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THE SHADOW OF THE *MONO LAKE* DECISION IN MONTANA

Rebecca Summerville

I. INTRODUCTION

Two principles of water law which have been developing side-by-side in several western states over the years collided in *National Audubon Society v. The Superior Court of Alpine County*¹ (hereinafter referred to as *Mono Lake*). The California Supreme Court was faced with determining the relative legal positions of the state's appropriative water rights system² and the public trust doctrine,³ which the court has recognized and expanded during the past century. The setting could not have been more dramatic. Mono Lake is a large beautiful lake at the base of the Sierra Nevada Range with unique ecological, geological and aesthetic values. Under the state's appropriation system, which evolved to encourage and insure the orderly distribution of water to sites distant from the source, Los Angeles was allowed to divert and transport water from Mono Basin over two hundred miles to the city even though the diversion significantly altered Mono Lake. To protect the lake and its ecological and recreational characteristics, the National Audubon Society sought an injunction to halt the increased diversion out of Mono Basin on the basis of the public trust doctrine. Despite each side's argument that one principle of water law should prevail, the court held that both principles were vital and by necessity must coexist to provide a balanced approach to water use.

Although far reaching, the scope of the *Mono Lake* decision was limited by the California court's insistence on associating public trust protection with navigability. By contrast, Montana, also a state with an appropriative water rights system, recently abandoned the navigability test in applying the doctrine. In *Montana Coalition for Stream Access v. Curran*,⁴ the Montana Supreme Court relied on both the public trust

1. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 104 S. Ct. 413 (1983). The case has popularly been referred to as the *Mono Lake* case.

2. The appropriation system can be viewed as the western counterpart to the eastern states' riparian system. In many western states it has become the only means of acquiring a water right. The appropriator must use the water for a beneficial purpose. Conflicting claims are decided on the basis of "first in time, first in right."

3. The public trust doctrine requires government to act as a fiduciary or "public guardian(s) of those valuable natural resources which are not capable of self-regeneration and for which substitutes cannot be made by man." Cohen, *The Constitution, the Public Trust Doctrine and the Environment*, 1970 UTAH L. REV. 388 (1970). The doctrine was first applied to navigable waters, but is now being applied to other uses.

4. *Montana Coalition for Stream Access v. Curran*, _____ Mont. _____, 682 P.2d 163, 170

doctrine and the water rights provisions of the Montana Constitution to hold that the public's use of water for recreational purposes should be limited only by the characteristics of the water.

California and Montana have signaled paths that the courts in other western states should follow as they seek to resolve competitive claims for the use of this region's lifeblood—water.

II. FACTS

The California Supreme Court described Mono Lake as a "scenic and ecological treasure of national significance."⁵ It is the second largest lake wholly in California and is located near Yosemite Park.⁶ The major source of water for the lake comes from five streams carrying snow melt from the Sierra Nevada Mountains.⁷ The lake has no natural outlet and the water is not potable because of the high saline content.⁸ The salinity, however, makes the lake suitable for a brine shrimp population, which at least until recently was thriving. The shrimp serve as an important food source for a number of migratory birds which the lake hosts and a breeding colony of California gulls which inhabit islands in the lake.⁹

Over forty years ago, with an eye toward procuring water for the projected future needs of Los Angeles, the Department of Water and Power of the City of Los Angeles (hereinafter DWP), purchased the riparian rights for four of the five streams supplying Mono Lake as well as the riparian rights of Mono Lake itself.¹⁰ Claiming that the water from those sources was necessary for domestic use in Los Angeles, DWP applied to the Division of Water Resources (the predecessor to the California Water Resources Board, hereinafter Board) for the appropriative rights

(1984). See also, *Montana Coalition for Stream Access v. Hildreth*, ___ Mont. ___, 684 P.2d 1088 (1984).

