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MONTANA GROUNDWATER LAW IN THE TWENTY-FIRST CENTURY

John B. Carter*

I. INTRODUCTION

Groundwater is a poorly understood natural resource in the law. In the last few decades, Montana courts have embraced hydrologic reality by addressing the subject from a scientifically sound perspective. While much still requires clarity, two twenty-first century Montana Supreme Court decisions have provided definition to divergent aspects of the law of groundwater. The first, *Confederated Salish and Kootenai Tribes v. Stults*,¹ confirmed that groundwater is a component of federal Indian reserved water rights. The second, *Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation*,² addressed the unitary nature of surface water and groundwater. This article will briefly address the status of federal and Montana state groundwater law prior to these decisions and then discuss the two Montana Supreme Court decisions.

II. BACKGROUND

A. Montana Water Law

The original Montana Constitution, enacted in 1889, addressed all aspects of water in a single sentence. It simply proclaimed that all water appropriated within the state of Montana for beneficial use is deemed a public use.³ Before the enactment of the new Constitution in 1972, Montana had no centralized system for obtaining, recording, regulating, or adjudicating water usage in the state.⁴ A person could simply divert and put water to use, post a claim onsite, or record a use in the local territorial or county office.⁵ However, the common thread was, and continues to be, a

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1. *Confederated Salish & Kootenai Tribes v. Stults*, 59 P.3d 1093 (Mont. 2002) [hereinafter *Ciotti III*].

2. *Mont. Trout Unlimited v. Mont. Dept. of Nat. Resources & Conserv.*, 133 P.3d 224 (Mont. 2006).

3. Mont. Const. art III, § 15 (1889) (superseded on 1972 by Mont. Const. art. IX, § 3 (1972)).

4. Donald Duncan MacIntyre, *The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure*, 49 Mont. L. Rev. 211, 216 (1988).

5. *Id.*

claimed adherence to the concept of “beneficial use” under the prior appropriation doctrine.⁶

The 1972 Constitution significantly elaborated on the treatment of water. The present provisions, contained in Article IX, Section 3, establish four principles. First, all existing rights to water for beneficial uses as of 1973 are confirmed.⁷ Second, all uses of water and attendant rights-of-way, ditches, and reservoirs are deemed public uses.⁸ Third, all water, including “underground” water, is identified as the property of the State for the use of the people.⁹ Fourth, the Montana Legislature was directed to create a unitary system of recordation, of administering, adjudicating, and regulating water rights.¹⁰ Although already firmly established in federal law by 1972, Indian or federally reserved water rights were not mentioned in the new Constitution.¹¹ That omission facilitates divisive litigation involving the Indian Nations, non-Indian water users, the United States, and the State of Montana.¹²

In response to the 1972 constitutional mandate, the Montana Legislature enacted the Montana Water Use Act in 1973 (“Act”).¹³ In a nutshell, the Act created (1) a centralized system of recording and filing claims for all water uses existing as of 1973,¹⁴ (2) a centralized system for obtaining permits for new water uses initiated after 1973,¹⁵ and (3) a state-wide general adjudication system for all water rights claims for pre-1973 water uses.¹⁶

In the 1979 legislative session, the Legislature created a system no other state has had the foresight to undertake. It amended the Act by creating the Montana Reserved Water Rights Compact Commission (“Commis-

6. “Beneficial use” is defined at Montana Code Annotated Section 85–2–102(4) (2007).

7. Mont. Const. art. IX, § 3(1).

8. *Id.* at art. IX, § 3(2).

9. *Id.* at art. IX, § 3(3); *but see Mont. ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 767 (Mont. 1985) (stating “Indian reserved waters are ‘owned’ by the Indians”).

10. Mont. Const. art. IX, § 3(4).

11. John B. Carter, *Indian Aboriginal and Reserved Water Rights, An Opportunity Lost*, 64 Mont. L. Rev. 377, 377 (2003).

12. *Id.* at 382 (citing *Confederated Salish & Kootenai Tribes v. Mont.*, CV–81–147 (D. Mont. 1981); *Confederated Salish & Kootenai Tribes v. Flathead Irrigation & Power Project*, 616 F. Supp. 1292 (D. Mont. 1985); *Confederated Salish & Kootenai Tribes v. Simonich*, 29 F.3d 1398 (9th Cir. 1994); *In the Matter of the Application for Beneficial Water Use Permit Nos. 66456–76L, Ciotti*, 64988–G76L, *Starnier*, 923 P.2d 1073 (Mont. 1996) [hereinafter *Ciotti I*]; *Confederated Salish & Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999) [hereinafter *Ciotti II*]; *Ciotti III*, 59 P.3d 1093; *Confederated Salish & Kootenai Tribes v. Clinch*, BDV–2001–253 (1st Jud. Dist. Mont. 2001); *Jt. Bd. of Control of Flathead, Mission & Jocko Irrigation Dists. v. U.S.*, 832 F.2d 1127 (9th Cir. 1987); *Jt. Bd. of Control of Flathead, Mission & Jocko Irrigation Dists. v. U.S.*, 862 F.2d 195 (9th Cir. 1988)).

13. Mont. Code Ann. §§ 85–2–101 to 85–2–907.

14. *Id.* at § 85–2–221.

15. *Id.* at §§ 85–2–301 to 85–2–370.

