

Maxine Korman

Issue - Correction of " Exempt" Water Right

The recommendation of Ron Korman and Maxine Korman is that all water rights that pre-date the 1972 Montana Constitution and under the 1973 Water Use Act be required to be filed as Declaration of Vested Water Right.

Attached Supplements to Objection & Request for Hearing re EXEMPT FILINGS, STATEMENTS OF CLAIM (water rights on patented lands) OBJECTIONS BLM FILINGS and excerpts from Nevada Water Engineer Report will hopefully provide enough information that the Advisory Committee agrees there are serious flaws that need to be properly corrected in order to have an accurate, valid and defensible general water adjudication showing all accurate, valid and defensible water rights.

The Prior Appropriation Doctrine is a federal granting statute RS2339 (Am Jur A granting act conveys the fee the same as if land patent had issued) - Mt. S. Court Smith v. Denniff that the state, like the federal government, granted water rights on unsold state lands

pre-Water Use Act cases contain language such as vested water right, vested and accrued water right, "existing within the meaning of accrued." However, Kormans have several documents from DNRC that there is no vested water right, vested has no significant meaning. The only vested water right is in **85-2-313. Provisional permit** A person may not obtain any vested right to an appropriation obtained under a provisional permit .

However vested water right and a savings provision of such vested water right appears in the majority of state-federal water compacts.

Also in MCA: **75-7-104. Vested water rights preserved.** This part shall not impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States.

History: En. 26-1516 by Sec. 7, Ch. 463, L. 1975; R.C.M. 1947, 26-1516.

87-5-506. Vested water rights preserved and emergency actions excepted. This part shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States or operate in emergencies such as floods, ice jams, or other conditions causing emergency handling.

History: En. Sec. 6, Ch. 10, L. 1965; R.C.M. 1947, 26-1506.

How is the vested water right defined?

How do we determine who are the owners of vested water rights?

Early territorial documents (section 6 Memorials and Resolutions Territory of Montana Fourth Session 1868) contained a section stating claims of vested rights could still be brought into courts. Also, 75-2-2510. Effect of name change on vested rights and existing laws.(1) The change of name provided for in this part shall not impair or work a forfeiture or alteration of any vested rights.

We have provided copies of state land patents to the DNRC Director showing these land patents read " subject to vested and accrued water rights" (the language of RS 2339) The Director has also been provided Interior Decision Arizona (the state took title with the land encumbered with prior vested and accrued water rights) and A T West & Sons (if there are already vested and accrued water rights and the land is withdrawn or disposed of, there must be sufficient easement for the exercise of those rights). The department still blocks us from being able to file for vested water rights on those sections, even after reminding the department of Water Court case 41g. The director returned all the information to us & in her letter said she couldn't keep it.

I have also asked the Director about pre-Water Use Act law re Declaration of Vested Groundwater Right. She provided me with a copy of DNRC amicus brief Mildenerger v. Galbraith.

We have appeared before the EQC and Interim Water Policy Committee, brought HB 711 To Recognize Vested Water Rights on Federal Lands. We did this following a United States Federal Court of Claims case Hage v. U.S. The Court said the rancher, Hage, owned the vested water rights and so owned the fee to those lands the waters service. This is significant as there are several United States Supreme Court cases that state land to which private rights and

claims attach are not public land. The earlier Montana law read that any stream, creek, coulee, pothole could be appropriated. This past session Senator Brenden tried to bring LC 1356 in a continuing effort to correct serious problems with the Water Use Act & adjudication under Water Use Act.

We understood Judge Loble to say to the EQC that there is no court in the state to bring Exempt Rights into. We believe that is a denial of due process. We have a Prairie Star article and Ag Reporter article where Director Sexton and DNRC Counsel Hall say this needs fixed before the adjudication is done and the exempt claims can't be brought into a court. In the Ag Reporter article Judge Loble said that before the Taylor Grazing Act, the rancher could have a water right, but after that he wasn't so sure because it's complicated. After the hearing for HB 711, Mr. Petesch had us brought to his office to tell us that on federal land, just like on state land, we are lessees and lessees can't have water rights. We are not claiming the water rights as lessees. We are attempting to declare and have protected vested and accrued water rights granted under the Prior Appropriation Doctrine and that pre-date creation of these state and federal agencies.

MAXINE KORMAN- SUPPLEMENT TO NOTICE OF OBJECTION AND REQUEST
FOR HEARING MONTANA WATER COURT, LOWER MISSOURI DIVISION
BEAVER CREEK TRIBUTARY OF MILK RIVER – BASIN 40M

SUPPLEMENT TO OBJECTION FORMS TO
“EXEMPT RIGHT” CORRECTED TO “VESTED” FOR VESTED WATER RIGHTS
OWNED BY Ronnie D. Korman and Maxine Korman
For those water rights listed on ACKNOWLEDGEMENT OF WATER RIGHT
OWNERSHIP UPDATE, as well as all rights submitted by Ronnie and Maxine Korman
that have been combined into one form and or misplaced or deleted by the Department of
Natural Resources

These water rights have priority dates beginning in the 1890’s, which pre-date passage of
the Montana Water Use Act, created by putting the water to beneficial use for
stockgrazing and stockwatering on what was then “public domain” and are Revised
Statute 2339 vested and accrued appropriative rights. These are rights recognized,
sanctioned and confirmed by the United States government and the United States Supreme
Court. These rights are protected by the federal Constitution. These rights should have
been recognized by the State of Montana as vested water rights and provision should
have been made for their recognition as DECLARATION OF VESTED WATER
RIGHT.

- 1) 40M30005530 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 2) 40M30005534 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 3) 40M30005542 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 4) 40M30005543 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 5) 40M30005547 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 6) 40M30009859 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 7) 40M30009861 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 8) 40M30009864 “EXEMPT” Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT

9) 40M30009866 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

10) 40M30009867 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

11) 40M30009868 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

12) 40M30009871 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

13) 40M30009873 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

14) 40M30009877 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

15) 40M30009878 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

16) 40M30009885 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

17) 40M30009886 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

18) 40M30009887 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

19) 40M30009893 “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

20) AND ALL OTHER FORMS FILED, INCLUDING FEES PAID, WHERE DNRC COMBINED MULTIPLE FILINGS INTO ONE AND/OR DELETED LEGAL DESCRIPTIONS “EXEMPT” Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT. We filed 42 “EXEMPT RIGHTS” and paid \$2,125 in filing fees to DNRC.

1) Ronnie Korman and Maxine Korman are objecting to the Montana legislatively created "EXEMPT RIGHT" stock water right. These claims involve the Prior Appropriation Doctrine vested and accrued appropriative water rights of Ronnie Korman and Maxine Korman. The appropriative right is recognized as vested property and protected under the federal Constitution. [Water Rights in the Western States, Wiel, page 127]

Ronnie Korman and Maxine Korman have recorded their DECLARATION OF ACCEPTANCE OF LAND PATENT as heirs and assigns to such legally described lands and appurtenances as described on the land patents. From the book "QUESTIONS AND ANSWERS ON THE UNITED STATES PUBLIC LAND LAWS AND PROCEDURE" by Joseph R. Rohrer, L.L.M. of the General Land Office; page 21: What is the nature of a patent to lands issued by the proper department of the government? It has a double aspect; the patent is to be regarded both as a deed of conveyance of the title and also as an adjudication of the right of the patentee (Beard v. Federy, 3 Wall. 478)

2) Ronnie Korman and Maxine Korman are entering their objections as Pro Se litigants, relying on Caldwell v. Miller (790 F. 2d 589, 595, 7th Cir. 1986) that Pro Se litigants are not held to the same stringent standards applied to formally trained members of the legal profession and are to be liberally construed. Additionally, Haines v. Kerner, (404 U.S. 519, 520-21, 1972) that Pro Se complaints are to be liberally construed and should be dismissed for failure to state a claim only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

3) A letter from Pam Weinmeister of the Glasgow Department of Natural Resources and Conservation. Dated March 12, 2003 (cc: Kimberly Overcast-New Appropriations Program Manager, BLM- Glasgow Office, Bud Clinch-DNRC Dept. Director, Jack Stults-DNRC Water Resources Division Administrator, Curt Martin-DNRC Water Rights Bureau, Bob Larson-DNRC Water Resources Regional Manager) in part: "By definition, exempt means water rights existing prior to July 1, 1973 for livestock and individual use, based upon instream flow or ground water sources. Instream flow means direct use in a stream without using a ditch, pipe, dam, bucket, pump or other diversion method. THE ACKNOWLEDGEMENT DOES NOT GRANT YOU A WATER RIGHT. It merely contains information about water use that you provided to the Department. Further, it is issued with the following statements, "THIS WATER RIGHT IS IDENTIFIED AS EXEMPT FROM THE ADJUDICATION PROCESS BY THE MONTANA WATER COURT PURSUANT TO 85-2-222, MCA(EXEMPT RIGHTS ARE BASED ON INFORMATION AND EVIDENCE PRESENTED BY THE OWNER. THE BURDEN OF PROOF OF THE RIGHT REMAINS WITH THE OWNER.) THIS ACKNOWLEDGEMENT IS NOT INTENDED, NOR IS IT THE INTENT TO BE CONSTRUED TO CONSTITUTE RECOGNITION OR ADMISSION BY THE STATE OF SUCH WATER RIGHTS, NOR AS EVIDENCE OF THE USE OR PRIORITY OF USE IN ANY ADJUDICATION PROCEEDINGS UNDER THE LAWS OF THE STATE OF MONTANA."

What that means is that sometime in the future you are still responsible to prove in a court of competent jurisdiction the water right claimed in the Notice. The Department understands that there are ownership questions surrounding these Notices, but the Department will not decide that issue. Nor will the Department take sides in the resolution of the issue.”

Ronnie Korman and Maxine Korman ask the court to accept the Priority Affidavit of Vested Water Rights, recorded in the Valley County, Montana Clerk and Recorder office and published for three consecutive weeks in the Glasgow Courier.

This was done for two reasons:

1) that although the Montana Supreme Court in *Mettler v. Ames Realty* stated that Montana is a Prior Appropriation Doctrine state and that the riparian doctrine was never suited to Montana, Title 85 Water Use does not recognize the vested water right, does not define the vested water right and makes no provision for recording and confirming the adjudication of the vested water right. 85-2-313 is the only mention of vested right

85-2-313. Provisional permit A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department. **History:** En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(4); amd. Sec. 8, Ch. 497, L. 1997.

Federal Statutes of 1866 and 1870 – The provisions of these statutes are now incorporated in Revised Statutes sections 2339, 2340, which are as follows :

Rev. Stats., sec 2339: “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; “

Rev. Stats., sec. 2340: “All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.” [Wiel, *Water Rights in the Western States*, 1908, pages 21, 22]

Definition – A water right of appropriation is real estate, independent of the ditch for carrying water, and independent of ownership or possession of any land, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose; and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water or in the channel of the stream [Wiel, page 129]

By the congressional acts , the government acquiesced; the kind of vested and accrued right grew up which the government by said acts of Congress promised to protect [Wiel, page 159]

Ballentines A Law Dictionary, 1916- Appropriated. Under constitutional provision, water held not appropriated until applied to beneficial use.

Vested water rights. See Accrued water rights.

Accrued water rights. Meaning within U.S. Rev. Stats., 2339, 2340, U.S. Comp. Stats. 1901, p. 1437, 7 Fed. Stat. Ann., pp. 1090, 1096, defined where jurisdiction had not recognized doctrine of prior appropriation.

Accrue. To accumulate and become a part of something; to ripen or spring into existence, as a right of action.

Ballentine's 3d., 1969 Accrue. To become complete by development.

Vested water rights See accrued water rights.

Accrued water rights. Rights in waters which have vested prior to the adoption or enactment of a constitutional or statutory provision affecting the right of appropriation (56 Am J 1st Wat sec 295)

The word existing- To be; to have being; to come into existence; to have existence. Existing. Existent; in existence.

Existing equity. An existing right enforceable in equity, if not at law

Existing use. A familiar term in zoning ordinances and regulations usually employed in characterizing a nonconforming use excepted from the application of the ordinance or regulation, and meaning an actual, as distinguished from a mere contemplated, use, existing at the time of the ordinance or the passage of the regulation, but not necessarily a use in actual operation at that time or a use which utilizes the entire tract involved.

Use. A beneficial ownership recognized in equity

Webster's 1828 dictionary had defined vest as to put in possession of; to come or descend to; to take effect as a title or a right; accrue as Something that accedes to, or follows the property of another; to be added.

Stroud's Judicial Dictionary (1d. 1890) Accrue- Title "accrues" when the instrument creating it, or the fact constituting it, first becomes operative

Vest- To 'vest', generally means to give the property in; it is a word which has acquired a definite meaning, carrying with it definite legal consequences. As applied to estates in land, to vest, signifies the acquisition of a portion of the actual ownership; the acquisition, not of an estate in possession, but of an actual estate.

Water Rights: Division of Water Resources - U.S. Fish and Wildlife Service

ADJUDICATION OF WATER RIGHTS

An adjudication is an administrative or judicial determination of all rights to use water in a particular stream system or watershed, to establish the priority, point of diversion, place and nature of use and the quantity of water used among the various claimants. These stream or watershed adjudications can be initiated by a water user (including the United States) or by the State. The United States may be joined in an adjudication if the requirements of the McCarran Amendment are met.

APPROPRIATION DOCTRINE

Water laws developed in the arid Western States--where water supplies are limited and often inadequate--are known as the Appropriation Doctrine. This doctrine is essentially a rule of capture, and awards a water right to a person actually using the water. It has two fundamental principles: First in time of use is first in right (i.e., the earliest appropriator on a stream has the first right to use the water), and Application of the water to a beneficial use is the basis and measure of the right.

BENEFICIAL USE Beneficial use is a cardinal principle of the Appropriation Doctrine. It has two components: the nature or purpose of the use and the efficient or non-wasteful use of water. State constitutions, statutes, or case law may define uses of water that are beneficial, those uses may be different in each State, and the definition of what uses are beneficial may change over time. The right to use water established under State law may be lost if the beneficial use is discontinued for the prescribed period of time (see Abandonment and Forfeiture).

VESTED RIGHT An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.

BLM.gov Western States Water Laws

Prior Appropriation:

The prior appropriation doctrine, or "first in time - first in right", developed in the western United States in response to the scarcity of water in the region. The doctrine evolved during the California gold rush when miners in California needed to divert water from the stream to locations where it was needed to process ore. Customs and principles relating to water diversion developed in the mining camps, and disputes were resolved by simple priority rule. According to the rules of prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use. In other words, those with earliest priority dates have the right to the use of that amount of water over others with later priority dates.

Unlike a riparian right, an appropriative right exists without regard to the relationship between the land and water. An appropriative right is generally based upon physical control and beneficial use of the water. These rights are entitlements to a specific amount of water, for a specified use, at a specific location with a definite date of priority. An appropriative right depends upon continued use of the water and may be lost through non-use. Unlike riparian rights, these rights can generally be sold or transferred, and long-term storage is not only permissible but common.

There are four essential elements of the prior appropriation doctrine: Intent, Diversion, Beneficial Use, and Priority.

In all states with the prior appropriation doctrine, the acquisition of water requires that the appropriator demonstrate an intent to appropriate the water, divert the water, and apply it to beneficial use. Historically, intent was indicated by on-the-ground acts such as site surveys, land clearing, preparation of diversion points, and most importantly, posting of notice. Today, however, intent is generally indicated by the application for a permit.

Another essential component of a prior appropriation water right is diversion. Historically, a physical diversion of water was required in order to acquire a water right. This requirement has diminished as states have implemented various instream flow programs. A point of diversion, however, is still an essential element of a consumptive use water right.

Beneficial use is perhaps the most important characteristic in defining a prior appropriation water right. Beneficial use is used to determine whether a certain use of water will be recognized and protected by law against later appropriations. The justification for beneficial use criteria is to prevent waste. Since water is a scarce resource in the west, states must determine what uses of water are acceptable. Beneficial uses of water have been the subject of great debate, and each western state has an evolving system for evaluating what uses of water are considered "beneficial."

The final essential feature of the prior appropriation doctrine is the priority of a water right. As described above, the first appropriator on a water source has the right to use all the water in the system necessary to fulfill his water right.

In western states, there are few restrictions on who can hold an appropriative water right. Therefore, both private and public entities hold rights. An appropriative right does not depend on land ownership, but some states do require that the water is appurtenant to the land on which it is used. In general, appropriative water rights are transferable property.

State of New Mexico 72-1-3. Declaration of water rights vested prior to 1907 Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents

Nevada Revised Statutes: CHAPTER 533 - ADJUDICATION OF VESTED WATER RIGHTS; APPROPRIATION OF PUBLIC WATERS **NRS 533.085 Vested rights to water not impaired.** 1. Nothing contained in this chapter shall impair the vested right of any person to the use of water,

ADJUDICATION OF VESTED WATER RIGHTS ADJUDICATION OF
WATERS MONITOR VALLEY

STATE OF NEVADA OFFICE OF THE STATE ENGINEER

The State Engineer ruled that he has the authority under Nevada law to recognize vested rights to water livestock irrespective of land ownership, and that livestock water rights would be adjudicated by the number of livestock, source, ownership and priority date without a specified quantity of water.

Blm.GOV Western States Water Law

Vested rights are rights that do not have to go through the application process. Vested rights to surface water are those rights for which the work to establish beneficial use was initiated prior to March 1, 1905 (the date of adoption of Nevada's water law). Vested rights from underground sources are those rights initiated prior to March 22, 1913, for artesian water and prior to March 22, 1939 for percolating water. The extent of all vested rights on a water source is determined through the adjudication process (see below).

Oregon If water was used prior to enactment of the 1909 water code and has been used continuously since then, the property owner may have a "vested" water right. Each vested right will be determined through the courts in an adjudication proceeding.

South Dakota In 1907, the state legislature affirmed the doctrine of prior appropriation by enacting legislation authorizing the state engineer to administer appropriation of surface water. A major addition to the water rights laws occurred in 1955. Legislation was enacted making use of ground water also subject to the doctrine of prior appropriation. In addition, a provision was inserted allowing anyone to claim a vested water right for water uses predating March 2, 1955. The 1955 legislation also transferred the authority to issue water right permits from the state engineer to a citizen's board with a chief engineer making recommendations to the board. This citizen's board is now known as the Water Management Board and consists of seven members appointed by the Governor.

