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MONTANA WATER RIGHTS — A NEW OPPORTUNITY†

34 MONT. L. REV. 57 (1973)

Albert W. Stone*

Article IX, section 3 of Montana's new constitution provides:

All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.¹

Of course, such existing rights would be recognized and confirmed without this comforting assurance. They would, that is, if existing rights were so clear and well defined as to be recognizable.

Under Montana's present mix of water laws, individuals bring their troubles and problems to a court, which then renders a decree stating what the rights of the parties are — what their rights are, that is, only as between the parties to any particular lawsuit, not what their rights are with respect to any and all challengers who may come along and start trouble at a later date. In the past, the Montana legislature has done very little to assist the courts; so decrees are neither permanent nor conclusive, and rights are neither clear nor secure: there can be little assurance as to exactly what is "hereby recognized and confirmed."

People tend to think that although the law may be slow to act, nevertheless the law ultimately has an answer — a solution that is final and conclusive. In the field of water law, this feeling, or impression, has been induced and confirmed by some writers on water law and by some parts of court decisions taken out of context. A brief review of some of these causes of incomprehension may be of aid in understanding the legislative complacency in this area of law, for a legislature, like people, can evidently be lulled by a sense of legal security which really does not exist at all.

I. INTIMATIONS OF SIMPLICITY AND CERTAINTY

One writer has characterized Montana water rights as being as "... fixed and impregnable as the Rock of Gibraltar² — so firm that the Army Corps of Engineers and the Bureau of Reclamation, in each of their plans to develop the Missouri Basin, could not interfere with the exercise of these

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1. Ratified by the voters on June 6, 1972 and proclaimed by Governor Forrest Anderson on June 30, 1972. The new constitution withstood a challenge on the validity of the vote and proclamation on August 18, 1972. *State ex rel Cashmore v. Anderson*, ___ Mont. ___, 500 P. 2d 921 (1972).

2. Patten, *Water Rights in Montana*, 23 R.M.L. REV. 162, 170 (1950).

rights:

[N]o farmer need fear that either plan if adopted will divest him of any established right he may have to the use of water from streams tributary to the Missouri River. Those rights are *fixed and immutable*, and any use of water will have to avoid disturbing them, whether there be enough water for the purposes of a larger scheme or not.”³ (Emphasis supplied.)

As early as 1874 the Montana supreme court characterized a water right thus: “[I]t is such a species of realty as to require for its transfer the same form and solemnity as the conveyance of any other real estate.⁴ Calling a water right “property” endows it with an aura of sanctity and definiteness, for who can doubt that a person knows the nature of his own local property? And from time to time since 1874 the supreme court has had occasion to refer to water rights as “property” or “real estate.”⁵

In 1885, four years before Montana became a state, the Legislative Assembly of the Territory of Montana apparently recognized the need to make future water rights certain, stable, and publicly recorded. It enacted a statute providing that anyone desiring to appropriate water “must post a notice” at the point of intended diversion, and then he “shall file with the county clerk” a notice of appropriation describing the right to be acquired.⁶ Twelve years later, in 1897, the Montana supreme court decided *Murray v. Tingley*,⁷ in which the court had high praise for this enactment. The praise came in the court’s comparisons of the confusion and uncertainty surrounding water rights acquired before this enactment with the insecurity afforded post-1885 appropriators who followed the statute:

Questions of priority, however, as well as of the original capacity, etc., of ditches, depended chiefly on oral testimony, on the memory of eyewitnesses, often at fault through lapse of time. Confusion and insecurity to vested rights resulted. To obviate this as much as possible, the statute was enacted. It required a notice of location to be posted at the point of diversion, to apprise others who contemplated the acquisition of water rights from the same stream that the locator had taken his initial step to appropriate water. It required a recorded notice of appropriation,

3. *Id.* at 171.

4. *Barkley v. Tieleke*, 2 Mont. 59, 64 (1874).

5. *E.g.*, *Quigley v. Birdseye*, 11 Mont. 439, 446, 28 P. 741 (1892) and *Middle Creek Ditch Co. v. Henry*, 15 Mont. 448, 572, 39 P. 838 (1892) use the term “real property.” *Lensing v. Day & Hansen Security Co.*, 67 Mont., 382, 384, 215 P. 999 (1923); *Wills v. Morris*, 100 Mont. 514, 523, 50 P.2d 862 (1936); *Brennan w. Jones*, 101 Mont. 550, 567, 55 P.2d 697 (1936); and *Harrer v. Northern Pac. Ry. Co.*, 147 Mont. 130, 134, 410 P.2d 713 (1966) are a few that refer to a water right as “property.”

6. REVISED CODES OF MONTANA, § 89-810 (1947) [hereinafter cited as R.C.M. 1947].

7. *Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897).

in order that a record might be supplied, giving the history in detail of each appropriation, which would inure to the benefit of their successors in interest, as well as to the appropriator's, and not leave them dependent upon the mere memory of witnesses when conflicts should arise.⁸

Such praise of the presumed requirement for filing claims further strengthened public confidence in their "rights" regarding water.

Also in 1885, the legislative assembly provided for water rights adjudication in a code section entitled: "Rights settled in one action."⁹ One writer on water law viewed the effect of that section this way:

[I]t is essentially an action to quiet title. . . . It brings before the court all of the parties who use or claim the use of water from a stream and its tributaries; *all persons* are required to set up their claims to the use of water, which are then examined and adjudicated.¹⁰ (Emphasis supplied.)

Another writer on Montana water law shared the same view, saying:

The basic method of protection of water rights in Montana is by adversary proceedings between claimants in an action to determine the relative rights of *all parties in the source of supply* in question.¹¹ (Emphasis supplied.)

Occasionally, when referring to the nature of a water right adjudication or to the nature of a decreed right which results from an adjudication, the supreme court implied certainty and conclusiveness. Thus, in *Whitcomb v. Murphy*, the court said: "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."¹² And in *Kramer v. Deer Lodge Farms Co.*, the court said:

The final decree of 1892 made in Cause No. 404 is binding and conclusive between all the parties to the suit and their privies and successors in interest, as to all matters adjudicated therein and as to all issues which could have been raised irrespective of whether the particular matter was in fact litigated.¹³

Such statements as those referred to above tend to confirm the widely

8. *Id.* at 268.

