

7-1-1969

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Recommended Citation

Albert W. Stone, *The Long Count on Dempsey: No Final Decision on Water Right Abduction*, 31 Mont. L. Rev. (1969).

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ARTICLES

THE LONG COUNT ON DEMPSEY: NO FINAL DECISION ON WATER RIGHT ADJUDICATION*

Albert W. Stone**

"But he was at a loss how it should come to pass, that the law, which was intended for every man's preservation, should be any man's ruin."

—Swift, *Gulliver's Travels*, Pt. IV, c. V, p. 242 (J. Hayward ed., Random House, 1939)

I.

One of the principal purposes of providing tribunals for the adjudication of civil matters is to enable people to settle their differences peacefully and authoritatively. To attain that purpose, some form of relatively efficient proceeding must be provided, and for most human problems it is essential that the proceeding should terminate in a final, irrevocable, and unalterable settlement of the differences between the parties. Although many legal proceedings are unfortunately slow and expensive, attended by various procedural steps followed by appeals to higher tribunals, most of them do proceed inexorably to a final settlement. Thus are boundary disputes between neighbors put to rest, ownership disputes result in decrees quieting title, and tort or contract disputes are ended by the award or denial of damages to one or more of the parties.

It has long been recognized that people whose vocation is irrigated agriculture are in need of stable water rights and final adjudications of those rights.¹ The Montana legislature recognized that need in 1885, for it then provided a procedure whereby all persons who had diverted water from the same stream could be joined in a single lawsuit, and be subjected to one judgment which could settle the relative priorities and rights of all of the parties to the proceeding.² Had this legislation been effective in attaining its apparent goal, it would have had a significant sociological effect, because neighbors could have settled their differences rather than continuing to fight in the courts and at headgates over old

*This paper was prepared under the auspices of the Montana University Joint WATER RESOURCES RESEARCH CENTER which granted funds to support the research under the Water Resources Research Act of 1964. (P. L. 88-379, July 17, 1964, 2nd Sess., 88th Cong.)

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¹This is illustrated by the attempts of state legislatures to enact stream adjudication statutes. See the following selection of pertinent session laws: Colo. 1879, p. 94, 99, sec. 19 and 1881, pp. 142-161; Wyo. 1890, ch. 8; Nebr. 1895, ch. 69; Ida. 1903, p. 223, amended 1905, p. 357; Nev. 1903, ch. 4; N. Dak. 1905, ch. 34; Okla. 1905, ch. 21; S. Dak. 1907, ch. 180; N. Mex. 1907, ch. 49; Oreg. 1909, ch. 216; Calif. 1913, ch. 586; Wash. 1917, ch. 117; Texas 1917, ch. 88 and 1967, ch. 45; Utah 1919, ch. 67; Ariz. 1919, ch. 164; and Kans. 1945, ch. 390.

²Secs. 11 and 12, pp. 132-33, Laws, 1885 (now codified in Revised Codes of Montana (1947), sec. 89-815.) This law has remained virtually unchanged to this day.

and sore disputes. The economic effect would have been of benefit to whole communities of people, and many other persons who also need and deserve prompt settlement of their own problems would have benefitted by the relieving of judges from repetitious litigation so costly to judicial energies and time.

An earlier paper analyzed the 1885 stream adjudication statute and concluded that in theory and concept it failed to provide a procedure for the final settlement of peoples' differences with respect to their relative water rights.³ That failure is due to the fact that the legislation does not require joining all water-users in the vicinity, nor does it require other affected persons to come forward and present their claims or be barred.⁴ It is not a "quiet title" proceeding. It is not structured so as to allocate the physical material, the water, among claimants in the manner that a boundary-dispute proceeding allocates the land among the disputants.⁵

The article referred to above pointed out the doctrinal or conceptual inadequacies of our statute on water rights adjudication. The present article proposes to examine the results of the application of these inadequacies in our system of adjudication upon one small community of a few more than twenty farms on a small watershed known as Dempsey Creek.

II.

Dempsey Creek flows easterly out of the canyons in the tall and rugged Flint Creek range into the Deer Lodge Valley, where it terminates by joining the Clark Fork River just a few miles south of Deer Lodge, the county seat of Powell County. The county is distinguished as the place where gold was first discovered in Montana—by Francois Finley at Gold Creek in 1852. The news of that and subsequent discoveries brought the initial population to Powell County, principally prospectors, and within a decade after the first discovery several towns had sprung up along the tributaries of the Clark Fork and Blackfoot Rivers. The ghost towns of Dixie, Pike's Peak, Pioneer, and Blackfoot bear witness to these beginnings, and approximately \$11,000,000, principally in gold and silver, has been mined in the county since then.⁶

³Stone, *Are There Any Adjudicated Streams In Montana?*, 19 MONT. REV. 19 (1957).

⁴Revised Codes of Montana, 1947 (hereinafter cited RCM (1947)) sec. 89-815; *State ex rel. Reeder v. District Court*, 100 Mont. 376, 47 P. 2d 653 (1935); *Wills v. Morris*, 100 Mont. 514, 523, 50 P. 2d 862, 865 (1935); *Sherlock v. Graves*, 106 Mont. 206, 214 P. 2d 87 (1937); *Cook v. Hudson*, 110 Mont. 263, 103 P. 2d 137 (1940); *Galiger v. McNulty*, 80 Mont. 339, 260 Pac. 401 (1927); and see Stone, *id.* at 21, and cases reviewed in this paper.

⁵See generally Stone, *supra*, note 3.

⁶See generally WATER RESOURCES SURVEY, POWELL COUNTY, STATE ENGINEER'S OFFICE (1959) 17-22.

The town of Deer Lodge, just to the east of the 10,000 foot Flint Creek Range⁷ and alongside the Clark Fork River, is near the center of the broad, beautiful Deer Lodge Valley. The town is credited with being the "first important business, banking, cultural, and educational center of western Montana."⁸ It was the home of the first college in Montana in 1878, and its first churches were also founded in the 1870's. It is now the center of a farming community which depends upon irrigation, because the annual rainfall at Deer Lodge averages only ten inches a year. The surrounding farmers and ranchers must make intensive use of the summer run-off of seepage from winter snows in the nearby mountains.⁹

As of 1958, there were 63,262 acres of irrigated land in the county,¹⁰ and the last United States Census shows a Powell County population of 7,002 persons.¹¹ The State Engineer in his *Water Resources Survey of Powell County* succinctly stated their major problem and the obstacles to its solution: "The great problem facing the ranchers in the Deer Lodge Valley District is the seasonally short water supply. In some sections the soils are very porous and a large amount of irrigation water is lost through seepage from the ditches. The District has been trying to consolidate the main supply ditches and to line them with concrete. So far not much success has been realized due largely to *water right difficulties* and the high cost of construction."¹²

III.

What sort of "water right difficulties" were referred to in the foregoing quotation? Can they be cleared up so that they no longer stand in the way of improvements, developments, and even programs to provide more water by preventing waste from porous ditches? The history of water right difficulties in the courts is instructive. To focus upon the "difficulties," there follows a review of that history on just one small stream: Dempsey Creek.

1. In 1891 Peter Johnson commenced an action against twenty-two defendants "to determine the rights and priorities of himself and said defendants in the waters of Dempsey Creek, for the purpose of irrigating agricultural lands. Upon the trial the court found all of their rights, and classified the same, and entered judgment accordingly."¹³ One of the defendants, Herman Johnson, appealed to the Montana Supreme Court, because he thought that two other defendants had been given more favorable treatment than they deserved, and that the find-

⁷U. S. DEPARTMENT OF COMMERCE, COAST AND GEODETIC SURVEY, Sectional Aeronautical Chart, Butte, 50th ed., 1969 (showing the mountains rising to 10,171 feet.)

⁸*Supra*, note 6 at 12.

⁹*Id.* at 15,16.

¹⁰*Supra*, note 6 at 14.

¹¹THE WORLD ALMANAC, p. 643 (1969 ed.)

¹²*Supra*, note 6 at 27 (emphasis added.)

¹³Johnson v. Bielenberg, 14 Mont. 506, 37 Pac. 12 (1894).

ings did not support that part of the trial court's decree which so favored those two defendants. The Supreme Court, in *Johnson v. Bielenberg*, remanded the case to the trial court to determine whether the award was based upon adverse use or appropriations by the two defendants.¹⁴ They were found to have acquired their rights by appropriation and since their priority dates were subsequent to Johnson's, Johnson prevailed.¹⁵

The trial court's decree is known as *Cause No. 404*, the decree of 1892, and is one of the foundations for the determination of water rights and the distribution of water from Dempsey Creek. Plaintiff Bielenberg and fifteen of the defendants were decreed specific amounts of water and priorities. Seven defendants were expressly denied rights.¹⁶ The purpose of the proceeding was to settle all of the water rights—to adjudicate Dempsey Creek.¹⁷

2. That decree was but a year old when another rancher, Jeremiah Ryan, began to divert water out of Dempsey Creek for use on his farm. He had not previously used water and so had not been a party to the 1892 decree, but he soon found himself in court as a defendant against eight plaintiffs who had been decreed rights in 1892. This lawsuit is known as *Cause No. 19*, and it involved the re-adjudication of all of the previously decreed rights. The decree, entered in 1902, updated the 1892 decree (because there had been some transfers of rights in the meantime) and added an 1893 right for Jeremiah Ryan.¹⁸

The files on this case in the Powell County Court House show that *Cause No. 19* is still quite active. Each year the parties petition the district court for the appointment of a water commissioner, and following appropriate proceedings one is appointed. Each month during the irrigation season the commissioner files a report to the court regarding his distribution of water, and from time to time he files an accounting to recover from the parties his salary and expenses.

3. Soon after the entry of the 1902 decree, Jeremiah Ryan commenced to develop a new water right, independent of anything included within the prior two decrees, and, according to Ryan, independent of Dempsey

¹⁴*Id.*

¹⁵The decree shows Heran Johnson with right no. 6 (1867) and the two responding defendants, Peter Johnson and Pat Quinlan sharing right no. 7 (also 1867). The decree may be found at the Powell County Court House, in cause no. 404, or more conveniently in *Perkins v. Kramer*, 121 Mont. 595, 609, 198 P. 2d 475, 482 (1948).

