7-1-1966

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MODERN WESTERN LEGISLATION AS A PATTERN FOR 
CHANGES IN THE MONTANA LAW OF WATER RIGHTS*

INTRODUCTION

The major problems of Montana's water rights laws were examined in a recent article by Professor Albert W. Stone.¹ The present paper discusses the statutory water rights law of the other western states, examines certain of those statutes in some detail, and proposes changes for Montana. The significant differences between Montana's law of water rights and the more updated approaches found in other western water codes should demonstrate the desirability of changes in the Montana law. A sequel to these articles will comprise a proposed new water rights code for Montana.

In the latter nineteenth and early twentieth centuries, the young states and territories of the arid western United States inaugurated two new concepts in water management. First, rejecting the old riparian principle that a right to use water accompanies ownership of the adjacent land, they invented the doctrine of prior appropriation: water rights derived from actual beneficial use and included a priority of right as of the date of acquisition. Second, the appropriation and use of water were placed under the supervision of an administrative official—a state water administrator. Today, except for scattered traces of riparianism, all of the seventeen western states follow the doctrine of prior appropriation.² And with the sole exception of Montana, these states uniformly provide for administrative rather than judicial supervision over water rights.³

The following changes are proposed for Montana: existing water rights should be determined and put on record after being ascertained by a state-wide administrative inventory; the future acquisition of water rights or change in the use of water rights should be controlled through an administrative permit system; the distribution of water should be regulated by water commissioners under the supervision of a state water administrator; the law concerning loss of water rights should be revised so that unused water rights do not result in useless records or discourage new appropriations; private persons should be authorized to condemn appropriation rights where that would promote better and more productive use of water; and some provision should be made for the appropriation or reservation of water for public purposes such as recreation.

Various other changes are proposed. Common to most of the pro-

*The work upon which this publication is based was supported in part by funds provided by the United States Department of the Interior as authorized under the Water Resources Research Act of 1964, Public Law 88-379.

²Hutchins, Selected Problems in the Law of Water Rights in the West 31 (1942).
³Id. at 90.

Published by The Scholarly Forum @ Montana Law, 1966
posals is a greater emphasis on administrative actions and procedures in all aspects of water rights administration. This emphasis is designed to result in the supervision of Montana water uses by trained and knowledgeable water experts, replacing the present combination of partial administrative supervision, partial supervision by district judges, and, in many instances, no supervision at all.

All of the proposals are patterned on the statutes of other western states. A comparison between modern water legislation and the anachronistic Montana law should demonstrate the need for extensive changes in Montana's law of water rights, especially in view of the growing scarcity of water and ever-increasing water demands.

A. ACQUISITION OF A WATER RIGHT

1. APPROPRIATION BY PERMIT

a. In General

Of all the western states, only Montana has not yet adopted the permit system of water appropriation. This system provides that except for certain limited uses, appropriation rights can be acquired only by obtaining a permit from a state water administrator. In Washington, the water code provides that water rights can be acquired in the statutory (permit) manner "and not otherwise." The Kansas statute is even more explicit:

No person shall have the power or authority to acquire an appropriation right to the use of water for other than domestic use without first obtaining the approval of the chief engineer, and no water rights of any kind may be acquired hereafter solely by adverse use, adverse possession, or by estoppel.

Under the permit system, there are two general criteria upon which issuance of a permit to appropriate water depends: first, whether it is in the public interest to issue the permit; and second, whether holders of existing rights will be adversely affected by the proposed appropriation. To aid the state water administrator in deciding whether a proposed appropriation meets these two criteria, the Kansas code specifies various factors that he shall consider.

Ibid.

\*WASH. REV. CODE ANN. §§ 90.03.010, 90.44.040 (1962).
\*KAN. GEN. STAT. ANN. § 82a-705 (1964).
\*E.g., KAN. GEN. STAT. ANN. § 82a-711 (1964).
\*E.g., WYO. STAT. ANN. § 41-203 (1957).

In ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall take into consideration the area, safe yield and recharge rate of the appropriate water supply, the priority of existing claims of all persons to use the water . . . , and all other matters pertaining to such question. With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit . . . . KAN. GEN. STAT. ANN. § 82a-711 (1964).
In most western states, the state water administrator is the state engineer. The application for an appropriation permit is designed to inform him generally of the location, nature, and amount of the proposed use. In addition, some states require information on the estimated time necessary for the beginning and completion of the works for diverting or withdrawing water, and the estimated time necessary for application of the water to the proposed beneficial use. Another typical provision authorizes the official to whom the application is made to require such additional information as he may deem necessary.

In Washington, other water users on the source of water supply must be given notice of any application for a permit to appropriate water. Washington also requires the supervisor of water resources to send pertinent information on the application to the directors of fisheries and game. Such notice requirements allow appropriators or public agencies whose interests might be affected by a proposed appropriation an opportunity to resist the application for a permit.

Under the permit system the public interest and existing appropriation rights can be protected by attaching statutory and administrative conditions to appropriation permits. In Kansas, under an express statutory condition, a prior appropriator’s right must allow for a reasonable raising or lowering of the static water level and a reasonable increase or decrease of the streamflow, at the prior appropriator’s point of diversion; and

Nothing herein shall be construed to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be raised or lowered at the point of diversion of a prior appropriator. Similarly, the administrator might approve an application for a smaller quantity of water than the applicant sought, or might specify a different point of diversion than was proposed by the applicant, or might approve the application upon any other terms and conditions he should deem necessary for the protection of the various interests concerned.

