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MONTANA WATER ADJUDICATIONS: A CENTENNIAL HISTORY*

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Albert W. Stone**

The first glimmerings of Western water law followed the miners who inundated the Sierra foothills after the discovery of gold in January 1848. The '49ers diverted water from streams for their placer mining works, and "mining districts" and other community institutions sprang up to govern rights, maintain order and enforce the rules and customs of the various communities.

Prominent among these rules and customs was the notion that prior mining claims had to be respected by those who came later. The same applied to water rights: The miner who diverted water for his placer works could not interfere with the water supply of an earlier miner; by the same token, his use should be secure against interference by a subsequent water user. And so the English common law doctrine of riparian rights (equality and sharing of reasonable uses of water) was replaced by the doctrine of prior appropriation (first in time, first in right).

These miners were trespassers on the federal domain and converters (that is, thieves) of federal minerals, so some miners were removed from their claims, pursuant to a writ issued by President Lincoln in 1863. After Nevada was admitted to the Union in 1864, however, that state's Senator William M. Stewart pushed through Congress the Lode Mining Act of 1866, which confirmed and legitimized the miners' customs and usages, including their appropriation of water on the public domain. Senator Stewart was protecting the Comstock Lode, discovered in 1859. Congress broadened this legislation with the 1870 Placer Mining Act, which put homesteaders on notice that they were subject to all of these prior water uses. The Desert Land Act of 1877 provided for settlement of Western lands and for the use of water for land development, under the doctrine of prior appropriation.

These federal laws might not have been given retroactive effect but for the 1879 case of *Broder v. Natoma Water Co.*, in which the U.S. Supreme Court said of the Lode Mining Act:

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** Albert W. Stone is professor of law at the University of Montana. For the past 30 years, he has researched, written about and lectured on the serpentine workings of Montana water law. He holds a JD from Duke University School of Law.

. . . rights of miners . . . and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation . . . are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the act was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. (Emphasis by the Court)

With the exception of Hawaii, all of the Western states adopted the doctrine of prior appropriation, in total or in part. The Pacific Coast states and the Plains states retained common law riparian rights in a strange combination of the two doctrines until they discovered it was impossible to administer these mutually inconsistent systems. Ironically, only in California, where appropriation rights in the West were born, can a person still commence a new use of water under the doctrine of riparian rights; in 1988, the California Supreme Court held that the United States government has California riparian rights for land reserved as national forest. But even in California, the prospect of developing new riparian uses is more theoretical than practical because of limitations placed on such new uses by that state's courts.

The Rocky Mountain states and Nevada simply never recognized the doctrine of riparian rights, so prior appropriation became the exclusive means of acquiring a water right. These states considered this doctrine the only one suitable for the arid conditions within their boundaries because it allowed people to divert water out of water courses for use on non-riparian land. Moreover, it protected existing or prior investments in water use against subsequent uses and changes. Montana was one of these states.

As in other Western states, an appropriation was accomplished in Montana merely by putting the water to some beneficial use, such as mining, irrigation or turning an arrastra for milling ore. It was not uncommon for a person to post a notice at the point of intended diversion as a way to stake out a claim before commencing actual work, but such posting was not necessary to acquire a legal right. The right had a priority the day the work commenced.

Throughout the West, legislatures recognized the desirability of a permanent record of water rights so that people could tell how many rights there were on a particular source and their amounts and priority dates. Such information was essential to current holders of water rights, people who might be considering a new appropriation and those contemplating purchase of property to which a water right attached. The latter was particularly important because the potential buyer would want to know the value of the right, which would depend on its volume and its priority in

relation to other water rights.

Thus, in 1885, the Montana legislature enacted a law providing:

Any person hereafter desiring to appropriate . . . MUST post a notice . . . at the point of intended diversion . . . [and] SHALL file with the county clerk . . . a notice of appropriation . . . verified by affidavit . . . [and] MUST proceed to prosecute the work . . . etc. (Emphasis added.)

