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The water which originates in the snowpacks of Montana's mountains is used by all of the states through which flow the Missouri River and the tributaries of the Columbia River. The more populous and industrious downstream states on these drainages are rapidly increasing their need, their demand—and their claim to these waters. And lately serious consideration has been given to diverting water out of these drainages to more southerly states which have developed a need.

Meanwhile Montana is limited in developing her water resources by laws and administrative patterns which were formed before Montana became a state. No law enables Montana to develop multi-purpose projects, or to give recognition, and thereby lay the basis for a claim, to some of the uses of water which do not entail storage or diversion. Neither is the public interest represented in the development of new uses or applications of water in Montana.

Montanans who are concerned with the water resources of the state are aware of the need for improving the legal and institutional structure to fully utilize existing waters. An example of that concern is Senate Joint Resolution No. 13 of the 1965 legislature, which directs the Legislative Council to examine the feasibility of authorizing the formation of Water Conservancy Districts enabling Montanans to develop multi-purpose water resources projects. That Resolution is the forerunner of many changes which inevitably must be made in our laws and our administration of water resources.

Such changes must be made on the basis of an understanding of the problems in this area. This paper deals with a small group of these problems concerning our water resources: the problems arising out of Montana's law of water rights.

## ACQUISITION OF A WATER RIGHT

### *"Use" Rights*

A "use" rights is an appropriation upon an unadjudicated stream, acquired by merely using the water—without posting, filing, declaring or stating anything.[1] Such use of the water may be corroborated by the

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[1]This method originated simply by use, before any enactments concerning methods of appropriation. Apparently, even in the absence of a statute, it was not uncommon

physical evidence of diversion works. Examples of such works are a headgate and ditch, or an electric pump, outfall pipe and sprinklers. But eventually all of the facts concerning such an appropriation will have to be established, and that will require litigation with other water users. The "proof" will be by means of parole testimony based upon recollection which bears upon the priority date, amount, purpose, place and periods of use.[2]

Thus, a "use" right is an existing but indeterminate right, with its actual ascertainment and establishment postponed to future litigation.[3] The longer the litigation is postponed, the more vagaries and uncertainties will creep into the ascertainment and establishment process. During the interim, a "use" right is a fragile and uncertain property to own, while for other appropriators it represents an uncertain and unascertained threat which may inhibit investment and development of the watercourse.

These effects of "use" rights are not in the interest of the owner, other local interests, or the public which has an interest both in knowledge of the uses of a public resource and in its full development. This method of acquiring a water right should not be permitted in the future.[4]

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for persons to post a notice of appropriation. That was done in Woolman v. Garringer, 1 Mont. 535 (1872), and the appropriator was held to have an appropriation as of the date of posting, which was in 1866. Where the appropriator did not post a notice, his appropriation "related back" to the date of commencement of work on the appropriation. Wright v. Cruse, 37 Mont. 177, 95 Pac. 370 (1908); Maynard v. Watkins, 55 Mont. 54, 173 Pac. 551 (1918).

After statutes providing for posting and filing with the county clerks were enacted, failure to comply with the statutes did not prevent a person from acquiring an appropriation, but merely prevented his right from relating back to a date earlier than his date of completion and putting the water to a beneficial use. Murray v. Tingley, 20 Mont. 260, 50 Pac. 723 (1897). The statutes referred to were enacted in 1885, and are now in REVISED CODES OF MONTANA, 1947, §§ 89-810 to 89-814. (The REVISED CODES OF MONTANA will henceforth be cited R.C.M. 1947.) *Murray v. Tingley, supra* is still the law on this point. Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949); Midkiff v. Kincheloe, 127 Mont. 324, 263 P.2d 976 (1953).

[2] These water-right cases are peculiar in their nature, in that the parties are obliged to depend to so great an extent upon the memories of those who came to a new country in the early days. . . .The testimony is voluminous, covering almost 1,000 printed pages. We have examined it with great care and see no good reason for quoting it here. There are contradictions of the testimony offered by both parties. Many mistakes and inaccuracies are apparent on both sides, but there is no reason to believe that any witness wilfully testified falsely.

These water rights were initiated a quarter of a century ago, and there is occasion for little wonder that the witnesses should not agree in their memories as to details. . . .

Wright v. Cruse, 37 Mont. 177, 180-81, 95 Pac. 370, 371-72 (1908);

But, as every appropriation must be made for a beneficial or useful purpose (section 1881, CIVIL CODE), it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof.

Toohey v. Campbell, 24 Mont. 13, 17-18, 60 Pac. 396 (1900).

Other cases are illustrative of the difficulty, uncertainty and lack of trustworthiness of this process, *e.g.* Gilcrest v. Bowen, 95 Mont. 44, 24 P.2d 141 (1933); Geary v. Harper, 92 Mont. 242, 12 P.2d 276 (1932); St. Onge v. Blakely, 76 Mont. 1, 245 Pac. 532 (1926); Allen v. Petrick, 69 Mont. 373, 222 Pac. 451 (1924); Controw v. Huffine, 48 Mont. 437, 138 Pac. 1094 (1914); Hilger v. Sieben, 38 Mont. 93, 98 Pac. 881 (1909); Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389 (1905).

[3] See cases cited, note 2 *supra*. On any stream in which it makes any difference how much water the various appropriators are entitled to, there must ultimately be litigation. That is because litigation is the only method extant whereby water rights may be determined.

[4] A possible exception is the use of water by the public. "What is everyone's business is no one's business," and so uses by the general public are quite naturally unrecorded.

 

*The "Statutory Method" of Appropriation on Unadjudicated Streams*

This procedure for making an appropriation on an unadjudicated stream was enacted in 1885, in an attempt to provide a simple substitute for the "use" right, and possibly was intended to abolish "use" rights.[5] At the least, it was intended to cause water rights to be placed on record, both for the security of the appropriator and for the benefit of others who might desire to invest in subsequent appropriations and who would need to know the nature of prior rights to which new appropriations would be subject.

