Recent Developments in Montana Natural Resources Law

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RECENT DEVELOPMENTS IN MONTANA NATURAL RESOURCES LAW
Stephen D. Roberts* and Albert W. Stone**

I. INTRODUCTION

Article IX of the 1972 Montana Constitution1 embodies broad policy goals and idealistic pronouncements mirroring the convention delegates' and state citizens' concern with preserving Montana's rare natural beauty. Article IX contains four sections:2 the first deals with protecting and improving the environment; the second, with reclaiming land disturbed by mining; the third, with recording water rights and the use of water; and the fourth, with preserving and enhancing cultural resources.

Each section of Article IX gives the legislature not only the power, but also the duty,3 to enforce the goals enumerated therein. The Montana legislature has been prompt and prolific in the fulfillment of its duties under Article IX, enacting an array of environmentally related bills since 1972. In this article the authors shall discuss the major pieces of environmental and natural resource legislation passed in Montana subsequent to 1972, and certain significant state and federal natural resources cases. The article will examine all areas of recent Montana natural resources law, with the exception of oil and gas law.

Rather than attempting an in-depth analysis of all facets of natural resources, the authors shall provide only a sampling of those developments which they consider particularly noteworthy, in the hope that the sources listed in this article will be a useful research tool for persons interested in a particular natural resources topic, and an overview of the law for persons with a more general interest.

II. LEGISLATION

A. Mines and Minerals

Three different reclamation acts set requirements to be met by

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1. MONT. CONST. art. IX.
2. A fifth section was added to Article 9 by the voters of the state. MONT. CONST. art. IX, § 5, calls for one-fourth of the severance tax on coal to be dedicated to a trust fund.
3. Each section states that the "legislature shall provide" for enforcement of the section's provisions.
those who mine in Montana. Each of the reclamation acts is administered by the Department of State Lands (hereinafter referred to as the "Department") and the Board of Land Commissioners (hereinafter referred to as the "Board"). The first act, the Hard Rock Reclamation Act, enacted before the effective date of the 1972 Montana Constitution, mandates reclamation of all mined lands in Montana. An act entitled the Open Cut Mining Act originally was enacted prior to 1972, but the 1973 legislature repealed that Act and passed another with the same title. The 1973 legislature also enacted the Montana Strip and Underground Mine Reclamation Act, the third of the State's three major reclamation laws. The mineral being mined determines which of the three reclamation acts controls.

1. **Hard Rock Reclamation Act**

If a person mines "any ore, rock, or substance, other than oil, gas, bentonite, clay, coal, sand, gravel, phosphate rock, or uranium" from the surface or below the surface of land in Montana, he must comply with the Hard Rock Reclamation Act. No person may disturb the surface of land, even to evaluate the economic feasibility of hard rock mining, without first obtaining an exploration license from the Board. To obtain an exploration license the miner must promise to reclaim any land disturbed during exploration, and he must file a reclamation bond to insure the fulfillment of that promise. The Board exercises supervisory control during the preparation of the area for the mining, during the mining itself, and during the reclamation of the land after the mining.

The heart of the Hard Rock Reclamation Act is the requirement that "no person shall engage in mining in the state without first obtaining an operating permit to do so." To receive an operating permit under the Act, a miner must submit to the Board an application along with a proposed reclamation plan and a reclamation and

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The Department sets the amount of the bond; but in no case may the bond "be less than the estimated cost to the state to complete the reclamation of the disturbed land." 15

The Board may approve the operator's reclamation plan only if the plan will accomplish the environmental objectives listed in the Act. 16 All reclamation activities must be finished within two years after completion of mining activities, unless the Board issues an order extending this time period. 17 Once the operation begins the operator must submit annual reports listing both the additional area he estimates will be disturbed by the operation within the following permit year and the activities completed during the preceding year. 18 To insure that the operator complies with the requirements of the Act, the Board may order inspection of the permit area. 19 The attorney general must, upon the request of the Department, sue any violator of the Act for recovery of civil penalties of up to $1,000 for each day of violation, and for temporary or permanent injunctive relief. 20

Several deficiencies in the Hard Rock Reclamation Act hamper effective reclamation of mined land. R.C.M. 1947, § 50-1220, exempts from the requirements of the Act, those persons who mine five acres or less of surface area. If the "small miner" merely agrees to refrain from polluting or contaminating any stream, 21 no other section of the Act regulates the condition in which he leaves the land after he ceases to mine. Montana has no provision, therefore, for the reclamation of hard rock mined land where the area mined is five acres or less. The Montana Constitution requires, however, that

14. R.C.M. 1947, § 50-1208(1)(c), (h) (Supp. 1975). The operating permit application must also contain the name and address of the miner, the minerals expected to be mined, the expected starting date of mining, a map showing the specific area to be mined, the types of access roads to be built and the manner in which they will be reclaimed, and a plan of mining.
16. R.C.M. 1947, § 50-1203(ii) (Supp. 1975) requires the applicant for an operating permit to include in his reclamation plan a statement of the proposed use of the land after reclamation, plans for surface gradient restoration, type of revegetation of the surface, procedures proposed to avoid danger to human life or property, method of disposal of mining debris, method of diverting surface waters around the disturbed areas where necessary to prevent water pollution or soil erosion, method of reclamation of stream channels and banks, maps and documents required by the department, and a time schedule for reclamation. R.C.M. 1947, § 50-1209 (Supp. 1975), lists several additional requirements that the reclamation plan must satisfy.
18. R.C.M. 1947, § 50-1212 (Supp. 1975). If operations are completed or abandoned prior to the anniversary date of the permit, the operator's report of activities must be submitted within 30 days after such abandonment or completion.
"[a]ll lands disturbed by the taking of natural resources shall be reclaimed." Thus, although the Act was passed to benefit the "small miner", even the largest and wealthiest corporation need not reclaim the land it mines, if it agrees not to mine more than five acres or remove more than 100 tons of material per day.

A further weakness of the Hard Rock Reclamation Act lies in its provision that all information contained in applications for exploration licenses and all information given by small miners shall be confidential between the Board and the applicant. Under this section, if facts on the application led the Board to believe that a miner was polluting the air or water, the Board could report the alleged violation to the Department of Health and Environmental Sciences only by violating the secrecy section and subjecting itself to the possibility of a $1,000 fine.