¹⁶*Id.*

¹⁷One Perkins was one of the defendants who was denied rights to water, but on June 8, 1905 and following days he nevertheless diverted water from Dempsey Creek. A petition was filed with the district court on June 23, 1905 praying that Perkins be cited to appear and show cause why he should not be held in contempt. In November he was found in contempt and ordered to pay a fine. In August 1906 the trial judge issued an order to the sheriff to arrest John Perkins and imprison him until the fine was paid, but to credit toward payment two dollars for each day that Perkins spent in jail. (From courthouse files.)

¹⁸Files in Powell County Courthouse, Cause No. 19. The decree is most conveniently read in the quotation from it in the later decree in Cause No. 1671.

Creek. He had found that Blind Lake, situated on the eastern slope of the Flint Creek Range, had a small outflow over its eastern rim which sank and disappeared some 1500 feet from the lake. Although it flowed in the direction of Dempsey Creek, it was still about 3,625 feet from the creek when it sank. He cleaned out the natural channel, dug a ditch and built a flume to deliver the water to Dempsey Creek. He also built a dam along the lower rim of Blind Lake, raising the water level four feet, more than doubling the surface area of the lake, and installed a headgate to control the timing of his deliveries of water to Dempsey Creek. Thus, during the irrigation season he would transport the water to the creek, allow for a 10% loss by evaporation, and divert the balance downstream out of the creek to his land. He claimed that this was just water which he had added to the creek.

The other parties to the 1902 decree commenced contempt proceedings, alleging that Ryan was taking more water than had been decreed to him, and in violation of the decree. He was found to be in contempt in both 1905 and 1906, and fined.¹⁹

4. Ryan did not give up. He brought his own lawsuit against the other parties to the 1902 decree, seeking to quiet title to his use of the water by the method described above. He lost in the trial court, so he appealed to the Supreme Court which reversed the judgment and ordered a new trial in the case known as *Ryan v. Quinlan*.²⁰ The Supreme Court held that the 1902 decree was not determinative because it did not take Blind Lake into consideration, and that the contempt proceedings were not *res judicata* with respect to substantive property rights. The issue was whether Blind Lake was a tributary to Dempsey Creek before Ryan installed his dam and delivery system. Since the water disappeared before it reached the creek, it was held that *prima facie* it was not a tributary and that the defendants had the burden of showing that "the flow finds its way into the creek by a defined channel. . ."²¹ That was a burden the defendants could not carry.²²

5. Ryan and his wife were made defendants in still another action because they were taking water from Alec's Gulch. This was *Cause No. 702*, filed in June of 1914 by William T. Elliott who was a party to the prior decrees. Unlike Blind Lake, Alec's Gulch was found to be a tributary to Dempsey Creek and so Elliott's challenge to Ryan's claims was sustained by judgment in 1915.²³

¹⁹*Id.* Some of the facts are taken from *Ryan v. Quinlan*, 45 Mont. 521, 527, 124 Pac. 512, 514 (1912).

²⁰*Supra*, note 19.

²¹*Id.* at 531, 124 Pac. at 515.

²²*Id.*, and see statement of Johnson, C. J., dissenting in *Kramer v. Deer Lodge Farms Co.*, 116 M. 152, 189, 151 P. 2d 483, 498 (1944).

²³*Cause No. 702*, Powell County Courthouse, and see WATER RESOURCES SURVEY, POWELL COUNTY, STATE ENGINEER'S OFFICE (1959), p. 41.

6. Ryan, W. T. Elliott and his wife Eliza, and one Martin became defendants to a complaint filed by Johnson and thirteen other plaintiffs in *Cause No. 1182*, filed June 23, 1919 to further adjudicate the relative rights of the parties. The Powell County files are currently missing, but the clerk's entries show that the case was very active, with many proceedings and papers being filed until 1938, and then a few entries in 1949. The survey by the State Engineer indicates that this litigation adjudicated the rights to several lakes which are tributary to Dempsey Creek.²⁴

7. The Perkins brothers had been parties to the 1892 decree, but had been expressly denied a right.²⁵ Sixteen years later they conceived a means of developing more water in the creek during the irrigation season by diverting late spring floodwaters into pot-holes for use later during the irrigation season. (The factual details will be developed later in connection with some factually related cases.)²⁶ So, pursuant to the 1907 statutes providing for acquiring an appropriation on an adjudicated stream,²⁷ in 1920 they filed with the district court an application for a water right (although they had actually been taking water for a dozen years under this scheme and were vulnerable to a contempt proceeding.)²⁸ Jeremiah Ryan filed objections to the Perkins' obtaining a water right, and the case became *Perkins v. Ryan, Cause No. 1291*. After proceedings and trial the Perkins' obtained a favorable decree in May of 1921, and thus were enabled to continue their use of water.

8. Sometime prior to 1917 one Carothers conceived the idea that he could go up the South Fork of Dempsey Creek to a lake, now known as Carothers Lake, raise the level of the lake by a dam to save the spring run-off, and thus obtain a good supply for himself by letting those waters in Dempsey Creek during the irrigation season and diverting them out of the creek farther downstream. Pursuant to this idea, Carothers posted and filed in October, 1917, but did little if anything to actually develop his plan. Later he sold his land and rights to the Anaconda National Bank. The land was at the confluence of the North and South Forks of Dempsey Creek, and as it later turned out, because of the lay of the land, it was only practical to irrigate it from the North Fork. There were two other prior rights on the North Fork, one on the South Fork and sixteen prior rights on the mainstream below the confluence. (Only two rights on the whole watershed were inferior to the right which Carothers had prior to becoming involved with this lake development.)

²⁴WATER RESOURCES SURVEY, *supra*, note 23.

²⁵*Supra*, note 15 and 17.

²⁶*Infra*, note 43 and accompanying text.

²⁷Laws of Montana, 1907, c. 185.

²⁸Indeed, one Perkins had been held in contempt for taking Dempsey Creek water in 1905 (*supra*, note 17), and it may have been to avoid any further difficulty that the Perkins' brought this lawsuit.

In August, 1923, the Anaconda National Bank brought an action against twenty appropriators from Dempsey Creek, they being essentially all of the holders of water rights, to establish the Bank's right to water developed under Carothers' plan. (Actually, there was a modification of Carothers' original plan, in that the Bank developed water at Carothers Lake on the South Fork for delivery to the prior appropriators on the mainstream below the confluence during the irrigation season, thus reducing their claims to water from the North Fork and enabling the Bank to divert an equivalent amount of water from the North Fork. It was intended to be an exchange of water: let the mainstream appropriators take the augmented Carothers-South Fork flow, leaving the North Fork available to the Bank.)²⁹

The trouble was that little if anything was done toward development until September, 1921, when serious development commenced. The delay since posting and filing in 1917 was held to show lack of diligence, and so any right would not relate back to 1917 but would have to be based upon the date of completion. But sec. 4 of the Laws of 1921 provided the exclusive method of acquiring a water right upon an adjudicated stream,³⁰ which was to file a lawsuit similar to that filed by the Perkins brother in *Cause No. 1291* in 1920, i.e., *Perkins v. Ryan*.³¹ The Bank had not proceeded in that essential manner, and since any priority date would therefore be on the date of completion which was after the effective date of the 1921 statute, it could not establish a right. Dempsey Creek was conceded to be an adjudicated stream. The plaintiff Bank appealed the adverse judgment of the trial court, rendered in 1924, but the Supreme Court affirmed in *Anaconda National Bank v. Johnson*.³² The decree re-adjudicated all of the rights of all of the parties along the creek, essentially integrating the 1891 and 1902 decrees.³³

9. In April, 1872, Max Kramer commenced diverting small amounts of water from a slough. According to Kramer the slough had little water in it and was not connected to Dempsey Creek, which was why neither his diversion nor the slough was mentioned in any of the subsequent decrees. But following the decree of 1892 there was a great increase in irrigation above the slough, causing increased seepage into the slough. That created a substantial source of water which Kramer enjoyed. The drought of the early 1930's caused his neighbors to cast covetous eyes upon this non-decreed use.

²⁹Such an exchange of water was later accorded statutory recognition. Laws of Montana 1937, c. 39; RCM (1947) sec. 89-806.

³⁰Laws of Montana, 1921, c. 228, sec. 4; RCM (1947) sec. 89-829; *Anaconda Bank v. Johnson*, 75 Mont. 401, 244 Pac. 141 (1926); *Donich v. Johnson*, 77 Mont. 229, 250 Pac. 963 (1926).

³¹*Supra*, notes 27 and 28.

³²*Supra*, note 30.

³³This decree may be found in the file of Cause No. 1671 in the Powell County Court-house. It quotes both the 1892 and 1902 decrees, and restates all of the rights.

To protect himself and secure his right to the future use of the slough, Kramer sued forty-four defendants to obtain a decree to the first 150 miner's inches from the slough.³⁴ The principal issue was whether the slough was a natural tributary to Dempsey Creek prior to the 1892 decree. The trial court found that it was not; therefore, it was an independent source and Kramer had an independent right. The defendants appealed to the Supreme Court and obtained a reversal of the trial court in the case: *Kramer v. Deer Lodge Farms Co.*³⁵ The majority opinion by Justice Adair, concurred in by Justice Anderson, reviewed the evidence, some of it pertaining to conditions subsequent to the 1892 decree, and concluded that the slough was a tributary and that Kramer was precluded by the 1892 decree from later asserting a right which he could have made an issue in that proceeding.³⁶ Justice Morris concurred in the result but disagreed that a water right adjudication settles "all issues which could have been properly raised. . . ."³⁷ Chief Justice Johnson and Justice Erickson dissented.³⁸ They likened the case to *Ryan v. Quinlan* which enabled Ryan to successfully assert that Blind Lake was independent and not a tributary to Dempsey Creek.³⁹ They viewed the evidence as clear that the slough could not have been tributary to Dempsey Creek until upland irrigation increased the seepage into the slough after 1892. They also agreed with Justice Morris that a water right adjudication does not settle all issues which could have been raised. Notwithstanding this disagreement on the Supreme Court, Kramer lost the use of the water which he had used for twenty years before the original adjudication of 1892 and for forty-three years after—sixty-three years of continuous use.

