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VOLUME 37 NUMBER 4 WINTER 1999

MONTANA Business Quarterly



Water Rights
and the Stakeholders

INSIDE:
1999 Mansfield Conference
Privatization Survey
World Population Facts

Montana Business Quarterly

The Bureau of Business and Economic Research is the research and public service branch of The University of Montana's School of Business Administration.

The Bureau is involved in a wide variety of activities, including economic analysis and forecasting; health care, forest products, and manufacturing industry research; and survey research. The latest information about these topics is published regularly in the Bureau's award-winning magazine, the *Montana Business Quarterly*, which is partially supported by Norwest Bank.

The Bureau's Economics Montana forecasting system provides public and private decision makers with reliable forecasts and analysis. These state and local area forecasts are the focus of the annual series of Economic Outlook Seminars, cosponsored by First Interstate Bank, the Bureau, and respective Chambers of Commerce in Billings, Bozeman, Butte, Great Falls, Helena, Kalispell, and Missoula.

The Montana Poll, a quarterly public opinion poll, questions Montanans about their views on a variety of economic and social issues. The Bureau also conducts contract survey research and offers a random-digit dialing program for survey organizations in need of random telephone samples.

The Health Care Industry Research Program examines markets, trends, industry structure, costs, and other high visibility topics in this important Montana industry.

Research on the forest products industry has long been an important part of Bureau operations. While emphasis is placed on Montana's industry, the cooperative research with the U.S. Forest Service involves most of the western states. A recently-formed research consortium including the Bureau, the Forest Products Department at the University of Idaho, and the Wood Materials and Engineering Laboratory at Washington State University, addresses forest operations and utilization problems unique to the Inland Northwest.

The Bureau, in cooperation with Montana Business Connections, recently expanded the scope of its ongoing wood products manufacturing research to include all of Montana's manufacturing industries. Through this program, a comprehensive statewide electronic information system will be developed.

Bureau personnel continually respond to numerous requests for local, state, and national economic data. Don't hesitate to call on Bureau staff members if they can be of service to you.

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Stakeholders and Water Rights in Montana: An Introduction

by John Horwich

In many ways, water is just another type of property – like real estate or personal property. And like other forms of property, the law recognizes two primary interests: ownership and use. The ownership of water in Montana is fairly straightforward: The Montana Constitution provides: “all surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people...” (Art. IX, § 3(3)).

Thus, the state ‘holds title’ to the waters of the state but it holds that title as a sort of trustee since the Constitution burdens that ownership with the restriction that the state holds its title “for the use of [the state’s] people.”

While ownership of the state’s waters might be fairly straightforward, the same cannot be said of the right to use those waters. Who has a right to withdraw water from a stream or for a well? Who is entitled to divert water from a river to irrigate their crops, water their livestock or operate their mine? Who is allowed to build a dam on a river to produce power? Who is entitled to insist that sufficient water remain in a creek to support fish?

If we had abundant water to meet all the needs all the time, we wouldn’t need any rules. Unfortunately, that is not the case—and people have turned to the law to establish rules allocating the right to use water.

The Riparian System

In the eastern half of the country, landowners bordering a watercourse have the right to use the adjacent water. Under this riparian system, landowners with property contiguous to a watercourse have a right to the reasonable use of the water in common with all other riparian owners on the watercourse. All have an equal right to use an indefinite quantity of water. However, their use must be reasonable, which includes considering the impact of their use on other riparian landowners. In times of water shortage, all users must share the burden equitably. They all must cut back their usage proportionately.

The Prior Appropriation Doctrine

Montana and most of the western states chose not to follow the riparian system. Instead, Montana (after a few fits and starts) adopted the prior appropriation doctrine as the basis for allocating the right to use water. Fundamentally, the prior appropriation

Articles by John Horwich, Raymond Cross, Holly Franz, and Jim Moore, were adapted from their presentations at the Fall 1999 Mansfield Conference entitled, “Giving Life to Ten Thousand Things: Water in Asia and the West.”

These articles examine water rights and the impact they have on the economic livelihood of our state.

doctrine is based on the "first in time, first in right" philosophy. Water rights are not dependent on owning property adjacent to the waterway (in contrast to the riparian system). The right to use water is established by using the water; older water rights have priority over more recent water rights.

The key elements to the prior appropriation doctrine are: intent, diversion, beneficial use, priority and fixed quantity. Let's look at each:

Intent: An appropriator must intend to use the water.

Diversion: A landowner may utilize water from a noncontiguous watercourse—even another watershed. Thus, with the exception of in-stream use, there must be some diversion of water from the stream to the area of use.

Beneficial Use: Not every possible use of water is given legal recognition. The law requires that water be put to a beneficial use in order to be recognized as a valid water right. There are a number of potential beneficial uses: domestic, agricultural, industrial, recreational, and fish/wildlife. Notice that some of these uses entirely remove water from the stream (consumptive uses), while others leave water in the stream or return the full volume of water to the stream after use (non-consumptive uses).

Priority: Once the water is put to a beneficial use, the water right receives a priority date. Priority dates determine the seniority of users on a particular watercourse. During periods of water shortage, senior appropriators may completely fulfill their water rights, leaving the burden of shortage on junior appropriators.

Fixed Quantity: The quantity of an appropriative right is fixed and definite. A water right's quantity depends on the quantity of water needed for the beneficial use, the carrying capacity of the diversion, and the quantity of water available in the watercourse.

Major Current Issues

Adjudication

Before the Montana Constitution was revised in 1972, and in particular until the Montana Legislature passed the Montana Water Use Act in 1973, there was no comprehensive system for keeping a record of water rights. No one really knew what water

rights existed on a given stream—and no effort was made to find out until a conflict arose over the appropriation of water on that stream.

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The Montana Water Use Act imposed three requirements:

1. All existing water rights (1973) had to be filed in the state centralized records system.

2. All existing water rights had to undergo an adjudication in state court to sort out the rights and their priorities.

3. All new or changed water rights (after July 1, 1973) had to undergo a permit process.

The adjudication process continues today, working its way through water basins across the state in an effort to untangle the century of water rights claims that preceded the permit system.

In-Stream Flow Rights

Traditionally, the doctrine of beneficial use required the removal of water from the watercourse and its application to some worthy endeavor—most commonly domestic, agricultural or mining uses. Leaving water in the stream was the opposite of

beneficial use. But what about "reserving" water in the stream for a future need—for example, to meet the domestic needs of a growing community? Or leaving water in a stream to preserve a fishery or to provide adequate dilution of pollutants?

Water law has evolved in an effort to accommodate these different interests—but not without controversy. Montana law now allows for the reservation of water for a future beneficial use by state or

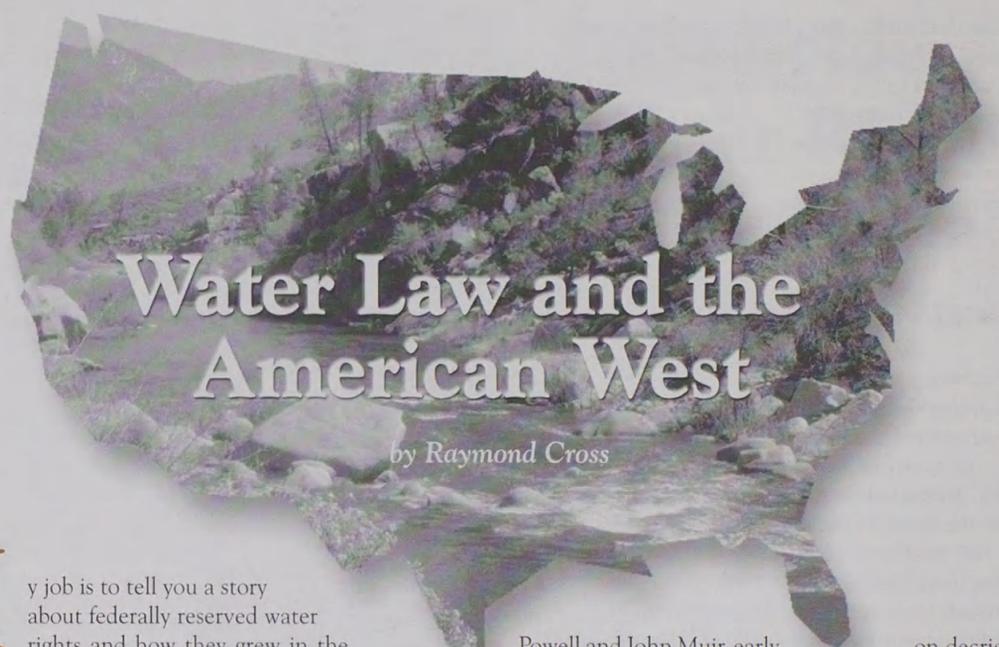
federal agencies and by subdivisions for certain limited purposes.

In addition, Montana law authorizes limited opportunities for state government to "lease" private water rights for the purpose of leaving water in the stream to enhance fisheries.

Clearly, we are just at the beginning of efforts to accommodate consumptive and non-consumptive uses. □



John Horwich is the associate dean and a professor at The University of Montana School of Law, and author of "Montana's Constitutional Environmental Provisions: Self-Execution or Self-Deletion."



Water Law and the American West

by Raymond Cross

My job is to tell you a story about federally reserved water rights and how they grew in the West. What I'd like to do is invent that story as the standard creation myth of the American West. I'll briefly tell you water's role in shaping this creation myth. And I will also suggest, just like a movie producer at DreamWorks, some alternative endings to this myth.

Imagine yourself in a movie theater. Imagine that we're going to tell a story about how the American West came to be. Let's look first at the role of water and water rights. Why is water important out West? Well, west of the 100th meridian, nature hasn't been kind. It is called the arid intermountain West for good reason. There's too much water east of the 100th meridian and too little water west of that line. Hence, problems with water scarcity arise. Water is, in fact, a central shaping character in the American myth of the West.

The bit players, and I don't mean this in a belittling way, that interact with water in this drama are several. First, the hard-working, rambunctious miners, irrigators, settlers, and ranchers who seized the West. They came in the 1840s, 1850s, and 1860s, overwhelming the efforts of the federal government to control the greatest human migration in history.