Notwithstanding that language, the Montana Supreme Court held in 1897 that compliance with the statute was purely optional: One's priority would date from the posting of a notice at the time of diversion, whereas one who did not comply with the statute would have a priority dating from the time of completion.

From 1897 until 1973, then, a water right on an unadjudicated stream (that is, almost all of the streams in Montana) could be acquired by following or ignoring the statute and putting the water to a beneficial use. Thus, there were a vast number of water rights for which there was *no record of any kind*.

But what of the record of rights where the statute had been followed? It is important to note that the statute required the would-be appropriators to post and file *before* doing the necessary work. What quantity should they claim in their posting and filing? It only made sense to claim the maximum that might possibly be developed. That, combined with widespread ignorance of the volume of water in the source or that a ditch might carry, led to the filing of grossly excessive claims, totally unrelated to the actual amount finally diverted or used.

There was yet another source of inaccuracy in the statutory method. Suppose the prospective appropriator properly posted and filed, became interested in something else, and never completed his appropriation? In such cases, the official records still exist and show a water right that was never consummated. A record without a right!

Water users on some Montana streams sued each other often enough over water rights in a limited or discrete geographic area that the creek or stretch of stream was considered "adjudicated." In 1921, the state legislature provided that the exclusive means of acquiring a right on such sources was through a court proceeding, in which the new appropriator would serve notice on the prior litigants and seek to have his new right added to the prior decree. A few would-be appropriators learned in later litigation that the stream from which they began taking water after 1921 was an "adjudicated" stream and that they had no water rights. Indeed, on the Sun River, on which there were early adjudications and decrees, a ranch is now objecting to the validity of water uses commenced after 1921 without compliance with the statute.

But even adjudication did not result in settlement of disputes. People not involved in a particular lawsuit could flout the orders of the water commissioner and the district judge. The "adjudication" could not affect people not joined in the action. Even if an individual was a party to the lawsuit, only one of his water rights may have been contested; his unadjudicated rights could cause later trouble and require further litigation. In addition, as expressed by the Montana Supreme Court in the 1926 case of *Anaconda National Bank v. Johnson*:

Experience has shown that after the right of all of the parties taking water from a stream had been adjudicated, a subsequent appropriator would appear upon the scene, tap the stream and ruthlessly take the water, disregarding the decreed rights and flaunting the orders of the commissioner appointed by the court to distribute the water according to the terms of the decrees. The only remedy the prior appropriators had was to commence a suit against the new appropriator, the result being that all of the rights of the stream had again to be adjudicated; and after that decree was entered, if another subsequent appropriator took the water the same process had to be gone over again . . .

That particular case involved the waters of Dempsey Creek, a small Powell County stream less than 20 miles long, which supplies about 20 farmers and ranchers. They have endured 14 lawsuits with eight decisions by the Montana Supreme Court.

This is the dismal picture of Montana water-rights law before 1973: "use rights" for which there were no records, statutory filings with unreliable information about quantity and whether the right had even been developed, and streams with a history of multiple litigation but no certain or final outcome.

As a consequence of this unruly situation, the 1972 Montana Constitutional Convention mandated a system of centralized records, and the 1973 legislature enacted the Water Use Act. The act requires anyone who wants a water right to file a permit application with the state Department of Natural Resources and Conservation (DNRC). The DNRC notifies other users and, if necessary, holds a hearing. It can then grant, deny or modify the requested permit. This method is exclusive, so new rights after July 1, 1973 have been and are considered and regulated by the DNRC.

That left all of the pre-1973 water rights. The Water Use Act established a system of water right adjudication to ensure both certainty and finality. Originally, its provisions were administered by the DNRC, which gathered information and notified claimants. There was no judicial involvement until the agency completed its determination and filed it with a petition in the local district court. There was concern, however, that an

adjudication commenced by an agency might be classified as an administrative proceeding and would not qualify under the federal McCarran Amendment to permit the determination of federal and Indian (reserved) water rights in state courts. The procedure was thus changed slightly in 1975, requiring the DNRC to obtain a district court order at the outset to commence an adjudication, so that its action became, technically, a judicial proceeding.