16. *Id.* at §§ 85–2–201 to 85–2–282.

sion").¹⁷ It vested the Commission with the authority to negotiate, rather than adjudicate, the federally reserved and aboriginal water rights of Indian tribes and of the various federal agencies claiming federally reserved water rights in Montana.¹⁸ Negotiation is not mandatory; a tribe or federal agency may also choose to adjudicate its water rights.¹⁹ However, all proceedings to adjudicate a federally reserved water right are put on stay while negotiations are ongoing.²⁰ To date, five of the seven tribes with reservations, and the vast majority of federal agencies with land holdings in Montana, have negotiated water rights compacts, thus avoiding adjudication.²¹ Interestingly, the Legislature has approved a water rights compact with the Northern Cheyenne Tribe that recognized a tribal right to groundwater under their reservation.²² This legislative recognition of tribal rights in groundwater came years before an unsuccessful effort by the Montana Department of Natural Resources and Conservation to defeat a tribal claim to a reserved right to groundwater under the Flathead Indian Reservation (while those tribes were negotiating with the Commission).²³

The Act is by definition a creature of state law. The Montana Constitution asserts that "all surface, underground, flood, and atmospheric waters . . . are the property of the state."²⁴ Montana has seven Indian reservations within its borders, and each of those tribal nations possesses water rights that are created under and defined by federal—not state—law.²⁵ Historically, water rights deriving from federal law, whether owned by a tribe or a branch of the U.S. government, were immune from state law.²⁶ The United States possessed sovereign immunity from state court adjudication of its federally reserved water rights, but that immunity was waived by Congressional passage of the McCarran Amendment²⁷ in 1952.²⁸

17. *Id.* at §§ 2–15–212, 85–2–701 to 85–2–708.

18. *Id.* at § 85–2–702.

19. Mont. Code Ann. § 85–2–702.

20. *Id.* at § 85–2–217.

21. *See id.* at § 85–20–201. The compact with the Blackfeet Nation is for on-reservation water rights only and, as of the date of this article, not yet finalized.

22. The compact with the Northern Cheyenne Tribe expressly recognizes a tribal right to groundwater under that Indian reservation. Northern Cheyenne-Montana Compact Ratified art. II(B)(4); Mont. Code Ann. § 85–20–301.

23. *Ciotti III*, 59 P.3d at 1096 (addressed in the introduction of this article and discussed herein).

24. Mont. Const. art. IX, § 3(3).

25. *See e.g. Greely*, 712 P.2d at 762 ("The basis for an Indian reserved water right is the treaty, federal statute or executive order setting aside the reservation. Treaty interpretation and statutory construction are governed by federal Indian law.").

26. *Colo. River Conserv. Dist. v. U.S.*, 424 U.S. 800 (1976).

27. 43 U.S.C. § 666 (1952).

28. *Ariz. v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 564 (1983).

On its face the McCarran Amendment did not address Indian water rights. It simply waived the immunity of the United States and allowed joinder:

1. for the adjudication of rights to the use of water of a river system or other water source, or
2. for the administration of such rights, where it appears the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.²⁹

This Western-states-inspired legislation was deemed necessary to allow each state to comprehensively adjudicate all claims to water within its boundaries.³⁰ Prior to McCarran, federal and Indian water rights were adjudicated, if at all, exclusively in federal court.³¹ Given the interrelated nature of water resources within a watershed, this jurisdictional dichotomy frequently led to inconsistent or conflicting state and federal decrees, as well as essentially unsolvable disputes between Indian and non-Indian claims to water.³² While the McCarran Amendment does not waive tribal immunity from state courts, the United States Supreme Court held that the United States, as trustee for Indian water, can be joined in a state water adjudication and may quantify tribal rights in its trustee capacity (whether or not the tribe participates).³³ This determination is based on the federal trusteeship of Indian reserved and aboriginal water rights.³⁴ Therefore, unless tribes are willing to rely on the United States' representation of tribal water rights, it behooves the tribes to commit to a limited waiver of immunity in adjudications of state water rights to prosecute and protect their own claims to water. Failure to do so often results in diminished tribal water rights.³⁵

B. Indian Reserved and Aboriginal Water Rights

The field of Indian reserved water rights is one hundred years old and still hotly disputed. It arose out of a water rights dispute on the Fort Belknap Indian Reservation in Montana in a case called *Winters v. United States*.³⁶ *Winters* is the foundation case for the Indian reserved water rights

29. 43 U.S.C. § 666(a).

30. *Id.*

31. *Greely*, 712 P.2d at 759; *San Carlos Apache Tribe*, 463 U.S. at 566–567; *Colo. River Water Conserv. Dist.*, 424 U.S. at 820 n. 26.

32. *San Carlos Apache Tribe*, 463 U.S. at 569 (citing *Colo. River Water Conserv. Dist.*, 424 U.S. at 819–820).

33. *Nev. v. U.S.*, 463 U.S. 110, 142 (1983).

34. *Id.* at 144.