9. R.C.M. 1947, § 89-815.

10. Patten, *supra*, note 2 at 169-170.

11. Heman, *Water Rights Under the Law of Montana*, 10 MONT. L. REV. 13, 29 (1949).

12. *Whitcomb v. Murphy*, 94 Mont. 562, 566, 23 P.2d 980 (1933). The same terminology is used in *Lensing v. Day & Hansen Security Co.*, 67 Mont. 382, 383, 215 P. 999 (1923) and in *Missoula Light & Water Co. v. Hughes*, 106 Mont. 355, 363, 77 P.2d 1041 (1938).

13. *Kramer v. Deer Lodge Farms Co.*, 116 Mont. 152, 156; 151 P.2d 483 (1944).

held impression that existing rights are so clear and certain that they can readily be ascertained and catalogued, or conclusively adjudicated. If such were the fact there would have been no need for further legislation after the 1885 enactments, and the assumption of such factuality may explain the legislative inactivity since that date in this area of law.¹⁴ But such is not the fact. And in order to know what the "existing rights" are that are "recognized and confirmed" in the new constitution, one must be able to say what such "existing rights" actually were prior to the adoption of the new constitution.

II. WHY "EXISTING RIGHTS" CANNOT BE READILY "RECOGNIZED AND CONFIRMED"

A. *The Water Right Records Are Nearly Useless*

As previously mentioned, the supreme court in *Murray v. Tingley*¹⁵ had high praise for that 1885 statute which provided that anyone desiring to appropriate "must post a notice" and then file a notice with the county clerk.¹⁶ But the statute was not sufficiently detailed and definite in its statement of the effect of noncompliance. It said:

A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this chapter the right to the use of the water shall relate back to the date of posting the notice.¹⁷

Should that have the effect of completely depriving a non-complying water user of all rights to his use of water? Or should its effect only be to regulate priorities among those who comply and those who do not?

In *Murray v. Tingley* both of the parties before the court were noncomplying water users. The issue was: who had priority? The plaintiff's irrigation works had been commenced in 1888 and completed in 1890, whereas the defendant's works had been commenced later in 1888 than the plaintiff's, but the defendant completed his works in 1889 and was thus earlier than the plaintiff's completion. The court decided in favor of the defendant because he had completed his works and put the water to a

14. Probably the most significant legislation since 1885 was the enactment of an exclusive method of appropriating from an adjudicated stream. LAWS OF MONTANA, 1921, Ch.228; R.C.M. 1947, § 89-829, construed in *Donich v. Johnson*, 77 Mont. 229, 250 P. 963 (1926). Neither the statute nor the supreme court has defined what an adjudicated stream is, so that question remains for litigation in each case in which it arises. See, Stone, *Are There Any Adjudicated Streams in Montana?*, 19 MONT. L. REV. 19 (1956).

15. *Murray v. Tingley*, *supra* note 7.

16. R.C.M. 1947, § 89-810. See, discussion, *supra* note 6.

17. R. C. M. 1947, § 89-812.

beneficial use first. The court held that posting and filing a notice of appropriation pursuant to the 1885 statute would enable an appropriator to relate his priority date back to the date of posting the notice. More importantly, it held that upon completion of his works, an appropriator who ignored the statutory requirements of posting and filing, would acquire a water right with a priority date as of when he completed his works. So there was no need and little reason to pay any attention at all to the 1885 statute.

Prior to the decision in *Murray v. Tingley*, the county records on water rights were unreliable because the filings were made *before* any physical works had been commenced by those who filed.¹⁸ Hence, there was no assurance that any of the filings stated a quantity of water that was even approximately close to the actual quantity taken.¹⁹ In fact, there was no assurance that after a notice of appropriation had been filed, any appropriation at all was actually made. So before *Murray v. Tingley* there could be an official record of a water right without there being any water right; after *Murray v. Tingley* there could also be a water right without any official record.

B. Adjudication That "Adjusts" A Prior Right Causes Uncertainties

Ultimately a record will be made of unrecorded water rights, because without a record such rights invite litigation. But when the lawsuit comes, appropriators are not always awarded the amounts that they originally used.

In *Power v. Switzer*,²⁰ for example, the plaintiffs had appropriated *all* of the water in Uncle George's Creek in Deer Lodge County in 1868 in order to run a water wheel to pump a mining shaft in 1885 to 1887, for placer mining; and in 1887 or 1888, for coal mining. After terminating those activities and water uses, the plaintiffs used about four miners' inches for domestic purposes, and turned the remainder into a meadow to grow wild hay. The defendant came along later, and in 1895 commenced diverting fifteen miners' inches, upstream from the plaintiff, thus diminishing the plaintiff's supply. Since the creek only carried twenty inches in a dry season, the plaintiffs sued to adjudicate the waters and to enjoin the defendant from so depleting the creek. The result: the plaintiffs were awarded priority only to the amount that they needed at the time of the adjudication — four miners' inches — and the defendant was decreed the

18. R.C.M. 1947, § 89-810.

19. See, this criticism expanded in STATE ENGINEER'S OFFICE, WATER RESOURCES SURVEY, MADISON COUNTY MONTANA 1 (1954).

20. *Power v. Switzer*, 21 Mont. 523, 55 P. 32 (1898).

balance of the water to the extent of his needs. The grounds of the decision were similar to those used in determining the amount of an initial appropriation: what were the appropriator's needs at that time? But the plaintiffs' initial appropriation was conceded, so the court spoke in terms of abandonment:

It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or "claimed" and filed a claim of, water for any number of inches, has thereby acquired a valid right, good as against all subsequent persons. But, as the settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases.²¹

In *Gilcrest v. Bowen*,²² the plaintiffs brought suit to enjoin defendant from interfering with their use of water from Antelope Creek in Judith Basin County. Although the plaintiffs established an 1883 right to 160 miners' inches, the trial court found that the defendant had an earlier 1882 right to 172 miners' inches. Yet, on appeal, the Montana supreme court decreed to defendant an 1882 right to only 80 miners' inches. The defendant's right was based upon the irrigation of 160 acres of government land, occupied by a predecessor of the defendant. That predecessor did have a water right to irrigate those 160 acres: at least 160 and perhaps 172 miners' inches. The defendant's predecessor ultimately patented only 80 of those acres, and the defendant succeeded to those 80 acres and all of the water right. But, without explanation, the supreme court held that the defendant could only succeed to a water right sufficient to irrigate 80 acres, i.e. 80 miners' inches. The balance of the water right went to no one; it simply evaporated.