The second bit player, the federal government, is always cast as itself, as a miserly, stingy absentee landlord. Then, came the Indian peoples. Once viewed as powerful friends or enemies, they were increasingly viewed as nuisances and obstacles to Western development. For the conscience of the West, we have our local Greek furies who come in and say their peace and exit. These lonely critics, prophets of doom in some cases, like John Wesley

Powell and John Muir, early on decried the wrong-headed policies on water and public lands and said we had to do things differently. Now, a hundred years later, we hear John Wesley Powell and John Muir.

Who created water law in the West? Well, in the best self-help traditions of our Western movies, it was Westerners themselves. It was through self-help and self-initiative. It was done by local associations of miners, settlers, and ranchers, who not only seized the land but also the water, and then shaped the water to meet their exigent needs of settlement. Mining the Sierra foothills, establishing the Mormon communities in the dry lands of Utah,

providing water for the longhorn herds that came up from Texas to the Judith Valley of Montana. These voluntary self-help associations created an entirely new water law, unknown to common law.

In the water-rich East, folks bought into English common law called riparian water law, where water is part and parcel of the land. Even in the softened American version of riparian law, you couldn't own a water right without owning the land. But Western settlers, ranchers, and miners didn't own the land. Who owned the land? Either the U.S. government or the Indian tribes. Westerners had to

separate the water from the land, both practically and legally. So they created something entirely new, called an appropriative system, in which water became a commodity, a use right, a necessary right. It was defined by three things. First, the intent to divert. Second, the actual diversion of a fixed quantity. Third, the application of that fixed quantity to a defined beneficial use. Historically, Westerners themselves, through local and customary

West of the 100th meridian, nature hasn't been kind. It is called the arid intermountain West for good reason. There's too much water east of the 100th meridian and too little water west of that line. Hence, problems with water scarcity arise.

activities, defined that use in a narrow range: mining, agriculture, domestic uses, and stock water. Some large consumptive uses, some teacup uses.

So where did Western water law come from? It came from you and me. It came from those basic interactions of human needs with nature. It came from settlement, it came from development. What happened to that self-help water law? Well, the federal government, our absentee landlord, finally responded after the Civil War and said we have to do something about our Western lands. We have to have a policy, a public land law. Who in the hell owns these lands anyway? And so there was a great struggle for control of the West within Congress.

By this time, the American West had begun to mature. It produced its own cultural heroes. Not people like John Wesley Powell, not people like John Muir. They were seen as Easterners. But homegrown saints like Congressman Stewart from Nevada, the father of the earliest mining law, called the 1866 Mining Act. That act was really a water rights law. These cultural heroes also enacted the General Mining Law of 1872 and the Desert Lands Act of 1877—pro-development acts that were favored in the West, not the East. Cumulatively, what did those acts do? Did they retain title in the United States to Western waters as well as Western lands? No! Through the intervention of those cultural heroes like Congressman Stewart, the public waters were severed from the public lands, even though over 90 percent of the waters of the major streams arise on public land. The decision was made to ratify Western customs, to ratify the right of local people and the states that emerged to choose water-rights regimes that met their needs.

Because of the nature and character of development, riparian water law wasn't chosen by the emerging Western states. They chose appropriative water law. Appropriative water law is based on the right to divert water from stream systems, of a fixed priority, and of the application of water to a narrow range of beneficial uses.

That could have been the end of the story and this could have been a very short creation myth. All for the good. But as in all great dramas, in a George Lucas version of the West, you have to have the empire strike back. And so it did. Why? Because the federal government discovered that it had been too generous. If everything had been given away to private users, both the public lands and the public waters, there would have been no problem.

But people began to listen to John Wesley Powell, and to John Muir, and they said we need to keep some of these lands in public trust. So the government began to reserve the Yellowstone, the Yosemite, the Indian reservations, national forests, national monuments, national parks, national wildlife refuges, and wilderness areas. A whole portfolio of lands was put in public trust, for the public interest. But wait. Those lands, just like the other arid lands of the West, were worthless without an attached water right. But the United States had given away its waters in the severance of the public lands and the public waters, right? Not quite.

The Supreme Court said, gee, there are two types of water rights: an appropriative right and a quasi-riparian right that we didn't tell anyone about. We forgot to tell them. And in 1908, in *Winters v. United States*, the court pulled the rabbit out of the hat and said: By the way, any time you create Indian reservations, you not only create the reservations, you create an appurtenant water right. It's for the future use of the reservation. By the Supremacy Clause of the Constitution, Article 6, that right is superior to state water rights that may conflict. Why? Because federally reserved rights are typically prior in date, dating from the reservation's creation or from time immemorial. What can be earlier than that?

Federally reserved water rights are different from state's appropriative rights. Remember that I said there had to be a diversion of water. In riparian law and the federally reserved rights law, this is no diversion. There is no fixed quantity of water. And the beneficial use of such water is defined not by state water law, but by the purpose of the reservation. In the case of Indian reservations, it is to create productive tribal homelands for the future needs of its Indian residents.

Now, just as in every great drama, there's a classic conflict. An event. In Westerns, we have the shootout at OK Corral. All of the great clans of gunfighters got together for one last hurrah at the closing of the American frontier to see who was top gun. This happened in water law, too. All of the hired guns, all of the water interests, showed up at one big shootout. And that was *Arizona v. California*. Now, you think we have water problems up here in the upper-basin states of the Missouri River. Just visit the Colorado River area some time. Talk about animosity. Anyway, this shootout was organized by the Supreme Court, which had original jurisdiction over the suit between two lower-basin states, Arizona, and California. In rare instances, the Supreme Court



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becomes a trial court. It literally takes evidence under its Article III grant of jurisdiction. Arizona distrusted California, the Imperial Valley, and California's water users. So they made a big mistake. They couldn't settle differences among themselves.

They tried compacts, creation of a so-called Law of the River, and it got all screwed up. So they resorted to their good friends, the nine justices of the Supreme Court. Big mistake. The nine justices said, "Hey, we have to be fair. Not only is this a lower-basin water conflict, but we have to invite all of the other hired guns." We have to invite the federal government, and we have to invite the Indian tribes as co-plaintiffs. So they had this big Colorado River shootout. Paper bullets flew in all directions.

And who walked away the winner when the smoke cleared? The federal government. And the Indian tribes. The federal government won because the Winters Doctrine was extended to all possible federal reservations.

National forests, national parks, national monuments, national wildlife refuges, and possibly wilderness areas.

But the Indians really won. Because the five Colorado River tribes were awarded a new measure of their reserved water rights. The court called it PIA—practically irrigable acreage. PIA means the Indians get as much water as they need to irrigate their homelands, and that basically puts them at the top of the food

chain for consumptive water use in terms of quantity and priority.

The 1963 Arizona decision was a product of an Easterner. One of those big-time lawyers from New York named Simon Rifkind. He was hired as what's called a special master. Because the Supreme Court doesn't see itself as a trial court, sometimes it hires a special master who takes the evidence, frames the issues, and recommends a decree. The court then, in the cool light of day, gets to consider that decree. Rifkind said, we need to be fair. So it was an Easterner as special master who helped shape Western water law.

What happened then? Just as in all great conflicts, there's always a few folks left. Not all the gunslingers and gunfighters

were killed at the OK Corral. The fight went on, but shifted venues. It shifted procedurally to something called the McCarran Act. It was sort of a hidden time bomb, embodied in 43.U.S.C.666, which said the United States will waive its

sovereign immunity to be joined in certain types of water cases called general state stream adjudications. After *Arizona v. California*, the Western attorney generals and Western governors sat down and tried to figure out how to respond. We need to respond. We have to solve this procedurally. We've got to modify our state water codes. So one side-effect of *Arizona v. California* was to spur the modernization of state water codes, including Montana's. To do what? To look at what John Wesley Powell said so long ago.

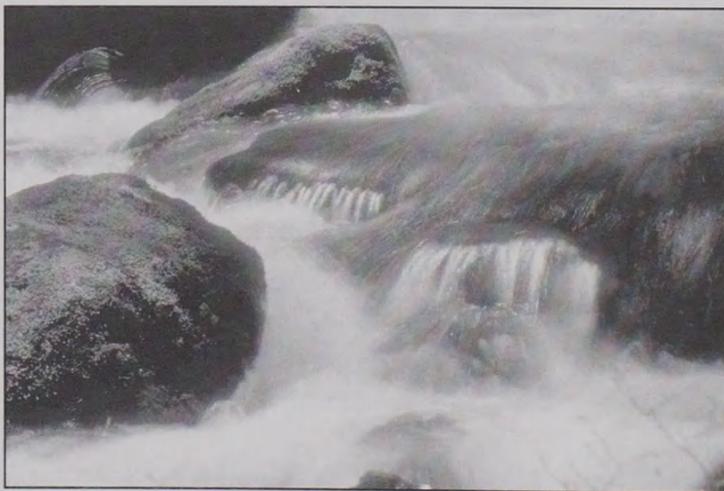
To look at water conservation. To look at water rights. To manage water on a basin and multi-basin basis. That's what *Arizona v. California* brought about: modernization of state water codes. States did this with a very

practical intent to bring the federal government and the Indian tribes into state water courts. But not necessarily to help the Indians or the federal government to get more water, or exercise it more effectively in fulfilling reservation needs. So what happened? The federally reserved water rights conflicts were displaced into state water courts. Water rights of national monuments or Indian reservations had to be defended within the state court system.

Nonetheless, the federally reserved rights doctrine governed as rules of decision in the proceedings.

I was trial attorney for the Klamath Indians in a reserved water rights case in south-central Oregon. It involved stream depletions from what's called the Klamath Marsh, a major flyway for Pacific migratory waterfowl. The Indians sued on the 1864 Brunot Treaty for a partial stream adjudication in federal court. That treaty said the Indians had a water right for hunting, fishing, gathering, and trapping that was superior to the state water rights of upstream appropriators who were depleting the Klamath Marsh. This was the first case to my knowledge that held that treaty rights create what's called an in-stream flow right, a right

Montana has two advantages that the Colorado River and the lower-basin states don't. We have a lot of water. There's a myth that we don't have a lot of water, but we do. And Indian tribes and Montana can work together to preserve this water for future needs and development, particularly in the case of the Missouri River.



to a stream's natural flow to preserve a treaty resource.