It was still up to the DNRC to select and specify the areas or sources that would be involved in a particular adjudication; gather all manner of data from various sources; make on-site inspections, surveys, reconnaissance and investigations; obtain, through the district court order mentioned above declarations by claimants of their rights; compile and analyze the data; and organize it and file it with a petition in district court. The district court then rendered a preliminary decree based on the filed data. A copy was served on everyone involved and those who had objections could require a hearing. If there were no objections, the preliminary decree became final; otherwise, a final decree was issued after the hearing. The decree was final and conclusive to all rights in the source or area: There were no rights except those stated in the decree.

Shortly after the July 1, 1973 effective date of the Water Use Act, the DNRC commenced a proceeding to determine all of the water rights to the Powder River. Progress was slow: The agency had the burden of ascertaining rights, many of them long unused and difficult to find, and the project was understaffed and underfunded. In 1979, the Powder River proceeding was only about half completed.

The pace of the Powder River proceeding raised fears that a century or more might be needed to adjudicate Montana water rights, and the DNRC sought significant legislative changes in funding and procedure. Anxiety was intensified by three suits over adjudication of Montana streams, filed in 1975 in federal courts, and by the 1979 filing of four additional federal suits by the U.S. Department of Justice.

The Montana legislature desperately wanted the adjudication to be in *state* not federal courts. But the Powder River case raised fear that the existing Montana system was inadequate and could not be used to suspend the federal cases. So, after a two-year interim study, the legislature enacted Senate Bill 76 in 1979. The bill partitioned the state into four immense water divisions: the Missouri and its tributaries below the mouth of the Marias, the Missouri and tributaries from the Marias to the Missouri headwaters, the entire Yellowstone drainage, and the waters west of the Continental Divide. Each division has a water judge, assisted by a water master (referred to collectively as the Water Court); all of the water masters are based in Bozeman and supervised by the chief water judge.

One of the major changes made by SB 76 shifted the burden of

ascertaining what rights existed from the DNRC to the claimants themselves. Anyone claiming a water right had to file a statement of the claim by 5 p.m., April 30, 1982, or his claim would be conclusively presumed to be abandoned. That provision allowed the Water Court to begin working on filed claims, thus freeing the DNRC from the responsibility of doing extensive field work to try to ferret out all possible claims.

The aforementioned federal suits in the federal courts have been suspended, pursuant to a decree from the U.S. Supreme Court, but may be revived and the adjudications taken over by the federal courts if the state court proceedings prove to be inadequate, inaccurate or unfair. Federal and Indian (reserved) water right claims are not yet a part of the proceedings in the Water Court. SB 76 created a Reserved Water Rights Compact Commission to negotiate and quantify those rights, and the claims are suspended from adjudication in the Water Court while negotiations for a compact are being pursued.

The legislature seems inclined to grant extensions of time for negotiations as long as there is hope for settlement. One such compact has been completed: the Fort Peck-Montana Compact, between the state of Montana and the Assiniboine and Sioux tribes of the Fort Peck Reservation in May 1985. The agreement quantified and settled the relative rights of the parties to the waters of the Missouri River, its tributaries, including the Milk River, and groundwater.*

Rights settled in this manner will have to be integrated into the decrees rendered by the Water Court. If there is a stalemate with one or more of the Indian tribes or with the federal government, Montana's law would require that their rights be litigated like other rights in the Water Court. That would raise the specter of federal court jurisdiction and supremacy if challenged by the tribes or the federal government, if these two entities choose to allege that the state court proceedings are *in practice* inadequate, inaccurate or unfair.

