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Water Rights Under the Law of Montana*

Howard W. Heman**

I. BACKGROUND.

Montana is the most northerly state of the arid region and has a comparatively large water supply, many rivers rising in the ranges of mountains which are found in the western part of the state. More than two-thirds of the state is on the eastern slope of the main range of the Rocky Mountains, and the greater portion of this area lies in the great drainage basins of the Missouri and Yellowstone Rivers. About 70% of the annual precipitation falls during the crop growing season, but it varies greatly with the altitude, the mountains receiving 30 inches or more, usually as snow, while the plains receive only ten inches or less. There is also the possibility of extreme cold in winter, though it does not last long and the dry air and frequent snow-melting chinook winds prevent personal discomfort. From the farmer’s standpoint, the worst feature of the climate is the comparatively short season between the frosts of late spring and early autumn. The character of crops raised is largely influenced by this feature, favoring grain and forage, but the soil is of the best and any crop can be raised which can withstand the climate.

The climate of the state is exceedingly varied, and is much more salubrious than is generally supposed. The rainfall in the western end averages about 16 inches, while the eastern average is about 13 inches. Rain and snow prevail during the spring until early July. July, August and September are largely without rain, but in many places there is no need of irrigation. In recent years, possibly due to increased irrigation and the tilling of many acres formerly used only for range, the rain-

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fall during summer months has increased, though remaining uncertain.

The annual flow of Montana’s rivers is sufficient to cover the entire state with six inches of water—more than enough to irrigate ten million acres. It does not drain off in great floods, for snow at the higher altitudes melts slowly, but yields a gradually diminishing flow throughout most of the summer. Nevertheless, only about two-thirds of the state’s irrigated land, which lies mostly in the southern and southwestern counties, has adequate water in dry years. Tributaries of the Missouri are used in irrigation, but the river itself contributes very little. The average farm on large irrigated projects must contain more than 100 acres because 90% of the land is devoted to hay and grains. Beans and sugar beets cover 3% each, with 4% in all other crops. More intensive use of land is not feasible because of the dry climate and distance from consuming centers. Montana’s water supply gives the state another valuable asset, electricity. The rivers average a 3,000 foot descent from source to state line, and could produce 2,500,000 horsepower of electric energy, more than five times their actual production. In annual per capita consumption of electricity Montana ranks first among the states, and in production, sixth.¹

A. Riparian Doctrine v. Appropriation Doctrine.

The present western law of appropriative rights to the use of water had its beginning in the gold mining regions of California a century ago, though long before our gold-rush pioneers or even the sixteenth-century Spanish explorers first entered that state, the natives of the arid regions of the southwest were using water for irrigation under a rudimentary system of appropriation. The crowding of the gold fields gave rise to controversies over water rights which the miners settled by analogy to the rule they had developed with regard to possessory interests in mining claims, giving the first locator of a claim a right to it superior to that of any later comer. The first one to put water to a beneficial use, without limitation to riparian land, was recognized as the first in right to the amount so used. An early California case brought this custom into the state’s common law, saying:

"Courts are bound to take notice of the political and social condition of the country, which they judicially rule. . . . a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the United States, and heartily encouraged by the expressed legislative policy of the State of California. If there are, as must be admitted, many things connected with this system, which are crude and undigested, subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of res judicata. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds. . . ."

The riparian doctrine of water law developed from the French Civil Code, was adopted in England (which formerly had had a doctrine of appropriative rights) during the fourth and fifth decades of the nineteenth century, and is in effect today in all the states east of the Mississippi. Under it only the owner of land contiguous to water has the right to the continuance of and the use of the water in its natural state, which right exists permanently appurtenant to the riparian land. As this doctrine was developed under climatic conditions vastly different from those in our western states, it is not well suited to use therein. In most of this area water supplementary to the precipitation on almost any particular piece of land is essential to agriculture, and the quantity of water available is far short of the quantity that would be required for the farming of all agricultural lands. As water is less abundant than good land, the problem is to distribute the water supply where it can be most beneficially and economically used. As the riparian doctrine gives rights solely by reason of location regardless of relative productive capacities of riparian and non-riparian land, the doctrine of appropriation, which laid emphasis upon beneficial use and protected enterprises based on application of water to fertile but non-riparian land, was universally adopted throughout the arid region of the United States.


Despite the adoption in all the western states of the doctrine of appropriation, some still retain a modified system of riparian rights. These are the less arid states which border the region on east and west, confining those which use only the appropriation system between giant parentheses. In these bordering states the combined system, more or less locally adapted, is known as the "California Doctrine." Under it riparian rights attach to land at the time it passes to private ownership (usually from the public domain), subject however to appropriative rights previously acquired by others. All such riparian rights are equal among themselves regardless of time of accrual, but later appropriators take rights inferior to them and may use water to which the riparian owner is entitled only when he does not choose to do so. The theory behind this rule is that originally the United States had title to the public land with full riparian rights. Appropriations constituted grants from the government as owner to the appropriator. The bundles of rights later transferred by the United States to those taking title to lands from the public domain thus lacked what had been previously conveyed away.