Yet another provision of the Act which is impractical in certain instances is the requirement that the applicant's operating permit be automatically approved if the Board does not approve or deny the application within sixty days of its filing. Other state statutes require that if the proposed project will significantly affect the quality of the human environment, the Board must issue an environmental impact statement (EIS). The time required to assess an application to determine whether an EIS is necessary, to compile a comprehensive EIS after consulting other state agencies, and to allow public response, will often make it difficult to meet that deadline. The legislature would do well to extend the period of time given to the Board to consider applications for operating permits.

2. Open Cut Mining Act

The Open Cut Mining Act, passed by the 1973 legislature, provides for the reclamation of land subjected to the open cut mining of bentonite, clay, scoria, phosphate rock, sand, or gravel. The Act authorizes the State Board of Land Commissioners to enter into

22. Mont. Const. art. IX, § 2(1). Is the time, expense, and paperwork involved in requiring the approximately 900 small miners in Montana to reclaim their five acres or less, and the Department of State Lands to oversee and enforce that reclamation, justified by the benefits the state would receive? If so, the Act should be amended to require reclamation by small miners. If, however, the benefits do not outweigh the costs, the Constitution should be amended to exclude small areas of mined land from its reclamation requirements.
contracts with operators for the reclamation of open cut land.\textsuperscript{30} If an operator's mining operations throughout the State result in the removal of 10,000 or more cubic yards of product or overburden,\textsuperscript{31} the operator must apply for a reclamation contract and submit a reclamation plan before conducting mining operations.\textsuperscript{32}

Before commencing to mine, the operator must post a bond of $200 to $1,000 per acre. If the operator fails to reclaim affected land, the Board must apply the forfeited bond toward restoration.\textsuperscript{33} After breach of the contract by the operator, the Board must institute an action to enjoin future operation and may sue for breach of contract, for payment of the performance bond, or both.\textsuperscript{34} An operator required by this Act to have a contract, but who conducts operations without a contract, is guilty of a misdemeanor for each day's violation.\textsuperscript{35}

Certain areas of the Open Cut Mining Act should be amended by the legislature. The Act's \textit{de minimis} provision, R.C.M. 1947, § 50-1507, which exempts operators removing only 9,999 cubic yards of overburden or less in a year, suffers the same constitutional infirmity as the small miner exemption in the Hard Rock Reclamation Act. Likewise, the Board should be given authority to extend, when necessary, the sixty-day period allowed under R.C.M. 1947, § 50-1510, for it to consider and decide upon the applicant's reclamation plan. As with the Hard Rock Reclamation Act, when an EIS is required, sixty days will likely be far too brief to allow adequate consideration, preparation, and public and agency involvement in the final decision. The maximum reclamation bond of $1,000 per acre may be inadequate to insure satisfactory reclamation at today's costs of hiring skilled labor and renting heavy equipment. If the statute were amended so as to require a bond commensurate with the estimated cost to the State to reclaim the disturbed land, the purposes of the Act more likely would be effectuated.

Further legislation is necessary to remove the underground mining of phosphate rock from the Open Cut Mining Act and to place it under the regulation of the Hard Rock Reclamation Act. R.C.M. 1947, § 50-1203(7) specifically excludes the mining of phosphate rock from the ambit of the Hard Rock Reclamation Act. R.C.M. 1947, § 50-1504(2) lists phosphate rock as a mineral which

\textsuperscript{32} R.C.M. 1947, § 50-1508 (Supp. 1975). Before the reclamation plan may be accepted, it must satisfy the eleven requirements listed in R.C.M. 1947, § 50-1510 (Supp. 1975).
\textsuperscript{34} R.C.M. 1947, § 50-1510 (Supp. 1975).
is regulated by the Open Cut Mining Act. The mining of phosphate rock, however, can involve extensive underground mining operations. The area around the mine mouth is the only land which is open cut mined within the meaning of the Open Cut Mining Act. Thus, that area around the mine mouth, and not the underground mine itself, is the only land that must be reclaimed. Because the Hard Rock Reclamation Act regulates underground mining, underground phosphate mining should be placed in that Act rather than in the Open Cut Mining Act.

Another section of the Open Cut Mining Act which warrants amendment is the requirement that all prosecutions for operation of open cut mines without a reclamation contract be handled by the county attorney for the county in which the mine is operated. This may result in conflicts of interest and may thwart effective enforcement of the Act. A county attorney might be required to prosecute a violator who is a client or friend, or indeed even an agency of the county that pays his salary. It is not surprising that under this system of prosecution only two fines for violation of the State's open cut mining acts have been collected in the past five years. If the attorney general handled prosecutions under the Open Cut Mining Act, as he does under each of the State's other two reclamation acts, a more consistent and impartial enforcement of the law would result.

3. Strip and Underground Mine Reclamation Act

The most recently enacted of Montana's three major reclamation laws is the Montana Strip and Underground Mine Reclamation Act of 1973. That Act, which applies solely to the mining of coal and uranium, was enacted during a time of widespread public concern over the potential environmental dangers of unrestricted strip mining. Under the Act, an operator may not mine coal or uranium in Montana unless he first obtains from the Department of State Lands an operating permit designating the land affected by

37. Letters to authors from Archie Cochrane (Nov. 21, 1976), Perry J. Moore (Nov. 29, 1976), and Gordon Bollinger (Dec. 8, 1976) (letters on file with MONTANA LAW REVIEW). These three co-sponsors of the Montana Strip and Underground Reclamation Act, each stated to the authors that public awareness and concern over the dangers of unrestricted strip mine coal development was a major reason that the Act was passed. Each of the legislators indicated that the separate reclamation act for coal and uranium was passed in the belief that the laws regulating reclamation of lands subjected to hard rock mining were insufficient to remedy the entirely different mining and environmental problems which strip mining posed.
38. An "operator" is defined in R.C.M. 1947, § 50-1036(7) (Supp. 1975) as "a person engaged in strip mining or underground mining who removes or intends to remove more than ten thousand (10,000) cubic yards of mineral or overburden."
the operator's strip or underground mining operation. The operator, in his permit application, must submit a plan for the mining and subsequent reclamation of the land and water affected by his mining operation. For each acre of land to be disturbed by the mining operation, the operator must furnish a bond of $200 to $2,500. The exact amount of the bond is determined by the Department, but in no event may the bond be less than the total estimated cost of reclamation. Furthermore, before the operator may enter upon land and commence strip mining operations, he must obtain the written consent of, or waiver by, the surface owner.