Although Montana has one procedure for acquiring an appropriation right on adjudicated streams, and a different procedure for acquiring such a right on a stream which has not been adjudicated, there is no logical necessity for such a distinction. Neither of Montana’s present

14 Ibid.
17 Revised Codes of Montana, 1947, § 89-829. (Henceforth the Revised Codes of Montana will be cited R.C.M.)
18 R.C.M. 1947, §§ 89-810 to 89-814.
procedures is satisfactory. Montana should adopt a permit system applicable to all sources of water, as the other western states have done.

On adjudicated streams, Montana law presently requires a cumbersome court proceeding for the acquisition of new appropriation rights. While such a court proceeding does assure a thorough hearing, thereby protecting other appropriators, the same protection can be afforded by an administrative permit procedure; and an administrative procedure would avoid the cost, delay, and inconvenience incident to a court proceeding. Nor is Montana's present procedure for acquiring appropriation rights on unadjudicated streams satisfactory; here, there is no control at all over new appropriations. The appropriator posts a notice at the point of intended diversion, files a notice of appropriation with the county clerk, and proceeds to appropriate the water. If it should later develop that the source was already fully appropriated, conflicts with earlier appropriators are almost inevitable. Administrative supervision over new appropriations can prevent such conflicts by disallowing new appropriations from fully appropriated sources.

Whenever an appropriation is proposed, the important determination to be made is whether—in terms of the public interest and uses under existing appropriations—water is available for the proposed appropriation. Consider one water law authority's definition of an appropriation right:

Essentially, it consists of a right to divert and use, or to use without diverting, a maximum quantity of water within a stated period, usually one year, at a maximum rate of diversion or use, from a stated source of supply, in which others may have similar rights, with a stated point or points of diversion, for a specified purpose or purposes, and, in some cases, at a specified place or places of use.

Whether water is available for the proposed appropriation is primarily a problem in water resource management rather than a problem in law. Logically, the determination should be made not by a district judge, but by a state water administrator with special knowledge and experience relating to water resource problems.

A change to an administrative permit procedure would mean protection of the public's interest in the full, efficient, productive use of water, provide a simpler procedure for future appropriations from adjudicated streams, and prevent overappropriation on unadjudicated streams.

b. Domestic Uses

Some states which have adopted the administrative permit method of appropriation exempt certain limited uses, such as domestic and

See generally Stone, supra note 1, at 3-5.
R.C.M. 1947, § 89-829.
R.C.M. 1947, §§ 89-810 to 89-814.
Bouldin, Proceedings, University of Texas Law School Water Law Conferences, Perfection and Loss of Appropriative Rights 227 (June 10-11, 1954).
stock-watering uses, from the permit requirement.²³ Such unrecorded rights constitute a potential threat to future appropriators. Moreover, the owner of an unrecorded right does not enjoy the security that recordation of rights provides. Even more importantly, uncontrolled appropriation might result in overappropriation. Yet there is a strong argument in favor of exempting domestic and other limited uses from the permit requirement: requiring permits for all appropriations—no matter how small—may unnecessarily inconvenience both small water users and the state water administrator.²⁴ A better approach would categorically exempt limited uses from the permit requirement, but authorize the state water administrator to require permits for limited appropriations as he deems necessary. A Kansas statute, while not authorizing the chief engineer to require permits for domestic appropriations, empowers him to require appropriators to furnish information on domestic appropriations;²⁵ thus, such limited uses are at least made a matter of record.

Except for minor provisions relating to groundwater, domestic appropriations are treated no differently from other appropriations under present Montana law.²⁶
c. Use by the Public

With the population of the United States expanding, and the increasing popularity of water sports such as fishing, boating, and water skiing, substantial demands upon our water resources for recreation are inevitable. To insure the lasting availability of some water for recreational purposes, a modern water code must provide means whereby waters can be preserved for such purposes. One way to do this is to authorize a suitable representative of the public interest—such as the head of the fish and game department—to appropriate water for fishing, fish propagation, boating, and other recreational purposes. Obviously, such uses, being nonconsumptive (and usually nondiversionary) would not preclude other uses of the same water at the same time, and such a provision would achieve preservation of the water substantially in its natural state. Thus, in Idaho, the governor is authorized to appropriate the waters of certain lakes in trust to preserve them for purposes of scenic beauty, health, and recreation.²⁷

²³E.g., WASH. REV. CODE ANN. § 90.44.050 (1962); KAN. GEN. STAT. ANN. § 82a-705a (1964).
²⁵KAN. GEN. STAT. ANN. § 82a-705a (1964). In Trelease, A WATER CODE FOR ALASKA § 204 (1962) a still more flexible approach is suggested. Dean Trelease’s proposed code section would empower the state water administrator to adopt regulations establishing certain exemptions from the permit system. An application for an exempted appropriation would not be subject to the full formal treatment given ordinary applications.
²⁶R.C.M. 1947, §§ 89-2912, 89-2915.
Where certain waters are not susceptible to immediate, significant public use, but have a good potential for future recreational uses or other uses by the public (as in the case of a remote lake to which access has not yet been provided), a modern water code should provide for reservation of the water from private appropriation. In Utah, the governor can withdraw unappropriated waters from private appropriation. Oregon has reserved certain fishing waters, beautiful falls, and other waters of potential public value.

The concept of appropriation or reservation of water by the public need not be limited to recreational purposes. Suitable agencies, officials, or governmental subdivisions should be authorized to appropriate or reserve water for any worthwhile public project. A California statute permits a state agency to apply for priorities that amount to reservations of water for a long-range state water plan. In addition, some western water codes define very broadly the persons who may appropriate water, so that various public agencies and officials can obtain appropriation permits.