10. In *Cause No. 1291, Perkins v. Ryan*, Perkins obtained a decree in 1921 establishing his right to take water.⁴⁰ But in July, 1939, Woodward and others filed a complaint again challenging this right in the case of *Woodward v. Perkins*.⁴¹ After hearing the evidence and viewing the site, the trial court again held for Perkins, but the plaintiffs appealed and the Supreme Court reversed the trial court, finding that Perkins had no supportable claim to water.⁴² Since this case is the first of a long and perhaps unending series, it is pertinent to set forth the facts.

³⁴The exact volume of flow represented by a miner's inch varies slightly from state to state. In Montana, forty miner's inches equals one cubic foot per second. RCM (1947) sec. 89-818.

³⁵116 Mont. 152, 151 P. 2d 483 (1944).

³⁶Montana water right decrees are seldom given such a broad effect. See *supra*, notes 3 and 4.

³⁷*Supra*, note 35 at 175, 151 P. 2d at 493.

³⁸*Id.* at 176, 151 P. 2d at 493.

³⁹*Supra*, note 19 and the text discussion following that note.

⁴⁰See text accompanying notes 25-28, *supra*. 116 Mont. 46, 147 P. 2d 1016 (1944).

⁴¹These facts appear in the dissent in the later case, *Perkins v. Kramer*, 121 Mont. 595, 600, 198 P. 2d 475, 478 (1948).

⁴²*Woodward v. Perkins*, 116 Mont. 46, 147 P. 2d 1016 (1944).

In 1908 Perkins commenced to divert surplus Dempsey Creek water during the spring run-off into four pot-holes, where he had hoped to contain the water until needed for irrigation, at which time he would release it into Dempsey Creek for his own use downstream. However, the pot-holes leaked and the water seeped into the ground. Below the base of the plateau on which the pot-holes were located, water was found to seep out and run into Dempsey Creek. So Perkins dug two drain ditches parallel to the creek, captured the seepage during the irrigation season, measured the amount, contributed it to Dempsey Creek, and after allowing for a small amount of loss, diverted the balance out of the creek for his own use downstream.⁴³

The majority of the Supreme Court focused both legally and factually upon the fact that the water seeped into the earth from Perkins' pot-holes. Legally: "When that happens it loses its character as flow water and is no longer subject to the regulations of law which govern while it is capable of direction and control."⁴⁴ In effect, even if he did contribute to the seepage along Dempsey Creek during the irrigation season, the percolating water was legally lost to Perkins as soon as it seeped into the ground. When it seeped out again, it was to be governed by the existing priorities of appropriation previously decreed. Factually: "The evidence is wholly inadequate to support the finding that an additional flow in the stream had been created. . . ."⁴⁵ (Seemingly that is either an alternative holding, suggesting a weakness in the prior basis, or is irrelevant. The majority brushed aside the fact that Perkins had already been decreed this right in 1921 in his lawsuit against Ryan,⁴⁶ because the present plaintiffs were not parties to that action and so were not bound. Justices Morris and Erickson dissented, saying that the findings of fact and judgment of the trial court were adequately supported and should be affirmed.⁴⁷

11. After the reversal of the trial court in *Woodward v. Perkins* (above) the victorious plaintiffs' attorney prepared a draft of new findings of fact and conclusions of law for the trial court. Perkins' attorney objected and moved to dismiss the action, which motion was denied, so Perkins filed an appeal in the case also known as *Woodward v. Perkins*. Plaintiffs moved for a dismissal of the appeal and that was granted in an opinion by Justice Adair who considered the case closed and *res judicata*.⁴⁸ Justice Cheadle concurred in the dismissal of *this* proceeding but suggested that changed conditions might afford Perkins grounds

⁴³The facts are elaborated in both of the cases cited in note 41, *supra*.

⁴⁴*Supra*, note 42 at 52, 147 P. 2d at 1018. This proposition derives from the language and holding in *Ryan v. Quinlan*, 45 Mont. 521, 124 Pac. 512 (1912).

⁴⁵*Id.* at 53, 147 P. 2d at 1019.

⁴⁶See text accompanying notes 25-28, *supra*.

⁴⁷*Supra*, note 42 at 55, 147 P. 2d at 1019.

⁴⁸*Woodward v. Perkins*, 119 Mont. 111, 171 P. 2d 907 (1946).

for a *new* proceeding.⁴⁹ Justice Angstman dissented, saying "I think we have jurisdiction and power in this proceeding to order the modification of the judgment of the trial court so as to remove the permanency of the injunction and thus enable defendant Perkins to take appropriate steps to have his claim adjudicated in the light of the change of circumstances."⁵⁰ Justice Morris also dissented, saying ". . . it is absurd to assume that [*res judicata*] was ever intended to be invoked to sustain as here an erroneous and vicious decision such as the case of *Woodward v. Perkins*. . . . The case just mentioned is so manifestly unjust that no rule of law should be permitted to shield it from the condemnation it clearly deserves."⁵¹

12. Perkins petitioned for a rehearing of the foregoing decision; that was denied, and ten days later, on Sept. 21, 1946, he filed in the Supreme Court an original proceeding seeking a writ of supervisory control against the district court of Powell County, asking the Supreme Court to order the remittitur in the prior case withdrawn, and to grant him modification of the judgment. His petition was denied in *State ex rel. Perkins v. District Court*.⁵² His petition for a rehearing and reconsideration was also denied.⁵³ Again the Supreme Court split, with the same division as before.

13. Slightly more than a year passed after that last defeat of Perkins, when, in February, 1947, he commenced *Perkins v. Kramer*,⁵⁴ a new lawsuit against Woodward and seven other defendants, seeking a declaratory judgment and relief from the judgment in the first *Woodard v. Perkins*.⁵⁵ That first case had been decided by Justices Anderson, Johnson, and Adair, with Morris and Erickson dissenting. Of those, only Justice Adair remained on the court when this new case was decided, and only Justice Adair held against Perkins, dissenting bitterly to the opinion of Angstman which was concurred in by Choate, Gibson, and Metcalf. In this case the defendants' demurrer to Perkins' complaint had been sustained in the trial court so the defendants had not had to file an answer. Perkins appealed, and the majority felt that Perkins should be permitted to try to prove that he contributed additional water to Dempsey Creek during the irrigation season by means of his pot-hole reservoir and seepage system. The trial court was reversed and ordered to permit the defendants to file an answer, and Perkins to prove the worth of his work.

⁴⁹*Id.* at 29, 171 P. 2d at 1005.

⁵⁰*Id.* at 30, 171 P. 2d at 1005.

⁵¹*Id.* at 36, 171 P. 2d at 1008.

⁵²See 121 Mont. 595, 606, 198 P. 2d 475, 480 (1948) for the only description of that proceeding which has been located.

⁵³*State ex rel. Perkins v. District Court*, 119 Mont. 630, 208 P. 2d 318 (1946).

⁵⁴121 Mont. 595, 198 P. 2d 474 (1948).

⁵⁵*Supra*, note 42.

14. With his case at last favorably remanded to the trial court, Perkins and the defendants entered into an agreement providing for daily measurements of the water at various points and for Perkins to receive ascertained increments. The trial court stayed proceedings so that the defendants did not file an answer to Perkins' 1947 complaint until 1956. In 1957, the trial court enjoined Perkins from using the seepage water. However, after the trial commencing in June of 1962 the court entered judgment in favor of Perkins, granting to him rights to Dempsey Creek water which he had commenced using in 1908, and which were decreed to him over the opposition of Ryan in 1921, but which he hadn't established in the Supreme Court. The evidence, as well as a visitation of Dempsey Creek by the trial judge, was sufficient to convince him that the seepage along the creek was identifiable as coming from Perkins' pot-holes. Defendants appealed to the Supreme Court in this second *Perkins v. Kramer* case.⁵⁶ The court split again. Justice Castles wrote for the majority with the concurrence of Chief Justice Harrison and Justice Adair. They found the evidence conflicting, but predominating against Perkins because he had not shown any modern technological evidence to trace or identify his pot-hole water as the water which seeped out into his drain ditches along Dempsey Creek during the irrigation season. Nevertheless, they permitted Perkins to continue to fill his pot-holes as before in order to attempt to obtain sufficient proof, but he was enjoined from using the seepage water during the irrigation season. Judge Allen (pro tem.) dissented with the concurrence of Justice Harrison, pointing out that in the original case of *Woodward v. Perkins*⁵⁷ as well as in the instant case, the trial judge had taken testimony, inspected the sites and works, and then had rendered judgment for Perkins. The dissenting judges reviewed the evidence and found it favorable to Perkins.⁵⁸ Presumably, Perkins, at the present time, is back at his pot-holes and at Dempsey Creek, attempting to accumulate additional evidence to once again ask for an adjudicated water right on Dempsey Creek, which he thought had been won in 1921 in his litigation with Jeremiah Ryan based on his use since 1908.^{58a}

IV.

This last review brings up to date the chronicle of litigation on Dempsey Creek, a small stream of less than twenty miles in length: fourteen lawsuits with eight decisions by the Montana Supreme Court. In nearly every one of these lawsuits, all or substantially all of the peo-

⁵⁶148 Mont. 355, 423 P. 2d 587 (1966).

⁵⁷*Supra*, note 42.

⁵⁸*Supra*, note 56 at 365, 423 P. 2d at 592.

^{58a}*See* *Supra* at 449, 581.

ple in the community of Dempsey Creek were litigants. There seems little risk in predicting that the past is but a prelude to continuing and endless litigation in the future.^{58b}

Other watersheds in Montana have also had multiple adjudications.⁵⁹ Those which haven't have been fortunate thus far. Periods of drought as well as increasing demands for water will give rise to new cases on new streams, with no final determination of the allocation of the waters.

