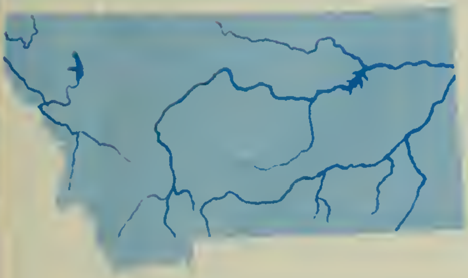
Symposium on Water Law and Its Relationship to the Economic Development of Montana's Water Resources



Montana University Joint

Water Resources Research Center

Symposium on Water Law and Its Relationship to the Economic Development of Montana's Water Resources

Edited By Helmer Holje

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June, 1971

FOREWARD

This symposium on Water Law and Its Relationship to the Economic Development of Montana's Water Resources was held in Helena, Montana, January 15 and 16, 1971. It was designed to analyze and discuss Montana's water law relative to the development of its water and land resources. Particular problem areas that impede or create conflicts in the use and development of these resources were given special attention. The symposium provided a forum for frank and open discussion of these problem areas enabling the participants and guests to develop a common understanding which should lead to a more optimum development of the State's water and land resources.

There were 28 people representing state and federal agencies, legislators, university personnel and lay people as direct participants in the Symposium. The presentations of each of these people are included in the proceedings. It should be pointed out that in many cases the participants did not have prepared papers. Their comments were transcribed, typed and edited by the Montana University Joint Water Resources Research Center without final editing by each of the participants. This was done to expedite the publication of the proceedings. An attempt was made to preserve the informal atmosphere that prevailed throughout the sessions. The Chairman assumes full responsilility for the editing and extends his apologies for any errors or misrepresentations in the final text.

Sincerely,

Helmer Holje
Chairman

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OPENING REMARKS AT WATER LAW SYMPOSIUM

Helena, Montana - January 15, 1971
by
D. P. Fabrick

I appreciate the privilege to open these proceedings by calling your attention to the purpose of this symposium, as it is stated on the agenda.

Reference is made in the statement of purpose to "problems that impede development." and to seeking a common understanding which should lead to a more optimum development of our water and land resources. These references indicate that the rate of progress in water development during recent years needs serious attention and correction.

We in Montana, for the last 100 years have taken part, and for many years to come will have a part, in the great epic undertaking to establish a healthy and permanent economy in the semi-arid American West.

At times we have been strong and leading participants. In recent years we have been faltering.

The history of water development is marked by a series of cycles, consisting of periods of accomplishment, each followed by a slow-down in activity, and then by an up-dating of programs to meet the new needs and the new opportunities of the next period of active accomplishment.

Speaking of new opportunities, we have already experienced a practical example of the importance of "water law and its relationship to the economic development of Montana's water resources," which is the theme of this symposium.

The Water Conservancy District Law, enacted by the 1969 session of the legislature, enables us to create and operate multi-purpose water resource projects.

This new enabling act created new opportunities for modern multi-purpose water development, and has already caused widespread interest in different sections of the State for this type of water development. This is encouraging.

It is hoped that this new law is the forerunner of additional changes in our water law and in administration of water resources. This symposium is held to aid progress in that direction.

However, the up-dating of our water laws, important as it is, is not the only corrective that is needed to bring about a new period of urgently needed constructive progress.

There are other problems. They are referred to in the stated purpose of this symposium as "problem areas that impede or create conflicts in the use and development of water and land resources."

Some of these problem areas may readily be identified.

One of them relates to our research and planning in the field of water development.

Another is the conflict between developers and preservationists.

A third one is the existence of un-coordinated single-purpose resource agencies, operating independently and sometimes at cross-purposes.

Where these issues have created conflict, we should approach them in an attitude of accommodation and co-operation, for the purpose of finding acceptable comprise that will best serve the broad interest of the State as a whole.

In addition I would like to offer the following observations and suggestions:

1. With reference to research and planning.

   We all expect that in the not too distant future, proposals will be seriously advanced for the diversion of water supplies from our river basins to water-scarce areas of the nation.

   Before such proposals become active federal issues, our main effort must be to establish additional vested water rights by creating new actual beneficial use.

   The urgency of this particular situation, added to the present need for economic growth, requires that our present research and planning be action-oriented.

   The main emphasis of our research and planning in the field of water development must be aimed at practical results, at project formulation, at implementation, and at an early increase in our total actual beneficial use, and at a corresponding increase in the total of our vested rights to the use of our waters.

2. With reference to the conflict between developers and preservationists.

   There is no basic conflict between resource development for a healthy economy, and the preservation of a healthy environment. We must maintain a reasonable rate of economic growth and we must also maintain a livable earth.

   Both of these needs are imperatives. They are not mutually exclusive. They go hand in hand. A healthy economy cannot permanently endure in a sick environment. A healthy environment is essential to the stability of a sound economy.

   The controversy arises not because of a basic conflict between a healthy economy and a healthy environment. The conflict is superficial and narrow. It exists only between the developer who ignores the need for a healthy environment and the preservationist who ignores the need for economic growth.

   It is my observation that this narrow conflict in recent months is noticeably subsiding and is giving way to a growing trend towards positive support for a balanced program that includes both economic development and environmental protection.

Our present need is for suitable legislation that will foster resource development, and that includes adequate provisions to protect the environment.

3. With reference to the need for a Department of Natural Resources.

The vital interests of the State in the development and management of our natural resources are not served as effectively and as efficiently as they should be. Un-coordinated single-purpose departments operate independently and sometimes at cross purposes. This creates unresolved disputes, delays and obstruction to progress.

The inclusion of these departments into a single Department of Natural Resources will make possible co-ordinated direction for the effective operation of government functions that are vital to the welfare of the State.

If we seek early improvement in our progress toward optimum development of our water and land resources, then the establishment of a single Department of Natural Resources is an essential and important step in the right direction.

WATER RIGHTS -- FUNDAMENTAL CONCEPTS

by

Henry Loble

It is a genuine privilege for me to appear at this Symposium. As I view my function here it is to lay the basic groundwork for the discussions which will follow. You are going to be privileged to hear from persons who have profound and specialized knowledge of the subject of water and the law relating thereto. In order to properly understand the following speakers, you should have a basic understanding of Montana Water Law as it exists today, and I, hopefully, will try to provide you with that knowledge. If, upon the conclusion of my remarks, there is anything about which you have any question, please do not hesitate to ask me about it. I will do my best to answer.

In some of my remarks, of course, I will be saying things that will be rather elementary to those of you who are specialists in this field. Nevertheless, I feel it necessary to say them for the assistance of the lay persons and others here who do not have the specialized knowledge that you professionals have. I may even say something that you disagree with. Certainly, the law on any subject, including water, is not so certain and exact that there is not room for argument. The law in all of its branches in not an exact science. God forbid that it should ever become so. I don't know what would happen to all of us lawyers and judges if it did.

Certainly, I cannot expect to cover the entire field of Montana Water Law at this particular time, and if I tried to I am afraid you would all get up and leave. No one should be required to take such a large dose of medicine at one time.

In this discussion my remarks are directed toward the usual waters which concern the average person. By this I mean surface waters in a defined channel and stream bed and ground waters which are normally viewed as such. I don't think it would serve any purpose for me to discuss, except in passing, such refinements as vagrant waters, waste waters, waters which might or might not be ground waters, and similar subjects, moreover, most of the case law in water law arises in connection with irrigation of agricultural lands and, necessarily, my comments will be largely related to waters used for irrigation except where I otherwise specify. I should qualify this by saying that much of our water law grew out of the use of water for mining purposes, but this has become less and less important over the years simply because mining for many years last past has, in general, not proved to be economically feasible except perhaps for very large operators.

Montana is one of the western states which, in its law, views the beneficial use of water as the important thing. In the early law in the eastern part of the United States, Riparian Rights in water courses were recognized. Basically this meant that every person owning land on the bank of a stream possessed by reason of such land ownership, a right to the use of the water in its natural stream flow, without dimunition or alteration. Such a doctrine never proved feasible in the western states and this probably was because of the special problems arising in the west because of our semi-arid conditions. This rapidly growing western area made increasing demands upon limited water supplies. Thus grew up the body of law which can best be characterized, in my

opinion as, firstly "beneficial use" and secondly, "first in time, first in right". In Montana, your water rights do not relate to your ownership of land on the bank of a stream but rather to whether you are making a beneficial use of water. In order to make a valid appropriation of water you must make a beneficial use ot it. This is fundamental to our water law. Your land may lie many miles distant from the stream from which your water comes but you could, theoretically, divert the entire stream over to your land to the exclusion of the landowners on the bank of the stream if you make beneficial use thereof. The second fundamental concept is that he who made the first beneficial use of this water has the first right. So, to return to our example, we should qualify by saying that if you are the first one to use the entire stream, and you can use it beneficially, you are entitled to it, whether or not your land is contiguous to the stream itself. Of course, (except for lucrative mining enterprises) it generally proved far too expensive to transport water for long distances so that the use of water from the stream was made close by the stream or in its watershed, but certainly, this was not always true. If you made beneficial use of it, and if you were first in time, you could take the water completely out of the watershed if you so desired. This is still the law in Montana.

When water rights are adjudicated upon a stream of water, priorities are accorded to the various users in accordance with the time when each made his first beneficial use. Many streams have 40, 50, 60 or more adjudicated water rights. Their priorities commence, in most cases, in the early 1860's are the early water rights, i.e., those used first for beneficial purposes are the best water rights and take priority. The late water rights, (perhaps those in the 1900's) may only be high water rights that can be used just during times of high or flood waters. Most, if not all, of the streams and rivers of Montana are high in the spring or early summer when the flood waters rush down from the mountains. At this time everybody's water right is filled and there may even be water which goes unused and flows into our larger rivers and thence on out of the state. As the summer progresses, however, less and less water flows down the stream, and the later rights are cut off until finally, in the hot days of late July or August, perhaps only the first one, two or three water rights are filled. The result is that many of those who depend upon water from a stream in Montana are cut off entirely as the flow of the stream diminishes with the onset of warm weather. It is quite possible that those with the early water rights, i.e., those first in time, still have ample water while the rest of the users on the stream watch their fields dry up and wither away under the hot summer sun. This may seem harsh, but this is the law.

The regulation of our water is entrusted to the District Courts of this State. This occurs only, however, if the particular stream in question has been adjudicated by a District Court. If it hasn't been adjudicated, there isn't any lawful regulation on the stream as far as I have every been able to tell. Many, but not all, of our important streams and rivers have been adjudicated. By adjudication I mean a court action has been brought and the various water users of this particular stream have presented their contentions to the court and a decision has been made as to who has the right to use the water and what the

priorities are on that particular stream. It should be observed, in passing, that nobody owns water in Montana. Your water right means that you have a right to use water but if you don't have a need for it at the particular time that it is available, then you must permit it to flow through to the user who is next in priority. If he can't use it he, in turn, must let it flow through to the user next in priority and so on.

If the stream of water in question has been adjudicated and the priorities of the various water rights established, then the water users have a right to have the court appoint a Water Commissioner. It is this Water Commissioner's duty to measure and distribute the water to the various water users on the stream in accordance with the decree of the court and the respective water rights and priorities of the different users.

Generally speaking, our early water right decrees measured water in miner's inches. For example, a decree will read that John Jones is entitled to the first water right as of April 25, 1865, in the amount of 100 miner's inches. According to law in Montana 40 miner's inches is equal to one cubic foot per second and, to use our example of 100 miner's inches that is two and one half cubic feet per second. Because the term "miner's inches" is used with such frequency in the decrees we lawyers have become accustomed to use that term but certainly, the more scientific terminology is the volumetric measure of cubic feet per second.

The law requires each user to measure the water as he diverts it from the stream, which is generally in a ditch. An approved measuring device or weir must be placed in the ditch as near to the head thereof as practicable.

Many streams in Montana have never been adjudicated. To me this means that the users of water on those streams are in a very uncertain legal position. They don't know what their rights are and there is no way to find out except through court action. Many persons depend upon a "Notice of Water Right Appropriation" filed by one of their predecessors in interest. To depend upon such a notice is to lean upon a very weak reed indeed. It may not be worth the paper it is written on.

Most streams of water in Montana are over-appropriated on the written record. However, the court must limit the use of water to that which can be used beneficially. So, many times a stream which appears to be over-appropriated according to the written record is actually not. It may be that someone believes he has 900 miner's inches of water for irrigation of 100 acres of land. He has a "Notice of Water Right Appropriation" or even a court decree to prove it. But it is very doubtful that any court is going to allow him to pour 900 inches of water upon 100 acres of land. That is not beneficial use. That is waste, and the court will not recognize wasteful use of water.

How do you appropriate water from a stream in Montana? How do you gain a water right in Montana? The only water right, in my opinion, that you can depend upon is an adjudicated water right. Even with an

adjudicated water right, you certainly can't always be sure. Litigation continues upon adjudicated streams. In some cases, such litigation has gone on for generations. My father, later District Judge Lester H. Loble, and his partner, later Chief and Associate Justice of the Supreme Court Hugh Adair, when I was a child, handled litigation on adjudicated streams for the persons then owing the right to use adjudicated water rights thereon. Since then, as a lawyer, I have handled much litigation for the sons of those persons. My son, Lester H. Loble II, is now starting to handle litigation for the grandsons of the original clients of my father and Hugh Adair. Sometimes it seems as if these questions will never be settled even on adjudicated streams. As mentioned above, however, some streams are not adjudicated. One in this vicinity, a rather large stream of water, is the Little Blackfoot River on the west side of the Continental Divide across McDonald Pass.

The manner in which most persons have appropriated water from unadjudicated streams is to simply take it and use it. In other words, to appropriate water from an unadjudicated stream in Montana you need only to divert it from the stream and use it upon your lands for irrigation or for such other beneficial use as the law recognizes, this has always been the law in Montana.

You may, if you wish, follow the statutory procedure of Posting Notice and filing a record of your water right appropriation with the County Clerk and Recorder. But you don't have to, and you have never had to. So, if you can prove that Great Grandpaw Ned back in 1865 diverted 500 miner's inches from the Little Blackfoot River, put it in his ditch and used it on his land, and that you now own that land, you have a water right whether any record was made of it or not. To make the matter even more confusing, the greedy nature of man is such that those who did post and record a Notice of water right appropriation usually stated therein that they were entitled to about 3 to 10 times as much water as they actually diverted and used for beneficial use. So if you add up the recorded notices you usually find that the stream is greatly over-appropriated but, in fact, it may not be. On the other hand there are many water rights established by diversion and beneficial use with not a written record in the world to evidence their existence.

Since the passage of a law in 1921 requiring this, the only way to appropriate water of an adjudicated stream is to start a lawsuit and name all of the decreed users on the stream as parties. The Court then, after a rather involved procedure, can give you, by a Court Decree, a right on the adjudicated stream which is Junior to the other previously adjudicated water rights. I am advised that the Montana Water Resources Board proposes to or has introduced a bill in this session which would apparently give to the Fish and Game Commission the right to appropriate all unappropriated waters in the streams of the State of Montana by simply filing a notice. If enacted this would appear to exempt the Fish and Game Commission, as far as adjudicated streams are concerned, from following the procedure that everyone else has to follow to appropriate waters of an adjudicated stream.

I sincerely hope I haven't confused you too much by this time. If I haven't, I will now try to do so. Theoretically, one who owns a water right or has a right to use water on any stream in Montana can lose it in several ways. Firstly, he can lose it by prescription. This means that if someone else uses it adversely to him, in a hostile manner, continuously, exclusively, (with notice to him) for a period of at least five years, at a time when the original user has need for it, such a person theoretically can take this water right away from the original owner of it by the theory of prescription or adverse possession. Also, if you decide you have no further use for your water right and you intend to and do abandon your right to use it, you lose it forever. Theoretically, if you abandon a water right at this instant and it can be proved that you did so and that you intended to do so, you could never again re-establish your right to that water.

As mentioned above, I do not want to give the impression that the only water rights I know anything about or that are lawfully recognized in Montana are those for agricultural irrigation purposes, certainly, Mining, Domestic, Industrial, and Power uses are recognized as beneficial uses. In addition, in my opinion, the Legislature and our Courts have probably already recognized recreation as being a beneficial use of water. There are no doubt other beneficial uses of water which I have not mentioned.

It does not seem within the purview of my subject to talk about water rights allocation through boundary agreements with Canada or by compacts with other states. Certainly, however, this is an important area of water law and one that is of the utmost concern when dealing with streams of water which go from Montana into other states or Canada, or vice versa.

The rights of the various Indian Tribes to the use of water is one that many of you have been or will be concerned with. Our Courts have held as a matter of law that rights to the use of the waters arising on or flowing upon or across the Indian Reservations were impliedly reserved to the Indians. The only real question is the nature, extent and quantity of water so reserved. It appears that the Indians are entitled to the use of sufficient water to irrigate all reservation lands susceptible of irrigation.

To exhaustively treat the subject of Private Irrigation Companies, Public Irrigation Districts, and similar entities would not, I believe, serve much purpose in these remarks. However, among those competing to use water in Montana are both Private Irrigation Companies, Public Irrigation Districts, the Government of the United States, the State of Montana, the Fish and Game Commission, Cities and Towns, and any person including a natural person, partnership, corporation, association or the like.

To the best of my knowledge, with one exception, neither our statutory law nor our courts have ever allocated water rights as between competing interests such as irrigators, domestic and industrial users, utilities, recreation, Fish and Wildlife interests, etc. The one exception is section 89-801 which was passed in the 1969 session and gave to

the Fish and Game Commission the right to appropriate the unappropriated waters of certain blue-ribbon trout streams. This was to be in such amounts as might be necessary to maintain stream flows for the preservation of Fish and Wildlife Habitat. The law provided that such uses would have a priority of right over other uses until the District Court in which lies the major portion of such stream or streams shall determine that such waters are needed for a use determined by said court to be more beneficial to the public. A similar law which extends the right of the Fish and Game Commission to make such appropriations to all of the streams of Montana is proposed for passage to this Legislature by the Montana Water Resources Board.

You may be interested to hear that because there is no statutory preference given to use of water for one purpose over another purpose, except as noted above, our Supreme Court recently held that a city using waters of a stream for its Municipal water supply had no rights, simply because it was a city, greater than those of any farmer or rancher using water on the same stream for irrigation purposes. The city probably could, of course, acquire additional water by condemnation or eminent domain for use of the public but that is not water law but another theory of law entirely.

The right of the United States Government in navigable waters within this state must certainly be taken into account in considering any right to use water in Montana.

There is a rather prolific body of Statutory Law in this State authorizing the creation of Soil Conservation Districts, Irrigation Districts, Drainage Districts and the like, all having some of the vestiges, or accoutrements of a political subdivision of the State of Montana. A rather limited analysis suggests that there is a certain overlapping of purposes, areas of responsibility,and roles when the functions of these entities are compared with the functions of Water Conservancy Districts which were authroized by the Legislature in 1969. Our legal firm has acted as attorney for those responsible for the feasibility studies authorized by the Montana Water Resources Board under the Water Conservancy District law passed by the last Legislature. These Water Conservancy Districts are designed to plan for co-ordinate, and beneficially use the waters within any such district which may be established. I do not think that we should go into this matter extensively at this time but certainly the availability of finances for such districts is the most important question in that area at this time. As I have suggested, however, such Water Conservancy Districts are not possessed of priority over or supremacy above anyone else in the State of Montana as far as the use of water is concerned. This in itself may come as a surprise to some people.

Probably the principal means of making more water available for use in the future in Montana is through the use of dams and reservoirs. I don't intend to discuss this part of the law extensively. However, one should realize that it isn't as simple as just going out and building a dam and a reservoir on some stream, its tributaries, or in the drainage area of a stream in Montana. Due regard must be had for presently existing water rights. Speaking in a general way, where prior rights

exist, any such dam and reservoir must be constructed so that all of the water going into it is measured, and all of the water released from it is also measured. The outlet for the dam should be constructed in such a way that the entire dam can be drained if required to honor prior water rights. While such a reservoir may be used to impound waters that would otherwise go to waste, it cannot be used to impound waters to which others have prior rights. Therefore, when there are no more surplus or flood waters, all water must be measured into and out of the reservoir to insure that the prior rights receive the seniority to which they are entitled. As a general rule, such reservoirs may only be filled once a year and that would be in the winter when little or no use is being made of irrigation rights, and in the spring when large volumes of water released by melting snows come down from the mountainous drainage areas.

Legislation regulating ground waters has wisely been enacted by the State of Montana. Ground waters (defined as any fresh waters under the surface of the land including the waters under the bed of any stream, lake reservoir or other body of surface water,) are now subject to appropriation in the State of Montana by statutory compliance. Rights in existence prior to the law are not affected except for legal advantages given when filing is done. A person may obtain a right to the use of ground waters without a well, by sub-irrigation or other natural processes. Ground waters are under the general jurisdiction of the Montana Water Resources Board. In order to currently appropriate ground waters, certain filing requirements are set forth in the applicable statutes. In addition, the work necessary to utilize the ground waters must also be accomplished. Controlled ground water use can be set up by the Montana Water Resources Board in a ground water area which is defined as an area which, as nearly as known facts permit, may be designated so as to enclose a single and distinct body of ground water which is a geologically established area designated so as to enclose a single and distinct body of ground water. Ground waters do not seem to be as important in the minds of the Montana Public as is true in such areas as Arizona, New Mexico, and other arid states where it is a highly significant source of supply of water. Certainly, as competing interests become short of water in Montana, ground water is going to be increasingly important, especially in the dry areas of the state where rainfall is limited and there are very few dependable sources of supply of surface waters. From a technical legal standpoint, there are no doubt going to arise cases where it is difficult to distinguish whether a designated source of water is ground water or surface water. Different methods of appropriation, priority, and regulation are statutorily provided for ground water as distinguished from surface water. If this Legislature again extends the time for filing records of previously existing ground water rights, I advise you to do so. It could be very important and advantageous to you.

Although our water law clearly states that there shall be no waste of water, we all know how wasteful is our process of using water in this state. Flood irrigation of agricultural lands, as generally practiced in this state, is highly inefficient and wasteful. Qualified Hydrolo-

gists tell me that at times the efficiency is 20% or less. Sprinkling for irrigation purposes, by contrast, is highly efficient. It has a defect, however, it is expensive. But, regardless of the expense, how long can Montana continue to wastefully and inefficiently use its water? It certainly seems to me, although I have no statistics on the subject, that most of our water is used for agricultural irrigation, and that most of that irrigation is done by flooding the land from ditches in a highly wasteful and inefficient manner. The Engineers and Hydrologists who are present here will be able to address themselves to this subject with a great deal more expertise than can I. However, in an article in the January issue of the Montana Farmer-Stockman, Hurlon C. Ray, Director, State and Federal Assistance Programs, Federal Water Quality Administration, said:

> "Western water laws hinging on the doctrine of prior appropriation, protect the rights of the irrigation community to water for use in producing agricultural products. This is right, and the way it should be. But, as a continuing thread in all Western Water Law is the key concept of the right to water for beneficial use. Perhaps the states involved must take a far sharper view of beneficial use, as related to what amounts of water are actually used beneficially and what amounts are lost through inefficient irrigation practices and conveyance systems. Conservation of our limited water supplies and protection of the quality of the water in our streams for all other uses must be accomplished to support the growing population and increasingly complex and expanding economy in irrigation agricultural areas."

Considerable dissatisfaction exists as to the legally established methods of appropriation and regulation of surface water in the State of Montana. Many believe our historically established law is inadequate and not able to provide for the economic development which is certain to occur in this state. Complaint is heard at every hand that there is no finality to our water law in that constant, almost never-ending litigation occurs which sometimes involves the same water rights on the same stream of water. In some instances, such litigation, as I have previously referred to, has lasted for generations, with no end in sight. Distinguished scholars of water law have written well reasoned articles on this failing which seems to be inherent in our Montana water law. It would be difficult indeed not to agree that changes are indicated. However, such changes should be made with the greatest care and only after study by many qualified persons as distinguished from one or two qualified persons. At least our present water law, even with its deficiencies, has the advantage of being familiar to us, and the statutes and decisions have considerable authority in that there have been relatively few changes in our water law over the history of this state.

To make drastic and sudden changes, without proper study by qualified persons, can lead to more rather than less litigation, delay, and

uncertainty. It is probably far too late, at least for this Legislative Session, to follow my advice even if persons in authority thought it was worthwhile. However, it would be my advice that before any material and substantive changes are made in our water law by this Legislature or any other, that the proposed changes be referred to a Board, Panel or Commission of qualified Water Lawyers, Judges, Hydrologists, Engineers or others with professional knowledge of the subject. At least if this is done, we will have attempted to produce a finished and superior legal product. To do otherwise is to trust to chance that the changes made in our well-established body of water law in this state are helpful rather than harmful.