This ushered in a new water rights era. New gunfighters came in, the newly-created state water agencies, the state water engineers, the state administrative regulatory agencies; these are the new players who have the delegated power to adjudicate water rights claims. In *U.S. v. Adair*, the Indians were able to keep the case out of



state court. They got an in-stream flow right to preserve their treaty hunting and fishing rights. That's a surprising decision, perhaps not likely to be replicated elsewhere either in procedure or substance.

Can Montana do better? Can we learn from all of these water fights? Can we rewrite the ending of this doomed creation myth? Does it have to be fighting all the way down to the bottom? I hope not. Because Montana has two advantages that the Colorado River and the lower-basin states don't. We have a lot of water. There's a myth that we don't have a lot of water, but we do. And Indian tribes and Montana can work together to preserve this water for future needs and development, particularly in the case of the Missouri River. Montana has a mechanism to do that. Rather than litigate, both costly and uncertain, the state Legislature had the foresight to create something called the State Reserved Water Rights Compact Commission. This is an alternative model for negotiating federally reserved water rights, not only for Indian tribes, but for a wide array of federal agencies as well.

Negotiation allows you to do two things. You can be more creative. Why? Adjudication under McCarran involves a narrow jurisdictional grant to state courts over the rights of Indian tribes and the federal government. Negotiation allows creativity!

Let me give you an example of what I consider to be a very positive outcome of the Montana Reserved Rights Compact Commission. Perhaps, two examples. One is the Rocky Boy's Compact. It looked to the real human needs of both Indians and non-Indians on that small reservation. It created something called an MIR water supply system. Municipal, Industrial, Rural Water Supply System. The attorneys from the Montana Reserved Water Rights Commission deserve a lot of credit. They looked beyond the limits of McCarran to what were the real needs of the people in settling water claims and in meeting their future needs.

The second is the Fort Peck Water Compact, the first product of this compact negotiation. It's an agreement by which the state of Montana recognized about a million-acre foot water claim by

the Fort Peck Indian people to the main stem and tributaries of the Missouri River. It was a positive outcome. The state and tribes can work together in Montana, where perhaps they can't in the Colorado River Basin.

The state has worked very well with the tribes in general. The Rocky Boy's Compact will be the first congressionally approved settlement by the Clinton administration.

Remember that the federal government is the trustee of the Indian people. As far as I know, there's been no other approved Indian settlement in the entire eight years of the Clinton administration.

Now an example of a not-so-good outcome. Even positive things can sometimes turn difficult and detrimental. Let's look at the Crow Tribal Water Compact. It was recently approved by a state special legislative session, and represents a difficult case. Both the state and tribe are over-reaching to some extent by subordinating individual allotted reserved water rights. Although the tribal water right recognized by that compact is about 500,000 acre feet for a variety of uses, it fails to recognize the heavily allotted nature of the Crow reservation. Most of the tribal water rights have been fragmented into individual allotted Indian rights. But the tribal water right describes only the tribally owned water rights, not the allotted water rights. It further subordinates them to a wide variety of existing and potential future state water uses. I think that when that proposed compact comes before Congress, there'll be a lot of hard questions about whether it conflicts with the trusteeship duty to the Crow people.

Creation myths are there to be used, not just admired like cultural baubles. So I'd encourage the people of Montana, Indian and non-Indian, to work together to reshape the myth that we inherited. Just as in every creation myth, there are villains, cultural heroes, and not-so-innocent bystanders. I'd encourage you folks not to be bystanders. Speak up for your interests, but also try to reshape the myth in accordance with the larger public interest. Take it beyond its narrow scope of rights and duties, toward some new vision of the public interest. Water can once again play its life-giving role. □

Raymond Cross is a professor of law at The University of Montana-Missoula, and an enrolled member of the Three Affiliated Tribes of the Fort Berthold Indian Reservation in North Dakota.

Industry and Hydroelectric Water Rights

by Holly Franz

In the words of Ray Cross, I'm one of the hired guns. And over the years, my holster has included a number of paper bullets. I have represented industrial interests, agricultural interests, municipal interests, and even some in-stream flow interests.

I believe the primary reason I'm on this panel is to talk about one of the big bullets in my holster. That's my representation of Montana Power Company and its power generation rights at hydroelectric dams, both in the Clark Fork drainage and the Missouri drainage. These water rights are somewhat unusual. Traditionally, water rights required a diversion. With hydropower, there is an impoundment.

Hydroelectric water rights have traditionally been recognized as water rights in Montana, based on the impoundment made by the dams. But hydroelectric water rights are also somewhat different from other water rights because they are not necessarily consumptive. The water right passes through the power-generation turbine and remains in the river. In that way, it is not consumptive. However, to someone upstream from the dam who would like to divert water from the stream, the water right is consumptive. The dam's prior water right can prevent diversions upstream that would diminish the amount of water available for power generation. So in some ways, power generation is a very

traditional water right. It has all of the property rights of any other water right, and yet it's somewhat different.

Industry, I believe, has the same interest as most other water

right holders. And that is the desire for predictability. An industrial plant, a power generation plant, a municipality, agriculture, the Department of Fish, Wildlife and Parks all want to have water available when they need it. This can never be guaranteed, because in addition to the system of legal water rights, we have the unpredictability of nature. You never know what water will be in a stream when it comes time to look for water for a particular use.

Under the prior-appropriation doctrine, the way you get predictability is, No. 1, you need a good priority date. You want a first right on the stream. First in time, first in right.

The second thing you want, of course, is protection for that water right. A water right is a property interest, and traditionally people invest a lot of money to protect the predictability of water. Industry builds a plant. Municipalities build towns and water treatment plants and people come and move to those towns and expect to have water when they turn on their taps.

Irrigators develop farm economies and put in pivots and sprinklers and irrigation ditches. So most water users want to protect their water right, which is an important property right.



A water right is a property interest, and traditionally people invest a lot of money to protect the predictability of water. Industry builds a plant. Municipalities build towns and water treatment plants and people come and move to those towns and expect to have water when they turn on their taps. Irrigators develop farm economies and put in pivots and sprinklers and irrigation ditches. So most water users want to protect their water right, which is an important property right.

But predictability, under the Montana system, is difficult to achieve. Montana has a prior-appropriation system, but in many areas in the state, the first in time, first in right is more theoretical than real. In order to impose the first in time, first in right, you've got to have a decree on a stream. And in Montana, very large areas of the state have never been decreed. We are currently going through a water adjudication process that is very long and complex. I wouldn't even venture to predict when it will be complete. Most of the streams in Montana that have been decreed are tributary streams. Many of the tributaries in the Blackfoot have decrees, many of the tributaries in the Bitterroot have decrees, many of the tributaries in the Clark Fork have decrees. But many of the big, main-stem rivers, like the Missouri, the Clark Fork, the Blackfoot, the Big Hole, and many others, have no decrees. And until they have a decree that says this water right is No. 1 and that water right is No. 2 and the next one is No. 3, you can't enforce your priority date. In those non-decreed areas, even though first in time, first in right applies, we have more of a sharing system. That can be difficult when you are a water user on those streams and you are looking for predictability. Without a decree, you simply can't enforce your water right.

Montana also has a self-help enforcement system. Many states in the West have a government-enforcement system. Someone from a government agency comes and turns on every headgate and turns off every headgate to insure that water is used within a priority system. In Montana, we have no such enforcement. We have self-help. If I think someone is taking water that belongs to me, and I have a decree, I can go to my district court and say to the judge, "So-and-so is taking my water, please appoint a water commissioner (also referred to as a ditch rider)." And the court will do that. But it is up to me and the other water users to pay for the water commissioner. So again, going back to the need for predictability, in many areas, you simply don't have that in the Montana system because of the lack of decrees and because of the inherent difficulty of enforcing water rights with a multitude of other users.

An example of how it was done in the good old days, if indeed they were the good old days, might be the Anaconda Company. The Anaconda Company had the same problem when they started developing the Anaconda smelter and concentrator. What Anaconda did was look at the Warm Springs drainage, which is a drainage outside of Anaconda, and they built some dams, as storage sites. They also purchased most of the ranches in the valley, so there were essentially no other water users to fight with Anaconda for the water. It's a little harder to do that in Montana today. I think concerns about predictability and enforcement reinforce the importance of adjudication in the state of Montana and the need to continue in an orderly manner to accomplish the adjudication as soon and as accurately as possible.

I think concerns about predictability and enforcement reinforce the importance of adjudication in the state of Montana and the need to continue in an orderly manner to accomplish the adjudication as soon and as accurately as possible.

Industry and other water users are also concerned about property rights. A good example of that is the recent controversy over in-stream flows and Montana's response to the controversy. The state of Montana has addressed the in-stream flow problem by bringing in-stream flow interests into the existing water rights system. From industry's standpoint, that's good. In-stream flow has a place at the table, as long as they play by the rules. And those rules are that water rights are valuable. If you want the first water right on the stream for in-stream flow, you can negotiate to either lease it or to purchase it. Actually, for in-stream, in Montana you can only lease at this time.

In-stream flow proponents are like any other water-right user. They want the first right on a stream. First in time, first in use. They also want a right they can protect. They want enforceability. They want predictability. Usually in Montana, in-stream flow interests are looking for water rights on small tributary streams which provide spawning areas for the larger stream. They want an early priority water right, and they want

to protect that water right so when the time comes to either flush little fish out into the main river or to accommodate another of the biological needs of the fish, water is there and flowing. And in that way the in-stream flow rights fit into the existing system and recognize both the need for enforceability and that water rights are property rights.

Another example of the desire for predictability is going on in western Montana right now with Avista. Avista is the new name for the Washington Water Power Company. If you keep your eye on the newspaper, you'll be reading more about a proposal from the state, in which Avista, which has a number of dams on the border with Idaho, is willing to give up its first in time, first in use, in return for the state saying it's not going to let any more users on the stream. In that way, there would be predictability. The legal water availability is not going to get any worse than it is now. There will be no more water taken out of the stream than there is today. And I suspect that is the reason why this may be desirable or interesting to that particular industry, even though it's giving up its rights under the prior-appropriation system. Then it has predictability. It knows where it stands. It gets no worse than it is today. And I think those concerns are central to any water user, whether it's an Indian tribe trying to make sure that the quantity of water they are entitled to shows up at the reservation border, or an irrigator, an industrial user, a hydroelectric power generator, or an in-stream flow user.