Another downward "adjustment" of a water right occurred in *Peck v. Simon*.²³ The plaintiff brought the suit to adjudicate water rights to Brown's Gulch in Silver Bow County. He had used 400 miners' inches for mining purposes, commencing in 1874; yet in his suit he was decreed an

21. *Id.* at 529.

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

23. *Peck v. Simon*, 101 Mont. 12, 52 P.2d 164 (1935).

1874 right to only 275 miners' inches. The plaintiff did change his use from mining to irrigation in 1882, which resulted in his using less water. But there was no finding of abandonment, and since his diversion was downstream from the defendant, the defendant couldn't be prejudiced by the plaintiff's change of use. The court simply announced: "[T]he trial court correctly limited the plaintiff's appropriations to the amount of use made of the water after its change of use to agricultural purposes."²⁴

The cases discussed in the preceding three paragraphs bring out some of the uncertainties and hazards which lurk for appropriators in litigation and adjudication. Here the supreme court seems to be saying that after a right has vested, the owner's property interest may be diminished by a subsequent and possibly temporary reduction in need.

But in these three cases the court may have been treating a larger, widespread problem, without the legislative tools to enable it to clearly articulate legal foundations for the results. The court surely was aware that claims to water rights are commonly inflated beyond the appropriator's actual original needs. The evidence to support such claims is frequently limited to oral testimony based upon memories which are subject to error and influence. And the late-comer who needs water can scarcely obtain evidence to refute those claims to the early use of excessive quantities of water. But excessive early appropriations should not be carried forward into the future, limiting other applications and uses. In the absence of effective legislation enabling the court to find abandonment or to enforce forfeiture for non-use, the court seems to have obtained the result that could come from such legislation, albeit on an *ad hoc*, discretionary case by case basis.

C. *Inquiry Into Original Needs Casts Doubt Upon Existing Rights*

Closely related to the foregoing three cases is *Allen v. Petrick*²⁵ an adjudication of Strawberry Creek, which is a tributary of the Yellowstone River in Park County. Philosophically it is allied to those three cases, but in the *Allen* case, rather than admitting that the early appropriators had once acquired a larger water right that was later confirmed to them, the supreme

24. *Id.* at 21. *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1947) places a different limitation on a water right. In that case the defendants apparently had a prior right to 450 miners' inches of water from Ramshorn Creek in Madison County, result; from their use of it for mining. There was evidence, however, that 300 of those inches had only been used from May 15 to July 15 of each year. In this section the defendants sought to exercise the latter right, beyond July 15, but this was denied them. The supreme court decreed defendants priority to 300 inches only to July 15 of each year. It is worth noting that *Galiger* introduces a time dimension into a water right, i.e., regardless of priorities, a person may be limited in how permanent or steady a flow he may enjoy. *See also*, *Brennan v. Jones*, 101 Mont. 550, 55 P.2d 697 (1936) and *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940).

25. *Allen v. Patrick*, 69 Mont. 373, 222 P. 451 (1924).

court inquired into the actual economic needs of the appropriators back when their rights were acquired. The court reviewed and considered the testimony taken by the trial court, and commented:

[The trial judges have been confronted with aged witnesses who testified to what took place in early days. These venerable men, having more or less knowledge of what they testified about, frequently looked through mental magnifying glasses in attempting to recall forgotten things from bygone days.²⁶

The supreme court reduced all of the claims of the parties, and, except for one party, the court substantially reduced the amounts awarded by the trial court decree. The whole tenor of the opinion was one of emphasizing the need for economy in water use.

Such scrutiny and parsimony on the part of the supreme court may be anticipated in any original adjudication of claims to water, and such an approach, in adjudicating water rights in Montana, appears to be both justified and needed. But, then, what can an appropriator whose right is not yet adjudicated count upon? What will the court say his water right amounts to?

D. *Purchasers Don't Know the Quality They Are Buying*

If a water right were similar to other property rights, it would be readily transferable, at least so far as persons unaffected by the change of location of diversion and use are concerned. Especially would this be true if it were a decreed right. But the case of *Brennan v. Jones*²⁷ qualifies and limits the transferability of decreed rights. In that case an irrigation company exchanged Bitterroot River water for Skalkaho Creek water; it purchased early priority Skalkaho rights and delivered to the Skalkaho vendors Bitterroot River water to replace what had been sold from the Skalkaho. Then the company moved upstream on the Skalkaho so as to gain elevation for canaling its purchased Skalkaho water out of the watershed for distant users.

The plaintiffs (with one irrelevant exception) were water users still farther upstream than the irrigation company's diversions, and so were not affected by the changes in point of diversion or place of use, and their rights were inferior in priority to the company's purchased rights. So the water commissioner, with the approval of the district judge, restricted the plaintiffs' diversions in order to deliver to the company a flow equal in miners' inches to what it had purchased from downstream, high-priority water users.

26. *Id.* at 378.

27. *Brennan v. Jones*, *supra* note 24.

All of the rights had been decreed in 1916, and the company was not diverting more water than had been decreed to its vendors. But it was using that almost continuously. Would those vendors have needed such a continuous flow for the purposes of their appropriations? The supreme court doubted it. So it remanded the case to the district court to ascertain how much the vendors would have actually needed from time to time for their original purposes. Whatever that amount turned out to be, that was the extent of the rights purchased.