This history of unending litigation among neighbors on a small watershed speaks for itself on the futility of Montana's present system of stream adjudication. A complete overhaul of the law was introduced in the last legislative session as part of House Bill No. 337, sponsored

^{58b} After completing this article, there appeared a per curiam opinion of the Montana Supreme Court, entitled *State ex rel. Perkins v. District Court*, No. 11754, in 26 *State Reporter* 574 (1969).

The author is informed that Clifford Perkins asked the water commissioner for permission to move his water into another ditch so as to benefit some land owned by his brother. The commissioner sought advice from the district judge, but meanwhile Perkins accomplished the change. That resulted in a contempt proceeding in which Perkins was found guilty. Perkins then brought a writ of review to the Supreme Court resulting in this memorandum opinion upholding the district judge.

⁵⁹ In *State ex rel. Reeder v. District Court*, 100 Mont. 376, 47 P. 2d 653 (1935) relator refused to obey the orders of the water commissioner and the trial judge who were administering a prior decree on Red Rock River, to which relator was not a party. The trial court found him in contempt, but on appeal it was held that he could not be bound to a decree to which he was not a party, and the remedy for other water users was to re-adjudicate the stream, making Reeder a party. Red Rock River also gave birth to *State ex rel. McKnight v. District Court*, 111 Mont. 520, 111 P. 2d 292 (1941), which dealt with three separate earlier decrees allocating the water. The trial court ordered the water commissioner to integrate the several decrees and make a co-ordinated distribution of the water, but on appeal it was held that since not all of the litigants had been parties to each of the decrees, the solution was to bring another lawsuit in which all would be joined. *Whitcomb v. Murphy*, 94 Mont. 562, 23 P. 2d 980 (1933) and *State ex rel. Swanson v. District Court*, 107 Mont. 203, 82 P. 2d 779 (1938) involved the distribution of the Sun River and its tributaries which had been adjudicated in 1911 in Cascade County and 1890 in Lewis and Clark County. The Whitcomb case ordered the integration of the decrees, but the Swanson case held that the district court of one county could not recognize or administer a decree from another county even though the tributary in question was within the court's own county; thus, as in *McKnight v. Reeder* (above) a newer and bigger lawsuit was prescribed.

In picking out Powell County water rights in order to find the ones pertaining to Dempsey Creek, the author found that there had been two adjudications on nearby Race Track Creek (*Bennett v. Quinlan*, 47 Mont. 247, 131 Pac. 1067 (1913) which held that the 1890 decree did not adjudicate the rights of joint ditch owners, inter sese, to waters running in the ditch; and *Donich v. Johnson*, 77 Mont. 229, 250 Pac. 963 (1926), involving rights to stored water in tributary lakes). Ophir Creek, also in Powell County produced four lawsuits (*Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. 741 (1892); *Quigley v. McIntosh*, 88 Mont. 103, 290 Pac. 266 (1930); *Quigley v. McIntosh*, 110 Mont. 495, 103 P. 2d 1067 (1940), and *Quigley v. Quigley*, 142 Mont. 596, 386 P. 2d 60 (1963)). Although the second *McIntosh* case dealt more with Three Mile Creek, the facts and prior decrees also relate to Ophir Creek and the parties are the same as in the first *McIntosh* case.

All of the foregoing cases were Supreme Court cases, which raises the speculation of how many cases and trials have occurred repetitiously in the district courts but which did not culminate in a Supreme Court opinion. If one can extrapolate from the investigation of Dempsey Creek, he would conclude that only a minority of such disputes ever appear in the Supreme Court reports.

by Representatives Stratton, Harlow, and C. Smith.⁶⁰ This proposal makes the Director of the Montana Water Resources Board the chief administrator of water resources,⁶¹ with authority to divide the state into water districts with a field office in each district headed by a district water commissioner, who functions as an agent of the Director,⁶² and who is in charge of as many local part-time water commissioners as may be needed.⁶³

Under the proposal, persons desiring to acquire a new right would be required⁶⁴ to follow the procedure of obtaining a permit and proceeding with orderly development pursuant to inspection and approval by the Director or his local agents.⁶⁵ If the Director is satisfied that both the public interest and the local community will be enhanced by the development, he will issue a Certificate of Appropriation which ends the matter.⁶⁶

The Director is required to make a physical inventory of water uses and rights by conducting hearings, making investigations, considering protests as well as all relevant evidence, and making a final determination of rights on a watershed basis.⁶⁷

All final decisions, acts, or orders of the Director are appealable to the judiciary,⁶⁸ but that neither licenses contestants to re-litigate nor does it impose upon them the burden, expense, and delay of going through the whole litigation over again in the courts after having completed the administrative procedure. It is the expressed intent of the proposed legislation that ". . . the court shall not receive or consider any evidence or arguments that were not presented to the director. . . ."⁶⁹ In addition, "the inquiry upon judicial review shall extend to

⁶⁰The bill died in committee probably because Montana's brief biennial legislative session afforded too little time to study such a comprehensive overhaul of the state's water rights laws. Briefly, the history of that proposed legislation is that it emerged from a study on improving Montana's law of water rights, sponsored by the Montana University Joint WATER RESOURCES RESEARCH CENTER which granted funds to support the research and drafting under the Water Resources Research Act of 1964. (P. L. 88-379, July 17, 1964, 2nd Sess. 88th Cong.) The initial draft was introduced late in the 1967 legislature, and was later made the object of study by the Water Use Priorities Committee of the House, during the interim between sessions. That Committee went over the original draft in detail, consulted with many interested groups and organizations and made many modifications, additions, and deletions. These changes resulted in improving the bill, in the opinion of this author, and it was the improved draft which was introduced as House Bill No. 337.

⁶¹House Bill No. 337, 1969 legislative session, sec. 4. See Appendix to this article for the bill itself.

⁶²*Id.* sec. 27.

⁶³*Id.* sec. 28.

⁶⁴*Id.* sec. 9.

⁶⁵*Id.* secs. 11-19.

⁶⁶*Id.* sec. 20.

⁶⁷*Id.* sec. 6.

⁶⁸Numerous sections which authorize final decisions, acts, or orders of the Director also authorize any party adversely affected to appeal.

⁶⁹*Supra* note 61, sec. 37(2)(b).

the questions whether the director has acted or proceeded without, or in excess of, jurisdiction; whether there was a fair hearing; whether there was any prejudicial abuse or [sic] discretion whereby the director did not act or proceed in the manner required by law, or the order or decision is not supported by the findings of fact, or the findings of fact are clearly erroneous in the light of the whole record; and whether there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the administrative hearing."⁷⁰ These restrictions will result in greatly reducing the number of appeals to the courts. They will strengthen the administrative procedure by making the Director's decisions final in most cases.

The heart of this legislation is the adoption of the permit system for acquiring a water right, and the watershed by watershed administrative determination of existing rights.⁷¹ Under it, water rights would eventually be stabilized and settled under the direction of persons whose primary expertise, knowledge, and duty are in the field of the orderly administration, distribution, and use of water. Such legislation would be a great boon to Montana and to all persons who deserve a secure and definite priority without endless lawsuits. It also would encourage investment in water resource development by enabling developers to know the extent to which apparently available waters have been committed to prior uses.⁷²

V.

The only consolation arising out of the multiple adjudications on Dempsey Creek is that it contributed much to Montana water law by the introduction of new doctrines and the clarification of existing doctrines through their application. *Ryan v. Quinlan* held that the 1902 adjudication was not conclusive against a claim which was not included in the decree,⁷³ that substantive property rights cannot be adjudicated in contempt proceedings,⁷⁴ that when water disappears into the ground *prima facie* it is not tributary to any surface stream.⁷⁵ Most importantly, the case suggested that "the secret, changeable, and uncontrollable character of underground water. . ." makes it an unfitting subject for the law to recognize as subject to claims and rights.⁷⁶ *Anaconda National Bank v. Johnson* is the principal case establishing that the 1921 legisla-

⁷⁰*Id.* sec. 37 (2) (c).

⁷¹See Appendix to this article for the bill itself.

⁷²*Supra*, note 12 and accompanying text.

⁷³*Ryan v. Quinlan*, 45 Mont. 521, 530, 124 Pac. 512, 514-15 (1912).

⁷⁴*Id.*

⁷⁵*Id.* at 531-534, 124 Pac at 515-516.

⁷⁶*Id.* at 532, 124 Pac at 515 (the court was quoting approvingly from *Chatfield v. Wilson*, 28 Vt. 49.)

tion provides the exclusive means of acquiring a right on an adjudicated stream.⁷⁷ *Kramer v. Deer Lodge Farms* establishes (by one judge who concurred in the result and two who dissented) that a water right decree is not conclusive of all issues which could have been raised,⁷⁸ and to that extent is consistent with *Ryan v. Quinlan*.⁷⁹ *Woodward v. Perkins* confirms the suggestion in *Ryan v. Quinlan* that seepage water is not subject to the regulations of law "which govern while it is capable of direction and control":⁸⁰ However, it weakened that proposition by finding that there was insufficient proof that the seepage water contributed to Dempsey Creek during the irrigation season,⁸¹ and said that seepage water belongs to the stream and to the prior appropriators.⁸² The second *Woodward v. Perkins* case held that a party cannot obtain an appeal from the entry by the district court of judgments handed down from a prior appeal, or the entry of findings of fact and conclusions of law under those circumstances.⁸³ Three justices (one concurring in the result and two dissenting justices) said that changed conditions can enable a party to bring a new action for the adjudication of a water right.⁸⁴ *State ex rel. Perkins v. District Court* found that a writ of supervisory control is not available to one who thinks that the trial court's judgment (after an appeal) is unfair.⁸⁵ *Perkins v. Kramer* held that *res judicata* should not preclude the showing of changed conditions nor the re-litigation of a water rights suit,⁸⁶ thus confirming one aspect of the second *Woodward v. Perkins* case.⁸⁷ By necessary inference *Perkins v. Kramer* overruled the suggestion in *Ryan v. Quinlan*⁸⁸ and *Woodward v. Perkins*⁸⁹ that once water seeps underground it is legally lost to the prior possessor, for it held that if Perkins could prove the underground facts then he should be permitted to claim the water which seeped out along the creek.⁹⁰ The latter important point of groundwater law is confirmed in the second *Perkins v. Kramer* case, for after quoting from *Ryan v. Quinlan* the court made this far-reaching concession: "Modern hydrological innovations have permitted more accurate tracing of ground-

⁷⁷Anaconda National Bank v. Johnson, 75 Mont. 401, 244 Pac. 141 (1926).