I want to thank those responsible for this Symposium for the opportunity of speaking here, and I want to thank you in the audience who have so patiently and courteously listened to me.

LEGAL PROBLEMS ARISING FROM CHANGING NEEDS, USES AND AVAILABILITY OF WATER

by

Judge W. W. Lessley

I want to thank the people who are responsible for my being here for the opportunity to discuss with you some of the legal problems that relate the development and use of the water resources of Montana.

Many of these problems are of our own making. Others have been thrust upon us and some are present because of the changing tone of our environment and our concern with water which is basic to the treasure in the Treasure State. First, we might talk about the problems associated with the adjudicated streams. I am so grateful to Henry for laying such a fine and basic understanding of the law. We are, as he indicated, an appropriation state that it is based upon the rule of first in time is the first in right. We can carry the water out of the stream and over to another area far away if we use it beneficially.

Now what about the adjudicated stream? There is a lot of learned discussion about it, but what is an adjudicated stream? I say it is a quick frozen stream of appropriations. Many in the field have taken the attitude that it's guilt edge and final. The actual fact of the matter is that it is not. It is not a final decision and it is certainly not settled. It does provide some records for the Engineer's office to hang their hat on. It is not nearly as bad as the unappropriated streams that Henry has talked about. There you have no idea at all what the beneficial uses and claims are of the water users. You do have some records when the stream is adjudicated. They may be inflated, but nevertheless, they are there. A famous case pointing out the uncertainty of rights even on adjudicated streams was that of Charles Reeder in 1935. These were dry times over on the Red Rock and Beaverhead Rivers. Charles Reeder opened the headgate that supplied his ranch with water. This was in open violation of the ruling of the water commissioner who had been appointed to carry out the court order issued by Judge Bennett on the basis of the stream adjudication which was a matter of record -- if you can find them in the Madison County Court House. Reeder was called in front of the Judge and held in contempt. He appealed to the Supreme Court which reversed Judge Bennett's ruling. This man's rights had never been adjudicated on this particular stream. That's true of practically every stream in the state. We've gone along for years and no one really wants to disturb the situation because with disturbance you have litigation. But the fact of the matter is that an adjudicated stream is not the precious frozen certain situation that we think it is in the Gallatin or anywhere else in Montana. I don't nosey this around. I keep this as quiet as I can so as the old lady says, "I can keep a secret, it's the people I tell it to who can't." As a matter of fact, we don't have any records on a lot of adjudicated streams. I would hate to tell you how many adjudicated streams we have in the Gallatin that don't have any decree. So the adjudication which we think is final, certain, and definite, is not. The problems that come with that, of course, are real. The problems that are going to come up as we seek to inventory our rights, are tremendous. Mr. Billie can tell you that there are no records on literally hundreds of

uses on the unappropriated streams and even on the adjudicated streams.

Henry talks about all of his difficulties with clients. When I first started practicing law in the Gallatin it was a dry year. You could tell by the number of shovel assaults we had. We have a saying down in our area that you can steal a man's wife, but you'd better not steal his water. I'm glad this year that there's so much snow that you can't ski in the Bridger's. This means that next summer I will not get the early calls. You may remember in 1950 I said in a speech at the University of Montana that engineers should be in charge of the adjudicated streams and the handling of the water. It should not be the Judge. When I got home they had the rail all ready for me, were warming the tar and had the feathers gathered. They said, "Don't you love us any more?" And I said, "Yes, I do, but I think this is an engineer's job." It is in most every other state, but not in Montana. So what do you do? You get a part time ditch rider who gets paid for about a month and a half. He is usually an old fellow who can't get anything else and is very sure of his job. I am very happy with one of my water commissioners. He's a fellow who has certain physical defects that make it difficult for him to speak very well and clear. We still have a number of Dutch people that have difficulty speaking English so that by the time they figure out what he said, and by the time he figures out what they said, they've cooled down. Once I sent a red-headed fellow, who was a college graduate to a stream in the Madison. He was in a first degree assault case within a week. So I don't know. I just know that I don't want to have to administer the water.

Ownership of stored water in the reservoir of natural lakes is another legal case that will give us all sorts of problems in the future. We, of course, have a provision that you can appropriate water and store it. Our constitution so provides. Dominich vs. Johnson is a very interesting case in which the Supreme Court said water was to be conserved and that the construction and maintenance of reservoirs for the conservation of flood waters and other water that would go to waste is a perfectly legitimate use. Remember what Henry said, "No one owns any water in this state, we have only the beneficial use." So when a fellow turns the water into the borrow pit and says, "If you think that SOB is going to get his secondary rights, you're crazy." That's when the Judge steps in and issues an injunction or restraining order and makes him put the water back. But what about the reservoirs, shades of 10-Mile and a few others that we have been around? You may remember when one lawyer said, "I represent 25,000 people in the city of Helena." I said to that lawyer, "Yes, but I don't run for election in Lewis and Clark."

The water law on reservoirs says you can store it. You can store the water that would ordinarily go to waste. You can store it during the winter time and during the high water time and then use it as you need it. The fellow who has appropriated decreed rights must watch your stored water go by. He doesn't dare use it. He may get ulcers and want to kill people and say, "What about my prior rights?", but that is the law. You can also have situations where they try to store not only in the winter, but in the fall, spring, and in the mid-irrigation season. The city manager of Helena and I once had a 'phone conversation about this. We never really needed the'phone. I leaned out the window and said, "Don't

use the 'phone, just lean out the window and yell at me. I'm in Bozeman." He said, "Well, why do we have to put a measuring device in now?" I said, "Because the law says that our water rights statutes provides that an appropriator may impound flood and seepage water in a reservoir and thereby appropriate." The law also allows him to collect water if the other rights are not needing it. Calloway said a long time ago, "He who saves something that would otherwise be lost is not only to be protected in what he has saved but commended for so doing." And that is the theory of reservoirs, but remember that the fellow way down in the Helena valley still has that basic right and it's there and this is one of the big problems we are going to have as we move into this idea of conserving. In the eastern part of the state where they have intermittent flow, they are going to have many of these problems.

I'm not going to talk about the right to national stream channels, particularly, but we are going to have more and more problems as we move into the adjudication of navigable streams. What's a navigable stream? I say that a navigable stream is a stream which the Supreme Court of the United States says is navigable. Now that is not very definite and certain, but that is the situation.

What about underground water, or overdraft and recharge? If you think I'm going to get mixed up in the technical engineering phase of that you're crazy. But there's going to be all sorts of problems concerning the relationship of ground and surface water. Henry talked about the fact that in Arizona they mine water. We are beginning to do that now. All sorts of interesting things are happening around the City of Bozeman. Recently, a lady called me who has a quarter of an acre and one-inch of water. Apparently, somebody has dug two wells which are interfering with her surface rights and wanted me to guarantee her supply. She said, "I want it delivered at my headgate." I said, "All right my friend"--and I use that word loosely after she called me about the fifth time and I kept telling her to see a lawyer. "You get a measuring device that will staisfy my Water Commissioner that he can measure one inch, but why not dig a well on your place and get 75 inches of good mountain water." Frankly, I like our underground water code. First of all it takes care of abandonment. It says if you don't use it, you don't have all this monkey business about proving abandonment Henry talked about. We also have unitization programs so that the state office can do something about overmining or overusing. I have 13 acres and I was thinking when Henry was talking that I have filed on every thing I could think of. I've got the well in the garage. Another well in the guest house and, of course, one in the barn with grandfather filing on all of these. I have also filed on the seepage water that comes down through M.S.U. And if you think that's unusual then you should look at water rights around this country. You are wrong. Most streams are over appropriated. If you're going to file, you're going to file big,aren't you? If you're hurt, are you going to sue for $2,311.64? You are like the dickens! You're going to sue for about $20,000 and hope you get half of that.

You understand as Henry indicated, that if you file an underground water right now it has the same legal rights as surface water. You take your same first in time, first in right priority with any surface rights that may be filed subsequently. But the old surface rights are still there and still prior. Can you imagine the problem that will develop when the ground water appropriator contends that a junior surface water appropriator is preventing a stream from recharging his aquifer. That would be an interesting case, but I think I want to be on vacation when that comes up. Or, when a surface water appropriator contends that a junior ground water user is taking water from an aquifer that would otherwise contribute to his stream flow. I am sure I want to be long gone on that one because we're going to have Mr. Twiddlededee and Mr. Twiddlededum and all of the experts testifying. It is going to be a great day for the hydrology boys. A slow rate of replacement of ground water greatly limits the aggregate ground water withdrawal to prevent mining. Our code specifies that the water be maintained at a normal level in the long run. It will take men and judges with a willingness and guts to see that the laws are enforced.

The engineers tell us we have more good ground water in Gallatin County than we have surface water and we've got a lot of surface water. The fellow down in Central Park doesn't need to fight about water, all he needs to do is spend about $400 or $500 and dig a well. He can get 150 miner's inches without any trouble and without any fussing with his neighbors. Someday those on the lower end of our rivers and streams will take their water from the underground and let those up above use the stream water instead of making a judge, who has to administer the water, take it all the way from Spanish Creek down to Central Park because that's where the early rights are.

I'm not going to talk about pollution except to say that under the appropriation doctrine I think you have a right to insist that your water come to you in useable quality and quantity. I think there is a lot of case law in other states about that but none here because we have not had that problem as yet. Water quality is basically a dynamic quality and was here long before the pollution and ecology boys got the band wagons rolling. Long before that. We have a water pollution act; take it or leave it, but it's there. We have many good laws on our statutes books that aren't enforced.

I want to tell you about my experience with Indians and water. Judges go through a period of education known as trial and error. If they get reversed enough times they begin to realize that maybe they could be wrong. Years ago I went to Hardin and I had a case where a man claimed a water right on a stream that flowed through the reservation. He alone was using it. I said to myself, "Well, this is beneficial use, this is what our law is talking about." I told him that he may use it until an Indian claims the right, constructs a ditch and takes it." Horace Davis, who was a pretty good lawyer in his time on most anything, and knew a lot more about Indians than I did, said, "There is one thing I like about you Judge Lessley, there is never any question what your decision is, but we sure as hell are going to reverse you on this one." That's exactly what they did. This is because there is a great group of cases, as Henry mentioned, which state in effect that the Indian has this reservation of rights. He has it

now; he has it tomorrow; and he has it whenever he needs it. You cannot interfere with it. The famous Pelton Dam case opened the doors in this area. What it really did was indicate to me that the Federal Government is going to look at the water problem from a National standpoint. They are not going to fool around about it. In the famous Winters case on the Fort Belknap Indian Reservation they said the water rights are reserved whether they were mentioned at the time the reservation was created or treaties made, whether there was any use of it, or whether the Indians knew about the water and just said, "Well, you can have it; we're not going to reserve it." The Indians you know are beginning to acquire a lot of our abilities in certain areas. They are beginning to do extensive irrigation programing, and develop water for other uses that have been laying dormant or used by other people for many years. These will all be subject to the reservation claim.

The reservation doctrine also applies to the National Forest, to the wildlife refuges, National Parks, etc. because the source of title to the water of public lands comes from the United States. This is spelled out in the Arizona vs. California case, which states that the reservation doctrine intended to satisfy all future as well as the present water needs of the Indian reservations and was also applicable to reserved lands withdrawn for national forests, parks, recreational areas and wildlife refuges. So there! That's the problem that's upon us. When I said, "This man may use the water until such a time as the Indian wants it"I was simply trying to make it possible for everyone to use the water.

Let's talk about interstate conflicts for just a moment. In Morris vs. Bean, which is a federal case that came out of the 9th circuit, it was stated that an appropriator on an interstate stream is entitled to have his appropriation protected against junior diversions upstream even though made in another state. This was a case, as I recall,where a man in Wyoming made an appropriation on a stream that flowed across Montana into Wyoming. What was happening is that Montana users above him, who were junior in time, were using the water. He said, "I appropriated this water for beneficial use and I want some relief." He went to the Federal Court in Montana and they said you do have this right. Dick Fabrick remembers what I used to say in Billings and other places that the time would come in Montana when the flushing of a toilet in Omaha will effect the rights of water users on the Yellowstone. I do know that we need to sharpen our pencils on our interstate problems because they are there and they are real. I think we need to have interstate compacts that are drawn by men of knowledge of the water.

Someday, somewhere, sometime, the state of Montana, I hope, will send a special attorney general who is qualified in water law to stand in the well of the Supreme Court and argue for the treasure of the Treasure State. I hope he has the facts because he is going to talk to masters appointed by the court like they did in Arizona vs. California. He will have to not only show that this water is used, but how much of it is used and relate it to beneficial use. That's the basic problem. These other things are intermediate problems.

We in Gallatin have no claim on the water of Montana, it belongs to all of the people of Montana and Montana has no claim on the water as it belongs to all the people of the United States and that is that. We want to be sure that we have taken care of the basic rules and that we have our house in order. If there is a lot of non-use on unappropriated streams, let's clean it up by decree or otherwise. Let's put some finality into our adjudicated streams. Let's be sure of our reservoir program, etc. If all of these things are done we can say, "We need this." That is why I'm in favor of appropriating all the water that we need. That is why I'm in favor of making recreation a beneficial use. I was interested to hear you say that you thought recreation was a beneficial use. I doubt it. I don't think it's in there in words and figures, but it could be implied. I hope you're right. But let's enact the legislation so there is no mistake about it. Presently I try to provide water for the fish by moral suasion. When the water gets down too low I say, "Now, boys, you're getting a little greedy." I call the low line and the high line and I say "Get with it and be honest and remember the Golden Rule or I'll cut you off." So the water starts pouring in and the river rises. The fish are soon able to go from hole to hole without walking over the sandbars.

Well, I have given you lots of problems and not many solutions, but I am confident that we have the ability as well as the will and determination to solve them.

ECONOMIC, ENGINEERING AND SOCIAL PROBLEMS ARISING FROM CHANGING NEEDS, USES AND AVAILABILITY OF WATER

Panel Discussion by
Dorothy Eck

In a sense, the League of Women Voters' political reputation was built in the area of water resources. This was pretty much at a national level where our national leaders put together the information they had gained from local studies all over the country, and a lot of congressional testimony and hearings all over the country. This is when we got our feet wet in politics and pretty much why we're still here. It gets to be a disease and you can't get out.

I would like to explain to you some of our positions in water. They pretty well represent the kind of program that the League supports. We support overall long-range planning of water resources development; managing water resources on a river basin or regional basis; federal financing of water development with cost-sharing by state and local governments and private users; improving coordination between agencies and departments; procedures to supply information and encourage intelligent weighing of alternative plans; citizen participation in water resources; and improvement of water quality. As you can see, this covers a lot of ground. We find it also meshes with a lot of other concerns. I was pleased this morning to hear mentioned a couple of times the problems created by single purpose districts dealing with water. One of the League's prime interests in dealing with state problems is that of planning. We generally think of planning in terms of city-county planning,area-wide planning, and this type of thing. But one of our real problems here also comes from single interests, single purpose districts, which foul up the whole scope of planning and make it very difficult to provide a coordinated plan.

I speak today also as a lobbyist. That is what my life is right now. In lobbying up on the hill, we are continually confronted with water problems. We listen to testimony, sometimes we give testimony, and we talk with a lot of other people with like interests, a lot of them with a lot more background in the technical areas of water resources development and water law than we have. And we are continually aware of the fact that there is really something wrong with Montana water laws. The legislation quite often becomes snarled up with technicalities. Sometimes we can get quite irate about this when we find that good legislation, the kind of programs we like to follow, is stymied because of the laws. We heard Henry Loble question the propriety or the wisdom of beneficial use of water, the right of the Fish and Game Department to appropriate the state water. This sounds like a really great idea to us and it is in a position or area where we have a firm position of support. I don't suppose we will go lobbying for it, but it is the kind of thing we follow and are concerned about. It is unfortunate if it gets bogged down in legal technicalities.

In looking at the topic that this entire Symposium was assigned today, the Economic, Engineering and Social Problems Arising from Changing Needs, Uses and Availability of Water, I thought maybe I could best speak as a sociologist. As a sociologist, I was schooled under Dr. Carl Kraenzel. I don't know how many of you have run into Carl Kraenzel, but I think if you have been in the state very long you have had some kind of a run-in with him. This is the kind of topic that would have delighted him.

He was concerned about that part of Montana we call the Great Plains. He repeatedly emphasized that this was a semi-arid land which would be expected to experience recurring periods of drought, frequently lasting a number of years. I have lived in Montana about 25 years, and such a period of wide-spread drought of any duration has not been a part of my experience. Yet I can't get away from Carl's admonitions and wondering, "What about that old dustbowl" Is it something that we still need to be concerned about?" I know he would say that even in periods of time when we don't have drought, the water is always a continuing problem in eastern Montana along with a lot of other problems that go with lack of water and a low density population. But he always insisted that we should keep in mind the fact that drought was a matter that needed to be dealt with. He advocated institutions, laws, credit systems, tax measures, agricultural methods, and systems of delivering medical services. All of these could be adapted to periods of drought, which would mean periods of economic loss to the farmers. He called for every segment of society in that eastern part of Montana to build the kind of reserves which would keep them over an emergency. I think that even though his thoughts were not enforced by any real drought, he still had an impact. And anyone who has lived in eastern Montana probably sees a lot of Carl Kraenzel written into the social fabric of the country. This is all based on the fact that if it is not periods of real drought and dustbowls, it is at least a lack of water and a kind of society that necessitates changes. His whole cost space analysis has made a big difference to eastern Montana. The idea is that they need, because of their dry conditions, to develop the kind of institution such as the 16, 17,and 18 county systems that are developing there now to deal with health and economic problems.

Dr. Kraenzel got into a lot of trouble with a lot of people, mostly mostly because he was very emotional about what he did. His colleagues criticized him a great deal because he was a university sociologist who was supposed to be very objective and keep his own personal values out of what he was doing. He was never able to do this. I think as a sociologist, or I might say as a non-sociologist, that this is perhaps one reason why I don't feel inclined to go into this field professionally and responsibly as a research sociologist. I don't really like keeping my values out of what I am doing. And I find now that values more and more are becoming an item that all kinds of professionals are going to have to deal with.

I could speak to you now not as a League of Women Voters member or a lobbyist or a sociologist, but as an environmentalist. I think this is an exciting way to talk. I suppose some of you have had environmentalists up to your ears, and I know some of you are environmentalists. During the last two years the demands of this group have become more and more pressing. It is difficult to see how values of the environmentalist can fit into the kind of water law we are hearing about this morning. It seems to be built entirely upon rights. I could say selfish rights, but it doesn't really matter whether they are selfish or not, they are very clear-cut rights of the individual and not society. I don't think this kind of a theme is one that we can work with much longer. I was at a

hearing yesterday for House Bill 66, which is the Environmental Policy Act. I don't know how many of you have seen it, but it certainly does provide the basis for considering environmental values in almost everything that will happen in the state. Chris Field, who was speaking yesterday, said, "I would like this stricken from the law. I would like to read this for you and get you started thinking how this could really be implemented." One of the provisions indicates that all agencies of the state shall "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social science and the environmental design arts in planning and decision making which may have an impact on man's environment."

I also have something that I would like to read out of "From Sea to Shining Sea", which is the President's Council on Recreation and Natural Beauty's report. They are considering the need for consideration of benefits and losses.

> "What is the value of a stretch of river in its free-flowing condition as opposed to the value of a reservoir which inundates it? What is the value of a silent group of trees or of a natural beach as compared to the value of a freeway that might be built there? These are the kinds of baffling questions confronted by public works officials in deciding whether and where to build a dam or a highway. The same kind of questions are prompted by most development projects, both private and public."

And they go on into the difficulties of trying to measure values. The fact is that you can measure economic values, but it is very difficult to measure the value of recreation or the value of natural beauty. Yet, I think that is something we need to get into.

If you listen to the environmentalist in considering changing needs, uses and availability of water, he has something to say about each one of them. About needs he would say as individuals our needs for water must be weighed in terms of ecosystems. And that is saying a lot. Someone mentioned today, "How about the right of the fish?" The ecosystem involves a lot more than just the fish. We must consider the total needs. The environmentalists, who are vocal and are a force to contend with, are pretty well insisting on this, and the law or the Policy Act really indicates that this needs to be done, needs to be considered. Incidentally, I think next week the legislature will be considering House Bill 33, which will really put legal teeth in House Bill 66, allowing the individual to sue on a much more easily defineable area, as I understand it, than has been done before.

The environmentalist is also concerned with the changing uses of water, and it really upsets some people when it is said that frequently the best use of water is no use at all. I don't really know that it would be given a legal right, the right to no use at all, and yet I would guess that the environmentalist will fight for this right. And finally, he will be utlimately concerned with the availability of water. I think the availability of resources, and it appears that the availability will diminish on a per capita basis, is really at the core of a lot of environ-

mentalist's concern. We come finally to a problem Judge Lessley mentioned at the beginning of his talk, and that is if our population is to continue to expand, availability will become more of a problem, even for Montana, because as he mentioned, Montana's water really belongs to the whole country. It is only our piece of it that is ours and although the water originates in Montana there are going to be demands for it continuing throughout the country.

I thank you for being able to be here today. I would especially like to say that from the indication this morning, this has been a most profitable kind of meeting for us. We often speak about water without having the firm basis of understanding that we really need. I also don't really think we can firmly understand the legalities of water law, but the presentation this morning was most helpful to those here listening to it. Thank you.

ECONOMIC, ENGINEERING AND SOCIAL PROBLEMS ARISING FROM CHANGING NEEDS, USES AND AVAILABILITY OF WATER

Panel Discussion by
Everett V. Darlinton

The multiple-use concept for water has been accepted by most of Montana's and our Nation's citizens for the past decade, but the means of accomplishing this utopian principle has been debated ever since the concept was first introduced. Water is so vital to agriculture, industry, municipalities, fish and wildlife, and recreation, especially in a semi-arid state such as Montana, that obtaining rights to its use for the development of these multiple purposes is becoming a struggle between each of them. Prospects for the future development of these uses within Montana become even more doubtful as demands are heard from other regions of the Nation for the transfer to them of unappropriated water originating in Montana, and these demands may well be heeded because of the large populations that are involved.

Regarding water rights in Montana, I believe that in order to acquire a water right, a water user should not only make beneficial use of the water he appropriates, but he should financially invest in some type of project which will supply the needed water. I further believe that numerous storage reservoirs should be constructed on Montana's headwater streams in order to capture additional spring surface water runoff, especially since more than one-half of Montana's annual streamflow is generated during the three months of May, June, and July. If we do not retain these floodwaters for our own growth and development, the water will become the property of downstream states and the world's oceans without Montana having materially benefitted from it. If, in order to obtain a surface water right, all of Montana's water users had to financially contribute, on a pro-rata basis, to projects which provide the water they need, more projects would become economically feasible and all users would be benefited.

I do not believe that Montana should pass legislation which would limit the amount of water that agriculture, industry, or municipalities can, in the future, appropriate from our streams when water is still available therein. To approve minimum flow legislation without constructing a project to provide the minimum flow is to guarantee to down-stream states and other regions that Montana will not use additional water for most of her future development, but instead, will let much of her water flow unused to them. I can assure you that nothing would please them more!

Concerning Montana's ground-water law, there is one facet of this act which makes administration of the code extremely difficult. This relates to the depth from which ground water can be pumped before an undue economic hardship is imposed upon the water user. For instance, does an appropriator of a flowing artesian well have a right in perpetuity to a flowing well? I don't think so, and for several reasons: First, nature doesn't guarantee that a flowing well will keep flowing. Secondly, any use of the ground water, including that by the first appropriator, reduces the artesian pressure and therefore it reduces the flows of all wells in the aquifer. Nevertheless, shouldn't other persons besides the first appropriator have a right to use some of the vast quantity of water stored in the aquifer? Can the first appropriator validly claim all of the water, even though he can use only a

very small part of it? Of course not! Therefore, how far should the pressure head (or water level) in a well be allowed to decline before stopping further withdrawls? Since ground water under static head (no artesian pressure) is by far the most prevalent potable ground water in Montana, and since numerous users of this type of ground water must, and do, pump water at least 200 feet up to the surface of the ground in order to use it for their livelihood, shouldn't everyone in the State be expected to pump water from that depth before we consider it to be an excessive financial burden upon the appropriator? I realize that this concept would result in costing many people a lot of money for the use of ground water from both artesian and shallow aquifers when they have been obtaining very low-cost ground water for many years, but I believe it would be fair to all users and it would eliminate a great many complaints over the use of ground water.