The *Brennan v. Jones* case is unsettling of course, because it shrouds the purchase of a water right in uncertainty for the purchaser — uncertainty in the amount of his purchase, even though it is a decreed right, and presumably superior in priority to all challengers. But still, the plaintiffs in any case comparable to *Brennan v. Jones* should not find themselves in a worse position just because someone else sold his water right. As the court said:

One who purchases a water right independent of the land to which it was theretofore appurtenant does not thereby enlarge or extend the right, and one who so purchases such a right is entitled to do only those things which the original owner of the water right might have done.²⁸

E. Adjudications are Inconclusive

The inconclusiveness of adjudications and decrees has been thoroughly discussed and documented in other writings,²⁹ and so will not be extensively treated here. Conclusiveness and certainty are attributes to be desired for property rights. But one of the supreme court's attempts to apply these attributes in litigation subsequent to an adjudication of a

28. *Id.* at 567.

29. Stone, *Are There Any Adjudicated Streams in Montana?*, 19 MONT. L. REV. 19 (1957); Stone, *The Long Count on Dempsey: No Final Decision in Water Right Adjudication*, 31 MONT. L. REV. 1 (1969). Gold Creek in Powell County (originally in Deer Lodge County) was adjudicated in *Caruthers v. Pemberton*, 1 Mont. 111 (1869), again in 1915, Cause number 517, Powell County, and was involved in litigation in *Mannix & Wilson v. Thrasher*, 95 Mont. 267, 26 P.2d 373 (1933) and *Thrasher v. Mannix & Wilson*, 95 Mont. 273, 26 P.2d 370 (1933). Orphir Creek in Powell County was adjudicated in 1928, Cause No. 1185, and returned to the supreme court in *Quigley v. McIntosh*, 88 Mont. 103, 290 P. 266 (1930) and *McIntosh v. Graveley*, ___ Mont. ___, 495 P.2d 186 (1972). Three Mile Creek in Powell County was adjudicated in 1913 and returned to the supreme court in *Quigley v. McIntosh*, *supra* note 24. Prickly Pear Creek in Lewis & Clark County was adjudicated in *Thorp v. Woolman*, 1 Mont. 168 (1870), and returned in *Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921). Crow Creek in Broadwater County was adjudicated in *Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909) and 39 Mont. 374, 102 P. (1909) and was again involved in *Sherlock v. Graves*, 106 Mont. 206, 76 P.2d 87 (1938). Bear Creek in Gallatin County was adjudicated in 1889, which decree was changed in the readjudicated *Conrow v. Huffine*, 48 Mont. 437, 138 P. 1094 (1914). Note also the multiple litigation discussed in subsection (F) of this paper.

stream, illustrates how unjust may be the result. The case is *Kramer v. Deer Lodge Farms Co.*,³⁰ cited earlier in this paper because in that case the court said that a decree is binding and conclusive upon all parties, and with respect to all issues which would have been raised.³¹

In the *Kramer* case, one Johnson had been a party to an 1892 adjudication of Dempsey Creek, and was decreed a water right. But he did not put in issue and ask for a decree concerning the use, since 1872, of water from a nearby slough. Perhaps the omission is explainable, because no one challenged his use, or perhaps because Johnson thought that the slough was not tributary to Dempsey Creek. Kramer became Johnson's successor, and in *Kramer v. Deer Lodge Farms Co.* the trial court decreed Kramer a water right in the slough, and found that the slough was not tributary to Dempsey Creek. The supreme court found that the slough was tributary to Dempsey Creek, and that Johnson lost this water right by failing to put it in issue in 1892.

So Kramer was denied a right to water which had been used for twenty year's prior to the 1892 adjudication and for forty-three years after that first case: a total of sixty-three years of continuous dependency upon the claimed right — a result as grotesque for Kramer as the continuing strife and litigation are for other water users. It occurred because we have no consistent system of adjudication, and so Johnson (Kramer's predecessor) had no forewarning that the 1892 adjudication would be given such breadth.

The *Kramer* case is an aberration, an example of treating all adjudication as broad, firm and conclusive, and an exception to the usual narrowness and inconclusiveness of a decree. The usual pattern is illustrated by the case of *Conrow v. Huffine*.³² There, one Moore diverted the entire flow of Bear Creek in Gallatin County in 1868 to irrigate seventy acres. During the irrigation season the creek sometimes declined to only 100 miners' inches. In litigation against one Axtell in 1889, Moore had his right confirmed by a decree awarding him the entire flow of the creek; that became his adjudicated right, and the defendants were Moore's successors. The plaintiff Conrow came along later, commenced irrigating, and brought this suit seeking to reduce the old Moore right so as to obtain a right with value for himself. The supreme court directed the trial court to limit the claims under the Moore right to seventy inches for his seventy acres, because Moore should not have needed more than that, and the plaintiff should not be limited by a prior decree favoring Moore over Axtell, because the plaintiff was not a party to that action.

30. *Kramer v. Deer Lodge Farms Co.*, *supra* note 13.

31. *Id.* at 156.

32. *Conrow v. Huffine*, *supra* note 29.

Conrow v. Huffine seems soundly decided, even though it is unsettling to realize that a decreed water right may be successfully attacked by any one affected by the use of the water who was not a party to the prior adjudication.³³

F. *Separate Adjudications Cannot Be Conjunctively Administered*

The more decrees on water rights that a district judge has to administer, the more impossible becomes his task. That would not have been so true had the supreme court followed and extended *Whitcomb v. Murphy*.³⁴ In that case, rights to water from the Sun River and its tributaries had been decreed in both Cascade and Lewis & Clark counties. The supreme court held that the Lewis & Clark water commissioner must recognize the plaintiff's right which had been decreed only by the Cascade County court.