The biggest change made by SB 76 was that the adjudication process, instead of remaining a gradual and long-lasting process of settling rights on one stream or stretch of river at a time, suddenly became a catalog of more than 203,000 pre-1973 water rights claimed statewide, with multiple adjudications going on simultaneously at a greatly accelerated pace. The magnitude and scope of this process was unprecedented in Montana and, indeed, Western water law.

Not surprisingly, there have been considerable difficulties in implementing such an enormous task. The law is unclear about how accurate the

* [Eds.: A second tribal-state agreement was reached by Montana and the Northern Cheyenne Tribe in 1991 quantifying the rights of the parties to the waters of the Tongue River and Rosebud Creek.]

results must be, particularly to satisfy federal requirements to maintain jurisdiction for adjudicating federal and Indian (reserved) rights. The legislature has asked the Water Court to expedite the process, but it is unclear at what point haste becomes an invitation for inaccuracy.

Some of the possible problems encountered are illustrated by the allegations in Petitions for Writs of Supervisory Control, that is, petitions to have the Montana Supreme Court exercise supervision and give directions to the Water Court. These petitions have been filed by state and federal agencies, public utilities and private parties.

One such petition alleges that on a creek with an average annual flow of 10.4 cubic feet per second (cfs), one ranch was granted 110.4 cfs, even though the ranch's combined hydraulic capacity, with three diversions, was only 9 cfs. That 110.4 cfs included 24.38 cfs for coke ovens and mining that had ceased about 1910, 7.38 cfs for the town of Electric, which no longer exists, and 13.75 cfs for a long-defunct power plant. Another claimant was granted 2.5 cfs for mining by "pan or other container" (2.5 cfs is 1,122 gallons per minute — a lot of water to handle by such means).

It is also alleged that the Water Court has accepted "late filings," that is, claims filed after the April 30, 1982 deadline. Specifically, the petition alleges that the Water Court accepted four filings by one ranch on July 22, 1985, more than three years after the statutory deadline. According to a petition by the Department of Fish, Wildlife and Parks (which legally represents the public interest in prior or existing public recreational use of water):

As of April 3, 1985, the Water Court has accepted 2,041 late water right claims filed after the April 30, 1982 deadline. Three hundred fifty-eight (358) late claims have been included in preliminary and temporary preliminary decrees used by the Water Court without giving notice to other water users in the affected basin that the claims were filed late.

Subsequent to this petition, the Water Court included a remark in the Preliminary or Temporary Degree that indicates that the filing was late. The adequacy of that remedy can be judged by what follows.

The Water Court has claimed that it relies on an "objection process;" that is, it relies on rival claimants to file objections to erroneous, exaggerated or invalid claims or rights included in Preliminary or Temporary Preliminary Decrees. But the parties to a decree are not apprised of their *relative* priority or of the amounts of water decreed to prior appropriators. Thus, they have no information on which to base objections. Most will not know what is in the decree because they don't realize the importance of reviewing the entire decree or at least the details on rights decreed prior to theirs, to do so entails time and the probable

expense of hiring a lawyer and technical experts.

Notices of Temporary Preliminary and Preliminary Decrees include a statement that the claimant should examine the decree; that his right may be subject to other rights; that he can either buy a copy of the decree and the indexes or go to a DNRC office or the local clerk of court and inspect them; and that making this effort is extremely important. Each decree abstract sent to each claimant also advises checking on the relative priority of the right. To follow that suggestion, the claimant might have to wade through and understand several feet of computer printout.

In addition, there is little verification information available because the Water Court limited DNRC's role and involvement in inspection and verification of claims (only 20 actual field investigations were made through the end of 1985). Even with the warnings in the decrees and the abstracts, the system discourages and diminishes objections, expediting the process, but at a price.