The statutory procedure requires the posting of a notice at the point of intended diversion, and, within twenty days thereafter, filing a notice of appropriation with the county clerk.[6] These notices must describe the intentions of the would-be appropriator with regard to the quantity of water claimed, the purpose of the intended use, the means of diversion, the date, the name of the appropriator, and a description of the point of diversion.[7] Within forty days after the original posting of the notice, the appropriator must proceed with reasonable diligence toward the completion of his appropriation.[8]

But this is an insufficient improvement over the "use" right. All of the records required by this filing procedure are created *before* any diversion is commenced and before the water is put to a beneficial use. So, if a person posts and files in accordance with the statutory method, and then changes his mind and proceeds no further, he leaves a record in the county clerk's office of an appropriation being made, while in fact there is none.

And even if a person goes ahead and completes an appropriation, it is natural for him to be on the "safe side" by filing for plenty of water. After all, he had to file before he commenced either his diversion work or his use.[9] Typically, Montana appropriators file claims to much more water than they need or can use—even to more water than is available in the stream, in some cases.[10] But the filing for an excessive claim does not produce a water right greater than a person finally put to an efficient

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But some of those uses are of great importance and should be recognized. The recreation industry in Montana is largely based upon the public's beneficial use of water.

[5]R.C.M. 1947, §§ 89-810 to 89-814. Section 89-812 states: "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." But in Murray v. Tingley, *supra* note 1, the court held that failure to comply with the statute does not deprive an appropriator of his right to water; it simply deprives him of his right to relate his date of appropriation back to the commencement of his works. Thus "use" rights survived these enactments.

[6]R.C.M. 1947, § 89-810.

[7]*Ibid.*

[8]R.C.M. 1947, § 89-811.

[9]See statutes cited *supra* note 5.

[10]See the classic discussion of this in Allen v. Petrick, *supra* note 2, at 376-80 (222 Pac. at 452-54).

beneficial use.[11] It result only in an erroneous and largely useless record filed with the county clerk.

In making his county-by-county survey of water use, the State Engineer spoke of how little value there was in researching these filings:

> About the only result one will accomplish by such a research will be a tabulation of the dates of filing. The amount of water filed on will be of no consequence, there is no conclusive evidence that the recorded appropriations have been perfected, and there is no record of the rights which are being used but never recorded. Therefore, a purchaser of ranch property, where he has to depend upon irrigation from a stream that is not adjudicated, has no way of determining the validity or priority of his water right. He has no assurance of the value of the right until the stream is adjudicated by the court, when each claimant must prove his claim by material witnesses.[12]

Thus, the statutory system leads to needless and endless litigation because of the same inadequacies which are inherent in "use" rights. Even worse, it results in the filing of distorted, self-serving notices of appropriation which become a prima facie threat to others who might desire to invest in water using activities,[13] while at the same time the statutory system does not lead to the security of an established quantity of water for the owner.

One improvement upon this system which could easily be made would be to require the filing of a notice of completion of an appropriation, stating how much water was actually diverted, and what the actual use of that water was.

But even that modification would not be a sufficient improvement in the administration of the use of Montana's waters. As the waters of the state become more fully utilized, necessarily there will be less available to commit to future uses and future purposes. There is a need to assure that the diminishing reserves are wisely allocated to the most beneficial future uses, and also to assure that existing uses are not jeopardized by overappropriation of the sources of supply.

The Constitution of Montana provides that a water right is a franchise, granted by the state, to permit an individual to put a public resource to a publicly beneficial use.[14] The public's stake in the efficiency and desirability of future uses of this public property requires that the public be represented and that future appropriations be approved in advance. Future rights should also be both definite and easy for subsequent appropriators to ascertain. To accomplish these purposes, a modern water law code should require that the permission of a public representative, such as a state engineer or a water board, be obtained in the making of future appropriations.[15]

[11]Conrow v. Huffine, *supra* note 2; Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940).

[12]STATE ENGINEER'S OFFICE, WATER RESOURCES SURVEY, MADISON COUNTY MONTANA 1 (1954).

[13]R.C.M. 1947, § 89-814.

[14]MONT. CONST. art. III, § 15.

[15]Developments in other states are set forth in Part II of this work, by Jon A. Hudak.

 

*The Exclusive Method of Appropriating from Adjudicated Streams*

Once an adjudication of rights among appropriators or claimants of the waters of a watercourse has been made, subsequent appropriations must comply with the exclusive method of appropriating which is provided by statute.[16] That method entails the filing of a petition with the clerk of the court in the county where the appropriation is to be made, stating the factual details concerning the means of appropriation. The petition must be accompanied by either a map prepared by an engineer, or an aerial photograph, showing the location of the works. The appropriator names himself as plaintiff. All other appropriators or claimants to the source of supply are made defendants in what amounts to an adversary proceeding: a water-rights suit.[17] A summons is issued and served upon each of the "defendants," and the trial results in a decree.[18]

The only means whereby a person can make an appropriation upon an adjudicated stream, is to involve himself and everyone else along that stream in another lawsuit. Such a cumbersome and costly procedure should not be imposed upon either the prior claimants or the new appropriator. Nor should the district judges be burdened with the minutia of determining and then forever after administering the rights in a stream system.[19] A simpler, cheaper and more efficient means should be substituted. Inevitably, Montana must adopt an administrative system, under which only one means of appropriation can exist, regardless of whether the stream has previously been adjudicated.[20]

*Acquisition by Purchase*

At the time of the original acquisition of an appropriation, in the ordinary case a surplus of water in the stream was available for appropriation, and it was in the public interest to put it to some use. Once having been developed, it usually is in the public interest to guaranty security in the investment, and to continue the appropriator's franchise to the use of water which he has developed.