If the State's Water Plan and Water Needs studies, which are now being formulated by the Montana Water Resources Board, should show that Montana my have surplus water which could be exported, then I suggest that Montana enter into a compact between the interested states and the Federal Government. Such a compact should limit the quantity of water to be transferred and it should list a point of diversion which would be least damaging to our region. It should also acknowledge the fact that water is a very valuable asset. In fact, water should be viewed in the same manner as any other natural resource, such as coal, in that it too has a definite value and it cannot be considered a free commodity. For instance, we in the Northwest are not asking for the transfer to us of crude oil from the Southwest, although this would be a similar situation. Can't you imagine the uproar if we were to attempt to demand such a thing? Therefore, we must be well compensated for any transfer of water, and the compact should so indicate. A compact of this type would be as legally binding as any form of agreement with Congress can ever be. If we permit Congress to decide the issue by itself without a compact, we could be in grave danger of having far more water taken from us than we would otherwise consider because of the large populations involved and the political pressures that are exerted by other regions.

Montana has, since its inception, needed a Modern Water Code wherein all water rights are centrally filed and administered by the State. Our forefathers could not forsee the multiple needs for, and shortages of, water which have recently arisen in Montana, so this type of law was not instituted. Many years ago, the former State Engineer's Office saw the need for the State to know who had water rights, the quantity of water claimed under those rights, and what the water was being used for, so twenty-eight years ago it initiated the Water Resources Survey. This study lays the ground work for a Modern Water Code. However, it would require many, many years and many millions of dollars before a Modern Code could become effective statewide since all stream and ground-water rights would have to be adjudicated and the quantity of unused water determined. Thereafter the quantity of water used would have to be measured and inspected annually. Nevertheless, each year that this type of code is delayed means more years in the future before Montana will know all of the facts about its water. Montana is the last state of the original 17 Western Reclamation States that does not have some form of a Modern Water Code in operation now.

ECONOMIC,ENGINEERING AND SOCIAL PROBLEMS ARISING FROM CHANGING NEEDS,USES AND AVAILABILITY OF WATER

Panel Discussion by
R. J. McConnen

The study of economics is concerned with two principal questions. The first question has to do with equity, "Who gets what?" The second question has to do with efficiency-- "What's the best way to use our resources?" Practically all economic problems deal with both questions, equity and efficiency. And this is certainly true when we face the economic problems associated with Montana's water resources. To a very large extent, the kind and nature of the water laws we have will influence both how we use our water and who gets what.

What I'd like to do is to first quote at some length from John W. Gardner's new book, No Easy Victories -- and in particular from the chapter -- "Tasks for the Tough Minded." I'd like to combine some of Gardner's principles with certain physical realities and economic principles in order to develop a rough guideline for changes in Montana water law. Changes which will,I think -- in words taken from the statement of the purpose of this symposium, bring about the "--optimum development of the State's water and land resources". This means change in institutions such as water law. Professor Galbrath has written, "Those who do not anticipate change will be its victims." Change is then indeed, as John Gardner says, "a task for the tough minded." Gardner states "Once it was thought that the woes of this world were immutable -- ordained by God or an inscrutable Nature, or simply a part of the unchanging order of things."

But for the past three centuries man has gained increasing confidence, justified or not, that he can have a hand in determining his own fate, can rid himself of at least some of the ancient afflictions.

Whatever else the consequences, that shift places a very heavy burden on man and his institutions. The man who once cursed his fate, now curses himself.

Social institutions, particularly political ones, have felt the full impact of the new attitudes. What had been a fervent prayer to an unseen Diety becomes an angry shout at political and institutional leaders.

The modern belief that man's institutions can accomplish just about anything he wants, when he wants it, leads to certain characteristic contemporary phenomena.

One is the bitterness and anger toward our institutions that well up when high hopes turn sour. No observer of the modern scene has failed to note the prevalent cynicism concerning all leaders, all officials, all social institutions. The cynicism is continually fed and renewed by the rage of people who expected too much in the first place and got too little in the end.

The aspirations are healthy. But soaring hope followed by rude disappointment is a formula for trouble. Leaders arise whose whole stock in trade is to exploit first the aspirations and then the disappointment. They profit on both the ups and downs of the market.

The roller coaster of aspiration and disillusionment is amusing to the extreme conservative, who thought the aspirations were silly in the first place. It gives satisfaction to the left-wing nibilist, who thinks the whole system should be brought down. It is a gold mine for montebanks willing to promise anything and exploit any emotion. But it is a devastating whipsaw for serious and responsible leaders.

All of this leaves us with some crucial and puzzling questions of public policy. How can we make sluggish institutions more responsive to human need and the requirements of change? How can we mobilize the resources to meet the grave crises ahead?

How can we preserve our aspirations (without which no social betterment is possible) and at the same time develop the toughness of mind and spirit to face the fact that there are no easy victories?

Social change is a learning process for all concerned. It always requires re-education of large numbers of people to accept new objectives, new values, new procedures. It cannot go forward without the breaking down of long-established ways of doing and thinking. This is true whether the problem is one of civil rights, the reform of local government, educational improvement or urban renewal. (And I might add, the water laws of a state). Most human institutions are designed to resist such learning rather than facilitate it.

Some people seem to believe that for each problem there is a solution readily available -- a solution that can be promptly achieved by passing a law and voting some money.

I think of this as the vending-machine concept of social change. Put a coin in the machine and out comes a piece of candy. If there is a social problem, pass a law and out comes a solution.

Social change takes time. That is a sentence which no one pressing for change likes to utter. I don't like to utter it. It is the business of the proponent of social change to be impatient.

But we're caught in a dilemma. If we pretend that social change doesn't take time, we're back to the vending-machine concept. And the consequences are predictable; unrealistic optimism as the change is initiated, disillusionment when it fails to ripen instantly.

How do you make rational choices between goals when resources are limited -- and will always be limited relative to expectations? The question translates itself into several others; How can we gather the data, accomplish the evaluation and do the planning that will make rational choices possible?

Our capacity to create new problems as rapidly as we solve the old has implications for the kind of society we shall have to design. We shall need a society that is sufficiently honest and open-minded to recognize its problems, sufficiently creative to conceive new solutions, and sufficiently purposeful to put those solutions into effect. It should be, in short, a self-renewing society, ready to improvise solutions to problems it won't recognize until tomorrow.

I hope we're all realistic. Realistic enough not to apply the vending-machine concept to either Montana's water resources or for that matter to any other of our problems. Laws do not make decisions, but they provide man with a framework that he uses when he makes decisions. Hopefully, the framework that law provides will do two things. First, it should permit rational choices between goals when water resources are limited and always will be limited relative to our expectations. Second, the framework must provide a basis for a self-renewing water resources policy. A policy that can deal with changing needs, uses, and availability of water.

Because the demands for the use of recreational water is increasing and the supply -- largely because lessening access -- tends to decrease, we're witnessing a marked increase in the value of water for recreational use. Because of both the reaction of industry to water quality controls and the limited industrial expansion, the value of water for industrial use hasn't changed much. Urban use like industrial use is relatively small and doesn't affect the total picture a great deal. With some important exceptions, and in large part because of the price -- cost squeeze in agriculture, the value of water for agricultural use hasn't shown any great increase. Significant problems exist, but sooner or later in a democratic society we will find means of providing more water for recreational use. Perhaps now isn't the time, but even the most reluctant cannot deny that these forces are at work. We have three choices, (1) We modify our laws to permit needed change. (2) We hope our courts will recognize social realities. (3) We live with existing institutions until the developing social pressures destroy the structure of our existing institutions.

As annual precipitation patterns and amounts vary, streamflows vary. As stream flows vary, the relative value of water in different uses vary. Even if only in a crude way, water laws must recognize this fundamental fact of life. Assume that Montana law permitted the purchase of some existing water rights in order to maintain stream flow. Assume that as a result, a certain minimum stream flow must be maintained. Fine? Let's have a drought. Will society go for happy fish and parched irrigated fields? I don't think so. If Montana law is modified to permit the maintenance of minimum stream flow during periods of normal precipitation, it must I think, make provisions for reallocation during periods of extreme and unusual drought. This would be an extremely tough decision. Therefore, it would have to be political. I'd suggest that the governor, after consulting with the Commissioner of Agriculture, the Director of Fish and Game, and the Director of the Water Resources Board, be given power to exercise emergency powers to reallocate water for limited periods of time.

If you were to buy some dirt, it would come by the truckload and be very crudely measured. If you buy a T-bone steak, its been graded and then measured -- in this case we call it weighing -- on a closely monitored scale. Once when beef was relatively much less expensive, we were much less particular about measuring both quantity and quality. When it comes to things like diamonds and gold, we're very precise about measurement. As water becomes more valuable, we must become more precise about measurement. When we buy gasoline, we measure both time and flow -- since we buy gallons -- a volume measurement. As we approach the day when beneficial use comes to be thought of in terms of some crude measure of relative value, we will be forced to use volume measurements for water and express rights in terms of volume, not just flow. This day is, I expect, a long way off. However, its day is being hastened by those operators who are already discovering that the specified combinations of all inputs -- including water -- unlocks the secrets of high productivity and low unit costs.

As I understand it, except for the responsive and responsible reactions by the courts, there is no legal connection between ground and surface water. In areas like the Gallatin Valley this is certainly not true. Some recent work just completed at Montana State University demonstrates what we all know. Extensive surface irrigation raises the ground-water table. In some cases the raise is so great that only the duck hunters are pleased. I doubt if this constitutes optimum land and water use. I don't think the vending-machine approach to social problems will work here. In fact, I expect that the situation is too complex for either the courts or the market place to act as a coordinator of individual decisions in order to serve the general good. As we recognize the increasing importance and complexity of the multiple use of our water resources, I expect we will come to rely more heavily on explicit coordinating and cooperative devises. At one time a lot of big operations were run on the back of a few old envelopes. That day is past. The same has been true for a long time for the "old-envelope" approach to water resource management. Devices such as the Conservancy District Law provide us with a means to live in the last third of the twentieth century and to make preparations for the next century.

As the needs, uses, and availability of water changes, the relative values of water in different uses change. If nothing happens to the way in which we use our water, economic and social problems arise. In a democracy if the disparity is great enough -- changes in laws will take place which will encourage and permit changes in use. Have no doubt, the changes will take place. The only question is, "How will we accommodate the needed change?" We can keep the pressure cooker lid on loosely and be bothered by the periodic clatter and steam. Or we can screw the lid down tight and keep everything quiet and stable. But if we take the last approach, some place down the road, we'll probably have to get an entirely new pressure cooker.

ECONOMIC, ENGINEERING AND SOCIAL PROBLEMS ARISING FROM CHANGING NEEDS, USES AND AVAILABILITY OF WATER

Panel Discussion by
Charles Bowman

I am going to make my remarks rather brief and to the point, hoping that towards the end you can pick out those points that are of interest to you and we can thrash them out thoroughly. I am going to speak about some of the problems we have run into as far as engineers go, and not into the specific problems of engineering.

Water is quite a subject. It is a great deal like women. Even a minister will steal a little water. When the engineer is called upon to determine the feasibility of a project, he must look at the total picture. He must look at the alternatives before coming to a conclusion. The feasibility study of any project must include an economic interpretation to determine a benefit-cost ration for that particular project. The ratio indicates what use will produce the most benefits. It may be maximum benefit of the people or the maximum use consistent with public interests. It does not mean the maximum dollar and cent return from a particular project. It has to be quite broad. The benefits may be the saving of lives in case of a flood, the maintenance of a state economy (which is what we are talking about as far as agriculture is concerned), or recreation. It may be for reasons of public health or public recreation, and it may be, in some cases, conservation. When a study of a project centers around Montana's water the engineer has the Montana Water Resources Survey report to go to, and this is good factual information. We have the U. S. Geological Survey reports and data; we have independent cooperative studies; the Soil Conservation Service; and many of the other Federal agencies do some very good work on these studies. These are all good sources of information, but when the study advances to the determination of available water, the situation becomes almost impossible. A search of the above sources and a search of the court records indicate the following key points.

A current up-to-date inventory of Montana streams is hard to find. We have the inventory of water flowing through the USGS gauging stations, don't get me wrong. I mean an inventory of water being used on the streams. Many of the Montana streams have more water rights or appropriations on record than there is water in the stream. This is hard to believe, but it is true. It is understandable for this to happen in areas where a high re-use factor exists, but not in general. Many landowners have legal water rights which have not been used for long periods of time. They feel that this is insurance, and at the present time you can't prove abandonment. Others have stored water in public reservoirs. They have bought so many acre-feet of water, but they do not use it and will not let others use it. They feel it is good insurance, again, for dry periods. The actual water used by landowners is different from that which is filed as water rights in the courthouse. Many users use less water than their water rights because the capacity of their ditches will not carry their water rights. All of these things actually distort the picture of true water use. And when you go out and make a survey of the stream, you have got to measure what they are taking, not what the water rights say.

Diversion structures or measuring devices are inadequate to determine the actual use of water. Many structures leak so badly that they are no longer a measuring device. Others are poorly installed. Many new units that are installed are not measuring devices -- many of them are submerged and more are non-existent. In this area you find people using water that use what we call Murphy dams. They go out with a dozer in the stream, push up a pile of rock, and divert some water. There is no measuring device in it, but that's his water. Duplication of delivery systems or parallel systems exist, and that is creating a terrific seepage loss. There are many of them. There are many people in this room who have worked on the Water Resources Survey who have had trouble drawing the ditches in on their maps because of parallel systems. Many of these systems are only a few feet apart, both flowing in the same direction, both having a high loss. These should be consolidated for good management of water. The owners will not consolidate even with the incentive programs we have because they feel they are giving up some sacred freedom. Inadequate records are kept as to the actual use of water by individuals and canal companies. Most records that are kept are done so to determine the user's portion when it comes to paying the ditch rider's salary. You look at the records and what do they mean? They don't mean a thing. Others are based on shares or what the man uses. Because he has so many shares of water, he pays so much. Or some are based on time for which they receive water rather than the actual use or volume of water received. Another case is that water is distributed by inexperienced or untrained commissioners or ditch riders. They could care less about the measuring of water. They really don't understand it; it is from some big black magic box. So what do they do? They go by the local customs as related by the various users and go about their happy way unaware of good management practices. Water application and irrigation methods are by custom rather than by methods of proven efficiency. People irrigate by wild flooding because granddaddy irrigated this way,and what was good enough for granddaddy is good enough for them. Another case we run into is that water rights become obscured from the records and are many times lost. For instance,when agricultural land is converted to residential areas, water rights are divided up in many cases and given to the various residents on one-tenth of his particular water right. This boils down to 8, 9, or 10 inches of water, not enough to do anything with, but the water right is lost. It cannot be reclaimed without the large expense of going out and buying up those fragmented rights from the individual and, boy, they think they have something valuable.

Under the present Montana water law good management of the state's water is impossible. We go as far as we can and we do everything we can. But pretty quick we meet the end of the road. Much of the law has been established by precedents. The precedents are good, but they require, in many cases, costly court action to apply to precedents to water problems at hand. Some of them are stated as statutes, but others are not. Laws must be passed to clearly state what can and cannot be done with Montana's water. I am saying that in some cases they might be clearly laid forth. Such laws and procedures should be patterned after the Wyoming water law. It is a good one. Fifteen of the northwestern states, including Alaska, have patterned their laws from those of Wyoming. This system provides for the issuance of permits by an agency responsible for the administration of

the state's water. They have a sound and firm program whereby permits are issued to those who want to develop a system (as you go into different states, some can be issued on a temporary basis). They can get a permit to start their project, they make their survey and design the system, after which another permit is given to them for construction. When construction is completed, they are given a certificate of water right. I don't want to give the mis-impression that it does not go through the appropriation procedures, because it has to. But nevertheless it gives them something to get hold of to develop their systems, and it gives a ready inventory of the water at hand. It gives them the protection they need if they are going to invest money in the system. These procedures are not to retard or hamper the water user in any way, but to provide a system to maintain an active and complete inventory of water use. This is what we lack. We have good data now, but we have to get down underneath and find out what is going on. We do not have the money, and the staff working on it does not have the time. The permit system requires the issuance of permits to move a point of diversion, to move the point of use, to move wells, and so forth. It keeps this inventory up-to-date, but it does not change the date of priority or the date of appropriation in any way. It protects the individual. We must remember that we have to have something to meet these changing times because we have had changing uses of water from the time people came into the state until now.

I am going to give you some of the suggestions for laws I feel we should have along with the permit system.

1. We must have a time limit established for the non-use of water. We have the abandonment now, but it is almost impossible to prove. I think there is only one or possibly two cases in the state where abandonment was allowed, but we should have a time limit. Most states have a five-year limit, after which it becomes abandonment, or statutory failure. And they have a legal means for this. In the construction of our highways the engineers find ditches that have not been used for years, water rights that have not been used for years, and just because the highway is going to cut across it, right away it is a very valuable piece of property. It costs a lot of money to put in the structure, and it may never be used, but we have got to come in and put something in here because people sit on these rights. They won't use them or let other people use them.

2. We must have the issuance of water rights certificates recognizing the date of priority of existing water rights. This, of course, should require an inspection of the facility to see that there is a good diversion structure and a measuring structure before issuance of the certificate. This in turn would give us an up-to-date inventory of water rights being used today.

3. Speculation on water in any form should be outlawed. Water rights and stored water should not be bought for the purpose

of financial gain on the water itself. It is public property. We have people sitting on water rights; we have people sitting on stored water, waiting, not letting anyone use it because they know it is going to increase in value and they can get their asking price. That is not right.

4. We should have a law requiring the consolidation of parallel systems of delivery ditches, or canals that run parallel, strictly for conservation.

5. We should require our water commissioners or ditch riders or any other persons engaged in the distribution of water to meet certain basic requirements in the knowledge of water measurement and management. I think it is too little to ask when they are handling a precious commodity.

6. We need a requirement for record keeping. I hate to ask farmers and ranchers to keep accurate records, but if they put in measuring devices it is not hard to keep records. We should have this on all water except small wells where the water is used for household or culinary use.

7. I feel we should have a law which prohibits the straightening of a stabilized stream, in order to conserve both soil and water. When we go into areas where we have stabilized streams such as the Big Hole Basin, when we have meandering streams that are slow, the banks store and hold water, and as a result we do not have erosion.

When such laws are put into effect we will take a step towards good management of Montana's water, and I hope some day soon it will be here. Thank you.

ECONOMIC, ENGINEERING AND SOCIAL PROBLEMS ARISING FROM CHANGING NEEDS, USES AND AVAILABILITY OF WATER

Panel Discussion by
Don Aldrich

My assignment is Economic, Engineering and Social Problems arising from Changing Needs, Uses and Availability of Water -- no restrictions beyond that; not unless one might be slightly intimidated by appearing on a program that includes the state's outstanding authorities in each of the fields mentioned.

In my position of working for an organization with a multi-interest representation, I must have a listening knowledge of many fields. I find that I generate little trouble with anyone while listening. Today, however, I must live dangerously and face the perils of "foot in mouth" disease. If the rabbit foot is still working, I may be fortunate enough to make a few undocumented statements without attracting too much attention or alienating too many of our potential supporters.

Which reminds me of the couple visiting in New York City. To celebrate their twelve-year-old son's birthday, they took him to a hit musical production. They felt somewhat uneasy when a line of chorus girls in the opening number appeared, clad only in skimpy white and green ribbons. When the dance ended the boy excitedly leaned over to his mother. "Mom, did you see that?" -- "See what?" -- "Those girls.", said the son, "They were wearing our school colors."

My point is -- we may all be looking in the same direction, but we are not seeing the same things -- at least, not entirely.

When I look at a stream, it is exhilarating and an inspiration. It may conjure up thoughts of fishing, boating, swimming, or it may just create a thirst. With the exception of what little I drink, my intentions are noble -- not consumptive or degrading.

In running water and in natural impoundments I see beauty, recreational opportunity, and a community that is natural, self-generating, and self-supporting.

But I am not the only one who looks at the body of water.

The first-in-time to recognize an economic value in water in our state seems to have been the miner. Thus, much of the language, the law, and the philosophy were geared to the early mineral developments' requirements of water.

Contrary to what we may have learned in early science courses, water is not just H_2O. H_2O-municipalities; H_2O-agriculture; H_2O-industry; and H_2O-generator of electricity. All of these uses have been able to evolve somewhat satisfactory position and some form of stability for themselves, but unfortunately my non-consumptive use has not been strong enough at the negotiating table to demand equal consideration. In fact, it has suffered severely from diversion, pollution, loss of access, and habitat alteration resulting from artificial impoundments.

Many of the decisions that produced the almost unreversable conditions were made a long time ago --when opposition didn't exist. Railroads, highways, industrial plants, and municipalities encroached upon live streams. Today -- in some cases due to legislation, and in others, due to an improved ethic -- these encroachments are less frequent and less severe.

Pollution control with consideration for downstream users is more evident due to state and federal water quality acts.

In most cases, environmental impacts of water development are now considered before authorization of impoundments and diversions. So you can see that a consideration for my nonconsumptive uses is evolving. Slowly, but it is happening. We are developing a concern for things we cannot take to the bank or store for the winter.

Diversion for agricultural use has on occasion been detrimental to the recreational resource. In severe cases, there is not enough flow remaining in the stream to accommodate boaters. Fish and the aquatic life that supports them are lost. Dewatering adversely affects riparian vegetation.

Much of this is not necessary. Through more efficient utilization of existing water supplies, more efficient systems for distribution and delivery and improved management of range and forest resources, the conflict with agriculture could be minimized.

Better utilization -- not using excessive water for irrigation -- more efficient systems of delivery -- lined ditches and canals -- could decrease the amount of water that needed to be diverted. Managing headwater vegetal cover to prolong flow would alleviate both the extreme spring floods and the low water associated with August.

So -- we say there ought to be a law -- a law that will take full consideration of all users. One that will establish priorities in the best interest of society and lend some control to the manner in which public resources are used.

There is a real old law that could accomplish this -- one recognized long before white man set foot on America --"Do unto others as you would have them do unto you." I fear, however, that our philosophy of first in time perverts this law into something that we used to think quite clever -- "Do unto others before they can do unto you."

What is the interest and right of those who do not have land? Streams and lakes are called public waters. Then it seem only logical that a non-consumptive, non-degrading user should have access to and the right to use them.

Since recreational use is a somewhat new and growing factor in water management, the statutes that cover this area are so confusing that a recreationist unwilling to fight or litigate will probably sell his fishing tackle and take up golf or bowling rather than trying to take his recreation by force.

There are statutes that evidently were intended to establish a John Q. Citizen right to enjoy waterways.

Chapter 2, Section 26-338 says that navigable rivers, sloughs, or streams between the lines of ordinary high water shall be public waters for the purpose of angling, -- and shall be subject to the right of any person owning an angler's license.

The intent seems obvious -- but determining which streams are navigable will cause you enough confusion to make a gardener out of you. Try it. Ask five persons trained in law to tell you how to determine which streams are navigable. If you get less than four different interpretations, I'll give you my dependable royal coachman or the worm shovel -- whichever suits your fancy.

Recreation as a beneficial use of water is referred to in Montana law but legislation that would eliminate the doubt to this claim is defeated year after year in the state legislature.

I would like to cite an instance in which lack of recognition had caused an injustice. In March of 1958, the Montana Fish and Game Commission, the Ravalli County Fish and Wildlife Association, and the Western Montana Fish and Game Association purchased for annual delivery 5,000 acre feet of water for $110,400. In addition to the purchase price, there is an annual operation and maintenance payment of $500.

The contract provides that the water will be released from the Painted Rocks Reservoir when requested and that it will be in the channel at the confluence of the Bitterroot and the Clark Fork Rivers. The objective was to keep the fish wet during periods of extreme low flow.

The delivery at site of origin and termination have been fulfilled but during dry periods of many summers, the Bitterroot River is diverted in its entirety to irrigation canals, leaving portions of the stream dry until recharged by return and seepage.

Recognition of recreation as a beneficial use of water would make it legally possible for us to insist that the water we purchased remain in the channel. This is but one case; it reflects, however, the spectrum of problems associated with lack of legal recognition -- and for all practical purposes precludes sportsmen's dollars being used to develop impoundments to augment low water flow.

Montana landowners have traditionally allowed access to rivers and hunting areas, but the benevolence of landowners is changing, and for many reasons. Population growth with its increase in incidents of antagonism, rising land values, intensified land use, and -- animal-like -- the protectiveness of our human territories increases with population density.

In a relative sense, Montana is still a hunting and fishing paradise and many nonresidents are aware of it. For them, buying lands in Montana is a way of getting away from it all, and often the land they buy is for personal recreation. They are more jealous in guarding their property than long-time residents are.

All of these things point to increased problems of access. Resentment is building up against the nonresident owner in some areas. Tying up public recreational lands may ultimately lead to legislative or judicial action which may not be desirable. As an example, South Dakota passed the favorite son duck law in the 40's, after Minnesotans had bought or leased the best duck sloughs and passes.

Other changes in landownership patterns are occurring which will jeopardize public use of public waters. For example, on the Bitterroot River at least three residential subdivisions are being planned. Rock Creek near Missoula is being subdivided for residential or summer home development. Big Spring Creek near Lewistown is rapidly urbanizing. These developments forecast access, as well as stream contamination and alteration problems. These new owners along streams will be more militant about trespass than the previous owners who had more extensive holdings. These lands along streams are being purchased under the assumption that they can control that stream against trespass. The longer these beliefs are held, the more valid they become.

