

My name is Wes Frye and my Family ranches South of Malta. I am here today to express my concerns on the Water Use Act of July 1, 1973 and the on going adjudication. It is obviously very important to understand the history of Montana Water Law, where it originated from, what terminology was used to define a water right acquired by an individual, whether or not that water right was a property right, if that right was guaranteed protection under the Federal Constitution, and if those rights are being protected under the Water Use Act of July 1st, 1973.

To determine where Montana water Law originated from, I turn to the Montana Supreme Court, where they have already answered that question to some extent. In it's first decision in a water rights controversy, in the case of Caruthers v. Pemberton, 1 Mont. 111 (1869) the Court recognized the appropriation doctrine with respect to a claim of right to use water for mining purposes. Also in the cases of Stearns v. Benedick, 126 Mont. 272, 247 Pac.2d 656 (1952); Bailey v. Tintinger, 45 Mont. 154, 122 Pac. 575 (1912); Maynard v. Watkins, 55 Mont. 54, 173 Pac.551 (1918), the Court said that the appropriation doctrine was first established primarily in mining regions pursuant to customs and rules of mining camps introduced from similar developments in California. All of the cases mentioned above state that we are a Prior Appropriation State. Now we need to define what Prior Appropriation means. Prior Appropriation is the act of carving out for ones self a private domain out of the public domain under the local laws and customs. We are also instructed that our Water Law originated from the law developed in California, we now need to determine where and how the California Water Law originated. Wells A. Hutchins, in volume I., (of which there are a total of III. Volumes) pg. 164 of Water Rights Laws In The Nineteen Western States, states that, "Gold was discovered in the foothills of the Sierra Nevada, California, in January 1848. This development and the resulting mining industry had a profound influence upon the political and economic growth of California and on the development of water law throughout the West. This mineral area was Mexican territory when gold was discovered but was ceded to the United States less than 6 months later by the treaty of Guadalupe Hidalgo. There was no organized government in the early years, nor much law except that made by the miners who helped themselves to the land, gold, and water under rules and regulations of their own making as they went along." In the United States Supreme Court case of Jennison v. Kirk, 98 U.S. 453, 457 (1879), speaking through Justice Field who had been Chief Justice of California, "the miners were emphatically the law-makers, as respects mining, upon the public lands in the State." With the passage of the Act of July 26, 1866, Congress recognized and confirmed local laws, customs, and decisions of the court. This issue was addressed in the United Supreme Court decisions of Central Pacific Ry. Rd. Co. v. Alameda County Cal. 284 U.S. 463 (1932); and Cal. Ore. Power Co. v. Beaver Portland Cement Co. 295 U.S. 142 (1935) where in the Court recognized and confirmed the local laws and customs which had been operating relative to the Western lands and that the Act of 1866 extended them into the future as well.

To determine what terminology was used to define the right that a individual acquired after putting water to beneficial use, and if that right was private property, I turn again to Mr. Hutchins, pg. 151 Id. Mr. Hutchins states that, "that Appropriative right is a

species of property. At the beginning of the development of water law in California, in the earliest years of statehood, it was established that the right which an appropriator gains is a private property right, subject to ownership and disposition by him as in the case of other kinds of private property. This view of the property nature of the appropriative right has been consistently taken by the western courts that have had occasion to pass upon or to discuss it," Mr. Hutchins cites the cases of Thayer v. California Development Co., 164 Cal. 117, 125, 128 Pac. 21 (1912) and Osnes Livestock Co. v. Warren, 103 Mont. 284, 294, 62 Pac. 2d. 206 (1936). Mr. Hutchins goes on to say on pg. 152 that, "not only is the appropriative right property, it is valuable property, one of the highest order," he cites the case of Tobacco River Power Co. v. Public Service Commission, 109 Mont. 521, 532, 98 Pac. 2d. 886 (1940). As we have seen, a person who puts water to beneficial use acquires a property right that is substantial in nature. Because the right originated under the Prior Appropriation Doctrine, it is given the title of a Appropriative Right. Mr. Hutchins, on pg. 157 Id. states, "The water may be used by the appropriator on or in connection with lands away from streams, as well as lands contiguous to streams. A distinctive feature of the doctrine as it was developed in the West is the principle of first in time-first in right." On page 254 Id. Mr. Hutchins also states that, "The principle was thus established that the first appropriator of water of a stream passing over Federal public lands-who had no title to the soil because it was still in the Government-had the right to insist that the water be subject to his use and enjoyment, to the extent that he thus appropriated it before the rights of others attached, whether such others were locators of mining claims or appropriators of water." As Mr. Hutchins points out, one who wished to appropriate water under the Prior Appropriation Doctrine was not required to own the land on which the appropriation was taking place to acquire a valid water right. In the case titled Gila Water Co v. Green, 232 P. 1016, 27 Ariz.318 the court states that one complying with local laws for appropriation of water and constructing works for diversion thereof on vacant public lands of US acquires vested and accrued rights within the Act of 1866, which is superior to rights of subsequent entry man and carries with it a right-of-way or easement for impounding water. In that decision and in others of that nature, the court refers to the term "vested and accrued rights." In Ballentine's Law Dictionary, third edition, when looking up the term vested water rights, it sends you to the term accrued water rights. The definition of accrued water rights is, "Rights in waters which have vested prior to the adoption or enactment of a constitutional or statutory provision affecting the right of appropriation." In referring to Montana, there was no statutory provision affecting the right of appropriation until July 1st, 1973 with the adoption of the Water Use Act. So with this information understood, we see that all of the water that was put to beneficial use prior to July 1st, 1973 vested and accrued in the appropriator.