2. Perfection of a Water Right

After an appropriation permit has been issued and the water has been applied to the proposed use, the appropriator is required under the modern water codes of some western states to prove or at least give notice to the state water administrator that the appropriation has been perfected. One who does not perfect an appropriation in accordance with the terms and conditions of his permit may lose it.

Requiring proof of notice of the perfection of appropriations results in an accurate, up-to-date record of appropriations which have been actually completed, rather than a record of mere intentions or proposals. This means that future appropriators and the state water administrator will more easily be able to ascertain how much water remains available for other appropriations from the same area or source. Further, recordation of completed appropriations protects an appropriation right in much the same way that title recordation protects ownership of a car.

In Montana, although groundwater users are required to file a notice of completion of their appropriations, there is no similar requirement for

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2UTAH CODE ANN. § 73-6-1 (1953).
2ORE. REV. STAT. §§ 538.110 to 538.300 (1965).
2CAL. WATER CODE §§ 10,500 to 10,505.
3E.g., WASH. REV. CODE ANN. § 90.03.250 (1962) ("Any person, municipal corporation, firm, irrigation district, association, corporation or water users' association" may apply for an appropriation permit); NEV. REV. STAT. § 533.010 (1963) (a "person" is defined to include "a corporation, an association, the United States, and the state, as well as a natural person.").
3E.g., WASH. REV. CODE ANN. § 90.03.320 (1962).
surface water appropriations. This is so even though a Montana appropriator must finish his diversion works and apply the water to a beneficial use to acquire a water right.

Western water codes generally require the permit holder to complete the proposed appropriation promptly. In Washington the supervisor of water resources prescribes dates for the commencement and completion of construction of the appropriation works. None compliance with the time limits results in cancellation of the permit, unless good cause for not cancelling the permit is shown. The time limits imposed would necessarily vary according to the nature of the appropriation; conceivably, full development might take years.

B. DETERMINATION OF EXISTING RIGHTS—AN AUTHORITATIVE ADMINISTRATIVE INVENTORY

Adopting the permit method of appropriation will result in a record of all permit-acquired appropriation rights. Such a record will be of limited value, however, unless appropriation rights in existence when the permit system becomes effective are also made a matter of record. Hence there is a need for an inventory of rights acquired before the effective date of the permit statute.

To be effective, an inventory of existing rights must be a final determination of those rights. Since the measure of an appropriation right is actual beneficial use, any determination of appropriation rights must depend largely upon surveys of actual water usage, rather than upon conflicting and possibly exaggerated claims or estimates made by water users. Consequently, the determination of rights logically should be made by a state water administrator, instead of by a district court.

In 1945, Kansas adopted the following procedure for the administrative determination of existing rights: the chief engineer was authorized to gather information on the "vested rights" of all persons using water for beneficial purposes (other than domestic) as of the day before the permit statute became effective. The chief engineer then was to make an order determining the rights of all such water users, and notify

8Montana's present filing procedure for surface appropriations (R.C.M. 1947, §§ 89-810 to 89-814) results only in a record of the prospective appropriator's intentions. For a discussion of the inadequacy of the present requirements, see generally Stone, supra note 1, at 3-4.


8E.g., WASH. REV. CODE ANN. § 90.03.320 (1962); KAN. GEN. STAT. ANN. § 82a-715 (1964); NEB. REV. STAT. § 46-238 (1943).

8WASH. REV. CODE ANN. § 90.03.320 (1962).

8Ibid.
the users of the contents of that order. Aggrieved water users could appeal to the district court.

Wyoming enacted a much more detailed procedure. Before making any order determining existing stream rights, the Board of Control was required to hold administrative hearings. These hearings were to be conducted in accordance with specific requirements relating to notice and the opportunity to be heard. The state engineer was required to make measurements on those streams and ditches in which rights were being investigated. Wyoming required groundwater claimants to file statements of their rights no later than a specified date; otherwise, the right would be lost.

Nebraska, instead of prescribing a detailed statutory method for the determination of existing water rights, authorized the Department of Water Resources to "make proper arrangements for the determination of priorities of right to use the public waters of the state," and to determine those priorities.

Regardless of the procedure adopted, all claimants should be required to come forward and assert their rights, or be subject to losing those rights; only then will the determination of rights result in a permanently useful record. For example, the claimant of a court-decreed right should be required to furnish the administrator with evidence of the decree. Similarly, a person claiming a right based solely upon beneficial use should be required to prove that he has made the requisite beneficial use of water. Otherwise, there is a danger that someone will come forward at some future time, claim an ancient water right, and thereby upset a long-standing determination of water rights.

Water uses in some Montana counties were inventoried by the Montana State Engineer some years ago, but those inventories had no legal effect as determinations of water rights. Many Montana water rights are not recorded at all, and the records that do exist are filled with inaccuracies. Even adjudication by courts has not provided satisfactory

Ibid.
Ibid.
Neb. Rev. Stat. § 46-226 (1943). Nebraska's administrative procedure for the determination of existing rights was held constitutional in Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).
Under the statute authorizing these inventories, they amounted only to "investigations to secure necessary information." R.C.M. 1947, § 89-347.
See generally Stone, supra note 1, at 11.
determinations of water rights, because persons who are not made parties to a decree are unaffected by the decree.53

C. CHANGES OF APPROPRIATIONS

Just as original appropriations should be obtainable only with the approval of the state water administrator, no appropriator should be allowed to make a substantial change in his appropriation unless he obtains a permit to do so. Nor should a person be able to buy an existing appropriation right and apply it to a different use, without obtaining a permit. Obviously, changes in the place of use, nature of use, point of diversion, place of storage, or timing of use might adversely affect other appropriators or the public interest. Such changes should be subject to control by a responsible public official, just as original appropriations should be. Further, to the extent that the state water administrator is unaware of changes of appropriations, his records of appropriations will be of little value. For these reasons, western water codes usually require an appropriator to obtain a permit for a proposed change.54

Washington allows seasonal or temporary changes, or rotation aimed at more economical use of available water, upon informal permission from the supervisor of water resources or local water master.55 Minor changes are thus distinguished from major changes, and are not subjected to the formal permit requirements governing the latter.