35. *Id.*

36. *Winters v. U.S.*, 207 U.S. 561 (1908).

doctrine.³⁷ The *Winters* Court concluded that, even though an Indian treaty might be completely silent about water use, if the purposes for which the reservation was created depend upon water, sufficient water to satisfy those purposes are impliedly reserved to the Indians in perpetuity.³⁸ The Indian Reservation's priority date for the water is generally the date of the treaty, executive order, or act of Congress pursuant to which the reservation was created.³⁹

Subsequent federal case law confirmed that when a tribe utilizes water before the date of the treaty, the tribe also possesses "aboriginal rights" to continue using that water regardless of the equities to junior users—frequently non-Indian settlers.⁴⁰ Aboriginal water rights are frequently manifested as in-stream flows necessary to preserve treaty-reserved fishing rights.⁴¹ Aboriginal water rights have a priority date of "time immemorial,"⁴² a fairly hard date to beat in Western water law.

Nearly eighty years after *Winters*, the Montana Supreme Court took a hard look at the reserved and aboriginal water rights of one Montana Indian Nation.⁴³ The Court in *Montana ex relatione Greely v. Confederated Salish and Kootenai Tribes* determined, among other things, that federal law trumped the Montana Constitution's assertion of state ownership of all water within the state.⁴⁴ Indian reserved water rights are owned by the United States in trust for the tribes.⁴⁵ The *Greely* Court also found that the purposes for which the Flathead Indian Reservation was created are quite broad⁴⁶ and include irrigation, domestic, industrial, commercial, and in-stream flow needs for fish and wildlife, as well as future uses not yet developed.⁴⁷

Within the proscriptions of the McCarran Amendment, Indian reserved and aboriginal water rights generally are not subject to the substantive laws of the states;⁴⁸ state courts have a "solemn obligation to follow federal law" for those limited state authorities allowed under the McCarran Amendment.⁴⁹

37. William H. Veeder, *Winters Doctrine Rights: Keystone of National Programs for Western Land and Water Conservation and Utilization*, 26 Mont. L. Rev. 149, 150 (1965).

38. *Winters*, 207 U.S. at 577.

39. *Greely*, 712 P.2d at 767.

40. *Jt. Bd. of Control of Flathead, Mission & Jocko Irrigation Dists.*, 832 F.2d at 1132.

41. *Id.*; *U.S. v. Adair*, 723 F.2d 1394, 1408–1411 (9th Cir. 1983).

42. *Jt. Bd. of Control of Flathead, Mission & Jocko Irrigation Dists.*, 832 F.2d at 1131.

43. *Greely*, 712 P.2d 754.

44. *Id.* at 760, 766.

45. *Id.* at 767.

46. *Id.* at 763.

47. *Id.* at 765.

48. *Id.*

49. *Greely*, 712 P.2d at 766 (quoting *San Carlos Apache Tribe*, 436 U.S. at 571).

C. *The Evolution of the Treatment of Surface and Ground Water by State Courts*

The political treatment of groundwater encompasses a broad spectrum of approaches. Historically, groundwater was viewed as a stand-alone resource used and managed as an independent substance without regard to surface water. For example, Colorado distinguishes between groundwater that is “underflow,” “tributary,” and “nontributary” to surface water.⁵⁰ Arizona designates some, but not all, groundwater as “subflow.”⁵¹ Subflow is comprised of waters that “slowly find their way . . . and are themselves a part of the stream” and, therefore, subject to the prior appropriation doctrine.⁵² Arizona also recognizes “percolating” water, which is supposedly not connected to surface water and, therefore, subject to the “reasonable use” doctrine, which effectively allows the owner of the surface to take what he or she wants.⁵³

The Arizona Supreme Court has labeled these and similar distinctions as an “artifice” that rests upon “hydrologic misconceptions.”⁵⁴ The *Gila River* Court was the first state supreme court to recognize that groundwater under an Indian reservation can comprise one component of a tribe’s *Winters* reserved water rights. The *Gila River* Court concluded:

[I]f the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations’ needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.⁵⁵

This conclusion was predicated on the Court’s observation that most prior appropriation jurisdictions have conformed “their law to hydrological reality” and have “abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies.”⁵⁶

While it is recognized that there are groundwater resources that exhibit more or less connectivity to surface water supplies, there will inevitably be some degree of hydrologic connectivity. The question is whether or not the degree of connectivity is politically acceptable. As Professor Albert Stone,

50. Colo. Rev. Stat. § 37–82–101 (Lexis 2008).

51. *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739, 743 (Ariz. 1993) [hereinafter *Gila River*].

52. *Id.* (quoting *Maricopa Co. Mun. Water Conserv. Dist. No. 1 v. S.W. Cotton Co.*, 4 P.2d 369, 380 (Ariz. 1931)).

53. *Id.*

54. *Id.*

55. *Id.* at 747.

56. *Id.* at 744.

an expert in Montana water law, wrote, “[S]urface waters contribute to groundwaters, and vice versa: they are interrelated and their effects on one another should be recognized through developments that tend to integrate surface and groundwater.”⁵⁷

III. DEVELOPMENT OF GROUNDWATER LAW IN MONTANA

A. *Surface and Groundwater Were Initially Treated as Unrelated Natural Resources*

Initially, Montana courts treated groundwater and surface water as unrelated resources subject to different laws. In *Leonard v. Shatzer*,⁵⁸ the Montana Supreme Court relied upon no prior Montana case law (and very little other law) to decide an early groundwater case. At issue was the question of whether waters emanating from a spring, which subsequently sank into the ground, contributed to the flow of a nearby down-gradient perennial stream.⁵⁹ The Court reviewed conflicting anecdotal (and no hydrologic) evidence and upheld a lower court determination that there was no connection between the spring and the stream.⁶⁰