Colorado **BLM Specific Information:** A water right applicant in Colorado does not have to have an approved right-of-way from the BLM in order to obtain an approved application. The BLM can challenge the applicant on land access issues in water court, and they can argue in court that the applicant does not have land access. If the applicant cannot prove that land access is available, the water court will dismiss the case.

The State of Wyoming does not require a right-of-way approval by the BLM prior to approving an application. There is a statement on the water right permit form which states that the granting of a water right does not grant an easement and that the applicant is responsible for obtaining any rights-of-way needed to perfect the permit.

Montana Water Use Act Part 1 General Provisions 85-2-101 (2)

(2) A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

[Water Rights Laws In The Nineteen Western States, Wells Hutchins, published by United States Department of Agriculture, page 329; "Existing right" means a right to the use of water which would be protected under the law as it existed prior to the effective date of this act." Mont. Rev. Codes Ann. 89-867(4) (Supp. 1973)]

(4) Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

(6) It is the intent of the legislature that the state, to fulfill its constitutional duties and to exercise its historic powers and responsibilities to its citizens living on and off reservations, comprehensively adjudicate existing water rights and regulate water use within the state. It is further the legislature's intent that the state, to the fullest extent possible, retain and exercise its authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights, and resolve issues concerning its authority over water rights and permits, both prior to and after the final adjudication of water rights. In furtherance of this legislative intent:

(a) all permits issued are provisional, and it is the intent of the legislature that this status provide enforceable legal protection for existing rights; and

(b) any judicial determination of the state's authority to issue provisional permits on or off reservations should be decided in the appropriate state forum. **History:** En. Sec. 2, Ch. 452, L. 1973; R.C.M. 1947, 89-866; amd. Sec. 1, Ch. 497, L. 1997.

The 1972 Montana Constitution Article IX, Section 3 (1) states : All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. The language of R.S. 2339 appears on every land patent owned by Ronnie Korman and Maxine Korman and state land patents in Townships 27N, 28N Range 34 E.

The book “Questions and Answers On The United States Public Land Laws And Procedure”, by Joseph R. Rohrer, L.L.M. Of the General Land Office

What is meant by entry; what is its legal effect? The word is of generic signification and includes all methods of acquisition of the equitable title to public lands (public lands and public domain were synonymous :” Define “public lands”. “Public lands” or “public domain,” are synonymous terms used to describe lands subject to sale or other disposal under general law. Newhall v Sanger; Barker v Harvey) It is a contract with the government. By entry and payment, made in the district land office, the purchaser secures a vested interest in the property and the right to a patent therefor (Cornelius v Kessel; Parsons v Venske)

When does a claimant get legal title to land? When he has performed all the acts prescribed by the law, including the payment of the purchase price, he has the equitable title; but he does not get the legal title until patent issues and is recorded (Wirth v Branson; Moore v Robbins; U.S. v Schurz)

What is the nature of a patent to lands issued by the proper department of the government? It has a double aspect; the patent is to be regarded both as a deed of conveyance of the title and also as an adjudication of the right of the patentee (Beard v Federy)

Interior Decision Arizona states that the state takes title encumbered with vested and accrued water rights that pre-date issuance of land patent. United States General Land Office Historical indexes show ‘title to vest to state; subject to prior rights.’

56 Interior Dec. 387, 1938 WL 4126 (D.O.I.) A. T. WEST AND SONS Decided November 2, 1938

***387** GRAZING AND GRAZING LANDS--WATER RIGHTS--BASE PROPERTY OF APPLICANT FOR GRAZING LICENSE.

Where a water hole is not one of natural occurrence but has been developed entirely by human agency, it is not a water hole within the meaning of the Executive order of April 17, 1926, and, if owned or controlled by an applicant for a grazing license, it may be recognized as base property for such license. PUBLIC LANDS--WATER RIGHTS--EXECUTIVE ORDER OF APRIL 17, 1926. The Executive order of April 17, 1926, does not apply to water which, in its natural condition, does not furnish or retain a supply of water available for public use.

Where lands containing waters to which the Executive order of April 17, 1926, is not applicable have been included in a departmental Order of Interpretation, such order should be revoked. Departmental Order of Interpretation No. 208, issued August 22, 1934, pursuant to Executive order of April 17, 1926, revoked. Santa Fe Pacific R. R. Co. (53 I. D. 210) cited and applied. PUBLIC LANDS--EFFECT OF WITHDRAWAL ORDER ON VESTED WATER RIGHTS. Under the provisions of section 2340, Revised Statutes, embodying section 17 of the act of July 9, 1870 (16 Stat. 218), subsequent disposal or withdrawal of lands containing waters, the rights to which have vested or accrued, are subject to an easement sufficient to permit of the continued use of such waters.

The following is in the Montana Code Annotated:

75-7-104. Vested water rights preserved. This part shall not impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States. **History:** En. 26-1516 by Sec. 7, Ch. 463, L. 1975; R.C.M. 1947, 26-1516.

87-5-506. Vested water rights preserved and emergency actions excepted. This part shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States or operate in emergencies such as floods, ice jams, or other conditions causing emergency handling. **History:** En. Sec. 6, Ch. 10, L. 1965; R.C.M. 1947, 26-1506.

2) The Priority Affidavit was filed with the Clerk and Recorder in accordance with Article IX, Section 3 (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. That present system was filing notice with the Clerk and Recorder of the county where the property was located and publishing notice.

Under the maxim of “ a thing similar is never exactly the same”, a Statement of Claim is not a Declaration of Vested Water Right and as evidenced by the Provisional permit section in the Montana code, a Provisional permit is not a vested right. These are retroactive alterations to Revised Statute 2339 vested and accrued appropriate water rights that pre-date Montana Water Use Act. A Statement of Claim, Provisional permit, or “Exempt right” created by the legislature of the state of Montana is not a granting act of the federal government and cannot and does not convey the “Fee” to what was originally public domain as R.S. 2339 originally conveyed the fee to our predecessors, the early day stockmen, who first put the water to beneficial use of stockwatering.

The intent of filing the Priority Affidavit was to assert ownership of R.S. 2339 vested and accrued water rights. Neither the BLM, nor the DNRC objected to our notices in the Glasgow Courier. This was done so we would not voluntarily and unknowingly relinquish vested water rights in an uninformed exchange for some type of equitable right. We have continued to try to file for vested water rights and the record of forms, correspondence show the DNRC has absolutely refused to allow us to file. The DNRC , DNRC Director Sexton and Legal Counsel Tim Hall have on multiple occasions acted to deceive us to have us rely on their statements or refuse to respond to certain of the questions of Ron Korman and Maxine Korman.

Ballentine's Law dictionary defines fraud as deceit, deception operating prejudicially on the rights of another, and so intended, by inducing him to part with property or surrender some legal right (23 Am Jur 2d s 2)

With respect to those appropriative rights that were originally created on public domain, *Gila Water Co. v. Green*, 27 Ariz.318:That the vested and accrued water right carried with it the future right of impoundment, and is a retroactive alteration of the vested and accrued appropriative right.

. These are vested rights protected under the Federal Constitution and the United States Supreme Court held in *Miranda v. Arizona* that no state may legislate or make rules that abrogate rights secured under the Constitution.

The Vested Rights Doctrine in Black's law dictionary, Constitutional law.

The rule that the legislature cannot take away a right that has been vested by a court's judgement; specif., the principle that it is beyond the province of Congress to reopen a final judgement issued by an Article III court.

. The appropriative right originated on public domain , independent of land ownership.

R.S. 2339 is a granting act of the Federal Congress. A confirmation by a law is as fully for all intents and purposes, a grant as if it contained in terms a grant de novo. Act of Congress as Grant- Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law.

A grant of this character is at least equivalent to a patent; in some respects, it has been regarded as a higher evidence of title than a patent, since it is a direct grant of the fee by the United States.

Am Jur Public lands, Rohrer General Land Office, citing Deseret Salt Co. v. Tarpey

In contrast, Abandoned property as defined by Ballentine's (3d. 1969) Property to which an owner has voluntarily relinquished all right, title, claim and possession with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not reclaiming future possession or resuming ownership, possession, or enjoyment. This is not the case with respect to these particular water rights. We have no intention of abandoning these vested water rights, however, by acts of the Montana legislature we are denied the ability to record them as vested and have them recorded in a decree as vested water rights and by acts of the Montana legislature, we are denied a court and remedy. This violates the Montana Constitution Article II Section 16: THE ADMINISTRATION OF JUSTICE. Courts of justice shall be open to every person, and speedy remedy

Afforded for every injury of person, property, or character. Right and justice shall be administered without sale, denial, or delay.

Section 17: DUE PROCESS OF LAW. No person shall be deprived of life, liberty, or property without due process of law. From “THE MONTANA STATE

CONSTITUTION A REFERENCE GUIDE” by Larry M. Elison and Fritz Snyder :

This section is intended to guarantee reasonable and fair process before government deprives any person of life, liberty or property. At a minimum, fair process includes notice as to what is at risk, an opportunity to be heard, and an impartial decision maker rendering a responsive and timely decision. The U.S. Supreme Court requires every state to provide minimal procedural due process to every person. A second dimension of due process, “substantive due process,” generally more protective of individual rights than substantive due process. Also, Section 18: STATE SUBJECT TO SUIT. The state, counties, cities, towns and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the Legislature.

"Property is the right to dominion over the use and disposition of an interest. Protected by the Equal Protection clause, which is grounded in stare decisis." **Cohens v. Virginia**,⁶ Wheaton 264, 399

PROPERTY (American Jurisprudence) definitions- In its strict legal sense “property” signifies that dominion or indefinite right of user, control and disposition which one may lawfully exercise over particular things or objects. It is generally used in this sense in the constitutional guarantee against deprivation of property without due process of law *(see Am Jur Constitutional Law) As so used, the word signifies the sum of all the rights and powers incident to ownership

THE WORD “PROPERTY” IS NOT ALWAYS USED IN ITS STRICT
LEGAL SENSE. IT IS FREQUENTLY USED TO SIGNIFY OR DESCRIBE THE
SUBJECT OF PROPERTY.

These things, although the subjects of property, are, when coupled with possession, but the indicia or visible manifestations of invisible rights. Much uncertainty and confusion in the decisions have arisen from overlooking this distinction. :”Neither ‘property’ nor the value of property is a physical thing. Property is a set of defined options...It is that set of defined options which has economic value...IT IS THE OPTIONS, AND NOT THE PHYSICAL THINGS, WHICH ARE THE ‘PROPERTY’ – economically as well as legally...But because the public tends to think of property as tangible, physical things, this opens the way politically for government confiscation of property by forcibly taking away options while leaving the physical objects untouched”

40 USCS § 102

- (9) Property. The term "property" means any interest in property except--
- (A) (i) the public domain;
 - (ii) land reserved or dedicated for national forest or national park purposes;
 - (iii) minerals in land or portions of land withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and
 - (iv) land withdrawn or reserved from the public domain except land or portions of land so withdrawn or reserved which the Secretary, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public land laws because the lands are substantially changed in character by improvements or otherwise;

40 USCS § 1314

- (2) Real property of the government. The term "real property of the Government" excludes--
- (A) public land (including minerals, vegetative, and other resources) in the United States, including--
 - (i) land reserved or dedicated for national forest purposes;
 - (ii) land the Secretary of the Interior administers or supervises in accordance with the Act of August 25, 1916 (*16 U.S.C. 1, 2, 3, 4*) (known as the National Park Service Organic Act);
 - (iii) Indian-owned trust and restricted land; and
 - (iv) land the Government acquires primarily for fish and wildlife conservation purposes and the Secretary administers;
 - (B) land withdrawn from the public domain primarily under the jurisdiction of the Secretary; and
 - (C) land acquired for national forest purposes.

The language on the BLM Permit says that the permit gives you no right, title or interest in the lands of the United States and it does not say anything about whether the permit recognizes or alters any private right, title or interest that pre-date the BLM and grazing permit system . This choice of wording is deceptive and misleading. Again, . Ballentine’s Law dictionary defines fraud as deceit, deception operating prejudicially on the rights of another, and so intended, by inducing him to part with property or surrender some legal right (23Am Jur 2d s 2)

85-2-306. Exceptions to permit requirements 6) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

(d) 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 and that is 40 acres or larger .

MCA 85-2-306(6)(d) is a bar to filing for future impoundments of the original appropriative rights and is in contradiction with Gila Water Co. v. Green, 27 Ariz.318:

That the vested and accrued water right carried with it the future right of impoundment.

Fallini v. Hodel, 963F. 2D 275 (1992) that BLM’s decision effected a regulatory takings of Fallinis’ water rights in violation of the Fifth Amendment.

Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 171-173, 295 Pac. 772 (1931) The general rule that to constitute a valid appropriation of streamflow there must be an actual diversion, does not apply to an appropriation for watering livestock in natural watering places formed by natural depressions [Water Rights Laws In The Nineteen Western States, 1977, Wells Hutchins, published by United States Department of Agriculture] The exempt water right classification operates in such a way as to make them not exist; which contradicts United States Supreme Court Jennison v. Kirk 98 U.S. 453 (1879) the object of the 1866 federal statute for protection of private water rights “is to give the sanction of the United States to possessory rights which had previously rested solely upon local customs, laws and decisions.

This ruling effectively conveyed clear title in prior appropriation water rights to private parties and their heirs and assigns forever.

Again, in *Broder v. Water Company* 101 U.S. 274 (1879) that the Act of 1866 constituted a voluntary recognition of a pre-existing right of possession. These were rights the government had known about and failed to act; therefore rights were created with the federal government's tacit consent and approval. These are rights the government is bound to protect.

Again, in *Gila River v. Green*, that the vested and accrued water right carried with it the future right of impoundment.

California Oregon Power Co. v. Beaver Portland Cement Co. 295 U.S. 142 (1935) The Act of 1866 and Desert Land Act of 1877 effectively severed the title to all non-navigable water from the "public domain"

From *WATER RIGHTS IN THE WESTERN STATES*, Wiel, 2d, 1908 on page 81:

"In *United States v. Rio Grande Dam & Irr. Co.*, 9N.Mex. 303, 51 Pac. 674, it is said that the riparian rights of the United States were surrendered in 1866. Rev. Stats., sec. 2339... Congress has manifested a purpose to extend the longest liberty of use of waters in the reclamation of the arid region, under local regulative control. It is claimed that this statute was a grant by the Federal government to the people of the State of the waters on the public domain." Justice Brewer in that case in speaking of the Act of 1866, Act of March 3, 1877 and the 18th section of the act of March 3, 1891 the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries."

Of paramount importance the United States Supreme Court ruling in *U.S. v New Mexico*, 438 U.S. 696, 1978 upholding the New Mexico court that under the Prior Appropriation Doctrine, it is the stockmen, the successors of the early stockmen who first put the water to beneficial use for stockwatering that are the owners of appropriative stockwater rights, not the federal government. Idaho Supreme Court in *Joyce Livestock Co. v. United States of America* (No. 39576 -2007) Affirmed Joyce Livestock water right claims by grazing livestock beginning in 1898 and predate the 1934 Taylor Grazing Act. Joyce Livestock's

predecessors obtained stockwater rights on federal land simply by applying the water to beneficial use through watering their livestock in the springs, creeks and rivers on the range they used for forage. The Supreme Court denied water rights to the federal government “based upon appropriations by those it permitted to use the rangeland after enactment of the Taylor Grazing Act. The water rights are appurtenances to the base property and are conveyed by deed.

Wiel, 2d.,1908 beginning on page 201 that the rights of an appropriator do not rest on the laws of a State, but upon the laws of Congress, and the legislative enactment of a State is only a condition which brings the law of Congress into force (Anderson v. Bossman, 140 Fed. 14, at 21) and citing Cruse v. McCauley (96 Fed. 369) referring to Eastern Montana, it reads in part: “ If a person receives a patent from the United States for lands subject only to accrued water rights, that is existing water rights, and as an incident to or part of this land, he would have all the rights the United States had at that time. I do not think any State law or custom can take away such rights except for some public purpose.” It does not appear as though the definition and application of ‘existing’ now is within the meaning and application of ‘existing’ as the previously referenced ‘accrued water rights’. It does not appear as though the definition and application of ‘Statement of Claim’ and ‘EXEMPT’ now is within the meaning and application of ‘existing’ as the previously referenced ‘accrued water rights’ and current DNRC forms are not the same as earlier forms provided for by Montana water law as DECLARATION OF VESTED GROUNDWATER RIGHT and DECLARATION OF EXISTING WATER RIGHT.

To: Kim Overcast, New Appropriations Manager

From: Tim D. Hall, Chief Legal Counsel ~ *t'*

Date: December 21, 2007

Re: Stockwater Pits and Reservoirs - Pre-1973 and Post-1973

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. § 85-2w222. 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 85w2-212. 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.

Form 627 for EXEMPT Rights was discontinued as of Jan. 1, 2009. We had filed 42 Form 627 Exempt right forms and paid the Department of Natural Resources and Conservation \$2,125 in filing fees.

A review of United States Supreme Court and other court cases as well as the elements of the Prior Appropriation doctrine and appropriative right show that MCA 85-2-306(6)(d) as applied to lands that are not patented parcels but now state grant sections and lands that were originally public domain to which no homestead patent issued, but are lands the United States Federal Court of Claims recognize as "fee" lands by virtue of ownership of vested stockwater rights is retroactive alteration of the Prior Appropriation Doctrine and vested and accrued appropriative rights by application of the riparian doctrine and retroactive alteration of rights protected by the Federal Constitution by Montana Water Use Act . The appropriative right originated on public domain , independent of land ownership.

R.S. 2339 is a granting act of the Federal Congress. A confirmation by a law is as fully for all intents and purposes, a grant as if it contained in terms a grant de novo. Act of Congress as Grant- Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law. A grant of this character is at least equivalent to a patent; in some respects, it has been regarded as a higher

evidence of title than a patent, since it is a direct grant of the fee by the United States.

[Am Jur Public lands, Rohrer General Land Office, citing Deseret Salt Co. v. Tarpey]

(New Orleans v. The United States, 35 U.S. 662, 1836: It is enough for this court in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government)

Montana Code Annotated:

1-1-205. Terms relating to property and decedents' estates. Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(4) "Real property" means lands, tenements, hereditaments, and possessory title to public lands.

7-2-2510. Effect of name change on vested rights and existing laws. (1) The change of name provided for in this part shall not impair or work a forfeiture or alteration of any vested rights.