Changes of appropriations should be without loss of priority, to encourage newer and better uses of water.56 Thus, a latecomer who needs an early-priority water right to obtain a dependable water supply for a new enterprise could purchase the right from an early appropriator.57

D. DISTRIBUTION OF WATER

1. IN GENERAL

As demands on Montana’s water resources—both in Montana and from downstream states—continue inexorably to increase, Montana appropriators must face increasingly frequent water shortages and a greater need for an efficient water distribution procedure. Other western states have long utilized a procedure that gives a state water administrator general authority to supervise water distribution according to determined

54E.g., KAN. GEN. STAT. ANN. § 82a-708b (1964); N.M. STAT. ANN. §§ 75-5-21, 75-5-22 (1953); I.D. CODE ANN. §§ 45-202, 45-222 (1948); ARIZ. REV. STAT. ANN. § 45-146B (1956); WASH. REV. CODE ANN. § 90.03.380 (1962).
55Changes usually are without loss of priority. Hutchins, op. cit. supra note 2, at 378-79. See generally id. at 378-384.
56See generally id. at 385-388; Bagley, Some Economic Considerations in Water Use Policy, 5 KAN. L. REV. 499, 509 (1957); Youtter, A Legal-Economic Critique of Nebraska Watercourse Law, 44 N.D. L. REV. 11, 38 n.15 (1965).
priorities, with the actual regulation of distribution being performed by local water commissioners or water masters.⁵⁸

It has been pointed out that determining whether water is available for new appropriations is principally a problem of water resource management, not of law.⁵⁹ Fundamentally what is needed is a realistic understanding of the availability of water in a stream or other source at a particular location and at a particular time of year. Similarly, once water rights have been determined with respect to a source of water, supervising water distribution from that source is mainly a matter of good water management. Logically, the task of supervision could be better handled by an agency or office which is specially organized, trained, and equipped to deal with water resource problems, than by a district judge—regardless of the judge's judicial or administrative ability. The other western states have already decided that administrative supervision of water distribution is preferable to judicial supervision.⁶⁰ Under a modern code the state water administrator has ready access to records of water rights, information on the location of ditches, condition of streams, and other pertinent data. This gives the administrator a state-wide perspective which places him in a better position than a district judge to regulate water distribution between two different districts. Further, administrative supervision offers greater flexibility than judicial supervision. The former can be achieved by such methods as administrative orders, direct administrative acts, or the issuance of administrative rules.⁶¹ And, an administrative procedure can be quicker and more economical for everyone concerned than a judicial procedure.

A state water administrator should be appointed because of his expertise in water resource management. He would be particularly qualified to decide which of several methods of regulating distribution is most suitable in a particular case. Perhaps all that is necessary in one case is to require certain junior appropriators to cease or reduce their use, so that the needs of senior appropriators may be satisfied. However, the administrator might decide in a different case that rotation of use would achieve a better result.⁶² Or perhaps a group of appropriators from a

⁵⁹ See text at notes 4-22 supra.

[The State Water Commissioner] shall have general control and supervision of the waters of the [state] and of the appropriation and of the distribution thereof, excepting the distribution reserved to Water Commissioners appointed by the courts under existing decrees.


⁶¹ Kan. Gen. Stat. Ann. §§ 82a-706a, -b, -c (1964) for example, authorizes the Kansas chief engineer to adopt and enforce rules and regulations for water distribution, to regulate headgates or other appropriation works, and to require that water users install meters, gages, and other measuring devices and report on water usage.
⁶² Various methods of regulating distribution are discussed in Yeutter, supra note 57,
common source might desire to have the water distributed according to a proration agreement rather than according to their strict priorities; a state water administrator could decide whether such a proration scheme would employ good management techniques, and whether it would protect the rights of appropriators who are not parties to the agreement. Other examples of possible methods of administrative regulation include requiring the owner of an inefficient or wasteful appropriation works to employ better appropriation practices, and preventing overdevelopment of an aquifer by requiring aggregate withdrawals to be reduced. Still other methods of regulation might be more suitable to particular cases. In any event, water distribution decisions should be made by a state water administrator; a district judge would have to spend long hours of research in deciding a case that an expert water manager could regulate according to his experience, easy access to data, and knowledge of water problems.

2. WATER COMMISSIONERS

In most other western states, the state water administrator accomplishes his general supervision of water distribution by employing field representatives—usually called water commissioners or water masters—who perform the tasks of actual regulation of headgates and otherwise regulate water distribution. Some states employ water commissioners on a part-time basis; the trend among western states now is to employ at least some full-time water commissioners, who serve in legislatively- or administratively-designated districts. Using part-time water commissioners has been generally unsatisfactory, largely because it is difficult to find qualified or competent men to perform such temporary and usually seasonal duties. Furthermore, in the states employing part-time water commissioners, the salaries and expenses of these men are usually

