MCA, is not worth the paper it is written on insofar as it applies to the streambeds between high water marks on navigable streams.
> ....
> In Hildreth, Justices Morrison and Weber concurred. Justices Gulbrandson and Harrison dissented, partly on the ground that they would defer to the legislature in finding solutions to water use conflicts between landowners and recreational users. The legislature has now acted.
> ....
> What is said foregoing about the right of the state to control streambeds, particularly under Class I lands, would indicate that the legislature has a perfect right as owner to permit any sort of lawful activity on the portions of the lands that it owns. The majority finds that permitting a water recreational user to roll out his sleeping bag or set up his pup tent overnight is "overbroad." Yet, these are legislative decisions, made by the legislature after public hearings and discussion. What was done was the legislature's business and not ours.

Justice Sheehy also disagreed with holding it unconstitutional to require the landowner to pay for portage routes around artificial barriers placed in the stream by landowners. He would uphold the constitutionality of the statute in toto.

The case shows a curious division on the Supreme Court. In his concurring opinion, Chief Justice Turnage reveals a slant toward the landowners, and a dislike of the Public Trust Doctrine. Justice Gulbrandson appears to be more in agreement with Chief Justice Turnage than with the opinion of the Court written by Morrison. Morrison seems to have saved the Stream Access law from being thrown out by conceding to landowners on big game hunting, camping where unnecessary for enjoyment of the waters, seasonal or permanent duck blinds, and the cost of providing portage routes. Considering that Harrison dissented along with Gulbrandson in the Hildreth case, the Galt case could well have turned on Justice Weber's inclinations, with Turnage, Harrison and Gulbrandson on one side; Morrison, Sheehy and Hunt on the other. The replacement of Chief Justice Haswell with Chief Justice Turnage changed the chemistry. Now, with the retirement of Justice Morrison and the appointment of Justice McDonough, it will be interesting to see how much weight the doctrine of stare decisis carries.

The concurring opinions require title to be in the State for the Public Trust Doctrine to apply. It is an easy case for use by the public where the State owns both the land and the water. But that is not what the Public Trust Doctrine is about. The riparian landowner may own the banks and beds of a stream, but he holds that title subject to reasonable public uses. As in the case of any trustee, the beneficial use is divided from the title, or ownership. So there are two trusts involved: the State holds the waters, and whatever land it owns in trust for the public; and under the Public Trust Doctrine, the landowner holds land which is regularly subaqueous in trust for public uses. The cases in our surrounding states and other Western

states generally reach the same result as Curran and Hildreth, but commonly use a liberal state test of "navigability" or "public waters", etc., which amounts to the same thing: the public has recreational rights over privately owned lands.

Page 86 Parent Volume. III.J.2.a. (Following discussion of Marks v. Whitney.)

In Summa Corp. v. Calif. ex rel. State Lands Com'n, 104 U.S. 1751 (1984) the landowner's property bordered tidelands to which the City of Los Angeles (as grantee from the State) asserted a public interest under the Public Trust doctrine. Landowner was a successor to owners under a Mexican land grant. The Act of March 3, 1851, 9 Stat. 631 established a Board of Land Commissioners, and provided that persons who claimed under Spanish or Mexican grants were required to present their claims to the Board within two years, or their claims would be barred. The owners at that time did duly present their claims, which were confirmed by the Board, and ultimately, after a survey, the Secretary of the Interior issued a patent to the Mexican grantees. The federal patent made no mention of any public trust interest.

The United States Supreme Court held that California should have presented its claim in the patent proceedings, and could not now assert its public trust easement against the title taken pursuant to the Act of 1851.

In City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362 (Calif., 1980), the issue concerned lands in San Francisco Bay that had been conveyed to private parties pursuant to an 1870 statute. Under that and other statutes, almost one-quarter of the Bay is claimed by private persons, including filled lands such as those on which much of San Francisco's

downtown business district was built. The California Supreme Court recognized the public trust interest, as well as practical difficulties, and held:

> In keeping with this principle, we hold that submerged lands as well as lands subject to tidal action that were conveyed by board deeds under the 1870 act are subject to the public trust. Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action, provided that the fill and improvements were made in accordance with applicable land use regulations. Tidelands that have been neither filled nor improved are not only the most suitable for the continued exercise of trust uses, but because there is only a remote likelihood that these parcels may be filled [cites omitted] the economic loss to the grantees of such lots is speculative at least and is clearly outweighed by the interests of the public.