But it should be kept in mind that all uses of water are public uses, under the Montana Constitution.[21] Although a water right is frequently likened to a "property" right, it is not at all similar to the more common

[16]R.C.M. 1947, § 89-829 provides the procedure for appropriating waters from an adjudicated stream, using the mandatory word "shall." Section 89-837 states that a failure to comply deprives the "appropriator" of the right to use any water as against any subsequent person who does comply. In Donich v. Johnson, 77 Mont. 229, 250 Pac. 963 (1926) it was held that this statutory method was the exclusive method of appropriating from adjudicated streams. (Laws of Montana 1921, ch. 228.) That case is also authority that the very similar 1907 statutes (Laws of Montana 1907, ch. 185) were not exclusive.

[17]R.C.M. 1947, § 89-829.

[18]R.C.M. 1947, § 89-830.

[19]See discussion *infra*, entitled "Administration."

[20]See discussion *infra*, under "Ascertainment of past vested rights—an authoritative inventory" and "Adjudication or determination of water rights."

[21]MONT. CONST. art. III, § 15.

rights in property. For example, a person who has the property interests in an automobile or a rocking chair, may choose not to use it and to have it stand idle, or he may choose to have it destroyed. No strong public interest is violated. But a person with a water right has no such exclusive control over it.[22] Nor does he own the water to which his right is related.[23] The exercise of a water right affects others who depend upon the same source of supply. It is an exercise of a public franchise in which both the public and neighboring appropriators have a vital interest.

Because others have such a vital interest in the use of water, the severance of a water right from its original purposes, and its application to different lands and different uses, raises some questions. A likely reason for the purchase of a water right would be that the source of supply is already fully appropriated, so that there no longer is the surplus available to additional, or other uses. Since there is no longer a surplus which ought to be used, the new use for which the right is purchased cannot be justified on the basis of conditions which existed when the original appropriation was made. Nor can the new use be justified as the continued recognition of a franchise which has caused investment in reliance upon its assured recognition in the future.

The purchase of a water right for the purpose of applying the water to different lands and different uses involves questions of both a public and a local interest. The public interest requires that a limited water supply on a fully appropriated stream be applied to the future uses which are most beneficial to the public. A strictly private purchase and sale will not assure the accomplishment of such purposes.

The local interest is demonstrated by the frequency with which such purchases result in a greater, or different demand in quantity of water and duration of flow, to the detriment of existing appropriations.[24]

[22]The heart of a water right is its priority—a concept which does not apply to the more familiar and common rights in property.

[23]Allen v. Petrick, *supra* note 2, at 377 (222 Pac. at 452) (''The appropriator does not own the water.''); Creek v. Bozeman W.W. Co., 15 Mont. 121, 129, 38 Pac. 459, 461 (1894) (''The right acquired by an appropriator in and to the waters of a natural running stream is not ownership of a running volume of the dimensions claimed, like the individual ownership of a chattel, so that it may be transferred corporally and carried away. . . .''); Anderson v. Cook, 25 Mont. 330, 338, 64 Pac. 873, 876 (1901) (''The parties did not own the water''); Norman v. Corbley, 32 Mont. 195, 202, 79 Pac. 1059, 1060 (1905) (''Neither party could acquire any title to the *corpus* of this water, but only to the use thereof''); Verwolf v. Low Line Irrigation Co., 70 Mont. 570, 578, 227 Pac. 68, 71 (1924) (''By its appropriations the company acquired merely the right to the use of the waters—not a title to the *corpus* of the waters. . . .''); Custer v. Missoula Public Service Co., 91 Mont. 136, 142, 6 P.2d 131, 133 (1931) (''It is elementary that the appropriator of the water of a running stream does not own the corpus of the water. . . .''); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 258, 17 P.2d 1074, 1076, 89 A.L.R. 200, 203 (1933) (''The doctrine that an appropriator does not own the corpus of the water, but only its use. . .has been announced by this court many times.''); Brennan v. Jones, 101 Mont. 550, 567, 55 P.2d 697, 702 (1936) (''We are committed to the rule that the appropriator of a water right does not own the water. . . .''); Sherlock v. Greaves, 106 Mont. 206, 217, 76 P.2d 87, 91 (1938) (quoting from *Brennan v. Jones, supra.*)

[24]*E.g.*, Conrow v. Huffine, *supra* note 2 (court found that the successors to Moore, the original appropriator, had expanded the original use and demanded more water than Moore himself had required); Creek v. Bozeman Water Works Co., *supra* note 23 (after sale, downstream appropriators were deprived of the return flow); Spokane

Although the law prohibits changes which will adversely affect other appropriators,[25] in actual practice such adverse effects quite commonly occur.[26] For example, the original appropriator might sell an unneeded portion of his claimed water right. If the purchaser now attempts to use the right to the full extent of the original claim, it will involve an extension of the use. If the purpose of his use is different from the original purpose of the appropriation, in all likelihood the new use will require taking water at different times of the season, or of the year, or will require a more constant flow.[27]

In applying the theory of the law to the actual practices of the purchaser of a water right, the courts have introduced uncertainty into the definition of a water right. In some cases the purchaser does not get what he paid for, because of judicial limitations placed upon his use as a result of the ensuing litigation with other appropriators. Thus an irrigator may be prohibited from fully utilizing his appropriation during the irrigation season, if the original purpose was for mining.[28] The purchaser of a decreed water right may find that he must now litigate to ascertain how constant a flow, or how intermittent a flow, he is entitled to during the irrigation season although the right which he purchased from his predecessor was backed up by a decree which assured a given amount of miner's inches without any such expressed limitation.[29] Or the purchaser may have to litigate to establish exactly how much water his seller would have used. The seller would not be permitted to take more than he currently needed, and cannot sell a better right than he himself possessed.[30]

There should be more security and certainty in the application of water to different uses, and, at least with respect to streams which no longer have a surplus of water available, new and different uses of the water should be made only with the permission of the public through its representative. It is questionable that a priority should be retained through such transfers.[31]

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Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 Pac. 727 (1908) (same); Allen v. Petrick, *supra* note 2 (defendants were successors to original appropriators, but used more water than their rights covered); Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935) (purchaser changed use from mining to irrigation, resulting in presumed injury to subsequent appropriator); Galiger v. McNulty, 80 Mont. 339, 260 Pac. 501 (1927) (same, requiring heavier use during the irrigation season than the original mining appropriation required); Brennan v. Jones, *supra* note 23 (purchaser was taking a more constant flow than his seller likely would have required).