Next we need to determine if the Appropriative Right which vested and accrued is protected under the Federal Constitution. In deciding this issue I turn to American Jurisprudence, Volume 11, under Constitutional Law, sec. 365. It states that, "after the passage of the 14th Amendment, however, the protection afforded by the due process clause was extended so as to prevent retrospective laws from divesting rights of property and vested rights." It is very important to understand what a "retrospective law" is.

Ballentine's Law Dictionary defines it as, "Laws which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." Sec. 372 of Am. Jur. Id. states that, "a repeal or amendment of a statute, however, cannot have the effect of extinguishing vested rights which have been acquired under the former law." In the case of Miranda v. Arizona, 384 US 436 (1966) the United States Supreme Court stated, "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Also in Marbury v. Madison, 5 US 137 the United States Supreme Court stated as well that, "All laws which are repugnant to the Constitution are null and void." As shown by the Supreme Court, Am. Jur., and Ballentine's Law Dictionary, owners of Appropriative Rights that have Vested and Accrued prior to July 1st, 1973, are protected under the 14th Amendment of the Federal Constitution.

Now that it is clear that prior to July 1st, 1973, all water that was put to beneficial use Vested and Accrued and is protected under the 14th Amendment of the Federal Constitution, I will now address my concerns about the ongoing adjudication. I am sure that all of you are aware that the only water in the adjudication was put to beneficial use prior to July 1st, 1973. As I have already stated, that water Vested and Accrued. There is currently no way to declare my Vested Water Rights so that they will be protected in the current adjudication. The only way for a person to be included in the adjudication is to have filed a Statement of Claim before April 1st, of 1982. The legislature also granted an Exemption under M. C. A. 85-2-222 from filing requirements for claims for existing rights for livestock and individual as opposed to municipal domestic uses based on instream flow and ground water sources, but it was pointed out at the E.Q.C. meeting in September of 2006 and in a memorandum written by Mr. Tim Hall, that those Exempt Rights are out side of the jurisdiction of the Water Court and that those claims do not have a court to go to. Obviously if the exempt right can't get into the Water Court, they will not show up on a Final Decree. It is essential to understand what the definition of exempt is. In American Jurisprudence the term exempt is defined as "a right that is not a Vested Right, clearly personal to the one asserting it and one that he can later be barred from asserting." This definition is clearly opposite of a Vested Right that is guaranteed Due Process and Equal Protection under the Federal Constitution. The term "Statement of Claim" came into existence with the creation of the Water Use Act, and would be classified as statutory privilege. In American Jurisprudence Id. Sec. 370, it states, "The distinction between statutory privileges and vested rights must be borne in mind, for the citizen has no vested rights in statutory privileges and exemptions. see State v. Cantwell, 142 N. C. 604, 55 S. E. 820, 8 L.R.A. (N.S.) 489, 9 Ann. Cas. 141; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331. It is the general rule of constitutional law that a person has no vested right in statutory privileges and exemptions," see Bearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N. S.) 1215, Ann. Cas. 1912B, 251. Clearly a Statement of Claim and a Exemption are not Vested Rights! It is very important to point out that prior to July 1st, 1973, water had to be put to beneficial use before one acquired a valid right. Now under the Water Use Act a mere Statement of Claim is prima facie evidence of a valid right. Prior to the July 1st, 1973 under the Prior Appropriation