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NOTES

63This approach has been suggested by Dean Trelease, in the form of a section in his draft of a new Alaska water code. TRELEASE, op. cit. supra note 25, § 224(b).
64WASH. REV. CODE ANN. § 90.03.360 (1962) authorizes the Washington supervisor of water resources to require owners of ditches or canals to “maintain . . . [to the supervisor’s satisfaction] substantial controlling works, and a measuring device . . . .”
65Samples of statutes authorizing this kind of control are WASH. REV. CODE ANN. § 90.44.180 (1962) and Wyo. STAT. ANN. § 41-132 (1957). In 1961 Montana enacted an efficacious statute authorizing the Supervisor of Water Resources to limit groundwater withdrawals after giving notice and holding hearings. R.C.M. 1947, § 59-2915. This statute’s substance should be carried over into a new code dealing with surface waters as well as groundwaters.
66The administrative difficulties inherent in the supervision of water distribution are discussed in Stone, Problems Arising Out of Montana’s Law of Water Rights, 27 Mont. L. Rev. 1, 16 (1965).
67See HUTCHINS, op. cit. supra note 56, at 75-78.
68E.g., WASH. REV. CODE ANN. § 90.03.060 (1962); ARIZ. REV. STAT. ANN. § 45-105B (1960).
70Letter from M. G. Walker, Supervisor, Division of Water Resources, Washington Department of Conservation, to Jon A. Hudak, July 9, 1965; letter from Earl Lloyd, former State Engineer and present Consultant to the State Engineer, Wyoming State Engineer’s Office, to Jon A. Hudak, July 19, 1965; letter from Hubert C. Lambert, Acting State Engineer, Utah Office of State Engineer, to Jon A. Hudak, August 9,
paid from county budgets or by assessing the affected water users. Neither of these methods of financing is dependable enough to insure that money will be available to employ water commissioners when they are needed. Indeed, in times of severe water shortage, when regulation is needed most, the expense of regulation will be higher than usual and hence more objectionable to the affected counties or water users.

Although better supervision can be obtained by using full-time, state-paid water commissioners, economic considerations often militate against establishing a new and expensive bureaucracy of water commissioners. Perhaps the best approach is a compromise: there could be a small number of full-time, state-paid water commissioners, and, in addition, some part-time water commissioners could be employed in areas where unusually close regulation of water distribution is necessary. Since the affected water users would be the principal beneficiaries of the part-time water commissioner's supervision, those users should bear the expense of paying his salary and official expenses. The permanently-employed water commissioners, on the other hand, would provide supervision in the great majority of cases where distribution problems develop. Since the effective and economical distribution of water is beneficial to the entire state, this full-time supervision should be financed through state general fund moneys. When these full-time water commissioners are not busy with water distribution duties, they could perform other tasks relating to water resource management.

So that administrative regulation of water distribution will be effective, the water commissioner's actions should be deemed presumptively valid where he has purported to distribute water according to priority of right, or according to controls imposed by the state water administrator. Anyone disagreeing with the water commissioner's actions should not be allowed to frustrate the administrative supervision of water distribution by obtaining from a court an ex parte preliminary restraining order.

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71E.g., WASH. REV. CODE ANN. § 90.03.060 (1962); WYO. STAT. ANN. § 41-67 (1957). 72E.g., ARIZ. REV. STAT. ANN. § 45-105B (1956). In Washington, where the salaries of district water masters are paid from county budgets (See text at note 71 supra), there is also a provision for appointing patrolmen for individual streams. The salaries of stream patrolmen are paid by the affected water users. WASH. REV. CODE ANN. §§90.08.040 to 90.08.070 (1962).

73Letter from Earl Lloyd, supra note 70.

74Wyoming presently employs five full-time, state-paid water commissioners. Letter from Earl Lloyd, supra note 70. An Arizona statute provides that water superintendent districts "shall not be created until a necessity therefor arises, but shall be created from time to time as the claims thereof from the streams or supply of the state is [sic] determined." ARIZ. REV. STAT. ANN. § 45-105 (1966).

75In Wyoming, before the irrigation season, the five full-time water commissioners work with the United States Geological Survey on stream measurements. In the winter they work on snow surveys. Letter from Earl Lloyd, supra note 70. The approximately twenty water commissioners in Colorado regulate streamflows to fill reservoirs after the irrigation season. Letter from A. Ralph Owens, supra note 70.
order against such actions. As in other western states, the aggrieved water user ought to be required to appeal, first to the state water administrator and then to the courts. Further, water code violators should be subject to arrest by the local water commissioner.

A Colorado statute allows some degree of local control over the selection of water commissioners, by providing that they be selected from a list recommended by the boards of county commissioners of the affected counties. New Mexico empowers the affected water users to obtain by petition the removal of a water master. By thus subjecting water commissioners to local control over their selection and removal, competent and impartial supervision of water distribution is encouraged.

In Montana at present, supervision of distribution by the state water administrator is available only to groundwater users. There is no provision for supervision on unadjudicated streams and supervision on adjudicated streams is under the direction of the local district judges.

E. SPECIAL PROBLEMS RELATING TO GROUNDWATER

In recent years, writings on water law have emphasized the essential unity of ground and surface waters. Emphasis has been placed upon the "hydrologic cycle," in which groundwater becomes surface water and vice-versa. For some purposes this emphasis is justified. For example, the interrelationship of groundwaters and surface waters causes management of one source to affect management of the other; and because groundwaters and surface waters both are applied to many of the same kinds of uses, management of both sources has many of the same functions. For these reasons, and for reasons of economy and efficiency, the same administrative organization should handle both groundwater and surface water problems.