The Colorado doctrine, on the other hand, is based upon the theory that water in all natural forms is the property of the state in which it lies. Since the common law doctrine of riparian rights is unsuited to semiarid conditions it never was part of the law of a semiarid state. The United States as owner of the public domain has no rights not accorded to private landowners, hence never enjoyed riparian rights on its land, hence none of its grantees have riparian rights. Rights to the use of water therefore may be acquired only by appropriating the water under the law of the state.

Montana, being one of the inner states, follows the Colorado doctrine. It specifically repudiated the riparian system by saying that the common law doctrine of riparian rights had never prevailed in Montana since 1865, being unsuited to conditions there. 5

5Washington, Oregon, California, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

5The date when the first statutes pertaining to water law were passed by the first Territorial Assembly. Montana became a territory in 1864, a state in 1889.

5Mettler v. Ames Realty, 61 Mont. 152, 201 P. 702 (1921).

Montana is committed to the rule that the appropriator of a water right does not own the water, but has rights in its use only. This rule is also recognized in the state constitution, which says:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. . . ."

The water right while appurtenant to land is real property," but it can be held in gross," and it would seem that when so held a Montana water right is not yet definitely included in the category of realty. Wiel says that as a general rule the right to the flow and use of water, being a right in a natural resource, is real property," but the case he uses to support the rule for Montana dealt with a water right appurtenant to land, held to be realty for tax purposes," and another tax case held a water right in gross to be personalty for tax purposes." There seems to be no decision that a water right in gross is real property, but no reason is seen why if the question arose it would not be held to be realty in common with what appears to be the general rule. Except for taxation it makes little practical difference either way, because Montana has a statutory system of descent and distribution which provides for both real and personal property to be treated in the same manner."

Another general rule without authority in Montana is that water when reduced to possession becomes personalty. Of course capture of water is restricted by the rule that appro-

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1See Brennan v. Jones, 101 Mont. 550, 567, 55 P. 2d. 697, 702 (1936) and cases there cited.
2Mont. Const., Art III §15.
3Revised Codes of Montana (1935) (hereinafter designated as R.C.M.) §§6667 (3), 6671.
4"Smith v. Denniff, 24 Mont. 20, 60 P. 398 (1900).
5"Wiel, WATER RIGHTS IN THE WESTERN STATES §283 (3d ed. 1911); see also Hutchins, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 28 (1942).
8R.C.M. §§7072 ff.
priators from streams may not retain waters if needed by other appropriators, prior or subsequent, so the only instances where water might become personality seem to be where surplus waters are impounded in reservoirs during flood season or where waters are appropriated for the purpose of sale.

D. Measurement and Duty of Water.

By statute the legal standard for measurement of water is the cubic foot (7.48 gallons) per second, but the amount of water granted to an appropriator is almost always measured by Montana courts in terms of miner's inches. The miner's inch is equivalent to a flow of .025 cubic feet per second, forty of them equalling one cubic foot per second. No limit on duration is ever mentioned in connection therewith, but the implication is that the flow is permanent.

As for the quantity itself awarded under the appropriation, the amount needed for beneficial use is granted, limited by either the amount claimed in the appropriator's notice, the capacity of his means of diversion, or the amount of which he can make beneficial use, considering the use and conditions affecting it. Usually the use is irrigation, and the Montana Supreme Court reiterates that in the absence of unusual conditions of soil or climate the amount awarded is one miner's inch per acre. However, the actual award in each case is a jury question depending on the particular facts. A recent

R.C.M. §7097.
R.C.M. §7107.

From 1885 to 1899 the method and device to be used in measuring flow in miner's inches was prescribed by statute as follows: "The measurement of water appropriated under this act shall be conducted in the following manner: a box or flume shall be constructed with a headgate placed so as to leave an opening of six inches between the bottom of the box or flume and lower edge of the headgate, with a slide to enter at one side of and of sufficient width to close the opening left by the headgate, by means of which the dimensions of the opening are to be adjusted. The box or flume shall be placed level, and so arranged that the stream in passing through the aperture is not obstructed by backwater, or an eddy below the gate; but before entering the opening to be measured the stream shall be brought to an eddy, and shall stand three inches on the headgate, and above the top of the opening. The number of square inches contained in the opening shall be the measure of inches of water." L. 1885 p. 130 §14, repealed L. 1899 p. 126 §4.
R.C.M. §§7108, 7132.
R.C.M. §7100.

Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).
Worden v. Alexander, 108 Mont. 208, 90 P. 2d 160 (1939); Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 250 P. 11 (1929); see also 2 KINNEY, op. cit. supra note 1, §904; 1 WIEL, op. cit. supra note 11, §488.
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One miner's inch flowing continuously for 30 days is equal to 1 1/2 acre-feet. The award in acre-feet includes all the water needed during the irrigating season, so a four-month season makes an award of three acre-feet the equivalent of 1 1/2 miner's inch per acre. This case is the only one found in the Montana Reports using other than miner's inches, and even so it reaffirms the rule of one inch per acre in the absence of circumstances requiring variation. It contains also the latest formulation of the criterion for awards of water: "The requirements of the lands for adaptable crops should fix the amount of water required in that particular locality."