Ultimately, we will need a decision, judicial or legislative, which would permit recreational use of streams that have a proven capacity to sustain such use without infringements on rights of the riparian owner. For example, the Wyoming Supreme Court decision allows fishermen to legally float down any stream large enough for that purpose.

Challenges between fishermen and landowners have occurred in the past over the right of an angler to float down or walk in Montana's streams. Since none of these incidents have been carried through the courts, there is little insight relative to the feelings of Montana's judicial system or their interpretation of navigability and access rights.

Two Western Montana sportsmen's clubs were going to pool their funds to finance a friendly court suit to establish that the Bitterroot River was navigable. The minimum cost was estimated at $1,500. If you multiply this by the number of streams that would require litigation to establish citizen rights, it becomes a staggering figure -- certainly more than sportsmen's organizations can afford.

Well-intended, free legal advice will in one case tell you that it would be better to accomplish our objective by legislation and another -- equally sincere -- tells us that it must be accomplished in the courts. I am sure both opinions are honest and well-intending. This only further establishes the fact that Montana water law is not clear -- that it does not serve all of the people and, in fact, that it may not serve the best interest of any.

We do need laws or interpretations that will determine without doubt the rights and obligations of all segments of society relative to the use of our waterways and impoundments.

Finders-keepers is a little immature in this day. First in time is not flexible enough to accommodate new techniques and increased demands. Wasteful consumption by the few at the expense of many cannot be permitted just because water does not have a unit price.

Our water supply is finite. Neither waste or degradation can be tolerated, and the laws that correct these abuses have evidently not been written.

"BENEFICIAL USE -- WHAT IS IT"

Panel Discussion by

James A. Posewitz

Montana's sport fishery depends on naturally reproduced trout that first saw the light of day peering up from the streambed gravel where they were incubated. It has alwasy depended upon these fish and if we are successful in defending and reclaiming habitat, it always will. Defending and reclaiming this habitat is the number one objective of Montana's fishery division. In the defense of aquatic habitat, Montana recognizes three basic areas of activity:

1. Maintenance of the natural physical channel.

2. Insuring the quality of water flowing through that channel.

3. Obtaining a sufficient quantity of water.

Of these three basic requirements, preserving the physical stream channel is the number one priority. This requirement is first because we already have some of the answers to rectify most problems interfering with the other two. But, once the channel itself is destroyed and converted to other uses, we may never get it back. We can and have cleaned pollution-fouled waterways. It's possible to augment depleted stream flows, but, at least in Montana, we have never satisfactorily reconstructed a physically destroyed stream channel. We are working on it.

In order to protect this physical habitat, the Montana Fish and Game Department in 1961 committed itself to a program to obtain legal protection for trout streams. We actively solicited public recognition of the problem and the involvement of many diverse groups in its solution.

By 1963 Montana had the first stream preservation law in the nation -- a shaky, tottering affair that was written to expire two years later in 1965. This bill passed Montana's House with a 53 to 33 margin and the Senate 32 to 21. In the following 1965 legislative session the bill was improved and made permanent with only a single dissenting vote in the entire legislature. The law had proven itself.

Montana's 1969 Legislature increased protection of trout streams with enactment of a tough dredge mine reclamation act. This bill is currently being challenged by the mining interests who feel it is unconstitutional. While these two pieces of legislation give significant protection to Montana's trout streams, we are still in need of additional legislation to protect the physical stream habitat. Bills currently pending before the legislature will accomplish this if passed.

Protected physical stream channels are of little value if they are allowed to function as open sewers, and that logically brings us to the area of water quality. The federal Water Quality Act of 1965 gave a tremendous boost to those involved in efforts to improve or maintain our quality water. This Act, however, did not insure clean water for Montana streams. Montana had water quality criteria and stream classification prior to 1965. These were improved in the process of

complying with the Water Quality Act. There is still need for additional improvement, particularly in the area of agricultural wastes where the specific problem is diffuse, ill-defined, and where relative immunity is enjoyed.

Montana, like many other western states, is presently forced to endure many miles of dry stream channels and a basic distrust between fishermen and irrigators that all but prohibits meaningful cooperation between the two groups. This is the issue that still confronts us today. This is most tragic in a time when the fishermen and recreationists are in a position to cooperate on projects that cannot be justified for either purpose alone. Other developers want the fisherman's contribution all right, but they are unable to supply an ironclad guarantee of the benefits. In some specific locations the fishery needs the water that development projects can provide to augment badly depleted stream flows. The irrigation interests need the financial assistance that fishermen could provide, but won't without complete protection for their investment. Every two years this situation comes to a head in the state legislature when recognition for fish, wildlife and recreation as legal beneficial users of water, without diversion, is sought. Every two years we come a little closer, but we have never quite achieved equality with other water users. This conflict is ridiculous. No one benefits from a dry stream.

Water development projects have demonstrated a capacity for altering habitat on a rather massive scale at times. This has been particularly, but certainly not exclusively, fish habitat. In general, Montana has not accepted the premise that exchanging a wild trout stream fishery for a reservoir fishery makes everything even. At the same time we do recognize the potential benefits that could accrue to the now abused aquatic habitat, if project designers really made a serious attempt at ecological planning.

This planning, of course, goes beyond supplying water for fish and extends to making projects compatible with both fish and wildlife. We also find upon achieving satisfaction that a given activity is beneficial to fish and wildlife, it is usually acceptable to most Montanans as being environmentally compatible.

These activities or projects then are also defendable as ecologically sound, since fish and wildlife are our best environmental indicators. "A livable environment for wildlife is a quality environment for man."

While this is a simple concept to state, it is a difficult one to live up to in reality. It will require radically new concepts of what <u>is</u> and what <u>is not</u> economically feasible, over what kind of time interval do we evaluate our actions, and how many reactions to our actions do we accept as our responsibility.

Man has already proved that it is economically feasible to destroy our environment. In fact it has been downright profitable.

This must change and it is changing, for some much too rapidly and radically, and for others too late and too little. However, things do change, and as water use and development traditional concepts undergo changes, we too must adjust our priorities and our allocation of resources and benefits.

This will, in the final analysis, mean making sacrifices for the real achievement of a quality environment, not simply redescribing our traditional activities with new language. It should also be recognized that environmental gains will frequently have to be made through the sacrifice of traditional benefits, historically capable of paying back original investments. Put simply, we will have to stop grabbing with both hands.

In the past we have all been practitioners of selective development. We wanted to achieve specific goals and did so by taking specific actions. Other effects of our actions were either not considered at all, or ignored if they were in conflict with our original objectives. Society is now dictating that our deliberations be complete, and as totally comprehensive as we have the intelligence to make them.

This will not be easy, and it will require making sacrifices we have not been willing to make in the past.

As mentioned earlier, Montana has led the nation in some aspects of environmental care, such as the Stream Preservation Act passed at least seven years before environmental care came into style. We can also lead in achieving a quality environment, in part through water care, if we are ready to consider all the beneficial uses of water, and if we are determined to really get the job done.

"BENEFICIAL USE -- WHAT IS IT?"

Panel Discussion by
John Morrison

Most of what I had in mind to say has already been presented. Our chairman, Dick Fabrick, this morning brought out one or two points that I thought would be of interest. Judge Lessley and Henry Loble took quite a bit of thunder out of what I thought I should say regarding the revision of our legal authority. Then this afternoon Charlie Bowman and Ev Darlinton took most of the engineering aspects of the problem. But I do think the meat of what we are here for today is to figure out how we can make beneficial use of our water and just what it is.

Starting back years ago in this state, all the farmer needed was a well or a source of water for his domestic supply and some to water his stock. Then, as agriculture developed, we got into irrigation and we very quickly found that in the state of Montana we were blessed in many places with good soil provided we could get water on it. So using the easiest and simplest methods of getting water were those that were developed first. In the years since 1930 our Water Resources Board took over and helped to develop many of the projects which we now have in the state, and, in addition, private individuals banded together and started their own small irrigation projects. And so almost by a hit and miss development we got quite a bit of our land irrigated. The Reclamation came along and they have developed some real good projects in the state and have many others on the books. Today we are in a new era, and I think manufacturing is going to be one of our big problems in time to come in making beneficial use of our water in the eastern area of our state, in particular to develop tremendous coal resources that we have there. I don't recall all the figures, but I do recall that it takes about 55,000 gallons of water to develop one barrel of crude oil from coal. That gives you an indication of the tremendous amount of water that we would be using if we start to develop our coal resources in the eastern end of the state for the use of petroleum products or other products.

I think in analyzing this problem the first part of the problem has been answered to some extent, and that is to know what we have in the line of resources. Without going into all the details, our Water Resources Board has been making studies for a period of years to kind of summarize just what we have in the line of surface runoff. Very briefly, we know that we develop in the neighborhood of 40-45 million acre-feet of water in the state of Montana per year depending upon the snowfall, rain, etc. About 55-56% of that water is developed on the west slopes of the Divide and it flows down the Columbia Basin through the Kootenai River, its tributaries, and on into the Columbia. About 3-4% of the water developed in what we call Montana and Glacier Park flows to the north and winds up in Hudson Bay. The other 35-40% flows out through the Missouri, Yellowstone, and on to the east. We do know this -- that our downstream neighbors on both sides of the Divide have envious eyes on the water that is developed here in Montana. We are in the middle of a moratorium at the moment. We have about eight years to go in which water cannot be diverted to other watersheds.

This was designed by an Act of Congress, I believe, about two years ago. We also recognize that plans are being formulated whereby water that is developed in this area will be used by our downstream neighbors if we do not file or lay claim to and somehow develop a beneficial use of this water. For example, Ralph Beck and Associates, a Texas Engineering firm, has developed what they call the Beck Plan. They propose to take somewhere between 15 and 16 million acre-feet of water out of the Missouri River through South Dakota and into Nebraska, pump it into a series of lakes, about 7 or 8 of them that are in Nebraska, get it up to the proper elevation and then by means of a gravity canal take that water to Texas. It is possible. I have a good friend in Phoenix and whenever we get together John always tells me how he can take Montana water and use it down there in Phoenix. About eight or ten years ago he told me they could afford to pay at least $60 an acre-foot for that water in the Phoenix area. You heard this morning what Dick said and Mike said that if we got $2 or $3 an acre-foot in Montana it would be economic. This was the reason I asked the Judge the question whether or not we could store water in Montana and possibly somehow or other arrange to sell it to our downstream neighbors. We have two possibilities as far as storage is concerned in the state. We can store water in our lower valleys and there are a number of dam sites that have not been developed in the state (they were studied under what was known as the Pick-Sloan Plan back in the late 20's. The plan was originated in the late 20's or early 30's and practically every major dam site in the lower valleys was studied in this plan). Or we can do as Ev pointed out, probably study some of our headwater valleys and see whether we can store some of this headwater which we lose in the months of April, May and June, in these upper valleys. I know, Jim, this is going to be one of the problems that might interest you and I am sure Don will be interested in it because it would affect the wildlife and the ecology in both these areas. But, nevertheless, these are both possibilities.

We also have tremendous underground water resources in the state, but they are from our sad experience, a little bit difficult to develop. Because it is like gold -- it is where you find it. Even in the lower parts of the Gallatin Valley we went down 240 odd feet at Manhattan to get sufficient quantity for the town. The irony of it is that there is water that is reasonably close to the surface, but the Health Department is reluctant to O.K. a well for a community that is less than 35-50 feet deep. Nevertheless, underground water development is possible and we need a lot of investigation to determine where we should go for this underground water. Studies should be made, wells drilled, records kept, and observations made as to whether this water in quantities would be available.

We had a lot this morning on the legal authority. There is no question about it. We have got to straighten up some of the laws if we are going to make gainful and beneficial use of our water in the state to the maximum extent. The laws are complicated and we find it out almost every day when we study where we can get water from or if we can get anything out of it. Small communities continually run into problems. For example, look at the town of Dillon. We can get ground water there, but the ground water has a hardness of probably 19-20 grains. The surface water which they are using from Rattlesnake Creek about 8 or 9

miles out of town has a hardness of probably 4 or 5. So the people in town don't like the well water. They have a well or two and there is a big spring just immediately east of Dillon that would be a beautiful source of supply but it's hard water and people don't like it.

Finances are another of the big problems that the State of Montana is faced with. Our Water Resources Board is endeavoring to get enough money at this session of the legislature to carry on the development which they have in mind. I hope that the legislature can find some of the money for some of the plans that have been proposed. I think we know what we should do now and it's a case of getting down and implementing some of the problems and ideas that have been discussed. First and foremost, of course, is that we need the finances. We've got to have the money and I think we've proved very conclusively that if we can get the money that we can do almost anything. We've put a man on the moon and brought him home again and I think that is pretty good proof that if we have the finances, we can do what we need.

Another problem is to control our floods. However, the ecologists claim that we shouldn't control flooding, that it has a certain benefit as far as the country is concerned and especially in the lower reaches of the rivers out on the deltas and flood plains and that nature designed them that way. Well, we've got to make a choice whether we're going to control these floods or let nature carry on. I do think that some of these can be controlled and especially when it comes to the control and reclaiming of land that has been flooded by our irrigation projects. We should very carefully study how we're going to try and reclaim that land with drainage ditches, pumping stations or what have you. The water has been used once and is carried to the lowlands where flooding occurs as I think the Judge mentioned this morning. He told of one place where a one-acre swamp was now 15 or 20 acres. Well that's land that probably could be reclaimed.

The problem of whether or not we're going to store in the valleys or store in the upper regions is best illustrated by what we have in the Dakotas. If you fly along the Missouri River from the south border of South Dakota all the way up through the Dakotas to Montana you can see what can be done by storage of water in the Missouri River Basin. It's practically one large storage reservoir from the south boundry of South Dakota until you get into Montana. There are a lot of opposing views and Dick as an economist could probably have a lot of fun figuring out what is the most economical way to use the land that was flooded and the most economical way to store the water. Of course, in Dakota, they probably didn't have too much choice because they are not blessed with the mountain ranges that we have here. I think we ought to give real serious consideration to these high level headwater storage reservoirs. We were involved in one in Utah that was constructed at an elevation of over 11,000 feet. In fact, most of the material which we used for the headwork was backpacked in as you couldn't even get a helicopter up there. So it can be done, it takes the ingenuity and desire to do it. I think that covers about what I had in mind.

"BENEFICIAL USE --WHAT IS IT?"
Panel Disucssion by
Mike Drazich

I want, at the outset to say, that I was a volunteer by request. I hope all of you realize the distinction. First I want to make a statement startling to some of you. That is that the Bureau of Reclamation was one of the earliest and most prominent environmental agencies. Now why do I say that? To pervert the slogan of the fish and game, it transformed a hostile environment -- a quality environment for wildlife -- into a liveable environment for humans. Now it didn't do this by itself, it had assistance. There were many other things occurring at the same time that were being developed for the same purpose. The extension of the railroads into the West with the aid of land grants was for that purpose. The Homestead Act was for that purpose. The Desert Land Act was for that purpose. Many of the things we recognize early in our generation were for the purpose of converting the West from a wild no man's land into a liveable environment for humans. Now when I say a quality environment for wildlife, I'm not speaking as an expert. Because you know Daniel Webster said it was only useful for prairie dogs and it should be kept that way.

Now, I'm supposed to talk about beneficial use. I don't have a prepared statement so I'll probably be referring to other things as well. Ill probably be enfringing on the fields of the legal experts who are here so I want to extend my apologies before I do it, but I'm going to do it anyway. Most of the things they say I agree with. Judge Lessley referred to the fact that there were many altercations in the early days and they're still occurring but they were worse then. He called them shovel assaults and I am reminded in this connection with the fact of how hard it is to dig out water right information. We were in the Beaverhead with a crew of hydrologists, engineers, etc. gathering the necessary background for an out-of-court adjudication of the Beaverhead. The Red Rock is a separate adjudication from the Horse Prairie, the Horse Prairie separate from the Beaverhead and the Beaverhead separate from the other two. Then there are several adjudications separately on the Beaverhead itself. There are also instances where the original right holders that have good rights -- and can prove these rights -- are not a part of the decree. They can go to court, of course, but any time any court action is started in the Beaverhead it costs millions of dollars. We figured we saved millions of dollars by building Clark Canyon Dam. We hope we did anyway. In building Clark Canyon Dam we firmed up the water rights below.

The Bureau of Reclamation is probably one of the only federal agencies, I don't know of any other, that is required by its legislation to operate in accordance with state statutes. We must observe state laws in every respect, especially water right laws. That's why I say when we build a reservoir we only impound the waters that are excess to the prior rights. If we use the excess water that are subject to rights, we have then to get state permission to redistribute this water. That's what we did in the Bitterroot Valley. Actually the water that's impounded there doesn't belong to the United States. It's a redistribution of the original right holder's

water who had an excess of water. I remember when we were there gathering data. They had several rustling cases going on. Rustlers were coming in with trucks and hauling the cattle out. One day I got a phone call saying you know you people are rustling our cattle. You're pretending to measure our water but actually our cattle are disappearing. So you see, you can get into a lot of things.

In talking to the banker there, he was telling about an incident of old man Flynn, an Irishman, who came over in the early days to find gold. He changed his ambitions to irrigation and secured one of the earliest water rights. He had a neighbor who came from a different part of the old country, his name was Carlson. They got into an argument over beneficial use. Flynn needed the water immediately to save a crop, but Carlson needed the water for his cattle. They were soon arguing as to who should get the water. It resulted in a shovel assault. Carlson took a shovel after Flynn. Flynn picked up a convenient boulder and brained Carlson. Well they took this to court -- Carlson was severely injured and was suing for damages. The Judge was quering Flynn, "Did you really intend to hurt this man? What size rock did you pick up?" Flynn said, "Idon't know, it was a pretty good sized one." "Was it as big as your fist?" "Oh, it was bigger than that, it was about as big as his head but not half as hard."

We have a lot of instances of beneficial use. There are many non-diversionary beneficial uses which are accepted as beneficial use, not only in Montana, but everywhere; some of which are power rights. You remember the old mill rights. One was on Spring Creek at Lewistown. The mill is gone now. They would use the water to operate the wheel to operate the machine to grind the grain and make flour. They were original rights. As the legal people have pointed out many original rights started with the miners. A number of these had been converted to irrigation as has most of the old mill rights. Some of these rights have also been converted to other purposes such as power rights. These nondiversionary rights for the most part were nonconsumptive; the water was used to operate machinery and then went on down the river. More recently, the maintenance of a flow for navigation is a recognized right. Water can be stored and released to maintain a sufficient depth of channel to float the barges, etc.

Another beneficial use as far as we're concerned in the future is going to be the maintanance of water quality in a stream. We will have to provide in our storage enough water so that we can release water down stream to maintain in the stream a quality environment as indicated by the Pollution Control Council or by the agency in charge of that field. Now when you do this, of course, you are providing not only a flow for maintenance of water quality but also a quality environment for fish and wildlife. Somebody mentioned the fact that there is a tremendous ground water reservoir under the Gallatin. The Bureau of Reclamation cooperated with the Geological Survey many years ago in an extensive ground water investigation of these resources. We originally investigated the Gallatin with the idea of putting a dam up the Spanish Fork. We planned

to do exactly what Judge Lessley referred to. We would use the well water down stream and transfer the surface rights to those lands upstream. This was not acceptable to the people so the plan died from want of support. You should recognize that even though you can develop the ground water and make the Gallatin a better place in several ways by doing so you run into problems immediately. There are people in the Gallatin who depend on a certain level of subsurface irrigation, maybe their ground water table is three feet below the ground. They like it that way, its less work, they don't have to depend on mother nature. If you start depleting that ground water you change that situation and you're in trouble. Nothing is simple in this water field. I also want to point out that without storage on the Gallatin you are still going to be subject to spring floods and the destruction that ensues whenever this happens. The only way that you can protect against floods that I know of is to store the surplus water.

John Peters mentioned how come in the West we don't operate on the Riparian Doctrine? It's the same reason as for the Reclamation Law, the Homestead Law and the assistance to the railroads. Western water law, which in effect is the priority use doctrine, evolved because of the need of water to develop the West and this is the only way they could do it. This is distinct from the Riparian Doctrine of the east which says that the water in the stream belongs to the land it flows through and it should be there at all times in the quantity that existed. Now I defer to the lawyers on how far he owns. I think in the eastern states the landowner owns to the middle or thread of the stream, whatever that means. He actually owns that far, but he doesn't necessarily own the water though he has the right to use that flow. The difference is that they didn't have the need to divert the water like they did out West. That's the reason for the difference in the two and as far as I'm concerned, I prefer our doctrine. The reservation doctrine which you people have mentioned, the reservation of water rights for lands reserved by the United States, is an extension of the Riparian principle and it does create a problem in all of the western states.

Thank you for your time and if any of you have questions I would be pleased to try to answer them after the presentations of the other panel members.

"BENEFICIAL USE -- WHAT IS IT?"

Panel Discussion by

H. G. White

I have been on various panels over the years with quite a few of you that I notice here and though we have never exactly agreed on everything we were talking about I think we always agreed on the purpose we hoped to achieve. I do represent a lot of farmers as president of the Montana Water Development Association. We have perhaps 1,000 farmers that are represented through the various water irrigation districts that are members of our association. I think farmers were some of the first environmentalists, even though they are catching a little "hell" today on how they are using their irrigation water. Many came to this country in the early days. They didn't make it mining gold so they settled on a stream, dug a ditch and did some irrigating and sold potatoes, grain and livestock to the miners.

The problems that I have heard today remind me of a show I saw called "Just Imagine". I recall the leading man was a Scandanavian by the name of Al Brenner. He had been knocked out by a hit on the head in 1930 with a golf ball and did not come to until 1980. He was walking along observing all the miracles that had happened in the intervening 50 years. Suddenly he saw a young couple walk up to something called an automat. They put a coin in it and here came a little craddle down with a baby in it. He looked at that and said, "Give me the good old days!" I think after hearing about the problems we have a lot of us would like to go back to the good old days. As we have heard this morning the appropriation of water must be for some useful or beneficial purpose. I think the key to the beneficial use of water is something that really hasn't been stressed and that is the economy of use. I believe that as the years go on and these problems become more acute that we'r going to be confronted more and more with the economy of use. Up to now it has never really been enforced. If we enforce the beneficial use concept I think we will solve a lot of our problems. In the western states beneficial use has meant water for domestic, municipal, irrigation and industrial uses. These were the only ones given beneficial use recognition. Now you heard this morning that all uses may be considered equal.

Irrigators have long recognized the needs of good water management. I have lived in one particular irrigated valley for some 27 years and have observed the progress made by the irrigators through the help of the Soil Conservation Service and their own devices. Irrigators aren't really sitting still; they have long recognized the need for help in saving their water and making beneficial use of it. In the meantime times have changed rapidly. We're now using fertilizers and sprays for weeds and beetles. Some of it's being carried off the land and polluting the streams. The irrigators are being blamed for it and, of course, there is some blame they have to accept.

Another problem being posed now is giving legality to the recreational use of water. There again, I don't think the irrigator has been lax in recognizing this need. At our last annual convention in Helena in 1970, the Montana Water Development Association passed a resolution

recognizing that there should be legal recognition of recreational beneficial use of water. In fact our resolution read: "The Montana Water Development Association recognizes the vast potential that water based recreation has as an economic factor in the development of Montana's economy and the importance of protecting and preserving water that can be utilized in recreation. Be it resolved that the Montana Water Development Association go on record in support of legislation that would recognize recreation as a legal beneficial use of water." I don't think irrigators are blind to the problems that face us today. I'm sure the 1,000 irrigators that we represent, not individually probably, but as a whole supports this resolution. Legal recognition of beneficial use to include recreation may have the most far reaching impact on water use in our future history. We heard this morning about the possibilities that may exist. I rather think that this legislature will pass some legislation in this regard. Once this is done and the Fish and Game Department files on surplus water in the stream, they are going to see that there is economy of use of water among the irrigators. They will also take a look to see if all of the water is appropriated. There will be more concrete ditch lining, more irrigation sprinklers and that type of thing to make irrigation more efficient. The economics of life don't always move as rapidly as we would like and we have to give it a little help occasionally. I believe and hope that we would all support existing law and insist that it be followed.

In my opinion, the area that we are going to have to approach for recreational water is in new development. Now Jim may see a dam as a possible destroyer of fish habitat but he probably concedes that the engineers and wildlife people can get together. There will always be problems but we should all work together in solving these problems rather than fighting each other. As John mentioned, we have about eight years left on the moratorium on interbasin transfer. Now we could sit up here and argue for the next eight years as to what we are going to do with our water. However, the question could very well become academic as we might not have any water left to argue about. It's hard for a lot of people to realize that as the water goes merrily down the stream it's being appropriated down stream. Already the states of North and South Dakota have appropriated about 25% of the water that goes out of our eastern borders. I think John and others have mentioned plans for the use of our water and diversion into other basins. Thus, the thing we have to do is get together and develop projects that meet the requirements of all segments of our economy. We have to have an economy that is balanced. I hope we can work together to save our water here in the State of Montana. Then, we can argue on how we're going to dish it out.