⁷⁸*Kramer v. Deer Lodge Farms Co.*, 116 Mont. 152, 176 (Morris) and 176-77 (Johnson and Erickson), 151 P. 2d 483, 493-94 (1944).

⁷⁹*Supra*, note 73.

⁸⁰*Woodward v. Perkins*, 116 Mont. 46, 52, 147 P. 2d 1016, 1018 (1944).

⁸¹*Id.* at 53-54, 147 P. 2d at 1018-1019.

⁸²*Id.* at 53, 147 P. 2d at 1019.

⁸³*Woodward v. Perkins*, 119 Mont. 11, 171 P. 2d 997 (1946).

⁸⁴*Id.* at 29 (Cheadle) and 35 (Angstman and Morris), 171 P. 2d at 1005, 1008.

⁸⁵*State ex rel. Perkins v. District Court*, 119 Mont. 630, 208 P. 2d 318 (1947), which is described more fully in *Perkins v. Kramer*, 121 Mont. 595, 606, 198 P. 2d 475, 480 (1948).

⁸⁶*Perkins v. Kramer*, *supra*, note 85.

⁸⁷*Supra*, note 84.

⁸⁸*Supra*, note 76.

⁸⁹*Supra*, note 80.

water movement. For this reason, we feel that traditional legal distinctions between surface and groundwater should not be maintained when the reason for the distinction no longer exists. . . ."⁹¹ There was no dissent to that point, which takes a major step toward legally integrating surface and groundwater law, and which recognizes the hydrologic interrelationship of water on the ground and water under the ground.

Dempsey Creek is a microcosm of Montana water law, not merely because of its contributions to the development of water rights doctrines: Dempsey Creek presents a portrait of the gap between the objectives of water rights settlement by adjudication and the practices which are generated by our statutes on adjudication.

Such legal development must be cold solace to the neighbors on Dempsey Creek, who would probably agree with this statement from one of their own cases:

Experience has shown that after the right of all 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 decree rights and flaunting 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. . . ."⁹²

⁹¹Perkins v. Kramer, 148 Mont. 355, 363, 423 P. 2d 587, 591 (1966).

⁹²Anaconda National Bank v. Johnson, 75 Mont. 401, 410-411, 244 Pac. 141, 144 (1926). Also see *supra*, note 58b.

Appendix—House Bill No. 337

89-121, 89-122, 89-123, 89-125, 89-801 through 89-864, 89-1001 through 89-1024, 89-2911 through 89-2936.

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR THE REGULATION AND ADMINISTRATIVE SUPERVISION OF THE UTILIZATION, DEVELOPMENT AND CONSERVATION OF THE WATER RESOURCES OF MONTANA; REPEALING SECTIONS 89-121, 89-122, 89-123, 89-125, 89-801 THROUGH 89-864, 89-1001 THROUGH 89-1024, AND 89-2911 THROUGH 89-2936, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. *Declaration of policy.*

Pursuant to the declaration of the Montana constitution that any use of water is a public use, the legislative assembly of Montana hereby declares:

It is the policy of the state of Montana to encourage the development of Montana water resources by making them available for maximum use consistent with the public interest, and to provide for the utilization, development, and conservation of the waters of the state for the maximum benefit of the people of Montana.

The foregoing policy shall be effectuated by providing for the utilization and development of water for actual beneficial use consistent with the public interest, under the supervision of the Montana water resources board responsible for the proper utilization, development, and conservation of the water resources of Montana. An appropriator shall not be entitled to use more water than he can beneficially use

Section 2. The state department of health and the water pollution control council shall maintain the same jurisdiction and responsibilities heretofore delegated to them by law in administering water of Montana.

Section 3. *Definitions of terms used in this chapter.*

(1) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence.

(2) "Groundwater" means that water occurring in the saturated zone beneath the shallowest water table.

(3) "Person" means any natural person, association, partnership, corporation, municipality, irrigation or other special district, the state of Montana or any political subdivision or agency thereof, and the United States or any agency thereof.

(4) "Beneficial use" means a use of water for the benefit of the appropriator, of other persons, or of the public, that is reasonable and consistent with the public interest, including, but not limited to, domestic, agricultural, irrigation, industrial, mining, power, municipal, fish and wildlife, and recreational uses.

(5) "Appropriation right" means a right to a beneficial use of water, with or without a diversion from the source of water, which is conferred or recognized by this act, and water quality control.

(6) "Director" means the director of the Montana water resources board.

(7) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to the enactment of this act, provided that actual construction of works for application of water to a beneficial use must commence prior to the effective date of this act.

Existing rights shall include beneficial uses by the public for recreational purposes when the source has been subject to substantial continuing regular public use, as of when that use became substantial; provided that this use does not conflict with another recognized water right.

Existing rights are appropriation rights, and are subject to the provisions of this act.

(8) "Fish, wildlife, and recreation uses" include but are not limited to providing or preserving flowing or still water for fish propagation, fish and wildlife habitat and feeding grounds, and sports fishing, hunting, boating, swimmin, and other recreational opportunities.

(9) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(10) "Aquifer" means any underground geological structure or formation which is capable of yielding water or is capable of recharge.

Section 4. *Powers and duties of director.*

The director shall:

(1) Enforce and administer the laws of this state pertaining to the beneficial use of water, and control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefit and beneficial use of all its inhabitants in accordance with the rights of priority of appropriation.

(2) Prescribe procedures, forms, and requirements for applications, permits, certificates, and proceedings under this act.

(3) Adopt, amend, repeal, and promulgate such reasonable rules and regulations as may be necessary or desirable for the discharge of his duties and for the achievement of the purposes of this act.

(4) Employ and fix the compensation of such assistants and employees as are necessary for the operations authorized or required by this act.

(5) Maintain such records as the Montana water resources board may deem necessary, administer oaths, and do all things incidental to the powers and duties conferred or imposed by this act.

(6) Delegate any of the administrative duties, functions, or powers imposed upon him to any responsible assistant or employee.

Nothing contained in this act shall repeal, amend, nor modify any existing statutes pertaining to the powers and duties of the director except as otherwise expressly provided in this act.

Section 5. *Director shall gather hydrologic data.*

The director shall, as often as necessary, gather, record, evaluate, and publish data on the location, quantity, and quality of the waters of the state. Such data shall include, but shall not be limited to, information concerning the condition of ditches, wells, pipelines, and other appropriation works, and all water appropriations. The gathered data shall be used by the director in considering applications for new water appropriations, in deciding controversies regarding the distribution of water, and in discharging other powers or duties conferred or imposed by this act.

Section 6. *Administrative inventory and determination of existing rights.*

(1) The director shall gather data essential to the proper understanding and determination of the existing rights of all persons using water for beneficial purposes. In gathering data pertaining to the determination of existing rights, the director may select and specify areas or sources where the need for a determination of existing rights is most urgent. Such observations and measurements shall be reduced to writing and made a matter of record in the director's office. The data gathered by the director shall include but shall not be limited to:

(a) any decree adjudicating water rights in a proceeding commenced prior to the effective date of this act, which shall be determinative of the rights of the parties thereto, according to the terms of such decree. If there are persons who claim rights which were not so determined when a source of water was adjudicated, any such decree shall be only prima facie evidence of the decreed rights. To the extent that any decree is incomplete, the director shall have authority to ascertain the additional facts necessary to a complete understanding of the decree, and to the application of the decree to any particular situation;

(b) records of rights acquired pursuant to the 1961 groundwater code (Section 89-2911 through 89-2936, R.C.M. 1947) which shall be prima facie evidence of the facts contained therein;

(c) the findings of the water resources survey which was conducted pursuant to Section 89-847, R.C.M. 1947. Such findings shall be prima facie evidence of rights existing as of the dates of the findings;

(d) declarations of existing rights filed by water users pursuant to this section, relating to the area or source under consideration. The director shall make orders requiring all appropriators within specified areas or from specified sources to file declarations of existing rights within three (3) months after the effective date of any such order. Notice of an order requiring the filing of declarations of existing rights shall be given by conspicuous publication once a week for four (4) weeks prior to its effective date in a newspaper of general distribution in the affected area. The director shall also cause notice of the order to be given by registered mail to any person required to file of whom the director has notice or knowledge or who has requested mailed notice to be given when the director adopts an order requiring the filing of declarations of existing rights.

The declaration shall be under oath and stated on personal knowledge or on a bona fide information and belief, and shall be in such form and contain such information as the director, by regulations, may prescribe. Such required information may include, but shall not be limited to, the date work was begun on the appropriation, the date the water was first applied to a beneficial use, and a true copy of any notice or claim upon which the existing right was initiated or is based;

(e) the findings of such inspections, surveys, reconnaissance, and investigations of the source or area involved as the director may make. Such findings shall be prima facie evidence of the facts therein found;

(f) if a detailed survey is necessary, the costs of such survey shall be borne one-half ($\frac{1}{2}$) by the state. The other one-half ($\frac{1}{2}$) of the costs will be apportioned among the users involved in the determination.

(2) On the basis of all data obtained, the director shall make a preliminary determination of existing rights for the area or source under consideration. The director shall prepare a summary or such determinations of all existing rights in the area or from the source involved, and shall mail a copy to each person who has filed a declaration in the proceeding.

(3) Any person who has filed a declaration in the proceeding, who feels aggrieved at the preliminary determination, may request a hearing thereon before the director. A request for a hearing pursuant to this subsection shall be in such form as the director may prescribe, and must be received in the office of the director within thirty (30) days of the effective date of the preliminary determination. If more than one (1) hearing is requested for a particular area or source, the director may in his discretion consolidate hearings. Notice of the hearing shall be sent to all persons who have filed declarations.