But in later years, the principle of *Whitcomb* was eroded and finally washed away. In *State ex rel. Swanson v. District Court*,³⁵ persons in Lewis & Clark County applied to have the Lewis & Clark court appoint water commissioner to distribute the water of Willow Creek in Lewis & Clark County pursuant to the 1911 Cascade County adjudication of the Sun River and its tributaries. It was held that the Lewis & Clark court had no jurisdiction to administer the Cascade County decree as though the water rights could be treated as unrelated to each other and independently administered.

And in *State ex rel. McKnight v. District Court*,³⁶ there were three decrees, all from the Beaverhead district court, adjudicating the waters of Red Rock River and Beaverhead River. The relatrix had a water right decreed in proceeding number 576, and a canal company had decreed rights under proceedings numbered 828 and 1053. The trial court ordered its water commissioner to recognize all of the decreed rights, integrating them so as to distribute the water according to the apparent prima facie priorities and amounts, as in *Whitcomb v. Murphy*. But the supreme court ruled that since these parties had not formally had their rights adjudicated in relation to each other, the trial court could not grant priority of inferiority to these parties in relation to one another. Apparently they were expected to bring still another adjudication of these same waters, in which all rights and parties could have their days in court together.

Where do these last two cases leave the district courts and the parties?

33. See also, *State ex rel. Reeder v. District Court*, 100 Mont. 376, 47 P.2d 653 (1935) and *State ex rel. Pew v. District Court*, 34 Mont. 233, 85 P. 525 (1906).

34. *Whitcomb v. Murphy*, *supra* note 12.

35. *State ex rel Swanson v. District Court*, 107 Mont. 203, 82 P.2d 779 (1938).

36. *State ex rel McKnight v. District Court*, 111 Mont. 520, 111 P.2d 292 (1941).

Except when all claimants have been parties to the same adjudication, the several uses of water and the several water rights of the claimants, although very much related to one another factually, now have no relationship to one another legally.

G. *Greater Efficiency in Water Use May Have the Effect of Reducing the Right*

Can one who could manage to use less water by reason of changing to sprinkler irrigation from ditch irrigation (or some other form of increased efficiency) extend his use to additional acreage and still stay within his water right? Maybe so, but there are some good reasons to doubt that he can thus extend his use.

In discussing the Moore right in *Conrow v. Huffine*, Justice Brantly said:

The use must be beneficial, and, when the appropriator or his successor ceases to use the water for such purpose, the right ceases. (Rev. Codes, sec. 4841 [now sec. 89-802].) If conditions change as time passes, and the necessity for the use diminishes, to the extent of the lessened necessity the change inures to the benefit of subsequent appropriators having need of the use, for, subject to the rule that "as between appropriators the one first in time is first in right" (sec. 4845 [now sec. 89-807].), the prior appropriator may not divert from the stream more than an amount actually necessary for his use (sec. 4844 [now sec. 89-805].). While, therefore, the extent of the right cannot in any case exceed the capacity of the means of diversion, the ultimate question in every case is: How much will supply the actual needs of the prior claimant under existing conditions ?"³⁷

This question was more directly involved in *Quigley v. McIntosh*,³⁸ wherein the two appellants, Quigley and Kimmerly had increased their irrigated acreage although they were not taking a greater volume of flow (in miners' inches) than had been decreed to them. All of the parties to this suit had been parties to the 1913 decree, all had decreed rights thereunder, and these appellants had been decreed priority for their rights. Moreover, they were only using the water within the land described in the 1913 decree. But the supreme court ruled that they were limited to the amount of water needed to irrigate only the acreage under irrigation in 1913. The court said: It seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial

37. *Conrow v. Huffine*, *supra* note 29 at 444-445.

38. *Quigley v. McIntosh*, *supra* note 24.

use has been proven, cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decreed, to the injury of subsequent appropriators. . . for by what constitutes an additional or third use or appropriation by the first user, an intervening appropriation by a second user, although earlier in time, might be entirely destroyed. Of course, water must be appropriated and decreed under our system for some useful and beneficial purpose. [citation] The proof of the existence of such purpose and the use applied to the same, as shown in the original case, of necessity formed the basis for the awards finally given in the 1913 decree.³⁹

Further authority on this point comes from *Brennan v. Jones*,⁴⁰ the case in which an irrigation company purchased high-priority downstream rights on Skalkaho Creek and then diverted water out of the watershed, continuously, in an amount equal to the miners' inches decreed to its vendors. The critical issue in the case was the point being discussed in this subsection, and the holding was that since a water right cannot be enlarged by sale and purchase, the purchaser can divert only so much water as his vendor would have needed for the purposes of his appropriation — very likely not a continuous flow of his decreed volume.

H. *Recapitulation of the Difficulties*

The holdings of the Montana supreme court point up various difficulties in Montana's water law; they may be reviewed in capsule form. If a water right were as simple and certain, and if adjudications were as conclusive as have sometimes been supposed, then the following statements would surely be true. But none of them can be relied upon, and there is authority that each one of them is false.

1. Since the 1885 statute says "[A]ny person hereafter desiring to appropriate . . . must post a notice . . . [and] shall file with the county clerk . . . a notice of appropriation . . ." one must now make a written record of any new appropriation.⁴¹
2. The county clerk's records of appropriations are a good and useful source of information for ascertaining who has water rights (since 1885) and the extent of those rights.⁴²
3. If the first appropriator on a stream applies a known rate of flow to a

39. *Id.* at 505.

40. *Brennan v. Jones*, 101 Mont. 12, 52 P.2d 164, and *see*, discussion *supra* note 23.

41. The statute is R.C.M. 1947, § 89-810, but it need not be complied with. *Murray v. Tingley*, 20 Mont. 260, 269, 50 P. 723 (1897); *Musselshell Valley Farming & Livestock Co. v. Cooley*, 86 Mont. 276, 290-291, 283 P. 213 (1929); *Bailey v. Tintinger*, 45 Mont. 154, 171-172, 122 P. 575 (1912); *Clausen v. Armington*, 123 Mont. 1, 14, 212 P.2d 440 (1949).