The Department of Fish, Wildlife and Parks petition alleges that: *Some claims are denied without citation of evidence or legal authority while other claims are granted even in the face of DNRC verification information indicating that the claims are inflated, exaggerated or bogus. Late claims are granted without public notice and to the detriment of those claimants who filed timely claims.*

Irrigation claims have been reviewed, granted and denied under numerous and different volume and acreage standards.

Flow rate and volume have not been quantified for storage, fish and wildlife claims even though such information is submitted as part of the water right applications. (The 1987 legislation may have made it unnecessary to decree fish and wildlife claims by volume, but stock ponds and reservoirs still require such description.)

The Water Court is serving as both the adversary and judge in water right hearings. The Water Court has improperly prejudged and determined that the Department's instream recreational claims are invalid before hearing and without citing admissible evidence or legal authority.

The Water Court has prohibited DNRC from field-investigating questionable claims and has failed to develop procedures for the identification of abandonment, enlargement of water rights and non-perfection of filed appropriation rights as issues affecting the validity of water rights in the adjudication process . . . [which] will result in exaggerated or invalid water right claims being granted, jeopardizing the legal validity of the final decrees and denying the Department due process of law.

The Water Court has failed to prioritize and fully define the nature and extent of individual water rights . . . The abstracts of individual rights do not indicate what priority each individual's water right may have under the "first in time, first in right" doctrine. The Department submits that the

Water Court's failure to prioritize and fully define the nature and extent of individual water rights in relation to other senior and junior rights in the basin makes the final decrees unenforceable and will result in substantial further litigation.

. . . : The Water Court is directly involved in the review of claims and is engaged in direct contact with claimants. Of course, the Water Court also determines whether its preliminary review of the claims is accurate or valid.

The Water Court is appearing as an objector to claims in the adjudication process. Of course, the Water Court will also determine whether the Water Court's objection is valid.

Subsequent to the filing of the petitions referred to or quoted above, the Department of Fish, Wildlife and Parks, the DNRC, the Montana Attorney General, the U.S. Department of Justice, the Montana Power Company, Trout Unlimited, the Washington Water Power Company, several individuals and ranches and the Montana Water Court signed a stipulation containing a summary of its content:

The parties and amici have recommended a process for resolving the substantive legal question in the most expeditious manner possible. Where procedural issues are involved, the parties and amici have recommended changes in Water Court procedures and policies that constitute a settlement of the procedural matters in dispute or have recommended a process for resolving the procedural issues. The Water Court has accepted the recommendations.

The stipulation deals with the matters discussed or quoted in this article. Some matters appear to be resolved, some have been settled by compromise, while others were left for adjudication by a water judge or by the Montana Supreme Court. As is the case in some complex documents, the stipulation gives more the appearance of mutual understanding than is actually the case. Some of the parties to the stipulation have stated that many of the problems are recurring.

To help resolve some of its own continuing concerns about the water rights adjudication process, the 1987 legislature ordered a review of the process to commence in September 1987 and conclude at the end of September 1988. The law firm hired to conduct the review was to report to the legislative Water Policy Committee and is also expected to meet with the 1989 legislature. The draft report, conducted by the Denver law firm of Saunders, Snyder, Ross and Dickson, commenced by noting that:

We were not asked by the Water Policy Committee to provide performance evaluations, but rather to address institutional issues.

With that limitation, the report states:

We did not find the framework of the Montana Water Adjudication law or the process prescribed by it to be so grievously flawed as to require a massive legislative overhaul.

In short, the report finds that the claims examination procedures of the DNRC are adequate, efficient and useful for the Water Court; claimants have adequate access to information; the Water Courts are highly efficient and provide adequate procedures for resolving disputed claims; and the process, so far, is adequate to adjudicate federal and tribal claims under the McCarran Amendment.

The report recognizes that the Water Court has accepted late claims and even included them in decrees. It disapproves of this practice and concludes that the decrees are void to the extent that they include such claims but are otherwise valid.