What about the correlation between quality and quantity of water? Historically, quality has been part of a water right. One of the first cases in Montana concerning water rights had to do with quality. In addition to the right to a quantity of water, a water-right owner has a right for the water to be of a quality that can be used. In the late 1800s, for instance, a private company in the city of Helena had a water right. Somebody upstream from Helena started a mining operation. The water users in Helena claimed that the upstream mining operation degraded the quality of the water such that it couldn't be used. In that case, the Montana Supreme Court said no, you can't dirty the water if it makes it such that somebody else cannot beneficially use it. So in some ways, quality and quantity have been tied together for years

in a very limited manner. If what you do to the water makes it so that I can't put it to my beneficial use, then I can stop what you're doing. Certainly compared to the Clean Water Act, and the types of statutes that we've seen in the recent past, this is a limited connection.

Since the early days, Montana has allowed a few additional ways to consider water quality in water-rights decisions. For instance, if I'm the city of Missoula and I'm discharging into the Clark Fork, my discharge permit is tied to a flow amount, a dilution amount in the river and if someone is upstream from me and proposes to divert a large amount of water that could then impact my ability to lawfully operate under my discharge permit, I could object. So in that way there is a connection. But largely, quality and quantity have gone down two separate roads without paying too much attention to each other.

Where we're seeing some of that change is with TMDLs, Total Maximum Daily Loads. This has to do with what is called non-point pollution. Montana adopted a voluntary approach in which individuals can become involved in fixing up their streams. We're seeing quite a bit of activity across the state in this area of water quality management plans for streams. Sometimes these TMDL management plans have an impact on water quantity, but the participants still have a property right in their water

rights. To the extent that in-stream flow leases are involved, or some other type of activity that would put more water into the stream, it has to be voluntary. □



Holly Franz is a partner at Gough, Shanahan, Johnson, & Waterman in Helena. She has extensive background in water issues and private sector concerns and represents a variety of clients, including Montana Power.

Water Rights/Fights in the Agricultural Community

by Jim Moore

Shootouts at the OK Corral and grand gunfights involving citizens, local, state, and federal government were mentioned earlier in conversation. Over the years, a fair number of brawls have come about over water rights. I speak for ranchers who fight among themselves.

You can't talk about water rights in Montana without talking about irrigators. Under the Water Use Act of 1973, Montanans who had claims to water rights were obligated to file those claims promptly. Of the 210,000 water rights claims filed, 90 percent were irrigation claims. So if we're going to talk about water use in Montana, we're going to talk about ranchers and farmers diverting water for irrigation purposes.

You've heard about the appropriation doctrine we operate under in Montana. By its very nature, it's guaranteed to create controversy. Picture with me, if you will, that you're a rancher with property that you irrigate on the upper reaches of Swamp Creek. And you have a water right for 400 inches of water. Your downstream neighbor also has a water right for 400 inches of water. But he has the first right.

It's interesting that almost always the first rights are on the lowest reaches of the stream. That's where the settlers first stopped, later moving further up toward the mountains.

Now, imagine that you've had a dry year and the crops that you irrigate represent your livelihood. One day, the water commissioner comes up the creek and says you have to turn off your water and let it go by so your downstream neighbor can irrigate his crops. You have to stand there day-by-day and watch that water go by, knowing that you can't use it and that it's going to mean economic disaster.

People don't put up with that type of situation very easily. My father, who was born and spent his entire life on our family ranch in Two Dot, once said more people were beat to death with irrigation shovels in the Old West than were ever shot down with six guns, and it certainly is the truth.

Those upstream users would come up with all kinds of ways to try to circumvent the appropriation system. One instance I recall was on Race Track Creek, or Opportunity Creek, near Deer Lodge. The man on the upper end of the creek had his water turned off. Next to the stream was a kind of swampy area. So he decided he would go into this swampy area, dig a drainage ditch, and create some water for irrigation. Of course the swampy area was tied hydrologically with the creek. Did he have the right to do what he did? If I recall this case correctly, the court said, "No, you can't steal water, even under those circumstances."

The water fights started as soon as the appropriation doctrine came into being.

One case, involving Three-Mile Creek near Avon, helps illustrate the ongoing battles over water.

In 1969, a man named Quigley diverted water out of Three-Mile Creek for mining purposes. He mined for a while and then found that mining didn't pay very well, so he converted his mining water right to an irrigation water right. And the fight was on. The names of the people who were involved in the very first legal action on Three-Mile Creek were Quigley, Macintosh, and Gravelly. Over the years, I don't know how many sessions the courts have seen over water from this creek. One of the partners in my law office just got a decision on water rights dispute on Three-Mile Creek, and the parties were Quigley, Macintosh, and Gravelly. Fourth generations are still fighting over the same water

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in the same creek. And that's not the end of it. Attorney Holly Franz is waiting for a court decision involving Quigley, Macintosh, and Gravely having to do with a ditch rather than with the water. It's the same people fighting the same fight. Only in this case, they are using a ditch as the vehicle to fight over water.

The fights over water are everywhere. Judge Lessley, who was our first chief judge on water-related issues, once said, "Every brand new lawyer needs a client that's going to generate a steady income. What every new lawyer should do is get a client with a ranch on South Meadow Creek in Madison County. Then he's assured of an income." Fights go on over water in that creek year after year after year.

The Water Use Act simply exacerbated the situation because it required a person to file a claim, then it gave a neighbor an opportunity to object to that claim if he thought the claim was exaggerated in some way. And it usually was. So even if there was no water controversy between them before, the new legislation stirred up water fights.

Water fights have been tremendously expensive for irrigators in this state, and for the state itself. Irrigators grumble about the cost incurred by the Water Use Act, but they are determined to protect the appropriation system because they know they must live by it.

Water rights have intrinsic value aside from the ability to produce crops. For example, some of Montana's rural areas—particularly in the southwestern valleys—are being subdivided for homesites. The value of a tract of land is enhanced if the realtor can say water rights go with the land. Even if it's just six inches of water, just enough to run a garden hose, the fact that there are water rights increases the value of the piece of land.

Thus, water rights enhance and determine the value of farms and ranches. The best example is a ranch in central Montana. For some unknown reason, the people who own the ranch did not file claims for irrigation rights on the ranch at the time those claims had to be filed. Under the Water Use Act, those rights are irrevocably lost. It seems so harsh a penalty that I wonder if it really will happen, but if in fact they are lost, that ranch is devalued by half or more. Without the water rights, the ranch will be unable to produce much of the feed for the livestock.

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So we've had this system in the past where ranchers fought with ranchers and farmers fought with farmers, all of them trying to decide who gets to use the water from the creek. But now the world is changing.

In the past 30 years, controversy has arisen over diverting water from creeks. People want water in the streams for recreation and for wildlife. They want water in the streams for fish, for aesthetics. When we ranchers look around, this new notion seems to arrive on the backs of those who came here from somewhere else. As one of my rancher friends said, "We feel the way the members of the Sioux Nation must have felt in 1860. They're here to destroy our way of life. And they just keep coming. There are more of them all the time."

In one of the Mansfield conference sessions, a man who obviously had a rural homesite with a stream going through it was chagrined because he looked out one day and found there wasn't any water in the creek. He called the Department of Natural Resources and asked, "Doesn't the stream have any rights?" And the answer he got was a lot of laughter.

Under the appropriation doctrine, the stream doesn't have any water rights. Irrigators have the right to divert all of the water from the stream in its entirety to satisfy their needs. This doesn't sit well, I believe, with a majority of the people in Montana at the present time. So efforts are out there to find ways to ensure that water does stay in the stream despite our appropriation doctrine.

At a water rights seminar I attended a few years ago, there was a lawyer from the Montana Wildlife Federation. During the session, he looked over at the few agriculture people huddled together and said, "We're going to get your water. We're going to get it with the Public Trust Doctrine. We're going to get it with the Clean Water Act. We're going to get it with the Endangered Species Act. We're going to get it with the Superfund Act. But we're going to get your water."

Kind of scary, if you're the guy who depends upon that water to make a living.

The agricultural community sees those kinds of remarks as indicative of intent to steal water, or to take it without paying for it. Irrigators might not concern themselves so much if they

received compensation for parting with their water. But in all of the discussions I've been involved in, I've never heard any suggestion from the people on the other side that they pay for the water. The Legislature did take an important first step by providing for a water leasing system. I suspect there will come a day when water rights will be salable for uses other than irrigation. It has already happened in California and Colorado. The city of Denver has simply gobbled up most of the irrigation rights east of the mountains and officials want to tunnel through the mountains to get all they can from the west side as well.

Holly Franz spoke of water quality. Those who live in rural areas are just like everyone else.

They want clean streams. One of the conference participants spoke of drinking water directly from Warm Springs Creek in his youth. I've done that on our family ranch. I'd like to be able to continue to do it in the future. Irrigators want quality water just as all of the rest of the state does. I believe that our agricultural community supports reasonable efforts to ensure that we do have clean water. Our concern is with the framework and design of the effort to take care of major polluters, the ones that created the Superfund cleanup sites. We are afraid that whoever is firing that cannon might miss the big polluters and hit the little guy out on the creek who really isn't hurting anybody very much.

A story went around the agricultural community a few years ago about a rancher who was approached by a bureaucrat from Helena and castigated severely because he had some hay bales in a ditch. The bureaucrat noted that the water from the ditch was wasting back into the creek and the result was a degradation of the water of the creek. Seems a small thing, but it bespeaks an attitude that's a real worry to people who live in the country.

The agricultural community is also concerned about companies that are obligated to clean up toxic sites taking water. The Arco cleanup site at Warm Springs, near Anaconda, is a good example. One of the lawyers in my office represents some ranchers over there. They say that Arco stole their water to divert it into ponds to settle out the minerals, arsenic, and everything else that's been coming down Silver Bow Creek. Arco takes the position that it didn't steal any water. But further than that, Arco says that even if it did take water that belongs to someone else, it was obligated to do so by the Environmental Protection Act. Arco says it had to clean up the creek and the only way to do that was by using water in the amounts they needed and at the times they needed it. My partner argues that is not what the Environmental Protection Agency said. But nonetheless, we're in court again, protecting water

rights. We're always in court it seems. This is just another threat, an obvious threat, to the agricultural community.