[25]R.C.M. 1947, § 89-803.

[26]See illustrative cases cited *supra* note 24.

[27]*Brennan v. Jones, supra* note 23, is similar to the illustration used in the text. Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940) involves the same elements except that the changes were not the result of a sale.

[28]*Galiger v. McNulty, supra* note 24; *Peck v. Simon, supra* note 24.

[29]*Brennan v. Jones, supra* note 23; *Quigley v. McIntosh, supra* note 27.

[30]*Brennan v. Jones, supra* note 23.

[31]Chief Justice Callaway suggested such a limitation in Allen v. Petrick, *supra* note 23, at 379 (222 Pac. at 453) and at least one early case found that to be the law, Alder Gulch Con. Min. Co. v. Hayes, 6 Mont. 31, 9 Pac. 581 (1886).

*Miscellaneous Points Concerning the Acquisition of a Water Right*

*Appropriation for a limited time.* None of our code provisions suggest that an appropriation may be for only a part of a week or a season or a year, or perhaps of only a few years duration if the purpose of the appropriation can be accomplished in a limited time.[32] Such limitations have been suggested by the courts,[33] but when they are applied for the first time in litigation, they are likely to come as a surprise to an appropriator, and to create uncertainty regarding the security of an appropriation right.

*Access.* The language of *Prentice v. McKay* to the effect that it is necessary to have an interest in the land which gives access to the water in order to obtain an appropriation[34] should be replaced by a statute which clearly severs ditch rights from water rights.[35] The validity of an appropriation for a beneficial use should not depend upon whether the originator of the appropriation was rightfully using the ditch which gave him access at the time that he appropriated.

*Watercourse.* It should make no difference, in the appropriation of water, whether the source of supply is a "watercourse."[36] A person who has discovered a means of employing vagrant migratory waters which only occasionally come his way, or of making use of occasional flood-waters, should be protected in his endeavors. Another person should not be permitted to subsequently interfere and construct means of diverting such waters for his own beneficial use, and receive legal protection by a subsequent finding of fact that the waters are not in a "watercourse." The doctrine of priority of use should apply, and such a change in law will avoid water rights suits, on intermittent watercourses, which are now necessary to determine whether the doctrine of prior appropriation gives protection to the water users.[37]

[32]See generally R.C.M. 1947, §§ 89-801, 89-802.

[33]Galiger v. McNulty, *supra* note 24.

[34]Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081 (1909). This is followed in Jones v. Hanson, 133 Mont. 115, 125-27, 320 P.2d 1007, 1013-14 (1958).

[35]As seems to be the clear implication of Connolly v. Harrel, 102 Mont. 295, 57 P.2d 781 (1936), in which defendants acquired an appropriation by means of a revocable license which afforded them access to the water.

[36]In Popham v. Holloran, 84 Mont. 442, 275 Pac. 1099 (1929), the determination of fact that the water had attained the status of a "watercourse" was essential to protect plaintiff's appropriation. But in Doney v. Beatty, 124 Mont. 41, 220 P.2d 77 (1950) the court denied plaintiff protection for his earlier appropriations and investments because the defendants were taking water and reservoiring it in an area where the source of supply was not deemed to be a "watercourse." The latter decision could have been based more satisfactorily upon the finding that the water would not reach plaintiffs in any event.

*For the purpose of determining responsibility and liability for flooding* a neighbor's basement, or his land, by diverting a flow of water toward him, it may be useful to distinguish between flood waters or vagrant surface waters, and streams. In the former case a person may be considered as defending himself against a "common enemy" and not responsible for the ensuing damage, while in the latter case he may be considered as the principal cause of the neighbor's plight. See, *e.g.*, Fordham v. Northern Pacific Ry., 30 Mont. 421, 76 Pac. 1040 (1904); Le Munyon v. Gallatin Valley Ry., 60 Mont. 517, 199 Pac. 915 (1921). But *that situation is quite unrelated to the acquisition of a water right.*

[37]See note 36 *supra.*

*Flood, seepage and waste.* Similarly, it should not be necessary to "impound flood, seepage, and waste waters in a reservoir" in order to appropriate them.[38] Although an appropriator probably should not acquire a right to compel his source of supply to continue to seep or to waste water, yet, as against a subsequent claimant to that source of supply, his priority should be sufficient. His means of appropriation should not be specified, for he can be governed by the usual rules concerning efficiency in diversion and use.

*Unifying our laws.* Under Montana law prior to the Groundwater Code groundwaters were probably not a part of the appropriation system, and that is why the Groundwater Code specifically authorizes their appropriation.[39] The authorization to appropriate water should be broad and comprehensive, and all such authorizations should be included in one place in the laws.

## ASCERTAINMENT OF PAST VESTED RIGHTS — AN AUTHORITATIVE INVENTORY

As pointed out in the preceding discussion, there is no record of a "use" right.[40] An appropriation by the statutory method on an unadjudicated stream results in a self-serving declaration of the amount of water that the appropriator will require in the future when and if he completes his appropriation, and is therefore an almost useless record.[41] Even an adjudicated right may only provide a record which will be found incomplete and therefore uncertain with respect to the amount of water included.[42] The existing legal system simply does not create security and certainty in rights, useful records, or an inventory which could be helpful to other appropriators and to the public administration of the use of water.

Montana's Code has allowed persons who acquired "use" rights prior to 1885 to file declarations of their rights.[43] The new Groundwater Code contains a similar provision.[44] Both provisions offer the inducement to such appropriators, that compliance will result in the declaration being

[38]R.C.M. 1947, § 89-801.