"BENEFICIAL USE -- WHAT IS IT?"

Panel Discussion by
John Acord

What is beneficial use to me? What has been the beneficial use of water in my life? Well, as a kid, I can remember my first impression of drinking water, being out in the yard and running through the hose. When I was a little bit older, I remember sneaking off to the Missouri to go swimming. These are all beneficial uses.

I can remember as a kid having to take a bath on Saturday night, and I am not sure whether I considered that a beneficial use at that time, but my ideas have changed through the years. As I became older and went into high school I worked at odd jobs in the summer and after school. I spent sometime in the forest service and I could see a very definite relationship with water being beneficial there. Also, I worked on farms and though these were mostly dry lands I could see a very beneficial use of water in the production of crops. I have worked as a florist and I can assure you that the greenhouses really drink it up. Production of flowers I consider a beneficial use. After I got out of school I went into the Army and crossed the Pacific right at the end of World War II. Transportation by water is a beneficial use although at the time I was crossing it might have been called a recreational tour. During my college career I started out in pre-med and of course this relates to humans. All human activity has something to do with water. At various times I worked in construction and I can remember at least one summer we spent building a concrete water storage tank up by Choteau. Water was used in the production of concrete. Another beneficial use and the tank itself was certainly of beneficial use to the people of Choteau for the storage of water.

With my graduate work in biochemistry I gradually went into physiology and I ended up taking a number of ichthyology and ornithology courses. Water requirements for biological systems is one of the things I became very familiar with. My overall point is that these are beneficial uses of water. In looking down through this list you will notice that I have touched on domestic, municipal, recreational, industrial and agricultural uses.

Over the past year I have been working on the state water plan. What does the law say regarding the development of a state water plan? It says that the general welfare of the people of Montana in view of the state's population growth and expanding economy, requires that the water resources of the state be put to optimum beneficial use and not wasted. It goes on to say that it is the public policy of the state to promote the conservation, development and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens. The development and utilization of water resources and the efficient economic distribution thereof are vital to the people in order to protect existing uses and to insure future supplies for domestic, industrial, agricultural and other beneficial uses. Finally it states that resources of Montana must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

We're not yet into plan formulation in the state water plan. We're assessing needs and finishing up the inventory of available water and related land resources. However, I can assure you that we will consider all the beneficial uses of water in preparing the state water plan.

I would like to echo the sentiments that were expressed here by some other panel member. I think there is going to have to be a comprise among all of us. Maybe the best way I can sum it up is to say that it will be a welding of all beneficial uses for the good of the people of the state including environmental and recreational values.

"THE LEGAL ROLE OF THE FEDERAL GOVERNMENT IN STATE LAND AND WATER DEVELOPMENT"

by

Ralph W. Johnson

A sub-title that I considered using at one time for this address has a long and a short form. The short form is "Ain't Much". The long form is "What the Federal Government Can't Do Constitutionally with Water Resources in the Face of Determined State-Legal Opposition Ain't Much". Widespread misunderstanding exists about the nature and extent of the federal government's constitutional powers in the water resources field. I would like to outline briefly these powers here and then indicate why we should be more concerned with what the federal government "ought to do" rather than what it constitutionally has the power to do.

We are concerned with two basic subjects, land and water. They are obviously closely inter-related. For example a bill has recently been introduced in Congress to put both land and water planning under the Water Resources Council and the various basin commissions. These two responsibilities would thus be merged.

It is appropriate to keep in mind that when the original 13 states gathered to form a union they reserved all powers of government to the states except those specifically delegated to the federal government in the Constitution. The interesting development during the past 50 years has been the rapid and extensive expansion of these delegated powers. We now see a continuing transition in the situs of governmental power. In the water and land management field we are observing some major shifts of power toward the federal end of the spectrum. At the same time we see that some power is going the opposite direction, and specifically that the federal government is encouraging and sometimes insisting on a greater exercise of responsibility at the state and local levels.

In the water field the states have traditionally controlled the allocation of water through the appropriation or riparian systems. The states have controlled water quality through pollution control agencies. More recently they have undertaken to control filling and building in lakes, streams and the ocean shores through state laws and state agencies. Zoning and land-use planning on the other hand have historically been a local responsibility. Hawaii is the only state that has statewide zoning and planning. However other states are now moving into this field and within the past two or three years have considerably expanded their interest in land planning. Now, rather suddenly, we see the federal government expressing great interest in the subject and in encouraging state and local governments to plan and zone more effectively.

To understand what is now occurring in the water field we need to know something of the historical development of federal and state responsibilities. I would like to review them briefly here.

The early federal policy was one of accepting state laws and local customs for the application of water in the western United States. Thus in the Act of 1866 and the Desert Land Act of 1877, the

federal government purported to "sever" water resources from the federal domain and make it available to western farmers and miners pursuant to local custom or state law. Much of the development of the west occurred under this laise-faire approach.

Federal deference to state law was continued in the Reclamation Act of 1902. Section 8 required that the Secretary of Interior "act in conformity with state law". This was long construed by the Secretary as requiring state approval of any Bureau of Reclamation project. The Federal Power Act of 1920 appeared to effect the same policy in Section 9(b). This section said that any applicant for a Federal Power Commission license must provide "satisfactory evidence" of compliance of state law.

The last 25 years has seen a distinct shift away from state control over water resources toward federal control. This shift has resulted partly from court decisions and partly from federal legislation.

In First Iowa Hydroelectric Cooperative v. F.P.C. (1946) the United States Supreme Court declined to bar a federally licensed interbasin transfer in Iowa which was supposed to be prohibited by a state statute. Specifically, the court construed Section 9(b) of the Federal Power Act to mean that Iowa had no veto power over the project and that compliance with state law was not a prerequisite to the issuance of a license. A similar attempt to bar a federally licensed project on a navigable river in the State of Washington on the basis of an initiative passed by the people of that state was also unsuccessful (Tacoma v. Taxpayers of Tacoma 60 Wn. 2d 66, 371 Pac.2d 938 (1962)).

The gradual demise of Section 8 of the Reclamation Act has taken longer and has been more subtle. One of the most important decisions here was Arizona v. California 373 U.S. 546 (1963) where the court said that water users under a federal reclamation project did not have a state water right but had only a federal contract right to water. Further it said that the Secretary of Interior could readjust this contract right, and had the power to reallocate project water, even intrastate, and even contrary to state law, in the event of a shortage. During the same year the Supreme Court decided two other cases, City of Fresno v. California 372 U.S. 627 (1963) and Dugan v. Rank 372 U.S. 609 (1963). These cases established that state law (giving a preference to a city) could not control the allocation of water under a reclamation project (in spite of Section 8) and that a person who was damaged by a federal reclamation project had only a right to damages under state law; that is, state law could not stop the project, it could only determine the amount of damages payable to persons injured.

Two other major sources of growing federal power must be noted. They are similar in that no compensation is required to be paid if the federal government acts under either one. They are known as the "navigation servitude doctrine" and the "reservation doctrine".

The basic raison d'etre of the navigation servitude is easily understandable. The federal constitution gave to Congress the power to regulate interstate commerce. This necessarily includes the power to regulate navigable waters on which that commerce occurs. Thus if you build a birdge, across a navigable stream, which interferes with navigation the federal government could make you take it down and need not pay you compensation. Carried to its logical end this rule would apply far up stream, to non-navigable tributaries. Thus if enough farmers consume water in irrigation during a period of low flow they might adversely affect navigation. One can argue therefore that Congress should be able to stop, or at least regulate their irrigation in order to protect navigation, on the same ground that Congress can regulate the building of bridges. What this means in practical effect is that Congress has the constitutional power to control, and even deny, irrigation water rights when necessary in aid of navigation -- without payment of compensation for persons injured. To do so, of course, Congress would have to say explicity that it was acting in aid of navigation.

This may frighten many people. It shouldn't. There is a great difference between Congress's constitutional power to do something and the practical possibility of its actually doing so. If we look at other areas of the law we see that Congress has the constitutional power to do many foolish things. Fortunately it usually has better sense than to do them. I suggest that Congress is not about to apply the navigation servitude to take over state-established water rights either with or without payment of compensation.

The reservation doctrine also gives many water rights owners cold shivers. Again one can question whether their fear is rational. The reservation doctrine originated with the Winters case in 1908. In that case the Supreme Court said that a treaty setting aside certain desert lands for an Indian tribe also impliedly reserved sufficient water for the irrigation of these lands. One could not expect the indians to move to a specified piece of desert land and become farmers, without providing them with enough water to carry out this goal.

This doctrine lay dormant until the Pelton Dam case in 1955 (FPC v. Oregon 349 U.S. 435 (1955)) where the court said that state law could not bar an F.P.C. license for a dam located on federal land reserved for a power site. This case raised a warning flag, although it did not directly involve state protected water rights. In Arizona v. California the doctrine reached the next step of development. The Supreme Court there held that all federally reserved lands, including national parks, national wildlife refugees, national forests, military reservations, and the like, all carried with them an implied reservation of sufficient water to accomplish the goals for which the land was reserved. Needless to say the amounts of water originally reserved were seldom quantified. Furthermore one can worry about the various changes in the purposes for which the reservations were originally set up, that have been enacted by Congress over the years, or adopted by the Executive. Theoretically one can argue that a new forest service use of water in 1971 (for a national forest set aside in 1910) could cut off a privately owned, state-protected water right established in 1915. This argument remains theoretical, however,

because only one rather insignificiant instance has been found where anyone's water has been cut off under this doctrine.

During the past few years a variety of bills have been introduced in Congress to either eliminate or reduce the impact of the navigation servitude and reservation doctrines. None of these bills has passed and none in fact has really come very close to passage.

The Public Land Law Review Commission rendered its final report on June 30, 1970. It studied the reservation doctrine with some care and in its report recommended that all federal agencies be required to qunatify the amount of water reserved for various federal lands under this doctrine. The PLLRC also recommended that procedures be established for private persons and others to contest the quantities so specified; lastly it recommended that compensation be paid to anyone damaged who claims a water right valid under state law before the 1963 decision in Arizona v. California. I do not agree with these recommendations, for two reasons:

1. The cost of quantification of the reserved amounts would be very great indeed. This cost might be justified if the doctrine had a major impact on water use. Apparently it does not. Its impact appears to be insignificant to date and there is little reason to think this will change. It would seem unwise to spend great sums of money in quantifying federally reserved waters when the bene- to be gained are so small.

2. One can guess that a federal administrator who is instructed to quantify the amount of water reserved for federal land under this jurisdiction will claim the largest possible amount. He will be strongly influenced to exaggerate and to lay claim to the largest amount of water possible.

A better solution to the problem would be simply to assure that anyone who is damaged by the application of the navigation servitude or the reservation doctrine should be compensated. This would not impair the power of the federal government to go ahead with projects, but it would assure compensation to those damaged. Besides, it is probably the only solution that might be politically acceptable at present.

One other matter I should refer to in talking about federal-state relations is the doctrine of sovereign immunity. This arose out of the early English notion that "the King can do no wrong". If the king can do no wrong he cannot be sued. We have carried this doctrine into the legal system of the United States and find that it is still around to plague us. An individual or a state can only sue the United States when it has specifically given its consent. In too many cases it has not given that consent. One can of course sue individual officers of the United States in their individual capacity. But this can only be done when they act entirely outside of any legislative authority -- a very difficult thing to prove. The United States itself can be sued in a limited number of situations under the Tucker Act, in the Court of Claims in Washington, D.C. -- a very inconvenient place to sue -- or under the McCarran Amendment when an entire stream is being adjudicated under state law. But this

leaves many important areas of water law and policy outside the range of clarifying litigation.

Now let's turn for a moment to the question of federal state relations in land planning. At the outset it is well to remember that the federal government has absolute management power over federal lands. This constitutes about one-third of the lands in the nation and some 30% of the lands in Montana.

The Public Land Law Review Commission made an intensive study of federal management of its lands. In its final Report it criticized past federal policy which, it said, was based largely upon the idea of withdrawing lands from general use and setting them aside for special purposes. It recommended instead that all federal lands be carefully surveyed and classified to assure that they were put to the best possible uses. It recommended generally a much more intensive management program for these lands.

Although recognizing that the lands should remain in federal ownership for the most part, it nonetheless urged that the state and local input into management decisions be increased. Thus the Commission recommended

1. that state and local zoning should ordinarily control the use of federal lands;

2. that all federal agency plans for the use of federal lands should be submitted for comment to appropriate state and local entities;

3. that greater federal financial assistance be provided to state and local governments for planning the use of these lands;

4. that the environmental zoning on federal lands recommended by the Commission be closely coordinated with state and local environmental goals;

5. that recreational policy on federal lands, except for lands of unique national significance, be closely coordinated with state and local policies. In general the Commission felt that federal lands designated for state or local recreational use should be managed, if not leased or sold, to the states for recreational management.

6. In the area of fish and wildlife management the Commission took a somewhat different tack on to and recommended stronger federal management on federal lands. At the same time it recommended that cooperative state-federal agreements be entered for each state and the coordinating committees of state and federal representatives be created for each state.

The past two or three years have also seen an increased federal interest in zoning and land-use planning for non-federal lands. As indicated earlier this field of law has traditionally been the exclusive domain of

local governments. Only very recently have state governments participated in it. Now we see the federal government expressing considerable interest. There is for example a bill in Congress to create a sea-coast management regime which would result in the federal government reviewing most state and local plans for sea-coast and shoreland management. This particular bill died in Senate Commerce Committee last December, but will undoubtedly be revived in 1971. It would have provided for federal grants of two-thirds of the cost of state and local planning for shoreland management where federal guidelines are met. Quite an incentive.

Probably the most comprehensive federal action in the area of land planning is the new bill proposed by Senator Jackson late last year entitled "The Land and Water Resources Planning Act". This Bill would amend the Water Resources Planning Act of 1965 and place land management responsibility in a newly constituted Water Resources Council and in the basin commissions created under the 1965 Act. The structure of these bodies would be changed slightly to reflect their new responsibilities. The status of the Council in the federal hierarchy would be upgraded by the appointment of the vice-president of the United States as chairman. Substantial amounts of money (probably on the order of $100,000,000) would be authorized to aid in local and state planning.

A variety of other methods of bringing the federal government into land use planning throughout the nation are also being proposed elsewhere in the federal establishment. The Council on environmental quality has a proposal, as well as other entities. In view of these initiatives it seems likely that the federal government will become more involved in local and state land planning. It also seems likely that this intervention will be in the form of the "carrot" -- that is, grants made to state and local entities to aid in their planning, conditioned upon meeting specified federal guidelines.

Now let us return to the area of federal and state water planning. Earlier I summarized the federal constitutional powers available to manage the nations water resources. Now let's look at how that management has actually been carried out.

Historically the federal government moved into project construction because state and local entities were not well enough financed to carry out such large enterprises. As early as 1944, however, the states began insisting on a greater voice in the planning for these large projects. Thus in the 1944 Flood Control Act Congress provided that the Corps of Engineers and the Department of Interior must submit project plans to the states for comment. Later the Secretary of Agriculture voluntarily agreed to follow the same procedure. The states, however, continued to complain that their views were both disregarded and were solicited too late to have any real impact.

In 1965 Congress enacted a Water Resources Planning Act. This Act created the Water Resources Council composed of five members, the Secretaries of the Interior, Agriculture, the Army, Health-Education-Welfare

and the Chairman of the Federal Power Commission. Subsequently the Secretary of Transportation was added as a member of the Council. The Chairman of the Council is designated by the President and to date has been the Secretary of the Interior.

This Act authorized creation of river basin commissions around the nation and four have been created to date, for the Pacific Northwest, the Souris-Red-Rainy Region, the Great Lakes, and New England. Two new ones are about to be born, the Upper Mississippi and the Ohio River. Others are currently under study.

The Water Resources Council and the basin commissions are an expression of the growing support for a federal-state partnership in water planning, and project development. One goal of the Water Resources Planning Act especially pertinent here was expressed in Title III which provided for planning grants for the states. In 1965 very few states were doing much planning in the water resources field. California, Indiana, Louisiana, New York, and Texas were involved significantly, but only California was a major spender in the area. Title III of the Act authorized some $5 million a year in federal funds to assist in state planning for water use. Unfortunately appropriations in the years since 1965 have never reached that sum, but they have been large enough to spur the states to a more extensive water planning program.

Two significant shortcomings of the basin commissions have been found. One, they are not structured to allow sufficient voice by local governments and secondly they are not structured to permit an adequate voice by private interests in the water field.

Now I would like to turn for a moment to the subject discussed by several prior panelists -- major interbasin transfers -- and particularly the possibility of a transfer of Columbia River waters to the southwest. Several speakers have mentioned the possibility of Montana becoming an exporting state. I would think this is very unlikely in view of the quantity and location of water in this area. If water is to be transferred to the southwest it most likely will come from the mainstream of the Columbia somewhere in the State of Washington. Even that transfer might, however, have an impact on water use in Montana.

You will recall that in 1968 Congress declared a ten-year moratorium on all studies of transfers of water to the southwest from the Columbia River. One of the interesting things that has occurred since that moratorium was the report by Mr. Mills, Executive Director of the Metropolitan Water District, that the area served by MWD probably has enough water to last 20 to 30 years longer than was predicted in 1968. This may give the nation more time to make a considered decision.

Several brief observations about legal and institutional matters might be usefully stated here. First, Congress has the power to enact legislation to study or to execute an interbasin transfer if it desires to do so. This power might have been in question prior to the 1963 decision in Arizona v. California, but is hardly in doubt at present. Furthermore the states cannot individually or collectively stop such action, either by state legislation or by interstate compact. Of course,

they can continue, through their Senators and Representatives, to exercise their political muscle in Congress, but that is the forum in which the decision will take place.

Nonetheless the states should be deeply involved in the process of planning and decision. They need to make a careful assessment of their own alternate futures, with or without an interbasin transfer, and of the ways they might protect or benefit their own interests if such a transfer occurs. One policy approach that ought to be considered more seriously is whether, and to what extent the area of origin might actually "benefit" (as determined by the area of origin) from a major interbasin transfer. In the case of Colorado Big Thompson project in Colorado and the California State Water project the areas of origin finally acceeded to the plans when they found they would be better off with the project than without it. This might be the criteria that should control the attitude of the Pacific Northwest states toward a Columbia River diversion proposal. Conceivably, of course, this criteria could not be met -- but we should study the question thoroughly to find out.

In this connection it would be well for these states of origin to give more serious study to the possibility of an inter-regional "sale" of water. Conceivably this might be done by creating a compact organization or a federally authorized corporation in the states of origin to represent the region in an exchange or sale of water to the Southwestern states. Needless to say this approach would demand some innovative planning. Nonetheless I suggest it is a concept that ought to be given more serious consideration.

In conclusion I might make two general comments about federal-state participation in water planning. First, I would urge that the states continue to improve and strengthen their own water planning capacity. Secondly, we should continue to seek federal laws that both permit and encourage state participation in water planning, and that provide financial assistance for such state action.

Touching quickly on some of the other key aspects of federal-state relations we should give serious thought to

1. amending the Water Resources Planning Act of 1965 to permit greater inputs by local governments and by private enterprise;

2. obtaining federal legislation that would require compensation to be paid to anyone damaged by a federal water project even though the injuries might be constitutionally non-compensable under the reservation doctrine or the navigation servitude;

3. eliminating entirely the doctrine of sovereign immunity;

4. urging the states to move more aggressively into the land planning field and encouraging more effective planning at the local level as well;

5. convincing the specific northwest states that they should stop being purely negative about interbasin transfers and consider whether and to what extent they might actually benefit (in their own terms) by such a transfer. Urge study of an inter-regional sale of water in this connection. Analyze the laws and institutions that might be essential to assure a benefit to the states of origin if an inter-regional transfer is to be effected.

LEGAL BACKGROUND ON RECREATIONAL USE OF MONTANA WATERS*

by

Albert W. Stone

There is neither a statute nor a recent case defining the right of the public to make recreational uses of the water which flows over private lands in Montana. But surely with the pressure of more people and the explosive expansion of their recreational uses of water it is inevitable that conflicts will mount between recreationists and landowners which will compel the defining of the public's right to use waters overlying private lands. It will happen every time a landowner wishes to fill in and build structures over his lake or stream land or otherwise interfere with or prohibit members of the public from the use of the overlying waters. The question of what are the public's rights is already perplexing personnel in state agencies and persons in wildlife and sportsmen's organizations; there is an equal, opposite, and justifiable concern on the part of ranchers and homeowners whose lands lie alongside of lakes and streams. All of those people seek some legal background to enable themselves to cope with the increasing incidents of conflict. This article is intended to assist by discussing that background.

Before attempting to deal directly with Montana's prospects for legal developments which will affect the ways of life of recreationists and landowners alike, it is first necessary to review developments which have already occurred in the law elsewhere in the United States, for it is that law which will probably guide our courts and lawmakers in the formulation of law in Montana. These more general developments elsewhere have already been analyzed and discussed in previous writings by this author and by others, but a review of them will set a perspective for our own development. Following that review, this paper will discuss the legal position of Montana -- if it can be said to have defined one -- with respect to recreational use of water.

I. General Review: The law governing recreational uses of water.

A. Navigability.

The word "navigability" has been properly described as "chameleon in character," for it has different meanings and definitions as it is used for different purposes. One cannot properly use the word without an understanding of the differences of meanings and an awareness of the purpose for which he is using it.

1. Navigability for the purpose of determining title.

*Some readers may wish to refer to the more technical version of this paper, complete with footnotes, found in the Montana Law Review, Vol.32, Winter 1971, Number 1

In 1842, a case arose involving litigation over an oyster fishery off the coast of New Jersey, which required a determination of the title to lands under tidal waters. The United States Supreme Court found that title to these beds was originally in the British Crown, that each of the thirteen original colonies succeeded to that title when they won their independence, and that there was no subsequent cession of that title to the United States or to anyone else upon the formation of the Union. So the original states have held title to these beds underlying navigable waters ever since the Revolutionary War.

Three years later the same court held that states subsequently admitted to the Union were admitted on an "equal footing" and that therefore they also took title to the beds of their coastal navigable waters upon their admission to the Union. In effect, then, there was a cession to the new states by the federal government of title to the lands under navigable waters at the time that the federal territories became states; the United States reserved title to the upland, subject to various public land laws, but title to the beds of navigable waters was automatically transferred to new states. In a long line of cases, this doctrine has been applied to inland non-tidal waters as well as to tidal waters, confirming state ownership of the lands beneath navigable lakes and streams to the high-water mark.

With respect to lands beneath inland non-tidal waters which were <u>not</u> navigable, there was no change of ownership upon the occurrence of statehood, so the federal government simply retained ownership of the beds of such streams as well as the upland. Upon disposition of lands under the various federal land laws, title to the beds of these streams was conveyed to various riparian patentees and thus was simply a part of the newly settled private land.

But how does one tell whether a particular body of water is navigable for the purpose of determining whether the bed of a lake or stream was ceded to the state or patented to private ownership? We have been taught to use an often repeated quotation from an 1870 decision of the United States Supreme Court:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Court's language is imprecise and therefore difficult to apply. It is made still more difficult by certain important refinements concerning its application. One refinement is that for the purpose of determining title navigability must be determined as of the date the state acquired statehood, because

it was precisely then that there was a cession (albeit unexpressed, undeclared) to the new state of the beds of navigable water. So, as the issue of title inexorably arises from time to time today and will arise in the future, fading evidence must be scrutinized to determine the susceptibility of a stream's use for commerce at a day long past. And thus the landowner who can trace his title back to a federal patent will eventually find out whether he or the state has owned his subaqueous land for perhaps the last century or so. Satisfactory evidence of trade and travel (or absence of trade and travel) on water at the time of statehood may be difficult or impossible to obtain now, and cannot become easier to prove in the future.

The language of the Supreme Court quoted above comes from a case involving navigability for the purpose of federal regulation of commerce, but the case has frequently been used without discrimination in cases concerned with title determinations. Its language suggests that navigability is determined by the susceptibility of the water for commercial use in its "ordinary condition" without need for improvements. That is a likely interpretation but we cannot yet be sure. Since it is now the law that navigability for commerce may occur at any time that it becomes feasible to improve a waterway for commerce, it is possible that the Supreme Court may hold either (1) a stream was navigable at the date of statehood if it could later have been made navigable by reasonable improvements, or (2) it was then navigable if it could have been made so by improvements which would have been reasonable back when statehood was acquired. We must await Supreme Court clarification of this aspect of applying the language of the case which we are working with, but in the meantime we are advised in an article in the Natural Resources Journal that neither of those two qualifications is likely to be adopted because they seem to somewhat alter the tenor of the Court's original language and they would introduce further uncertainty into title determinations.