Ranchers aren't hell bent on fighting with the rest of the community. I like to think of things that are happening on the Ruby River in Madison County. 1985 was a horribly dry year in Montana and the Ruby River de-watered. And every television camera in the state was there, it seemed, focused on a dying fish flopping around on a dry gravel bed. The inference was that the ranchers—those rascals—had turned all of the water out of the river to irrigate without concern for anyone else.

The ranchers, susceptible to public opinion, immediately released water from the Ruby River reservoir, water that they paid for, to re-water the river and make the problem disappear.

1988, three years later, was another terribly dry year. It was the year that Yellowstone Park burned, if you recall. The Ruby River irrigators made certain that the river didn't de-water that year. They did this voluntarily because they recognized it was not in their interest to antagonize the whole community of Montana. And they bore the cost of the water that was released for public benefit. No one else helped pay that cost.

Out of that experience has come better communications throughout

the valley. The people in the valley meet to discuss various uses of water. They want to ensure that irrigators can irrigate, but also make sure there is water for other purposes. It seems to me that it could be a model for solving problems on other streams, streams where similar problems arise.

Simple population growth is going to force changes in our appropriation system to allow in-stream flow. When I was a child, there were about 450,000 people in Montana and 100 million in the United States. We're now approaching 900,000 in Montana and 250 million in the United States. Simple population growth—people flowing into Montana, each wanting water in the streams—is going to force changes in the way we handle things. But it seems to me that ways can be found to address the need for in-stream

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flow without changing the appropriation doctrine, and without stealing water from ranchers.

Ranchers do need to use water more efficiently, and that is happening. And we will have to allow for irrigators selling water to municipalities. I think that those who want water in the streams have to recognize that they have to bear at least some of the cost. They can't simply say, as the wildlife lawyer did, "We want your water and we're going to take it away from you and you're just going to have to suffer the loss."

There are ways to do what I'm suggesting. To use the Ruby River again as an example, there is a reservoir on the upper end of the stream and the water can be used to maintain flow in the Ruby and the Jefferson River, to which the Ruby is a tributary. Those who want in-stream flow can buy water contracts from irrigators and then let the water go downstream to provide for the fish. Holly Franz is correct that we need adjudication to carry out this plan. Once the adjudication is completed, however, the water can be administered. If the community that wants water in that stream is willing to pay for it, we don't have to change the appropriation doctrine. We simply have to tidy up the books.

Even streams where there aren't any reservoirs can have in-stream flow without a change in the doctrine. Let me use the Gallatin River as an example. The earliest water right is at the lower end of the stream. There's a concern because the stream does de-water when irrigators divert all of it in the upstream reaches. But the earliest right is at the lower end. Why not pay the people who have that water right to irrigate at times when in-stream flow is needed up above? For them to irrigate, the

water has to travel all the way down to them, so there's in-stream flow all the way, isn't there? That's all it takes. But somebody has to put up the money so the people on the lower ditch irrigate at the proper time, the time that suits the needs of fish, not necessarily the time that provides them the maximum benefit from the use of the water from irrigation. It can be done. Without changing the law. But somebody, other than the irrigators, has come up with some dollars.

I'm a cattle rancher. You may notice that I have some prejudices. Do you know what I hear when I'm representing people who've bought ranches in Montana? They're here because they like open spaces. They like to be able to see for miles. If we don't protect the agricultural community, and the water rights associated with that community, the possibility exists that we will lose the thing that we want the most. We need to recognize the need for diversion, the need for people to irrigate, and somehow mold that need together with our desire to have water remain in the stream. My concern arises from the expression of the Montana Wildlife Federation lawyer, "We're going to get

your water." No mention of payment. The environmental community speaks to the agricultural community about accommodation. But far too often, they seek accommodation for their interests without any thought of accommodation for agricultural interests. I think it has to go both ways. □

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The River Next Door

by Bruce Farling

Anthropologist Loren Eiseley said that if there is magic in this world it is found in rivers. But today's Montanans and our forebearers several generations removed have seen little of the magic of the Clark Fork River. This remarkable ribbon drains the wet western third of our state, supplemented by the waters of the Bitterroot, Flathead, and Big Blackfoot rivers. During late spring, the 320-mile-long Clark Fork discharges 50-60 thousand cubic feet per second of water into Idaho, which easily exceeds what the Yellowstone and Missouri rivers combined wring from our state. The Clark Fork is our biggest, and to me, our grandest river.

But it is also our hardest-working river. Its blue-collar legacy began before Montana was a state, before slaves were emancipated, before buffalo were erased from the prairies. Nearly 150 years of being asked to do too much for too many enterprises has robbed the Clark Fork of much of the magic it should have. There is no one alive today, nor was there likely anyone alive 50 years ago, who fished or swam in this river before it began its spiral into something to be plugged, twisted, yanked, dumped on, and drained. In 1872, while traveling in the Clark Fork country, future president James Garfield remarked: "The beautiful river has been permanently ruined by miners. And has been for three years as muddy as the Missouri. Before the discovery of gold, it was as clear and pure as any mountain stream could well be."

The last century and half have been hard on this river. The pollution it has endured has been the worst of any river in

Montana, and nearly in the West. It is therefore hard to imagine what it can be. But we need to try.

The ultimate revival of the Clark Fork will be a measure of our ability to assume the necessary humility it takes to realize it's time to give something back to a river that has served Montana so well.

I think Montanans are up to the task.

We have indications as to what is achievable. In the early 1980s, folks from Missoula to the Idaho line rose up to protest a proposal to once again allow a pulp mill—our neighbor—to increase its discharge of wastewater into the river. Agency bureaucrats and industry managers were shocked. After all, hadn't the Clark Fork's primary purpose been to serve as a handy repository for

our wastes? The immediate result of the uprising was a region-wide effort to examine how we have affected the river and its tributaries, and what must be done to mend their waters.

Since then, Missoula and other communities have invested considerably in riverside parks and greenways. Not long ago these same towns turned their back on the river, using it much like a dust bin is used to collect sweepings of those things we don't want. Pollution reduction has produced a modest

rebound in the wild trout fishery in some sections of the river. This has attracted enough sport angling that people actually fight over places to wet their lines. This was not the case 20 years ago. Nor was it the case that on hot summer days Montanans found themselves jostling with flotillas of outfitted and private boats to float the river's challenging whitewater stretch in the Alberton Gorge. But that is the way it is today.

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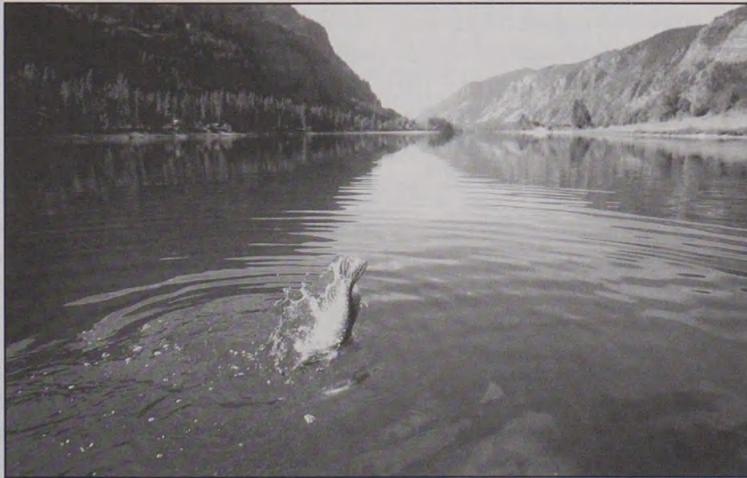


Photo of the Clark Fork River by Michael Gallacher – Missoulian.

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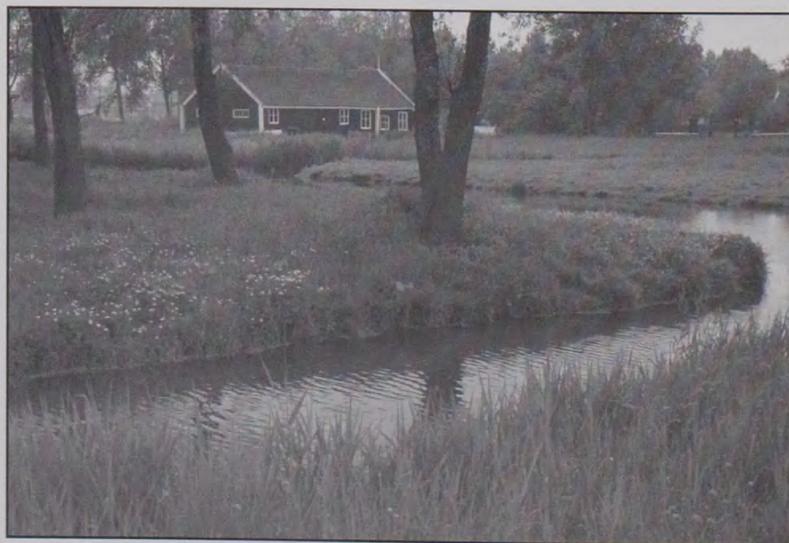
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I think Montanans are up to the task.

We have indications as to what is achievable. In the early 1980s, folks from Missoula to the Idaho line rose up to protest a proposal to once again allow a pulp mill—our neighbor—to increase its discharge of wastewater into the river. Agency bureaucrats and industry managers were shocked. After all, hadn't the Clark Fork's primary purpose been to serve as a handy repository for our wastes? The immediate result of the uprising was a region-wide effort to examine how we have affected the river and its tributaries, and what must be done to mend their waters.

Since then, Missoula and other communities have invested considerably in riverside parks and greenways. Not long ago these same towns turned their back on the river, using it much like a dust bin is used to collect sweepings of those things we don't want. Pollution reduction has produced a modest

rebound in the wild trout fishery in some sections of the river. This has attracted enough sport angling that people actually fight over places to wet their lines. This was not the case 20 years ago. Nor was it the case that on hot summer days Montanans found themselves jostling with flotillas of outfitted and private boats to float the river's challenging whitewater stretch in the Alberton Gorge. But that is the way it is today.