The concept of duty of water is inseparable from the topic of measurement. The Montana cases give it only passing mention, usually citing Wiel or Kinney, but it seems important enough to set forth. Briefly, it is the work a given amount of water must do in raising crops, and whether mentioned or not, is at the base of every award of a quantity of water for irrigation. It will naturally be higher if the water table is near the surface of the ground or if land has previously been irrigated sufficiently to cause it to retain a certain amount of moisture or receive seepage from surrounding lands than if the land is being irrigated for the first time or has a low water table. That is to say, a higher duty of water makes for a lower award to a given area of land, or, requires a greater area of land to be irrigated by a given amount of water. The crop is another factor in determining the duty. A crop requiring a large amount of water tends to lower the duty, but the result of this factor may be more than offset by such a crop being of a far greater cash value than one needing less water, thus leading to more intensive cultivation and hence increasing the duty with less water being required per unit of the greater yield per acre. Losses by evaporation, leakage and seepage in the ditches en route from the point of diversion to the place of use must also be considered, the greater the distance the lower the duty. Some states fix a minimum duty by statute varying from one cubic foot per second (40 miner's inches) per fifty acres to one per 160 acres, but Montana leaves the question to the discretion of its courts. As more than three inches per

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"Id. at 452, citing Worden v. Alexander, supra note 22, and sustaining award of 3 acre-feet per acre.
"2 Kinney, op. cit. supra note 1, §906.
acre is rarely awarded, we may say the minimum duty is roughly one cubic foot per second per 13 acres. This extremely low figure may be explained by the fact that for an arid state Montana has a large water supply, as shown in the background material.

E. Evolution of the Montana Statutes.

The first statute in Montana relating to water rights was an act to protect and regulate the irrigation of land, passed by the First Territorial Legislative Assembly at Bannack on January 12, 1865. It was in twelve sections, and provided that anyone with a possessory right or title to land on or near any stream should be entitled to use the water of the stream for irrigation. If too far from a stream to have access to its water otherwise, he might have a right of way over intervening land for necessary ditches. If the stream was insufficient to supply all users, the nearest justice of the peace was given power to appoint three commissioners to apportion the water equitably on alternate days to different localities as they might judge best for all concerned. If anyone refused to allow a ditch through his land, commissioners might be appointed to make an assessment of damages, on which judgment would be given either by the appointing justice or county probate judge, depending on the amount in question. If anyone carelessly managed his water, so that his waste injured someone, commissioners might assess damages against him.

The grant of judicial powers to commissioners was soon thereafter held invalid as being in conflict with the Organic Act of the Territory which vested all judicial power in certain officers, and the act was repealed in toto immediately thereafter. The act of repeal substituted provisions substantially the same but omitted all reference to commissioners and added recognition of appropriative rights, as well as two sections which required those digging or using ditches across public roads to keep them in good repair where the water might injure the road. This act was carried forward in the 1872 Codified Statutes as Chapter 34, with the addition of a section providing that in all controversies, rights should be determined by dates of appropriation as modified by local custom.

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Bannack Stats., p. 367 (1864-5).
Thorp v. Woolman, 1 Mont. 108 (1870).
L. 1869-70, p. 57.
Now, R.C.M. §§7111, 7112. See also id. §§1732, 1733.
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In 1877 any person having a surplus of water was required to sell it to anyone who tendered the usual rate per inch and constructed ditches to carry it away. The buyer could not resell the water, but acquired only the right to use it. The next session of the legislature added to the first section of Chapter 34 of the 1872 Codified Statutes a provision that where one had appropriated more than he at a later time happened to need, he was required to return the surplus for the use of subsequent appropriators within five days after notice from them, on penalty of $25 per day of delay.

Thus stood Montana's statutory water law at the time of the Revised Statutes of 1879; fifteen sections, relating primarily to irrigation, with no subject called "Water Rights" separately listed in the index.

The period during which the law of water rights was governed only by custom ended in 1885, with the passage of an act providing in detail a method of appropriation of water which has remained substantially unaltered to the present date. It allowed appropriation for beneficial purposes, to last until such use ceased or the right was abandoned, by posting a notice of appropriation at the point of diversion, filing a copy in the county records, and promptly completing works to carry the water away. Persons who had previously acquired rights were required to file the details in the county records, though non-compliance did not deprive them of their rights. Filed documents were to be prima facie evidence of their contents. Adversary proceedings with joinder of all concerned was made the method of determination of rights in a particular source of water. Finally, a device and method for the measurement of water were prescribed. These provisions were carried forward in the 1895 codes without change of substance, which process was repeated in the Revised Codes of 1907, 1921 and 1935 except for the last section. This was replaced in 1899 by the legal standard of

*L. 1877, p. 406; R.C.M. §§7113-7116.
*L. 1879, p. 52; R.C.M. §7097.
*L. 1885, p. 130.
§§4840-4843, 4845, 4847-4853.
§§7093-7096, 7098, 7100-7106.
*Ibid.
*L. 1899, p. 126; R.C.M. §§7107-7109.
measurement of cubic feet per second, which has since remained unchanged.