Doctrine, the Act of 1866 recognized and confirmed local law and custom. Under local law and custom a person did not have to own the land on which that person appropriated water to be a valid right. Now, after July 1st, 1973 the DNRC says that a person has to have ownership of the land to claim a right [see attached copies.] That is a misrepresentation if Montana claims to still be a Prior Appropriation State. Keep in mind that the first time that the Montana Supreme Court applied the Prior Appropriation Doctrine was 139 years ago in 1869. Under the Water Use Act, as mentioned before, a Statement of Claim is Prima Facie evidence of a valid right. With that being so, the various agencies of the Federal Government claimed stock water rights by electronically filling prior to the filling deadline of April 1st, 1982, on our pits, dams, and reservoirs on our Federally Adjudicated Allotments. My family's Predecessors in interest put that surface water to beneficial use and became the owners of Appropriative Rights that Vested and Accrued back before Montana became a State in 1889. The Federal Government could have acquired stock water rights the same way every other individual did, by owning stock and putting the water to beneficial use. If they didn't do that, how could the State of Montana grant them a stock water right? In the case of U.S. v. New Mexico, 438 U.S. 696 (1978) the Supreme Court Justices agreed unanimously that, "any water rights arising from cattle grazing by permittees on the forest should be adjudicated to the permittee under the law of prior appropriation and not to the United States." Briefs of Amicus Curiae, urging affirmance on behalf of New Mexico were filed by Attorney Generals from Montana, California, Utah, Idaho, Washington, Nevada, Oregon, Colorado, and Wyoming. I have heard it said that the State of Montana owns all of the water within its boundaries. As discussed in Wiel, Water Rights in the western States (Copyright 1911) Volume I, pg. 194, "Congress in 1877 passed the Desert Land Act, providing that all waters upon public lands should be and remain free for the appropriation and use of the public." Volume II, Pg. 1452 states, "Civil Code, section 1880 et seq. (Rev. Codes 1907 sec. 4840 et seq.), recognizes the doctrine of prior appropriation, and had been said to declare waters the property of the State see Smith v. Denniff, 23 Mont. 65." He goes on to state that, "the actual wording is that the waters of this State may be appropriated." So we see that the State of Montana claimed all the water, but for the purpose of allowing its people to appropriate it.

The Water Use Act of July 1st, 1973 appears to be retrospective to me in the following ways:

1. By allowing the various Federal Agencies to file on water rights that had already Vested and Accrued in the hands of the Appropriator.
2. By not allowing for the owners of Appropriative Rights which have Vested and Accrued prior to July 1st, 1973, to be recognized as such though the adjudication, but by only allowing for Statements of Claims and Exemptions, which are Statutory Privileges.

Thank you for allowing me to point out some of my thoughts and concerns.

Wesley R. Frye

THE CONSTITUTION OF THE STATE OF MONTANA

**1. AS ADOPTED BY THE CONSTITUTIONAL CONVENTION MARCH 22, 1972, AND
AS RATIFIED BY THE PEOPLE, JUNE 6, 1972, REFERENDUM NO. 68**

PREAMBLE

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

ARTICLE IX ENVIRONMENT AND NATURAL RESOURCES

1. Protection and improvement.
2. Reclamation.
3. **Water rights.**
4. Cultural resources.
5. Severance tax on coal - trust fund.
6. Noxious weed management trust fund.
7. Preservation of harvest heritage.

Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

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

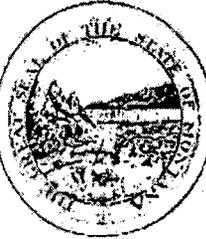
(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Copies furnished by:

Decreed Water Advocates, an Association of decreed water owners.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
GLASGOW WATER RESOURCES REGIONAL OFFICE



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GLASGOW, MONTANA 59230-1269

January 8, 2008

Larry D. Pippin
PO Box 184
Saco, MT 59261

RE: Application for Provisional Permit for Completed Stockwater Pit or Reservoir (Form 605)
No. 40M-30029575

Dear Mr. Pippin,

The Department of Natural Resources and Conservation received your Application for Provisional Permit for Completed Stockwater Pit or Reservoir (Form 605).

Montana water law requires "the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant" (85-2-306 (6)(d) MCA). See the enclosed memo dated December 21, 2007 from Tim Hall, Chief Legal Counsel.

The application you submitted does not meet this statutory requirement and has been terminated. The filing fee you submitted with the application will be refunded.