The Department has the discretion to approve or disapprove an operator's application. The Act prohibits approval of any application for land having "special, exceptional, critical or unique characteristics . . ." or for land which, if mined, will adversely affect nearby land with such special characteristics. Nor may the Department approve an application if it is inevitable that mining will result in water pollution, landslides, etc., or if the operation will constitute a hazard to houses or other occupied structures or public lands.

An operator is charged with the duty of revegetating the mined land and restoring it to its original contour. The operator must reclaim "[a]s rapidly, completely, and effectively as the most modern technology . . . will allow." Noncompliance with the Act may result in the Department's revocation of the operator's permit and forfeiture of his bond. The bond may be used to defray the State's cost in reclaiming affected land. Violations may also subject an operator to civil fines and criminal penalties. As with the Hard Rock Reclamation Act discussed above, the Act provides for suit by the attorney general to collect these fines and penalties. But, un-

41. Such "special" land is defined in R.C.M. 1947, § 50-1042 (Supp. 1975), as land which possesses special biological productivity, ecological fragility, ecological importance, "... scenic, historic, ... geological ... or recreational significance."
49. Id.
like that Act, the Strip and Underground Mine Reclamation Act expressly permits citizens to bring a mandamus action to compel the Department to enforce the Act. 50

After the Strip and Underground Mine Reclamation Act was enacted, certain legal writers predicted that the strictness of the Act would encourage coal producers to look to States other than Montana for their sources of coal. 51 As stated by one author: "Montana has boasted of having the toughest strip mine law in the nation. I think this is correct . . . it is possible to mine coal in Montana, but to do so will require considerable effort and preparation on the part of any operator to comply with its rigorous law." 52 Although no one can say how much coal would have been mined in Montana from 1973 to 1976 had there been no coal reclamation law, it is doubtful that the Strip and Underground Mine Reclamation Act had an overly prohibitive effect on coal mining in Montana, because coal production in the state has increased consistently and markedly since the Act became law. 53

52. Gwynn, supra note 51 at 27, 29.
53. Factors other than the existence of the Act also had a bearing on how much coal was mined in Montana from 1973 to the present date. Until 1975, R.C.M. 1947, § 84-1302 provided that coal was taxed at a rate of $.05/ton for every ton of coal in excess of 50,000 tons that was extracted from state lands. In 1975, R.C.M. 1947, § 84-1302 was repealed and replaced by the present coal severance tax, R.C.M. 1947, § 84-1314, which provides that strip mined coal may be taxed at a rate of as high as $.40/ton or 30% of the coal's value.

Long term contracts entered into by the major coal producers prior to passage of the Strip and Underground Mine Reclamation Act undoubtedly had a steadying effect on Montana coal production; yet it is interesting to note that Westmoreland Resources did not commence mining operations in Montana until 1974, and that, of the state's five major coal producers, all except Knife River Coal Co., have plans for projected expansions of coal strip mining.

While the effect of the above factors and the Act itself on coal production in Montana can only be subjectively estimated, the following objective facts on Montana coal production show a rapid and steady increase in coal production under the Act:

MONTANA COAL PRODUCTION IN TONS, 1970-1975

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<tr>
<td>1. Western Energy</td>
<td>1,657,737</td>
<td>5,161,390</td>
<td>5,500,775</td>
<td>4,253,781</td>
<td>3,211,770</td>
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<td>2. Peabody Coal</td>
<td>1,431,956</td>
<td>1,495,222</td>
<td>1,601,170</td>
<td>1,971,643</td>
<td>2,210,647</td>
<td>2,104,931</td>
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<tr>
<td>3. Decker Coal</td>
<td>74,956</td>
<td>0</td>
<td>792,949</td>
<td>4,159,287</td>
<td>6,874,365</td>
<td>9,283,351</td>
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<td>4. Knife River</td>
<td>321,008</td>
<td>325,475</td>
<td>320,975</td>
<td>312,785</td>
<td>329,390</td>
<td>300,053</td>
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<td>5. Westmoreland</td>
<td>0</td>
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<td>0</td>
<td>0</td>
<td>1,457,673</td>
<td>4,048,082</td>
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<tr>
<td>Resources</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>6. Others</td>
<td>25,321</td>
<td>89,439</td>
<td>27,769</td>
<td>23,917</td>
<td>40,010</td>
<td>18,368</td>
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<tr>
<td>State Total</td>
<td>3,511,778</td>
<td>7,071,526</td>
<td>8,243,647</td>
<td>10,721,413</td>
<td>14,124,055</td>
<td>22,162,098</td>
</tr>
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</table>

Source: Montana Department of Revenue

https://scholarship.law.umt.edu/mlr/vol38/iss1/5
4. Other Mining Legislation

Besides complying with the Strip and Underground Mine Reclamation Act, a coal miner must also satisfy the requirements of two other recent Montana Acts. Under the terms of the Strip and Underground Mine Siting Act, before an operator may begin preparatory work on any new strip or underground mine site location, he must submit a reclamation plan and apply to the Department of State Lands for a mine site location permit. Under that Act the Department must notify the operator if the proposed site is acceptable for development of a new strip or underground mine, and if the proposed reclamation plan is adequate. If either the site or the reclamation plan is unacceptable, the Department must notify the operator of the reasons for its unacceptability.

An operator must also file a bond of $200 to $1,000 per acre to insure that the land will be reclaimed according to the terms of the reclamation plan. This bond precedes and is in addition to the bond required under the Strip and Underground Mine Reclamation Act. Violators of the Act are subject to fine, and citizens may bring an action of mandamus to force the government to enforce this Act.

A coal mine operator must also comply with the Strip Mined Coal Conservation Act. Under this 1973 Act, the operator must file a strip mining plan with the Department of State Lands. The Department shall approve the plan only if it determines that the applicant's proposed strip mining operations will not waste strippable and marketable coal. Any person who engages in strip mining of more than 10,000 cubic yards of coal or overburden without an approved strip mining plan is liable for substantial civil penalties.

B. Facility Siting

The legislature again relied on Article IX in passing the Mont-
The Montana Major Facility Siting Act. The Act provides that no one may construct a facility "without first obtaining a certificate of environmental compatibility and public need" from the Board of Natural Resources and Conservation.