Following the 1885 statute came the Montana Constitution in 1889, which made the use of all water and connected works a public use,\(^a\) recognizing the importance of water to the welfare of the state and its inhabitants. The Civil Code of 1895 added to prior laws a section covering the right of eminent domain for irrigation ditches,\(^a\) to be exercised "in the manner provided by law for the taking of private property for public use," apparently replacing an 1891 act of eleven sections\(^a\) providing detailed procedure for obtaining a right of way for ditches, flumes and canals, which was never again heard of thereafter. Except for the addition of two sections requiring dams to be secure\(^a\) and the omission of what remained of the 1865 irrigation act after its revision in 1870\(^a\) (which omission removed the requirement that an appropriator for irrigation had to have a possessory right there-to)\(^a\) no other changes were made in existing statutes.

In 1911 a statute providing details of appointment, duties, authority and compensation of water commissioners acting to distribute waters\(^a\) replaced previous similar enactments on the same subject,\(^a\) and except for the addition in 1919 of another instance in which commissioners might be appointed\(^a\) no substantial changes have been made.

Irrigation districts were first authorized by statute in 1907\(^a\) but this was repealed in 1909 and a new enactment substituted\(^a\) which remains in the present code with only minor additions and amendments to its provisions concerning water rights. Apparently the only difference between the 1907 and 1909 acts was that the latter was more detailed, for no part of the 1907 act ever was passed upon, for constitutionality or otherwise, by the Supreme Court of Montana.

\(^a\)Mont. Const. Art. III, §15.  
\(^b\)$1894; R.C.M. §7110.  
\(^c\)L. 1891, p. 285.  
\(^d\)Mont. Civ. Code §§1901, 1902 (1895) ; R.C.M. §§7117, 7118. See also Id. §§2658-2671.  
\(^e\)Supra note 26.  
\(^f\)Supra note 26.  
\(^g\)L. 1911, c. 43; R.C.M. §§7136 ff.  
\(^h\)L. 1890, p. 136; L. 1905, c. 64; R.C.M. §§4881-4889 (1907).  
\(^i\)L. 1919, c. 181 (pendency of action between partners, tenants in common, or stockholders) ; R.C.M. §§7152 ff.  
\(^j\)L. 1907, c. 70 ; R.C.M. §§2309-2402 (1907).  
\(^k\)L. 1909, c. 146 ; R.C.M. §§7166 ff.
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1921 brought an exclusive method of appropriation from adjudicated streams⁶ to replace a previous non-exclusive method, and thereafter no important additions were made to Montana's water law until the depression and a long dry spell gave rise to the state water conservation board in 1933⁷ for the purpose of conservation, development, storage, distribution and utilization of water for the welfare and benefit of the people of the state. Because of the continuance of adverse conditions, its powers were broadened in 1935⁸ to permit full cooperation with the Federal Government in the work of recovery. A further progressive step was made in 1939⁹ when the state engineer was authorized to bring actions under the water conservation board for the adjudication of rights in all the waters of the state and especially interstate streams. Such legislation and a liberal interpretation of the statutes by the courts are a beginning in the process of modernization of Montana's water law, which was considered backward in 1912¹⁰ and has since undergone little change.

The latest step in the conservation of water was taken at the last session of the state legislature by the passage of an act¹¹ to conserve underground water by regulating artesian wells and preventing waste therefrom, which added administration of the act to the powers of the state engineer. These recent additions to the jurisdiction of the state engineer are in line with recommendations by various authorities,¹² though still not going all the way and setting up a centralized control of water. A comprehensive water code was introduced at the 1917 session of the Montana Legislature, but failed of passage. It is doubtful that future attempts will be more successful, for Montana has been the only state without such a code since 1919 and may prefer its decentralized system.

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⁶L. 1921, c. 228; R.C.M. §§7119 ff.
⁷L. 1907, c. 185; R.C.M. §§4868 ff (1907).
⁸L. 1933, c. 35; R.C.M. §§349, 1-349.25.
⁹L. 1935, c. 96 & 97; R.C.M. §§349. 26-349. 38.
¹⁰L. 1939, c. 185; R.C.M. §§349. 68-349. 76.
¹¹⁴ KINNEY, op. cit. supra note 1, §1864.
¹²L. 1947, c. 218.
¹³See e.g. ⁴ KINNEY, op. cit. supra note 1 §1864; NATIONAL RESOURCES PLANNING BOARD, STATE WATER LAW IN THE DEVELOPMENT OF THE WEST p. 55 lines 26-31 (1943).
¹⁴CHANDLER, ELEMENTS OF WESTERN WATER LAW 81 (Rev. ed. 1918).
II. OPERATION OF THE APPROPRIATION DOCTRINE IN MONTANA

A. Acquisition of Water Rights.

1. Unadjudicated waters.

A recent publication classifies available water supplies as follows:\n
A. Waters on the surface of the earth.
   a. Diffused surface waters.
   b. Surface waters in watercourses.
      1. Flowing in well defined channels.
      2. Flowing through lakes, ponds or marshes which are integral parts of a stream system.
   c. Surface waters in lakes or ponds unconnected with streams.
   d. Spring waters.
   e. Waste waters.