[39]R.C.M. 1947, § 89-2912. The inference with respect to the law of groundwater prior to the Groundwater Code, may be drawn from a scattering of cases which bear upon that law. Leonard v. Shatzer, 11 Mont. 422, 28 Pac. 457 (1891); Ryan v. Quinlan, 45 Mont. 521, 124 Pac. 512 (1912); Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944); Rock Creek Ditch & Flume Co. v. Miller, *supra* note 23; McGowen v. United States, 206 F. Supp. 439 (D. Mont. 1962). It seems questionable whether Perkins v. Kramer, 121 Mont. 595, 198 P.2d 475 (1948) is consistent with that assumption, and see Note, *A Landowner Has the Right to Intercept Water Percolating Beneath His Land Even Though it Supplies a Spring Which Another Has Appropriated,* 24 MONT. L. REV. 169 (1963).

[40]See notes 1 and 2 *supra.*

[41]See note 12, *supra.*

[42]See discussion under "Adjudication Or Determination Of Water Rights" *infra*; Stone, *Are There Any Adjudicated Streams in Montana?* 19 MONT. L. REV. 19 (1957).

[43]R.C.M. 1947, § 89-913.

[44]R.C.M. 1947, § 89-2913(h).

taken as prima facie evidence of the statements contained in them.[45] But again, such declarations are self-serving and unreliable. Besides that, these provisions have not even been effective in inducing water users to make the filing declaration in compliance.[46]

The only inventory of existing Montana water rights of any real value is the county-by-county survey carried on by the State Engineer's Office.[47] Such a systematic and careful inventory of water uses should be continued until the entire state is covered. The chief inadequacy in these inventories is that they were not given the legal effect which they should have received. In effect, they amount to a private inventory, and not a determination of water rights.

The existing inventories made by the State Engineer's Office will be invaluable in making future administrative determination of present water rights. Nearly all of the data needed has been compiled for those counties in which the survey has been completed. There would still need to be an opportunity for appropriators to file objections, to come and be heard, and to appeal if they feel unfairly treated. These additional procedural steps should be provided, and should result in a legally final determination of existing rights, based upon past uses and needs. The administrative body which conducts the inventory should be given authority to divide large stream systems into practicable administrative units, both for the purpose of determining rights and for the purpose of administering them, following Wyoming law in this respect.[48]

In establishing existing uses of water, existing public uses should not be overlooked. Such uses may not require a diversion of water, and therefore may not be apparent to the surveyor.[49] For example, the use by the public of a valuable trout stream or of a recreational lake should be recognized as a beneficial use which has existed in the past and which requires a quantity of water just as does an irrigator. The mere fact that some public uses require that a quantity of water stay in a stream or a lake is no evidence that the use of that water is not beneficial and in the public interest, and is certainly not an indication that there is a surplus of water in the stream or lake available for appropriation. The public use should be included in the inventory and a right recognized as of the date of the earliest such public use.

## ADJUDICATION OR DETERMINATION OF WATER RIGHTS

Many of the frailties and uncertainties in Montana's system of adjudication and judicial administration of water rights have already been

[45] *Ibid.;* R.C.M. 1947, § 89-814.

[46] Witness the numerous law suits dependent upon perishable memories alone; and witness the extension of time to file under the Groundwater Code, provided by the 1965 legislature. (Laws of Montana 1965, ch. 21.)

[47] This work was carried on for several years from funds made available for the purpose by several successive legislatures.

[48] 9 WYO. STAT. § 41-61 (1957).

[49] Indeed, it is regrettable that the State Engineer's county-by-county Water Resources Survey omitted such uses.

pointed out in the preceding discussion. But one fundamental weakness in the adjudication system was not touched upon. Our system is not designed to adjudicate streams, or parts of streams, but rather it is designed to permit two or more appropriators to establish the relative merits of those appropriations which they put into issue in a water-rights suit.[50] Such a suit is not designed to finally determine the allocation and distribution among appropriators of a distinct quantity or source of water (*i.e.*, a stream) but rather it is designed to fragment the water supply and adjudicate parts of it among some of the users without relationship to the whole body of water which is affected.[51]

There is no requirement that all who might be interested should be made parties, nor are there means whereby one can assure that he has joined all such persons.[52] Those who are not made parties are completely unaffected by the resulting decree and the administration of that decree by the court appointed water commissioner.[53] They may use water in defiance of the orders of the water commissioner, and they cannot be brought into court on charges of contempt, for they are not affected by either the decree or the court's order.[54]

To attempt to control persons who were not included in a decree, one must bring another water-rights suit against them, joining all of the parties to the prior water-rights suit, and redetermine all of the relative priorities and amounts.[55] But such an additional attempt will give no assurance that there are not still others who should have been joined and

[50]R.C.M. 1947, § 89-815; Stone, *supra* note 42.

[51]*Ibid.;* State *ex rel.* Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935); State *ex rel.* Pew v. District Court, 34 Mont. 233, 85 Pac. 525 (1906); State *ex rel.* Boston & Montana Con. C. & S. Min. Co. v. District Court, 30 Mont. 96, 75 Pac. 956 (1904). Also to be noted are cases wherein there has already been an adjudication, but by reason of the inclusion of new parties the prior decree is not binding in the subsequent litigation, *e.g.*, Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935); Sherlock v. Greaves, 106 Mont. 206, 214 P.2d 87 (1937); Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940); Galiger v. McNulty, *supra* note 24. In State *ex rel.* McKnight v. District Court, 111 Mont. 520, 524, 111 P.2d 292 (1941) there had been three separate decrees, but "since the respective rights of relatrix and of the plaintiff have not been adjudicated as against each other, it is apparent that relatrix's rights cannot, in a summary proceeding of the nature in question, be subordinated to those of the plaintiff." That meant that there had to be still another adjudication, joining all of the parties in an additional lawsuit, in order to once again determine their relative priorities and administer their water uses.

[52]See note 51 *supra.*

[53]*Ibid.*

[54]*State ex rel. Reeder v. District Court, supra* note 51; *State ex rel. Pew v. District Court, supra* note 51; *State ex rel. Boston, etc. v. District Court, supra* note 51; *State ex rel. McKnight v. District Court, supra* note 51.