An applicant for a certificate must file an application with the Board, serve this application on government officers and environmental agencies, and publish notice of the proposed project in local newspapers. The Department of Natural Resources and Conservation must then evaluate the application and consider input and analyses from other state agencies. Upon receipt of the Department's report, the Board of Natural Resources and Conservation sets a date for hearing, at which time the applicant must show by clear and convincing evidence that the application should be granted.

The Board has no authority to grant the certificate unless exacting standards are met. The Board must find: "(a) the basis of the need for the facility; (b) the nature of the probable environmental impact; (c) that the facility represents the minimum adverse environmental impact; . . . (g) that the facility will serve the public interest, convenience and necessity; (h) that duly authorized state air and water quality agencies have certified that the proposed facility will not violate state and federally established standards and implementation plans." The Board may waive compliance with the application requirements only if the applicant can show that there is an immediate, urgent need for the facility. It must issue its decision in opinion form, and that opinion is judicially reviewable. The remainder of the Act deals with long-range plans for construction and operation of facilities, periodic site review by the

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64. R.C.M. 1947, § 70-806 (Supp. 1975), provides that the application must contain:

"(i) a description of the location and of the facility to be built; (ii) a summary of any studies which have been made of the environmental impact of the facility; (iii) a statement explaining the need for the facility; (iv) a description of any alternative location or locations for the proposed facility and an explanation of why the proposed location is best suited for the facility; (v) other information that the applicant or the board deems necessary."
66. R.C.M. 1947, § 70-807 (Supp. 1975), provides that the Departments of Health and Environmental Sciences, Highways, Fish and Game, and Public Service Regulation shall report to the Department of Natural Resources and Conservation information relating to the impact of the proposed site on each department's area of expertise.
70. R.C.M. 1947, § 70-811(4)(a), (b) (Supp. 1975).

https://scholarship.law.umt.edu/mlr/vol38/iss1/5
Board, penalties for violation of the Act, and a moratorium on the siting of certain energy conversion facilities.73

C. Water Law

The Montana Water Use Act74 was passed pursuant to Article IX, section 3 (4), which commands the legislature to “provide for the administration, control, and regulation of water rights and . . . establish a system of centralized records, in addition to the present system of local records.”

A prior article in this publication had urged the legislature to revitalize the State’s water law.75 The present Montana Water Use Act represents a legislative attempt to clarify the State’s muddy water law. The Act requires the Department of Natural Resources to establish a centralized record system for all existing rights,76 and to select specific areas or sources of water for the commencement of proceedings to determine existing rights.77

Although the initial investigation and documentation of existing water rights is a judicial proceeding which is commenced by petition to a district court,78 the process will usually result in an administrative determination by the Department of Natural Resources. The Department will file its findings with the district court,79 which will issue a preliminary decree.80 If there are no objections, that decree will become final.81 Objections, which will almost inevitably be filed, will lead to a time-consuming, complex, multiparty, water rights law suit.82 This process will move from one water source to another, and at the present rate of funding, will continue through most or all of the next century.

The only means by which new water rights may be acquired is by application to the Department;83 and, if specified criteria are satisfied,84 a permit must be issued. Water rights will pass with the

77. R.C.M. 1947, § 89-870(2) (Supp. 1975).
82. A request for a hearing made by the Department or by any interested person “for good cause shown,” will trigger the hearing provisions of R.C.M. 1947, § 89-876 (Supp. 1975). After the hearing on the preliminary decree, the district court must enter a final decree fully defining the nature and extent of the water rights. R.C.M. 1947, § 89-877 (Supp. 1975). A person may appeal the final decree if he satisfies the requirements of R.C.M. 1947, § 89-878 (Supp. 1975).
land unless specifically excluded, but water rights may be abandoned. The district courts shall supervise the distribution of water among all appropriators and shall have jurisdiction to adjudicate water distribution controversies.

The prospect of heavy demand by energy conversion facilities for water in Yellowstone River basin has stimulated restrictive legislation. A 1975 amendment to the Water Use Act requires an applicant for an appropriation of 15 cubic feet per second or more to prove by "clear and convincing evidence that the rights of a prior appropriator will not be adversely affected." A second 1975 amendment prohibits changing an appropriation of 15 cubic feet per second or more from agricultural to industrial use. A 1974 addition places a three year moratorium within the Yellowstone River basin on the granting of any application for a reservoir with a capacity of 14,000 acre feet or more, or for a flow of 20 cubic feet per second or more. That addition also encourages the reservation of water for public purposes and changes of use to agriculture, irrigation, domestic and municipal.

D. Miscellaneous Legislation

Several other acts passed since 1972 deal in whole or in part with natural resources in Montana and deserve mention, if not extended discussion. The Nongame and Endangered Species Conservation Act was passed to protect endangered species or subspecies of wildlife indigenous to Montana. The legislature, heeding its duty under Article IX to protect the environment of the State,

The department shall issue a permit if: (1) there are unappropriated waters in the source of supply; (2) the rights of a prior appropriator will not be adversely affected; (3) the proposed means of diversion or construction are adequate; (4) the proposed use of water is a beneficial use; (5) the proposed use will not interfere unreasonably with other planned uses . . . (6) an applicant for an appropriation of 15 cubic feet per second or more proves . . . that the right of a prior appropriator will not be adversely affected.

92. Among those legislative enactments that should be noted are: the Energy Conservation and Alternative Energy Sources—Incentive Programs, R.C.M. 1947, §§ 84-7401 to 7413; the Montana Economic Land Development Act, R.C.M. 1947, §§ 84-7501 to 7526; an act for the "Lease of Geothermal Resources," R.C.M. 1947, §§ 81-2601 to 2613; and the substantial amendments and revisions to the Sanitation in Subdivisions Act, R.C.M. 1947, §§ 69-5001 to 5009.
also passed an act to place a moratorium on the use of uranium solution extraction\textsuperscript{94} due to the unknown dangers involved in that method of mining.