Exactly how much trade and travel is required to qualify a stream as navigable at the date of statehood depends upon the individual characteristics of the water in question and upon the local activity of the time. An early leading case stated:

> ...The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.
>
> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public

> highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

Navigability for title purposes cannot be determined by examining whether a body of water has been meandered on the maps of the U.S.Government survey. If the surveyor's lines run across the body of water in disregard of its presence, it shows that the surveyor thought the water so insignificant that any later patentee should pay for the underwater acreage just as he would the uplands. If, however, the surveyor has drawn lines along the vicinity of the edge of the water and stopped his survey lines at those boundary lines, it is said that the body of water was "meandered," and it shows that the surveyor thought that the water was so significant that a later patentee would not have to pay for the subaqueous acreage. But navigability for title purposes is strictly a federal question, and the final arbiter is the United States Supreme Court. That Court has given scant consideration to the fact that on the government survey the stream or lake was or was not meandered.

2. Navigability for federal regulation of interstate commerce.

As has been noted, the cases determining navigability for purposes of ownership of the beds under waters relied on the definitions of navigability developed in cases concerned with the federal jurisdiction over commerce in navigable waters. But the application of tests for navigability for the purpose of commerce does not require going back to the date of admittance to statehood, or indeed, back anywhere. Navigation for federal commerce jurisdiction may arise in the future if a stream can be made into an avenue of commerce by reasonable improvements. It does not depend upon the "natural and ordinary condition" of the water under consideration. There is no more authoritative expression of criteria for navigability for commerce than this language by Justice Reed of the United States Supreme Court:

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken...
>
> Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region

> may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. Although navigability to fix ownership of the river bed or riparian rights is determined as the cases just cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise.... It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.

3. Navigability for public use.

Of course, if a stream is navigable for title purposes, the bed normally belongs to the state, and so the public has the right to use the waters; and if it is navigable for purposes of commerce, then travel and transportation on the water are under the jurisdiction of the federal government and again the public can generally make use of the water. But each of these determinations of navigability has to do with problems of federalism: does the state or the United States own the land under the water; and who has jurisdiction to regulate the use of the water. Those determinations of navigability have to do with a state's relationship to the United States rather than with the state's relationships with its citizens. Neither a determination of navigability or non-navigability for commerce nor for title need have anything to do with the body of internal state law which governs the use of property and the activities of citizens within a state, in connection with water over which the federal government exercises no paramount jurisdiction. When the problems of federalism are separated from the problems between citizens concerning water use, the latter problems can be dealt with simply as matters of intrastate law, unencumbered by definitions and determinations which are neither pertinent nor useful.

Many state courts have developed a broad definition of navigability for their intrastate purpose of determining what waters the public may resort to, frequently requiring only that the water be capable of floating a skiff, a canoe, or most frequently a log. In some of the earlier state cases the courts assumed that the bed of the body of water had to be owned by the public for there to be a right of public use, and also that the criterion for determining title was a state rather than a federal test of navigability. That latter assumption subordinated problems of federalism to intrastate law, and so permitted the courts to hold that a stream was navigable (for title and therefore for public use) whenever the waters in question were susceptible of substantial recreational use. The 1893 decision in Lamprey v. Metcalf uses an approach, rationale, and language which others have followed:

> ...yet we have extended the meaning of that term 'navigable' so as to declare all waters public highways which afford a channed for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year.... Certainly we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.... To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.

More recent federal cases have established that one of the assumptions underlying the more liberal state cases on public uses was erroneous: that the criterion for determining title was a state rather than a federal test of navigability. But title determination is a problem in the state's relationship to the federal government and should require a uniformly applied federal test. The state courts can continue to use their own self-developed liberal definitions of navigability for their separate purpose of regulating intrastate uses of the waters of the state by citizens of the state. The recognition of a separate state purpose in defining waters suitable to substantial public beneficial use has enabled the state courts to establish a trend favoring public use.

Shoreline owners on western lakes have long paddled their canoes, swum, and waterskied all over the surface of lakes without regard to whose land they may have floated over. They have simply assumed that legal access to a particular lake carried with it a right to share the use of the lake's surface. That popular assumption has been vindicated in recent cases which have held that on non-navigable (for title) lakes where the bed is privately owned, persons who obtain legal access also have the right to make reasonable use of the entire lake and can prohibit or remove obstructions which would unreasonably interfere with their use. These decisions are logically as applicable to a stream as a lake, and just as logically for the benefit of members of the public as for riparian landowners, if the stream is susceptible to substantial public use. Consider, for example, this language from a 1952 Wisconsin case:

> ...It is no longer necessary in determining navigability of stream to establish a past history of floating logs, or other uses of commercial transportation, because any stream is <u>'navigable in fact'</u> which is capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes....

B. Public waters.

Two Rocky Mountain states, New Mexico and Wyoming, have premised their conclusions upon a proposition long recognized in Western states: that waters do not belong to the owners of land

through which they flow; they belong to the public. The New Mexico case, State v. Red River Valley Co., arose as a result of the construction by the Army Engineers of the Conchas Dam on the South Canadian River. Defendant had owned the land, but conveyed the damsite as well as a flowage easement (not the ownership) covering the large area to be flooded, reserving to himself all other rights to the area affected by the flowage easement. The state brought this action for a declaration whether it could open these waters, over private land, to public fishing. The New Mexico Supreme Court found that fishing is a beneficial use which pertains to public waters. It said:

> We hold that the waters in question were, and are, public waters; and that appellee has no right of recreation or fishery distinct from the right of the general public.... The right of the public, the state, to enjoy the use of the public waters in question cannot be foreclosed by any circumstances relied upon.

The Wyoming case, Day v. Armstrong, arose because the plaintiff sought a declaration of his right and that of the public to float the non-navigable North Platte River across defendant's lands. Some of the pertinent statements of the court follow:

> ...the actual usability of the waters is alone the limit of the public's right to so employ them....
>
> The title to waters within this State being in the State, in concomitance, it follows that there must be an easement in behalf of the State for a right-of-way through their natural channels for such waters upon and over lands submerged by them or across the bed and channels of streams or other collections of waters.... The waters not being in trespass upon or over the lands where they naturally appear, they are available for such uses by the public of which they are capable....

C. Reasonableness, or limitations on the public use.

There is good reason for concern over the privacy and enjoyment of life by the riparian landowner. Justice Sadler, dissenting in State v. Red River Valley Co., expressed it: The Common law has dramatized the sanctity of the home and premises of the individual against invasion by strangers and trespassers in the age-old maxim: 'A man's house is his castle.' So it was and immemorially has been but no more, to view the matter realistically, since henceforth a rod, reel and fly are to perform the office of a writ of entry.

In the Wyoming case of Day v. Armstrong, although the Court protected the public's right to float the North Platte, somewhat illogically it denied a right to wade the stream, saying that such a use would be a trespass on the privately owned bed. Perhaps

the Court was indirectly attempting to limit the public to streams which are large enough to permit floating, but to restrict the public from wading up rivulets through landowners' farmyards. That will be the effect of the decision, but it may go too far in restricting uses of state waters to floating. Wading while fishing and fishing from the streambank of non-navigable (for title) streams has become prohibited in Wyoming.

There is very little law directly restricting public uses of public waters, either for the benefit of members of the public by affording protection from over-congestion and unsuitable uses by others, or for the benefit of landowners who need similar protection. The problem has been considered in an article by Messrs. Johnson and Austin, who state:

> Although few cases have raised the question of legal controls of lake or stream use to date, many more will undoubtedly arise in the future as greater pressure is put on the smaller streams and lakes of the West. The very purpose for which these bodies of water are thought desirable, recreation and homesite location, may be thwarted unless some rational means for allocating their use is found. Whether the courts articulate a 'nuisance' theory, or one based on 'riparian rights', the standard of 'reasonableness' will probably be controlling. Just what this will mean in a given state will have to be worked out on a case by case basis...

D. Navigability, title and public use: conclusion.

Having not considered the historical background and the modern developments pertaining to the public recreational use of water, several conclusions emerge. The problems which call for our careful attention and for resolution are created by conflicts between private landowners and members of the public who seek recreation. Solutions to the problems will require evaluation of the suitability of particular bodies of water to particular uses by the public, as well as where and how the public should be regulated for its own benefit and for the benefit of the private landowner. It is time to stop worrying about "navigability" and "title"; they do not contribute to a solution, and they distract and divert our attention from what is relevant to a solution.

II. Montana: problems and prospects.

A. Problems.

> The defendant trespassed also when he waded up and down Fall Creek fishing. The channel of the creek belonged to the plaintiff (1 Tiffany on Real Property sec. 302), and while the plaintiff did not own the fish, *ferae naturae*, he had the exclusive right to fish for them while they were in the waters of Fall Creek within

> his land. (26 C.J. 598.) It would seem clear that a man has no right to fish where he has no right to be. So it is held uniformly that the public have no right to fish in a non-navigable body of water, the bed of which is owned privately.
>
> -- Callaway, C. J., in Herrin v. Sutherland,
> 74 Mont. 587, 596, 241 Pac. 328, 331,
> 42 A.L.R. 937, 942 (1925).

The foregoing opinion, written in 1925, represents the Montana Supreme Court's only attempt to deal with the rights of the public to make recreational use of waters over private land. But there are some good reasons why the Court may choose not to adhere to so simple, and essentially mechanical a solution of the conflict between landowners and recreationists. Curiously, it was entirely unnecessary to any decision in the case for the court to announce that recreationists have no right to use water over private land. More curiously, the case was not vigorously contested, and so the Court was not called upon to give the question of public recreational rights the serious and thoughtful consideration that it deserved. These weakening aspects of the case come forth when one considers the case in detail.

The complaint in Herrin v. Sutherland alleged eight causes of action arising out of defendant's approaching plaintiff's land from the navigable Missouri River, trampling the banks along plaintiff's land while hunting and fishing, breaking plaintiff's fence, entering plaintiff's fast land, and fishing in a small pond and the small Fall Creek on plaintiff's land. In all but the seventh cause of action, plaintiff expressly alleged that defendant trespassed <u>above</u> the high-water mark of the Missouri or elsewhere on plaintiff's <u>uplands</u>; and in the seventh, plaintiff implicity alleged a trespass on his uplands because he alleged that defendant fished in a pond and stream which were entirely surrounded by plaintiff's land. So defendant necessarily trespassed on plaintiff's uplands in the seventh cause of action because he had to obtain access to the landlocked pond and stream. The Supreme Court expressly inferred such a trespass.

That part of the opinion in Herrin v. Sutherland which declares that "the public have no right to fish in a non-navigable body of water, the bed of which is owned privately" is seriously weakened by the fact that each cause of action alleged explicitly or implicitly a trespass by defendant which had no relationship either to water or to the bed of a non-navigable body of water. Justice Calloway, writing for the majority of the Court, found that plaintiff's complaint alleged a trespass upon plaintiff's <u>uplands</u> in each of the eight causes of action. In discussing the second cause of action, the Justice did place emphasis upon defendant's fishing in the non-navigable Fall Creek -- a finding which was unnecessary since the Justice also found, with respect

to that cause of action, that defendant trespassed on plaintiff's fast land when he tramped upon and destroyed plaintiff's hay. So it was quite unnecessary to the decision to state that defendant had no right to fish Fall Creek.

Defendant put up a minimum defense. Notwithstanding that plaintiff had alleged a trespass on his uplands in each cause of action, defendant entered a general demurrer: he conceded as true all of the facts alleged by plaintiff and claimed that they did not constitute a basis for a complaint. The demurrer was overruled by the trial court, but defendant refused to file an answer in his own defense. So there was no trial -- merely the entry by the trial court of a default judgment. Surprisingly, defendant appealed and the matter was submitted to the Supreme Court on briefs, without appearance of counsel. It was not extensively briefed. Of course the judgment was affirmed. In concurring, Justice Holloway pointedly and appropriately said: "...the appeal does not merit serious consideration, but should be disposed of summarily...."

Leaving Herrin v. Sutherland, there is another aspect of Montana law which deserves discussion because it is so different from the law elsewhere. Under federal law each state acquired title to the beds and banks of navigable streams up to the high-water mark upon the occurrence of statehood. When later settlers patented riparian land from the federal government they received title from the United States only to the high-water mark of navigable streams because the state already owned the land below that mark. But by statute and case law, commencing in 1895, Montana has conceded to the riparian landowner title extending to the low-water mark. The United States Supreme Court has thought it permissible for a state to so concede property already vested in the state for the benefit of the public, so each time a person obtained a federal patent to land bordering a navigable stream in Montana, the state generously conferred upon the federal patentee the strip of land between high and low water, which the state had owned since 1889.

But ownership of subaqueous land is quite different from ownership of dry land. That is illustrated by one of the well established fundamentals of water law: with respect to those streams which are navigable for both title and commerce, the states own the beds but they do not have authority over the use of the overlying water -- that lies with the federal government. In Gibson v. Kelly, the case which first stated Montana's peculiar rule that private ownership extended to low water, the Montana Supreme Court recognized that ownership of land which is periodically covered with public water is a limited ownership. The Court said:

> It is true that while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river and upon the strip in question....

Forty-six years after Gibson v. Kelly the Montana Supreme Court rendered a decision on another matter which can be related to the public's use of the private land adjacent to navigable or public water. In Laden v. Atkeson, the plaintiffs owned a right-of-way for a ditch across defendant's land, and maintained a dam in the river from which their water was taken. Defendant refused to permit plaintiffs the use of a road over defendant's land or the use of defendant's soil and materials alongside the ditch. Plaintiffs desired the use of defendant's road for access for maintenance, and the soil for maintenance materials. The Supreme Court found that plaintiffs not only had an easement for their ditch, but also a secondary easement "for the purpose of obtaining full enjoyment of their primary easement consisting of their ditch right...." So the Court held for the plaintiffs. If a private party is entitled to that which is necessary to obtain the full enjoyment of an easement, there must be an analogous right in the public: the primary public right is to travel on navigable streams and public waters, and that carries with it a secondary easement to utilize the banks of the stream as required to ensure full public enjoyment of its primary right. It logically follows that members of the public should be permitted to enter upon the uplands for the purpose of portaging around obstacles or impassable places along a stream where that is necessary for travel in or along the stream itself.

B. Can the public acquire a water right by beneficial use?

It was natural for our water laws to use the term "diversion" in connection with the acquistion of a water right for a beneficial use. Water rights law began its growth when mining and irrigation were the only substantial uses of water, and diversion by weir and ditch were physically necessary because there were no electric pumps or gasoline engines. Montana's codes bear witness to history in directing a person desiring to appropriate water to post a notice "at the point of intended diversion" and to file with the county clerk a statement containing the "name of the stream from which the diversion is made."

Mining and irrigation are still important uses of water, and a diversion is still the principal means of putting the water to a beneficial use. But now there are additional important uses of water, some of which do not require a diversion. Indeed, for some uses a diversion would damage the use: The generation of hydro-electric power and the use for recreation are conspicuous examples. Is it true or was it ever true that to obtain a water right there must have been a diversion?

In Hutchins' authoritative treatise on water law, the emphasis is placed upon the "beneficial use" rather than upon the means of transporting or applying the water. Even the 1911 treatise by Weil emphasizes "beneficial use" rather than the means of use. An early Colorado case says: "No principle in connection with the law of water rights is more firmly established than that the application of water to beneficial

use is essential to a completed appropriation." No "dam, ditch, reservoir or other artificial means was used" for watering cattle in one Nevada case, the court saying that if there must be a diversion with intent to apply the water to a beneficial use, then "if the drinking by cattle constitutes a diversion, then the necessary intent must be that of the cattle." If the use of water in a streambed by cattle is a sufficient beneficial use to support a water right, can it be argued that the use in the same manner by people is not? Beneficial use rather than a diversion is the touchstone of a water right.

The Montana Supreme Court has never closed the list of what comprises a beneficial use. In Osnes Livestock Co. v. Warren, the Court recognized a right originated for a swimming pool and fish pond; and in Quigley v. McIntosh, the court prohibited the use of water for a fish pond, but it did so only because that use extended and increased the use of water under a prior right acquired for other purposes and would have injured other water right owners. The Court protected a private use for fish ponds in a 1966 case and a Montana statute authorizes the operation of such ponds. If private persons can acquire a right to a quantity or flow of water for swimming pools, fish ponds, and the like, can it be argued that the public may not acquire similar rights for similar beneficial uses? In Paradise Rainbow v. Fish and Game Commission, the court said: "Under the proper circumstances we feel that such a public interest should be recognized."

C. Prospects.

There are some recent developments in Montana law, and some recent proceedings in the Montana Legislature, which strongly indicate that the public's interest in the recreational use of Montana waters will be both protected and elaborated in the future.

In the most recent legislative session (1969), the Montana Legislature amended Revised Codes of Montana (1947) sec. 89-801, which is the basic statute authorizing the acquisition of water rights. The amendment authorizes the Fish and Game Commission to appropriate the waters of twelve recreational streams for the purpose of maintaining stream flows necessary for the preservation of fish and wildlife habitat. This is legislation of the greatest significance, because it is a recognition that recreational uses of Montana waters are beneficial uses. Water will be appropriated -- in effect, reserved -- for such purposes.

This amendment also authorizes the reservation by the Fish and Game Commission of other streams and rivers in addition to the twelve named, if approved by the Water Resources Board, the State Soil Conservation Committee, the State Board of Health, and the Legislature. The requirement of approval by so many agencies will make it a cumbersome or nearly impossible process to reserve additional streams. But recognition of the public's interest has always been a step-by-step process, and this part of the amendment is a step -- albeit a step which needs to have an obstruction removed.

There were three bills introduced into the 1969 Legislature which were killed, but which are indicative of future legislation. The most far-reaching was House Bill No.337, which attempted a complete recodification of Montana's surface and underground water rights law. It necessarily was a lengthy piece of proposed legislation. Among its many features was the express inclusion of fish, wildlife, and recreational uses as beneficial uses, and that a right or reservation of waters could be effected with or without a diversion of the water. Importantly, it expressly recognized as existing rights the uses by the public for recreational purposes as of the time that the public made a substantial use of the water in question. It also provided for the reservation of any public waters for existing or future uses and for maintaining adequate streamflow. It is likely that there will be more legislative activity on this bill or other comparable proposals.

Had it passed, Senate Bill No. 45 would have added the following language to RCM (1947) sec. 89-802:

> Beneficial purposes shall include, but shall not be limited to, domestic water, industrial water, irrigation, livestock water, municipal water, public recreation, and the preservation, propegation, /sic/and minimum habitat of fish and other wildlife; providing that diversion, when not essential to beneficial application of the water, is not required for protection of a right. (emphasis added.)

Quite obviously the underlined portions contained the purpose of this amendment, because the rest of the text surely presented no innovations. But in the Paradise Rainbows case, to be discussed in more detail later, the Montana Supreme Court suggested that the law of Montana already encompasses the underlined portions. Therefore it would be advisable for such legislation to contain a paragraph recognizing existing rights of the public to recreational uses, as was done in H.B. 337. Such an inclusion would avoid the implications that the public has not yet acquired rights and that the underlined wording was intended to operate only prospectively.

House Bill No. 414 was introduced to authorize the Fish and Game Commission to purchase water from reservoirs, and to assure that the purchased water would remain in streams, augmenting their flow for recreational uses. Purchases of water for recreational uses in streams require different treatment from purchases of water for other purposes. Most purchasers are unconcerned with stream volume of flow elsewhere along the stream than at the point of intended diversion. It is quite possible that the purchaser actually diverts little or none of the same water which was released from the reservoir pursuant to his purchase. That is because the stream may have been totally exhausted by upstream irrigation uses, and the water which the purchaser diverts may have come to his reach of the stream from drainage and return-flow from upstream uses.

The situation is different for the Fish and Game Commission or a sportsman's organization which purchases water for the purpose of augmenting stream-flow for recreational purposes. Here there is concern over the flow of the stream elsewhere than at some particular point of delivery. Neither fish nor fishermen can satisfactorily congregate at a few points along a stream where there is sufficient water, and neither fish nor fishermen desire water carrying heavy siltation. But there is now no satisfactory means of protecting purchased water throughout the length of a stream or a sizeable portion thereof. House Bill No. 414 would have protected water purchased by the Fish and Game Commission from other uses "from the point of release of such waters and continue to the point or points of intended use."

Lastly, there is evidence that the Montana Supreme Court will decree that the public has acquired water rights by its beneficial uses of water for recreational purposes. In the recent Paradise Rainbows case, one DePuy diverted water from Armstrong Spring Creek to Trail Creek in 1957, where he used it in private fish ponds. DePuy looked upon Trail Creek as a dry streambed which he artificially supplied with diverted water. If those were the facts, then Trail Creek was artificial for the purpose of RCM (1947) sec. 26-306 which authorizes the operation of private fish ponds under license by the Fish and Game Commission. The Commission licensed his operation from 1958 until 1965, when it refused licenses on the ground that Trail Creek was not artificial. DePuy then brought mandamus to compel the issuance of licenses, and the factual issue was whether Trail Creek was a natural stream prior to DePuy's diversion of Armstrong Spring Creek into it. The trial court found that it was not a natural stream and the Supreme Court affirmed, finding that there was sufficient evidence to support the trial court's conclusion. Therefore, DePuy could sustain his claim that his ponds were artificial. It is significant that the Court here protected an appropriation of water for the purpose of operating fish ponds -- a recreational beneficial use.

But there is more to this case. The Fish and Game Commission had asked the Court for a mandatory injunction against DePuy to compel him to install a fishladder on Armstrong Spring Creek. Neither the trial court nor the Supreme Court found a strong enough factual case for the Commission: the Commission had permitted the diversion of Armstrong Spring Creek without a fishladder since the spring of 1957, and Armstrong Spring Creek was found to be but a short stream and not a major migratory route for fish. The Commission had argued that it was guarding a public right acquired by the public's beneficial use of the stream for fishing. The Court held against the Commission because there were insufficient facts to support the Commission's argument, but the Court's treatment of the issue was prophetic:

> The Commission does maintain that the public has a prior right in the waters of the creek which would require DePuy to release some water through a fishladder. The public right urged by the Commission

> would be based on the fact that the public had used the creek as a fishing stream and natural fish hatchery before DePuy built his dam. Under the rule of Bullerdick v. Hermsmeyer, 32 Mont. 541, 554, 81 Pac. 334, DePuy could not use the water to the detriment of prior rights.
>
> Such a public right has never been declared in the case law of this state. California, an appropriation doctrine jurisdiction whose Constitutional provisions relating to water rights are virtually the same as Article III, sec. 15 of the Montana Constitution, has recognized such a right and has upheld statutes requiring fishways. 'citation' Under the proper circumstances we feel that such a public interest should be recognized. This issue will inevitably grow more pressing as increasing demands are made on our water resources. An abundance of good trout streams is unquestionably of considerable value to the people of Montana.
>
> While the Commission's argument is plausible, we cannot yield to it, given the facts at hand..... .(emphasis added.)

D. Conclusion.

No statute yet exists in Montana defining the conflicting rights of landowners and recreationists, or settling whether the public has acquired water rights for recreational uses by resorting to the water for recreation, or determing whether a water right can be acquired by a private person for recreation as for a fish pond or swimming pool. While legislation is non-existent, case law is sparse; the Montana Supreme Court has not yet been called upon to develop deliberately, the law governing the conflict between landowners and recreationists in a vigorously contested case, nor has the Court expressly held that water rights can be obtained by either the public or a private person for recreational purposes, although it has at least intimated that such rights do exist.

Those in state agencies who hold responsibility for providing public recreation, those members of the public who desire to make recreational beneficial uses of the waters, and those landowners who desire privacy and tranquillity are indeed frustrated and perplexed at the uncertain and unsettled state of the law concerning the public's recreational uses of Montana waters. Troublesome as it is, the tardy development of doctrine in Montana is probably fortunate for the best long-term interests of the public. Had Montana's law been developed and settled many years ago when the public's interest was not so pressing as it now is, the makers of the law might not have given the careful consideration to the public interest which that interest so strongly demands today. Moreover, the experience and development in the law in other states can be most helpful in guiding our own development. Free from the encumbrances of fixed and settled statutes and precedents binding us to the restrictions inherent in concepts of title, navigability, and diversions of water, the Montana courts and legislature have today an unrestricted opportunity to determine the public's right to recreational use of Montana waters -- waters which belong to the public.