The plaintiff argued that merely because water from a spring reached a stream by “subterranean” means, which are not well understood, does not lessen the fact that it contributes to stream flow.⁶¹ Therefore, interference with the spring constituted interference with water rights derived from the stream.⁶² The defendant, on the other hand, argued that in the absence of a clearly defined underground channel or other identifiable subterranean water course, the law of surface water has repeatedly been found not to apply.⁶³

While discussing the surface and groundwater theories of the time, the *Leonard* Court chose not to decide the case on those principles. Rather, noting substantial conflicting evidence, the Court punted, finding that the case failed to “raise any distinction, of law or fact, as to percolating water and channel water, subterranean or superficial; but the matter on this appeal is simply the fact of whether or not the water of the spring in its natural

57. Albert W. Stone, *Montana Water Law* 43 (St. Bar of Mont. 1994).

58. *Leonard v. Shatzer*, 28 P. 457 (Mont. 1892).

59. *Id.* at 459.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 457. Symptomatic of the lack of clarity in early groundwater law, the Court failed to clearly develop the several arguments in the case. That was left to the court reporter to address in the syllabus included in the published opinion in the Montana Reporter (see *Leonard v. Shatzer*, 11 Mont. 422 (1892)).

flow reached the creek at all.”⁶⁴ Given the science of the times, letting the trier-of-fact’s conclusion stand might have been an understandable response.⁶⁵

In *Ryan v. Quinlan*,⁶⁶ the Court was asked to distinguish “seepage” groundwater, deemed to possess a discernable underground channel or stream, from “percolating” groundwater, which was deemed to lack any discernible or well-defined underground flow channel and, therefore, was not a tributary to any particular stream.⁶⁷ The water at issue flowed out of a lake located up-gradient that was some distance from the headwaters of Dempsey Creek.⁶⁸ After flowing from the lake in a well-defined channel, it eventually subsided and produced no discernible channel for the remaining distance to Dempsey Creek.⁶⁹ While the evidence was found to support a hydrogeologic conclusion that the lake water could logically flow underground and contribute to the flow of Dempsey Creek, there was no visible surface or subsurface connection.⁷⁰

Regardless, having asserted the lack of a connection between the waters of the lake and Dempsey Creek, an irrigator junior to surface water claims on Dempsey Creek sought to augment his usage by asserting a right to waters from the lake.⁷¹ He accomplished this by damming the lake and diverting lake water into a newly-constructed ditch that carried this combined stored and diverted water to Dempsey Creek, from which he subsequently diverted it for his use.⁷² In essence, he argued he had created new water and was entitled to divert it.⁷³

The *Ryan* Court concluded that if evidence showed that the lake water, “however small in volume, reaches the creek by reasonably ascertainable channels, it is one of its sources of supply.”⁷⁴ To defeat the plaintiff’s claim, the defendant must prove that, “if uninterrupted, the flow finds its way into the creek by a defined channel either upon the surface or under-

64. *Leonard*, 28 P. at 459.

65. In *Hilger v. Zabel*, 98 P. 881, 881 (Mont. 1909), a case similarly lacking in citation to Montana case law (and also lacking any scientific evidence), the Court made passing reference to conveyance of water by “subterranean channel” to surface expression as a spring. Hydrologic science has yet to cast its imprint on Montana groundwater law.

66. *Ryan v. Quinlan*, 124 P. 512 (Mont. 1912).

67. *Id.* at 514.

68. *Id.*

69. *Id.* at 513.

70. *Id.* at 515.

71. *Id.* at 514.

72. *Ryan*, 124 P. at 514.

73. *Id.*

74. *Id.* at 515.

ground” and the plaintiff’s diversion of it diminishes the flow of water in the creek.⁷⁵ The Court noted:

[After water] seeps into the earth, it mingles with the soil and remains suspended therein, or moves through it either by percolation, thus losing its identity as a flowing stream, or passes away by one or more defined channels. . . . It has been settled by a long line of decisions that percolating water is not governed by the same rules that are applied to running streams. ‘The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams [which, unlike groundwater, have] no secret influences move them We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land as one of its natural advantages, and in the eye of the law a part of it’⁷⁶

Accordingly, as of 1912, while the surface estate owner was entitled to unregulated use of “percolating” water taken from under his land, the State had a legitimate interest in regulating “seepage” water under the same land.⁷⁷ The Court recognized that “[s]ubsurface water flowing in defined channels reasonably ascertainable is subject to the same rules as water flowing in surface streams; but there is no presumption that any subsurface water, in whatever form it may be found, is tributary to any stream.”⁷⁸ Rather, it must be proven by the introduction of substantial evidence, which the *Ryan* Court noted was “remarkable for what it fails to show rather than what it does show,”⁷⁹ and, therefore, the Court directed a new trial. While establishing no new substantive law, and perpetuating the old dichotomy, the case might have prompted more stringent scientific analysis of future groundwater disputes.

When finally presented with scientific groundwater evidence, the Montana Supreme Court embraced it. *Perkins v. Kramer*⁸⁰ marked Montana’s transformation to the progressive, science-based treatment of groundwater. The dispute in *Perkins* started in 1921 as yet another dispute over water rights in Dempsey Creek.⁸¹ Under an early decree, Perkins diverted a fork of Dempsey Creek during spring runoff into natural depressions, or “potholes,” located on a plateau.⁸² During the summer months, the water

75. *Id.*

76. *Id.* (citing *Chatfield v. Wilson*, 28 Vt. 49 (1855)).