Of particular interest to Montana are the holdings in the Lyon case (State v. Superior Court of Lake County, 625 P.2d 239 (Calif., 1981)) and the Fogarty case (State v. Superior Court of Placer County, 625 P.2d 256 (Calif., 1981)) because they involved a statute nearly identical to Montana's MCA § 70-16-201 which donates to the owner of land riparian to navigable waters, title to the low water mark. These two cases hold that the title is held in trust for public uses. (These cases are discussed in this work at III.J.1.a.(3), and so will not be further discussed at this point. The same can be said for the Mono Lake case, Nat. Audubon Soc. v. Superior Court of Alpine County, 658 P.2d 709 (Calif., 1983), discussed herein at III.J.1.b.)

Page 89 Parent Volume. III.J.2.b.

In J.J.N.P. Co. v. State, 655 P.2d 1133 (Utah, 1982) a private landowner owned the land surrounding a nonnavigable lake (he had title to the bed and banks) but a public road led to the lake. The Utah Supreme Court said:

> Private ownership of the land underlying natural lakes and streams does not defeat the State's power to regulate

> the use of the water or defeat whatever right the public has to be on the water. Irrespective of his ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water.

In a footnote, the court expressly reserved the question of the public's right to use the bed and banks, as that was unnecessary to decide.

In Kootenai Environmental Alliance v. Panhandle Yacht Club, 671 P.2d 1085 (Ida., 1983), the Idaho Dept. of Lands had leased to a private club 417 feet along the shore of Lake Coeur d'Alene for marina docking facilities extending 470 feet out into the lake. The lease was for 10 years, renewable, and was principally for docking sailboats. The Idaho Supreme Court held that the grant remained subject to the public trust and could be terminated, and that the grant is in aid of navigation, commerce and other public trust interests.

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U.S. v. Adair, 723 F.2d 1394 (9th Cir. 1984) held that the Klamath Tribe of Indians have a priority date of time immemorial for water on their former reservation to support the hunting and fishing rights reserved to them in the Treaty of 1864, 16 Stat. 707. The quantity is "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights were exercised by the Tribe in 1864." The priority date of Indian rights to water for irrigation and domestic purposes is the Treaty date, in 1864.

U.S. v. Anderson, 736 F.2d 1358 (9th Cir.,1984) clarified a number of issues in the 9th Circuit's jurisdiction:

1. Water rights appurtenant to land which never left trust

status, and water rights appurtenant to lands opened for homesteading which were never claimed, have date-of-reservation priority, apparently regardless of the use to which the water is put.

2. Water rights appurtenant to lands reacquired by the Tribe following allotment and sale to non-Indians or following homesteading:

a. Homesteaded lands reacquired by the tribe carry priority as determined by State law.

b. Homesteaded lands where water right has been perfected and lost, or not perfected at all, carry priority date as of reacquisition.

c. Water rights appurtenant to lands reacquired after allotment and sale to non-Indians carry priority (if not lost by non-use) as of date of the reservation.

3. As to allotted lands and attached water rights, the case follows Walton and Adair (supra): Non-Indians obtain date-of-reservation priority. And if the Tribe reacquires that land, it reacquires that water right and priority date. But, per Walton, if the non-Indian does not diligently put the water to use, he will not obtain the full quantity of the reserved right. It will be lost. Upon reacquisition by the Tribe, it is still lost.

4. Because homesteads don't confer a federal water right, lands opened to homesteading within the reservation only obtain water rights pursuant to State law. If reacquired by the Tribe, that's what the Tribe gets. If the homesteader perfected no water rights, on reacquisition by the Tribe the lands obtain Winters Doctrine rights as of the date of reacquisition.

5. Walton is not controlling re State regulatory jurisdiction over surplus water on non-Indian owned lands within

the reservation. "We conclude that the State, not the Tribe, has the authority to regulate the use of excess Chamokane Basin waters by non-Indians on non-tribal, i.e. fee, land."

"The Walton decision was compelled by the geography and hydrology of the No Name Basin and its relationship to the Colville Reservation."

In State ex rel Greely, et al v. Confederated Salish and Kootenai Tribes, 42 St. Rptr. 1856, 712 P.2d 754 (Mont., 1985) the Montana Supreme Court found that the adjudication proceedings under S.B.#76 of 1979 were compatible with the State Constitution, and that the statute was adequate on its face to accomplish the adjudications of federal and Indian water rights pursuant to the McCarran Amendment.

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