B. Waters under the surface of the earth.
   a. Ground waters.
      1. In defined subterranean channels.
      2. Diffused percolating waters.

All these would seem to be included in the waters appropriate under the Montana statute, which includes "or other natural source of supply," though some difficult cases have arisen over the appropriation of flood, waste and seepage waters. These have been held subject to appropriation, but the proprietor of land may change the flow of waste waters thereon to suit his purposes, so long as he does not act maliciously or arbitrarily to the detriment of the appropriator. The prescribed manner of appropriation of such waters is by impounding them in a reservoir, the right so acquired being measured by the quantity of water which the reservoir will hold at one filling. Any person (including a corporation) may appropriate

\n\textsuperscript{\textsuperscript{50}Hutcheson, op. cit. supra note 11, at 1.}
\textsuperscript{\textsuperscript{51}R.C.M. §7093.}
\textsuperscript{\textsuperscript{52}E.g., Woodward v. Perkins, 116 Mont. 46, 147 P. 2d 1016 (1944).}
\textsuperscript{\textsuperscript{53}Popham v. Holloron, 84 Mont. 442, 275 P. 1099 (1929).}
\textsuperscript{\textsuperscript{54}Newton v. Weller, 87 Mont. 104, 286 P. 133 (1930).}
\textsuperscript{\textsuperscript{55}R.C.M. §7093.}
\textsuperscript{\textsuperscript{56}See Federal Land Bank v. Morris, 112 Mont. 445, 455, 116 P. 2d 1007, 1011 (1941).}
\textsuperscript{\textsuperscript{57}R.C.M. §16.}
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unadjudicated waters by posting a notice of appropriation at the point of intended diversion, stating the quantity of water claimed, the purpose of diversion and size of channel, the date, and his name. Then within twenty days he must file with the county clerk in whose jurisdiction the point of diversion lies a notice of appropriation containing the above data and the name or a description of the stream and a description of the point of diversion with reference to some permanent monument. This notice must be verified by an affidavit of the appropriator or someone on his behalf stating that the contents of the notice are true."

Filing the notice does not give the appropriative right, but only the right to perfect it. This is done by the construction of the means of diversion, completed with reasonable diligence after having been begun within forty days after the filing." Unless this is done, the appropriator's right is suspended until he completes his works, at which time his right relates back to the date he posted the notice." This date governs his rights as to all other appropriators, the first in time being first in right." Before the 1885 statute, the elements of an appropriation were a completed ditch and beneficial use of water, and the water right related back to the date the ditch was begun." This manner of appropriation was not superseded by the statutory method, but relation back is now controlled by the statute so that one seeking to avail himself of that doctrine can only do so by compliance with the statutory requirements." As means of conveying the water from the point of diversion to the point of use are indispensable adjuncts of water rights, the appropriator has the right to build any works necessary for such purpose, such as dams, reservoirs and embankments, across intervening lands, and to take by the private form of eminent domain any land necessary therefor on payment of just compensation." For the purpose of making it easier for the United States to proceed with its valuable work of reclamation and improve-

*R.C.M. §7100.
*R.C.M. §7101.
*R.C.M. §7102.
*R.C.M. §7098.
"Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897).
"R.C.M. §7110.
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ment of land, it was authorized in 1905 to appropriate the water of streams or lakes in Montana through the secretary of the interior or his agents subject to the same general conditions applicable to appropriations by private individuals, with the proviso that such appropriation should be held valid for three years after filing the notice thereof with the county clerk. Unless at the end of those three years construction of a means of diversion has been commenced, the right terminates. In the same year the state was authorized to appropriate water via the state board of land commissioners in the same manner (but without the three-year proviso) in order to facilitate operations under the Carey Land Act.

2. Adjudicated Waters.

Where a decree of court has previously fixed the rights in a water supply, a person desiring to appropriate from it must employ a competent engineer to survey his intended diversion works, and must file a petition in the local district court giving the amount desired, a description of the source and the intended diversion works, the latter prepared by the engineer, showing capacity and means and place of use. A map of the project must also be included, as well as a declaration that any rights awarded will be subject to the terms of any existing decree. All persons appearing to have rights in the supply must be named as defendants. Upon notice to these parties a hearing is had, and the court may enter a permanent or interlocutory decree granting the appropriation sought, subject to all prior adjudicated rights.