81-5-101. Moving livestock from customary range forbidden. (1) A person who willfully moves or causes to be moved any cattle, horses, mules, swine, llamas, alpacas, bison, or sheep from their owner's customary range without the permission of the owner shall upon conviction be punished by imprisonment in the county jail not exceeding 6 months or by a fine not exceeding \$500, or both.

Organic Act of Territory of Montana, sec. 6. Provided, however, That in all the claims of vested rights thereunder, the party claiming the same shall not, by reason of anything in this section contained, be precluded from making and testing said claim in the courts of said territory

Public Lands; Definitions and Distinctions.- The term "public land" usually signifies such government or state land as is open to public sale or other disposition under general laws. Land to which any claims or rights of others have attached does not fall within this designation. Vacant lands are such as are absolutely free, unclaimed and unoccupied. [Am Jur 1d. Public Lands] Additionally, Joseph R. Rohrer, L.L.M., General Land Office, "Questions and Answers On The United States Public Land Laws and Procedures", 1912 : "Define "public lands". "Public lands" or "Public domain" are synonymous terms used to describe lands subject to sale or other disposal under general law. (Newhall v. Sanger, 92 U.S., 761-763, Barker v .Harvey, 181 U.S. 481-490) Bouvier's Law Dictionary A Concise Encyclopedia of The Law Public Lands. Such lands as are subject to sale or other disposition by the United States, under general laws. Newhall v. Sanger, 92 U.S. 761, Bardon v. R. Co., 145 U.S. 535.

Ballentine's 1916 Public lands. Such lands as are open to sale or other disposition under general laws

Ballentine's 3d. 1969 Public domain The public lands of the United States or a state. Barker v. Harvey, 181 U.S. 481, 490. Public land Land of the United States or a state, particularly land open to public sale or other disposition under general laws. A term of varying senses, depending largely on the context in which it appears and the special circumstances of the case. Kindred v. Union Pac. R. Co. 225 U.S. 582. * Federal lands. See public lands.

Black's law dictionary 7. 1999 Public land. Unappropriated land belonging to the federal or a state government; the general public domain

Public domain. Government owned land

Prior Montana water law :

89-801. (7093) What waters may be appropriated. The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

Appropriation Made on Public Domain by Settler

A settler on lands which were a part of the public domain could make a valid appropriation of water thereon. Galahan v. Lewis, 105 M 294, 300, 72 P 2d 1018.

Ca. Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) The Act of 1866 and Desert Land Act had effectively severed the title to all non-navigable water from the public domain. The prior Montana water law, the waters appropriated for stockwatering of any stream, ravine, coulee, spring, lake or other natural source of supply are appropriative rights, Revised Statute 2239 vested and accrued water rights.

Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 171-173, 295 Pac. 772 (1931) The general rule that to constitute a valid appropriation of streamflow there must be an actual diversion, does not apply to an appropriation for watering livestock in natural watering places formed by natural depressions [Water Rights Laws In The Nineteen Western States, 1977, Wells Hutchins, published by United States Department of Agriculture] The exempt water right classification operates in such a way as to make them not exist:

Chief Water Judge Loble to the EQC that the exempt rights cannot be brought into the water court or any court in the state; that exempt rights do not show up on a decree. Maxims in Montana Code Annotated : "That which appears not to exist is to be treated as if it does not exist. " The original appropriative rights for the beneficial use of stockwatering, created, recognized, sanctioned and confirmed according to local law, custom and decisions of courts will not be able to be proven to exist, will not be defensible and will not be enforceable. Likewise, the conveyance of the fee to the use of those lands by virtue of the appropriative stockwatering rights will not be able to be proven to exist, will not be defensible and will not be enforceable.

Forfeiture and Abandonment of Grants or Rights Thereunder. To create an abandonment of a claim, there must be not only an omission, but an intent to abandon. But a voluntary formal relinquishment restores the land to the public domain (Am Jur 1d. Public lands)

Exempt, as in free of an obligation which is binding on others, freedom or release from duty or obligation not granted to others (Ballentines 3d. 1969) however Am Jur (1d) Exemption Not a vested right, but one the validity of which is to be determined in most instances by conditions which exist at the time when the privilege is claimed. It is a right, moreover, which is purely personal to the one in whose favor it exists, and he may waive it or be estopped to assert it

Articles in the Prairie Star and Agri-News quoting Department of Natural Resources Director Mary Sexton in March 16, 2007 Agri-News Montana Legislative Update: Vested water on federal lands : “We’re buying time and process with the interim study. We need a thorough review on this issue. An interim study will give us time for that thorough review,” says DNRC Director Mary Sexton (referring to exempt water rights.)

DNRC attorney Tim Hall, in the same article :” Exemption left such water right holders seemingly without a court to validate their rights. It is important to find a court to get these rights adjudicated. We have to find a way to get these claims through the court system, whether that is the Water Court that will eventually disappear, or District Court.”

With respect to HB711, the bill To Recognize Vested Water Rights on Federal Land, we would ask the court to take notice that Ron Korman and Maxine Korman initiated that legislation after requesting that the EQC evaluate Montana’s water law in light of the United States Federal Court of Claims decision in Hage v. U.S. where the court found that Hage owned vested water rights on his grazing allotments and because of those vested water rights that he owned the “fee” to those lands that those waters serviced. Kormans appeared at that EQC meeting and submitted written testimony and continued to bring information and questions to the various interim committees since. Representative Rick Jore didn’t think that the law as it is follows Montana’s Constitution and he thought we were right so he carried the bill HB711 “To Recognize Vested Water Rights on Federal Land” for us. The week before the bill hearing, the DNRC lawyer, Tim Hall called several times and talked to me. He kept trying to get me to agree to call the water rights “existing” because he said that’s what they are. He kept telling me that I did not want ‘vested’ because “vested” didn’t mean what I thought it meant and didn’t do what I thought it did. [Affidavit of Maxine Korman] He also faxed us a 30 page draft of his bill.

Prairie Star, June 22, 2007, Director Sexton :” As Montana continues to adjudicate its water rights, those with stock ponds are starting to question whether or not they should file for adjudication on the water in their ponds. The question is where do you want to do that and who is going to pay for the processing,” said Sexton. “The rights need to be defined and put in the process to be implemented before the final decrees.”

Mr. Hall had written an amicus brief that Director Sexton provided . I have submitted written request to Director Sexton three times about the following amicus brief re Mildenberger vs. Galbraith.

I had asked you for any and all documents related to and explaining why Montana, modeling its water law after Idaho in creating a classification of exempt rights, has been allowed to proceed in a state-wide adjudication while being in violation of the McCarran Amendment.

The DNRC brief stated Idaho had been challenged about “exempt rights” by the federal government because “exempt rights” violated the federal McCarran Amendment and not all parties and not all water rights were a part of the adjudication. The federal government pointed out that this is not then a general stream adjudication.

The DNRC brief then goes on to say that the federal government has not challenged Montana’s “exempt rights” and adjudication, to the DNRC’s knowledge.

I am requesting any and all documents and records explaining how and why Montana is being allowed to violate the federal McCarran Amendment, even as neighboring state Idaho was not and had to remedy its law.

Director Sexton, if you do not respond and produce the requested records and documents within ten business days of your receipt of this certified letter, I will interpret that as your intent to commit fraud by deliberately withholding material information that is adverse to my interests.

The Director has never provided any response or acknowledgement.

7) I had also submitted requests to the Bureau of Land Management State office in Billings

Theresa M. Hanley responded : “Your July 13, 2009 letter requests information about legal strategies implemented by the United States in the Montana water rights adjudication. The United States is represented by the Department of Justice in the Montana water adjudication. Litigation strategy documents are not public records and are not available under your request.”

State Director Terland responded to my request and stated that the BLM filed claims for its uses of all known water sources on public lands. With respect to the exempt rights and the McCarran Amendment: in the Idaho adjudication, the Department of Justice and the State of Idaho entered into a stipulation that specified how these “de minimus” livestock and domestic water rights would be handled to resolve the McCarran adequacy issue. The statutes governing the adjudication in Montana and Idaho are state laws and are different. Whether the Montana adjudication would meet the standards of the McCarran amendment is not a decision that would be made by the BLM.

With respect to “exempt”, “etheric” water rights, water rights in a ‘state of mystery’:

Excerpted from

Adjudication of the Waters of the Monitor Valley. State of Nevada Office of The State Engineer:

Citing U.S. v. City and County of Denver

"Until the enactment of the McCarran Amendment, [footnote omitted] however, the prior appropriation system in Colorado could not be applied to the adjudication or administration of water rights of the United States, because Congress had not consented to the determination of such water rights by state courts. As a sovereign, the United States was privileged to withhold such consent."²⁰

[T]his Court noted that the sovereign immunity of the United States created an anomaly in the adjudication of water rights:

"We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure - and this is equally true from the standpoint of the United States as well as Colorado and its citizenry." (Citation omitted.)

¹⁹43 U.S.C. § 666.

²⁰U.S. v. City and County of Denver, 656 P.2d 1, 8 (Colo. 1982).

Just as the federal sovereign claims which are nowhere listed and are etheric and in an uncorrelated state of mystery, so are the legislatively created "exempt" rights. If forced to accept the classification of exempt, for originally RS 2339 vested and accrued appropriative rights, as previously stated, these will be non-existent rights; unable to be proven to exist, to defend and to enforce.

As to Mr. Terland's statement that the BLM filed claims for its uses of all known water sources, following the ruling from the United States Supreme Court in U.S. v. New Mexico, the BLM should have withdrawn all stockwater filings and should have ceased continuing to file and should be prohibited from filing stockwater claims under estoppel by matter of record; estoppel by matter of judgement.

The BLM was a party to the Adjudication of the Waters of the Monitor Valley. State of Nevada Office of The State Engineer:

13 The BLM objected to Proof , permit: a.. the claimant failed to show title & exclusive use, and the evidence does not support this title, and/or, use; b. the claimants have no federal grazing permits; therefore, no beneficial use of these water rights is occurring .by, non-federal claimants; .. c. the claims for irrigation of public lands cannot be recognized as neither irrigation nor access for irrigation has ever been authorized by the BLM on the public lands ; therefore, no water: rights should be recognized for this purpose; d. the use of the public lands for grazing sheep has never been allowed by permit; therefore, ,no water rights should , be recognized for this purpose; and, the quantity of water recognized for livestock watering .is for a number of livestock greater than authorized to use public lands. and the evidence does not support this title, and/or, use; b. the claimants have no federal grazing permits; therefore, no beneficial use of these water rights is occurring .by, non-federal claimants; .. c. the claims for irrigation of public lands cannot be recognized as neither irrigation nor access for irrigation has ever been authorized by the BLM on the public lands ; therefore, no water: rights should be recognized for this purpose; d. the use of the public lands for grazing sheep has never been allowed by permit; therefore, ,no water rights should , be recognized for this purpose; and, the quantity of water recognized for livestock watering .is for a number of livestock greater than authorized to use public lands.

3. The BLM also objected to the State Engineer’s rejection of those reserved right claimsThe purpose listed on the rejected claims for PWRs was for livestock and wildlife, and even if the State Engineer rejects the claims for wildlife he should still recognize the claims for livestock use as valid

15 The BLM objects to Section XI “Rights of Appropriators” wherein the State Engineer listed stockwater claims by livestock class, number and period of use because: The livestock class, number and season of use differ significantly from the current livestock class, number and season of use authorized under federal grazing permits; the livestock classes listed have never been authorized and the numbers are in excess of historical authorizations;

The USFS objects to the issuance of stockwater rights to private grazing permittees on federal lands as those private permittees have no right or claim to an interest in federal property or resources associated with permitted use of federal property, and it is prohibited under the terms of federal grazing permits and law. The USFS also objected to the issuance of stockwater rights which are appurtenant to the cattle which use the federal estate instead of being appurtenant to the federal land where the intended federal benefit from grazing occurs. The claimants failed to establish a proper chain of title and exclusive use nor does the evidence support title and/or use; the proofs or permits demonstrate an illegal or expanded use and change in point of diversion and place of use;

Store Safe Redlands also objects to the language in preliminary Order of Determination that states the season of use may be further limited by grazing permits issued by the appropriate federal agency and it should be excluded from the Order of Determination as it is unclear as to its meaning, it implies an improper abdication of the State Engineer's authority to federal agencies contrary to law, and would perhaps implicate a Fifth Amendment takings under the U.S. Constitution.

At the Pre-hearing Conference, the State Engineer ruled that he has the authority under Nevada law to recognize vested rights to water livestock irrespective of land ownership, and that livestock water rights would be adjudicated by the number of livestock, source, ownership and priority date without a specified quantity of water.

67 PUBLIC WATER RESERVES CREATED PURSUANT TO EXECUTIVE ORDER NO. 107, DATED APRIL 17, 1926 "Every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all land within one quarter mile of every spring or waterhole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section IO of the Act of December 29, 1916." That executive order does not expressly state an intention to reserve water in public springs or waterholes and to withdraw it from appropriation under state law. Regulations later enacted by the Department of the Interior recognized the limited domestic drinking and stockwatering purposes of the 1926 reservation.⁸² (82 The Department of Interior's most recent pronouncement on springs and waterholes is codified in 43 C.F.R. § 2311.0-3(a) (2) (1980) :

2. Purpose of withdrawal . The Executive Order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes."

The State Engineer finds the issues in this s adjudication are whether the springs upon which "the BLM filed PWR 107 claims are important springs or water holes which make them special by their location, whether there is unappropriated water, and whether the water source has enough flow to support human and animal consumption

70 The State Engineer determines that claims of reserved water rights under a PWR 107 are recognized as viable claims in a general adjudication under the guidelines outlined below: 1) The federal reserved right created by PWR 107 has a priority date of April 17, 1926, the date of the Executive Order / unless the subject spring or waterhole came into existence after that date, .but before October 21, 1976. 2) PWR 107 claims cannot divert or displace a water right vested under Nevada law prior to April 17, 1926. 3) PWR 107 claims do not pertain to artificially developed water sources and are limited to only human and animal consumption. 4) The quantity of water reserved from a particular source is the minimum quantity required to prevent monopolization of the water source and meet the primary purpose of the reservation. The State Engineer has established that "important springs" be so isolated and of satisfactory quality to satisfy the need for human and animal consumption.

The BLM objected to the rejection of claims of reserved rights filed for reserved rights for stockwatering and wildlife purposes. The State Engineer rejected these proofs in the Preliminary Order of Determination based on the fact that the stated uses of stockwatering and wildlife are not valid for PWR 107 claims.

The USFS objects to the issuance of stockwater rights to private grazing permittees on federal lands on the grounds that those private permittees have no right or claim to an interest in federal property or resources associated with permitted use of federal property, and it is prohibited under the terms of federal grazing permits and law. The USFS also objected to the issuance of stockwater rights which are appurtenant to the cattle which use the federal estate instead of being appurtenant to the federal land where the intended federal benefit from grazing occurs. The USFS further objected to those identified proofs or permits determined to be valid, specifically alleging that: (a) the claimants failed to establish a proper chain of title and exclusive use nor does the evidence support title and use; (b) the proofs or permits demonstrate an illegal or expanded use and change in point of diversion and place of use; (c) the historical record does not support the priority dates, irrigated acres claimed, season of use or uses; (d) the water right has been abandoned or forfeited; (e) the amount of water determined necessary for irrigation exceeds the duty of water established in the Preliminary Order (f) the use of water will interfere with the proper management and use of federal property in violation of federal and state law; and (g) the claimant no longer has a valid federal grazing permit., therefore no beneficial use of the waters is occurring by the non-federal claimants.

The USFS argues that it is seeking to fulfill the directives of Congress by acquiring state water rights that enable the government to operate its grazing program on the national forest and it cannot allow private individuals to thwart the directives of Congress and monopolize the grazing land of the national forests by acquiring exclusively-owned stockwatering rights on the national forests. The USFS alleges that as a matter of law a private party may not own water rights for stockwatering purposes where the point of diversion and place of use are on the national forests.

The ranchers who settled this part of Nevada were there long before the USFS even existed and had been beneficially using the waters for stockwatering and irrigation purposes. Under the prior appropriation system of acquiring water rights, the earliest documented use is of critical importance in establishing a right of use. The State Engineer finds that the water the USFS is arguing about is not "federal property." Notwithstanding its ownership of water forming part of the public domain, the United States for a period of years silently acquiesced in the creation of private appropriative rights in water on the public domain under customary local uses. When it was confronted with the customary system of water allocation in the West however the federal government was relegated to the position of recognizing accomplished facts and, in a series of statutes passed in the last half of the nineteenth century, Congress rejected the alternative of a general federal water law. In 1866, Congress provided statutory protection to water users who had relied upon the customary legal system in the western states for allocating water by prior appropriation. The Act of July 26, 1866 (1866 Act) provided: "[W]henever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized by the local customs, laws, and the decisions of courts the possessors and owners of such vested rights shall be maintained and protected. in the same .

. Next , the Act of July 9/i-187.0, made it clear that the rights of patentees of federal lands were subject to the appropriative rights recognized by the 1866 Act Finally; .the Desert Land Act of 1877 reaffirmed the rule . that private rights in waters on the public domain were to be governed by the appropriative doctrine

By virtue of these acts, Congress determined that water rights on the public domain could be acquired under state law embodying the appropriation doctrine. It thereby largely acquiesced in comprehensive state control over the appropriation of water, including water on federal lands, at least with respect to rights that could be asserted by private appropriators. The United States Supreme Court has interpreted these acts as expressing congressional recognition of and acquiescence in water rights law developed by the western states: "Congress intended [by these acts] 'to recognize as valid the customary law with respect to the use of water which had grown up'" among the occupants of the public land under the peculiar necessities of their condition. *California v. United States*, 438 U.S. 645, 656, 98 S.Ct. 2985, 2991, 57 L.Ed.2d 1018, 1027 (1978) .86 86*United States V. City and County of Denver*, 656 P.2d 1, 7-8 (Colo. 1982) . 89See *Ca. v. U.S.*, 438 U.S. 645, 653-663 (1978) *Federal Power Comm, v. Oregon*, 349 U.S. 435 (1955); *Ca. Ore. Power Co. v.Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *U.S. v.Rio Grande_Dam .and Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770 (1889).

80 Wi th the other dry-land States, Nevada was granted control of its natural waters by the law of 1866 ... , and for many years its citizens appropriated irrigation and stock waters (along with those used for mining and smelting) without any very definite regulations. In 1905 the State legislature passed a law establishing a method of obtaining the right to put waters to beneficial use. Water appropriations that were already established at the time of the passage of this act were recognized as vested rights, for both irrigation and stock water. Future appropriate ions under this law are to be made through the State engineer who keeps a record of all official allotments.