5. *Mono Lake*, 33 Cal. 3d at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

6. The court notes in the opinion that prior to any diversion from the Mono Basin the lake's area was 85 square miles. By 1979 the area had been reduced to 60.3 square miles. DWP projects that the lake will stabilize with an area of 38 square miles, some 56% smaller than the pre-diversion lake. Plaintiffs dispute DWP's projections and contend that the lake's size will be decreased even more and that the lake may even go dry. *Id.* at 429, 658 P.2d at 714-715, 189 Cal. Rptr. at 351-352.

7. The five freshwater streams which supply Mono Lake are Mill, Lee Vining, Walker, Parker and Rush Creeks. DWP has the riparian and appropriate rights to all but Mill Creek. *Id.* at 424, 427, 658 P.2d at 711, 713, 189 Cal. Rptr. at 348, 350.

8. Water is lost from Mono Lake only by evaporation and seepage as there is no natural outlet. As the water evaporates natural salts are left behind and give the lake its saline nature. *Id.* at 429, 658 P.2d at 715, 189 Cal. Rptr. at 352.

9. Among the birds which stop at Mono Lake on migration routes are the Northern Phalarope, Wilson's Phalarope, and the Eared Grebe. About a quarter of the total world population of California Gulls nest on islands in Mono Lake. *Id.*, 33 Cal. 3d at 424, 430, 658 P.2d at 711, 716, 189 Cal. Rptr. at 348, 352.

10. *Id.* at 427, 658 P.2d at 713, 189 Cal. Rptr. at 350.

from those sources.¹¹ The statutory authority governing the Board's actions contained an inherent conflict: while the Board was empowered to reject applications for appropriation which were not in the public interest, the domestic use of water was declared to be the highest use of water.¹² On that basis and despite testimony of harm to the public interest, the Board in 1940 granted the appropriative rights to DWP.¹³ Within a year water from the Mono Basin was transported to Los Angeles by its aqueduct system.¹⁴

For thirty years Los Angeles diverted about 60,000 acre feet of water per year, which caused the lake's surface level to recede at the rate of about one foot per year.¹⁵ In an effort to meet the city's ever increasing water needs, Los Angeles constructed another aqueduct for the purpose of increasing the flow from the Mono Basin. The amount of water diverted from the Mono Basin after completion of the second aqueduct between 1970 and 1980 was almost double what it had been.¹⁶

The effect of this new diversion has been dramatic. The lake's salinity has drastically increased.¹⁷ As the salinity increases the brine shrimp population will diminish.¹⁸ A decrease in the shrimp population will in turn have an effect on the lake's resting and migratory bird populations. High saline conditions damage these birds by affecting their osmotic equilibrium.¹⁹ The bird populations are also threatened by the recession of the lake level. The lower lake level has caused some of the islands to become connected with the shore, thus exposing the nesting birds to predators such as the coyote.²⁰

To halt these problems and to prevent further destruction to the character of Mono Lake, the National Audubon Society brought an action

11. *Id.*

12. "The board's primary authority to reject that application lay in a 1921 amendment to the Water Commission Act of 1913, which authorized the board to reject an application 'when in its judgment the proposed appropriation would not best conserve the public interest.' (Stats. 1921, ch. 329, § 1, p. 443, now codified as Wat. Code, § 1255.) The 1921 enactment, however, also 'declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water.' "*Id.*

13. *Id.* at 427, 658 P.2d at 713-714, 189 Cal. Rptr. at 350.

14. *Id.* at 428, 658 P.2d at 714, 189 Cal. Rptr. at 351.

15. *Id.*

16. Since completion of the second aqueduct in 1970, Los Angeles has diverted nearly 100,000 acre feet per year. *Mono Lake*, 33 Cal. 3d at 428-429, 658 P.2d at 714, 189 Cal. Rptr. at 351.

17. Without the supply of fresh water from the creeks diverted by DWP, the lake's natural salinity is no longer balanced, and the salinity of the water remaining in the lake has been increased. *Id.* at 429, 658 P.2d at 715, 189 Cal. Rptr. at 352.