ONE THIRD OF THE NATION'S LAND

by

Ted Schwinden

The report, "One Third of the Nation's Land", is the summary report of the Public Land Law Review Commission. This Commission was established in September, 1964 by an Act of Congress. The Commission formally went out of existence December 22, 1970. It spent some six years and some $6,000,000 in what has to be one of the most comprehensive analysis of the federal public land resources that has ever been undertaken. The one third refers to the fact that approximately 1/3 of the United States is public domain of one type or another. In Montana, approximately 40% of our land is either in federal or state ownership. We actually have about 30% of public domain-lands. In the 11 Western States, which are the basic public land states, 61% of the natural runoff arises on federal lands, a vast majority on lands administered by the Forest Service. The charge that Congress made to this Commission was to examine the federal public domain with this question in mind: Should the public lands be retained and managed or should they be disposed of? Either way, the Commission was charged with the responsibility of determining which alternative would secure the maximum benefit to the general public. One-half of the Commission members were appointed by Congress and the other one-half by the President. The chairman was appointed by the Commission itself. There was an advisory council representing the various federal agencies and special interest groups across the United States. Finally, in an effort to get the broadest base kind of support, each state governor was asked to designate a governor's representative to participate in the discussions, hearings, meetings and recommendations through the history of the life of the Commission. Mr. Tiegan served as Governor Babcock's representative and I represented Governor Anderson during the last 18 or 19 months.

Perhaps two general comments on the report are in order. First, the Commission after looking at several study methods decided they would take a commodity approach. Thus, the study is broken down into various commodity values that exist on the public land such as recreation, timber, minerals and water resources. Secondly, there runs throughout the PLLRC report a new concept called the dominant use concept. This is a recognition by the PLLRC that there very well may be recreational, timber, mineral, or other values that are available on any given tract or area of public domain that is more important than any other. Congress should direct its land managing agencies to determine the dominant use and that this should be a key factor in management decisions from that time forth.

Chapter 8, entitled "Water Resources", summarizes the Commission's recommendations on water resources. In its study, review and analysis of water resources the Commission dealt with three significant areas. I'll deal with these in just brief detail. First of all they looked longest and hardest at one of the most controversial areas of federal-state water rights; namely, the Reservation Doctrine as it applies to the federal domain. Secondly, they did review current land managing agencies and congressional policies in

the area of watershed protection and management programs. Thirdly, the Commission considered whether or not due regard had been given to the impact on the public land resource in the various multi-purpose water project planning operations which had been done in the past and may be done in the future. And as a final note, the Commission points out they focused their attention on all of the resources and resource uses which might have an effect on water with primary concern for environmental effects. As I said, the Commission spent more time and took more testimony on the Reservation Doctrine than any of the other areas. I'm going to skirt over the legal implications, but I'm sure many of you know that as early as 1955 in the Pelton Dam Case that the court indicated that a withdrawal or reservation of public land carried with it reserved rights to water. In 1963, Arizona v. California, the Supreme Court removed any doubt about the Reservation Doctrine as a source of water right. The net result of the '63 Arizona v. California decision has been to create a situation of general uncertaintity particularly in the Western States where most of the public land is found. Impact of the Reservation Doctrine on states such as Montana was discussed and testimony was presented to the PLLRC. The Commission listened to the testimony and came up with a series of recommendations which they felt would resolve this crucial issue in federal-state water rights relations. They said first of all that the Reservation Doctrine of water rights for federally reserved land should be clarified and limited by Congress in at least four ways. First of all, the Commission recommends that the amount of water to be claimed, both surface and underground, be formally established. In other words, they must quantify their requirements. Secondly, they must provide administrative procedures by which each claim can be contested by parties affected. Thirdly, they said that the Federal Agencies should file these water rights within a reasonable length of time. There was a great urgency on the part of the Western Governors to make this time as short as possible so that it doesn't hang fire for 30 or 40 years. Finally, the commission recommended that Congress enact legislation which would clearly require that compensation be awarded to those with claims that were valid under state law prior to the Supreme Court decision of Arizona v. California.

The Commission also looked at the area of watershed protection and management and pointed out that the present congressional statutory directives are pretty general and vague. They pointed out the absence of priorities for the various program objectives which may presently exist in federal managing agencies and they pointed out conflicts which are pretty obvious. For example,the report states "In some cases planting vegetation to control erosion results in decreased runoff into streams. Clear cutting of forests to increase water yield can, on the other hand, seriously increase erosion problems". They recommend that Congress should require public land management agencies to submit comprehensive reports describing the objectives of their current watershed management protection program, and describe the actual practices that they are carrying out under such programs and the effect of their practices on the nations water resources. I mentioned earlier that the Commission recommended changing from the multiple use to the dominant use concept. There is also an insistence

by the Commission that Congress play a more dominant role in the development of criteria for the management of the public land resource. There is an explicit criticism that too much responsibility has shifted into the administrative branch and that Congress has really lost its leadership in setting forth the goals for the use and disposal of the public domain for the benefit of the general public. The one other area which the Commission dealt with in its report is in the determination of the impact of various water resource development projects. They simply say that Congress should require that all federally authorized water development projects on public lands be planned and managed so that they give due regard to other values of the public land.

This, then, is a very brief summary of this massive report and the 45 or 50 study volumes from which it was drawn. I'm sure that Montana would be well advised and the people that are interested in water and all the other resources of the public lands to watch carefully the Congressional by play that will take place in the next two or three years on the recommendations that the Commission has made.

AGENCY PROBLEMS IN WATER LAW

by

Douglas Smith

The Montana Water Resources Board does have problems in water law. Part of these problems might be alleviated by legislation that we would like to see introduced in this session of the legislature. I thought it might be a good idea to go through some of these items with you. The first is the modern water code. We were directed by house resolution to develop a modern water code. We have had a committee working on this for over a year. The first recommendation is the passage of an act; "to provide for centralized filing of all notices of appropriation with the Montana Water Resources Board and providing a copy for the respective county clerks and providing for the automatic appointment of the Director of the Montana Water Resources Board as referee in any adjudication suit". The reason for centralized filing is that the County Clerk and Recorder's records are not always easily available to us and many times difficult to find. A good inventory of our water rights is a necessity. We feel that the Montana Water Resources Board can provide the courts with most of the expertise needed in water adjudication cases and, therefore, are recommending that the Board be automatically appointed a referee.

We feel that recreation should be a recognized beneficial use. The act would allow for the appropriation of water without diversion by the Fish and Game Commission for recreational purposes. We think this is a necessity and are strongly advocating passage during this session. We feel that a ground water permit system is a necessity. This is due partially because of the problems we have had in the Fox Hills area in Eastern Montana and the Miller Creek near Missoula. The ground water permit system would require that when ground water is to be withdrawn that a permit be obtained before any well or other works are constructed. We are also interested in amending our conservancy district law. We have had a lot of interest in conservancy districts the last two years and we have found that we needmore time to prepare the preliminary survey and detailed feasibility. study. We are asking that the time be extended to one year rather than six months. We have prepared an act to provide for state inspection, regulation and supervision of dams and reservoirs for safety purposes.

There are a number of other bills that we are very much interested in which includes legislation on seismograph and exploratory holes, water pollution control, open cut mining and the Smith River as a recreational waterway. All of these will receive our support as well as a number of others that I have failed to mention.

In closing I want to say that I certainly agreed with our dinner speaker when he said that the states are going to have to take a more active interest in the development and use of their water resources or else give up their responsibility to the federal government. This means that we will have to put more money into water planning activities here in Montana. If we don't do it, someone will do it for us.

AGENCY PROBLEMS IN WATER LAW

by

Art Whitney

One of the objectives of the agency I represent and the major objective of the division that I head is to provide sport fishing in Montana. If we're going to provide sport fishing, I think it's understandable that there are two things needed. We have to have a place for fish to live and we have to have some way for people to get to these places. Of first importance is a place for fish to live. For the wild stream trout, that Montana is famous for, we have to have a good quality of water along with a sufficient quantity. We also have to get people to the fishing sites. This is an easier job on lakes than streams because the people that use lakes seem more mobile than the ones that use streams. Most people that use lakes have boats. If you can get them down to the shore with an access point, they can usually get all over the lake. Also, owners on lakes seldom seem to object to people boating around in front of their place. The same isn't true on streams. Most people that use streams either walk along the bank or in the water or float down. Owners usually object to this. They frequently put fences across their streams and, of course, barbed wire is pretty hard on rubber boats, faces and hands and anything else that happens to slam into them.

We have 107 fisherman access sites at the present time. But this isn't going to be enough. I don't care if it is increased to 1070 or 10,700. There will never be enough to allow the sportman to use the streams to their full potential unless some kind of a passageway is provided. One of my major problems with water law is trying to determine the fisherman's stream rights. I probably get 20 or 30 inquiries a year about this. I was fishing on the West Gallatin last summer and some guy came along and said, "Get the h_ _ _ out of here". I went, but did I have to? Well, four or five years ago I thought that would be easy to determine. We have a little compilation of fish and game laws outlining these rights. It states, "Navigable rivers, sloughs, and streams below the lines of ordinary high water in the State of Montana and all rivers, sloughs and streams flowing through any public land of the state shall hereafter be public waters for the purpose of angling." But then you try to define navigability. I wish that five or six years ago I had access to the paper that Al Stone gave this morning. That would have saved me a lot of time and effort. We asked the opinion of Arnold Olson, then the Attorney General, what constituted a navigable stream. His opinion was summarized like this: "All streams capable of floating logs or which have floated logs to the Miller Market are navigable." The legislature has taken this opinion to declare all streams in the above category to be navigable. The streams that the Commission knows have floated or do float lumber and come within the above category have already been declared navigable in fact by the legislature so no further declaration is necessary.

I thought that somewhere there must be a list of the navigable streams. I first went to the state engineers office, from there to the land board, then to the U.S.G.S., and many other offices in Helena. No one had such a list. I was finally directed to the BLM, the Regional office in Billings. In '65 I got an answer that said in Montana the only

streams recognized as being navigable are those which have been known to be navigable in the past. These are the Missouri River downstream from Fort Benton, the Yellowstone downstream from Billings, and the Big Horn from its mouth to the mouth of the Little Big Horn. To the best of my knowledge there are no judicial decisions that would add to that. I could add a good bit more to the story of my search for a compilation of navigable streams, but time is short. The basic point I wish to make is that though the Lesiglature has used the Attorney General's opinion to define a navigable stream, there is no clear-cut answer as to what streams are navigable other than those I mentioned. This, indeed, creates a very chaotic and uncertain situation in providing access and passageway to our stream fisherman. I think Jim pretty well covered yesterday the quality of water, so I'll concentrate on water availability for the remainder of my time. Don Aldrich has already told you of our Bitter Root experience where we bought the water but couldn't get it. We were finally told that the only way we could do it would be to hire a ditch rider. It seemed as if the ones that were pirating our water weren't too enthusiastic about hiring a ditch rider to find this out.

In 1969 we got a new law that said we could file on the unappropriated water of certain streams. We face the same thing here that has been brought out by several of the speakers when we went to file. Our law very definitely says: "From the unappropriated remainder." So, we figured we had better find out the unappropriated stream flows. We found that there isn't a stream of those listed that the appropriations don't exceed the stream flow. On one, I think it was the Madison, I believe appropriations exceed the maximum flood flow of the stream twelve times. We then went back to Rep.Murphy and said, "just what did you mean?" He said, "Well, that water really isn't appropriated until someone puts it to good use and if there is water going down the stream, as there obviously is in the south fork of the Flathead and most of these others, those appropriations are not really valid. If there is water remaining there, file on it." And, so we have. We've filed in all but two counties. I was somewhat surprised yesterday to learn of Mr. Loble's concern about this bill leaving it up to the court in the future because I personally don't know of any other way to do it. It's obvious that the other uses of water are not going to stand still for us getting a filing that binds it up forever. Surely municipal use, if our population keeps growing, is going to have to take water from other uses, but it seems to me that to leave it to the court in the future is the only way. We figure this is a great step forward for us anyway. We may have a junior water right on a short list of streams, but at least in the future it will come to court. Without it we have nothing.

AGENCY PROBLEMS IN WATER LAW

By
Don Willems

In the protection of water quality, we see several basic needs:

1. Water Pollution Control Law (Sections 69-4801 -- 69 -- 4819). There is a need for better enforcement provisions. The present water pollution control law needs a specific penalty provision. Also the hearing procedures and time allowed for the various procedures need revision. The exact hearing procedure is unclear and enforcement though existing law takes months and perhaps years.

The classification of waters for industrial use clause should be eliminated. Presently, streams being used for industrial waste usage for the past 30 years and where there is no single public water supply serving over 100 persons can be classified only for industrial use. There should not be this exclusion.

2. Subdivision Law (Sections 69-5001 -- 69-5005). This law relates to water supply and sewage disposal for new subdivisions.

Enforcement procedures are not given and there is not specific penalty provision. Changes are needed to correct this.

Some subdividers have evaded the law by filing a deed by description rather than by plat. This needs to be changed so all new subdivisions come under the law.

3. Requirement for connection to existing sanitary sewerage system or water system (no existing law).

There are areas near cities that need to be served by an adjoining city's water or sewerage system in order to protect water quality. We would like to see a law which required connection to an adequate water system and/or to a sewerage system where a public health hazard or water pollution problem exists. Presently, conditions have to be mighty bad before some of these areas will make this consideration.

Further along this line, many of our cities will not permit connection to water and sewer systems unless the area is first annexed. This has led to many problems in the outlying areas. In a way you can't blame the cities as in many cases the supplying of water and sewerage services is the big incentive for the outlying area to be annexed. Perhaps better annexation powers would be the answer. An alternative might be this procedure: A law which would make it mandatory for a city to permit connection by an individual or individuals to their water or sewerage system with fair compensation to be given to the City. However, when the outlying area reached a certain density, the city would annex it. This would give both the outlying area and city certain advantages which they do not presently have and at the same time give the area a good source of water and an adequate sewerage system. For orderly development around a city, there must be some give and take.

AGENCY PROBLEMS IN WATER LAW

by

A. B. Linford

I would like to open my remarks on agency problems in water law by quoting from one of our policy memorandums. "The Soil Conservation Service is not a water user and does not acquire water rights. The SCS furnishes technical assistance to individual and group water users in planning and constructing water storage and utilization facilities. Such water users are responsible for acquiring water rights and obtaining state agency approval of construction plans as required by state laws and regulations. The SCS assumes no responsibility for procuring these rights or approvals or for enforcing state water laws and regulations." In light of this policy statement these remarks then are the problems of our cooperators as we see them, and may not necessarily express the viewpoint of our cooperators, either individually or collectively. However, I am sure many of these cooperators would agree with our assessment of the situation.

As an agency whose primary concern is for the conservation and development of soil and water resources, i.e. use of resources in such a manner as to prevent erosion, degradation, and waste, we find that many problems are not with the law itself, but rather with the legal application of the law by the appropriators. In the early stages of development, free water in Montana was plentiful for all purposes. The law gives users the right to appropriate state waters for beneficial use. It assumes that the appropriator in good conscience will perform his duty in making efficient use of the resource, while at the same time protecting and conserving the resource base.

Under our free enterprise -- competitive system the tendency is to maximize profits by minimizing costs of production. Following this trend, such things as protection and conservation of the resource becomes external to the resource development because costs associated with protection, conservation, and enhancement for sustained use are not commensurate with returns to the individual on a short term basis. Some of the things which are not provided for in the law which appear to be external to many developments which have been made are:

1. Maintenance of minimum flows in live streams.
2. Land capability classification to insure lands are suitable for irrigation on sustained basis.
3. Limiting amount of water which may be diverted for a given use on an annual basis. (Beneficial use should be described in terms of quantity, time, and efficiency.)
4. Requiring that diversions from livestreams be made in such a manner that there is a minimum disturbance of the stream bed and channel after diversion works are installed.
5. Requiring that conveyance systems (ditches and canals) be constructed on non-erosive grades for all design flows.

6. Requiring that common diversions and common conveyance systems be used to supply lands to be irrigated where engineeringly and topographically feasible.

As a result of irrigation developments made without giving due consideration of the above we find:

1. "Live" streams almost totally dried up during irrigation season.

2. Land being irrigated which is too steep, has erosion problems, alkalinity and salinity problems, is being "seeped out" and will not sustain high level production.

3. Water diverted to land far in excess of crop needs resulting in seeped lands, lowered quality of vegetation, reduced crop yields, erosion in waste water channels and supply ditches.

4. Annual diversions being constructed with bulldozers from loose gravels in the stream bed, disrupting the stream stability and causing accelerated erosion.

5. Productive land being used by paralleling supply ditches where one canal would suffice. Losses from seepage in multiple ditch systems is extensive.

Where SCS is requested to provide technical assistance or where federal cost sharing is requested, we can control and provide for the conservation measures needed to increase efficiency of water use, prevent erosion, and soil and water deterioration. However, we estimate that only 15% of the land irrigated in Montana is adequately treated in this respect. A water law which supports the objectives of efficient use of water without erosion, or degradation of soil and water resources would do much to plan the remaining 85% in land adequately treated for sustained use and long term benefit to Montana.

Another area of concern to us is the too often expressed phrase of "water shortage." With the possible exception of certain streams in eastern Montana most areas of the state do not have a water shortage. There is, of course, a period of time in late summer when there is not enough water in most of our snow-fed streams to meet all the demands that have been placed on the resource. The same may be true during winter low flow periods. On the other side of the coin is the fact that these same streams, in all probability, are in flood stage in May and June. Flood water damage reduction is a major consideration in most PL-566 watershed projects. Some recent changes in city and county laws have overcome early organizational problems affecting these projects.

Management, or modulation, of these streamflow variations is essential if we are to put Montana's water to its most effective and efficient use. This, we believe, can best be accomplished by storage. Floodwater peaks can be reduced, thus reducing damages,

and low flows can be supplemented. The Madison and Missouri Rivers are good examples of the benefits to be realized from modulated flows. Obviously,some trade-offs are involved if we are to place storage reservoirs where they can best serve their intended purposes. However, I believe it is important that we recognize that legislation, by itself, will not put water in a stream in August.

There are several other areas of concern to us that I will cover very briefly:

1. The scarcity of good reservoir sites indicates that multiple purpose water resource developments should have priority in development plans.

2. The present pattern of paralleling irrigation ditch systems should be recognized as a major deterrent to efficient use of our water resources many of these ditches are being maintained because of fear of loss of a "right" if they are changed. Many have been built simply to get "higher" on the stream and as a result criss-cross other ditches making repair and maintenance very expensive. Many of these same ditches have erosive grades.

3. Wild and scenic river proposals should give full consideration to the downstream effects of limited or restricted development. As the name states, these river systems, uncontrolled, are both wild and scenic.

Thank you for the opportunity to present these views.

AGENCY PROBLEMS IN WATER LAW

by

Alvin E. Bielefeld

As a representative of many of the Interior agencies in Montana, I would like to say that the cooperation our agencies have received from Montana state officials has been excellent. To my knowledge, this has always been true.

But we do have problem areas in the field of water law:

1. In Montana, we do not have a clear definition of what a beneficial use of water is. This is particularly troublesome when we undertake to appropriate water for recreation, for fish and wildlife purposes or for quality control.

Now, when Interior agencies construct a reservoir, they like to be in a position to charge some of the costs of the reservoir to recreation, fish and wildlife and quality control. If construction costs cannot be assigned to these normally non-reimbursable functions, the construction of the reservoir may prove to be financially infeasible. In other words, the benefits to and repayment by irrigation waterusers, municipal and industrial waterusers, and by power may not be sufficient to satisfy Congress that the reservoir project should be authorized. Additionally, the fact that an appropriation of water for fish and wildlife uses and for quality control may be legally challenged, reduces the support for the reservoir project which we would normally expect from fish and wildlife interests and from the environmentalists.

2. In Montana, as well as elsewhere, we have the federal reserved water doctrine to consider. Under this doctrine, as most recently stated in Arizona v. California, 373 U.S. 546, 601 (1963), it is considered that when the federal government reserves lands for a federal purpose, there is reserved, at the same time, sufficient water to carry out the federal purpose for which the lands were reserved. This water right is considered to have a priority date as of the date on which the federal lands were reserved and it continues valid, even though unexercised.

To date, this federal reserved water doctrine has caused no acute problems in Montana. This is true even on Indian lands where the doctrine had its genesis in Winters v. United States, 207 U.S. 564 (1908). The Winters Case, as you will recall, arose on the Fort Belknap Indian Reservation in Montana.

But in water resource planning, it is becoming increasingly evident that we will eventually need to quantify the compass of the federal reserved water right. We will need also to consider whether it is a right which can be transferred from the federal government or from the interested Indian owners, to third parties.

Our recent framework studies on the Missouri River Basin made it very clear that state and private agencies will increasingly insist that the federal reserved water doctrine be further defined.

3. In Montana, federal agencies, just as private enterprisers, are discovering that a so-called "early water right" on an unadjudicated stream is of little value without adequate evidence that the water was put to timely beneficial use. The older the water right, the more difficult it may be to prove that the water was applied to beneficial use either under an appropriation statute or under the doctrine of Bailey v. Tintinger, 45 Mont. 154 (1912). The oldtimers who could prove the required beneficial use are gone and other evidence may be unavailing. And, as Professor Stone has pointed out in his writing and discussions, even a court-adjudicated water right may have frailties that could be serious. In this situation, I think most federal agencies would welcome a state administrative system that would permit the adjudication of a water right at the time water is first put to beneficial use.

Thank you.

AGENCY PROBLEMS IN WATER LAW

by

Thomas N. Schenarts

I am here today representing the largest block of water stockholders in America, the public. For, the public lands of the National Forest System are the most important watershed lands under a single jurisdiction in the United States. In the 11 Western States, more than one-half of the streamflow comes from the National Forests. In Montana, where 20 percent of the land area is administered by the Forest Service, these forest and range lands yield more than 18 million acre feet a year. These public lands produce 45 percent of Montana's water.

In the central and southern parts of the Missouri Basin in Montana, 36 percent of the water comes from National Forest lands. This represents more than 10 percent of the flow of the Missouri River to its confluence with the Mississippi River.

Few people in Montana realize the importance of the lands behind Hungry Horse Dam. Water produced on this watershed, which is administered by the Forest Service, is used 20 times for power alone before reaching the Pacific Ocean. This is probably the most valuable watershed in the Columbia system from an economic standpoint.

While we are large producers of water, we are small consumers. Within the next six months we will have completed a four-year inventory of all public water uses on the National Forests. This inventory has been compiled by specific locations not only for current use but for potential future uses to about 2020 as well. The inventory shows the purpose of use, location of use, location of diversion, amount of use, and water right information. When completed, a copy will be given to the State as a notification of public use on these lands to assist them in State water planning. The inventory is the most comprehensive study of water uses ever undertaken on wildlands in Montana.

Preliminary analysis shows that the public will use about 1,155,000 acre feet per year for administrative or domestic use, stockwater, recreation, and a minor amount of irrigation. This is the amount for which the public has a right on National Forest lands. However, actual consumptive use will be only about 300,000 acre feet or less than one-fourth the total right. The other three-fourths will be available for other downstream users. Actual comsumptive use then, is only one-half of one percent of the waters in Montana but represents all uses on 20 percent of the State's land area.

These brief examples will help illustrate the important role that National Forest lands play in the management of water in Montana. If you think that I have cited these little-known facts about water to impress you -- you're right. Even if you're not impressed, I hope that I have at least stirred your interest in these water-producing lands.

Managing 20 percent of Montana is no easy task for these are the rugged mountainous areas of the State where the effects of land management, good or bad, are displayed publicly downstream for hundreds of miles. It is the streams that really mirror our management. Unlike the privacy of an underground discharge pipe, our streams cry out to all

who pass, the conditionof the land they represent. Like ribbons of honor or dishonor, they hang upon the breast of every landscape. Most of our energy is directed to protecting these soil and water resources while providing water, forage, wood, wildlife and recreation opportunities from the public lands. Administration of the land and planning for long-term uses are two of our most important duties.

These activities require close cooperation with state, local, and other Federal agencies and almost all involve laws of some sort and their often elusive interpretations.

You have asked us to speak today of problem areas in regard to Montana water laws that impede or create conflicts in the use and development of our resources and the administration of public land. For the next few minutes I will point out some of the problems that we most often encounter. These are real problems that need real, specific, and often courageous answers. Unfortunately, I don't have many solutions but we are ready to assist you in every way that we can.

Briefly, then, here are some of the problems:

We need a clear decision on ownership of streambeds as they relate to navigable, nonnavigable and riparian ownership. In relation to this, we need to know where the State stands on removal of gravel from these streambeds. We would also like a specific interpretation of what constitutes navigability. How does ownership of the streambeds affect the use of the water by the public?

A case in point is the subdivision of the private lands in the lower end of Rock Creek, a blue ribbon trout stream near Missoula. The developers are selling and deeding land to the middle of the stream! It has been our understanding that the waters of the State belong to the people of Montana, but if it's possible to sell lots that include the stream, then is the water truly public? Does the water belong to the people when a stream can be fully or over-appropriated for private use, leaving no minimum flows for fish, wildlife, aesthetics, or recreation? If these public benefits are not protected by our water laws, then when is water public? Where is the water in Montana that belongs to the people?