The first statutory provisions for appropriation from adjudicated streams were passed in 1907 for the purpose of providing security for those whose rights had theretofore been adjudicated and to compel new appropriators to take their rights subject to those previously fixed after bona fide litigation by the decree of a competent court. This purpose failed when they were held to be non-exclusive, but they had been rein-

*L. 1905, c. 44; R.C.M. §7099. It may also take existing ditches by eminent domain, subject to rights of present owners. L. 1905, c. 70; R.C.M. §7134.

*L. 1905, c. 85; R.C.M. §1965.

*A discussion of the Carey Land Act is beyond the scope of this paper. See CHANDLER, op. cit. supra note 58, at 123-127; WIXI., op. cit. supra note 11, §§1380-1385; KINNEY, op. cit. supra note 1, §§1312-1336.

*R.C.M. §§7119-7133.

*L. 1907, c. 185, partly surviving as R.C.M. §§7129-7133.

*Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926).
forced in 1921 by new sections which made them thereafter exclusive."

The latest construction of these statutes was made in 1930, when a lower court granted a person conforming to the statutory procedure a water right, but limited it by requiring him to stop taking water when the water flowing past his point of diversion should be equal to or less than the arithmetical total of all prior decreed rights regardless of whether or not they were being used at the time. He appealed, and the judgment was modified to give him all the rights of a junior appropriator as if he had been included in the original adjudication. By this decision it is settled that the rights procured under the statute are the same as those in non-adjudicated streams, differing only in the procedure by which they are acquired.

3. Interstate Streams.

A statute adopted in 1921 requires the approval of the Montana legislature for the appropriation of water within the state for use outside, but in 1933 the state engineer was authorized to negotiate with other states regarding interstate waters and in 1937 such appropriations were authorized to be made by the state of Wyoming, to be valid only when the Montana water conservation board should issue certificates therefor, the statute to be effective only if Wyoming should enact legislation granting similar rights to Montana. It was also provided that the board might cooperate with Wyoming officials in the control of water rights on interstate streams. Wyoming now has a statute authorizing appropriation of water from the Little Missouri River in Wyoming for use in Montana on certification from Montana that it will be put to beneficial use.

As for appropriations within the state in which the water from interstate streams is to be used, it is generally recognized that the state line has no effect if both states recognize the
appropriation doctrine only (Montana-Wyoming, Montana-Idaho)." If one state employs the appropriation doctrine and the other the riparian doctrine (Montana-North Dakota), the controversy is settled by an equitable apportionment of benefits based on all the circumstances of the case.

B. Use and Protection of Rights.

1. Restrictions on Use.

Once a person has completed his works and acquired title to his water right, he is subject to several restrictions. He may change his point of diversion only if other appropriators from the same source are not injured thereby, and under the same restriction may change his place of use and the use itself. Instead of using a ditch, an appropriator or purchaser of water may turn it into a natural stream and reclaim it at a lower point, but in so doing, must not diminish or deteriorate water of other appropriators. If an appropriator has a right to more water than he needs, he must return any surplus on demand by a subsequent appropriator. This also applies to waste waters remaining after use by the prior appropriator.

An appropriator constructing channels across or over public highways, or using water therefrom, must keep the crossings in good repair where the water may overflow or otherwise injure the roads, on penalty of fine, while one constructing or using a dam or reservoir must see that it is secure and safe before filling it.

Persons with the right to sell water who have a surplus are required to sell it to anyone who pays or tenders the customary rates therefor. The purchaser must furnish the works necessary to carry the water away, and on doing so and tendering the price of it is entitled to enforce his rights by suit.

"See e.g. Bean v. Morris, 159 Fed. 651, 655 (C.C.A. 9th 1908).
"Wiel, op. cit. supra note 11, §§341, 342.
"R.C.M. §7095; Loyning v. Rankin, 165 P. 2d 1006 (Mont. 1946).
"R.C.M. §7095; Quigley v. McIntosh, 110 Mont. 495, 103 P. 2d 1067 (1940).
"R.C.M. §7095; Pioneer Min. Co. v. Bannack Gold Mining Co., 60 Mont. 254, 188 P. 749 (1921).
"R.C.M. §7086, 7086.1.
"R.C.M. §7007; Tucker v. Missoula Light, supra note 22, at 101, 250 P. at 15.
"R.C.M. §§7111, 7112.
"R.C.M. §§7117, 7118.
Purchasers under the above rules cannot resell water purchased by them after use, but if the sellers are in a position to do so, they may recapture the waste water and sell it again.\(^6\)

2. Manner of Protection.

The basic method of protection of water rights in Montana is by adversary proceedings between claimants in an action to determine the relative rights of all parties in the source of supply in question.\(^7\) This right of action is implemented by injunctions when necessary. Most water right cases are handled in equity, with an occasional suit at law for damages resulting from temporary wrongful diversions sufficient to injure crops. In these actions, the records made by filing notices of appropriation and claims to water rights in the offices of the county clerks\(^8\) are prima facie evidence of all statements therein contained.\(^9\) If a commissioner is in charge of distribution of a water supply, a person with rights in it may if dissatisfied with the commissioner's performance petition the court to give correct instructions to the commissioner or otherwise relieve the situation. No other pleadings, motions, etc., are necessary or indeed permissible.\(^10\) After hearing, the court may make any order it considers proper under the circumstances.\(^11\)