18. The court cited the Task Force Report and noted that experimental evidence indicates that brine shrimp populations decrease as salinity increases. The plaintiffs alleged that in 1981 there was a 95% reduction in the shrimp hatch. *Id.* at 430, 658 P.2d at 715, 189 Cal. Rptr. at 352.

19. *Id.*

20. Gull nesting at Mono Lake has declined since coyotes have been able to reach Negrit Island, formerly the most popular nesting site. *Id.* at 430, 658 P.2d at 716, 189 Cal. Rptr. at 353.

in May 1979 to enjoin DWP's diversions on the basis of a bold theory. They argued that the shores, bed, and waters of Mono Lake were subject to and protected by a public trust, and that under the trust, the lake's recreational and ecological values should be protected.²¹

The action was brought in Mono County, but upon DWP's motion, venue was changed to Alpine County. DWP cross-complained against over one hundred individuals claiming rights in Mono Basin, including the United States. The United States removed the case to the District Court for the Eastern District of California. Arguing that the two issues to be resolved were important issues of California law, DWP moved the District Court to stay its proceedings under the federal abstention doctrine.²² The District Court did so pending resolution of:

1. A determination of the interrelationship of the public trust doctrine and the California water rights system.
2. Whether the exhaustion principles generally applied in water rights cases were applicable to plaintiffs' federal action.²³

Seeking resolution of these issues, plaintiffs filed a second action in the Alpine County Superior Court for declaratory relief. Summary judgment was entered against the plaintiffs on both issues on November 9, 1981.²⁴ Plaintiffs then filed a Petition for Mandate in the Supreme Court of California. The Supreme Court issued an alternative Writ and set the case for argument.²⁵ After argument, the Supreme Court of California ordered the Superior Court of Alpine County to vacate its Judgment and to enter a new Judgment in conformity with its Opinion.²⁶

21. *Id.* at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

22. The court noted that "[a]bstention is 'now appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public impact whose importance transcends the result in the case then at bar.'" *Id.* at 432, n.12, 658 P.2d at 717, n.12, 189 Cal. Rptr. at 353, n.12, citing *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976); *Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25 (1959); and *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968).

23. The scope of this note is limited to the first issue. As to the second issue, the California Supreme Court reviewed the role of the Water Board, prior public trust doctrine cases, the recent decisions *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, known as EDF I, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977) and EDF II, 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 446 (1980), and the legislative intent, to hold that although the Board could have provided a remedy for plaintiffs, the Superior Court had concurrent jurisdiction and it was not therefore necessary for plaintiffs to exhaust administrative remedies prior to judicial review. The court recommended deference to the Board in cases involving issues which required the Board's expertise. This issue is covered by the court at 33 Cal. 3d at 448-451, 658 P.2d at 729-732, 189 Cal. Rptr. at 366-368.

24. *Mono Lake*, 33 Cal. 3d at 433, 658 P.2d at 717-18, 189 Cal. Rptr. at 354.

25. *Id.* at 433, 658 P.2d at 718, 189 Cal. Rptr. at 355.

26. *Id.* at 452-453, 658 P.2d at 732-733, 189 Cal. Rptr. at 369.

III. THE DECISION

The court carefully considered the California appropriation system and the state's public trust doctrine in its decision. The court reached its holding by reconciling the two systems and recognizing the interrelationships which exist between them.