It does not get much clearer that the private stockman can hold water on the public lands than the Supreme Court's holding in *v. New Mexico* wherein it ruled: The United States contends that, since Congress clearly foresaw stockwatering on national forests reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to the individual stockwaterers. We agree .. (Emphasis added.) In the file s of the office of the State Engineer is a letter dated September 25, 1961, wherein the BLM stated that the State Engineer should grant the water right to the present range user. While the United States Government has apparently changed its position regarding who should own the stockwater rights on the federal lands, this shift in position cannot change the history that. for over 100 years stockmen have owned the stockwater rights on the public lands. The Taylor Grazing Act at 43 u. S . C. 315 (b) recognized the existence of prior privately owned water rights on the public lands and the continued existence of those rights in the very fact · that it recognizes a preference for grazing permits to go to landowners within or near the grazing district engaged in the livestock business or who own water rights. The Act also states that nothing in the Act shall be construed in any way to diminish or impair any right to possession or use of water for agriculture that was vested under existing law validly affecting the public lands. For the United States to now argue that stockwater does not come under the definition of agriculture goes completely against history and law. The State Engineer finds that both history and law support. Issuance of water rights to private persons for stockwatering on the public lands and concludes that stockwatering rights may be granted to

private citizens on the public lands including those lands encompassed by the national forests.

CLAIMANTS CHAIN OF TITLE AND PROOF OF USE. The USFS and the BLM argue that the claimants failed to show title and exclusive use and the evidence does not support title and/or use. The non-federal claimants chain of title to the privately held base home ranch for the proofs filed in this proceeding pertain to lands that in some instances were patented and in others are possessory claims to lands controlled by the federal government. The State Engineer is authorized and is responsible for maintaining water right files and accompanying documents. Water rights transfer with the land to which they pertain unless there is a specific reservation of the water rights in the document of transfer. *97 97Zoluzzi v. Jackson*, 72 Nev. L50, 297 P.2d 10B1. (1956). The documents submitted to support the claims of vested rights in this adjudication proceeding are the only evidence available to the State Engineer. Documents which convey an interest in land with appurtenant water rights include the right to beneficially use the water sources incidental to those “Patented [The record of the ownership transfer of the lands included in the various proofs is the only documentation on file in the office of the State Engineer to determine if the claimant is the successor in interest to the individual that first put the subject waters to beneficial use. The State Engineer finds that the private claimants in this adjudication are the successors in interest and are deemed to be the recipient of the vested water rights as evidenced by the documents filed demonstrating their chains of title.

The USFS objected to the determination of vested water rights wherein the non-federal claimants no longer have a valid federal grazing permit, because no beneficial use of the waters is occurring by the non-federal claimants. The State Engineer finds that the claims filed in this proceeding are for vested water rights held by the successors to the early stockmen who grazed the range livestock on 98NRS § 533.485 (2) on the public range 99NRS § 533.485 (1) wherein the beneficial use was occurring prior to 1905 is prior to control of the public lands by the federal entities that currently issue grazing permits. The State Engineer concludes that the claims filed for vested water rights for stockwatering purposes wherein the ability of the claimant to put the waters to beneficial use is currently impaired does not invalidate the claims filed for watering livestock

Even though the original settlers were trespassers on the public range, the federal government did not act to evict them and this lack of action allowed for the conveyance of possessory titles to land and water rights acquired to pass from one holder to another. Some of these possessory claims to land eventually came into private ownership through patents that did not necessarily include the entire place of use where historical irrigation was occurring. The conveyance of possessory rights on the public range for irrigation or stockwater would transfer in the same manner as water appurtenant to private lands. A settler in good faith might convey his possessory interest in the land and in the water right appurtenant thereto by voluntarily surrender to one who takes possession from him. The transferee became vested with all the rights his predecessor had in the premises. *101 Hindman v. Risor*, 21 Or. 112, 116-118, 27 Pac. 13 (1891). The lands where the possessory claimants and initial appropriators

originally irrigated were on unsurveyed public lands and the boundaries of those lands did not necessarily have definite metes and bounds. However, these appropriations already made on the public lands and recognized by Congress were a confirmation of the right to insist on the use of the waters to the extent necessary for beneficial purposes for the entire place of use before any control of the public domain was exerted by the federal government. It is the beneficial user of the water who is recognized as having a valid vested water right.

The BLM objects to the determination of vested water right claims for sheep since sheep use has never been authorized in any grazing permits within the subject area. The use of the public lands for grazing of sheep was occurring before exertion of plenary control by the federal government. The Taylor Grazing Service, the predecessor to BLM, came into existence after 1905. Therefore, no management or specific control of the grazing practices were in effect at the time the vested rights originated. The determination of the vested Claims, for stockwatering purposes included sheep as one of the types of animals historically watered in the subject adjudication area prior to the creation of the National Forests in 1907. A review of the 1894 assessment roll of Nye County, Nevada, indicates that cattle and sheep were two types of stock animals owned by predecessors to claimants in this proceeding.

The claims for sheep grazing are based on the historical use and not a forage analysis. The claims filed for irrigation purposes may include stockwatering and it is these claimants' predecessors who developed water and grazed their sheep on the public range. The State Engineer finds that sheep were historically watered on these public lands, and claims will be recognized for this type of beneficial use. The claims filed for irrigation purposes may include stockwatering which may include sheep. Claims for stockwatering purposes only also may include sheep as opposed to just cattle. The State Engineer finds claims for vested water rights for sheep are valid unless otherwise determined in this Order.

QUANTITIES I LIVESTOCK CLASS, NUMBER AND SEASON EXCEED MODERN GRAZING PERMITS OR ARE IN EXCESS OF HISTORICAL AUTHORIZATION

The BLM objected to the claims for vested water rights wherein the claimed numbers of animals are greater than were authorized to use the public lands. The claims filed by the non-federal claimants are for the numbers and type of animals that were historically on the public range prior to any grazing regulations. Livestock are opportunistic animals and will consume water from various sources in varying quantities depending on the available feed within the grazing area which may now include federal grazing allotments. The amount of water an animal consumes depends on the season and how much moisture is available in the feed. Use of the limitations set forth in grazing permits is not a correct quantification of a prestatutory water right. The State Engineer finds that the historical number and type of stock will be the limiting factor. No specific quantity is given on any particular source since livestock will be in different parts of the range at different times of the year and consume water at different rates. The amount of water allotted for irrigation purposes includes the amount necessary for stockwater, but is not additive in the total amount recommended for irrigation purposes. The period of use for stockwatering is year long even when the irrigation right is for a shorter period of time.

long even when the irrigation right is for a shorter period of time.

USE OF WATER WILL INTERFERE WITH THE PROPER MANAGEMENT AND USE OF FEDERAL PROPERTY IN VIOLATION OF FEDERAL AND STATE LAW

The USFS argues that the use of water will interfere with the proper management and use of federal property in violation of federal and state law. The use of the waters claimed in this adjudication occurred prior to the creation of the National Forests in the subject adjudication area and prior to any control or management by the USFS. Acts of Congress have recognized historical uses of water throughout. The recommendation of a vested water right to a non-federal claimant on federal lands is based on the authority provided to the State Engineer under Nevada Revised Statutes chapter 533. The State Engineer finds that the USFS ability to manage its lands in modern times is an issue entirely separate and distinct from the recognition of valid historical water rights

The USFS argues that the denial of its vested right claims for wildlife and stockwatering purposes under state law is contrary to state and federal law. The United States Supreme Court issued its decision in the case of U.S. v. New Mexico. In that case, the Supreme Court held : The New Mexico courts held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree (Emphasis added) . The State Engineer finds that the non-federal claimants whose title traces back to the original homesteader is the person to whom the vested water right for stockwatering should be granted and not the United States. The USFS has not shown through a chain of title it is the successor in interest to the original stockmen whose cattle grazed the public lands and consumed the waters found on those lands The USFS is attempting to derive its claim from the cattle that were on the range, and not from the cattlemen. Neither the USFS nor the U.S. owned livestock which consumed those waters, the owners of the livestock were private individuals .The State Engineer determines that the proofs filed by the USFS claiming vested water rights for stockwatering purposes are invalid and must be rejected. The State Engineer finds that the use of water by wildlife prior to 1905 will not be recognized as a beneficial use of water which can support a claim for a vested water right. The United States was not managing the land for wildlife purposes; therefore, the use of water by native animals in their natural state will not be considered as valid grounds to support a claim to water. USFS claims for in streamflows, stockwater, and wildlife purposes The USFS filed numerous claims of vested and reserved rights for instream flow, stockwatering, and wildlife purposes. The State Engineer determined these claims to be invalid. Therefore, these proofs filed for reserved and vested water rights must be rejected in this Order

PWR 107 FILINGS The BLM filed numerous claims for reserved water rights under Executive Order 107 for Public Water Reserves. The State Engineer determined the following PWR claims to be invalid. Reserved water rights are rejected in this Order.

It has been made clear beginning in 1978 when the United States Supreme Court upheld a New Mexico court that private stockmen owned Prior Appropriation stockwater rights, not the federal government, to the 1998 Nevada State Engineer Order of Determination in the Adjudication of the Waters of the Monitor Valley to the 2007 Idaho Supreme Court ruling in Joyce livestock Co.

The waters are not federal property, USC Title 40 excludes 'public domain' as property of the U.S. government in 40 USC 102 and 1314, BLM does not have title as successor to the early day stockmen. Shipman on Common-Law Pleading: When in pleading any right or authority is set up in respect of property, personal or real, some title to that property must of course be alleged in the party, or in some other person from whom he derives his authority. As the BLM was made aware, they do not have title to vested stockwater rights. Ronnie Korman and Maxine Korman have on file in the Clerk and Recorder Records of Valley County Montana, Declaration of Acceptance of Land Patent Assignment for United States of America Land Patent # 918918, 1008348, 1014768, 1017879, 1041761, and 1077513. The lands patents are to heirs and assigns forever the tract of land above described; TO HAVE AND TO HOLD the said tract of Land, with all the appurtenances thereof. Other documents on record show Warranty Deed including language all range rights, all water rights and all appurtenances, tenements and hereditaments as well as BLM Assignment of Range Improvements showing Hammonds assign all right, title and interest in fences and stock reservoirs that are listed to Korman

Montana Water 'Use' Act The word 'use' generally implies commercial for profit industrial or artificial person business activity under license from some government agency that has statutory power & duty to regulate that kind of person & that kind of USE. that which employs a thing without destroying it; or the employment of a thing which destroys or wastes it as the use of water for turning a mill.

. Ballentines 1969 beneficial ownership recognized in equity (equitable characterization of a right which should be recognized even though it is not a legal right or title) Equity (term having variety of meanings) an interest in property which a court of equity will protect; a title which is not a legal title & is enforceable only in a court of equity, title derived thru contract or relation & based on recognized equitable principles*EQUITABLE WASTE acts which at law would not be deemed waste but in court of equity are regarded as waste from their manifest injury although such acts aren't inconsistent with legal rights of the party who commits them. Black's: application or employment of something esp long-continued for purpose for which it is adapted. conditional use a property subject to special controls and conditions. a conditional use is one that is suitable to a zoning district, but not necessarily to every location within that district

Ballentines 1916 vested right power one has to do certain acts or to possess certain things according to the law of the land. vested water right, see accrued water right. Ballentines 1969 vested right immediate fixed right of present or future enjoyment. vested estate absolute, unconditional and indefeasible interest. contingent right a right which depends on the performance of some condition or the happening of some event before some other event. expectant right (expectancies) mere possibility not coupled with an interest, something so inchoate as to have no attribute of property. Black's vested has become a completed, consummated right for present or future enjoyment & invest a person with full title to property. vested right a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. conditional right a right that depends on an uncertain event ; a right that may or may not exist. expectant right a right that depends on continued existence of present conditions until some future event occurs ; a contingent right.

-VESTED RIGHT

It is **only a vested right** which cannot be taken away except by due process of law. *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N.W. 97 (1939); *Crump v. Guyer*, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331 (1916)

The word "property" as used in the Due Process Clause refers to vested rights, and there is no reference to mere concessions or privileges which may be bestowed or withheld at will. *Senior Citizens League v. Department of Social Sec. Of Wash.*, 38 Wash. 2d 142, 228 P.2d 478 (1951).

A mere subjective "**expectancy**" is **not an interest in property** protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570, 1 I.I.R. Cas. (SNA) 33 (1972).

To have a property interest in a benefit protected by procedural due process, **a person must have more than an abstract need or desire** for it, and he or she must have more than a unilateral expectation of it; in short, **he or she must have a legitimate claim of entitlement to it.** *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548, 1 I.E.R. Cas. (SNA) 23 (1972).

Accordingly, the revocation of such qualified rights does not amount to deprivation of property without due process of law. *State v. Durein*, 70 Kan. 1, 78 P. 152 (1904).

(In recognition of the Commerce Clause of the US Constitution, it has often been declared that a state cannot make the payment of a license [permit] tax or the securing of a license [permit] a condition to carrying on interstate commerce and cannot tax the privilege of carrying on interstate business.)

The substantial **value of property lies in its use;** if the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right. *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).

The Constitutional right to acquire, possess and protect property is not limited to any particular **amount of property.** *Hamilton v. Williams*, 145 Fla. 697, 200 So. 80 (1941).

Under the constitutional provision that private property shall not be taken or damaged for public use without just compensation, **owner has absolute right to damages whenever his property is taken** or damaged for public use, and it is **immaterial** whether **the damages are ascertained before or after the injury, since such right is a 'Vested property right'** *People ex rel. O'Meara v. Smith*.

Vested:

Under the decisions of this state, **the word "vested"** has a well-understood meaning. It **is used to define an estate**, either present or future, the **title** to which has become **established in some person** or persons and **is no longer subject to any contingency.** *Snortum v. Snortum*, 193 N.W. 304, 305, 155 Minn. 230.

Vested and Accrued Right

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 right"** within Rev.St.U.8. §§ 2339,2340, 30 U.S.C.A. §§ 51, 52, which is superior to rights of subsequent entry-man and **carries with it right of way or easement for impounding water.** *Gila Water Co. v. Green*, 232 P. 1016, 1017, 27 Ariz. 318.

Vested Right

A **"vested right"** has been defined briefly as an immediate, fixed right of possession or future enjoyment. *Young v. Jones*, 54 N.E. 235, 236, 180 111. 216

A **"vested right" is property** which the **law protects.** *Hoefl v. Supreme Lodge Knights of Honor*, 45 P. 185, 186, 113 Cal. 91, 33 L.R.A. 174.

A **"vested right" is absolute, complete and unconditional in itself.** *State ex rel. Wayne County v. Hackmann*, 199 S.W. 990, 991, 272 Mo. 600.

A "vested right" is a right which **is fixed, unalterable, or irrevocable.** *Miller v. Johnstown Traction Co.*, 74 A.2d 508, 511, 167 Pa. Super. 22.

A "vested right" is power to do certain actions or possess certain things lawfully and is **substantially a property right** which may be created either by common law, statute or contract. *Scamman v. Scamman*, *Ohio Com.Pl*, 90 N.E.2d 617, 619.

A "vested right" is one which **is absolute, complete and unconditional** to exercise of which no obstacle exists and which is **immediate and perfect in itself and not dependent upon a** **contingency.** *Hutton v. Autoridad Sobre Hogares De La Capital, D.C. Puerto Rico*, 78 F. Supp. 988, 994, 999.

A "vested right" **is a property interest so substantial in character that its destruction or deprivation cannot be justified by the objectives in view.** *Vernon Manor Co-op. Apartments Section I, Inc. v. Salatino*, 178 N.Y. S.2d 895, 901, 15 Misc. 2d 491

From the Paragon Foundation publication "The Loop" article by Mr. G.B. Oliver, Executive Vice President: "VESTED RIGHTS" :

Justice William Paterson stated clearly in *Horn's Lessee v. Dorrance* (1775) "So that any law taking one person's freehold and vesting it in another without compensation must be seen as inconsistent with the principals of reason, justice and moral rectitude...

Contrary to the principals of social alliance in every free government."

Justice Joseph Story's opinion in *Wilkins v. Leland*:" The fundamental maxim of a free government seems to require that the rights of personal liberty and private property should be held sacred." The adoption of the Fourteenth Amendment served to strengthen the "vested rights" doctrine under federal Constitutional law.

CONSTITUTIONAL LAW [WIEL,2D.,1908]

p.72 : WATER PROPERTY OF THE PUBLIC OR STATE. Established either by judicial decision or statute or both, as an essential principle, that the water of all natural streams is the property of the public or of the State. All waters within the State are declared to be "property of the public" (or to "belong to the public") Montana Constitution, article 15.

p.73: The courts lean toward construing such a declaration as meaning, in an old phrase of the law, that waters are "publici juris," and free for all to take, under State police power regulation.

p.75 : the declaration that water is the property of the State: "Such rights are under the protection of the fourteenth amendment to the federal constitution, which protects property against all State action that does not constitute due process of law."

p. 106: prior appropriator has a vested right that can be taken only on eminent domain proceedings and payment of compensation (denial of priority unconstitutional)

p. 217: State Engineer (administrative agency); United States circuit court has held an action by State Engineer in issuing permits to be void where his action injures existing appropriators, and that a permit issued by the State Engineer is of no avail if it is shown in court that the appropriation would injure prior appropriators. An injunction will be granted in spite of the permit. That the power of the State Engineer is open to collateral attack in court by injunction or other process as held in the Federal case, can hardly admit of doubt; for the statute certainly cannot constitutionally give him power to authorize interference with vested rights.