Nevertheless, emphasizing the interrelationship of groundwaters and surface waters can be carried too far. Some differences in characteristics between these different kinds of sources call for different legal treatment. In a state following the prior appropriation doctrine an important dif-

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Footnotes:
76 Such an order was obtained in McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 Pac. 16 (1908).
77 For a discussion of appeals to obtain review of administrative actions and decisions see text at notes 122-26 infra.
81 The state water administrator in Montana is the director of the state water conservation board. The director's duties principally are those formerly performed by the state engineer. R.C.M. 1947, § 89-103.1 to 89-103.8 (Supp. 1965).
82 R.C.M. 1947, § 89-2932.
83 Stone, supra note 66, at 12 n.60.
ference between groundwaters and surface waters is the relative ease with which the boundaries, quantity, and direction of movement of these two kinds of sources can be determined. The physical characteristics of surface waters, being subject to ordinary techniques of measurement, are readily ascertainable, whereas groundwater sources cannot easily be measured or mapped. As a result, determining the interrelation of given sources of groundwater and surface water often will be exceedingly difficult. This difficulty leads to practical legal problems: What should be done when a groundwater appropriator contends that a junior surface water appropriator is preventing a stream from recharging an aquifer, or when a surface water appropriator contends that a junior groundwater appropriator is taking from an aquifer water which would otherwise contribute to a streamflow? In such situations, the most practicable solution would be to treat the two sources in question as being prima facie separate and unrelated, unless the state administrator knows from his own records or the aggrieved appropriator demonstrates that the sources are immediately interrelated and the nature of that interrelationship. Very recent Colorado legislation, recognizing a need for different legal treatment of groundwater and surface water in this situation, goes even further. Colorado recognizes that in some areas water usage principally relies upon groundwater wells, while in other areas surface water appropriations predominate. Further, many “surface water” appropriations actually draw upon groundwater sources which feed streams. In areas where the administrator ascertains that groundwater appropriations constitute the principal water usage or that the fulfillment of decreed surface rights does not require groundwater, appropriators are allowed to acquire enforceable rights to use groundwater. Outside such administratively-designated areas one can obtain only a transitory authorization—not an actual right—to use groundwater.

Another important difference between groundwater and surface water is that the former usually has a much slower rate of replenishment than the latter. In order to prevent the overdevelopment or excessive “mining” of an aquifer, limitations on aggregate groundwater withdrawals might become necessary. Montana has enacted adequate legislation concerning this problem: the 1961 groundwater code provides for the designation (or modification) of areas of controlled groundwater use, pursuant to an administrative hearing. If the administrator finds through the hearing that the withdrawal of groundwater in an area

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8 But see a useful discussion of modern scientific techniques of mapping and analyzing groundwater sources in Sax, Water Law Cases and Commentary 239-240 (prelim. ed. 1965).


88 Ibid.


91 Stone, supra note 66, at 15.
"exceeds the safe annual yield of groundwater as measured by the recharge," the administrator must order the aggregate withdrawal of groundwater from the area to be decreased. He is also given authority to enforce his order by requiring persons to cease their groundwater withdrawals in reverse order of their priority.

F. CONTINUING ADMINISTRATIVE COLLECTION OF HYDROLOGIC DATA AND EXAMINATION OF APPROPRIATIONS

Realistic administration of water resources requires accurate information on such facts as the condition of streams, the location, size, and other characteristics of aquifers, and the location, nature, and amounts of withdrawals of water. Such information may be necessary when the state water administrator is processing an application for an appropriation permit or performing some other aspect of water administration. Furthermore, a continuing survey of appropriations can reveal instances of nonuse or misuse of water rights, so that abandonment or forfeiture proceedings may be initiated and the water made available for new appropriations. Nebraska authorizes the Department of Water Resources to make such surveys and streamflow measurements as may be necessary in various facets of water administration. Recent Colorado groundwater legislation authorizes the water conservation board to "investigate and determine the nature and extent of the [groundwater] resources" of the state, and to determine the effect of groundwater withdrawals upon aquifer supply and surface streamflow. Washington empowers the supervisor of water resources to require reports from groundwater appropriators on the extent of withdrawals and the manner and extent of beneficial use.

G. LOSS OF WATER RIGHTS THROUGH NONUSE, MISUSE, OR ABANDONMENT

1. IN GENERAL

Most western states have codified the doctrine that an appropriation right may be lost through mere nonuse for a specified period even though the appropriator did not intend abandonment. Underlying this doctrine is the recognition that water is a precious commodity which

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*R.C.M. 1947, § 89-2915.

*Ibid.* The statute also authorizes the administrator to bring an action in district court to enforce his order.

*NEB. REV. STAT. §§ 46-212, 46-227 (1943).*

*COLO. REV. STAT. ANN. § 148-18-16 (Supp. 1965).*

*WASH. REV. CODE ANN. § 90.44.250 (1962).*

*Hutchins, Selected Problems in the Law of Water Rights in the West 392-394 (1942).* Sample statutes are NEB. REV. STAT. § 46-229.02 (1943) and KAN. GEN. STAT. ANN. § 82a-718 (1964). Forfeiture statutes have been held valid even when applied retroactively to appropriation rights which were in existence at the time of enactment of the forfeiture statute. Kersenbrock v. Boyes, 95 Neb. 407, 145 N.W. 837 (1914); St. Germain Irrig. Ditch Co. v. Hawthorne Ditch Co., 32 S.D. 260, 143 N.W. 194 (1913).
should be utilized to the fullest extent possible. The state is deprived of the economic benefits which result from the full use of available water when an appropriator not only fails to use the water but also prevents appropriation of that water by others. Moreover, if someone else has been using the water in the interim and has, perhaps, built a large enterprise in reliance on a plentiful supply of water, both the new appropriator and the state suffer when the earlier appropriator decides to reassert his “right” after many years of nonuse.

The states that have adopted the permit method of appropriation require appropriators to obtain a permit before making any substantial change in an existing appropriation. One who changes his appropriation without obtaining such a permit is subject to loss of his water right. In effect this means that an appropriator can lose his water right by misuse, as well as by nonuse, of the right.