(4) The director shall, on the basis of the preliminary determination and on the basis of any hearings that may have been requested, make a final order determining each existing right in the area or from the source under consideration. The director shall issue certificates of each existing right in duplicate. The original of such certificate shall be sent to the holder of the existing right and shall be recorded with the county clerk and recorded in the county wherein the point of diversion, if any, or place of use is located in the same manner as other instruments affecting real estate. The duplicate shall be a matter of record in the office of the director.

(5) If a person fails to file a declaration as required under this section, and the person shall later assert any right to the water, the director in his discretion may proceed to determine such tardily asserted right. If in the director's opinion any person would be injured by the recognition of a tardily asserted right, the director may refuse to proceed with a determination of such right.

In no event shall the director proceed to determine a tardily asserted right, unless such right is asserted within one year of the effective date of the original final order for that area or source.

Tardily asserted rights shall be determined by the director in the same manner as any other existing right, according to the provisions of this section. Provided, that persons whose rights were determined by the original final order for the area or source affected shall not be required to refile their declarations.

(6) Any person feeling aggrieved by a final order determining existing rights, or by the director's determination of or refusal to determine a tardily asserted right, may obtain review by a proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act relating to appeals. Any final order determining existing rights shall be in full force and effect beginning thirty (30) days after its entry in the director's records, and shall remain in effect unless and until overruled on appeal.

Section 7. *District court clerks shall furnish director with copies of water decrees.*

The clerks of the various district courts of the state of Montana shall furnish the director with copies of all decrees affecting water rights.

Section 8. *Regulation of water distribution pending director's determination of existing rights.*

As of the effective date of this act, the director shall supervise all distribution of water. This supervisory authority shall include the supervision of all water commissioners appointed prior to the effective date of this act.

Pending the director's preliminary determination of existing rights, such rights shall be ascertained by reference to pertinent judicial decrees, records of rights acquired pursuant to the 1961 groundwater code Sections 89-2911 through 89-2936, R.C.M. 1947), and the findings of the water resources survey which was conducted pursuant to Section 89-847, R.C.M. 1947. Where the foregoing sources of information are incomplete, existing rights shall be deemed to correspond with local usages concerning recognition of water rights.

Section 9. *Acquisition of appropriation rights generally.*

Henceforth no person shall have the power or authority to acquire a new appropriation right to the use of water from any source without first obtaining the approval of the director, and no water rights of any kind may be acquired hereafter solely by use, adverse use, adverse possession, prescription, or estoppel.

Section 10. *Exemptions for limited appropriations, appropriations for certain uses, and appropriations from certain areas or sources.*

(1) The director may adopt regulations providing that appropriations for less than specified quantities of water, appropriations for specified purposes, appropriations from specified areas or sources, or appropriations excluded by one or more of the above specifications, shall be exempted from those requirements of this act concerning applications for permits which relate to inspections, notice, objections, and hearings, and from the requirements relating to perfection and notice of completion of appropriations. Such exemptions may be modified or terminated from time to time by new regulations, without affecting rights acquired under such exemptions.

(2) If the application is for an exempted appropriation, and if the director determines from the application that the proposed use is beneficial and comes within the terms of the exemption, he shall forthwith approve the application and issue the permit.

(3) Any person aggrieved by a regulation establishing exempted appropriations or by the director's approval or disapproval of an application for an exempted appropriation, may obtain review by a proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act relating to appeals. A regulation establishing exempted appropriations, or the director's approval or disapproval of an application for an exempted appropriation, shall be in full force and effect beginning thirty (30) days after its entry in the director's records, and shall remain in effect unless and until overruled on appeal.

Section 11. *Application for a permit to appropriate water.*

Any person intending to appropriate water shall apply for a permit from the director, and shall not appropriate the water except with the director's approval. The director may in his discretion require an application for a permit to include such information as the director may deem useful and appropriate, including but not limited to the name and address of the applicant, the source from which the appropriation is to be made, the maximum rate at which the water is to be appropriated and the total annual quantity of water sought to be appropriated, and if the water is to be diverted the location of the proposed appropriation works, the location of the place of use and estimates of the time required to begin construction and to apply the water to the proposed beneficial use.

A defective application shall be returned for correction or completion together with the reasons for returning it. An application shall not lose priority of filing because of defects with the director within thirty (30) days after its return to the applicant, or within such further time as the director may, by an order of record, allow. Applications shall be recorded in a book kept for that purpose.

Section 12. *Inspections of proposed appropriations.*

Upon the receipt of an application for an appropriation permit, the director may make any inspection he shall deem necessary of the proposed works, the source of the water, the location of the proposed use, and other water demands or uses in the area, to determine whether there is any likelihood that the proposed appropriation will adversely affect other persons or the public interest.

Section 13. *Applications for permits: notice to public, to affected appropriators, and to representatives of the public interest.*

Upon the receipt of a proper application for a permit other than an application for an exempted appropriation, the director shall prepare a notice containing the facts pertinent to the application and shall cause it to be conspicuously published, at the applicant's expense, in the newspaper of general circulation in the affected area, once a week for three (3) consecutive weeks. The director shall also cause copies of the notice to be served personally or by ordinary mail upon any person likely to be affected by the proposed appropriation, of whom the director has notice or knowledge. The director shall also cause notice to be served upon any person who represents any public interest likely to be affected by the proposed appropriation.

The notice shall state that any person may, within fifteen (15) days after the third date of publication or the date of mailing of notice, whichever occurs later, file with the director an objection to the application.

Section 14. *Applications for permits: objections.*

Objections must be filed within fifteen (15) days after the third date of publication or the date of mailing of notice, whichever occurs later.

Objections must state the name and address of the objector, and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, rights, or interests of the objector would be adversely affected by the proposed appropriation, or that harm to the public interest would be caused by the proposed appropriation.

Section 15. *Hearings on applications and objections.*

(1) The director shall examine any objection that may be filed, and if he determines that it states a prima facie valid objection to the issuance of the permit, he shall set a time and a place for a hearing on objections within one (1) year from the date the objections were filed, and cause notice of the hearing to be served personally or by registered mail upon the applicant and the objectors.

(2) If no valid objection is filed against the application, the director shall within one (1) year approve the application and issue the permit on the basis of the information contained in the application, the director's inspections, if any, and the director's records of appropriation rights and hydrologic data, disapprove the application or issue an interim permit.

(3) No application shall be approved in a modified form or upon terms, conditions or limitations specified by the director, nor denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application, but the director is of the opinion that the application should be approved in a modified form or upon terms, conditions or limitations specified by the director, or that the application should be denied, or whenever the director thinks that the application should be modified or denied, the director shall prepare a statement of his opinion and the reasons therefor. The director shall cause the statement of his opinion to be served personally or by registered mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor. Said notice shall further state that the application will be modified in a specified manner, or denied, unless a hearing is requested.

(4) Any person feeling aggrieved by the director's approval, modification, or denial of an application may obtain review by a proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act relating to appeals.

Section 16. *Interim permits.*

Pending final approval or denial of an application, the director may, in his discretion, issue an interim permit authorizing an applicant to begin appropriating water immediately. The director may issue an interim permit subject to any terms and conditions he may deem proper, and he may revoke an interim permit at any

Section 17. *Specific factors governing approval or denial of applications for appropriation permits.*

(1) If there are unappropriated waters in the source of supply, and the proposed appropriation neither will impair uses under other appropriation rights nor prejudicially and unreasonably affect the public interest, the director shall promptly approve the application. Otherwise the director shall deny the application or require its modification to protect the public interest and uses under other appropriation rights.

(2) In determining whether a proposed appropriation will impair a use under another appropriation right, impairment shall include but shall not be limited to the unreasonable raising or lowering of the static water level or lake or reservoir water level, or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the affected appropriator's point of diversion or use, beyond a reasonable economic limit.

(3) In determining whether a proposed appropriation will prejudicially and unreasonably affect the public interest, the director shall consider all matters pertaining to the question of the continued availability of appropriable water, including such matters as the area, safe yield, and recharge rate of aquifers, the seasonal changes in streamflows, and the status of other appropriations on the proposed water supply; the values to the applicant likely to result directly from the proposed use of the water; the benefits to the state and to the locality likely to result indirectly from the proposed use of the water; the losses likely to result from the preclusion or hindrance of potential alternate uses of the water; the impairment of the property, interests, and rights of other persons likely to result from the proposed appropriation; the harm to the public that would result from the impairment of fish, wildlife, and recreational values; public water supplies and maintenance of sufficient water in streams to dilute waste effluents; and the good faith, intent, and ability of the applicant to successfully complete the proposed appropriation.

Section 18. *Terms and conditions of appropriation rights.*

(1) An appropriation right is a right to a beneficial use of water, and does not include an absolute right to a particular means or point of withdrawal or diversion, nor a right to prevent reasonable changes in the condition of water occurrence, such as the increase or decrease of a streamflow or the raising or lowering of a water table or water level, or of artesian pressure, caused by later appropriators, provided the prior appropriator can reasonably acquire his water under the changed conditions. In determining whether the prior appropriator can reasonably acquire his water under the changed conditions caused by later appropriations, the director shall determine whether both the prior and the later appropriators' means of appropriation are reasonable and consistent with the state of development in the area in which the water source is situated.

(2) Subject to the requirements of Section 15 of this act relating to hearings and appeals, the director may approve an application in a modified form or upon any reasonable terms, conditions, and limitations he shall deem necessary for the protection of the public interest and the rights of other appropriators.

Section 19. *Seasonal and temporary permits.*

Seasonal and temporary permits may be granted under the provisions of this act relating to ordinary permits. The right to appropriate water under a seasonal permit shall be limited to that portion or portions of the calendar year expressly stated in such permit. A temporary permit may be granted by the director. A temporary permit shall not vest in the holder thereof any permanent right to use of water and shall expire and be cancelled by the director in accordance with the terms of the permit.

Section 20. *Perfection of appropriation rights; affidavit of proper completion; certificate of appropriation right.*

(1) If any water is to be diverted, an appropriation permit issued by the director shall reasonably limit the time for commencement of construction of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing the foregoing time limits, the director shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for such gradual development. For good cause shown by the holder of the permit, the director may extend any time limits.