Water Rights in the Western States, Wiel, 3rd, 1911:pages 1101, 2. The general rule seems to be that the jurisdiction of water officials is over the 'natural resources', but it would seem they do not have jurisdiction over the water after it has been diverted. In an early Montana case it was held that a statute conferring on commissioners the power to apportion the water of any creek according to the legal rights of the parties is unconstitutional as conferring upon them judicial powers (*Thorp v. Freed*, 1 Mont. 651, per Knowles, J., and *Thorp v. Woolman*, 1 Mont. 168 That the powers are judicial)

p. 1103 VESTED RIGHTS PROTECTED. As is true of administrative officers generally, irrigation or water officials cannot authorize acts injuring existing owners; their action is invalid where it has that effect (Federal - Trade Dollar Co. v. Fraser, 148 Fed. 587; Waha Co. v. Lewiston Co., 158 Fed. 137) They cannot cut down vested rights. Their authorization cannot legalize a wrong upon existing claimants, nor abridge their rights. A permit is of no avail against existing owners with whose rights it conflicts. The effect of the State Engineer's action upon vested rights is open to judicial inquiry in the Federal courts as well as the State courts.

p. 1105 DECISIONS OF WATER OFFICIALS NOT CONCLUSIVE UPON COURTS. Since the authority of the water officials is administrative and not judicial, and they have no power to impair vested rights, their decision as to what existing rights are is not conclusive. Their action based upon a mistaken interpretation of existing rights will be open to collateral attack in court, by injunction or other process, as will also the action of other parties whom they may have authorized or in whose favor they may have decided

p. 219: APPLICATION FOR PERMITS. Making filings of maps or applications does not alone constitute an appropriation, Filings under an unconstitutional statute are void. A verified statement filed and introduced in evidence is not evidence of title, and cannot be held to be constructive notice if the statute under which the same was filed has been declared unconstitutional.

p. 280 THE RIGHT IS INDEPENDENT OF MODE OF ENJOYMENT. By appropriating a stream the law has always considered that a right of property was conferred, and being property, the owner may enjoy it as he will, so long as he does no injury to others. The law, hence, has always regarded the right as independent of means or place or purpose of use or of point of diversion. The litigation upon this question has always been addressed to the contention that the right was limited to its initial mode of enjoyment, and that a change forfeits priority and can only be made by new appropriation. The decisions now passed into legislation, almost universally, and with but a few exceptions, decided against the contention, and have settled the rule that change of means, place, or purpose of use or of diversion does not forfeit priority. "A priority to the use of water is a property right which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the right of others. (Seven Lakes etc. Co. v. New Loveland etc. Co. Colo. 93 Pac. 485) (Wiley v. Decker, 11 Wyo. 496, 73 Pac. 210.) (Coffin v. Left Hand Ditch Co. 6 Colo. 443)

p. 311: Court Decrees.(Due Process) The Montana court has held that a decree cannot bind persons who were not parties to the action and who had no connection with the litigation.

The “Exempt Right” has converted a vested water right, a right that cannot be taken without consent, due process of law and just compensation to a non-existent barren right. The federal McCarran Amendment calls for all owners (parties) of water rights and all water rights to be accounted for and brought into an adjudication if the adjudication is to be considered a general streamwide adjudication when the federal government has water rights in that adjudication. Montana’s Water Court home page states that the Water Court was created to expedite and facilitate the statewide adjudication of over 219,00 state law-based water rights. The page also references stockwater rights on “Federal Public Lands”. The Montana legislatively created “Exempt ‘Right’” denies those rights and the owners of those rights the right to appear in court and in a final decree and the State offers no method to confirm, adjudicate, offer quiet title in alternative to completion of a “statewide adjudication,” or resolve issue remarks upon “EXEMPT ACKNOWLEDGEMENTS” such as Based on reasonable carrying capacity.” That is a condition and requirement that was not in force at the time these water rights were created and perfected. There is no method or opportunity to resolve the issue remark:

“ THE PLACE OF OWNERSHIP OF THIS RIGHT MAYBE QUESTIONABLE. THE POINTS OF DIVERSION AND PLACE OF USE APPEAR TO BE ON FEDERAL LAND.” To quote Wiel:” this violates a rule “as old as the law, that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court” (Terrell v. Allison, 21 Wall.293, U.S. Sup. Ct. Rep.) A final decree cannot bind persons who were not allowed to be parties to the action (general streamwide adjudication) and who were denied connection with the litigation. The fact that there are unknown owners of an unknown number of unquantified rights left out of a “statewide adjudication” calls into question the value of decrees where those rights will not be shown, whether as “EXEMPT” or “PROVISIONAL PERMIT.” The question will need to be answered then that those “owners”, do not, in fact, own any of those water rights at all.

From page 166 SURFACE TRIBUTARIES. It is proper to look upon the stream as not merely consisting of the channel and flo, but as a composite body in which the upper branches and tributaries are an integral part. The right to these tributaries is then identical with the right to the stream, on the principle that the whole includes the sum of its parts. The appropriator of a stream has a right to its tributaries and to all its sources.

Under VESTED RIGHTS in the INDEX are the following: See Constitutional Law; Due Process of Law, appropriation is, reserved in land patents, State Engineer’s interference with, “vested and accrued right” as used in Federal statutes. when appropriation becomes.

Wiel, 3rd, 1911, p. 1228 that it is a truism of law that an act of the legislature conflicting with constitutional provision must fall. All of the acts of the legislature regulating or attempting to regulate the public use of waters so appropriated are subordinate to the provisions of the constitution and to be valid, must be in harmony therewith.

Page 203, 2nd. Ed. See also *Rossmiller v. State*, 114 Wis. 169 where it was held among other things that the legislature has no such arbitrary power under our constitutional system, as that of changing the nature of the ownership of property by its mere fiat. It can no more accomplish that result in that way than it can change the laws of nature by legislative declaration.

The right to the use of the water as part of the land once vested in its private grantee (the grantee of the United States via Land Patent), the State has no power to divest him of that right except on due compensation. (*Lux v. Haggin*)

Certain aspects of the Water Use Act are in conflict with the legal definition of constitutional: Pertaining to a constitution; in accordance with, agreeably to, consonant with, not in conflict with, the constitution. Again, A "vested right" **is a property interest so substantial in character that its destruction or deprivation cannot be justified by the objectives in view.** *Vernon Manor Co-op. Apartments Section I, Inc. v. Salatino*, 178 N.Y. S.2d 895, 901, 15 Misc. 2d 491.

The United States Supreme Court in *Marbury vs. Madison*, (5 U.S. 1 Cranch 137, 1803) It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. An act of a court or of a legislature that is repugnant to the Constitution is null and void.

Ballentine's Law Dictionary (3rd. 1969) unconstitutional law. See unconstitutional statute. A self-contradictory expression, since a statute in conflict with the constitution is not law but is wholly void and as inoperative in legal contemplation as if it had never been passed, notwithstanding it has the form and name of law. *Am Jur Const. L.*

When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their construction are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time passed and in legal effect.

AM JUR PROTECTION OF RIGHTS. The general rule is that an unconstitutional act of the legislature protects no one.

EFFECT OF UNCONSTITUTIONAL STATUTES- IN GENERAL. The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. Moreover, a construction of a statute which brings it in conflict with the Constitution will nullify it as effectually as if it had, in express terms, been enacted in conflict therewith.

Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. No one is bound to obey an unconstitutional law and no courts are bound to enforce it because only the valid legislative intent becomes the law to be enforced by the courts. A void act cannot be legally inconsistent with a valid one. Moreover, an unconstitutional law cannot operate to supersede any existing valid law. Accordingly, where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provision for the repeal of the prior law will usually fall with it and will not be permitted to operate as repealing such law- it has been said- has no legitimate basis at all and is not to be treated as a judgement of a competent tribunal.

A contract which rests on an unconstitutional statute is void and creates no obligation to be impaired by subsequent legislation. These general principles apply to the Constitutions as well as to the laws of the several states in so far as they are repugnant to the Constitution and laws of the United States.

As stated above, the general rule is that an unconstitutional act of the legislature protects no one. It is said that all persons are presumed to know the law, meaning that ignorance of the law excuses no one. Consequently, if any person acts under an unconstitutional statute, the general rule is that he does so at his peril and must take the consequences. This warning has been so phrased as to present the actual concept underlying the utter nullity of an invalid law by a holding to the effect that all persons are held to notice that all statutes are subject to all express and implied applicable provisions of the Constitution, and also that should a conflict between a statute and any express or implied provision of the Constitution be duly adjudged, the Constitution by its own superior force and authority would render the statute invalid from its enactment and further that the courts have no power to control the effect of the Constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the Constitution. Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the Constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is adjudged invalid, though the statute was considered valid by eminent attorneys, public officers, and others.

The Water Court has jurisdiction over the issues raised:

3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under [85-2-309](#) or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly. (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under [85-2-309](#) or concerning the determination and interpretation of existing water rights within the judge's division as specified in [3-7-102](#) that are considered filed in or transferred to a judicial district wholly or partly within the division.

(4) The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree. **History:** En. Secs. 1, 6, Ch. 697, L. 1979; amd. Sec. 4, Ch. 80, L. 1981; amd. Sec. 4, Ch. 596, L. 1985; amd. Sec. 4, Ch. 604, L. 1989; amd. Sec. 1, Ch. 174, L. 1997

85-2-216. Venue for water rights determinations. All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [85-2-212](#). **History:** En. Sec. 6, Ch. 697, L. 1979

85-2-222. Exemptions. Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to

the order of the department or a district court issued under sections 8 and 9 of Chapter 452 Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of [85-2-221](#)(1). **History:** En. Sec. 11, Ch. 697

The legislatively created 'Statement of Claim' is not recognition, sanction and confirmation of prior perfected vested and accrued appropriative rights and is not DECLARATION OF VESTED WATER RIGHT. This is a retroactive legislative alteration of vested water rights. The legislatively created 'Provisional permit' is not recognition, sanction and confirmation of prior perfected vested and accrued appropriative rights. This is a retroactive legislative alteration of vested water rights. The legislatively created 'Exempt' "water right" is not recognition, sanction and confirmation of prior perfected vested and accrued appropriative rights and is not DECLARATION OF VESTED WATER RIGHT. This is a retroactive legislative alteration of prior perfected vested and accrued water rights.

We object to denial of right to claim as, recognition, sanction and confirmation and adjudication of ALL VESTED WATER RIGHTS (vested water rights pre-date Water Use Act) in what is supposed to be a general streamwide adjudication and we object to the retroactive alteration of the Prior Appropriation Doctrine.

Supplement to Objection Forms submitted by Ronnie Korman and Maxine Korman

MAXINE KORMAN - SUPPLEMENT TO NOTICE OF OBJECTION AND REQUEST
FOR HEARING MONTANA WATER COURT, LOWER MISSOURI DIVISION
BEAVER CREEK TRIBUTARY OF MILK RIVER – BASIN 40M

SUPPLEMENT TO OBJECTION FORMS TO DEPARTMENT OF INTERIOR
BUREAU OF LAND MANAGEMENT CLAIMS # :

- 1) 40M31619 Provisional Permit Stock & Wildlife
- 2) 40M31627 Provisional Permit Stock
- 3) 40M55448 Provisional Permit Stock & Wildlife
- 4) 40M55449 Provisional Permit Stock & Wildlife
- 5) 40M75198 Statement of Claim Stock
- 6) 40M75199 Statement of Claim Wildlife
- 7) 40M75200 Statement of Claim Stock
- 8) 40M75201 Statement of Claim Wildlife
- 9) 40M75202 Statement of Claim Stock
- 10) 40M75203 Statement of Claim Wildlife
- 11) 40M75204 Statement of Claim Wildlife
- 12) 40M75205 Statement of Claim Stock
- 13) 40M75206 Statement of Claim Stock
- 14) 40M75207 Statement of Claim Wildlife
- 15) 40M75208 Statement of Claim Stock
- 16) 40M75209 Statement of Claim Wildlife
- 17) 40M75216 Statement of Claim Stock
- 18) 40M75217 Statement of Claim Wildlife
- 19) 40M75218 Statement of Claim Wildlife
- 20) 40M75219 Statement of Claim Stock
- 21) 40M75220 Statement of Claim Stock
- 22) 40M75221 Statement of Claim Wildlife
- 23) 40M75222 Statement of Claim Wildlife
- 24) 40M75223 Statement of Claim Stock
- 25) 40M75224 Statement of Claim Stock
- 26) 40M75225 Statement of Claim Wildlife
- 27) 40M75226 Statement of Claim Wildlife
- 28) 40M75227 Statement of Claim Stock
- 29) 40M75228 Statement of Claim Wildlife
- 30) 40M75229 Statement of Claim Stock
- 31) 40M75232 Statement of Claim Wildlife
- 32) 40M75233 Statement of Claim Stock
- 33) 40M75234 Statement of Claim Wildlife
- 34) 40M75235 Statement of Claim Stock
- 35) 40M75236 Statement of Claim Stock
- 36) 40M75237 Statement of Claim Wildlife
- 37) 40M75240 Statement of Claim Stock
- 38) 40M75248 Statement of Claim Stock
- 39) 40M75249 Statement of Claim Wildlife
- 40) 40M75316 Statement of Claim Wildlife

- 41) 40M75317 Statement of Claim Wildlife
- 42) 40M75319 Statement of Claim Stock
- 43) 40M75320 Statement of Claim Stock
- 44) 40M75321 Statement of Claim Wildlife
- 45) 40M75322 Statement of Claim Stock
- 46) 40M75323 Statement of Claim Wildlife
- 47) 40M75324 Statement of Claim Wildlife
- 48) 40M89034 Stockwater Permit Stock
- 49) 40M89035 Stockwater Permit Stock
- 50) 40M89060 Stockwater Permit Stock
- 51) 40M89061 Stockwater Permit Stock
- 52) 40M89064 Stockwater Permit Stock
- 53) 40M103683 Stockwater Permit Stock
- 54) 40M103684 Stockwater Permit Stock
- 55) 40M111288 Stockwater Permit Stock

1) Ronnie Korman and Maxine Korman are objecting to the stock water and wildlife water right claims filed by the United States Department of Interior, Bureau of Land Management as these claims involve the Prior Appropriation Doctrine vested and accrued appropriative water rights of Ronnie Korman and Maxine Korman . The appropriative right is recognized as vested property and protected under the federal Constitution. [Water Rights in the Western States, Wiel, page 127]

2) Ronnie Korman and Maxine Korman are entering their objections as Pro Se litigants, relying on Caldwell v. Miller (790 F. 2d 589, 595, 7th Cir. 1986) that Pro Se litigants are not held to the same stringent standards applied to formally trained members of the legal profession and are to be liberally construed. Additionally, Haines v. Kerner, (404 U.S. 519, 520-21, 1972) that Pro Se complaints are to be liberally construed and should be dismissed for failure to state a claim only if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

3) MCA 85-2-212. Order by supreme court, (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of claim of an existing water right in substantially the following form:
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.

85-2-226. Abandonment by failure to file claim. The failure to file a claim of an existing right as required by [85-2-221](#)(1) establishes a conclusive presumption of abandonment of that right. **History:** En. Sec. 14, Ch. 697, L. 1979; amd. Sec. 6, Ch. 629, L. 1993.

Ronnie Korman and Maxine Korman ask the court to accept the Priority Affidavit of Vested Water Rights, recorded in the Valley County, Montana Clerk and Recorder office and published for three consecutive weeks in the Glasgow Courier.

This was done for two reasons:

1) that although the Montana Supreme Court in *Mettler v. Ames Realty* stated that Montana is a Prior Appropriation Doctrine state and that the riparian doctrine was never suited to Montana, Title 85 Water Use does not recognize the vested water right, does not define the vested water right and makes no provision for recording and confirming the adjudication of the vested water right. 85-2-313 is the only mention of vested right

85-2-313. Provisional permit A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department. **History:** En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(4); amd. Sec. 8, Ch. 497, L. 1997.

Federal Statutes of 1866 and 1870 – The provisions of these statutes are now incorporated in Revised Statutes sections 2339, 2340, which are as follows :

Rev. Stats., sec 2339: “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; “

Rev. Stats., sec. 2340: “All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.” [Wiel, *Water Rights in the Western States*, 1908, pages 21, 22]

Definition – A water right of appropriation is real estate, independent of the ditch for carrying water, and independent of ownership or possession of any land, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose; and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water or in the channel of the stream [Wiel, page 129]

By the congressional acts , the government acquiesced; the kind of vested and accrued right grew up which the government by said acts of Congress promised to protect [Wiel, page 159]

Ballentines A Law Dictionary, 1916- Appropriated. Under constitutional provision, water held not appropriated until applied to beneficial use.

Vested water rights. See Accrued water rights.

Accrued water rights. Meaning within U.S. Rev. Stats., 2339, 2340, U.S. Comp. Stats. 1901, p. 1437, 7 Fed. Stat. Ann., pp. 1090, 1096, defined where jurisdiction had not recognized doctrine of prior appropriation.

Accrue. To accumulate and become a part of something; to ripen or spring into existence, as a right of action.

Ballentine's 3d., 1969 Accrue. To become complete by development.

Vested water rights See accrued water rights.

Accrued water rights. Rights in waters which have vested prior to the adoption or enactment of a constitutional or statutory provision affecting the right of appropriation (56 Am J 1st Wat sec 295)

The word existing- To be; to have being; to come into existence; to have existence. Existing. Existent; in existence.

Existing equity. An existing right enforceable in equity, if not at law

Existing use. A familiar term in zoning ordinances and regulations usually employed in characterizing a nonconforming use excepted from the application of the ordinance or regulation, and meaning an actual, as distinguished from a mere contemplated, use, existing at the time of the ordinance or the passage of the regulation, but not necessarily a use in actual operation at that time or a use which utilizes the entire tract involved.

Use. A beneficial ownership recognized in equity

Webster's 1828 dictionary had defined vest as to put in possession of; to come or descend to; to take effect as a title or a right; accrue as Something that accedes to, or follows the property of another; to be added.

Stroud's Judicial Dictionary (1d. 1890) Accrue- Title "accrues" when the instrument creating it, or the fact constituting it, first becomes operative

Vest- To 'vest', generally means to give the property in; it is a word which has acquired a definite meaning, carrying with it definite legal consequences. As applied to estates in land, to vest, signifies the acquisition of a portion of the actual ownership; the acquisition, not of an estate in possession, but of an actual estate.

Water Rights: Division of Water Resources - U.S. Fish and Wildlife Service

ADJUDICATION OF WATER RIGHTS

An adjudication is an administrative or judicial determination of all rights to use water in a particular stream system or watershed, to establish the priority, point of diversion, place and nature of use and the quantity of water used among the various claimants. These stream or watershed adjudications can be initiated by a water user (including the United States) or by the State. The United States may be joined in an adjudication if the requirements of the McCarran Amendment are met.

APPROPRIATION DOCTRINE

Water laws developed in the arid Western States--where water supplies are limited and often inadequate--are known as the Appropriation Doctrine. This doctrine is essentially a rule of capture, and awards a water right to a

person actually using the water. It has two fundamental principles: First in time of use is first in right (i.e., the earliest appropriator on a stream has the first right to use the water), and Application of the water to a beneficial use is the basis and measure of the right.