[55]*Ibid.;* Sloan v. Byers, 37 Mont. 503, 97 Pac. 855 (1908); Bennett v. Quinlan, 47 Mont. 247, 131 Pac. 1067 (1913); State *ex rel.* Swanson v. District Court, 107 Mont. 203, 82 P.2d 779 (1938).

Consider this statement by Chief Justice Calloway in Anaconda National Bank v. Johnson, 75 Mont. 401, 410, 244 Pac. 141, 144 (1926):

> Experience has shown that after the rights of the parties taking water from a stream had been adjudicated, a subsequent appropriator would appear upon the scene, tap the stream and ruthlessly take the water, disregarding the decreed rights and flaunting [sic] the orders of the commissioner appointed by the court to distribute the water according to the terms of the decree. The only remedy the prior appropriators had was to commence a suit against the new appropriator, the result being that all of the rights of the stream had again to be adjudicated; and after that decree was entered if another subsequent appropriator took the water the same process had to be gone over again.

who may make similar trouble in the future;[56] nor is there assurance that those who *are* parties to the suit have asserted *all* of their claims.[57] Nor does such a proceeding affect a person who was not joined because he apparently had no water right, but who later claims that he did have one. These results occur because the courts do not adjudicate streams as such.

Such a cumbersome and ineffectual system of adjudication will ultimately fall of its own weaknesses, as it has almost done during periods of water shortages.[58] The solution is an administrative finding of priorities, as discussed above, providing for notices to all persons within a practicable administrative unit of a stream system, publication of the notices, opportunity to object and be heard, and to appeal to the courts by alleging that there is no substantial evidence to support the findings of the administrator. Future appropriations should be added to existing findings of priorities and amounts only with the approval of the administrator, who represents the public and also guards the local interests in the fair administration of the stream system.[59]

## ADMINISTRATION

With respect to the surface waters of Montana, there is no provision for any organized or orderly administration of water rights unless there has been litigation between water users.[60] Until there has been a law suit, the appropriators take care of themselves, and take such water as each believes he is entitled. On many streams this is undoubtedly satisfactory. No administrative system should require the employment of a water master where one is not needed.

Many streams in Montana do require authoritative administration of their waters during the irrigation season, or during dry years. Unfortunately there is no simple means whereby the water users can obtain this service. The situation must become so vexed, so critical, and so bitter that a water-rights suit is commenced. In effect, there must be a breakdown in the community of water users along the source of supply, before assistance can be obtained.[61] Such a requirement is not in the interest of the water users nor of the public. Easier access to authoritative administration of the source of supply should be provided.

After there has been a breakdown and a water-rights suit among the

[56] *Ibid.*

[57] Sloan v. Byers, 37 Mont. 503, 97 Pac. 855 (1908); Stone, *supra* note 42, at 23-24.

[58] The early thirties were dry years (1930-39), and resulted in over twice as many cases being taken to the Montana Supreme Court than did the period from 1945 to 1957. (Determined by counting cases cited in West Publishing Company's Pacific Digest).

[59] See discussion under "Acquisition of A Water Right" above.

[60] The only agency which can control or regulate water uses and protect prior rights, is the judiciary, *i.e.*, the district judge. In order for a person to obtain such aid, he must be under the jurisdiction of the district judge: he must be in a law suit. Normally that will be under R.C.M. 1947, § 89-815. After the relative water rights have been decreed, the litigants may have a water commissioner appointed by the district judge, to administer the decree, under R.C.M. 1947, § 89-1001.

[61] See discussion, note 60 *supra.*

appropriators, a water commissioner may be appointed by the district judge to supervise the use of waters by the parties to the law suit.[62] As previously pointed out in connection with "adjudication," the water commissioner cannot be placed in charge of the stream itself, for the stream is not adjudicated. He is only authorized to supervise the taking of water, under the decree, by those parties who engaged in the law suit.[63] Legislation is needed to permit complete adjudication of a source of supply, and then complete administration of it by a water commissioner.[64]

Local water commissioners are needed on many streams during the dry part of the irrigation season, or during dry years, and it is well that our laws provide for them. But they should not be under the supervision of the district judges because the water users are required to engage in a water-rights suit in order to avail themselves of a district judge and thus obtain a water commissioner.[65]

Such a system involves too much legal procedure, and is very cumbersome and expensive. A district judge's position is essentially judicial rather than administrative. In so far as is practical, his job should remain judicial, and he should be evaluated primarily upon his qualifications for the judicial task rather than upon his administrative capabilities. Another, and very important reason, is that district judges are already fully employed and cannot properly assume and handle the very burdensome additional job of administering water rights in an irrigation district during dry periods of the irrigation season. Consider this protest by one able district judge in such a district:

> The ultimate 'work horse' of all enforcement and supervision of all decreed water and appropriated water is the District Judge. The burden of the minutiae of this task is impossible to appreciate. If it is a judicial district in which much water must be controlled and ad-

[62] *Ibid.;* R.C.M. 1947, § 89-1001.

[63] See text at "Adjudication Or Determination Of Water Rights" *supra*, particularly notes 51 and 55 thereunder. Illustrative of the point being made here, is the case of Allen v. Wampler, 143 Mont. 486, 392 P.2d 82 (1964). A 1938 decree provided for amounts and priorities of water rights, and further, it directed which ditches the water should be carried in. In 1959 the respondents changed their point of diversion and switched from their assigned ditch to the ditch in which complainants had a 2/11ths interest. The water commissioner and 9/11ths of the owners of the latter ditch approved the change. So did the district court, which found that respondents were not trespassers because they had permission from some of the tenants in common of the ditch; the ditch had adequate capacity; and there was no harm to the complainants. But the action had been brought under R.C.M. 1947, § 89-1015, complainant asserting that the commissioner was not properly complying with the 1938 decree. The Montana Supreme Court held that this statute did not authorize the adjudication of either water rights or ditch rights. So there is no summary proceeding available to the parties. They must once again go through a full scale law suit to readjudicate rights in the ditches.