(2) Upon the actual application of the water to the proposed beneficial use within the time allowed, the holder of the permit shall furnish the director with an affidavit, stating that the holder of the permit believes that the appropriation has been properly completed. The director may then inspect the appropriation, and if he is satisfied that the completed appropriation substantially complies with the

permit, he shall issue a certificate of appropriation right in duplicate. The original of such certificate shall be sent to the holder of the appropriation right and shall be recorded with the county clerk and recorder in the county wherein the point of diversion, if any, or place of use is located, in the same manner as other instruments affecting real estate. The duplicate shall be made a matter of record in the office of the director.

(3) Any person aggrieved by the director's issuance of or refusal to issue a certificate of appropriation right may obtain review by a proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act on appeals.

Section 21. *Recognition of existing rights; priority dates of existing and future rights.*

(1) Existing rights and their priority are hereby recognized as valid appropriation rights.

(2) Rights acquired under the provisions of this act shall have priority as of the date applications are received in the office of the director.

Section 22. *Revocation of permits.*

If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or any extension thereof, or if the water is not being applied to beneficial use as contemplated in the permit, or if the permit is otherwise not being followed, the director may require the holder of the permit to show cause why the permit should not be revoked. If the holder of the permit fails to show sufficient cause, the director may revoke the permit.

Any person aggrieved by the director's revocation of, or refusal to revoke, a permit, may obtain review by a proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act on appeals.

Section 23. *Changes in appropriation rights.*

(1) An appropriator may change the point of diversion, place of use, nature of use, place of storage or make a seasonal or temporary change, or rotate his use of water provided that such an action does not adversely affect the rights of other persons or the public interest.

(2) The director may inspect to determine whether there is any likelihood that the change will adversely affect other persons or the public interest. If any person claiming to be injured by the change files an objection meeting the requirements of Section 14 of this act, within one (1) year after the date the change was actually made, the director shall hold a hearing in compliance with Section 15 of this act.

Section 24. *Sales and other transfers of interests in appropriation rights.*

(1) An appropriation right may either be appurtenant to or severable from the land or place upon which it is used. An appurtenant right shall pass with a conveyance, or transfer by operation of law, of the land, unless specifically excepted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.

(2) A copy of any instrument which transfers an interest in an appropriation rights shall be filed with the director by the person receiving the appropriation interest, and the director shall maintain a record of such filings.

Section 25. *Right to construct dams and raise water—conducting water over lands and railroad rights of way.*

The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use; provided further, that if it is necessary to conduct the water across the right of way of any railroad, it shall be the duty of the owners of the ditch or flume to give thirty (30) days notice in writing to the owner or owners of such railway of their intention to construct a ditch or flume across the right of way of such railroad, and the point at which the said ditch or flume will cross the railroad; also the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fail to appear and attend at the time and place fixed in said notice, it shall be lawful for the owner or owners of the said flume or ditch to construct the same across the right of way of such railroad, without further notice to said owner or owners of the railroad.

Section 26. *Administration supervision of water distribution.*

(1) The owner or manager of any appropriation works shall maintain, at his own expense and to the satisfaction of the director, substantial and efficient controlling works, and any measuring devices the director may require, and these shall be so constructed as to permit of efficient appropriation, accurate measurement, and effective regulation of the water that is appropriated.

(2) The director shall have authority to require any appropriator to report the readings of measuring devices at reasonable intervals, and to file reports on appropriations, in such form, containing such information, and at such reasonable intervals as the director may require.

(3) The director shall supervise the distribution of water among appropriators. The supervision shall be governed by the principle that first in time is first in right, except as provided in subsection (7) of this section. However, groundwater sources shall be treated as separate from surface water sources, unless an appropriator shall demonstrate to the water commissioner or director that sources of groundwater and surface water are so closely interrelated that it is practical to integrate their administration.

(4) Whenever a water distribution controversy involving a claimant of an existing right arises upon a source of water in which existing rights have not been determined according to Section 6 of this act, the director may on his own motion and shall on the petition of one or more of the parties to the controversy proceed within a reasonable time to determine existing rights in the source, according to Section 6 of this act.

(5) If the director shall ascertain, by any means reasonably deemed sufficient by him, that any person is wasting water, using water unlawfully, or preventing water from moving to another person having a prior right to use the same, the director may:

(a) regulate the controlling works of any appropriation as may be necessary to prevent the wasting or unlawful use of water, or to secure water to a person having a prior right to its use; and the director may attach to the controlling works a written notice properly dated and signed, setting forth the fact that the controlling works have been properly regulated by him, which notice shall be legal notice to all persons interested in the appropriation or distribution of the water; or

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from so doing, and to take such steps as may be necessary to remedy the waste, unlawful use, or interference; or

(c) request the attorney general to bring suit to enjoin such waste, unlawful use, or interference.

(6) The director may make orders establishing controls for any area or source of water, by which priority of rights of appropriators may be enforced by apportionment, rotation, reduction, or cessation of uses of appropriation rights. Such orders shall be preceded by notice in accordance with Section 13 of this act. After giving notice, the director shall hold a hearing on the proposed controls, for the purpose of giving interested persons an opportunity to express their views on the proposed controls. The director may also make any inspections he deems necessary concerning the proposed controls. The director may order controls on the basis of his inspections, if any, his records of appropriation rights and hydrologic data, and the views expressed at the hearing.

(7) The director may make orders approving agreements among appropriations in any area or from any source providing for controls such as apportionment, rotation, reduction, cessation, or proration of uses. However, no such agreement shall be approved which is not consistent with the protection of the public interest and the rights of other persons.

Orders approving agreements on controls shall be made according to the procedures of subsection (6) of this section.

Upon the director's approval, the agreement shall govern the distribution of water as therein provided. The director may, for any reason deemed sufficient by him, dissolve any such agreement at any time, and, upon notice to the affected appropriators, distribute the water according to the principle that first in time is first in right.

(8) Any person aggrieved by an administrative order or action regulating the distribution of water may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act on appeals.

Section 27. *Field offices and district water commissioners.*

(1) The director may divide the state into water districts and establish a field office for each district, for the purpose of securing the best protection to all appropriators and the economical and efficient supervision of water distribution. As the director shall deem necessary he may at any time change the boundaries of water districts to better serve the intent and purposes of this section.

(2) The director shall appoint one (1) district water commissioner for each field office, to be selected by the director from among persons recommended by the several boards of county commissioners of the counties into which the water district falls. Each county shall have authority to recommend district water commissioner

candidates. Vacancies shall be filled according to the same procedure as that used for original appointments.

(3) Each district water commissioner, before entering upon the discharge of his duties, shall take and subscribe an oath before the judge of a state court of record, to faithfully perform the duties of his office, and file said oath with the secretary of state, together with his official bond, in the penal sum of one thousand dollars (\$1,000), the bond to be executed by a surety company authorized to do business within the state, and conditioned upon the district water commissioner's faithful discharge of his official duties.

(4) District water commissioners shall be full-time state employees, and their salaries and official expenses shall be paid from the state general fund. Salaries shall be fixed by the director.

(5) A district water commissioner shall serve at the pleasure of the director.

(6) The district water commissioner shall be the director's agent in supervising the distribution of waters within the water district, and shall perform such other duties as the director may require. The district water commissioner shall have authority to regulate the controlling works of any appropriation within the district, under the general supervision of the director. All regulation of controlling works shall be accompanied by a notice, in accordance with Section 26 (5) (a) of this act.

(7) The district water commissioner shall have the power, within his district, to arrest any person violating any of the provisions of this act and to deliver such person promptly into the custody of the sheriff or other competent officer within the county. Immediately upon such delivery the water commissioner making the arrest shall, in writing and under oath, make complaint before the proper justice of the peace against the person so arrested.

Section 23. *Part-time water commissioners.*

(1) Upon application by an interested appropriator making a reasonable showing of the necessity therefor, which application shall have been approved by the district water commissioner, the director shall select and appoint a part-time water commissioner for any area or source where the director deems closer regulation of water distribution to be necessary. A part-time water commissioner shall be appointed to serve at such times and for such periods as local conditions may indicate to be necessary to provide the most practical supervision and to secure to appropriators the best protection of their rights.

(2) A part-time water commissioner shall comply with the provisions of Section 27 (3) of this act concerning an oath and a bond.

(3) Salaries of part-time water commissioners shall be fixed by the director. The salaries and official expenses of part-time water commissioners shall be borne by the appropriators receiving the benefits and shall be paid monthly, in the following manner:

A part-time water commissioner shall be paid for the time actually employed, and shall be compensated for official expenses actually incurred. Each appropriator shall pay his proportionate share of the total cost of the ratio that the amount of water he is authorized to use bears to the total amount of water authorized for use from the source of water, during each month. On or about the first of each month the part-time water commissioner shall present to each appropriator a statement of his proportionate share of the cost of maintaining such services for the preceding month. Where the appropriators are organized into an association, the statement shall be presented to the proper officers of such association for payment.

Upon the failure of any appropriator to pay his share of the expense referred to in this section, the part-time water commissioner may, with the approval of the district water commissioner, prevent further use of water by the delinquent appropriator until payment is made. The county attorney for the county in which such appropriator's appropriation is located shall, upon request of the district water commissioner, bring suit in any court of competent jurisdiction, and is authorized to recover for said part-time commissioner any such unpaid share.

(4) A part-time water commissioner shall serve at the pleasure of the district water commissioner.

Section 29. *Abandonment and forfeiture of appropriation rights.*

(1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right, or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with such terms and conditions, the appropriation right shall, to that extent, be deemed abandoned and shall immediately expire. If a partial or total cessation of use, or a failure to use an appropriation right according to its terms and conditions, continues for ten (10) successive years, that shall be prima facie evidence that an intent to abandon occurred.

(2) If an appropriator ceases to use all or part of his appropriation right, or ceases using his appropriation right according to its terms and conditions, for a period

of fifteen (15) successive years, the appropriation right shall be deemed forfeited in whole or in part, regardless of whether the appropriator intended abandonment.