BENEFICIAL USE Beneficial use is a cardinal principle of the Appropriation Doctrine. It has two components: the nature or purpose of the use and the efficient or non-wasteful use of water. State constitutions, statutes, or case law may define uses of water that are beneficial, those uses may be different in each State, and the definition of what uses are beneficial may change over time. The right to use water established under State law may be lost if the beneficial use is discontinued for the prescribed period of time (see Abandonment and Forfeiture).

VESTED RIGHT An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.

BLM.gov Western States Water Laws

Prior Appropriation:

The prior appropriation doctrine, or "first in time - first in right", developed in the western United States in response to the scarcity of water in the region. The doctrine evolved during the California gold rush when miners in California needed to divert water from the stream to locations where it was needed to process ore. Customs and principles relating to water diversion developed in the mining camps, and disputes were resolved by simple priority rule. According to the rules of prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use. In other words, those with earliest priority dates have the right to the use of that amount of water over others with later priority dates.

Unlike a riparian right, an appropriative right exists without regard to the relationship between the land and water. An appropriative right is generally based upon physical control and beneficial use of the water. These rights are entitlements to a specific amount of water, for a specified use, at a specific location with a definite date of priority. An appropriative right depends upon continued use of the water and may be lost through non-use. Unlike riparian rights, these rights can generally be sold or transferred, and long-term storage is not only permissible but common.

There are four essential elements of the prior appropriation doctrine: Intent, Diversion, Beneficial Use, and Priority.

In all states with the prior appropriation doctrine, the acquisition of water requires that the appropriator demonstrate an intent to appropriate the water, divert the water, and apply it to beneficial use. Historically, intent was indicated by on-the-ground acts such as site surveys, land clearing, preparation of diversion points, and most importantly, posting of notice. Today, however, intent is generally indicated by the application for a permit.

Another essential component of a prior appropriation water right is diversion. Historically, a physical diversion of water was required in order to acquire a water right. This requirement has diminished as states have implemented various instream flow programs. A point of diversion, however, is still an essential element of a consumptive use water right.

Beneficial use is perhaps the most important characteristic in defining a prior appropriation water right. Beneficial use is used to determine whether a certain use of water will be recognized and protected by law against later appropriations. The justification for beneficial use criteria is to prevent waste. Since water is a scarce resource in the west, states must determine what uses of water are acceptable. Beneficial uses of water have been the subject of great debate, and each western state has an evolving system for evaluating what uses of water are considered "beneficial."

The final essential feature of the prior appropriation doctrine is the priority of a water right. As described above, the first appropriator on a water source has the right to use all the water in the system necessary to fulfill his water right.

In western states, there are few restrictions on who can hold an appropriative water right. Therefore, both private and public entities hold rights. An appropriative right does not depend on land ownership, but some states do require that the water is appurtenant to the land on which it is used. In general, appropriative water rights are transferable property.

State of New Mexico :

72-1-3. Declaration of water rights vested prior to 1907; form; contents; verification; filing; recording; presumption.

Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents

Nevada Revised Statutes: CHAPTER 533 - ADJUDICATION OF VESTED WATER RIGHTS; APPROPRIATION OF PUBLIC WATERS

NRS 533.085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water,
ADJUDICATION OF VESTED WATER RIGHTS

ADJUDICATION OF WATERS MONITOR VALLEY
STATE OF NEVADA OFFICE OF THE STATE ENGINEER

The State Engineer ruled that he has the authority under Nevada law to recognize vested rights to water livestock irrespective of land ownership, and that livestock water rights would be adjudicated by the number of livestock, source, ownership and priority date without a specified quantity of water.

Blm.GOV Western States Water Law

Vested rights are rights that do not have to go through the application process. Vested rights to surface water are those rights for which the work to establish beneficial use was initiated prior to March 1, 1905 (the date of adoption of Nevada's water law). Vested rights from underground sources are those rights initiated prior to March 22, 1913, for artesian water and prior to March 22, 1939 for percolating water. The extent of all vested rights on a water source is determined through the adjudication process (see below).

Colorado BLM Specific Information:

A water right applicant in Colorado does not have to have an approved right-of-way from the BLM in order to obtain an approved application. The BLM can challenge the applicant on land access issues in water court, and they can argue in court that the applicant does not have land access. If the applicant cannot prove that land access is available, the water court will dismiss the case.

The State of Wyoming does not require a right-of-way approval by the BLM prior to approving an application. There is a statement on the water right permit form which states that the granting of a water right does not grant an easement and that the applicant is responsible for obtaining any rights-of-way needed to perfect the permit.

The BLM pays filing fees for water rights applications. The fee for stock reservoirs, wells, and springs are \$25, and the fee for any dam over twenty feet high or impounding more than twenty acre-foot is \$100.

Oregon If water was used prior to enactment of the 1909 water code and has been used continuously since then, the property owner may have a "vested" water right. Each vested right will be determined through the courts in an adjudication proceeding.

Utah VESTED WATER RIGHT a legal term for a certificated or perfected water right.

[Utah Code](#)

[Title 73](#) Water and Irrigation

[Chapter 3](#) Appropriation

Section 3 Permanent or temporary changes in point of diversion, place of use, or purpose of use.

(b) Except as provided by Section [73-3-30](#), a change may not be made if it impairs a vested water right without just compensation.

South Dakota In 1907, the state legislature affirmed the doctrine of prior appropriation by enacting legislation authorizing the state engineer to administer appropriation of surface water. A major addition to the water rights laws occurred in 1955. Legislation was enacted making use of ground water also subject to the doctrine of prior appropriation. In addition, a provision was inserted allowing anyone to claim a vested water right for water uses predating March 2, 1955. The 1955 legislation also transferred the authority to issue water right permits from the state engineer to a citizen's board with a chief engineer making recommendations to the board. This citizen's board is now known as the Water Management Board and consists of seven members appointed by the Governor.

Montana Water Use Act Part 1 General Provisions 85-2-101 (2)

(2) A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

(4) Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

(6) It is the intent of the legislature that the state, to fulfill its constitutional duties and to exercise its historic powers and responsibilities to its citizens living on and off reservations, comprehensively adjudicate existing water rights and regulate water use within the state. It is further the legislature's intent that the state, to the fullest extent possible, retain and exercise its authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights, and resolve issues concerning its authority over water rights and permits, both prior to and after the final adjudication of water rights. In furtherance of this legislative intent:

(a) all permits issued are provisional, and it is the intent of the legislature that this status provide enforceable legal protection for existing rights; and

(b) any judicial determination of the state's authority to issue provisional permits on or

off reservations should be decided in the appropriate state forum.

History: En. Sec. 2, Ch. 452, L. 1973; R.C.M. 1947, 89-866; amd. Sec. 1, Ch. 497, L. 1997.

The 1972 Montana Constitution Article IX, Section 3 (1) states : All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. The language of R.S. 2339 appears on every land patent owned by Ronnie Korman and Maxine Korman and state land patents in Townships 27N, 28N Range 34 E.

Interior Decision Arizona states that the state takes title encumbered with vested and accrued water rights that pre-date issuance of land patent. United States General Land Office Historical indexes show ‘title to vest to state; subject to prior rights.’

The following is in the Montana Code Annotated:

75-7-104. Vested water rights preserved. This part shall not impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States. **History:** En. 26-1516 by Sec. 7, Ch. 463, L. 1975; R.C.M. 1947, 26-1516.

87-5-506. Vested water rights preserved and emergency actions excepted. This part shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States or operate in emergencies such as floods, ice jams, or other conditions causing emergency handling. **History:** En. Sec. 6, Ch. 10, L. 1965; R.C.M. 1947, 26-1506.

2) The Priority Affidavit was filed with the Clerk and Recorder in accordance with Article IX, Section 3 (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. That present system was filing notice with the Clerk and Recorder of the county where the property was located and publishing notice.

Under the maxim of “ a thing similar is never exactly the same”, a Statement of Claim is not a Declaration of Vested Water Right. The intent of filing the Priority Affidavit was to assert ownership of R.S. 2339 vested and accrued water rights. Neither the BLM, nor the DNRC objected to our notices in the Glasgow Courier.

A Statement of Claim created by the legislature of the state of Montana is not a granting act of the federal government and cannot and does not convey the fee to what was originally public domain as R.S. 2339 originally conveyed the fee to our predecessors, the early day stockmen, who first put the water to beneficial use of stockwatering.

4) Ronnie Korman and Maxine Korman offer an affirmative defense for failure to file for those particular water rights that the Bureau of Land Management (BLM) has filed on .

“ United States v. Murdock (U.S.C.A. 10th Cir. No. 95- 4071) said Murdock’s failure to act was “excusable” because he relied on what Navy personnel had told him. We did the same thing by filing only on patented land because we were following the information of DNRC and BLM employees. Information given was that the BLM owns it all, Montana law says we can’t file, after the Taylor Grazing Act, we are lessees and lessees can’t own water rights.

We relied on their information and so we have an excusable defense. We had no intention to forfeit or abandon any water rights that we knew were ours.

Additionally : At that time I had not been informed of United States Code Title 40 102 (9) PROPERTY “ the term “property” means any interest in property- except (i) the public domain (ii) lands reserved or dedicated for national forests for national parks purposes (iii) minerals in land or portions of land withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws and; (iv) land withdrawn or reserved from the public domain except land or portions of land so withdrawn or reserved which the Secretary with the concurrence of the Administrator determine are not suitable for return to the public domain for disposition under the general public land laws because the lands are substantially changed in character by improvements or otherwise. [Affidavit of Ronnie Korman] [Affidavit of Maxine Korman]

Abandoned property as defined by Ballentine's (3d. 1969) Property to which an owner has voluntarily relinquished all right, title, claim and possession with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not reclaiming future possession or resuming ownership, possession, or enjoyment. This is not the case with respect to these particular water rights.

40 USCS § 1314

(2) Real property of the government. The term "real property of the Government" excludes--

(A) public land (including minerals, vegetative, and other resources) in the United States, including--

(i) land reserved or dedicated for national forest purposes;

(ii) land the Secretary of the Interior administers or supervises in accordance with the Act of August 25, 1916 (*16 U.S.C. 1, 2, 3, 4*) (known as the National Park Service Organic Act);

(iii) Indian-owned trust and restricted land; and

(iv) land the Government acquires primarily for fish and wildlife conservation purposes and the Secretary administers;

(B) land withdrawn from the public domain primarily under the jurisdiction of the Secretary; and

(C) land acquired for national forest purposes.

The language on the BLM Permit says that the permit gives you no right, title or interest in the lands of the United States and it does not say anything about whether the permit recognizes or alters any private right, title or interest that pre-date the BLM and grazing permit system . This choice of wording is deceptive and misleading. Ballentine's Law dictionary defines fraud as deceit, deception operating prejudicially on the rights of another, and so intended, by inducing him

to part with property or surrender some legal right (23 Am Jur 2d s 2)

85-2-306. Exceptions to permit requirements 6) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

(d) 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 and that is 40 acres or larger .

MCA 85-2-306(6)(d) is a bar to filing for future impoundments of the original

appropriative rights and is in contradiction with *Gila Water Co. v. Green*, 27 Ariz.318:

That the vested and accrued water right carried with it the future right of impoundment.

Fallini v. Hodel, 963F. 2D 275 (1992) that BLM's decision effected a regulatory takings of Fallinis' water rights in violation of the Fifth Amendment.

Of paramount importance the United States Supreme Court ruling in *U.S. v New Mexico*, 438 U.S. 696, 1978 upholding the New Mexico court that under the Prior Appropriation Doctrine, it is the stockmen, the successors of the early stockmen who first put the water to beneficial use for stockwatering that are the owners of appropriative stockwater rights, not the federal government.

Idaho Supreme Court in *Joyce Livestock Co. v. United States of America* (No. 39576 - 2007) Affirmed Joyce Livestock water right claims by grazing livestock beginning in 1898 and predate the 1934 Taylor Grazing Act. Joyce Livestock's predecessors obtained stockwater rights on federal land simply by applying the water to beneficial use through watering their livestock in the springs, creeks and rivers on the range they used for forage. The Supreme Court denied water rights to the federal government "based upon appropriations by those it permitted to use the rangeland after enactment of the Taylor Grazing Act.

To: Kim Overcast, New Appropriations Manager

From: Tim D. Hall, Chief Legal Counsel ~ *t'*

Date: December 21, 2007

Re: Stockwater Pits and Reservoirs - Pre-1973 and Post-1973

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,

-8-

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. § 85-2w222. 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 85w2-212. 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.

Form 627 for EXEMPT Rights was discontinued as of Jan. 1, 2009. We had filed 42 Form 627 Exempt right forms and paid the Department of Natural Resources and Conservation \$2,125 in filing fees.

A review of United States Supreme Court and other court cases as well as the elements of the Prior Appropriation doctrine and appropriative right show that MCA 85-2-306(6)(d) as applied to lands that are not patented parcels but now state grant sections and lands that were originally public domain to which no homestead patent issued, but are lands the United States Federal Court of Claims recognize as "fee" lands by virtue of ownership of vested stockwater rights is retroactive alteration of the Prior Appropriation Doctrine and vested and accrued appropriative rights by application of the riparian doctrine and retroactive alteration of rights protected by the Federal Constitution by Montana Water Use Act . The appropriative right originated on public domain , independent of land ownership.

R.S. 2339 is a granting act of the Federal Congress. A confirmation by a law is as fully for all intents and purposes, a grant as if it contained in terms a grant de novo. Act of Congress as Grant- Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law. A grant of this character is at least equivalent to a patent; in some respects, it has been regarded as a higher

evidence of title than a patent, since it is a direct grant of the fee by the United States.

[Am Jur Public lands, Rohrer General Land Office, citing Deseret Salt Co. v. Tarpey]

(New Orleans v. The United States, 35 U.S. 662, 1836: It is enough for this court in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government)

Montana Code Annotated:

1-1-205. Terms relating to property and decedents' estates. Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(4) "Real property" means lands, tenements, hereditaments, and possessory title to public lands.

7-2-2510. Effect of name change on vested rights and existing laws. (1) The change of name provided for in this part shall not impair or work a forfeiture or alteration of any vested rights.

81-5-101. Moving livestock from customary range forbidden. (1) A person who willfully moves or causes to be moved any cattle, horses, mules, swine, llamas, alpacas, bison, or sheep from their owner's customary range without the permission of the owner shall upon conviction be punished by imprisonment in the county jail not exceeding 6 months or by a fine not exceeding \$500, or both.

Organic Act of Territory of Montana, sec. 6. Provided, however, That in all the claims of vested rights thereunder, the party claiming the same shall not, by reason of anything in this section contained, be precluded from making and testing said claim in the courts of said territory

Public Lands; Definitions and Distinctions.- The term "public land" usually signifies such government or state land as is open to public sale or other disposition under general laws. Land to which any claims or rights of others have attached does not fall within this designation. Vacant lands are such as are absolutely free, unclaimed and unoccupied. [Am Jur 1d. Public Lands] Additionally, Joseph R. Rohrer, L.L.M., General Land Office, "Questions and Answers On The United States Public Land Laws and Procedures", 1912 : "Define "public lands". "Public lands" or "Public domain" are synonymous terms used to describe lands subject to sale or other disposal under general law. (Newhall v. Sanger, 92 U.S., 761-763, Barker v .Harvey, 181 U.S. 481-490) Bouvier's Law Dictionary A Concise Encyclopedia of The Law Public Lands. Such lands as are subject to sale or other disposition by the United States, under general laws. Newhall v. Sanger, 92 U.S. 761, Bardon v. R. Co., 145 U.S. 535.

Ballentine's 1916 Public lands. Such lands as are open to sale or other disposition under general laws

Ballentine's 3d. 1969 Public domain The public lands of the United States or a state. Barker v. Harvey, 181 U.S. 481, 490. Public land Land of the United States or a state, particularly land open to public sale or other disposition under general laws. A term of varying senses, depending largely on the context in which it appears and the special circumstances of the case. Kindred v. Union Pac. R. Co. 225 U.S. 582. Federal lands. See public lands.

Black's law dictionary 7. 1999 Public land. Unappropriated land belonging to the federal or a state government; the general public domain

Public domain. Government owned land

5) The Water Court has jurisdiction over the issues raised:

3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under [85-2-309](#) or of existing water rights is exercised exclusively by it through the water division or water

divisions that contain the judicial district wholly or partly. (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under [85-2-309](#) or concerning the determination and interpretation of existing water rights within the judge's division as specified in [3-7-102](#) that are considered filed in or transferred to a judicial district wholly or partly within the division.

(4) The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree. **History:** En. Secs. 1, 6, Ch. 697, L. 1979; amd. Sec. 4, Ch. 80, L. 1981; amd. Sec. 4, Ch. 596, L. 1985; amd. Sec. 4, Ch. 604, L. 1989; amd. Sec. 1, Ch. 174, L. 1997

85-2-216. Venue for water rights determinations. All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [85-2-212](#). **History:** En. Sec. 6, Ch. 697, L. 1979

85-2-222. Exemptions. Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452

Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of [85-2-221](#)(1). **History:** En. Sec. 11, Ch. 697,

89-801. (7093) What waters may be appropriated. The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

Appropriation Made on Public Domain by Settler

A settler on lands which were a part of the public domain could make a valid appropriation of water thereon. Galahan v. Lewis, 105 M 294, 300, 72 P 2d 1018.

6) Ca. Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) The Act of 1866 and Desert Land Act had effectively severed the title to all non-navigable water from the public domain. The prior Montana water law, the waters appropriated for stockwatering of any stream, ravine, coulee, spring, lake or other natural source of supply are appropriative rights, Revised Statute 2239 vested and accrued water rights.

Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 171-173, 295 Pac. 772 (1931) The general rule that to constitute a valid appropriation of streamflow there must be an actual diversion, does not apply to an appropriation for watering livestock in natural watering places formed by natural depressions [Water Rights Laws In The Nineteen Western States, 1977, Wells Hutchins, published by United States Department of Agriculture] The exempt water right classification operates in such a way as to make them not exist:

Chief Water Judge Loble to the EQC that the exempt rights cannot be brought into the water court or any court in the state; that exempt rights do not show up on a decree. Maxims in Montana Code Annotated : “That which appears not to exist is to be treated as if it does not exist. “ The original appropriative rights for the beneficial use of stockwatering, created, recognized, sanctioned and confirmed according to local law, custom and decisions of courts will not be able to be proven to exist, will not be defensible and will not be enforceable. Likewise, the conveyance of the fee to the use of those lands by virtue of the appropriative stockwatering rights will not be able to be proven to exist, will not be defensible and will not be enforceable.