77. *Id.* at 515–516.

78. *Ryan*, 124 P. at 516.

79. *Id.* at 515.

80. *Perkins v. Kramer*, 423 P.2d 587 (Mont. 1966).

81. See generally Albert W. Stone, *The Long Count on Dempsey Creek: No Final Decision on Water Right Adjudication*, 31 Mont. L. Rev. 1 (1969).

82. *Perkins*, 423 P.2d at 588.

would percolate into the ground.⁸³ Perkins would capture the water in ditches, and the water would run back into the creek after being “measured.”⁸⁴ That amount of water, “less shrinkage” (presumably evaporation and canal seepage), was diverted by Perkins further downstream.⁸⁵

By 1950, time and additional Dempsey Creek water users came into play, necessitating a court-appointed water commissioner to address a dispute over the “seepage” water.⁸⁶ The commissioner undertook daily measurement of the seepage water using then-modern hydrologic measurement technology.⁸⁷ The Court identified the real issue to be whether Mr. Perkins had satisfied the burden of proving that the seepage water at issue came from his “potholes.”⁸⁸ According to testimony of a “qualified geological engineer,” significantly more seepage water was available than the potholes could possibly contain, thereby demonstrating, *inter alia*, an independent groundwater contribution.⁸⁹

The *Perkins* Court found that “[m]odern hydrologic innovations have permitted more accurate tracing of groundwater movement” and “traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists.”⁹⁰ The Court opened the door for the eventual dissolution of the “artifice” of non-conjunctive water management.

Subsequently, in a case questioning ownership of water under state school trust lands, the Court found, “[s]ubject to Title 85, Chapter 2, Part 5 MCA, groundwater appropriated and used on State land should be treated no differently than surface waters appropriated and used on those lands. The Montana Constitution . . . and the Montana Water Use Act . . . make no distinction between ground water and other water rights.”⁹¹ Finding thus, the Court held that Montana, not a lessee, retains title, while a lessee is entitled to a water-use right appurtenant to the land.⁹² More significantly, however, the Court recognized the concept of conjunctive management of surface water and groundwater under the Act.⁹³

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 589.

87. *Id.*

88. *Perkins*, 423 P.2d at 590.

89. *Id.*

90. *Id.* at 591.

91. *Dept. of St. Lands v. Pettibone*, 702 P.2d 948, 957 (Mont. 1985).

92. Appellants urged the Court to find a *Winters*-type federal reserved right for the state sections, which the Court declined to do, adhering to state-based water law instead. *Id.* In a special concurring opinion, Justice Morrison regretted any reference to *Winters*, fearing it may “effect the adjudication of Indian water rights.” *Id.* at 958.

93. *Id.* at 951.

The volume and flow of groundwater is not the only concern for people living in rural Montana.⁹⁴ Montanans are entitled to a constitutionally protected “clean and healthful environment.”⁹⁵ *Montana Environmental Information Center v. Department of Environmental Quality* involved environmental permitting of groundwater dewatering and discharge, as well as a mining company’s underground injection proposal for the upper drainage of the Blackfoot River in Western Montana.⁹⁶ In essence, the company sought to pump groundwater from the mine site and to dispose of it by re-injection into groundwater “mixing zones” near the Blackfoot River.⁹⁷ A “mixing zone” is “a portion of the aquifer receiving discharge where water quality standards may be exceeded in order to allow mixing with the receiving water”—here, the Blackfoot River.⁹⁸ Various studies demonstrated the groundwater at the pump sites contained arsenic at levels exceeding water quality standards.⁹⁹

However, as measured in the river below the mixing zones, arsenic concentrations were lower than Montana’s surface water and groundwater standards, yet higher than concentrations in the receiving river water.¹⁰⁰ The Court concluded that the constitutional right to a clean and healthful environment was implicated because arsenic is a known carcinogen, and the addition of a known carcinogen in concentrations “greater than the concentrations of those parameters in the receiving waters has a significant impact,”¹⁰¹ which requires environmental review even if a strict water quality standard has not been violated.¹⁰²

Prior to the 1972 Montana Constitution’s guarantee of a clean and healthful environment, *Nelson v. C & C Plywood Corporation* effectively guaranteed Montanans that same right through tort law.¹⁰³ In *Nelson*, the plaintiffs built their lives around a small farm in a rural, residential portion of Flathead County.¹⁰⁴ They relied for years on shallow groundwater wells

94. Even the question of when groundwater becomes surface water is a bit unclear. The right of the public to fish Mitchell Slough, a component of the Bitterroot River, was based in part upon the Court’s review of hydrologic evidence that groundwater was a significant contributor to the surface flow of the Slough. Some of that groundwater was originally surface water applied for irrigation. *Bitterroot River Protective Assn. v. Bitterroot Conserv. Dist.*, 198 P.3d 219, 223–224 (Mont. 2008).

95. *Mont. Env. Info. Ctr. v. Dept. of Env. Quality*, 988 P.2d 1236, 1246 (Mont. 1999); Mont. Const. art. II, § 3.

96. *Mont. Env. Info. Ctr.*, 988 P.2d at 1237.

97. *Id.* at 1238.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1249.