The legislature passed the State Antiquities Act\textsuperscript{95} in fulfillment of its duty under Article IX, section 4, "to provide a method of identification, acquisition, restoration, enhancement, preservation, conservation, and administration of the historic, archaeological, paleontological, scientific, and cultural sites and objects of Montana."\textsuperscript{96} The Montana Natural Areas Act of 1974\textsuperscript{97} establishes a system for the perpetual protection of natural areas. The legislature also adopted the Natural Stream Bed and Land Preservation Act of 1975\textsuperscript{98} to protect the State's natural rivers and streams from unnecessary soil erosion or sedimentation, while insuring the waters' use for any beneficial purpose guaranteed by the Montana Constitution.

\section*{E. Agency Turnover}

Agency staff turnover hampers effective enforcement of these many new reclamation and conservation laws. Because reclamation is an ongoing process that may take several years from initial operating permit application to final restoration of the mined land, retention of experienced staff personnel is essential to a workable reclamation program. The low salaries offered by the state government to field inspectors\textsuperscript{99} are not competitive with salaries offered by the federal government, private consulting firms, and industry. This has resulted in a high turnover rate for staff in the Department of State Lands.\textsuperscript{100} Inspectors who reviewed coal permits in 1973 are no longer employed by the Department, and thus are not available to study the reclamation of the mined areas in 1976. Montana should follow the lead of other states\textsuperscript{101} and attempt to reduce staff turnover by increasing the salaries of state employees.

\begin{itemize}
\item \textsuperscript{94} R.C.M. 1947, §§ 50-1701 to 1704 (Supp. 1975).
\item \textsuperscript{95} R.C.M. 1947, §§ 81-2501 to 2514 (Supp. 1975).
\item \textsuperscript{96} R.C.M. 1947, § 81-2502 (Supp. 1975).
\item \textsuperscript{97} R.C.M. 1947, §§ 81-2701 to 2713 (Supp. 1975).
\item \textsuperscript{98} R.C.M. 1947, §§ 26-1510 to 1523 (Supp. 1975).
\item \textsuperscript{99} The starting salary in the Department of State Lands for an "Inspector I" position is $9,900.
\item \textsuperscript{100} Interview with C. C. McCall, Administrator for the Department of State Lands Reclamation Division, (Nov. 21, 1976). Mr. McCall stated that since June, 1973, the division has lost fourteen staff members. The staff numbered six in 1973 and eighteen at present.
\item \textsuperscript{101} "The 1976 West Virginia Legislature recognized the Division of Reclamation's problem and . . . [b]eginning July 1, all inspectors and supervisors within the Division must receive a minimum salary of $15,000 per year . . . . The Division, like other state agencies had experienced significant turnover . . . . The Division is hopeful that this action will provide a precedent for other states which are experiencing similar turnover problems." The National Assoc. of State Land Reclamationists Newsletter, June 20, 1976, at 1, col. 2.
\end{itemize}
III. LAND USE LAW

In 1973, the Montana legislature enacted the Montana Subdivision and Platting Act\textsuperscript{102} which totally revised and replaced the prior Montana plat law.\textsuperscript{103} Considered the "most dramatic result of the 1973 Legislative Assembly insofar as land use legislation is concerned,"\textsuperscript{104} the Act applies, with certain narrow exceptions, to all land divided into parcels of less than 20 acres.\textsuperscript{105} Under the Act, local governments are required to develop subdivision regulations within guidelines set down by the Department of Community Affairs.\textsuperscript{106} If the local community failed to adopt such regulations by July 1, 1974, the Department was required to promulgate reasonable regulations to be enforced by the local governing body.\textsuperscript{107}

It is the duty of the subdivider, under the Act, to include an environmental assessment with the preliminary plat.\textsuperscript{108} The subdivider also must provide the local community with parkland, or money in lieu of parkland.\textsuperscript{109} Once the subdivider has submitted his plat to the local governing body, it must determine if the plat conforms to the local master plan and if approval of the plat would be in the public interest.\textsuperscript{110} This determination is made after a public hearing on the matter and the final decision must contain written findings.\textsuperscript{111} Only after the aforementioned statutory requirements have been satisfied, including a survey of the land, and local approval has been gained, may the subdivider file and record a final subdivision plat and offer the land for sale or transfer.\textsuperscript{112}

In \textit{Montana Wilderness Association v. Board of Health and...}
Environmental Sciences," the Montana Supreme Court broadly interpreted the language of both Article IX and the Subdivision and Platting Act, concluding that private citizens have standing to sue to enjoin state agencies from approving subdivisions until the agencies have met the requirements of both the Subdivision and Platting Act and the Montana Environmental Policy Act. The court also clarified the requirements for a satisfactory state agency environmental impact statement (EIS).

Plaintiffs and respondents in the Montana Wilderness Association case were nonprofit corporations dedicated to environmental causes, including the promotion of wilderness areas and the conservation of wildlife, wildlife habitat and other natural resources. Plaintiffs brought suit against the Montana Board and [the Montana] Department of Health and Environmental Sciences, claiming that they approved a subdivision proposed by Beaver Creek South, Inc. even though the Department’s environmental impact statement did not fully satisfy the requirements of the Montana Environmental Policy Act (MEPA). 114

The court rejected appellants’ argument that the plaintiffs lacked standing to bring the action. The appellants argued the following theories: (a) that the associations suffered no cognizable injury; (b) that any injury suffered or threatened was indistinguishable from the injury to the public generally; and (c) that neither MEPA nor any other statute granted standing to plaintiff associations to sue state agencies.115

The court reviewed prior Montana cases116 and established a three-part test to determine standing to sue the State:

1. The complaining party must clearly allege past, present or threatened injury to a property or civil right.
2. The alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.
3. The issue must represent a ‘case’ or ‘controversy’ as is within the judicial cognizance of the state sovereignty.117

The court found that the plaintiffs had satisfied the first stand-
ing requirement—that of a threatened injury to a property or civil right. Plaintiffs had alleged that their right to a "clean and healthful environment" guaranteed to Montana citizens in Article IX, section 3, 1972 Montana Constitution, was threatened by the proposed subdivision. The court rejected appellants' contention that Article IX, section 1, vested in the legislature exclusive power to enforce the State's duty of environmental protection.\textsuperscript{118} The plaintiffs also met the second standing requirement—that of injury distinguishable from the injury to the public generally—because of substantial use by their members of the public lands adjacent to the proposed subdivision.\textsuperscript{119}

Finally, the court held the suit to be a case or controversy within judicial cognizance because the Montana Constitution and MEPA clearly demonstrate the State's recognition of environmental rights and duties in Montana.\textsuperscript{120} By finding that private citizens' groups such as plaintiffs had standing to sue state agencies to compel enforcement of state environmental laws, the court gave substantive meaning to the idealistic language of the Montana Constitution and MEPA.