Western case law generally recognizes a third way in which a water right may be lost: the right may be abandoned by a cessation of use coupled with an intention never again to use the water. Unlike loss through mere nonuse, abandonment causes the water right to be lost immediately.

Montana has no clear, effective statutory law on the loss of water rights. The few rules that have been established through the case law have done little to improve the situation, and in some respects have worsened it.

2. ESTABLISHING LOSS OF WATER RIGHTS: PROCEDURE

In Nebraska, when an appropriator has neglected to exercise his water right for more than three years, the Department of Water Resources may hold a hearing in which the appropriator is required to show cause why the appropriation should not be declared forfeited. To insure effective application of this forfeiture statute, the Nebraska code provides for a continuing administrative examination into the condition of ditches, canals, and appropriations. This examination is conducted by the Department of Water Resources, and when the Department dis-

100See Stone, supra note 66 at 16.
101See generally id. at 15-17.
102See text at notes 54-57 supra.
103KAN. GEN. STAT. ANN. § 82a-708b (1964) (semble); WYO. STAT. ANN. § 41-146 (1957).
105HUTCHINS, op. cit. supra note 99 at 395.
106Stone, supra note 66, at 15-17. Montana’s statute, R.C.M. 1947, § 89-802, contains ambiguous language which has been construed by the courts to require intentionally abandonment.
107See generally Stone, supra note 66, at 15-17.
covers unused appropriations, it initiates forfeiture proceedings.\textsuperscript{110} Since this procedure does not depend for its enforcement upon the commencement of forfeiture proceedings by private water users, better enforcement of the forfeiture statute theoretically should result. In actuality, however, the Nebraska Department of Water Resources does not have sufficient facilities to gather evidence and conduct hearings on an adequate scale, and consequently is unable to properly effectuate the otherwise commendable forfeiture provisions.\textsuperscript{111} If Montana should adopt a similar procedure, one improvement which might be made would authorize the official in charge of state water administration to initiate forfeiture proceedings on the basis of information furnished by interested private persons. Any change to an administrative procedure for establishing loss of water rights would be entirely new law for Montana. Loss of water rights in Montana is presently accomplished by individual lawsuits.

H. EMINENT DOMAIN: CONDEMNNG WATER RIGHTS ON PROPERTY TO PROVIDE OPPORTUNITIES FOR NEW APPROPRIATIONS

As economic and social conditions change, a particular use of water might become outdated in relation to society's changed needs, even though it was originally a highly productive or otherwise beneficial use. As a region develops and more of its existing uses of water become relatively outdated, these outdated uses might effectively block fulfillment of the region's present economic and social needs. For example, industrial utilization of a stream for waste disposal might prevent the use of the same stream for a municipal water supply or for irrigation. Similarly, upstream irrigation ditches might reduce a streamflow that could be put to better use as a source of public or private hydroelectric power, or as a water supply for a new industry which could promote local economic development. In such situations, the early appropriation which is precluding more productive use of the water can hardly be said to be in the public interest. To achieve the most productive use of the public's water, a modern water code should provide fair rules and an orderly procedure whereby water rights or property can be condemned to make way for new appropriations.\textsuperscript{112}

A latecomer who needs an early-priority water right in a fully-appropriated region will frequently be able to acquire such a right through purchase. But when a needed water right cannot be obtained at a reasonable price, an orderly transfer of the right can be achieved only through the device of condemnation.

\textsuperscript{110}Ibid.

\textsuperscript{112}Yeutter, \textit{A Legal-Economic Critique of Nebraska Watercourse Law}, 44 Neb. L. Rev. 11, 36-37 (1965).

Assuming for the foregoing reasons that private condemnation of appropriation rights would sometimes be desirable, there is still the question whether it would be constitutional. The United States Supreme Court has held in Clark v. Nash that in Utah, a private water user may constitutionally condemn land for an irrigation ditch, since irrigation ditches in arid states serve an important public interest. Although that court has not considered the constitutional validity of private condemnation of existing appropriation rights, the Clark case would strongly support an affirmative holding on that question. Moreover Clark's individualized approach would have a special significance for states such as Montana which have a constitutional provision that the use of water is a public use, that is, a franchise. Where a franchise no longer promotes the public interest it should be revoked, so that the franchise can be granted to another person.

A Washington statute expressly authorizes condemnation by a private appropriator:

[A]ny person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, ... including the right and power to condemn an inferior use of water for a superior one.

The statutes or constitutions of several western states contain lists of “preferred uses.” For present purposes such provisions mean that a use may be condemned where the water is needed for a preferred

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198 U.S. 361 (1905). R.C.M. 1947, § 89-820 authorizes private appropriators to exercise eminent domain for the purpose of raising reservoir levels or constructing ditches. The statute was applied in Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757 (1897), to allow an irrigator to condemn another person’s property for an irrigation ditch. The court relied to a considerable extent on MONT. CONST. art. III, § 15, which provides: “The use of all water now appropriated, or that may hereafter be appropriated for ... beneficial use, and the right of way over the lands of others, for ... ditches ... necessarily used in connection therewith ... shall be held to be a public use.” The Montana court in Ellinghouse held that the above sections of the Montana Constitution and water code do not violate the United States Constitution.


WASH. REV. CODE ANN. § 90.03.040 (1969). In State ex rel. Andersen v. Superior Court, 119 Wash. 406, 205 Pac. 1051 (1922), a private person was allowed to acquire an appropriation right by condemnation. The condemnor’s intended use was for domestic and irrigation purposes, and the court—saying that the action could succeed only if the intended purpose was a public purpose—relied on a Washington constitutional provision providing that the use of water for irrigation is a public use. WASH. CONST. art. 21. It is noteworthy that the Montana Constitution states in effect that all uses of water are public uses. Supra note 113.