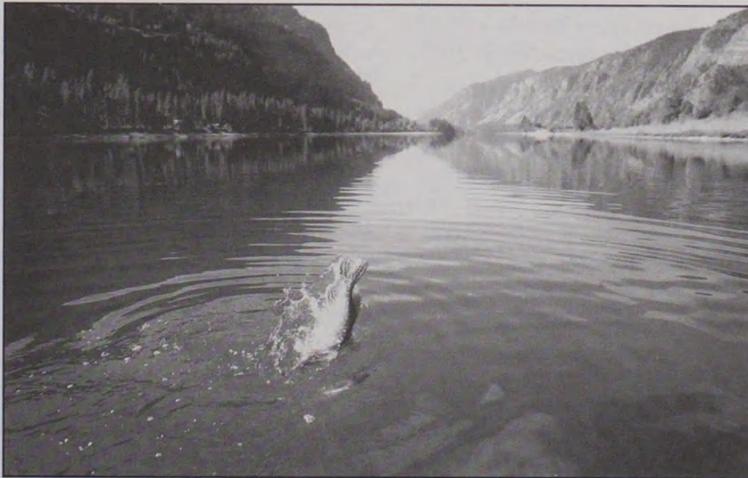


Photo of the Clark Fork River by Michael Gallacher – Missoulian.

Not that many years ago, some folks wouldn't even swim in the river.

It is true that a river is the sum of many parts, including tributaries that stretch from high divides and course through rural and municipal landscapes. To heal a river, its arterial contributions must be safeguarded. And so Montanans are endeavoring in many ways to fix, and quite successfully at that, the considerable problems of some of the Clark Fork's tributaries, most notably the Big Blackfoot River. They are also fighting proposals in tributaries for new, and potentially devastating sources of harm, such as large, unnecessary mining projects of the sort that invoke our past missteps with mineral extraction. Montanans have also struck modest but important bargains in the tributaries to preserve both natural values and the traditional uses that mark our rural landscapes. In the Bitterroot, conservation-minded anglers have teamed with ranchers to tackle problems associated with over-allocation of scarce water.

I have a vision, it's really rather humble and not particularly profound, that this river can be healthier and much more robust while still supporting some of the traditional uses that depend on it. This river can and should support more wildlife habitat; its upper reaches can once again support furbearers and provide more streamside nesting for water thrushes or yellow warblers. The Clark Fork's full reach can have back some of the wetlands it once supported, which in turn once provided food and habitat for millions of migrating waterfowl, or for less conspicuous but still remarkable creatures like spotted frogs or painted turtles.

It can surely have more wild trout, even the native species that have been extirpated. It can support more recreation, neighborly recreation that is. And it can become more attractive as a respite from the buzz of workaday life.

Importantly, we can achieve these things and still protect the traditional uses that support some very good people in agriculture, as well as the open spaces they provide that are a trademark of this state. We can also provide water for cities and agriculture and places for people to live. And finally, we can protect and restore a river and the landscape that surrounds it so that Montana can have something few other places have. Something it seems many Americans want these days, and are willing to pay for, invest in or relocate to: a healthy natural landscape with a prosperous society. By restoring and protecting natural gifts like the Clark Fork, we can better choose which economic forces we want to be partners with. We don't have to court smokestacks or industrial tourism.

But all this requires some change and innovation.

First we must come to grips with what the past has wrought. One hundred and fifty years of mining has been awfully hurtful to the Clark Fork River. If we don't clean up the upper river right, or we squander our opportunity to restore its scars, we won't get far with this vision. We need to better address how we plan our communities, where people should live and work, and which

landscapes need protection. The Clark Fork basin has some of the most poorly planned, if you can call it planning, rural and municipal areas in the West.

We also must be willing to share water, and endeavor to make the water we have go further for more uses, including for healthier streamflows.

And we must buck up and admit that some of the engineering artifacts we have erected do not necessarily represent the ultimate utility of a watershed or river. For instance, we need to revisit whether we really need all those forest roads that, in small, largely imperceptible but still important ways, harm our water quality, wildlife, fish and native rangelands. We must examine whether our engineering of river banks to fend off flood flows is really a wise task, and admit that lessons learned elsewhere make it abundantly clear that in the long run it's folly to expect a river to run where it doesn't want to go.

And finally, we must ponder whether some human artifacts we've always thought of as forever, are really necessary.

I'm a kook. I'll admit it. But I strongly believe the wooden plug we have in the river upstream of Missoula will have to eventually go. Milltown Dam produces only negligible power. Its main value anymore is that it impounds some 6.5 million cubic yards of

contaminated sediment. If we don't take it out, nature certainly will. Maybe not in my lifetime, but in a not too distant time. Its removal, of course, means also removing the mess it contains as well as pollution found upstream. The financial cost will be high. The short-term environmental upheaval will seem at times not worth it. But we have no choice. The dam blocks migrating fish, the reservoir wastes are contributing to a growing plume of contaminated groundwater and they sit there poised, ready to be flushed downstream in an uncontrolled flood, earthquake or ice-scour event. Better WE should manage the fate of the dam and contamination. People say, where do we put the waste once we remove it? Do we want to contaminate another area? I say, what's worse than leaving it in a river? Our river. Montana's largest river.

Normally I'm invited to gatherings like these to talk about laws, policy, and regulations. Or the Xs and Os of stream geomorphology, water chemistry or fishery science. But I do that only because I'm motivated by rivers. Rivers like the Clark Fork. Especially the Clark Fork. In the long run, and the poets know this well, we really can't make ultimate expressions of rivers a matter of numbers and laws. We can only talk about water and magic. □

By restoring and protecting natural gifts like the Clark Fork, we can better choose which economic forces we want to be partners with. We don't have to court smokestacks or industrial tourism.

Bruce Farling is executive director of Montana Trout Unlimited, and former member of the Upper Clark Fork River Steering Committee. He was a panelist at this year's Mansfield Conference.

Privatization Popular Among Local Governments

by Jeffrey D. Greene



Few public policy issues have drawn more attention or been more controversial than the privatization of government services. Providing public services through the private sector is not a new concept, but since the mid-1970s local governments have increasingly sought new ways to deliver services in hopes of reducing operating costs. The shift is not surprising, considering the fiscal dilemmas faced by many local jurisdictions during an era of devolution (Brammer 1997).

Broadly defined, privatization is the attainment of a public policy goal through the use of the private sector (National Council of Employment Policy 1988). Privatization comes in many forms ranging from getting government completely out of the production and delivery of services to simple contracting. The concept also encompasses deregulation, tax reduction, voucher systems, and public divestiture of government properties. Over the past two decades, scholars and practitioners have debated the merits of privatization (Starr 1988; Donahue 1989; Wolf 1988; Savas 1987). This ideologically-charged debate pits the merits of positive government action and responsibility against the virtues of capitalism and free markets as the best means to achieve public goals (Drucker 1969).

Examples of privatization abound in “the reinventing government era.” Local governments have privatized services ranging from garbage collection to wastewater treatment systems (Osborne and Gaebler 1992). The most common rationale for

privatization is that governments privatize in response to fiscal pressures caused by economic recessions, demographic shifts, and changing patterns of federalism (Liner 1989). Surveys of local officials have confirmed that the main reason governments use privatization is to save money (Touché-Ross 1987; ICMA 1989). Privatization generally reduces expenditures because of the lower costs associated with private delivery of services.

Privatization is not a new phenomenon for local governments. Research suggests that the use of privatization by local governments is common (Morley 1989). Surveys conducted during the 1980s by the International City Management Association (ICMA) and the Touché-Ross Company revealed that local governments use privatization for an array of services (Valente and Manchester 1984; Morley 1989; International City Management Association 1989; Touché-Ross 1987). These surveys also found that 80 percent of local governments were using privatization.

Although privatization is widely used at the local level, one analysis by the ICMA did not reveal significant changes in the amount of privatization used by local governments between 1982 and 1988 (Morley 1989). For example, Morley’s analysis found that the use of private contracting—the most common form of privatization used by local governments—remained relatively stable during the 1980s. Another analysis of the ICMA surveys found that aside from private contracting, local governments made little use of

Surveys of local officials have confirmed that the main reason governments use privatization is to save money. Privatization generally reduces expenditures because of the lower costs associated with private delivery of services.

other service delivery options (Miranda and Andersen 1994). The study also found that government employees continue to deliver most public services. These findings are surprising considering the attention privatization has received and the widespread debate over reinventing government. Many local governments have opted not to privatize services, despite the promise of greater efficiency.

Are service delivery patterns in Montana consistent with national patterns? Montana is an interesting case. It is a rural, geographically large western state with a political culture resistant to higher taxes and any increase in the size or scope of government. In November 1998, *Constitutional Initiative 75* (CI-75) was passed by Montana voters, requiring that voters approve all tax increases. In an unexpected turn of events, the Montana Supreme Court overturned CI-75 in February 1999. But since resistance to taxation is such a part of Montana's political culture, another version of CI-75 may appear on the ballot in the next general election. This type of culture makes political forces in Montana receptive to the concept of privatization. The Republican-controlled state government sees privatization as a way to reduce state spending. The state has experimented boldly with privatization. It has privatized part of its welfare system, health care system, prisons, and has even discussed privatizing the public university system (Anez, 1995; McLaughlin, 1997). Despite rapid growth in the western part of the state, Montana continues to experience budgetary shortfalls at the state and local level. It is one of only five states without a general sales tax and the statewide tax base is relatively small. Considering Montana's fiscal dilemmas and the apparent predisposition toward the private sector, one would expect the use of privatization to be common in Montana.

Findings

In a recent study conducted by the author, privatization by Montana's 56 counties and 160 cities and towns was compared to cities and counties surveyed by the ICMA in 1992. Forty-three Montana counties (77 percent) and 131 cities (82 percent) responded to the mail-in survey, which was a modified version of the ICMA survey. Types of privatization included in the survey were contracting with private business, contracting with non-profit groups, subsidies, volunteers, self-help, vouchers, and contracting with other governments. The term "privatization levels" refers to the breadth of privatization used to provide 59 local services (0=no privatization; 59=100 percent privatization). Contracting with other governments was excluded from the privatization level calculations.