[64] Montana water-rights suits have been erroneously referred to as essentially "quiet title" actions in Sain v. Montana Power Co., 84 F.2d 126, 127 (9th Cir. 1936); State *ex rel.* Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935); Whitcomb v. Murphy, 94 Mont. 562, 566, 23 P.2d 980, 981 (1933); and Patten, *Water Rights in Montana,* 23 ROCKY MT. L. REV. 162, 169, 170 (1950). But as has been pointed out, a water-rights suit does not adjudicate a stream, nor attempt to allocate a source of water. ("Adjudication Or Determination Of Water Rights" *supra.*) It is not comparable to the familiar real property "quiet title" actions, authorized under R.C.M. 1947, title 93, ch. 62. To put it more legalistically, a water-rights suit is *in personam* with permissive joinder, rather than *in rem.* See Stone, *supra* note 42.

[65] Note 60 *supra.*

> measured the working season is from June to September. The judge must know intimately all decrees, keep abreast of the transfers so that his first knowledge is workable. Know competent persons to appoint as water commissioners. Understand and know the precise locations of hundreds of ditches, diversion points and storage areas. Understand the duty of water, how to measure it, and know background of water users. The judge must expect to be called at all hours of the day and night by water users, water commissioners and ditch riders. He scans the skies at the springtide, checks the water table, for he knows if it is a dry year his task will be increased 'ten fold.'
>
> It is no answer to say that he may appoint water commissioners, for he is the ultimate authority for both the water users and the water commissioner—and he is easily reached.[66]

The supervision of water commissioners or water masters should be placed under an administrator at the state level, as is presently the case in Montana under the Groundwater Code.[67] In fact, this aspect of the Groundwater Code[68] should be broadened, so that groundwater supervisors may be used to supervise the distribution of surface waters in areas where and at times when such administration is needed.

The Groundwater Code permits either the administrator or a group of water users to have a source of supply designated a "controlled groundwater area," upon showing facts which demonstrate the need for administering withdrawals.[69] Thereafter, the administrator may limit withdrawals of groundwater, following provisions for notices and a hearing,[70] and he may appoint groundwater supervisors as needed, to assist the administration.[71]

The framework for the administration of groundwater should be continued and broadened so as to make it available to surface water users also. Administrative determinations arrived at by fair procedures can be obtained before there is a breakdown in the community of water users. The proceedings need not be so much of the adversary type as the typical water-rights suit, and the saving in time, technicalities, bitterness and money will be great. The code should provide for appeals to the courts which may result in reversals of administrative determinations in those cases in which there is no substantial evidence to support the administrator.[72]

## GROUNDWATER

Groundwaters and surface waters are simply waters that are in different stages of a single hydrologic cycle.[73] Surface waters seep into the

[66]District Judge W. W. Lessley, in a paper deliv red at the Third Annual Water Resources Conference, Aug. 1 and 2, 1958.

[67]R.C.M. 1947, § 89-2932.

[68]See discussion under "Groundwater" *infra*.

[69]R.C.M. 1947, § 89-2914.

[70]R.C.M. 1947, §§ 89-2914, 89-2919.

[71]R.C.M. 1947, § 89-2932.

[72]The Groundwater Code should be strengthened in this respect. (R.C.M. 1947, §§ 89-2920—89-2923.)

[73]McGuiness, Water Law With Special Reference To Ground Water 4 (1951); Swenson, Montana's Ground Water Resources and Problems of Their Use and Development, Proceedings of Fourth Annual Water Resources Conference, Montana School of Mines Information Circular 26, p. 4, Dec. 1958.

ground and are then called groundwater, while groundwaters seep out to the surface and become surface water. Consequently the depletion of one of these sources can affect the other, and when that occurs it is desirable to integrate their administration.

But groundwaters and surface waters also have distinct and different characteristics, which require recognition if each is to be administered effectively. Surface water is characterized by rapid, free movement, and annual replenishment. Overuse has immediate results but it does not damage the resource which is replenished annually. Groundwater, however, sometimes moves with glacial slowness. The supply is frequently the result of decades of accumulation, and although the resource may be overused for a period of years without depletion, when it is exhausted the effect is long lasting.[74]

Because of their distinct characteristics, it will usually be most practical to treat groundwater and surface water as separate sources, separately administered. In adjudications or in administrative determinations of existing rights, it will usually be administratively convenient to combine surface appropriators from a given stream or part of a stream in one proceeding, and the users of a groundwater area in another. New appropriations will be designated as either groundwater or surface water appropriations, and usually will involve only the other similar appropriators. And a water commissioner, master or supervisor will generally administer surface water appropriations in relation to one another according to the annual run-off in the drainage area, while at the same time he is separately administering a controlled groundwater area on a basis such as its average annual rate of recharge.

Because of the interrelationship of surface water and groundwater there will be instances in which they should be administered conjunctively because one of the sources is being significantly affected by management practices in the other. As our water resources become more intensively used, these instances will gradually become more common. But for the time being, conjunctive administration should be initiated by the person or persons who claim that their prior rights are being harmed by the management practices which are alleged to be the cause, and they should have the burden of showing the cause and effect.

Although for the time being, at least, the two sources will generally be administered as separate entities, in the interest of efficiency and economy there should not be a duplication of personnel or basic procedures. The same procedures can be used for the acquisition, determination and day to day administration of rights. Since our Groundwater Code provides a much better framework than do our surface water laws, it should be used as the basis for improving both aspects of our water laws.