102. *Mont. Env. Info. Ctr.*, 988 P.2d at 1249.

103. *Nelson v. C & C Plywood Corp.*, 465 P.2d 314, 323–324 (Mont. 1970).

104. *Id.* at 315.

for domestic use and farming with no water quality issues.¹⁰⁵ Subsequently, a plywood manufacturing company commenced production adjacent to the Nelsons' property and caused the disposal of glue waste in a surface water drainage that crossed the Nelsons' property.¹⁰⁶ Tracing the role of science in the developing law of groundwater—from *Ryan v. Quinlan*¹⁰⁷ to *Perkins v. Kramer*¹⁰⁸—the Supreme Court reviewed studies of the local hydrology and groundwater quality¹⁰⁹ and concluded the plywood plant caused the groundwater pollution as a “continuing temporary nuisance.”¹¹⁰

B. Federal Groundwater Law in Montana and Elsewhere

Soon after the Montana Supreme Court decided *Perkins*, the Montana federal district court addressed the nature of groundwater on the Blackfeet Indian Reservation in *Tweedy v. Texas Company*.¹¹¹ At issue was the ownership of groundwater under fee title land owned by a non-Indian on the Blackfeet Indian Reservation.¹¹² Because the surface estate in *Tweedy* was contained within the exterior boundaries of the Blackfeet Indian Reservation, the water ownership analysis began with a look at federal Indian law.¹¹³ The court reasoned that when the Blackfeet Indian Reservation was created, “the waters of the reservation were reserved for the benefit of the reservation lands.”¹¹⁴ Basing this premise on the *Winters* ruling, and noting that *Winters* dealt only with surface water, the court concluded:

[T]he same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.¹¹⁵

Carrying this thought further, the *Tweedy* court noted that the prior appropriation doctrine “increasingly is being applied to underground waters.”¹¹⁶

105. *Id.*

106. *Id.*

107. *Ryan*, 124 P. 512.

108. *Perkins*, 423 P.2d 587.

109. *Nelson*, 465 P.2d at 320–321.

110. *Id.* at 325.

111. *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968).

112. *Id.* at 383.

113. *Id.* at 385.

114. *Id.*

115. *Id.*

116. *Id.* at 386 (citing Robert Emmet Clark, *Ground Water Legislation in Light of Experience in the Western States*, 22 Mont. L. Rev. 42 (1960)).

The *Tweedy* court relied on *United States v. McIntire*,¹¹⁷ an Indian water law case arising on the Flathead Indian Reservation, to reach the conclusion that an Indian-reserved right can apply to groundwater, as well as surface water.¹¹⁸ The *McIntire* court, in turn, relied on *Winters* and an analysis of the Treaty of Hellgate¹¹⁹ for the rule that the waters of Flathead Reservation's creeks were "impliedly reserved by the treaty to the Indians."¹²⁰ The *McIntire* findings on the nature of the *Winters* rights on the Flathead Indian Reservation were reconfirmed in *United States v. Alexander*, another Flathead case, when the court stated: "The treaty impliedly reserved all waters on the Reservation to the Indians."¹²¹

A more narrowly applied version of the reserved rights doctrine also applies in a non-Indian setting, such as within United States Forest Service lands.¹²² It also applies to Devil's Hole National Monument, a federal land withdrawal to preserve an endangered species called the desert pupfish.¹²³ The pupfish survived in one spring-fed pool in the American Southwest.¹²⁴ The United States sought to protect that pool by creating a federal reservation of land surrounding it to protect the water supply necessary to sustain the fish.¹²⁵ A conflict arose when nearby agricultural interests drilled groundwater wells that caused a drawdown of the water available to the desert pupfish, rendering it unable to spawn.¹²⁶ The United States sought to enjoin the well production to serve the purpose for which the federal reservation was created—to preserve a spawning population of pupfish.¹²⁷ The Ninth Circuit's decision in *United States v. Cappaert*¹²⁸ relied on *Winters* and *Tweedy* to conclude that "the United States may reserve not only surface water, but also groundwater" to satisfy the purposes of a federal reservation.¹²⁹

The Ninth Circuit *Cappaert* decision was unanimously affirmed by the Supreme Court's decision in *Cappaert v. United States*.¹³⁰ The Supreme Court noted:

117. *U.S. v. McIntire*, 101 F.2d 650 (9th Cir. 1939).

118. *Tweedy*, 286 F. Supp. at 385 (citing *McIntire*, 101 F.2d 650).

119. The Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation as their exclusive homeland in the Treaty with the Flatheads. *Treaty of Hellgate*, 12 stat. 975 (July 16, 1855).

120. *McIntire*, 101 F.2d at 653 (citing *Winters*, 207 U.S. at 577; *Treaty of Hellgate*, 12 stat. at 975–976).

121. *U.S. v. Alexander*, 131 F.2d 359, 360 (9th Cir. 1942).

122. *U.S. v. N.M.*, 438 U.S. 696, 707 (1978).

123. *Cappaert v. U.S.*, 426 U.S. 128, 132 (1976).

124. *Id.*

125. *Id.* at 132, 136.

126. *Id.* at 134–135.

127. *Id.* at 135.

128. *U.S. v. Cappaert*, 508 F.2d 313 (9th Cir. 1974).

129. *Id.* at 317 (citing *Winters*, 207 U.S. 564; *Tweedy*, 286 F. Supp. 383).