If you have any questions, please call.

Best regards,

Denise Biggar
Denise Biggar

Water Resources Specialist

Phone number: 406-228-2561

E-mail address: dbiggar@state.mt.us

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DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION



BRIAN SCHWETZER, GOVERNOR

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DIRECTOR'S OFFICE (406) 444-2074 TELEFAX NUMBER (406) 444-2654

PO BOX 201601 HELENA, MONTANA 59620-1601

To: Kim Overcast, New Appropriations Manager
From: Tim D. Hall, Chief Legal Counsel
Date: December 21, 2007
Re: Stockwater Pits and Reservoirs - Pre-1973 and Post-1973

The Montana Water Use Act of 1973 established a permit system for new uses of water. Any person planning a new or expanded development for a beneficial use of water from a surface water source must obtain a Permit to Appropriate Water prior to the water being put to use. The permit system is administered by the DNRC. The Water Use Act at Mont. Code Ann. § 85-2-306 (6) & (7) has a special provision for obtaining permits for completed stockwater pits or reservoirs. If the pit or reservoir meets the following criteria, construction can begin immediately. The stockwater pit or reservoir must be located on a non-perennial stream, have a capacity of less than 15 acre-feet of water, and an annual appropriation of less than 30 acre-feet. The pit or reservoir must also be constructed on a parcel of land that is 40 acres or larger which is owned or under the control of the applicant. The proper form to file with the Department for a new water right under the above provisions is a Form 605, application for Provisional Permit for Completed Stockwater Pit or Reservoir.

The Department will not process Form 605 applications for Provisional Permit for Completed Stockwater Pit or Reservoir on federal land when the application is received in the name of the grazing permit holder. The water right must be in the name of the federal agency. The same applies for developments on state land. A federal grazing permit does not constitute control of the land. The grazing permit holder does not control other individuals from entering the land for other purposes nor do they control any resources on the land. The federal agency has control of the land, including control of the grazing. The grazing permit dictates how many animal units will occupy a pasture, when the animals will be allowed to enter the pasture, and how long they will be allowed to stay. Grazing permit holders can also be told to remove the animals at other times, such as when the condition of the pasture is severely degraded due to drought. The grazing permit holder agrees to these terms by signing the grazing permit. Failure to adhere to the terms of the grazing permit can result in cancellation of the permit and trespass charges filed against the permit holder.

Because of the variety of private leases with varying levels of "control of the land," the Department requires written permission from the landowner when a Form 605 is filed for a water right in the name of the private lessee.

There has been some confusion of late between Form 605 filings, Form 627 filings, and issues of how certain unclaimed water rights get adjudicated. The Department has been receiving numerous improper Form 627 "Notice of Water Right" filings and copies of papers filed at the courthouse attempting to "claim" stockwater pits and reservoirs. Unlike a Form 605, which is for a new water right, a Form 627, which has been discontinued as of Jan. 1, 2008, was merely a notice form provided by the Department for the filing of some sort of claim to a pre-1973 water right that was exempt from the filing requirements of the statewide general stream adjudication ("Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources...." Mont. Code Ann. §-85-2-222. All existing pre-July 1, 1973, water rights not meeting the exempt definition were to be filed with the Department during the claim filing period of 1979-1982. Stockwater pits and reservoirs were not exempt from adjudication filing requirements. The Montana State Supreme Court early on in the adjudication issued a water rights order stating that "failure to file a claim as required by law will result in a conclusive presumption that the water right or claimed water right has been abandoned" MCA 85-2-212. Existing water rights that were not filed as statements of claim during the claim filing period, or were not exempt from filing, were later deemed by the Supreme Court to have been forfeited. *Matter of Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992).

Therefore, a Form 605 is for filing for new surface water rights for stockwater pits and reservoirs. Pre-July 1, 1973, stockwater pits and reservoirs needed to be claimed in the adjudication or were forfeited. For water rights exempt from the filing requirements of the adjudication, claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources, a Form 627 could formerly be filed with the Department to give notice that the filer claimed such a right. A Form 627 does not constitute a claim that the Water Court will adjudicate. The legislature has not yet made clear where or when someone who did not voluntarily file a water right exempt from the filing requirements of the adjudication can file their claim and have it adjudicated. It is clear, however, that anyone who filed a Form 627 has not placed their water right before the Water Court for adjudication and no such water rights claimed on that form will be included in water right decrees.

Water users should contact attorneys of their choice for advice on the handling of their water rights.