42. *Id.*, and *see*, discussion *supra* note 19.

beneficial use, that rate is his permanent right, and he will be decreed priority to that flow, limited only by his current needs.⁴³

4. In an original adjudication the appropriators will be decreed the amounts that they diverted and put to a beneficial use.⁴⁴

5. If one sells a water right, say, for example, one for 500 miners' inches, the purchaser acquires a right to take 500 inches, at least so far as persons unaffected by the change of location of diversion and use are concerned.⁴⁵

6. Once all of the water users on a creek have been joined and their rights adjudicated, the decree is conclusive and the disputes are over, because they have had their "rights settled in one action" per R.C.M. 1947, § 89-815.⁴⁶

7. When different parties have had their rights decreed in different adjudications a water commissioner can be appointed by the district judge to allocate the water in accordance with the priorities set forth in the decrees.⁴⁷

8. A user who has already been decreed a quantity of water will be protected in his decreed right against a latecomer who has no decreed right.⁴⁸

9. A user who is able to accomplish the purpose of his appropriation with less than his decreed right, as e.g., through greater efficiency of use, can apply his surplus property (his water) to some other beneficial use.⁴⁹

It is not here contended that water rights should be so simple and mechanically administered that all of the foregoing statements *should* be true. But these statements do represent pretty much what the public and even water users believe about water rights, and what the public and the users desire. To come closer to that belief and this desire, clarifying legislation is needed to supply guidelines which courts or administrators could then follow, and which would remove many of the uncertainties created over the past century by our case-by-case, judicially formed water law. Some suggestions with respect to such legislation will follow.

III. "ADMINISTRATION, CONTROL, AND REGULATION"

Montana's new constitution commands:

The legislature shall provide for the administration, control, and

43. See, discussion *supra* notes 20 to 24.

44. See, discussion *supra* notes 25 and 26.

45. See, discussion *supra* notes 27 and 28.

46. See, discussion *supra* notes 29 to 33.

47. See, discussion *supra* notes 34 to 36.

48. See, discussion *supra* notes 32 and 33.

49. See, discussion *supra* notes 37 to 40.

regulation of water rights. . . .⁵⁰

Quite properly, the constitution is silent with respect to just what the legislature must do and how it should be implemented. What are the principal needs which the legislature should examine?

A. *There Must Be a Conclusive Ascertainment of Existing Rights*

Providing for a conclusive ascertainment of existing rights is the foundation for building a more rational and orderly structure of water law. Montana has three codified methods of adjudicating water rights. One of them provides for the State Engineer (now the Department of Natural Resources and Conservation) to bring actions to adjudicate streams,⁵¹ but these code sections have never been implemented. The non-use of this method may be attributable to the fact that the code does not provide for publication of summons so as to join, and bind, all persons, whether or not they receive actual notice of the proceedings and put forth their claims for adjudication. Consequently, any proceeding under these code sections would not be conclusive, and any decree emanating therefrom would be subject to attack by any person who was not a party.

A second adjudication provision authorizes the State Water Conservation Board (now also the Department of Natural Resources and Conservation) to adjudicate its sources of supply for state projects,⁵² and hence is more narrow than the statutes described in the foregoing paragraph. It also has not been of use, and suffers from exactly the same deficiencies as those statutes first discussed — again, a lapse in legislative draftsmanship.

The third provision for adjudicating water rights has been used frequently; in fact, it has been used over and over again for adjudicating and re-adjudicating the same water rights.⁵³ That is because it is the basic provision in Montana law expressly authorizing private litigation over water rights, and hence it is invoked whenever a dispute arises over water rights. But it also suffers from the same deficiencies as the previously discussed methods — there is no provision for publication of notice which binds all persons who might claim an interest in a stream whether or not they receive actual notice and put forth their claims for adjudication. Nor has it prevented multiple litigation between the same parties.⁵⁴

In other western states there are three predominant methods for settling water rights: the Wyoming system, the Oregon system, and the

50. MONT. CONST. art. IX, § 3(4) (1972).

51. R.C.M. 1947, §§ 89-847 to 89-855.

52. R.C.M. 1947, § 89-118.

53. R.C.M. 1947, § 89-815.

54. *See, supra* note 29.

system derived from the Bien Code.

The Wyoming system⁵⁵ authorizes the Board of Control to select streams for adjudication, to publish notice of the investigation and hearing, and (after a hearing by the Division Superintendent) to make the determination of rights which is conclusive and binding upon all. An aggrieved person may appeal to the courts.

The Oregon system⁵⁶ starts out similarly to the Wyoming system, in that the State Engineer publishes and mails notice, conducts an investigation and hearing, and makes a determination of all rights. But then this administrative order of determination is filed in a circuit court, where interested parties may file exceptions, and from which emanates a final court decree of adjudication which is conclusive and binding upon all, subject to appeal to the Supreme Court of Oregon.

The Bien Code system⁵⁷ derives its name from Morris Bien of the U.S. Reclamation Service who drafted this system of stream adjudication in 1903. It provides for an administrator such as the State Engineer to prepare a hydrographic survey and transmit it to the state Attorney General, who then brings an action in court based upon the Engineer's findings and determinations. Some of the states which use the Bien Code provide for publication of notice and a conclusive decree.⁵⁸

The following is a summary chart of the systems in effect in the Western states:⁵⁹

55. WYO. STATS. ANN. (1947) §§ 41-165 to 41-193.

56. OREG. REV. STATS. (1971) §§ 439.202 to 439.200.

57. N. MEX. STATS. ANN. (1953) §§ 74-4-2 to 75-4-6.

58. N. MEX. STATS. ANN. (1953) §§ 75-4-2 to 74-4-6; UTAH CODE ANN. (1953) § 73-4-22; REV. CODE WASH. ANN. § 90.03.220. *See*, table which follows and notes cited thereunder.