130. *Cappaert*, 426 U.S. at 138.

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in the unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.¹³¹

The immutable conclusion reached by the Supreme Court in *Cappaert* is that “since the implied reservation-of-water-rights doctrine is based upon the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or ground water.”¹³²

One thing is clear in the field of federally reserved water rights: they encompass surface and groundwater necessary to satisfy the purposes for which the lands are reserved. Groundwater and surface water constitute “a unitary resource. . . . [t]he actions of one user have an immediate and direct effect on other users.”¹³³

C. Indian Reserved Water Rights Include Groundwater

The Montana Supreme Court’s decision in *Confederated Salish and Kootenai Tribes v. Stults* was the third in a series of four cases between the Tribes and the Montana Department of Natural Resources and Conservation (DNRC). Each of the cases involved the State’s permitting of post-1973, new water uses on the Flathead Indian Reservation. These four cases will be collectively referred to as *Ciotti I* through *IV*.¹³⁴ In *Ciotti I* the Court held that “given the nature of Indian reserved water rights,”¹³⁵ the DNRC lacked the authority to permit new water uses on the reservation until the Tribes’ senior and “pervasive”¹³⁶ reserved and aboriginal water rights were finally quantified, either by negotiation with the Commission or through a McCarran-qualifying general adjudication.¹³⁷

In each of the four *Ciotti* cases the Tribes’ argument remained the same. Montana’s new water use permitting statute¹³⁸ required DNRC to make a finding that, *inter alia*, issuing a new water use permit would cause

131. *Id.*

132. *Id.* at 143.

133. *Mont. v. Env. Protec. Agency*, 137 F.3d 1135, 1142 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998) (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981)).

134. *Ciotti I*, 923 P.2d 1073; *Ciotti II*, 992 P.2d 244; *Ciotti III*, 59 P.3d 1093; *Confederated Salish & Kootenai Tribes v. Clinch*, 158 P.3d 377 (Mont. 2007) [hereinafter *Ciotti IV*].

135. *Ciotti I*, 923 P.2d at 1080.

136. *Id.* at 1079.

137. *Id.* at 1080.

138. Mont. Code Ann. § 85–2–311.

no adverse impact to senior water rights.¹³⁹ The Tribes' undeniably senior reserved and aboriginal water rights—rights protected under federal law—had not yet been quantified either by a compact or by general water rights adjudication.¹⁴⁰ Therefore, lacking the ability to measure the impact (adverse or otherwise) to a pervasive, senior, yet unquantified right, the DNRC simply could not make the finding of no adverse impact required by the permitting statute.¹⁴¹

The earlier *Ciotti* cases arose out of the DNRC's surface water permitting under Montana Code Annotated Section 85–2–311.¹⁴² That statute treats surface and groundwater similarly for certain post-1973 permitting purposes.¹⁴³ The Courts' injunctions did not distinguish between surface and groundwater permitting.¹⁴⁴ Rather, they enjoined DNRC from permitting any water use on the reservation because the Tribes' senior rights had not been quantified and, again, the DNRC possessed no way to make the required statutory finding of no adverse effect necessary to issue a new water use permit.¹⁴⁵

In the build-up to *Ciotti III*, DNRC tried to permit a new groundwater use on the Flathead Indian Reservation on the theory that the previous *Ciotti* decisions did not expressly bar it from permitting groundwater uses, which remained a proper exercise of DNRC authority on the Flathead Indian Reservation.¹⁴⁶ In *Ciotti III*, the Montana Supreme Court again enjoined the DNRC from permitting any water use on the Flathead Indian Reservation.¹⁴⁷ The Court recognized

[n]o reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights in this case. The Legislature has created the Montana Reserved Water Rights Compact Commission, a body charged with the difficult task of quantifying and negotiating Indian reserved water rights. Quantifying the amount of groundwater available to the Tribes is simply another component of that inquiry.¹⁴⁸

The Court, building on the *Gila River* decision and federal case law discussed above, concluded that “[t]he significant question for the purpose of the reserved water rights doctrine is not whether the water runs above or

139. *Id.* at § 85–2–311(1)(b).

140. *Ciotti I*, 923 P.2d at 1080; *Ciotti II*, 992 P.2d at 250; *Ciotti III*, 59 P.3d at 1098; *Ciotti IV*, 158 P.3d at 389.

141. *Id.*

142. *Ciotti I*, 923 P.2d at 1076 n. 1; *Ciotti II*, 992 P.2d at 246.

143. For example, domestic use of groundwater is exempt from the permit and filing provisions of the statute. Mont. Code Ann. § 85–2–222.

144. *Ciotti I*, 923 P.2d at 1080; *Ciotti II*, 992 P.2d at 250.

145. *Id.*

146. *Ciotti III*, 59 P.3d at 1095.

147. *Id.* at 1101.

148. *Id.* at 1099.

below the ground but whether it is necessary to accomplish the purpose of the reservation.”¹⁴⁹ In Montana, as in Arizona, groundwater is an integral component of Indian reserved water rights and will be used to serve the many purposes for which Indian reservations were established.