Table 1 compares the aggregate levels of privatization by Montana's local governments with those surveyed by the ICMA. The average privatization level was 31 percent for Montana's

Table 1
Privatization Levels in Montana Versus National Averages

| Montana Cities n=142 | National Cities n=1220 | Percent Difference | Montana Counties n=43 | National Counties n=284 | Percent Difference |
|--|---------------------------|--------------------|--------------------------|----------------------------|--------------------|
| 31.0 | 26.8 | 16.0% | 33.8 | 24.8 | 36.2% |
| Montana Cities and National Cities | | | t=2.8 at .00 | | |
| Montana Counties and National Counties | | | t=3.2 at .00 | | |

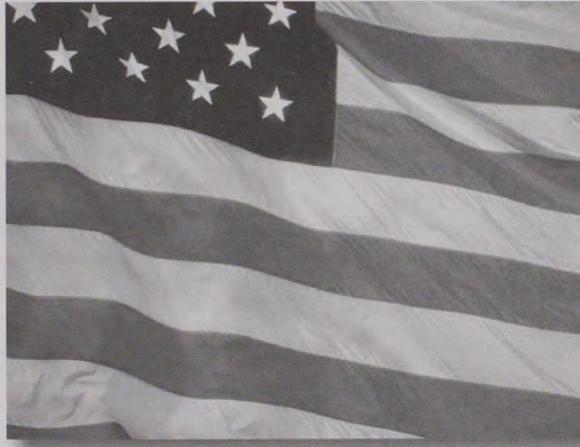
Considering Montana's fiscal dilemmas and the apparent predisposition toward the private sector, one would expect the use of privatization to be common in Montana.

cities and nearly 34 percent for its counties. The findings also revealed that privatization levels were higher in Montana than in ICMA-surveyed cities and counties. The difference between Montana cities and ICMA-surveyed cities was 16 percent, which is a statistically significant difference (t=2.8 at .00). The difference between Montana's counties and ICMA-surveyed counties was larger (25 percent). The difference was also statistically significant (t=3.2 at .00). In short, the findings suggest that Montana's local governments use more privatization than the national sample of cities and counties surveyed by the ICMA.

Montana's higher privatization levels are not particularly surprising. Montana is geographically large and predominantly rural, with a relatively small population. Montana's local governments have experienced many of the fiscal pressures believed to cause privatization. The eastern portion of the state has experienced population losses, economic decline, and eroding tax bases in recent years. Fiscal stress, coupled with a scattered rural population, likely contributes to the extensive use of privatization, particularly self-help. The western portion of the state (the mountainous region) has experienced population increases and economic growth, which has greatly added to the tax bases of local governments. Some western counties have experienced such rapid growth that they likely have experienced the "overload effect." That is, rapid growth causes government to utilize private methods of service delivery to keep pace with expanded demands. This rationale is often used to explain the widespread use of privatization in Sunbelt states (Greene 1996).

It is possible that privatization is even greater than the data indicate. Much of the growth in western Montana has been in

counties. Montana's counties are weak political entities whose powers are severely restricted by the constitution and state law. Restrictions imposed by the state affect service provision. The growth in suburbs located in counties has caused a unique problem. By law, the cities cannot provide services outside their jurisdictional boundaries. Thus, developers and citizens must provide the services. For example, water provision via a private company is common throughout Montana. This type of development has created pressures for what might be thought of as *virtual privatization*. That is, because of legal restrictions, private business must provide services that are usually provided by governments. These services would otherwise be unavailable to residents. The weak authority of counties is reflective of Montana's political culture and tradition.



with other governments. Despite the widespread use of privatization in Montana, the findings illustrate that public employees still provide most public services. The finding is surprising in the case of Montana, but is consistent with the findings of national surveys conducted by the ICMA. In the case of Montana, this may be attributable to the lack of economies of scale. Most towns are small, scattered geographically, and situated in rural areas. Services are limited and perhaps manageable by small public work forces.

The form of privatization used most often by Montana's local governments is private contracting. This finding is also consistent with the results of surveys conducted by the ICMA. Private contracting is the most popular form of privatization for local governments nationwide.

The second most commonly used form of privatization is included within the "other alternative service delivery arrangements" category—self-help. This finding is not particularly surprising considering that many Montana communities are relatively rural and remote. Thus, residents often are responsible for handling certain services, such as disposing of their own garbage. Most alternative service delivery arrangements, such as subsidies, volunteers, and franchises, are not widely used by Montana's local governments.

How Do Montana Cities, Towns, and Counties Provide Services?

Table 2 lists the service delivery arrangements used by category. The data reflect the average percent of cities and counties that used the specified service delivery method. In every category, the most common service delivery method used was government employees. Second most common was contracting

Table 2
How Services are Provided by Category for Montana Counties and Cities

| Service Category | Government Employees | Contract w/ Government | Contract w/ Private | Franchise | Other ASDAs* |
|-------------------------|----------------------|------------------------|---------------------|-----------|--------------|
| Public Works | 67% | 16% | 20% | 12% | 16% |
| Public Utilities | 56% | 10% | 20% | 16% | 15% |
| Public Safety | 52% | 22% | 7% | 7% | 18% |
| Cultural and Arts | 50% | 41% | 17% | 5% | 28% |
| Health & Human Services | 27% | 37% | 14% | 3% | 32% |
| Parks & Recreation | 74% | 20% | 14% | 5% | 7% |
| Support Services | 67% | 32% | 26% | 8% | 13% |

*Alternative Service Delivery Arrangements

Note: The responses reflect the average percentage of local governments that used the service delivery method by category. The percentages shown will not equal 100 percent because more than one response is possible.

Other ASDAs refers to Alternative Service Delivery Arrangements such as self-help and subsidies.

Conclusion

Privatization has become part of the local government landscape, and its potential to improve both the efficiency and effectiveness of government programs and services appears to be far from exhausted. Privatization is widely included in the management portfolios of local governments in Montana. As Montana continues to grow, it will be interesting to see which mix of service delivery options local governments adopt to meet increased public demands. Privatization is not a panacea, even in states with political cultures favorable toward privatizing services. In March 1999, Montana's Legislature—which has tended to favor privatization in the past—cancelled a \$400 million per year contract with the private corporation that handled its statewide mental health care for failing to meet performance standards (McLaughlin 1999). Despite examples of the shortcomings of privatization, it is a practice not likely to fade. Interest in privatization in Montana and elsewhere will likely continue as long as fiscal pressures persist for local governments. □

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Countries Ranked by Population, 2000

by Paul Polzin

Quick! What are the 10 largest countries in the world in terms of population? Which has more people, Mexico or Canada?

These are not merely trick questions or an easy way to win a buck at your favorite bar. Montana's economy is becoming increasingly internationalized, and basic information about worldwide markets will be needed on a day-to-day basis.

Following is the projected 2000 population for all the 227 nations of the world, as prepared by the U.S. Bureau of Census.

| Rank/Country | Population | Rank/Country | Population |
|---------------------|---------------|-----------------------|------------|
| 1 China | 1,256,167,701 | 52 Ghana | 19,271,744 |
| 2 India | 1,017,645,163 | 53 Australia | 18,950,108 |
| 3 United States | 274,943,496 | 54 Syria | 17,758,925 |
| 4 Indonesia | 219,266,557 | 55 Yemen | 17,521,085 |
| 5 Brazil | 173,790,810 | 56 Kazakhstan | 16,816,150 |
| 6 Russia | 145,904,542 | 57 Cote d'Ivoire | 16,190,105 |
| 7 Pakistan | 141,145,344 | 58 Cameroon | 15,891,531 |
| 8 Bangladesh | 129,146,695 | 59 Netherlands | 15,878,304 |
| 9 Japan | 126,434,470 | 60 Madagascar | 15,294,535 |
| 10 Nigeria | 117,170,948 | 61 Chile | 15,155,495 |
| 11 Mexico | 102,026,691 | 62 Ecuador | 12,782,161 |
| 12 Germany | 82,081,365 | 63 Guatemala | 12,669,576 |
| 13 Philippines | 80,961,430 | 64 Cambodia | 11,918,865 |
| 14 Vietnam | 78,349,503 | 65 Burkina Faso | 11,892,029 |
| 15 Egypt | 68,494,584 | 66 Angola | 11,486,729 |
| 16 Turkey | 66,620,120 | 67 Zimbabwe | 11,272,013 |
| 17 Iran | 65,865,302 | 68 Cuba | 11,139,412 |
| 18 Thailand | 61,163,833 | 69 Greece | 10,750,705 |
| 19 Ethiopia | 60,967,436 | 70 Mali | 10,750,686 |
| 20 United Kingdom | 59,247,439 | 71 Serbia | 10,529,507 |
| 21 France | 59,128,187 | 72 Belarus | 10,390,697 |
| 22 Italy | 56,686,568 | 73 Senegal | 10,390,296 |
| 23 Congo (Kinshasa) | 51,987,773 | 74 Czech Republic | 10,283,762 |
| 24 Ukraine | 49,506,779 | 75 Niger | 10,260,316 |
| 25 Burma | 48,852,098 | 76 Belgium | 10,185,894 |
| 26 South Korea | 47,350,529 | 77 Hungary | 10,167,182 |
| 27 South Africa | 43,981,758 | 78 Malawi | 10,154,299 |
| 28 Colombia | 40,036,927 | 79 Portugal | 9,902,147 |
| 29 Spain | 39,208,236 | 80 Zambia | 9,872,007 |
| 30 Poland | 38,644,184 | 81 Tunisia | 9,645,499 |
| 31 Argentina | 37,214,757 | 82 Sweden | 8,938,559 |
| 32 Sudan | 35,530,371 | 83 Rwanda | 8,336,995 |
| 33 Tanzania | 31,962,769 | 84 Dominican Republic | 8,261,536 |
| 34 Algeria | 31,787,647 | 85 Bulgaria | 8,155,828 |
| 35 Canada | 31,330,255 | 86 Austria | 8,148,007 |
| 36 Morocco | 30,205,387 | 87 Bolivia | 8,139,180 |
| 37 Kenya | 29,250,541 | 88 Azerbaijan | 7,955,772 |
| 38 Peru | 27,135,689 | 89 Chad | 7,760,252 |
| 39 Afghanistan | 26,668,251 | 90 Guinea | 7,610,869 |
| 40 Nepal | 24,920,211 | 91 Somalia | 7,433,922 |
| 41 Uzbekistan | 24,422,518 | 92 Switzerland | 7,288,715 |
| 42 Venezuela | 23,595,822 | 93 Haiti | 6,991,589 |
| 43 Uganda | 23,451,687 | 94 Hong Kong S.A.R. | 6,966,929 |
| 44 Iraq | 23,150,926 | 95 Benin | 6,516,630 |
| 45 Taiwan | 22,319,222 | 96 Tajikistan | 6,194,373 |
| 46 Romania | 22,291,200 | 97 Honduras | 6,130,135 |
| 47 Saudi Arabia | 22,245,751 | 98 Burundi | 5,930,805 |
| 48 Malaysia | 21,820,143 | 99 El Salvador | 5,925,374 |
| 49 North Korea | 21,687,550 | 100 Israel | 5,851,913 |
| 50 Mozambique | 19,614,345 | 101 Paraguay | 5,579,503 |
| 51 Sri Lanka | 19,355,053 | 102 Laos | 5,556,821 |