Claimants, objectors and interested parties have enough notice of each step of the procedures, the report finds, although decrees adjudicating sub-basins may affect water users in other sub-basins within a drainage or users on the main stream. It is therefore recommended that further notice be given to all who could be affected within the larger drainage area and that more time be allowed for objections.

The report argues that:

Some litigants feel that they have been foreclosed from participation in decisions on issues which the Water Court may later apply to their claims. However, all litigants have an opportunity through the objection process and the appellate process to seek the correction of what they perceive to be errors of law or fact which may be applied TO THEIR CLAIMS. The fact that THEY MAY NOT HAVE had an opportunity to litigate such issues WITH RESPECT TO CLAIMS OF OTHERS does not deprive them of the right to litigate such matters fully WITH RESPECT TO THEIR OWN CLAIMS. (Emphasis added.)

Does this discussion adequately consider the interrelationship of water rights — that is, that what has been done to *another* person's right in the same source may drastically affect one's own right? Or that a claimant or litigant will remain ignorant of other cases which may involve issues that the claimant or litigant is also concerned with and which will affect or even determine the outcome of his own claim or case?

Another issue addressed by the report is the Water Court's constitutionality. In a recent issue of the *Montana Law Review*, DNRC chief legal counsel Donald MacIntyre pointed out that each of the four water judges presides over all of the judicial districts within his water division. Each

water judge, who must be a district judge or retired district judge, is selected by a majority vote of district judges within his water division. He is an integral part of Montana's system of judicial district courts.

But the Montana constitution requires that the district courts be an *elected* judiciary, except for a judge or individual qualified to serve as judge *pro tempore*. The latter is appointed by the chief justice to serve on a temporary assignment to a particular case to relieve an overburdened district court. The water judges do not fit that exception; neither are they elected by the constituency they serve, except coincidentally when a water judge who is a district judge presides over a case within his water division which also happens to be within his judicial district. Outside his *judicial* district, he has no electoral constituency, and a retired judge has none anywhere. Mr. MacIntyre therefore questioned the constitutionality of the Water Court.

The water policy report argues that although the water courts have the status of district courts, they do not perform the same functions or deal with the same subject matter, so they are special courts created by the legislature and thus not subject to the constitutional provisions that governs the election of judges to the district courts. The issue obviously is not resolved.

The report uses a survey of claimants' opinions to draw some conclusions, among them:

The majority of claims have not been objected to by other users, and this is consistent with the finding that the majority of users are not aware of the nature of rights claimed by other users from the same source.

Another survey was conducted of attorneys identified by the water courts, the Water Policy Committee staff and the DNRC as being active in the practice of water law. The report's conclusions from the survey include the following:

Approximately 74 percent of the responding attorneys report that the current adjudication process does not provide them or their clients sufficient notice of the claims of other water users so that investigations can be completed in time to file appropriate objections.

Approximately 77 percent of the responding attorneys report the DNRC examination of claims materially increases the accuracy of the adjudication process, and 50 percent of the responding attorneys report that such DNRC examinations always or often result in material modifications of claims in issued decrees.

Approximately 77 percent of the attorneys report the DNRC examination should be utilized much more often by the

water courts.

Only 35 percent of the responding attorneys report that the decrees issued by the water courts constitute accurate adjudications of water rights with greater than 50 percent accuracy.

These conclusions, drawn from the group that has observed and worked with the adjudication process most intimately (although it is admittedly a small group) are not reflected in the water policy report itself. This may be because the report does not *purport* to provide "performance evaluations," but it is an unfortunate weakness.

Notwithstanding the above disclaimer, the water policy report contains many opinions and conclusions about performance. But, most fundamentally, the report does not settle the questions concerned with the *accuracy* of the decrees and equal treatment of claimants. This leaves the most important questions unanswered.

ADDENDUM: In October 1988, the draft report was superseded by a final report which contains further documentation, argument and drafts of legislation to improve the adjudication procedures. It does not, however, make any changes that require revision of this article.

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