Forfeiture and Abandonment of Grants or Rights Thereunder. To create an abandonment of a claim, there must be not only an omission, but an intent to abandon. But a voluntary formal relinquishment restores the land to the public domain (Am Jur 1d. Public lands)

Exempt, as in free of an obligation which is binding on others, freedom or release from duty or obligation not granted to others (Ballentines 3d. 1969) however Am Jur (1d) Exemption Not a vested right, but one the validity of which is to be determined in most instances by conditions which exist at the time when the privilege is claimed. It is a right, moreover, which is purely personal to the one in whose favor it exists, and he may waive it or be estopped to assert it

Articles in the Prairie Star and Agri-News quoting Department of Natural Resources Director Mary Sexton in March 16, 2007 Agri-News Montana Legislative Update: Vested water on federal lands : “We’re buying time and process with the interim study. We need a thorough review on this issue. An interim study will give us time for that thorough review,” says DNRC Director Mary Sexton (referring to exempt water rights.)

DNRC attorney Tim Hall, in the same article :” Exemption left such water right holders seemingly without a court to validate their rights. It is important to find a court to get these rights adjudicated. We have to find a way to get these claims through the court system, whether that is the Water Court that will eventually disappear, or District Court.”

With respect to HB711, the bill To Recognize Vested Water Rights on Federal Land, we would ask the court to take notice that Ron Korman and Maxine Korman initiated that legislation after requesting that the EQC evaluate Montana’s water law in light of the United States Federal Court of Claims decision in Hage v. U.S. where the court found that Hage owned vested water rights on his grazing allotments and because of those vested water rights that he owned the “fee” to those lands that those waters serviced. Kormans appeared at that EQC meeting and submitted written testimony and continued to bring information and questions to the various interim committees since. Representative Rick Jore didn’t think that the law as it is follows Montana’s Constitution and he thought we were right so he carried the bill HB711 “To Recognize Vested Water Rights on Federal Land” for us. The week before the bill hearing, the DNRC lawyer, Tim Hall called several times and talked to me. He kept trying to get me to agree to call the water rights “existing” because he said that’s what they are. He kept telling me that I did not want ‘vested’ because “vested” didn’t mean what I thought it meant and didn’t do what I thought it did. [Affidavit of Maxine Korman] He also faxed us a 30 page draft of his bill.

Prairie Star, June 22, 2007, Director Sexton :” As Montana continues to adjudicate its water rights, those with stock ponds are starting to question whether or not they should file for adjudication on the water in their ponds. The question is where do

you want to do that and who is going to pay for the processing,” said Sexton. “The rights need to be defined and put in the process to be implemented before the final decrees.”

Mr. Hall had written an amicus brief that Director Sexton provided . I have submitted written request to Director Sexton three times about the following:

I had asked you for any and all documents related to and explaining why Montana, modeling its water law after Idaho in creating a classification of exempt rights, has been allowed to proceed in a state-wide adjudication while being in violation of the McCarran Amendment.

The DNRC brief stated Idaho had been challenged about “exempt rights” by the federal government because “exempt rights” violated the federal McCarran Amendment and not all parties and not all water rights were a part of the adjudication. The federal government pointed out that this is not then a general stream adjudication.

The DNRC brief then goes on to say that the federal government has not challenged Montana’s “exempt rights” and adjudication, to the DNRC’s knowledge.

I am requesting any and all documents and records explaining how and why Montana is being allowed to violate the federal McCarran Amendment, even as neighboring state Idaho was not and had to remedy its law.

Director Sexton, if you do not respond and produce the requested records and documents within ten business days of your receipt of this certified letter, I will interpret that as your intent to commit fraud by deliberately withholding material information that is adverse to my interests.

The Director has never provided any response or acknowledgement.

7) I had also submitted requests to the Bureau of Land Management State office in Billings

Theresa M. Hanley responded : “Your July 13, 2009 letter requests information about legal strategies implemented by the United States in the Montana water rights adjudication. The United States is represented by the Department of Justice in the Montana water adjudication. Litigation strategy documents are not public records and are not available under your request.”

State Director Terland responded to my request and stated that the BLM filed claims for its uses of all known water sources on public lands. With respect to the exempt rights and the McCarran Amendment: in the Idaho adjudication, the Department of Justice and the State of Idaho entered into a stipulation that specified how these “de minimus” livestock and domestic water rights would be handled to resolve the McCarran adequacy issue. The statutes governing the adjudication in Montana and Idaho are state laws and are different. Whether the Montana adjudication would meet the standards of the McCarran amendment is not a decision that would be made by the BLM.

Adjudication of the Waters of the Monitor Valley. State of Nevada Office of The State Engineer:

"Until the enactment of the McCarran Amendment, [footnote omitted] however, the prior appropriation system in Colorado could not be applied to the adjudication or administration of water rights of the United States, because Congress had not consented to the determination of such water rights by state courts. As a sovereign, the United States was privileged to withhold such consent."²⁰

[T]his Court noted that the sovereign immunity of the United States created an anomaly in the adjudication of water rights:

"We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure - and this is equally true from the standpoint of the United States as well as Colorado and its citizenry." (Citation omitted.)

¹⁹43 U.S.C. § 666.

²⁰U.S. v. City and County of Denver, 656 P.2d 1, 8 (Colo. 1982).

As to Mr. Terland's statement that the BLM filed claims for its uses of all known water sources, following the ruling from the United States Supreme Court in U.S. v. New Mexico, the BLM should have withdrawn all stockwater filings and should have ceased continuing to file and should be prohibited from filing stockwater claims under estoppel by matter of record; estoppel by matter of judgement.

The BLM was a party to the Adjudication of the Waters of the Monitor Valley. State of Nevada Office of The State Engineer:

13 The BLM objected to Proof , permit: a.. the claimant failed to show title & exclusive use, and the evidence does not support this title, and/or, use; b. the claimants have no federal grazing permits; therefore, no beneficial use of these water rights is occurring .by, non-federal claimants; .. c. the claims for irrigation of public lands cannot be recognized as neither irrigation nor access for irrigation has ever been authorized by the BLM on the public lands ; therefore, no water: rights should be recognized for this purpose; d. the use of the public lands for grazing sheep has never been allowed by permit; therefore, ,no water rights should , be recognized for this purpose; and, the quantity of water recognized

for livestock watering .is for a number of livestock greater than authorized to use public lands. and the evidence does not support this title, and/or, use; b. the claimants have no federal grazing permits; therefore, no beneficial use of these water rights is occurring .by, non-federal claimants; .. c. the claims for irrigation of public lands cannot be recognized as neither irrigation nor access for irrigation has ever been authorized by the BLM on the public lands ; therefore, no water: rights should be recognized for this purpose; d. the use of the public lands for grazing sheep has never been allowed by permit; therefore, ,no water rights should , be recognized for this purpose; and, the quantity of water recognized for livestock watering .is for a number of livestock greater than authorized to use public lands.

3. The BLM also objected to the State Engineer’s rejection of those reserved right claims

The purpose listed on the rejected claims for PWRs was for livestock and wildlife, and even if the State Engineer rejects the claims for wildlife he should still recognize the claims for livestock use as valid; and,

15 The BLM objects to Section XI “Rights of Appropriators” wherein the State Engineer listed stockwater claims by livestock class, number and period of use because:

The livestock class, number and season of use differ significantly from the current livestock class, number and season of use authorized under federal grazing permits; the livestock classes listed have never been authorized and the numbers are in excess of historical authorizations;

The USFS objects to the issuance of stockwater rights to private grazing permittees on federal lands as those private permittees have no right or claim to an interest in federal property or resources associated with permitted use of federal property, and it is prohibited under the terms of federal grazing permits and law. The USFS also objected to the issuance of stockwater rights which are appurtenant to the cattle which use the federal estate instead of being appurtenant to the federal land where the intended federal benefit from grazing occurs. The claimants failed to establish a proper chain of title and exclusive use nor does the evidence support title and/or use; the proofs or permits demonstrate an illegal or expanded use and change in point of diversion and place of use;

Store Safe Redlands also object s to the language in preliminary Order of Determination that states the season of use may be further limited by grazing permits issued by the appropriate federal agency and it should be excluded from the Order of Determination as it is unclear as to its meaning, it implies an improper abdication of the State Engineer’s authority to federal agencies contrary to law, and would perhaps implicate a Fifth Amendment takings under the U.S. Constitution.

At the Pre-hearing Conference, the State Engineer ruled that he has the authority under Nevada law to recognize vested rights to water livestock irrespective of land ownership, and that livestock water rights would be adjudicated by the number of livestock, source, ownership and priority date without a specified quantity of water.

67 PUBLIC WATER RESERVES CREATED PURSUANT TO EXECUTIVE ORDER NO. 107, DATED APRIL 17, 1926 “Every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all land within one quarter mile of every spring or waterhole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section IO of the Act of December 29, 1916.” That executive order does not expressly state an intention to reserve water in public springs or waterholes and to withdraw it from appropriation under state law. Regulations later enacted by the Department of the Interior recognized the limited domestic drinking and stockwatering purposes of the 1926 reservation.⁸² (82 The Department of Interior’s most recent pronouncement on springs and waterholes is codified in 43 C.F.R. § 2311.0-3(a) (2) (1980) : “2. Purpose of withdrawal . The Executive Order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.”

The State Engineer finds the issues in this s adjudication are whether the springs upon which “the BLM filed PWR 107 claims are important springs or water holes which make them special by their location, whether there is unappropriated water, and whether the water source has enough flow to support human and animal consumption.

70 The State Engineer determines that claims of reserved water rights under a PWR 107 are recognized as viable claims in a general adjudication under the guidelines outlined below: 1) The federal reserved right created by PWR 107 has a priority date of April 17, 1926, the date of the Executive Order / unless the subject spring or waterhole came into existence after that date, .but before October 21, 1976. 2) PWR 107 claims cannot divert or displace a water right vested under Nevada law prior to April 17, 1926. 3) PWR 107 claims do not pertain to artificially developed water sources and are limited to only human and animal consumption. 4) The quantity of water reserved from a particular source is the minimum quantity required to prevent monopolization of the water source and meet the primary purpose of the reservation. The State Engineer has established that “important springs” be so isolated and of satisfactory quality to satisfy the need for human and animal consumption.

The BLM objected to the rejection of claims of reserved rights filed for reserved rights for stockwatering and wildlife purposes .The State Engineer rejected these proofs in the Preliminary Order of Determination · based on the fact that the stated uses of stockwatering and wildlife are not valid for PWR 107 claims.

The USFS objects to the issuance of stockwater rights to private grazing permittees on federal lands on the grounds that those private permittees have no right or claim to an interest in federal property or resources associated with permitted use of federal property, and it is prohibited under the terms of federal grazing permits and law. The USFS also objected to the issuance of stockwater rights which are appurtenant to the cattle which use the federal estate instead of being appurtenant to the federal land where the intended federal benefit from grazing

occurs. The USFS further objected to those identified proofs or permits determined to be valid, specifically alleging that: (a) the claimants failed to establish a proper chain of title and exclusive use nor does the evidence support title and or use; (b) the proofs or permits demonstrate an illegal or expanded use and change in point of diversion and place of use; (c) the historical record does not support the priority dates, irrigated acres claimed, season of use or uses; (d) the water right has been abandoned or forfeited; (e) the amount of water determined necessary for irrigation exceeds the duty of water established in the Preliminary Order (f) the use of water will interfere with the proper management and use of federal property in violation of federal and state law; and (g) the claimant no longer has a valid federal grazing permit., thereforeI no beneficial use of the waters is occurring by the non-federal claimants.

The USFS argues that it is seeking to fulfill the directives of Congress by acquiring state water rights that enable the government to operate its grazing program on the national forest and.it cannot allow private individuals to thwart the directives of Congress and monopolize the grazing land of the national forests by acquiring exclusively-owned stockwatering rights on the national forests. The USFS alleges that as a matter of law a private party may not own :water rights for stockwatering purposes where the point of diversion and place of use are on the national forests.

The ranchers who settled this part of Nevada were there long before the USFS even existed and had been beneficially using the waters for stockwatering and irrigation purposes. Under the prior appropriation system of acquiring water rights, the earliest documented use is of critical importance in establishing a right of use. The State Engineer finds that the water the USFS is arguing. about is not “federal property.” Notwithstanding its ownership of water forming part of the public domain, the United States for a period of years silently acquiesced in the creation of private appropriative rights in water on the public domain under customary local uses. When it was confronted with the customary system of water allocation in the West however the federal government was relegated to the position of recognizing accomplished facts and, in a series of statutes passed in the last half of the nineteenth century, Congress rejected the alternative of a general federal water law. In 1866, Congress provided statutory protection to water users who had relied upon the customary legal system in the western states for allocating water by prior appropriation. The Act of July 26, 1866 (1866 Act) provided:” [W]henever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes ,have vested and accrued, and the same are recognized by the local customsI laws, and the decisions of, courts the possessors and owners of such vested rights shall be maintained and protected. in the same . Next , the Act of July 9/i-1870, made it clear that the rights of patentees of federal lands were subject to the appropriative rights recognized by the 1866 Act Finally; .the Desert Land Act of 1877 reaffirmed the rule . that private rights in waters on the public domain were to be governed by the appropriative doctrine

By virtue of these acts, Congress determined that water rights on the public domain could be acquired under state law embodying the appropriation doctrine. It thereby largely acquiesced in comprehensive state control over the appropriation of water, including water on federal lands, at least with respect to rights that could be asserted by private appropriators. The United States Supreme Court has interpreted these acts as expressing congressional recognition of and acquiescence in water rights law developed by the western states: “Congress intended [by these acts] ‘to recognize as valid the customary law with respect to the use of water which

had grown up” among the occupants of the public land under the peculiar necessities of their condition. *California v. United States*, 438 U.S. 645, 656, 98 S.Ct. 2985, 2991, 57 L.Ed.2d 1018, 1027 (1978).⁸⁶ *United States v. City and County of Denver*, 656 P.2d 1, 7-8 (Colo. 1982).⁸⁹ See *Ca. v. U.S.*, 438 U.S. 645, 653-663 (1978) *Federal Power Comm, v. Oregon*, 349 U.S. 435 (1955); *Ca. Ore. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *U.S. v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770 (1889).

80 With the other dry-land States, Nevada was granted control of its natural waters by the law of 1866 . . . , and for many years its citizens appropriated irrigation and stock waters (along with those used for mining and smelting) without any very definite regulations. In 1905 the State legislature passed a law establishing a method of obtaining the right to put waters to beneficial use. Water appropriations that were already established at the time of the passage of this act were recognized as vested rights, for both irrigation and stock water. Future appropriations under this law are to be made through the State engineer who keeps a record of all official allotments.

It does not get much clearer that the private stockman can hold water on the public lands than the Supreme Court’s holding in *v. New Mexico* wherein it ruled: The United States contends that, since Congress clearly foresaw stockwatering on national forests reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to the individual stockwaterers. We agree .. (Emphasis added.) In the files of the office of the State Engineer is a letter dated September 25, 1961, wherein the BLM stated that the State Engineer should grant the water right to the present range user. While the United States Government has apparently changed its position regarding who should own the stockwater rights on the federal lands, this shift in position cannot change the history that for over 100 years stockmen have owned the stockwater rights on the public lands. The Taylor Grazing Act at 43 U.S.C. 315 (b) recognized the existence of prior privately owned water rights on the public lands and the continued existence of those rights in the very fact that it recognizes a preference for grazing permits to go to landowners within or near the grazing district engaged in the livestock business or who own water rights. The Act also states that nothing in the Act shall be construed in any way to diminish or impair any right to possession or use of water for agriculture that was vested under existing law validly affecting the public lands. For the United States to now argue that stockwater does not come under the definition of agriculture goes completely against history and law. The State Engineer finds that both history and law support issuance of water rights to private persons for stockwatering on the public lands and concludes that stockwatering rights may be granted to private citizens on the public lands including those lands encompassed by the national forests.

CLAIMANTS CHAIN OF TITLE AND PROOF OF USE. The USFS and the BLM argue that the claimants failed to show title and exclusive use and the evidence does not support title and/or use. The non-federal claimants chain of title to the privately held base home ranch for the proofs filed in this proceeding pertain to lands that in some instances were patented and in others are possessory claims to lands controlled by the federal government. The State Engineer is authorized and is responsible for maintaining water right files and accompanying documents. Water rights transfer with the land to which they pertain unless there is a specific reservation of the water rights in the document of transfer. *97 97Zolizzi v. Jackson*, 72 Nev. L50, 297 P.2d 10B1. (1956). The documents submitted to support the

claims of vested rights in this adjudication proceeding are the only evidence available to the State Engineer. Documents which convey an interest in land with appurtenant water rights include the right to beneficially use the water sources incidental to those “Patented IThe record of the ownership transfer of the lands included in the various proofs is the only documentation on file in the office of the State Engineer to determine if the claimant is the successor in interest to the individual that first put the subject waters to beneficial use. The State Engineer finds that the private claimants in this adjudication are the successors in interest and are deemed to be the recipient of the vested water rights as evidenced by the documents filed demonstrating their chains of title.

The USFS objected to the determination of vested water rights wherein the non-federal claimants no longer have a valid federal grazing permit, because no beneficial use of the waters is occurring by the non-federal claimants. The State Engineer finds that the claims filed in this proceeding are for vested water rights held by the successors to the early stockmen who grazed the range livestock⁹⁸ on 98NRS § 533.485 (2) · on the public · range’9 .. ,99NRS § 533.485 (1) . wherein the beneficial use was occurring prior to 1905 is prior to control of the public lands by the federal entities that currently issue grazing permits. The State Engineer concludes that the claims filed for vested water rights for stockwatering purposes wherein the ability of the claimant to put the waters to beneficial use is currently impaired does not invalidate the claims filed for watering livestock

Even though the original settlers were trespassers on the public range, the federal government did not act to evict them and this lack of action allowed for the conveyance of possessory titles · to land and water rights acquired to pass from one holder to another. Some of these possessory claims to land eventually came into private ownership through patents that did not necessarily include the entire place of use where historical irrigation was occurring. The conveyance of possessory rights on the public range for irrigation or stockwater would transfer in the same manner as water appurtenant to private lands. A settler in good faith might convey his possessory interest in the land and in the water right appurtenant thereto by voluntarily surrender to one who take s possession from him. The transferee became vested with all the rights his predecessor had in the premises. 101 Hindman v. Risor, 21 Org. 112, 116-118, 27 Pac. 13 (1891). The lands where the possessory claimants and initial appropriators originally irrigated were on unsurveyed public lands and the boundaries of those lands did not necessarily have definite metes and bounds. However, these appropriations already made on the public lands and recognized by Congress were a confirmation of the right to insist on the use of the. waters to the extent necessary for beneficial purposes for the entire place of use before any control of the public domain was exerted by the federal government. claims It is the beneficial user of the water who is recognized as having a valid vested water right.