59. ALASKA STATS. ANN. (1962) §§ 46.15-010 to 46.15.135; ARIZ. REV. STATS. (1956) §§ 45-231 to 45-243; WEST'S ANN. WATER CODE, §§ 2501 to 2527, 2750, 2767, 2774; COLO. REV. STATS. (1963) 1971 PERM. CUM. SUPP., §§ 664-31 to 664-36; IDA. CODE ANN. §§ 42-1406 to 42-1411; KAN. STATS. ANN. §§ 82a-704 and 82a-724; R.C.M. 1947, §§ B9-847 to 89-855, 89-118, 89-815; NEBR. R.R.C. (1943), §§ 46-229.03 to 46-230; NEV. REV. STATS. §§ 533.090 to 533.205; N. MEX. STATS. ANN. (1953) §§ 75-4-2 to 75-4-6; N. DAK. CENT. CODE, §§ 61-03-15 to 61-03-19; OKLA. STATS. ANN. §§ 82-6 to 82-14; OREG. REV. STATS. (1971) §§ 539.020 to 539.200; S. DAK. COMP. LAWS (1967) §§ 46-10-1 to 46-10-8; VERNON'S TEXAS CODE ANN., WATER CODE, §§ 5.303 to 5.322; UTAH CODE ANN. (1953) § 73-4-1 to 73-4-22; REV. CODE WASH. ANN. §§ 90.02.110 to 90.03.220; WYO. STATS. ANN. (1957) §§ 41-165 to 41-193.

| State | Type of System | Who Investigates & Hears? | Who's Word is Final | Comment | Provide for Publication? | Conclusive? | How Court Becomes Engaged |
|--------------------|----------------|--------------------------------|---------------------|---|--------------------------|----------------------------------|----------------------------|
| Alaska | Wyo. | Comm/Nat. Res. | Comm/Nat. Res. | | Yes | Impliedly | Appeal |
| Ariz. | Oreg. | St. Land Dept. | Court | | Yes | Yes | Filed in Court |
| Calif. | Oreg. | Water Res. Bd. | Court | | Yes | Yes | Filed in Court |
| Colo. | | Referee under a Water Judge | Court | Prior adjds. take priority | Yes | Yes | Court proceeding |
| Hawaii | | Court | Court | Private party or state may bring suit. | Yes [~] | Yes, except persons out of state | Court proceeding |
| Ida. | Oreg. | St. Recl. Eng. | Court | | Yes | Yes | Filed in Court |
| Kans. | Oreg. | Chief. Eng'r. | Court | Determination does not settle rights inter-sece but an appeal would have that result ¹ | Yes | Yes if appealed to Court | Appeal by anyone aggrieved |
| Mont. ² | | 1. Dept./Nat. Res. 2. Court | Court Court | Private suit. | No No | No No | Court proceeding |
| Nebr. | Wyo. | Dir/Water Res. | Dept/ Nat. Res. | | Yes | Yes | Appeal |
| Nevada | Oreg. | St. Eng'r. | Court | St. Eng delivs. Hydr. survey to Atty. Gen. who sues. Court may use referees. | Yes | Yes | Filed in Court |
| N. Mex. | Bien | St. Eng'r. | Court | | Yes | Yes | Court proceeding |
| N. Dak. | Bien | St. Eng'r. | Court | Same as N. Mex. Says all claimants shall be joined. | No | ? ³ | Court proceeding |

¹Kans. Stats. Ann. § 82a-704 provides for the chief engineer to make an investigation and an order determining all rights prior to 1945 (post-1945 rights are by permit) but further provides that his determination is not an adjudication of the relative rights between vested right holders, and hence may be an inconclusive, limited proceeding. But the proceeding apparently will determine the state's administration of water rights, and an aggrieved person may appear under K.S.A. § 82a-724. It would seem that the decree on appeal would be a conclusive adjudication.

²R.C.M. 1947, § 89.118, briefly discussed, *supra* note 52, is omitted, as it does not appear to be a general adjudication statute, but merely one enabling the Dept. of Nat. Res. & Cons. to adjudicate its sources of supply for state projects, and the rights on streams where there are such projects.

³Whether North Dakota has provided for a conclusive adjudication seems in doubt. The legislative intent seems to be present, for "... all who claim the right to use such waters shall be made parties. . . ." N.Dak. Cent. Code § 61-03-17, and all who claim a right shall be joined in the suit by the attorney general, § 61-03-15. But there is no provision for service by publication, and hence there remains the possibility of unjoined claimants.

| State | Type of System | Who Investigates & Hears? | Who's Word is Final | Comment | Provide for Publication? | Conclusive? | How Court Becomes Engaged |
|-------|----------------|---------------------------|---------------------|--|--------------------------|---------------------------|----------------------------|
| Okla | 1. Bien | Water Res Bd | Court | Board delivs. hydr survey to Atty Gen who sues claimants ⁴ | No | No | Court proceeding |
| | 2. Oreg | Water Res Bd | Court | Same as Kansas ⁵ | Yes | Yes, if appealed to Court | Appeal by anyone aggrieved |
| Oreg | Oreg | St Eng'r | Court | | Yes | Yes | Filed in Court |
| S Dak | Bien | Water Res Comm | Court | Atty Gen sues, then W. Res Comm makes hydr surv | No | No | Court proceeding |
| Texas | Oreg | Water Rights Comm | Court | | Yes | Yes | Filed in Court |
| Utah | Like Bien | St Eng'r | Court | St Eng'r sues, makes hydr surv & recommends decree | Yes | Yes | Court proceeding |
| Wash | Like Bien | Sup./Water Res | Court | Sup./Water Res files in Court, conducts investg & hearing & reports to Court | Yes | Yes | Court proceeding |
| Wyo | Wyo | Div Suptndt | Bd/Control | | Yes | Yes | Appeal to Court |

⁴Okla. Stats. Ann. § 82-13 provides for permissive joinder of parties, and that those not joined are not bound.

⁵Okla. Stats. Ann. § 82-6 deserves the same comment as that made with respect to Kansas, *supra* note 60.