Closely associated with the questions of navigability is the problem of jurisdiction over surface waters on lakes and streams. Let me cite another example. The Clearwater chain of lakes which includes Seeley Lake, Salmon Lake, Lake Inez and others, is surrounded by National Forest land on some lakes and partially by National Forest land on others. We are presently preparing a land management plan for these lands and need to know who has jurisdiction over the surface waters on these lakes. For example, who regulates the size of motors allowed? Is it the Fish and Game Department or the Forest Service? It really is an important matter to be resolved before we can develop the management plan because if the Forest Service has the jurisdiction, then regulations will have to be agreed upon, people hired to enforce the regulations and funds will be needed to carry out the regulation program. Problems regarding jurisdiction over surface waters will come

up more frequently with increased public use. We need to know who regulates use on mountain lakes completely surrounded by National Forest lands.

The State water quality standards were a giant step forward in maintaining a quality environment, but the job has just begun. We need more specific standards for most of the water quality parameters. We need a realistic definition of "naturally occurring levels" and we need criteria for where to sample our streams to monitor the standards.

What controls do we have over cumulative or simple discharges (such as fertilizers) into the stream from upstream users that affect the quality of water for rights of others downstream? We strongly support all of the water quality standards but we wonder why there are laws controlling water quality for fisheries and water contact recreation and no laws providing water quantity for these same beneficial uses!

The Forest Service, as a public agency, encourages the State of Montana to expedite the passage of such laws as are necessary to recognize fish, wildlife, and recreation as beneficial uses of the waters of Montana.

I wish that there were easy answers to these and other similar problems relating to water, but I'm afraid this is not the case. We recognize that this is a tough job and we pledge our cooperation.

The National Forests are not just located in Montana, they are a vital part of Montana -- the lands that produce nearly half of the waters in the State. These lands are being managed to protect water quality but we can do more. In many places where water is in short supply, we can plan our management to increase water yields; we can provide water storage sites; and we can work with the SCS and the Water Board in rural areas in encouraging more efficient water use. We hope that we will be invited to be involved with the State Water Board and other interested agencies to help resolve the water problems of our State and develop a long-range water plan for the people of Montana.

PROPOSED AND NEEDED LEGISLATION IN WATER LAW

by

Senator Gordon McGowan

In regards to what is taking place in the legislative halls, I am a bit uncertain. I think in many respects things look good. There are many good responsible legislators who believe more than ever in the need for legislation concerning our water resources. I do not have in my committee all the bills dealing with water. Some of them have been put into natural resources, but I will hastily go through what we have.

There are two bills which would change the time from 6 months to 1 year in the Conservancy District Act giving the Water Board a longer period of time to make their studies. There is a Senate joint resolution that is asking the Corp of Engineers to make all haste and speed in providing a regulating dam on the Kootenai. That is still in my committee and we'll take it up shortly. We have another bill, Senate Bill 100, which would give the Fish and Game Department the right to file complaints against anyone who is using or misusing our streams and water supplies. Senate bill 124 was introduced by Senator Turnage and myself. He will explain this to you. The other bill that we have which I am most concerned with is the Reclamation Bill on mined lands. I'm hopeful we will get it out on the floor Monday or Tuesday morning. I don't know how many bills dealing with land reclamation there will be, but I'm sure at least half a dozen. The most unfortunate part of it is that this is another area where nobody knows for sure what is needed. During the last two years we have been trying to put something together that is workable, but I'm running across people everyday who are trying to pick it to pieces who have no understanding of the situation. When the Governor asked me take over the job to try and coordinate the interests of the development people to some degree with the environmentalists and the recreationists the first question I asked, "What in the world have I done to deserve this?" I asked the Governor if he realized the impossibility of this task. He said, "Yes, I do, but don't you realize that something has to be done?" I said, "Yes, I realize that also and I will try to do it. But, don't get carried away and expect too much." At the end of the first public hearing that was held on November 9 and 10, 1969, I left with the feeling that we weren't going to do anything. It appeared that we were going to let the water run out of the state completely, stop the harvesting of lumber and do no more mining. On October 5 and 6 of 1970, with the same people talking about the same subject after they had been given some guidelines of what we expected, there was about 180^{o} change. Then the philosophy seemed to be, yes we realize our economy must develop but we want to preserve the air, land and water and it is on that basis that we must proceed. We have made many compromises and will probably make more. This bill is not exactly to my liking. I'm sure the mining people are not too happy with it. I'm also sure that there are many environmentalists, and conservationists and ecologists that are not too happy with it. But I believe on the grounds where nobody is completely happy, that we have a pretty good draft. In order to get at this right and try to weigh it carefully I got the National Guard airplane last summer and took 22 legislators from both political parties and both houses to spend a day in the coal fields of North Dakota. We traveled by bus 200

miles and saw mining operations at their worst and some reclamation at its greatest. This indicates very clearly that it can be done. We can restore this land to a higher degree that it is today but we have to do it with good planning and reason.

We've got 22 billion ton of coal located in Montana and whether we like it or not it's going to be mined. All I'm asking now is for the people to be reasonable and help us get the reclamation laws enacted that will allow this operation to take place and allow the State of Montana and counties to receive the benefits from it, but also conserve our land as well.

PROPOSED AND NEEDED LEGISLATION IN WATER LAW

by

Senator Jean Turnage

It was my good fortune in the Montana Seante to be placed on a committee that has been headed for a number of years by Senator Gordon McGowan. I have had the pleasure of serving since 1965 under his guidance as committee chairman and what little I've learned about Montana's problem concerning water and reclamation has been as a member of Senator McGowan's committee. Now we're going to have some real problems again this session with our water legislation. Primarily I am concerned with the bill that I have been requested to introduce, Senate Bill 124. I'm not going to try to describe that bill or explain it in detail because the primary author of that bill is Al Stone who is much more qualified in the matter of water law in Montana than either Senator McGowan or myself. Senate Bill 124 will be only one of many to deal with the problems of Montana water, but we think it's an important bill. We're seriously going to work for its adoption. I'm only going to refer to the title of the act and then later on fellow panel member Professor Stone will be able to go into more detail. Essentially the bill proposes a number of amendments to the sections of the Montana code that deals with water appropriation and the adjudication of water rights. The title to the act does, I think, a rather adequate job of telling you in a thumb nail sketch what the bill is for. It is basically an act to provide for centralized filing for all notices of appropriation with the Montana Water Resources Board and providing a copy for the respective county clerks. The bill provides for the automatic appointment of the Director of the Montana Resources Board as referee in any adjudication suit that provides for public motives of the referee's hearing and it provides for appeal to the courts. The bill further provides a new procedure for final adjudication of water rights which essentially will be the pattern that we have had for many years in Montana law. That is the procedure for quieting of title to real property. I think the bill will provide many forward steps in Montana Water Law and I might say now that among those, and by no means the least, is the concept of use as opposed to the narrow concept of diversion before a use can be recognized. If we can accomplish this, we've made some major strides forward in making our water law suitable for today's needs.

Senator McGowan indicated that there would be many other bills that will deal with water and its problems in various degrees. Some good I'm sure and some not so good, but we're going to have a look at all of these bills before the Senate is through with them in one way or another. I hope that we can continue to work in the Senate Irrigation and Water Committee toward legislation that is a needed thing in Montana. Thank you.

PROPOSED AND NEEDED LEGISLATION IN WATER LAW

by

Representative James Harrison, Jr.

I don't have any formal remarks although I jotted down some things which I thought you might be interested in. The legislature has been in session now two weeks and I am happy to report that in the House, and I think in the Senate, that peace still prevails. Everyone was waiting for the bubble to burst but that doesn't seem to be happening and it really appears that there is a great cooperative effort and a real concern that we move forward and address the problems that face Montana. We have as you probably noted from the newspapers a good deal more problems areas than we traditionally have. We have reapportionment and executive reorganization which involves water and the water agencies directly. The topic here is not what the legislature is doing but rather needed legislation in that assembly. Further there is a great deal of legislation I think that is necessary and is needed for the benefit of Montana relative to its water that will not be introduced during this session.

One of the problems that I have seen in my association with water is the need for a final determination of rights. I stress the word final because we have on the books a number of procedures by which water rights are adjudicated and supposedly determined and established. However, when we analyze these procedures we find they don't provide a final solution. I was associated in a trial, which fortunately I got out of, involving one of the rivers on which the Water Resources Board has a dam. The people below the dam came in and attempted to open the water right decree to establish flood rights that they said existed prior to 1918. For all intents and purposes the rights had been determined.

A dam had been built, irrigation constructed, and irrigation projects supplied from it. Yet when we hit the courthouse it turned out that this apparent status of finality is a transitory thing. It seems to me that we are going to have to enact a procedure to finalize these rights in a particular reach or on a particular stream. We have attempted to do that in the bill that Senator Jean Turnage discussed. The procedure would be the same as that we now use to quiet title on land. Now this legislation was the result of a House resolution introduced by Jim Murphy in the last session. It called for the Water Resources Board to come up with some type of modern water code. Doug Smith appointed a committee to work on this problem comprised of members from various walks of life; private enterprise, agriculture, state government, etc. A suggestion that I have for future efforts such as this would be the appointment of a commission such as the criminal law commission that have worked to prepare legislation. The members were people from throughout the state without agency or state government affiliation.

In my opinion the most needed legislation, individual legislation, is money. That's the whole crux of moving forward in the water field at least as far as participation by the State of Montana. A state government, as you well know, or federal or local government just can't move without money. The Legislature is concerned as to where are we

going to get the money. That still seems to be somewhat up in the air, but the problem is to adequately fund the agencies which have jurisdiction over our water resources. We talked often about the reality that does exist regarding Californian's looking at Montana's water. I don't think that there is any doubt but what they're attempting by virtually any means possible to end up with part of it. It's interesting to note that Montana has had in the past bienium as few as 42 employees in the Water Resources Board and a maximum of less than 70 at any one time. During that same period of time, California has had 4500 people working in their department. That is a fairly awesome number of people. They obviously have a very big state and many problems, but it wouldn't be surprising to me to learn that they have more people working on how to get our water than we have in our state working on how to utilize it in this state. The finalization of water rights, etc. are longer term propositions and necessarily so, but if you want to get involved in appropriations I can assure you that there is plenty of room out there. Jump in, the water is just fine!

PROPOSED AND NEEDED LEGISLATION IN WATER LAW

by

Representative Bradley Parrish

I will limit my remarks primarily to water pollution and tell you a few things that have happened on the Big Springs Creek Watershed Project in Lewistown as related to legislation that has been introduced. In this last campaign I ran on a platform of being a conservationist and also I proposed and stood for water development. Now some people may think that this is inconsistent, but the reason I did this was to show that the two are not exclusive. That there is a possibility of water development and also a strong conservation stand. I am a Director of the Montana Water Development Association and I think I fit in quite well with being a strong conservationist.

In water development I think that the first thing you must have is a strong water pollution act. In my estimation, polluted water is wasted water and a comprehensive development plan cannot begin on that basis. Montana is similar to several western states in that water pollution acts were aimed mainly at eliminating health hazards. This can be seen from the time that we became a state until 1967 when really the first water pollution law was enacted. Under the act a board of 7 members was set up. On it were representatives from the State Department of Health, the State Fish and Game Department, the Water Resources Board, a representative of industry concerned with the disposal of inorganic waste, a representative from agriculture and a representative of municipal government. This board was given the responsibility for furthering the purpose of the act. The Water Pollution Act of 1967 was a good start, but there have been a number of problems with it. House Bill 85 is an excellent bill that would rectify many of these problems and is worthy of everyone's support.

I would like to say a few words concerning Plan #4. Now some of you may not be familiar with this. Several studies have been done on the Missouri River between Fort Benton and the Fred Robinson Bridge, a stretch of river that has historical significance to it. The final plan agreed on was called Plan #4. A feasibility report was prepared by the Corp of Engineers. In 1965 the legislature passed a resolution favoring Plan #4. The plan was to develop the river by a dam with power recreation and some irrigation produced. The feasibility report was finished but never released. When Senator Metcalf introduced his recreation river bill just before the session ended the reaction in Lewistown was incredible. The Daily News said, "Senator Metcalf can take his recreation river bill and stick it up his nose." All the articles that came out were slanted against the recreation river bill. They claimed that Senator Metcalf had stabbed them in the back. The report said Plan #4 was not feasible with 4% money. We are now looking at 8% money. This has not been made public to the people in Lewistown. I assume that it will be up to me to make it public. There is a direct conflict here between development, recreation and conservation, but I think in the end you look at the feasibility of the project. Now that doesn't mean that we can't develop. Development of a recreational facility on a river is water development. With that I will close and, of course, I will be open to any questions.

PROPOSED AND NEEDED LEGISLATION IN WATER LAW

by

Roy Huffman

I would like to talk in a general way of what seems to me is needed in the way of legislation and action with regard to water development in Montana. First, I would like to say that preceeding that there is a real need for a philosophy of cooperation and a willingness for compromise if we are really going to accomplish anything. I think we have made some significant strides in this direction. At the same time, it seems to me that while we get a lot of agreement on the general theory of the need for compromise or accomodation of different viewpoints we still have too much of a tendency to reject it when we get down to specific cases. Every situation is different obviously and everyone is likely to justify a different listing of priorities in terms of what the water ought to be used for. What I'm saying is that we just won't get the job done if in all the specific cases someone always says, "no crompromise here". I think that's quite different than trying to prove a case that a particular water use should have priority.

I think we need to get on with some of our programs of development. This may sound a little inconsistent, especially for a University person and now an administrator of research programs. You might expect me to say that we need to have all of the facts, all of the research done, before we do anything. This may be a desirable way to do it, if you start early enough, but we're past that point now and I think that at the same time we're trying to improve our knowledge situation and our available information and facts we must get on with some of the things that need to be done. I would make the observation that the willingness to take action relates to the scarcity of a resource and this may have been one of the reasons why we haven't moved as rapidly as we should have in the case of water development. Everytime I fly over Eastern Montana I'm just amazed at the number of stock ponds that I see scattered all over that part of the state. To me this is one of the most tremendous jobs of water resource development ever carried out to provide stock water which was one of the things that crippled the whole area during the drought. I think this is a fantastic accomplishment.

I think we need to recognize, too, that development is hard work. It takes a lot of effort and determination. It is not spontaneous. It requires not only individual and private effort but it requires some input from the public. We start with what nature gave us. Some of it is good and some bad, but at least we can start from that point. I haven't seen Mother Nature developing very many things recently. The only one I have looked at that was accomplished recently, and it wasn't a very good job in terms of utilizing water resources, was when she built Quake Lake.

There is another aspect of this development process that I would like to mention. I think it is a major factor in this whole task of getting something done and it may be in itself a part of the problem that needs to be considered in the whole matter of legislation and state participation in development. It's a concept that I used to teach when I was teaching land enconomics years ago. It's what the land economists call "ripening costs". If you're going to have an

investment in resource development, whether its public or private, and it becomes particularly sticky if it's private development, who is going to carry the cost of investment until it is in full operation and making its return? The simplest example that you can get, of course, is somebody that goes out and develops a subdivision and makes an investment in streets, curbs, water, sewer system and all of these sorts of things and is sitting there with a considerable investment without full return on it for a considerable length of time. I think this is important and it has been recognized in many states that there has to be some way of carrying these costs during the time you don't get full returns. If you want to take a look at the Reclamation Law, you'll find that this was recognized when in addition to the 40 year repayment period they gave the irrigator a 10 year development period. In this case Uncle Sam carried the ripening costs.

When Dick said I was an institutionalist, the first thing that occurred to me was that I'm a defunct economist. In case you don't know, I used to teach economics courses. For about 13 years now I have been shuffling papers and don't profess to be much of an economist any more. When I was I called myself an institutional economist; which meant simply that I was concerned primarily with the fringe area between economics and the political process. In the process of getting into water development I think it is significant that when the federal government first took a look at the problems of developing the West they started off with the assumption that if you get the right institutional devices that individuals would do it. This was consistent with the Homestead Act and everything else that had gone on before. They passed the Desert Land Act and as Mike mentioned yesterday if you put some water on the land you could get it. This didn't work too well because we human beings seem to have a real genius for trying to out maneuver Uncle Sam. I remember one they used to point out to me when I was a kid. A piece of land had been secured under the Desert Land Act with a source of water from a two foot high dam in a coulee. The irrigation ditch was a plow furrow that ended up about 40 feet higher than the dam. It still was a desert land claim! When the federal government decided that the individuals really weren't going to get the job done they said to the states that if they would develop it they would get a million acres of public domain land. This was known as the Carey Land Act of 1894. This Act was successful in some areas, partially successful in some and not so successful in other areas. Finally, we had the Reclamation Act of 1902, to develop land for irrigation. Here is an example of how Uncle Sam tried the private route and the state route before he finally said, "Well if we're going to get the job done we have got to get in here with both feet ourselves." Now we're back to the problem of how the state participates and this is perhaps of even greater importance than it ever was. Montana was a leader a number of years ago. Dick was one of the people originally involved when they created the Montana Water Board. This was one of the pioneer water agencies in our country.

There are several things in the institutional area that needs to be done. One is the whole question of water rights for recreation in

relation to the traditional idea that you have to make a diversion. Someone was commenting on this yesterday when a man, who was sitting next to me, poked me and said, "What about the investment?" I was listening to the guy, but I didn't want to get into a discussion at the time. I just said that the investment is probably a totally different kind of investment. I think this is an important thing to recognize. When you are diverting for a use you probably have made the major part of the investment that's involved by the time you get the storage, the diversion, the canal system, etc. When you talk about a water right for recreation, which may not involve a diversion at all, you are talking about a different kind of investment. It would involve all of the investment that goes into making use of that water for the recreational purpose. This would include the lodges, marinas, etc. It's a different kind of investment, but from the standpoint of society it may be just as big.

I completely agree with the other speakers who have said something needs to be done with our Montana Water Code. One of the major shortcomings is that there is no legal relationship between surface water and ground water. The hydrologists and anyone else who has ever worked in this field will tell you that it just ain't so. There is a direct connection and it is all part of the hydrologic cycle. This certainly suggests that some work is needed here. One other thing that I wanted to comment on was discussed briefly yesterday. What do you do about the benefits that you can't put dollar signs on? This relates very much to the whole problem of recreation and environmental values. When I used to do active research this was my general interest area. I concentrated on the problem of non-monetary or extra market values. We have to recognize the fact that there are some very important values in our society that you can't put a dollar sign on. We just kid ourselves when we think we can put everything into the benefit-cost ratio. Some things just aren't that way. I am not sure that I have ever heard of a better procedure than what was proposed by the President's Water Policy Commission in 1950. They said you should have a board or commission that reviewed all of the proposals and make the judgments and determine the trade offs. Thank you for your time.

PROPOSED AND NEEDED LEGISLATION IN WATER LAW

by

Al Stone

My main comments will be on Senate Bill 124 which Senator Jean Turnage has just assigned to me. Before I do that I would like to tell you about a proposal for a declaration of water policy which was taken largely from the Minnesota statutes and which, I hope, could be introduced into the Montana Legislature and become part of Title 89, Section 502. There currently is no section 502. Section 501 deals with public waters and with public use of navigable waters. The declaration would read as follows: "It is hereby declared to be the policy of the State (1) subject to existing rights, all waters and streams and lakes within the State which are capable of substantial beneficial public use are public waters subject to the control of the State. The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying or surrounding land or on whether it is a body or a stream of water which is navigable in fact, or susceptible as being used as a highway for commerce at the time this State was admitted to the Union. This section is not intended to effect determination of ownership of the beds, of lakes and streams. (2) The public shall have the right to make recreational use of public waters of the beds and banks of those waters to the high water mark." I think such a declaration of policy would be very helpful.

Roy, you spoke about the connection between surface and ground water. I think it would be very good if Montana had a comprehensive surface and ground water code coordinating the administration of both surface and ground water. I'm not sure that these two bodies of water can be administered identically or even very similarly because there are some physical differences. Ground water moves very slowly whereas stream water moves very rapidly. Stream water is replinished annually and if it is over appropriated people come to know within the year that it is over appropriated. Ground water may be depleted over a long period of time and sometimes it is difficult to determine the damage that is being done to the resource. The relationship between the two in the hydrologic cycle is still under investigation in many areas and before they can be administered conjunctively more knowledge is needed.

With respect to Senate Bill 124, I think I'll only talk about one aspect. That is the adjudication of streams in Montana. Let me introduce this with a couple of short quotations. "One day during the last two weeks of May, 1935, Charles Reeder, a rancher on Red Rock River in Beaverhead County, Montana, opened the headgates supplying his ranch with water. In so doing he was clearly in violation of the ruling of the court appointed water commissioner, Charles Calvert, and of the court order issued by District Judge Lyman Bennett. There upon Mr. Reeder was convicted of contempt of court and fined. His neighbors feeling secure at last from further trouble from Mr. Reeder settled down to normal operations, but Mr. Reeder appealed his conviction to the Supreme Court and secured a reversal. All of this trouble had lately come to a valley whose waters had been adjudicated according to Montana procedure in 1899. The relative rights of the ranchers had seemed well settled long before the water shortage of the 1930's induced Mr. Reeder to ignore Judge Bennet's order and Commissioner

Calvert's administration. The commissioner, supported by the judge, decided that since Mr. Reeder's claim had never been adjudicated, he would have to go without water just like those whose priorities had been adjudicated as inferior. After the Supreme Court overruled the judge, did the ranchers on Red Rock River have any rights or priorities that they could count on during dry years?" The Supreme Court was right. If I bring a water right adjudication suit against three or four members of this panel and we get our rights determined according to the priorities and the quantities that we are permitted, does that mean that Mr. Parrish over here, who is not a party, can be enjoined and held in contempt of court for violating a decree that he was not a part of? We don't have any means in Montana for enjoining everybody who may be concerned and the court has no business in finding anyone in contempt against whom no order of the court has been given. The futility is illustrated by what has happened on Dempsey Creek and I want to read a short portion of this, too. "This last review brings up to date the chronicle of litigation on Dempsey Creek, a small stream of less than twenty miles in length; fourteen lawsuits with eight decisions by the Montana Supreme Court. In nearly every one of these lawsuits, all or substantially all of the people in the community of Dempsey Creek were litigants. There seems little risk in predicting that the past is but a prelude to continuing and endless litigation in the future." Last summer there was another contempt action that went to the Montana Supreme Court.

Other watersheds in Montana have also had multiple adjudications. Those that haven't been fortunate thus far. Periods of drought, as well as increasing demands for water, will give rise to new cases, on new streams, with no final determination of the allocation of the water. This history of unending litigation among neighbors on a small watershed speaks for itself on the futility of Montana's present system in stream adjudication. Basically there are three means of finally settling water rights; three things that have been developed by different states. There is the Wyoming system which has been followed I believe in Nebraska and Kansas. It provides for strictly an administrative system wherein the state engineer and a panel of administrators deal exclusively in water problems. They take a section of a stream that they can deal with and serve notice to all of the parties. A hearing is held and a final determination of all of the water rights in that area is made. Anyone who does not come in and prove his right, or who is excluded by their final determination, is precluded; he has no right. He does have a right to appeal to the court, but if there is no appeal, the administrative determination is final. Then there is the Oregon system. It is one designed to give a little more confidence to the system because it gives more authority to the court, but it's quite similar to the Wyoming system as you have the same administrative procedure that I just described. In this case the determination of rights by the administrative system is submitted directly to the District Court which presumably holds a perfunctory hearing. If there isn't anything to really contradict the administrative finding, or to show that it was arbitrary and capricious the Court puts its stamp on it. Montana's Senate Bill 124 has a somewhat ingenious means of satisfying the sentiment in Montana that the court should play a larger part in the adjudication of water rights. It provides that the Director of the Water Resources Board, or anyone else for that matter bring an action in District Court where the stream

is located to determine the rights of the parties who have appropriated water. The District Court must refer the matter to a referee who would be the Director of the Water Resources Board. Hopefully, he would have sufficient staff to carry out an administrative determination of the priorities and quantities of water which each of the parties on the stream is entitled to, or who are found not to have a right would be excluded. The Director's report goes to the court and then the parties can contest whether he has acted arbitrarily, capriciously or whether it is supportable. A decree of the district court can be appealed to the Montana Supreme Court. This is an ingenious way of incorporating the expertise of an administrative hearing with the safeguard of a proceeding in the local District Court. I think it is an excellent provision. It does not repeal our present system of adjudication; it is supplementary and cumulative. With this enactment I don't have to be critical of our present proceeding. It should be possible for a couple of gentlemen such as Senators Turnage and McGowan to have their own private little suit that won't concern all the other people. Don't make a big case out of something that isn't a big case. Thank you.

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