After the court found standing, it addressed the main issues in the case, specifically the Department's responsibilities under MEPA and the Subdivision and Platting Act, and the practical meaning of a satisfactory EIS under MEPA. Beaver Creek and the Department maintained that final subdivision approval authority was, by virtue of the Subdivision and Platting Act, vested solely in the local government, and that the Department could interfere with local subdivision approval only to the extent of its particular expertise and authority under the Sanitation in Subdivisions Act. Appellants maintained that a department EIS need analyze only the environmental effects related to water supply, sewage disposal, and solid waste disposal.\textsuperscript{121} The court rejected this argument. Had the legislature intended the local review in the Subdivision and Platting Act to replace the state agency review in MEPA, it would have been simple to so provide.\textsuperscript{122} The court did not find the two acts irreconcilable, but, rather, read them together "as creating a complementary scheme of environmental protection."\textsuperscript{123}

The court held that MEPA obligates the Department to prepare a comprehensive EIS for a proposed subdivision such as Beaver Creek.
Creek before it approves subdivision water supply and sewer systems.\textsuperscript{124} According to the court, the Department’s Beaver Creek EIS inadequately examined both the economic costs to the proposed subdivision’s locality,\textsuperscript{125} and the visual effects of the structures to be built.\textsuperscript{126} The EIS was also deficient in its study of the effect of the proposed subdivision on the wildlife in the area.\textsuperscript{127}

By interpreting MEPA and the Subdivision and Platting Act to require complementary rather than mutually exclusive action by local and state governments, the court insured that neither entity could abdicate its responsibilities to the other: “The cooperative inter- and intra-governmental approach fostered by MEPA section 69-6503, R.C.M. 1947, should encourage the free exchange of data compiled by local and state agencies.”\textsuperscript{128}

The final question the court examined was the appropriate remedy available to the plaintiffs. The court said: “The rule is well settled that injunction actions by private parties against public officials must be based upon an irreparable injury and a clear showing of illegality.”\textsuperscript{129} Because plaintiffs showed potential irreparable injury (environmental damage) and illegality by the Department (an EIS that failed to meet the minimum standards of MEPA), the court granted injunctive relief, preventing construction of the subdivision until the agency had fully complied with MEPA.

The supreme court decided the \textit{Montana Wilderness Association} case in July, 1976, by a three to two majority. Justice Haswell wrote the majority opinion with the concurrence of Justice Daly and District Judge Arthur Martin, sitting for Chief Justice James Harrison.\textsuperscript{130} Justice John Harrison concurred in the majority opinion’s ruling on standing and EIS standards, but dissented from the majority’s opinion that injunctive relief should be granted to the

\textsuperscript{124} Id. at 727. R.C.M. 1947, § 69-6504(b)(3) (Supp. 1975), provides: [A]ll agencies of the state shall include in every recommendation or report on proposals for projects . . . significantly affecting the quality of the human environment, a detailed statement on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

\textsuperscript{125} \textit{Montana Wilderness Assoc. v. Board of Health and Environmental Sciences}, 33 St.Rptr. 711, 730 (1976).

\textsuperscript{126} Id. at 731.

\textsuperscript{127} Id. at 732.

\textsuperscript{128} Id. at 730.

\textsuperscript{129} Id. at 735.

\textsuperscript{130} Id. at 711.
plaintiffs. Justice Castles dissented from the majority on all three issues.

The July 22 majority opinion in *Montana Wilderness Association* was law in Montana for less than six months. The supreme court granted appellants’ petition for rehearing and, on December 30, 1976, reversed their prior holding. The second *Montana Wilderness Association* case was also a three to two decision. Justice Castles wrote the majority opinion two days before his term on the court expired. Justice John Harrison, who dissented in part in the first *Montana Wilderness Association* case, concurred with the majority opinion. Justices Haswell and Daly dissented. Judge Arthur Martin, the district judge who sat for Chief Justice James Harrison, changed his opinion on rehearing and, in so doing, became the third member of the majority changing the court’s prior ruling on the case.

The majority found that the legislature demonstrated a clear intent in the 1973 Subdivision and Platting Act that local governmental units should control subdivision development. The court’s majority found no similar legislative grant of subdivision control given in MEPA to the State or its agencies. Rather, the only duty of the Department of Health and Environmental Sciences in the regulation of subdivision development was, in the majority’s opinion, “in the statutorily prescribed areas of water supply, sewage and solid waste disposal (as required in the 1967 Subdivision and Sanitation Act).” Because the local governing unit, the Gallatin County Commission, complied with the provisions of the Subdivision and Platting Act, and because the majority decided that a comprehensive revised EIS was not required of the Department under MEPA, the court’s majority vacated the injunction originally ordered by the district court to halt the development of the Beaver Creek subdivision. The issue of citizens’ standing to sue state agencies for non-compliance with MEPA, normally the threshold determination before a court may adjudicate substantive issues, and citizens’ right to injunctive relief against state agencies not complying with MEPA, were not decided by the majority, “because of our view of the law of Montana.”

131. *Id.* at 736.
132. *Id.* at 738.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
The majority in the second *Montana Wilderness Association* decision left several questions unanswered. Justice Harrison and Judge Martin concurred with the majority in the first *Montana Wilderness Association* in holding that the provisions of MEPA require the Department of Health and Environmental Sciences to submit a comprehensive revised EIS for a proposed subdivision such as Beaver Creek South. Both Justice Harrison and Judge Martin, however, concurred in Justice Castles' majority opinion in the second *Montana Wilderness Association* which ruled that MEPA is not applicable to subdivision developments. Neither Justice Harrison nor Judge Martin wrote a concurring opinion in the second decision to indicate why he had so completely changed his position on this important legal issue.

In the first *Montana Wilderness Association* decision, Justice Haswell looked to federal case law for interpretation of the National Environmental Policy Act (NEPA), the federal statute from which MEPA is modeled. Justice Haswell cited *Calvert Cliffs' Coordinating Committee, Inc. v. AEC* as strong authority for its holding that MEPA required the Department of Health and Environmental Sciences to submit a comprehensive revised EIS for subdivisions that may have a major environmental impact. The majority in the second decision neglected to distinguish the cases cited in the first majority opinion. The new majority based its decision solely on a reading of selected provisions in Montana's Sanitation in Subdivisions Act, Subdivision and Platting Act, and MEPA, and failed to cite a single case in support of its position.