(3) Procedure for declaring appropriation rights abandoned or forfeited.

When the director is informed that an appropriator may have abandoned or forfeited his appropriation right, or when another appropriator shall claim that he has been or will be injured by the resumption of use of an appropriation right alleged to have been abandoned or forfeited, the director shall serve notice requiring the appropriator to show cause why his appropriation right should not be declared abandoned or forfeited. The notice shall include the following information:

- (a) a description of the appropriation right in question;
- (b) a statement that unless due and sufficient cause is shown the appropriation right will be held to have been abandoned or forfeited, for specified reasons;
- (c) the time and place of the hearing.

The notice shall be served personally or by registered mail, and shall be served or mailed at least thirty (30) days before the hearing. The notice shall be served upon the appropriator of record at his last known address.

Within sixty (60) days after the hearing, the director shall make an order determining whether the appropriation right shall be held abandoned or forfeited, and he shall notify the appropriator as to the contents of the order by registered mail.

The director's order declaring the abandonment or forfeiture of a water right shall be in full force and effect beginning fifteen (15) days after its entry in the records of his office, unless and until its operation shall be stayed by an appeal from the order.

Any person aggrieved by the director's refusal to initiate abandonment or forfeiture proceedings, or by an order declaring that an appropriation right has or has not been abandoned or forfeited, may obtain review by the proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act on appeals.

Section 30. *Reservation of waters.*

(1) Any water users' association, municipality, irrigation or other special district, the state of Montana or any political subdivision or agency thereof, the United States or any agency thereof, or any other representative of the public interest, may request the director to reserve any public waters from the appropriation and use for existing or future beneficial uses, or to maintain a minimum flow, level, or quality of water therein, throughout the year or at such periods or for such length of time as the director shall designate.

(2) Upon receiving such a request, the director shall give notice in accordance with Section 13 of this act and, in accordance with Section 26 (6) of this act, hold a hearing and decide whether to reserve the water. The director's costs of giving notice, holding a hearing, conducting investigations, and making records, incurred in acting upon a request to reserve water, shall be paid by the party making the request.

(3) From and after the adoption of an order reserving waters, the director may reject an application and refuse a permit for the appropriation of reserved waters, or may issue the permit subject to such terms and conditions as the director may deem necessary for the protection of the objectives of the reservation.

(4) Any person aggrieved by the director's adoption of, or refusal to adopt, an order reserving waters, may obtain review by a proceeding for that purpose, in the nature of an appeal, in accordance with the provisions of this act on appeals.

Section 31. *Legal assistance for water officials.*

The county attorneys and the attorney general shall perform such legal services and bring such legal proceedings in carrying out the purposes of this act within their respective counties as the director or district water commissioners request, and may employ private counsel.

Section 32. *Appropriation by means of reservoirs; permits to appropriate by means of reservoirs.*

(1) Except as provided in subsection 2 of this section, a reservoir is a means of appropriating water which includes groundwater recharge, and in itself does not constitute a beneficial use of water. A right in a reservoir is limited to a right to use the reservoir as a means of applying water to a beneficial use.

(2) If the state of Montana constructs a reservoir for a public purpose or in the interests of the public, the impounding of the water in the reservoir shall constitute a beneficial use of water.

(3) A person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed by Section 11 of this act. Applications to appropriate water by means of a reservoir may include, in addition to information required by the director under Section 11 of this act, any of the following information that the director in his discretion requires:

- (a) a general description and the dimensions of the proposed construction or enlargement of the dam

- (b) the location, type, size, and height of the proposed dam and appurtenant works;
 - (c) the storage capacity of the reservoir for each foot in depth;
 - (d) the means, plans, and specifications by which the stream or other body of water is to be dammed, by-passed, or controlled during construction;
 - (e) subsoil and foundation conditions, including conditions disclosed by any drilling or other prospecting that the director in his discretion requires the appropriator to perform;
 - (f) a description of the land to be submerged;
 - (g) a description of the beneficial uses to be made of the impounded waters;
 - (h) rainfall and streamflow records, flood flow records and estimates, and the area of the drainage basin.
- (4) Appropriation by means of reservoirs is controlled by this section and sections 11 through 18, 20, 21, and 23 of this act. It is unlawful to construct, reconstruct, repair, operate, maintain, enlarge, remove, or alter any dam except in compliance with these sections and the other applicable sections of this act.
- (5) When repairs are necessary to safeguard life or property, they may be started immediately; but the director shall be notified forthwith of the proposed repairs and of work under way, and the repairs shall be made to conform to his orders.
- (6) Prior to approving an application to appropriate water by means of a reservoir, the director may require a surety company bond in an amount sufficient to secure the costs to the state in assuring the safety of any dam partially constructed, and in assuring the protection of the water supply against the possibility that an appropriation by means of a reservoir might be left incomplete.

Section 33. *Records of director's actions.*

The director shall make and preserve a true and complete transcript of all proceedings and hearings conducted under this act. After any hearing, investigation, inspection, survey, or reconnaissance, the director's decision shall be rendered in writing.

Section 34. *Entry on land.*

Any persons authorized by the director may enter upon any land to carry out the purposes of this act after giving reasonable notice to the land owner. A person, entering land under the authority of this section, is responsible for any damage done to the property.

Section 35. *Penalties.*

Any person who violates or refuses or neglects to comply with any provision of this act, or of any order, rule, or regulation promulgated by the director, is guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25) nor more than two hundred fifty dollars (\$250) for each offense.

Section 36. *Fees.*

- (1) The director shall collect the following fees:
 - (a) ten dollars (\$10) with each application for a permit to appropriate water;
 - (b) three dollars (\$3) for certifying a document;
 - (c) the cost of recording documents with county clerks and recorders where recording is required by this act;
 - (d) five dollars (\$5) for issuing a certificate of an appropriation right;
 - (e) five dollars (\$5) with each declaration of an existing right;
 - (f) five dollars (\$5) with an objection to an application for a permit;
 - (g) three dollars (\$3) for recording a document for the director's records.
- (2) Fees collected shall be deposited in the state general fund.

Section 37. *Appeals.*

Any person authorized by this act to obtain review of an administrative act, decision, or order may appeal in the following manner:

- (1) Review of acts, decisions, and orders of district or part-time water commissioners:

Within twenty (20) days after the act, decision, or order complained of, the appellant shall file a written statement of objections with the director. The statement of objections shall be under oath and stated on personal knowledge or on bona fide information and belief, and shall be in such form and contain such information as the director may prescribe. Such information shall include the names and addresses of any other persons of whom the appellant has or readily could obtain knowledge, who are likely to be affected by the director's decision on appeal. Within twenty (20) days after receiving a statement of objections, or sooner if practicable, the director shall hold a hearing upon the objections. The director shall require notice of the hearing together with copies of the statement of objections, to be served or mailed at least ten (10) days before the hearing, by personal service or certified mail, upon all persons likely to be affected by the director's decision on appeal, of whom the director has or readily could obtain knowledge.

Notice of the hearing shall be served upon the water commissioner whose act, decision, or order is being reviewed, and the water commissioner shall respond to the statement of objections before the day set for the hearing.

The director shall conduct the hearing at a convenient and suitable location in the vicinity where the controversy arose. Persons required to be given notice, who appear at the hearing, shall be given an opportunity to be heard at the hearing.

As soon as practicable after the hearing, having regard to the best interests of the persons concerned and the urgency of the matter, the director shall render his decision. The director's decision shall affirm, reverse, modify, or vacate the water commissioner's decision or order, and shall be in full force and effect as soon as entered in the director's records and remain in effect until reversed, modified, or vacated upon a further appeal. Notice of the director's decision shall be served by personal service or by ordinary mail, upon all persons required to be given notice of the hearing.

(2) Judicial review of original or appellate acts, decisions, and orders of the director:

(a) appeals shall be taken to the district court of the county in which the point of diversion, if any, or place of use is situated. Within twenty (20) days after the act, decision, or order complained of, the appellant shall file with the court a copy of the order appealed from, together with a petition stating the grounds of appeal. A copy of the petition shall be served upon the director who shall answer it within twenty (20) days from service thereof, and with the answer transmit to the court the records and files, duly certified, in the manner on appeal. A copy of the answer shall be served upon the appellant. The court shall require notice of the appeal, together with copies of the order appealed from the the petition, to be served by personal service or registered or certified mail, upon the persons required to be given notice under subsection (1) of this section. Notice shall be served or mailed at the same time that the appellant files his petition.

The court shall set the matter for hearing, and notice of the hearing shall be served upon the persons required to be notified of the appeal.

(b) the court shall decide the appeal upon the petition; the answer; the director's duly certified records and files, including evidence presented before the director as reported by the director's official stenographer and reduced to writing; briefs filed with the court that were furnished, reasonably in advance of the judicial hearing, to all persons required to be given notice; and evidence presented at the judicial hearing.

Except in its discretion for good cause shown, the court shall not receive or consider any evidence or arguments that were not presented to the director reasonably in advance of the director's act, decision, or appealable order complained of.

(c) the inquiry upon judicial review shall extend to the questions whether the director has acted or proceeded without, or in excess of, jurisdiction; whether there was a fair hearing; whether there was any prejudicial abuse or discretion whereby the director did not act or proceed in the manner required by law, or the order or decision is not supported by the findings of fact, or the findings of fact are clearly erroneous in the light of the whole record; and whether there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the administrative hearing.

(d) where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the administrative hearing; the court may enter judgment remanding the case to the director to be considered in the light of such evidence, without limiting or controlling in any way the discretion legally vested in the director, or the court may admit such evidence at the judicial hearing without remanding the case.

(3) Appeals from applicable decisions of the district courts:

Appeals in water controversies may be taken from the district courts to the supreme court, in the same manner as in other civil cases.

Section 38. Section 89-121, Section 89-122, Section 89-123, and Section 89-125, R.C.M. 1947; Sections 89-801 through 89-864, R.C.M. 1947; Sections 89-1001 through 89-1024, R.C.M. 1947; and Sections 89-2911 through 89-2936, R.C.M. 1947 are repealed.