| Rank/Country | Population | Rank/Country | Population |
|---|------------|--------------------------------------|------------|
| 103 Sierra Leone | 5,509,263 | 175 Maldives | 310,425 |
| 104 Slovakia | 5,401,134 | 176 Bahamas, The | 287,548 |
| 105 Denmark | 5,374,554 | 177 Iceland | 274,141 |
| 106 Togo | 5,262,611 | 178 Barbados | 259,248 |
| 107 Finland | 5,164,825 | 179 French Polynesia | 246,171 |
| 108 Libya | 5,114,032 | 180 Western Sahara | 244,943 |
| 109 Georgia | 5,034,051 | 181 Belize | 241,546 |
| 110 Nicaragua | 4,850,976 | 182 Samoa | 235,302 |
| 111 Papua New Guinea | 4,811,939 | 183 Netherlands Antilles | 209,888 |
| 112 Jordan | 4,700,843 | 184 New Caledonia | 200,481 |
| 113 Croatia | 4,681,015 | 185 Vanuatu | 192,848 |
| 114 Kyrgyzstan | 4,584,341 | 186 French Guiana | 173,246 |
| 115 Moldova | 4,466,758 | 187 Sao Tome and Principe | 159,832 |
| 116 Norway | 4,455,707 | 188 Mayotte | 156,852 |
| 117 Turkmenistan | 4,435,507 | 189 Saint Lucia | 155,678 |
| 118 Eritrea | 4,142,481 | 190 Guam | 154,623 |
| 119 Puerto Rico | 3,915,798 | 191 Micronesia, Federated States of | 133,144 |
| 120 Costa Rica | 3,743,677 | 192 Saint Vincent and the Grenadines | 121,188 |
| 121 New Zealand | 3,697,850 | 193 Virgin Islands | 120,917 |
| 122 Ireland | 3,647,348 | 194 Tonga | 109,959 |
| 123 Lebanon | 3,619,971 | 195 Grenada | 97,913 |
| 124 Bosnia and Herzegovina | 3,591,618 | 196 Jersey | 90,259 |
| 125 Singapore | 3,571,710 | 197 Kiribati | 87,025 |
| 126 Lithuania | 3,571,552 | 198 Seychelles | 79,672 |
| 127 Central African Republic | 3,515,657 | 199 Man, Isle of | 76,191 |
| 128 Albania | 3,401,126 | 200 Northern Mariana Islands | 71,912 |
| 129 Armenia | 3,396,184 | 201 Aruba | 69,080 |
| 130 Uruguay | 3,332,782 | 202 Marshall Islands | 68,088 |
| 131 Liberia | 3,089,980 | 203 Andorra | 67,673 |
| 132 Panama | 2,821,085 | 204 Guernsey | 66,218 |
| 133 Congo (Brazzaville) | 2,775,659 | 205 American Samoa | 65,446 |
| 134 Jamaica | 2,668,740 | 206 Antigua and Barbuda | 64,461 |
| 135 Mauritania | 2,660,155 | 207 Dominica | 63,944 |
| 136 Mongolia | 2,654,572 | 208 Bermuda | 62,912 |
| 137 Oman | 2,532,556 | 209 Greenland | 60,324 |
| 138 United Arab Emirates | 2,386,472 | 210 Saint Kitts and Nevis | 43,441 |
| 139 Latvia | 2,326,689 | 211 Cayman Islands | 41,011 |
| 140 Lesotho | 2,166,520 | 212 Faroe Islands | 40,172 |
| 141 Kuwait | 2,067,728 | 213 Liechtenstein | 32,410 |
| 142 Macedonia, The Former Yugo. Rep. of | 2,035,044 | 214 Monaco | 32,231 |
| 143 Bhutan | 1,996,221 | 215 Gibraltar | 29,272 |
| 144 Slovenia | 1,970,056 | 216 San Marino | 25,215 |
| 145 Namibia | 1,674,116 | 217 Cook Islands | 20,407 |
| 146 West Bank | 1,661,749 | 218 Virgin Islands, British | 19,610 |
| 147 Botswana | 1,479,039 | 219 Palau | 18,827 |
| 148 Estonia | 1,398,140 | 220 Turks and Caicos Islands | 17,480 |
| 149 Gambia, The | 1,381,496 | 221 Wallis and Futuna | 15,283 |
| 150 Guinea-Bissau | 1,263,341 | 222 Montserrat | 12,875 |
| 151 Gabon | 1,244,192 | 223 Anguilla | 11,875 |
| 152 Mauritius | 1,196,172 | 224 Tuvalu | 10,730 |
| 153 Gaza Strip | 1,162,777 | 225 Nauru | 10,704 |
| 154 Trinidad and Tobago | 1,086,908 | 226 Saint Helena | 7,197 |
| 155 Swaziland | 1,004,072 | 227 Saint Pierre and Miquelon | 7,018 |
| 156 Fiji | 823,376 | | |
| 157 Cyprus | 759,048 | | |
| 158 Qatar | 749,542 | | |
| 159 Reunion | 730,201 | | |
| 160 Guyana | 703,399 | | |
| 161 Montenegro | 680,736 | | |
| 162 Bahrain | 641,539 | | |
| 163 Comoros | 580,509 | | |
| 164 Equatorial Guinea | 477,763 | | |
| 165 Solomon Islands | 470,000 | | |
| 166 Djibouti | 454,294 | | |
| 167 Macau | 445,427 | | |
| 168 Suriname | 434,093 | | |
| 169 Luxembourg | 432,577 | | |
| 170 Guadeloupe | 425,317 | | |
| 171 Martinique | 415,724 | | |
| 172 Cape Verde | 411,487 | | |
| 173 Malta | 383,285 | | |
| 174 Brunei | 330,689 | | |

Source: U.S. Bureau of the Census, International Data Base.

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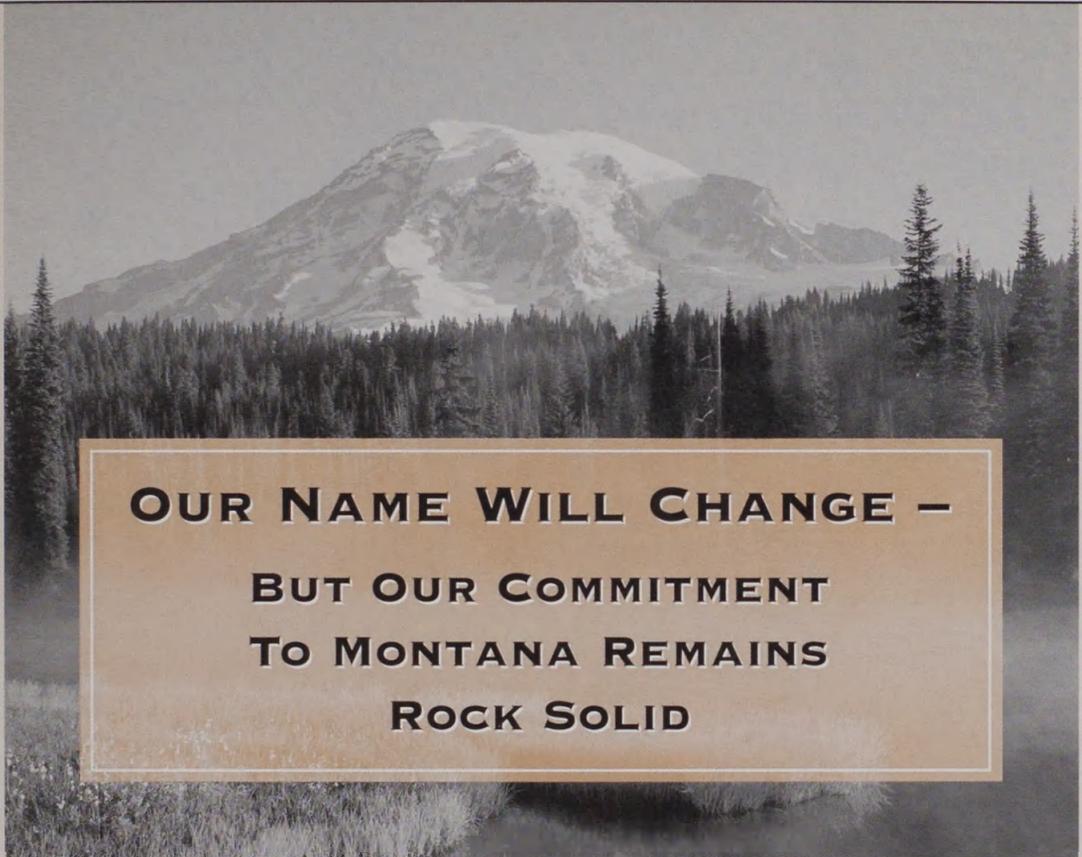
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