Both Justice Haswell and Justice Daly dissented from the majority opinion in the second *Montana Wilderness Association* case. Justice Haswell excoriated the majority for dealing "a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control." Justice Haswell proceeded to incorporate in his dissenting opinion the original majority opinion of the court.

### IV. Federal Case Law

#### A. The Monongahela Decision

Of the innumerable federal court decisions relating to natural

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140. 449 F.2d 1109 (D.C.Cir. 1971).
resources decided since 1972, one which has received considerable
attention is the "Monongahela decision." The district court in the
Monongahela case held that the U.S. Forest Service had no right to
enter into contracts for the clearcutting of timber in Monongahela
National Forest. The court found that Section 476 of the Organic
Act of 1897, the act which created the national forest system, "authorizes the sale only of the 'dead, matured, or large growth of
trees,' and requires that 'before being sold, shall be marked and
designated'. . . Policies and practices of the United States Forest
Service to the contrary are an unwarranted intrusion into an exclu-
sive area of congressional province." The district court, and the circuit court in its opinion affirming
the lower court's ruling, held that the Forest Service's prior practice
of authorizing clearcutting of entire tracts of timber was statutorily
impermissible. Rather, the Organic Act required the individual
inspection and marking for cutting of only those trees which were
dead, matured, or large. Young trees had to be left standing, unless
Congress chose to amend the Organic Act to allow clearcutting in
the national forests.

The decision of the Fourth Circuit Court of Appeals in
Monongahela was applied by a court of the Ninth Circuit in the case
of Zieske v. Butz. In the Zieske case, the Alaska district court,
Judge von der Heydt, held that the Organic Act precluded clearcut-

143. A partial listing includes National Forest Preservation Group v. Butz, 485 F.2d 408
(9th Cir. 1973), regarding the authority of the Forest Service to exchange National Forest land
for privately owned land; Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) regarding
requisites of an Environmental Impact Statement (EIS) under the National Environmental
1975), holding that scientific unanimity is not required in an EIS under NEPA; Natural
responsibilities of the Army Corps of Engineers under the Federal Water Pollution Control
Act were not limited to those waters as defined under traditional tests of navigability, but
extended to the nation's waters to the maximum extent permissible under the commerce
clause; General Agriculture Corp. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975), regarding
what constitutes existing water rights under art. 9, § 3 of the 1972 Montana Constitution;
Montana Bd. of Natural Resources and Conservation v. Montana Power Co., 166 Mont. 522,
536 P.2d 758 (1975), regarding the meaning of the phrase "commence to construct" for the
purpose of the Utility Siting Act provision that a certificate of public need is not required for
facilities under construction or in operation on 1/1/73; Carroll v. Eaton, ___ Mont. ___, 541
P.2d 64 (1975), regarding construction of terms in mining leases.

144. West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz, 367 F.


146. West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz, 367 F.

147. For more extended discussions of the Monongahela case, see Note, 76 W. VA. L.
Rev. 420 (1974); Note, 9 LAND AND WATER L. REV. 527 (1974); Note, 27 OKLA. L. REV. 700
(1974).

ting in an Alaskan national forest. The case was not appealed to the Ninth Circuit Court of Appeals, and thus does not directly affect clearcutting policies in Montana's national forests, but Montana's national forests are, of course, under the same Organic Act.

In 1976, Congress accepted the courts' invitation to amend the Organic Act, so as to allow clearcutting in the national forests.\[149\]

B. Cappaert v. United States

In *Cappaert v. United States*,\[150\] the Supreme Court discussed the meaning and dimensions of the "reserved water rights doctrine." The Cappaerts, petitioners in the case, sought to pump water for use on their ranch from underground sources which, by percolation, supplied a pool in Devil's Hole, a deep cavern that had been reserved as part of Death Valley National Monument. The pumping of the water by the Cappaerts significantly lowered the water level in the Devil's Hole pool, thereby endangering the future of the pool's denizens, a species of prehistoric fish found nowhere else on earth.\[151\]

The United States brought action to enjoin the Cappaerts from further depleting the water sources of Devil's Hole, claiming that the United States, in establishing the land as part of the national monument, "reserved the unappropriated waters appurtenant to the land, to the extent necessary for the requirements and purposes of the reservation."\[152\] In their answer, the Cappaerts denied that the reservation of Devil's Hole reserved any water rights for the United States.\[153\]

The Court held that when the United States withdraws its land from public use and reserves it for a federal purpose, it acquires water rights superior to all future appropriators to the extent necessary to accomplish the purpose for which the land was reserved.\[154\] In this case, the purpose of the reservation of the Devil's Hole pool was preservation of its scientific interest, and the scientific interest consisted mainly of the unique fish which lived in the pool. The Court therefore allowed the Cappaerts to pump ground water only to the extent that the pool level would not decrease to a point where the fish would be endangered and the purpose of the reservation frustrated.\[155\]
The *Cappaert* case, in addition to being good news to Devil's Hole pupfish and their admirers, was the first Supreme Court decision to apply the doctrine of implied reservation of water rights to groundwater. The Court rejected the argument that the implied reservation doctrine is limited to surface water. Rather, as a test to determine what water rights had impliedly been reserved by the United States, the Court reiterated its concern by focusing solely on the purpose for which the government had reserved the land. "Thus, since the implied reservation of water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." This decision will affect future uses of groundwater by private parties in Montana, as it did the Cappaert ranch, because of the vast federal reservations in Montana, such as national forests, military reservations, wildlife preserves, parks and Bureau of Land Management land.

C. *The Akin Case*

One of the issues involved in the case of *Colorado River Water Conservation District v. United States*\(^{157}\) (the "Akin case") was whether the McCarren amendment, 43 U.S.C. § 666, manifested a congressional consent to have reserved water rights held on behalf of Indians adjudicated in state courts, and thus provided a basis for federal courts to abstain from such adjudications in deference to state court proceedings.