E.g., NEB. CONST. art. XV, § 6; NEB. REV. STAT. §§ 46-204, 70-688 (1943); COLL. CONST. art. XVI, § 6; WYO. STAT. ANN. § 41-3 (1957); TEX. CIV. STAT. ANN. art. 7471 (1954); KAN. GEN. STAT. ANN. § 825-707 (1964).
Such an inflexible approach can only obscure the important question in condemnation cases, which is whether the public interest will be better served by condemning an older appropriation to make way for a newer one. A much better approach has been taken in Washington, where a statute provides that in condemnation cases involving water, "the court shall determine what use . . . shall be deemed a superior one."119

Discussion of the criteria which should govern preference decisions in condemnation cases is beyond the scope of this article. In an article which also contains a valuable general discussion of the problem of water rights condemnation, one writer has suggested using economic principles, with marginal value productivity as the "key determinant."120

When condemnation of one water use in favor of another is sought, the state water administrator's special knowledge should be fully utilized, since he is an expert in water management problems. Also "water law" problems largely are problems of water resources administration more than they are problems of applying legal principles. Under a permit system the new appropriation permit could not be obtained without seeking the administrator's permission.121 Logically, then, a procedure for the condemnation of appropriations should at least provide for a reference of the matter to the state water administrator.

I. APPEALS FROM ADMINISTRATIVE DECISIONS

A centralized administrative supervision over the determination, acquisition, exercise, and loss of water rights results in economical, efficient, better-informed supervision; but as in any area of law where an administrative organization is given substantial authority which affects private rights, there must be adequate provision for judicial review.122

A model code should afford standing to appeal to any person whose interests may be affected by administrative decisions. For example, other water users who have objected to the issuance of a new appropriation permit should be authorized to appeal the administrator's decision. Similarly, judicial review should be available to representatives of the public interest, such as the fish and game department. Some states have provided the necessary protection for the various interests concerned by


119 Wash. Rev. Code Ann. § 90.03.040 (1962). This problem is discussed in Bagely, supra note 112, at 512-513.

120 Yeutter, supra note 111, at 49-53.

121 See text at notes 54-57 supra.

122 Statutes relating to appeals from water officials's decisions and acts vary considerably from state to state, especially on such questions as how much weight the reviewing court should give to the administrative findings and conclusions, and whether new evidence should be freely admissible on appeal. Only the outlines of a suggested model approach are discussed here.
authorizing “any aggrieved person” to appeal from a water official’s decision. 123

Where the state water administrator has based his decision largely on his own factual determinations and expertise in water management, the reviewing judicial tribunal should rely primarily upon the administrator’s findings. For instance, when the administrator makes an order determining existing water rights, he will have conducted field surveys and an administrative hearing. In the course of the surveys and hearing he will have drawn upon his own expertise in problems of water management. He also will have prepared records of the various proceedings and put his findings and conclusions into writing. A subsequent judicial review of such a thorough proceeding should not be tantamount to a completely new trial. Instead of holding a trial de novo, at which new evidence is freely admissible and the court is virtually free to disregard the administrator’s findings and conclusions, the judicial review should be in the nature of a true appeal. The review should be limited to a consideration of the evidence introduced before the administrator and the administrative record, 124 and should adhere to a standard on the order of the “substantial evidence” rule. The only other permissible inquiry on review should be whether the administrative proceedings were conducted in a fair manner. Thus a model code can encourage a meaningful administrative procedure in which the parties furnish the administrator with adequate evidence for an informed decision.

Probably the local district court should be the first court to handle appeals from the state water administrator’s decisions. 125 There may be a definite advantage in a review by a judge who is more familiar with local conditions than the state Supreme Court would be; moreover, the district court will usually be much more convenient geographically for the parties interested in the proceedings. A further appeal to the state Supreme Court should be available; this would provide for the fullest protection of litigants, and for state-wide uniformity in the water code’s interpretation and application. 126

A water commissioner’s actions should be reviewed by the state water administrator before being reviewed by any court. Under a modern code, the relevant information, such as hydrologic data, the dates of priorities,
maps of the area, and the location and specifications of the various appropriation works involved will generally be located in the office of the state water administrator. The state water administrator will therefore be able to make an informed decision quickly; a matter of extreme importance to the affected water users in any water distribution controversy.

CONCLUSION

As of 1966 it is evident to concerned Montanans that water is rapidly becoming scarcer here, as well as in the rest of the country. The major causes are well known: increasing agricultural, industrial, and municipal demands for water. Complicating the need for more water are scenic and recreational demands for the preservation of some waters in substantially untouched form.

Possibly at some future date the fundamental problem of making more water available will be solved. Perhaps scientists and water management experts will perfect a method for the desalinization and redistribution of sea water. But until such a panacea is found, Montana—like other states before her—must learn to cope with an ever-growing shortage of water. This article has proposed some changes which can help Montana face this interim problem. An attempt has been made to point out other, better methods of allocating scarce water than the methods presently used in Montana.

Although this article has concentrated on the intra-state appropriation and use of water, Montana has another problem of immediate and related importance. Steps must be taken to establish a convincing claim to water reserves for future Montana development against the claims of downstream states. To enable a realistic estimate of future water needs, Montana's present water usage must be made a matter of record. The logical way to ascertain the nature and extent of present uses is through a state-wide administrative inventory. And to have lasting usefulness such an inventory must be kept current by putting new appropriations on the record as they are completed. These and related functions can be achieved only under a modern water code.

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