A. *The Public Trust Doctrine in California*

Recognition of the public trust doctrine is well established in California. In its analysis, the *Mono Lake* court traced the doctrine's origins to Roman law and English common law. "[F]rom the earliest days," the court stated, "judicial decisions have recognized and enforced the trust obligation."²⁷ Having recognized the contemporary viability of the doctrine, the court carefully examined three aspects of the public trust doctrine: the purpose, scope, and duties of the state as trustee.²⁸

The *Mono Lake* court observed that the purpose of the public trust doctrine was not limited to traditional uses. "[T]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."²⁹ In an earlier decision the court recognized that the public trust doctrine is not a static, rigid, or inflexible doctrine limited to the purpose of protecting navigability, commerce, or fisheries. In *Marks v. Whitney*, a case concerning tide lands, the court recognized additional trust purposes and held that the preservation of wild lands for ecological and aesthetic purposes was "a use encompassed within the tide lands trust."³⁰ The *Mono Lake* court relied on the *Marks* decision, holding that the recreational and ecological characteristics of Mono Lake were similarly protected under the public trust.³¹

The court next looked at the scope of the public trust doctrine. Since the city was diverting water from non-navigable tributaries feeding Mono Lake, the court had to determine to what extent, if any, the public trust doctrine imposed limitations on the use of non-navigable streams which affects navigable waterways. The court relied on two early cases to hold that "[t]he Public Trust Doctrine . . . protects navigable water from harm caused by diversion of non-navigable tributaries."³²

Both earlier cases provided solid precedent for the *Mono Lake* court's holding. *People v. Gold Run Ditch & Mining Company* involved an action by the state against miners who dumped hundreds of cubic yards of sand

27. *Id.* at 434, 658 P.2d at 718-19, 189 Cal. Rptr. at 355.

28. *Id.* at 434, 658 P.2d at 719, 189 Cal. Rptr. at 355.

29. *Id.* at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.

30. *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

31. *Mono Lake*, 33 Cal. 3d at 435, 658 P.2d at 719, 189 Cal. Rptr. at 356.

32. *Id.* at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

and gravel into the American River annually.³³ The sand and gravel was carried downstream raising the bed of the Sacramento River and affecting its navigability. Stating that “[t]he rights of the people in the navigable rivers of the state are paramount and controlling,” the court barred any further dumping.³⁴ In *People v. Russ*,³⁵ the second case on which the *Mono Lake* court relied, the defendants dammed non-navigable sloughs which fed into the Salt River. The trial court held for the defendant because of the non-navigable character of the sloughs. The California Supreme Court, however, reversed and ordered the trial court to enter a finding which considered the effect of the dams on the Salt River. Based on these two early decisions, the *Mono Lake* court extended the public trust doctrine to protect Mono Lake from the harmful effects caused by diversion of the tributaries which supply the lake even though they were non-navigable.

Of the three aspects of the public trust doctrine which the court examined, the most significant in terms of putting the doctrine on equal legal ground with the appropriation system was the determination regarding the state’s duty as trustee. After reviewing the landmark case of *Illinois Central Railroad Company v. Illinois*, which stated that a state cannot “abdicate its trust over property in which the whole people are interested,”³⁶ the older California cases of *People v. California Fish Co.*,³⁷ *Boone v. Kingsbury*,³⁸ and the recent *City of Berkeley v. Superior Court of Alameda County*,³⁹ the court stated:

[T]he public Trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people’s common heritage of streams, lakes, marsh lands and tide lands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.⁴⁰

On this basis, the court concluded that the state as trustee of the public trust, “retains continuing supervisory control over its navigable waters and the lands beneath those waters.”⁴¹ The state’s continuing fiduciary duty “prevents any party from acquiring a vested right to appropriate water in a

33. 66 Cal. 138, 4 P. 1152 (1884).

34. *Id.* at 151-152, 4 P. at 1159.

35. 132 Cal. 102, 64 P. 111 (1901).

36. 146 U.S. 387 (1892).

37. 166 Cal. 576, 138 P. 79 (1913). In *California Fish Co.*, the court held that purchasers held title to tide lands subject to the public interest.

38. 206 Cal. 148, 273 P. 797 (1928). The *Boone* court held that structures built on leased trust lands for oil drilling may be removed any time the state subsequently determined that they were impairing navigability or commerce.

39. 26 Cal.3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

40. *Mono Lake*, 33 Cal. 3d at 441, 658 P.2d at 724, 189 Cal. Rptr. at 360-361.

41. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 364.

manner harmful to the interests protected by the public trust."⁴²

B. *The California Water Rights System*

In the *Mono Lake* decision, the court traced the history of the state's appropriation system to the Water Commission Act of 1913 (Act), and noted that the Act detailed a statutory procedure for acquiring appropriative rights which subsequently became the exclusive method for obtaining such rights.⁴³ The court noted that the appropriation system is administered by the Board, and that the Board evolved from an agency performing only ministerial functions such as determining whether water was available for appropriation,⁴⁴ to an agency presently playing a central role in resource planning and shaping state policy.

The Board has responsibility to protect the trust res and to consider trust values in granting appropriations. The *Mono Lake* court delineated both a statutory and judicial basis for the Board's trust responsibilities in the opinion. Under the state water code, "[i]n determining the amount of water available for appropriation, the Board shall take into account, whenever it is in the public interest, the amount of water needed to remain in the source for protection of beneficial uses."⁴⁵ Further, the court noted that several decisions have established the Board's right to withhold water from appropriation if it is necessary for the protection of instream uses.⁴⁶ Thus, the Board which administers the appropriation system has a statutory and judicial mandate to consider public trust interests.

C. *The Interrelationship Between the Public Trust Doctrine and The California Appropriation System*

In *Mono Lake*, the California appropriative water rights system and the public trust doctrine met head-on. The plaintiffs alleged that the public trust was imposed before water rights were appropriated and therefore the rights protected by the public trust doctrine were thus superior to all other rights.⁴⁷ Conversely, the defendants alleged "that the public trust doctrine" as to stream waters "has been 'subsumed' into the appropriative water rights system."⁴⁸ The court rejected the notion that either system was exclusive:

42. *Id.*

43. *Id.* at 442, 658 P.2d at 724, 189 Cal. Rptr. at 361. The court notes that the 1923 amendment to the Act established the exclusive procedure for obtaining appropriative rights. *Id.*

44. *Id.* 3d at 444, 658 P.2d at 726, 189 Cal. Rptr. at 363.

45. *Id.* at 445, 658 P.2d at 726, 189 Cal. Rptr. at 363.

46. *Id.* 3d at 444, 658 P.2d at 726, 189 Cal. Rptr. at 363. See CALIFORNIA WATER CODE § 1243.5 (West 1971).

47. 33 Cal. 3d at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363.

48. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363-364.

[B]oth the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of the state, or deny any duty to protect or even consider the values promoted by the public trust.⁴⁹

Recognizing that a balance between the two systems was essential the court reached three major conclusions calculated to accommodate both systems:

1. The State retains continuing supervisory control over its navigable water.⁵⁰
2. The Water Board can grant appropriative rights which are subject to the public trust but that "may unavoidably harm, the trust uses at the source stream."⁵¹
3. "The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and protect public trust uses whenever feasible."⁵²

IV. THE IMPACT

The appropriation system followed in most western states has been fashioned to serve the immediate and pragmatic needs of growing populations and industry in arid climates. The system has worked well. Before statehood it allowed for the growth of agriculture and mining. Today it continues to serve the needs of additional industrial and domestic users and promote the economies of these states. At the same time that states' appropriative water rights systems were evolving, however, courts were recognizing the states' obligation to protect waters for the public under the public trust doctrine. By refusing to hold that the two principles of water law are mutually exclusive, or that one is legally superior to the other, the California court has firmly established, at least where navigable water may be affected, that an individual or entity may not acquire an absolute right in that water. Such waters may be available to appropriative use but in turn come burdened with the trust obligation. The court's recognition of the continuing fiduciary duty of the state underscores the usufructary nature of the right.

49. *Id.*, 658 P.2d at 727, 189 Cal. Rptr. at 364.

50. *Id.*

51. *Id.* at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364.

52. *Id.* at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.