The Court noted that 28 U.S.C. § 1356 provides that the federal district courts shall have original jurisdiction over all civil actions brought by the federal government except as Congress should by legislation otherwise provide.\(^{158}\) The Court then viewed the government's trusteeship of Indian water rights as the equivalent of ownership of such rights.\(^{159}\) Citing two previous Supreme Court cases\(^{160}\) for the proposition that the McCarren amendment, by its language, impliedly consented to adjudication of federally owned reserved water rights in state courts, the Court concluded that state courts had jurisdiction of Indian water rights under the amendment.\(^{161}\) The Court further found in the underlying policy and legislative history

\(^{156}\) Id. at 2072.
\(^{157}\) 96 S. Ct. 1236 (1976).
\(^{158}\) Id. at 1241.
\(^{159}\) Id. at 1242.
\(^{160}\) United States v. District Court for Eagle County, 401 U.S. 520 (1971); and United States v. District Court for Water Division No. 5, 401 U.S. 527 (1971).
of the McCarren amendment, an intent by Congress to include federal water rights reserved on behalf of Indians among the rights subject to adjudication in state courts. This has obvious implications for the current water right adjudication actions on the Tongue, Powder and Big Horn Rivers, and for subsequent water adjudications in other watersheds where there are Indian reservation lands.

In declaring reserved Indian water rights to be justiciable in state courts, the Supreme Court rejected the Government’s argument that state court jurisdiction could be recognized only if expressly conferred by Congress. Furthermore, the Court rather summarily dismissed the fear of many Indian tribes that their rights would receive less adequate attention in state courts than in federal courts:

Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court. . . . Indian interests may be satisfactorily protected under regimes of state law.

Indian water rights were first recognized by the United States Supreme Court in a 1908 case, Winters v. United States. There, the Court said: “The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the government did reserve them we have decided. . . .” But the context of the case was the construction of an 1888 “agreement” or treaty, which in form was a cession by the Indians to the United States of a large amount of land, retaining and reserving to themselves a smaller tract known as the Fort Belknap Reservation. This aspect of the case is more clearly stated in an earlier case. “. . . [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. . . .”

Based on the Court’s interpretation of this treaty language in which the Indians ceded land to the United States, the Indians contended that their rights to the land and water do not stem from a reservation or grant from the United States, but rather, that those rights are aboriginal and immemorial, as well as unquantifiable. In Arizona v. California the Court had dealt with non-treaty reservations for which it assigned priority dates and specific quantities of

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162. Id. at 1243.
163. Id. at 1243-44.
164. 207 U.S. 564 (1908).
165. Id. at 577.
167. Id. at 381.
water. The Indians argued that cases such as *Arizona v. California* must be distinguished from those such as *Winters*.

By implication, the Supreme Court seems to be denying, or at least ignoring, this position of the Indians. It based its decision in *Arizona v. California* upon the *Winters* case. And in *Colorado River Water Conservancy District v. United States*, it based its decision upon both *Winters* and *Arizona v. California*, without distinction or discrimination. If this portends the result when the Court squarely faces this issue, as it seems it must, it will be disappointing to the Indians, but will simplify and stabilize water rights and their administration.

D. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*

An Oregon case now pending before the United States Supreme Court could affect land titles in Montana and in all other public land states, particularly with respect to land along navigable streams, and land that was formerly the bed of a navigable stream which shifted to a new channel. The case, *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, involves land titles affected by avulsion or accretion in the Willamette River. The Oregon Supreme Court adhered to the concept that federal law, rather than state real property laws, determines boundaries and titles to land affected by avulsion, accretion, reliction or other phenomena, where the source of title was originally the federal government.

That concept appears to be contrary to earlier Court decisions, but it follows two more recent Supreme Court cases. *Hughes v. Washington* announced the doctrine with respect to coastal land, and in 1973 it was extended inland to navigable streams in *Bonelli Cattle Co. v. Arizona*. Both of these later cases relied on language in *Borax Ltd. v. Los Angeles*, stating that the extent of a federal grant "is necessarily a federal question" but ignored the statement in the *Borax* case to the effect that once the land comes under state sovereignty, ownership questions "are matters of local law." The issue needs review and reconsideration, and so it is

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169. *Id.* at 599-600.
170. 96 S. Ct. 1236 (1976).
171. *Id.* at 1240.
177. 296 U.S. 10 (1935).
178. *Id.* at 22.
significant that certiorari was granted in *Corvallis Sand and Gravel*.\(^1\)

E. *Environmental Defense Fund, Inc. v. Morton*

The plaintiffs in *Environmental Defense Fund, Inc. v. Morton*\(^2\) sought to enjoin defendant Secretary of Interior from selling or otherwise disposing of water for industrial purposes from Yellowtail or Boysen reservoirs. The plaintiffs argued that Congress, in the Reclamation Act of 1902,\(^3\) authorized the construction and operation of these reservoirs, located in Montana and Wyoming, for the *exclusive* purposes of providing water for agricultural irrigation, hydroelectric power, flood and silt control, and supplementation of stream flow. United States District Judge Battin rejected plaintiff's argument, and held that the Secretary of Interior has authority to market water from the reservoirs for industrial purposes, under the Reclamation Project Act of 1939\(^4\) and the Flood Control Act of 1944,\(^5\) as well as the Water Supply Act of 1958.\(^6\) Thus, the stored waters are available to industry, under contract with the Secretary of Interior, and, by necessary implication, the Secretary has authority to market water in all federal dams in the Missouri River Basin for industrial use.

V. CONCLUSION

In passing the State's network of recent natural resource laws, the legislature thoughtfully and comprehensively responded to the environmental concerns expressed in Article IX of the Montana Constitution. By suggesting that provisions in recently enacted Montana laws should be amended, we mean not to deprecate those acts, but to suggest changes to make good laws more effective.

This brief review analyzes selected legislative and judicial actions affecting natural resources. But more significantly, it illustrates that environmental and natural resource protection has much vitality and potential for growth through legislation and judicial decisions.

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\(^1\) The Court handed down its *Corvallis Sand and Gravel Co.* opinion on January 12, 1977, and overruled the holding in *Bonnelli Cattle Co.* The Court held that, where navigable rivers do not form interstate boundaries, state law, rather than federal common law is determinative of disputes concerning ownership of riverbed lands. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 45 U.S.L.W. 4015 (1977).


\(^3\) Act of June 17, 1902, 32 Stat. 388.