The foregoing table reveals that among the nineteen western states, Montana is in a minority of three that offer no conclusive water adjudication system. That is why there is so little security or certainty in a Montana water right, and why people have to return to court time and time again to defend what has already been decreed to them.⁶⁰ Surely this should be a primary concern of the legislature under Art. IX, § 3 of the new Montana constitution.

B. Future Water Rights Must Be Acquired By Permit

In addition to providing for a final determination and adjudication of existing and past vested rights, newly acquired rights should be equally definite, certain, and public in record. Montana's present loose law, by which a water right may be acquired simply by making use of water,⁶¹ inherently results in uncertainty, ignorance of what rights there are in a stream, disputes, and litigation. And the statutory method of appropriation, under which a person files with the county clerk a statement of what he hopes to put to a beneficial use,⁶² has exactly the same deficiencies.

The third paragraph of Art. IX, § 3 of the new constitution provides:

All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law. The law should provide for considering all public interests each time a prospective water user seeks to have a part of this property of the state committed to his use. And so the Department of Natural Resources and Conservation, or an agency under that Department should review the benefit to the public, as well as the effect on other water users, of granting an additional franchise to use this public property. That is one reason why a person should be required to secure a permit, in effect a license, to make a new use of Montana's water.

There is another reason for requiring persons to obtain a permit from a state agency which is concerned with water uses: to introduce some control over how much water a person may claim for a particular use.⁶³

And lastly, when a person appropriates under a permit system, both he and anyone else who is interested will be able to ascertain what has been done, what the new appropriator is entitled to do, when he can do it, and what his relationship is to other users.

60. See, discussion *supra* notes 29 to 32.

61. See, discussion *supra* note 41 and 15 to 17.

62. *Id.*

63. Dissatisfaction with existing inadequacies is eloquently expressed in *Allen v. Patrick*, *supra* note 25.

C. *Administering the Resource Should Be Recognized As An Administrative, Not a Judicial Task*

Of course, the use of water in many of the streams of the state is controlled and regulated by the users themselves, without an undue amount of disagreement and conflict. Those users have no present need or desire for an outside administrator, and may never have such a need. They should be left undisturbed. But other water users on other streams cannot do without a water commissioner to open and close headgates and generally oversee the uses of the water.

Montana law provides that after there has been an adjudication, and after application by the owners of at least fifteen percent of the decreed water rights, the district judge may appoint one or more water commissioners to distribute water to the parties according to their decreed rights,⁶⁴ for so long a period during the irrigation season as the judge finds necessary.⁶⁵ A water user who is dissatisfied with the water commissioner's administration can file a complaint in the district court, whereupon the other affected water users are notified and the matter is set for a hearing — *i.e.*, a trial which culminates in an order by the judge either confirming the commissioner's administration or instructing him on the proper distribution of the water.⁶⁶ Any party aggrieved by the district judge's order may appeal to the Montana supreme court.⁶⁷

The foregoing system of administration of water rights has serious disadvantages for everyone involved with it. In the first place, there has to be a water rights lawsuit before there can be *any* administration,⁶⁸ and such suits are both costly and time consuming. Then, if there is dissatisfaction or disagreement, the only recourse that a person has is to file a complaint in the district court and engage in another expensive and time consuming lawsuit.⁶⁹ The district judge, already burdened with more typically legal matters, must maintain familiarity with all of the factual details concerning the use and distribution of water within his district, in order to be competent to appoint commissioners and supervise their various activities. In effect, the district judge is compelled to act as the district supervisor of

64. R.C.M. 1947, § 89-1001. This statute also authorizes the appointment of one or more water commissioners by petition of less than 15% of such owners if they can show that they are unable to obtain the water to which they are entitled.

65. R.C.M. 1947, § 89-1004.

66. R.C.M. 1947, § 89-1015.

67. Quigley v. McIntosh, *supra* note 24; Whitcomb v. Murphy, *supra* note 12; State *ex rel.* McKnight v. District Court, *supra* note 36; Allen v. Wampler 143 Mont. 486, 392 P.2d 82 (1964).

68. R.C.M. 1947, § 89-1001. And *see*, the equitable proceedings for injunction: Parsons v. Mussigbrod, 59 Mont. 336, 196 P. 528 (1921); Irion v. Hyde, 107 Mont. 84, 81 P.2d 353 (1938).

69. Which lawsuit, under R.C.M. 1947, § 89-1015, can only affect parties to the prior adjudication. State *ex rel.* Reeder v. District Court, *supra* note 33.

water uses, a job for which he has no special training or expertise.⁷⁰

District judges and their water commissioners have no authority to administer or control uses of water by persons who were not parties to an adjudication.⁷¹ That too should be changed.

District supervisors are needed to direct the water commissioners, and they should be trained in engineering, hydrology, and administration. They should be responsible to the Department of Natural Resources and Conservation or an agency under that Department. And they should have authority for "the administration, control, and regulation"⁷² of *all* water uses, not just those of parties to a law suit.

Then, when disagreements or disputes arise, an expeditious, relatively informal, and inexpensive administrative hearing before the district supervisor can be held to settle differences. Although a person may obtain judicial review of an order by a district supervisor, it is likely that most proceedings will end at this administrative level. Water users would thus have a faster and less costly adjustment and settlement of conflicts by a person qualified and specialized in water resource matters. People simply should not have to engage in a law suit every time a conflict arises over the distribution of water.

IV. CONCLUSION

(1) There must be a conclusive ascertainment of existing rights; (2) future water rights — must be acquired by permit; and (3) administering the resource should be recognized as an administrative, not a judicial task. These three areas broadly sketched in the preceding section are the ones to be focused upon and developed if legislation is to create order and clarity in our water laws in place of the *ad hoc* improvisation on a case-by-case basis which is the situation today. The new constitution has put responsibility for action upon the legislature.

70. See, the protest against this burden by one district judge, quoted in Stone, *Problems Arising Out of Montana's Law of Water Rights*, 27 MONT. L. REV. 1, 13-14 (1965).

71. State ex rel Reeder v. District Court, *supra* note 33.

72. MONT. CONST. art. IX, § 3(4) (1972).