## ABANDONMENT

Montana's surface water laws provide that when an appropriator

[74]Groff, A Summary Report on the Groundwater Situation in Montana, Montana Bureau of Mines and Geology, Information Circular 26, *passim*, Dec. 1958.

abandons and ceases to use the water for the purpose for which he appropriated it, the right ceases; but questions of abandonment are questions of fact.[75] The judicial construction of this provision has never directly implemented the limitations of use to the initial purpose of the appropriation,[76] but has required as proof of abandonment that the user ceased using the water with a present intention to never make any further use of it.[77] It has been virtually impossible to prove an actual intent to never make further use of a water right, and consequently for practical purposes there is no effective law of abandonment in Montana.[78] A long unused water right therefore remains as a permanent threat, and a severe inhibition to future development of the source of supply.

In considering abandonment, one should realize that the original appropriations were often inflated, and claimed more water than was needed for the beneficial use installed. As expressed by Chief Justice Callaway in 1924:

> In Montana, as elsewhere, when the early settlers made their original appropriations they had little knowledge of the quantity of water necessary to irrigate their lands to good advantage. Ample quantities of water being available in the streams the settlers claimed extravagant amounts. . . .Almost every irrigator used an excessive amount of water, some all they could get. Some actually washed the seed out of the ground. . . .
>
> It is a matter of common knowledge in the several judicial districts of this state where irrigation has been practiced since the early days that extravagant quantities of water were awarded the litigants by the courts. In instances more water was awarded than some of the ditches of the litigants ever would carry; in others much greater quantities of water than the litigants ever did or could use beneficially. . . .In water suits in which members of this court have been engaged 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. The difficulty encountered in attempting to do equal and exact justice upon testimony of this character is always great and sometimes insuperable.
>
> As a result of erroneous decrees awarding excessive quantities of water much water which should be available to subsequent appropriators has been denied them. . . .
>
> One should not be permitted to play the dog in the manger with water he does not or cannot use for a beneficial purpose when other lands are crying for water. It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated. It is the writer's opinion that the legislature should enact a statute to the effect that, where one has not made a beneficial use of the whole or some part of the water claimed by or decreed to him, for a specified number of years, the part so unused shall be deemed abandoned *prima facie*. There might well be included a section providing that one who sells a part of his right because the land he owns and for which the water was appropriated does not require that sur-

[75]R.C.M. 1947, § 89-802.

[76]Although the Montana Supreme Court took a step in the direction of such a restriction in *Alder Gulch Con. Min. Co. v. Hayes, supra* note 31, nevertheless our code appears to authorize changes in the purpose of an appropriation without loss of priority. (R.C.M. 1947, § 89-803.)

[77]Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 648 (1891); Tucker v. Jones, 8 Mont. 225, 19 Pac. 571 (1888); McCauley v. McKieg, 8 Mont. 389, 21 Pac. 22 (1889). See discussion of Montana's law of abandonment in Stone, *supra* note 42, at 26, n. 31.

[78]*Ibid.*

> plus shall by the act of selling be held to have abandoned the part sold, the purchaser taking the right as of the date of purchase. . . .[79]

The foregoing statement by Chief Justice Callaway concerning the need for an abandonment law, and the nature of the law needed, can scarcely be improved upon.

It should be pointed out, moreover, that the lack of an abandonment law has led our courts to reach a result similar to abandonment, but without so stating. Thus, excessive appropriations have been reduced;[80] purchasers of water rights have been limited to whatever demands upon the water their sellers would make;[81] and even decreed rights have been re-examined to redetermine what the actual need was at the time of the original decree.[82] Such efforts to administer water rights equitably are are commendable, but since they are without clear and understandable statutory expression, they result in further uncertainty and insecurity in our water rights law. A clear, effective abandonment law would be more fair to the user, the public, existing appropriators and future developers.

## PRESCRIPTION

Montana's law of prescription is almost as useless and ineffective as the law of abandonment. One claiming a right by prescription must show that he used another person's water at a time when the other person wanted and needed that water. That is almost impossible to prove.[83]

But rather than strengthening this doctrine in order to make it more frequently useful and effective, the doctrine should be abolished. Water rights should be acquired in an orderly manner, of record, with other local interests and the public interests represented. Prescription satisfies none of these requirements.

## CONCLUSION

These and other problems arising out of Montana's water laws are receiving attention. The Montana University Joint WATER RESOURCES

[79]Allen v. Petrick, 69 Mont. 373, 377-379, 222 Pac. 451, 452-453 (1924).

[80]*Ibid.;* Conrow v. Huffine, 48 Mont. 437, 138 Pac. 1094 (1914); Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935); Galiger v. McNulty, 80 Mont. 339, 260 Pac. 401 (1927); Power v. Switzer, 21 Mont. 523, 55 Pac. 32 (1898).

[81]*E.g., Conrow v. Huffine, supra* note 80; *Allen v. Petrick, supra* note 79; Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 Pac. 459 (1894); Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 Pac. 727 (1908); *Peck v. Simon, supra* note 80; *Galiger v. McNulty, supra* note 80; Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936).

[82]Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940) and cases cited note 81 *supra.*

[83]Talbott v. Butte City Water Co., 29 Mont. 17, 73 Pac. 1111 (1903); Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059 (1905); Smith v. Duff, 39 Mont. 374, 102 Pac. 981 (1909); Featherman v. Hennessy, 42 Mont. 535, 113 Pac. 751 (1911); Boehler v. Boyer, 72 Mont. 472, 234 Pac. 1086 (1925); Zosel v. Kohrs, 72 Mont. 564, 234 Pac. 1089 (1925); St. Onge v. Blakely, 76 Mont. 1, 245 Pac. 532 (1926); Galiger v. McNulty, *supra* note 80; Irion v. Hyde, 107 Mont. 84, 81 P.2d 353 (1937); Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944).

RESEARCH CENTER is supporting, with federal funds, a project which will propose a complete overhauling of Montana's water rights laws, in the form of a drafted recodification. The Montana Legislative Council, acting pursuant to Senate Joint Resolution No. 13 of the 1965 legislature, is preparing a draft of a Water Conservancy District Act to facilitate the financing and development of multi-purpose projects for the use of water. These, and other proposals which will arise in the future to meet other needs, should receive careful but sympathetic study by our legislature.