At first glance it appears that the California court has undermined the security of appropriative rights and that difficulties may arise as a result. In a broader sense, however, the court has increased the stability of California's water rights system. By mandating consideration of trust values, the court has offset purely economic concerns and forced a balance which may ultimately enhance the perpetuation of the water resource, and other resources as well.

This decision has been referred to as the most significant public trust case since *Illinois Central*.⁵³ The court limited the reach of the decision, however, when it, like previous courts, linked public trust protection with navigability.⁵⁴ Recently Montana took a step beyond this landmark case when it rejected the navigability notion in applying the public trust doctrine and instead applied a much broader test effectively providing public trust protection to nearly all of the state's waters.⁵⁵

Relying on its constitution and the common law public trust doctrine, the Montana court established that the public's right of recreational use should be limited only by the capabilities of the water and not by streambed ownership or navigability.⁵⁶

The holdings in the Montana cases were directed at facts involving recreational boaters and the court was not directly faced with the fish and wildlife, aesthetic and ecological concerns which the *Mono Lake* court considered. But the Montana court used the term "recreational use", and arguably the public's interest in fish, wildlife, aesthetic and ecological values would be subsumed by that broad category. The court's reasoning that the state constitution imposed no limits on public use of water suggests that this would be a logical extension.

These decisions by the Montana court parallel the result reached by the California court in abandoning the rigid, traditional classification of trust purposes and extending public trust protection to the "non-tradi-

53. Professor Al Stone made the observation in a Water Law class at the University of Montana School of Law on April 24, 1985.

54. In examining the scope of the public trust doctrine, the navigability of *Mono Lake* was central to the court's analysis. See *supra* notes 32-35 and accompanying text.

55. The two recent cases are *Montana Coalition for Stream Access*, ___ Mont. ___, 682 P.2d 163 (1984); *Montana Coalition for Stream Access v. Hildreth*, ___ Mont. ___, 684 P.2d 1088 (1984). Discussed more fully in Thorson, Brown and Desmond, *Forging Public Rights in Montana's Waters*, PUB. LAND L. REV. (1985). See *Curran*, ___ Mont. at ___, 682 P.2d at 170, for the court's conclusion that water characteristics determine the availability of the water for public recreational use.

56. The Montana Constitution provides in Art. IX Section 3(3) that:

All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."

The court found no constitutional limit on the public's right to use water for recreation. *Curran*, ___ Mont. at ___, 658 P.2d at 170.

tional" recreational use. Further, by severing the navigability requirement, Montana has clearly gone beyond California in expanding the scope of the doctrine.

The Montana court neatly sidestepped the issue arising from the inevitable conflict between the public trust doctrine and the state's appropriative water rights system by stating in *Curran* that its holding applied only to the state's unappropriated water.⁵⁷ However, with the development of the doctrine in the state and the court's demonstrated willingness to rely on the state constitution as well as the common law to find a trust obligation, the Montana court has an even stronger foundation than the *Mono Lake* court for holding that the state has a continuing fiduciary duty to protect the trust res. If the court eventually recognizes that duty, Montana recreationists, including those with wildlife or aesthetic concerns, may also demand consideration of trust values for appropriated water.

V. CONCLUSION

The *Mono Lake* case established a basis for reasoned resource allocation in the face of significant and competing economic and ecological concerns from which other western states can benefit. The decision does not insure that Mono Lake will retain its ecological viability or that Los Angeles will have a continuous and adequate supply of fresh water. It does, however, insure that at least before either of those eventualities occur, the costs will be considered and understood, and a balance struck.

In light of *Curran* and *Hildreth*, the Montana court will likely be confronted with the task of balancing competitive claims to Montana's waters. In striking the balance, the court would be wise to integrate the *Mono Lake* reasoning into its holding.

57. The court concluded that defendant Curran had, "no right to control the use of the surface waters of the Dearborn to the exclusion of the public except to the extent of his prior appropriation of part of the water for irrigation purposes, which is not at issue here." *Curran*, ____ Mont. at ____, 682 P.2d at 170.