D. *The Montana Trout Unlimited Case: Surface and Groundwater Connectivity*

The Montana Supreme Court solidified its adherence to the hydrology of groundwater in *Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation*.¹⁵⁰ The Court expanded its prior analysis of the interrelated nature of surface water and groundwater while focusing on a statutory basin closure in the upper Missouri River drainage.¹⁵¹ Under that closure, the DNRC generally is prohibited from permitting any new water use within the basin until a final decree in the adjudication of pre-1973 water rights has been issued.¹⁵² However, the basin closure statute contains several exceptions to the prohibition. For example, the DNRC can issue new permits for groundwater not “immediately or directly connected” to surface water.¹⁵³ Notably, the Legislature did not define these terms.¹⁵⁴ That was left to the DNRC’s rulemaking.¹⁵⁵

The Smith River is a tributary to the Missouri River within the basin closure area, and is therefore subject to the closure.¹⁵⁶ The DNRC hydrologic studies, completed in 2003, noted that the Smith and its tributaries are hydrologically connected to the groundwater in two ways.¹⁵⁷ First, pumping wells might intercept groundwater before it reaches the surface water.¹⁵⁸ This is called “prestream capture.”¹⁵⁹ Second, pumping groundwater may draw water from the surface-water body by a process called “induced filtration.”¹⁶⁰ The DNRC promulgated rules that attempted to define the statutory language by prohibiting the permitting of water “immediately or directly connected” to surface waters.¹⁶¹ However, the rule only

149. *Id.*

150. *Mont. Trout Unlimited*, 133 P.3d at 231.

151. *Id.* at 226.

152. Mont. Code Ann. § 85–2–343.

153. *Id.* at § 85–2–342(2). After the *Montana Trout Unlimited* Court’s decision, the 2007 Montana Legislature amended the statute by simply deleting any reference to groundwater, regardless of connectivity. Science has some up-front costs—politics does not.

154. *Mont. Trout Unlimited*, 133 P.3d at 227.

155. *Id.*

156. *Id.* at 226.

157. *Id.* at 232.

158. *Id.*

159. *Id.* at 226–227.

160. *Mont. Trout Unlimited*, 133 P.3d at 227.

161. *Id.*

addressed one of the two types of groundwater-capture identified in the DNRC's study of induced filtration.¹⁶² The rule was silent on the DNRC's duty to evaluate possible impacts to surface water by pre-stream capture.¹⁶³ Regardless, the DNRC proposed to process permits for new groundwater use near the Smith River in the closed basin.¹⁶⁴

Trout Unlimited sued to prohibit the DNRC from processing applications for groundwater near the Smith River before the agency completed a thorough analysis of whether or not surface water and groundwater in the Smith drainage were "immediately or directly connected."¹⁶⁵ The Supreme Court focused on that statutory language and the DNRC's interpretive rule in a standard administrative law analysis.¹⁶⁶ First, the Court observed that agency rules must be consistent with the statute they are designed to implement.¹⁶⁷ Second, the Court found that, as a general rule, courts should defer to long-standing agency interpretations of unclear statutes.¹⁶⁸ Third, the Court noted that agency rules, while instructive, do not bind a court, particularly if the agency has no long-standing track record of implementing the rule.¹⁶⁹ The Court found the rule flawed as a matter of law because it addressed only one of two ways recognized by the DNRC studies in which groundwater might immediately or directly connect to surface water.¹⁷⁰

As in *Perkins v. Kramer* forty years earlier, the *Montana Trout Unlimited* Court supported the reality of the hydrologic cycle. It concluded that the agency's failure to fully recognize the interrelated nature of surface and groundwater was bad science.¹⁷¹ While the Legislature confirmed the unitary nature of water resources, the agency chose to recognize only immediate connections to surface flow caused by induced filtration and to ignore the less immediate, but no less direct, impact of pre-stream capture of tributary groundwater.¹⁷² The Court concluded by observing that basin closures generally serve a valid legislative purpose—to protect senior water rights claimants from juniors.¹⁷³ In the eyes of the Montana Supreme Court, "[i]t makes no difference to senior appropriators whether groundwater pumping reduces surface flows because of induced filtration or from prestream cap-

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Mont. Trout Unlimited*, 133 P.3d at 228.

167. *Id.* at 231.

168. *Id.*

169. *Id.*

170. *Id.* at 232.

171. *Id.*

172. *Mont. Trout Unlimited*, 133 P.3d at 232.

173. *Id.*

ture of tributary groundwater. The end result is the same: less surface flow in direct contravention of the legislature's intent."¹⁷⁴

IV. CONCLUSION

The 1972 Montana Constitution addresses water in a systematic and nearly comprehensive manner, although it failed to acknowledge federally reserved and aboriginal water rights. A decade earlier in *Perkins v. Kramer*, the Montana Supreme Court nearly established a systematic approach to surface and groundwater.¹⁷⁵ In this respect Montana leads other Western states in applying science to the conjunctive analysis of surface water and groundwater disputes.

Montana's historic practice of allowing surface estate owners to appropriate groundwater without regard to adverse effects on other consumptive uses and stream flows lies in the past. The Montana Supreme Court is clear: using sound science to unravel the "practical uncertainties" associated with discerning the interrelationship of groundwater and surface water is an essential predicate for evaluating developments that may impact a unitary resource. As the Legislature's response to the *Montana Trout Unlimited* decision suggests, Montana's legislative and executive branches will be challenged to preserve the role of science when, as in the state of Arizona, water begins to substantially limit economic growth.

174. *Id.*

175. *Perkins*, 423 P.2d 587.