Since 1939 the state engineer has had authority to bring actions to have rights in water supplies adjudicated, in accordance with the stated policy of Montana that all the waters in the state be investigated and adjudicated as soon as possible to protect the rights of water users within the state and ground negotiations for interstate water compacts.\(^12\) If this policy is carried out, it may be foreseeable that the number of water right cases will decrease steadily until the legislature sees the wisdom of a centralized system of water control and vests administration of water rights in the hands of the state water conservation board.

C. Loss of Rights.

1. Abandonment.

The question of abandonment of a water right is one of fact.\(^13\) As the use must be for a beneficial purpose for a right

\(^6\) R.C.M. §7116.
\(^7\) R.C.M. §7105.
\(^8\) R.C.M. §§7100, 7103.
\(^9\) R.C.M. §7104.
\(^11\) R.C.M. §7150.
\(^12\) R.C.M. §§349, 68-349.76.
\(^13\) R.C.M. §7094.
to accrue in the first place, one attacking another's right must first ask whether any right ever existed,\(^{18}\) and if so, the question of abandonment may arise. Mere disuse does not constitute abandonment, though Chief Justice Callaway, who wrote many of the decisions on water rights handed down while he was a member of the Montana Supreme Court, has recommended a statute providing that disuse for a certain number of years be prima facie evidence of abandonment.\(^{19}\) No legislative action has resulted from this proposal, however, so the rule remains that to constitute abandonment in Montana there must be concurrence of relinquishment of possession, and intent not to resume it for a beneficial use.\(^{20}\) Most of the western states have provided by statute for forfeiture after a certain number of years, usually three to five, but Montana leaves the question to its triers of fact.

2. Prescription.

The water right of an appropriator may be lost, in general, by adverse use on the part of another, usually upstream from the appropriator, for the prescriptive period defined in the statute of limitation of actions to recover real property. This period is ten years in Montana.\(^{21}\) To ripen into a prescriptive title, there must be a continuous, exclusive, uninterrupted, notorious and adverse use of the water under claim of right throughout the statutory period, a result difficult to attain in a state where water flows in many stream beds only in certain months of the year. The problem may be further complicated sometimes by drouth which may prevent some streams from containing any water for years. Does such interruption break the continuous use? Does a year during which the appropriator does not need all of his appropriation prevent the use from being adverse? Then, too, what priority shall the person acquiring the prescriptive right be given? Is he to be put in the exact situation of its former owner as a purchaser would be, or does this right date only from the completion of the prescriptive period? Or from its inception? Such a detailed discussion is not within the scope of this paper, but these problems and others of equal interest arising from the topic of


\(^{19}\)See Allen v. Petrick, 69 Mont. 373, 379, 222 P. 451, 453 (1924).

\(^{20}\)Thomas v. Ball, 66 Mont. 161, 213 P. 597 (1922).

\(^{21}\)R.C.M. §§6818, 9015.
prescription of water rights are discussed in a Montana Law Review note to which the reader is recommended.

3. Estoppel.

No Montana case wherein a water right has been held to have been lost by estoppel has been found, but the doctrine is available if a situation to which it is applicable should arise. An appropriator may lose his right by the operation of the doctrine of estoppel if by inequitable conduct or by acts or declarations he leads others to make use of his water rights in reliance thereon. Usually some degree of turpitude on the part of the appropriator is required before he will be estopped, such as misleading statements or acts, or concealment of facts by silence, plus an intent to deceive or at least an expectation that the other party will act. Silence while another acts may or may not be the basis of estoppel, depending on the circumstances.

D. Water Commissioners—Administration of Rights and Distribution of Water.

1. Appointment.

Once the rights in a water supply have been adjudicated, the owners of fifteen per cent of the water rights affected by the decree may petition the court to appoint one or more commissioners to admeasure and distribute to all the parties the waters to which they are entitled under the decree. Any person owning stored waters, including the state water conservation board, may likewise petition to have such waters distributed by commissioners already appointed if it does not interfere with decreed water rights, in order to provide a uniform, equitable and economical distribution of waters. Where a water supply or system lies in more than one county, the district court of any county in which it lies may adjudicate the entire supply, and the one first acquiring jurisdiction retains it for the purpose of disposing of the entire controversy, so has the exclusive right to appoint water commissioners for the system. The commissioner’s pay is fixed in the order of appoint-


R.C.M. §§7136, 7137.

Whitcomb v. Murphy, 94 Mont. 562, 23 P. 2d 980 (1933).

State v. District Court, 107 Mont. 203, 82 P. 2d 779 (1938).
ment," and his tenure is fixed by the appointing judge, to begin on petition by at least three persons entitled to the use of the waters in question, and may at any time be changed on such petition or in the discretion of the court.\(^2\) If the owners of at least fifty-one per cent of a system request it, the court may also empower the commissioner to maintain and repair the system at the owners' expense, vesting in him all authority necessary to accomplish that purpose.\(^1\) All persons using water from a supply for which a commissioner is appointed must provide and maintain a headgate and measuring device at their points of diversion on pain of having their water withheld until they do so.\(^2\)

A commissioner may also be appointed if requested in the petition in an action to determine rights in a ditch owned by a partnership, corporation or tenants in common, to distribute the water according to the respective rights during the pendency of the action,\(^1\) and afterwards if desired by the owners of ten per cent of the waters in the ditch.\(^2\)

2. Qualifications, Duties and Authority.

Before entering upon the discharge of his duties, each water commissioner must file with the clerk of the district court appointing him a signed oath of office and a bond with two or more sureties for the faithful performance of his duties in such sum as the court may designate.\(^1\) No qualifications of education or experience are prescribed, but doubtless the appointing courts choose men qualified for the position.

A commissioner must distribute the water of which he has charge in accordance with the decree of adjudication subject to the further order of the court.\(^2\) If he misinterprets the decree or instructions he is subject to correction on petition of a dissatisfied water user,\(^4\) and if he fails to perform any of the duties imposed upon him by the order of the court he is guilty of contempt of court.\(^4\) He must keep a daily record of water

\(^1\) R.C.M. §7136.
\(^2\) R.C.M. §7139.
\(^3\) R.C.M. §7141.
\(^5\) R.C.M. §§7152-7157.
\(^6\) R.C.M. §§7158-7159.
\(^7\) R.C.M. §7150.1
\(^8\) R.C.M. §7142.
distribution, and file a summary monthly with the clerk of the court including a table showing the proportion of his salary charged against each user daily.¹⁸⁵

To accomplish his purposes, the commissioner has authority to build headgates or dams, repair ditches, and incur other expenses where necessary and charge the lands with them.¹⁸⁶ He may enter all lands in the performance of his duty to make necessary inspections and adjustments of the means of distribution, and has the same powers as a sheriff or constable to arrest anyone interfering with his operations.¹⁸⁷ Anyone interfering with the commissioner's administration of water in a disputed ditch is guilty of contempt of court.¹⁸⁸ Cases concerned with water commissioners are quite rare, but those few found pertinent are mentioned in the footnotes to this section.

III. CONCLUSION

Montana's primary need in the field of water law appears to be a centralized system of administration, to control the determination of existing rights, the distribution of water among those entitled to its use and the acquisition of new rights. The present system of appropriation by notice-posting and determination of rights by private suits in which it is not necessary to join all parties concerned is regarded by all who comment upon it as antiquated and outdated, having been abandoned since 1919 by every other western state. Where centralized systems have been adopted, the state's supervision and control is exercised through the state engineer or an administrative agency, with the function of the courts usually limited to deciding questions of priority of appropriation or appeals from administrative decisions. Montana has both a state engineer and an administrative agency, the state water conservation board, and needs only to have the legislature broaden the scope of their activities. A step in this direction was taken in 1939 as described above when the state engineer was authorized to sue for adjudication of streams, but the system is still administered by water commissioners appointed by local courts and records are required to be filed only in the office of the clerk of the court concerned.

The advantage to the public of a centralized system of

¹⁸⁵R.C.M. §7144.
¹⁸⁶R.C.M. §§7140, 7145, 7146.
¹⁸⁷R.C.M. §§7143, 7155.
¹⁸⁸R.C.M. §7157.
administration of water rights lies in the high degree of order and definiteness of rights which it affords. Priorities to water in a long stream system become a matter of record in one office, instead of being based on filings in a number of counties and upon acts of appropriation that may not become matters of record. Determinations of rights are made in comprehensive proceedings, based on public records and surveys, in which the state engineer participates, rather than in a multiplicity of suits between individuals. Distribution of water according to priorities in water supplies is coordinated under one public authority instead of being in the hands of water commissioners responsible only to the courts which appoint them. Economy to the public should also result from having permanent salaried water commissioners covering certain water districts, for at present their fees are limited only by the discretion of the courts.

Of course applications of centralized systems have not been uniform even where statutes have been enacted authorizing them, but since the first centralized control was set up over fifty years ago it has been shown that such a plan is workable, and the system is generally conceded in the West to have been of marked public benefit. None of the states which have imposed public control have receded from the principle, though specific functions have been rendered inoperative by unfavorable court decisions.

A contrary argument is that strict control is not needed because of the state's water supply, large for an arid region, averaging about fifteen inches yearly as compared to three or four in some of the other western states. Also, no pressing need appears, and the general inertia present when things are going satisfactorily helps prevent action. Still, some degree of improvement and benefit to the public is practically certain if Montana adopts legislation to centralize its system of administration of water rights. With all the records of success and failure to profit from in the experiences of the other western states, Montana, if she chooses, should be able to build herself the model of model water codes.