The BLM objects to the determination of vested water right ,claims for sheep since sheep use has never been authorized in any grazing permits within the subject area. The use of the public lands for grazing of sheep was occurring before exertion of plenary control by the federal government. The Taylor Grazing Service, the predecessor to

BLM, came into existence after 1905. Therefore, no management or specific control of the grazing practices were in effect at the time the vested rights originated..The determination of the vested Claims, for stockwatering purposes included sheep as one of the types of animals s historically watered in the subject adjudication area prior to the creation of the National Forests in 1907 .A review of the 1894 assessment roll of Nye County, Nevada, indicates that cattle and sheep were two types of stock animals owned by predecessors to claimants in this proceeding. The claims for sheep grazing are based on the historical use and not a forage analysis. The claims filed for irrigation purposes may include stockwatering and it is these claimants' predecessors who developed water and grazed their sheep on the public range. The State Engineer finds that sheep were historically watered on these public lands, and claims will be recognized for this type of beneficial use. The claims filed for irrigation purposes may include stockwatering which may include sheep. Claims for stockwatering purposes only also may include sheep as opposed to · just cattle. The State Engineer finds claims for vested water rights for sheep are valid unless otherwise determined in this Order.

QUANTITIES I LIVESTOCK CLASS, NUMBER AND SEASON EXCEED MODERN GRAZING PERMITS OR ARE IN EXCESS OF HISTORICAL AUTHORIZATION

The BLM objected to the claims for vested water rights wherein the claimed numbers of animals are greater than were authorized to use the public lands. The claims filed by the non- federal claimants are for the numbers and type of animals that were historically on the public range prior to any grazing regulations.Livestock are opportunistic animals and will consume water from various sources in varying quantities depending on the available feed within the grazing area which may now include federal grazing allotments. The amount of water an animal consumes depends on the season and how much moisture is available in the feed. Use of the limitations set forth in grazing permits is not a correct quantification of a prestatutory water right. The State Engineer finds that the historical number and type of stock will be the limiting factor. No specific quantity is given on any particular source since livestock will be in different parts of the range at different times of the year and consume water at different rates. The amount of water allotted for irrigation purposes includes the amount necessary for stockwater, but is not additive in the total amount recommended for irrigation purposes. The period of use for stockwatering is year long even when the irrigation right is for a shorter period of time.

USE OF WATER WILL INTERFERE WITH THE PROPER. MANAGEMENT AND USE OF FEDERAL PROPERTY IN VIOLATION OF FEDERAL AND STATE LAW

The USFS argues that the use of water will interfere with the proper management and use of federal property in violation of federal and state law. The use of the waters claimed in this adjudication occurred prior to the creation of the National Forests in the subject adjudication area and prior to any control or management by the USFS. Acts of Congress have recognized historical uses of water throughout. The recommendation of a vested water right to a non-federal claimant on federal lands is based on the authority provided to the State Engineer under Nevada Revised Statutes chapter 533. The State Engineer finds that the USFS ability to manage its lands in modern times is an issue entirely separate and distinct from the recognition of valid historical water rights

The USFS argues that the denial of its vested right claims for wildlife and stockwatering purposes under state law is contrary to state and federal law. The United States Supreme Court issued its decision in the case of U.S. v. New Mexico. In that case, the Supreme Court held : The New Mexico courts held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree (Emphasis added) . The State Engineer finds that the non-federal claimants whose title traces back to the original homesteader is the person to whom the vested water right for stockwatering should be granted and not the United States. The USFS has not shown through a chain of title it is the successor in interest to the original stockmen whose cattle grazed the public lands and consumed the waters found on those lands The USFS is attempting to derive its claim from the cattle that were on the range, and not from the cattlemen. Neither the USFS nor the U.S.. owned livestock which consumed those waters, the owners of the livestock were private individuals .The State Engineer determines that the proofs filed by the USFS claiming vested water rights for stockwatering purposes are invalid and must be rejected. The State Engineer finds that the use of water by wildlife prior to 1905 will not be recognized as a beneficial use of water which can support a claim for a vested water right. The United States was not managing the land for wildlife purposes; therefore, the use of water by native animals in their natural state will not be considered as valid grounds to support a claim to water. USFS claims for in streamflows, stockwater, and wildlife purposes The USFS filed numerous claims of vested and reserved rights for instream flow, stockwatering, and wildlife purposes. The State Engineer determined these claims to be invalid. Therefore, these proofs filed for reserved and vested water rights must be rejected in this Order.

PWR 107 FILINGS The BLM filed numerous claims for reserved water rights under Executive Order 107 for Public Water Reserves. The State Engineer determined the following PWR claims to be invalid. Reserved water rights are rejected in this Order

It has been made clear beginning in 1978 when the United States Supreme Court upheld a New Mexico court that private stockmen owned Prior Appropriation stockwater rights, not the federal government, to the 1998 Nevada State Engineer Order of Determination in the Adjudication of the Waters of the Monitor Valley to the 2007 Idaho Supreme Court ruling in Joyce livestock Co. The waters are not federal property, USC Title 40 excludes ‘public domain’ as property of the U.S. government in 40 USC 102 and 1314, BLM does not have title as successor to the early day stockmen. Shipman on Common-Law Pleading: When in pleading any right or authority is set up in respect of property, personal or real, some title to that property must of course be alleged in the party, or in some other person from whom he derives his authority. As the BLM was made aware , they do not have title to vested stockwater rights. Ronnie Korman and Maxine Korman have on file in the Clerk and Recorder Records of Valley County Montana, Declaration of Acceptance of Land Patent Assignment for United States of America Land Patent # 918918, 1008348, 1014768, 1017879, 1041761, and 1077513. The lands patents are to heirs and assigns forever the tract of land above described; TO HAVE AND TO HOLD the said tract of Land, with all the appurtenances thereof. Other documents on record show Warranty Deed including language all range rights, all water rights and all appurtenances, tenements and hereditaments as well as BLM Assignment of Range

Improvements showing Hammonds assign all right, title and interest in fences and stock reservoirs that are listed to Korman

BLM filed various Notice of Appropriation of Water in the Valley County Clerk and Recorder records. Those filed in the 1950's state that the United States of America did appropriate for stockwater and other useful purposes which may be, but not limited to flood, irrigation, flood prevention, watershed protection and water conservation and the place of use area of 40 acres. These PWR 107 filings were invalid. The 1973 filings state United States of America did appropriate for stockwater and other useful purposes which may be, but not limited to, flood irrigation, flood prevention, watershed protection, and water conservation on an area of 640 acres. These were invalid claims as the BLM cannot and did not put the water to beneficial use and is a fraudulent claim. These claims were re-filed under the Montana Water Use Act as stockwater and wildlife filings

The BLM filings are a fraud; as defined in Black's law dictionary 8th: a knowing misrepresentation of the truth or concealment of material fact to induce another to act to his or her detriment. That which is done under fraud is null and void. (Kramer v. Deer Lodge Farms Co., 153 Mont. 152, 174-175, 151 Pac. 2d. 483, 1944 : the court indicated that an appropriator may be estopped from asserting his water right against parties whom he has misled, where there has been some degree of turpitude- such as misleading statements or acts, or concealment of facts by silence when there was a duty to speak- with the result that the other party was induced or led by the words, conduct or silence of the appropriator to do things which he otherwise would not have done.) The filing creates a presumption that the BLM is putting the water to beneficial use and is in possession when in fact the BLM is not putting the water to beneficial use or in possession. There is no such venue as BLM lands (No act of Congress has created such a fiction or venue) If these lands were public lands, then the BLM would have a mandate to manage for wildlife under the Federal Land Policy Management Act, 1976. Management and actual putting water to beneficial use are not the same.

The fact that vested and accrued stockwater rights that grant the fee and pre-date the Taylor Grazing Act of 1934, Grazing service which was the predecessor of the present day BLM are located on every coulee, ravine, creek, spring, pothole, and any other natural stockwater site ("It is of course elementary that a natural depression may be utilized as a reservoir if no one is injured thereby", Perkins v. Kramer, 121 Mont. 595, 599, 198 Pac 2d. 475, 1948) evidences that there are private rights and claims attached. As the United States Supreme Court has held that it is well-settled that all lands to which private rights and claims have attached are not public lands. [Am Jur public lands]

Additionally, 85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1, 1973. :

(1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may appropriate water only for a beneficial use.

(3) A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive

(4) All permit actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a permit by the department.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(1); amd. Sec. 3, Ch. 573, L. 1985; amd. Sec. 5, Ch. 497, L.

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

Incident to beneficial use is bona fide intent to apply the water to appropriate the water and put it to actual beneficial use. As to filing notice :” A declaration of a claim to water, unaccompanied by acts of possession is wholly inoperative as against those who shall legally proceed to acquire a right to the same.” Columbia Min. v. Holter, 1 Mont. 296

BLM filings for reservoirs: Montana Supreme Court “ The primary right to the use of water in a stream is that of the appropriator of the natural flow, not the storage claimant”

Gwynn v. City of Phillipsburg, Mont. 478 pac. 2d. 855, 898 , 1970, citing Whitcomb v. Helena water Works Co., 151 Mont. 443, 444 Pac. 2d. 301, 1968. The flow of water impounded in our Range Improvement Reservoirs are those waters that will not appear on a decree and appear not to exist. However, without that run-of flow, there would be no water in those reservoirs.

For all the reasons previously stated, Ronnie Korman and Maxine Korman object to any and all water rights being issued to the Bureau of Land Management (BLM) whether Statement of Claim, Provisional Permit, Certificate, Stockwater Permit and for stock or wildlife. All BLM filings should be rejected.

Additionally, Statement of Claim, Provisional Permit, Certificate are retroactive

alterations of our vested and accrued appropriative water rights: [Water Rights Laws In The Western United States, Wells Hutchins, 1977, published United States Department of Agriculture]- The right of continued flow extends to the tributaries; right to protection against material infringement of water from tributaries (Beaverhead Canal Co. v. Dillon Elec. Light & Power Co., 34 Mont. 135, 141, 85 Pac. 880, 1906) All streams are dependent upon tributaries for supply of water (Strickler v. Co. Springs, 16 Co.61,67, 1891)

Change in Exercise of water Right- point of diversion,, place of use, and purpose of use- without loss of priority of the appropriative right. Changes to a later priority date for a change in point of diversion, change in place of use, change to purpose of use are not the original intent of the prior appropriation doctrine and are a retroactive alteration of the doctrine and the appropriative right. (noted as a property right)

Ramsay v. Gottsche 51 Wy. 516, Lindsey v. McClure, 136 Fed. 2d. 65, 69-70 (10th Cir. 1943)

Supplement to Objections to BLM Filings submitted by Ronnie Korman and

Maxine Korman

MAXINE KORMAN - SUPPLEMENT TO NOTICE OF OBJECTION AND REQUEST
FOR HEARING MONTANA WATER COURT, LOWER MISSOURI DIVISION
BEAVER CREEK TRIBUTARY OF MILK RIVER – BASIN 40M

SUPPLEMENT TO OBJECTION FORMS TO
Montana State Board of Land Commissioners DNRC Trust Land Management

- 1) 40M135693 Statement of Claim Stock
- 2) 40M135698 Statement of Claim Stock
- 3) Objection to 1973 Water Use Act retroactively altering original RS 2339 vested and accrued stockwatering rights under previous water law by converting these to “exempt” rights to which no record can be produced and no court within the state of Montana to bring those water rights into to prove existence, quiet title and guarantee a defensible and enforceable vested water right.

1) Ronnie Korman and Maxine Korman are objecting to the stock water right claims filed by the Montana State of Board of Land Commissioners, Department of Natural Resources Trust Land Management, as these claims involve the Prior Appropriation Doctrine vested and accrued appropriative water rights of Ronnie Korman and Maxine Korman . The appropriative right is recognized as vested property and protected under the federal Constitution. [Water Rights in the Western States, Wiel, page 127]

2) Ronnie Korman and Maxine Korman are entering their objections as Pro Se litigants, relying on Caldwell v. Miller (790 F. 2d 589, 595, 7th Cir. 1986) that Pro Se litigants are not held to the same stringent standards applied to formally trained members of the legal profession and are to be liberally construed. Additionally, Haines v. Kerner, (404 U.S. 519, 520-21, 1972) that Pro Se complaints are to be liberally construed and should be dismissed for failure to state a claim only if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

3) MCA 85-2-212. Order by supreme court, (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of claim of an existing water right in substantially the following form:
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.

85-2-226. Abandonment by failure to file claim. The failure to file a claim of an existing right as required by [85-2-221](#)(1) establishes a conclusive presumption of abandonment of that right. **History:** En. Sec. 14, Ch. 697, L. 1979; amd. Sec. 6, Ch. 629, L. 1993.

Ronnie Korman and Maxine Korman ask the court to accept the Priority Affidavit of Vested Water Rights, recorded in the Valley County, Montana Clerk and Recorder office and published for three consecutive weeks in the Glasgow Courier.

This was done for two reasons:

1) that although the Montana Supreme Court in *Mettler v. Ames Realty* stated that Montana is a Prior Appropriation Doctrine state and that the riparian doctrine was never suited to Montana, Title 85 Water Use does not recognize the vested water right, does not define the vested water right and makes no provision for recording and confirming the adjudication of the vested water right. 85-2-313 is the only mention of vested right

85-2-313. Provisional permit A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department. **History:** En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(4); amd. Sec. 8, Ch. 497, L. 1997.

Rev. Stats., sec 2339: “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; “

Rev. Stats., sec. 2340: “All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.” [Wiel, *Water Rights in the Western States*, 1908, pages 21, 22]

Definition – A water right of appropriation is real estate, independent of the ditch for carrying water, and independent of ownership or possession of any land, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose; and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water or in the channel of the stream [Wiel, page 129]

By the congressional acts , the government acquiesced; the kind of vested and accrued right grew up which the government by said acts of Congress promised to protect [Wiel, page 159]

Ballentines A Law Dictionary, 1916- Appropriated. Under constitutional provision, water held not appropriated until applied to beneficial use.

Vested water rights. See Accrued water rights.

Accrued water rights. Meaning within U.S. Rev. Stats., 2339, 2340, U.S. Comp. Stats. 1901, p. 1437, 7 Fed. Stat. Ann., pp. 1090, 1096, defined where jurisdiction had not recognized doctrine of prior appropriation.

Accrue. To accumulate and become a part of something; to ripen or spring into existence, as a right of action.

Ballentine's 3d., 1969 Accrue. To become complete by development.

Vested water rights See accrued water rights.

Accrued water rights. Rights in waters which have vested prior to the adoption or enactment of a constitutional or statutory provision affecting the right of appropriation (56 Am J 1st Wat sec 295)

The word existing- To be; to have being; to come into existence; to have existence. Existing. Existent; in existence.

Existing equity. An existing right enforceable in equity, if not at law

Existing use. A familiar term in zoning ordinances and regulations usually employed in characterizing a nonconforming use excepted from the application of the ordinance or regulation, and meaning an actual, as distinguished from a mere contemplated, use, existing at the time of the ordinance or the passage of the regulation, but not necessarily a use in actual operation at that time or a use which utilizes the entire tract involved.

Use. A beneficial ownership recognized in equity

Webster's 1828 dictionary had defined vest as to put in possession of; to come or descend to; to take effect as a title or a right; accrue as Something that accedes to, or follows the property of another; to be added.

Stroud's Judicial Dictionary (1d. 1890) Accrue- Title "accrues" when the instrument creating it, or the fact constituting it, first becomes operative

Vest- To 'vest', generally means to give the property in; it is a word which has acquired a definite meaning, carrying with it definite legal consequences. As applied to estates in land, to vest, signifies the acquisition of a portion of the actual ownership; the acquisition, not of an estate in possession, but of an actual estate.

Water Rights: Division of Water Resources - U.S. Fish and Wildlife Service

ADJUDICATION OF WATER RIGHTS An adjudication is an administrative or judicial determination of all rights to use water in a particular stream system or watershed, to establish the priority, point of diversion, place and nature of use and the quantity of water used among the various claimants. These stream or watershed adjudications can be initiated by a water user (including the United States) or by the State. The United States may be joined in an adjudication if the requirements of the McCarran Amendment are met.

APPROPRIATION DOCTRINE Water laws developed in the arid Western States--where water supplies are limited and often inadequate--are known as the Appropriation Doctrine.

This doctrine is essentially a rule of capture, and awards a water right to a

person actually using the water. It has two fundamental principles: First in time of use is first in right (i.e., the earliest appropriator on a stream has the first right to use the water), and Application of the water to a beneficial use is the basis and measure of the right.

BENEFICIAL USE Beneficial use is a cardinal principle of the Appropriation Doctrine. It has two components: the nature or purpose of the use and the efficient or non-wasteful use of water. State constitutions, statutes, or case law may define uses of water that are beneficial, those uses may be different in each State, and the definition of what uses are beneficial may change over time. The right to use water established under State law may be lost if the beneficial use is discontinued for the prescribed period of time (see Abandonment and Forfeiture).

VESTED RIGHT An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.

BLM.gov Western States Water Laws

Prior Appropriation:

The prior appropriation doctrine, or "first in time - first in right", developed in the western United States in response to the scarcity of water in the region. The doctrine evolved during the California gold rush when miners in California needed to divert water from the stream to locations where it was needed to process ore. Customs and principles relating to water diversion developed in the mining camps, and disputes were resolved by simple priority rule. According to the rules of prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use. In other words, those with earliest priority dates have the right to the use of that amount of water over others with later priority dates

Unlike a riparian right, an appropriative right exists without regard to the relationship between the land and water. An appropriative right is generally based upon physical control and beneficial use of the water. These rights are entitlements to a specific amount of water, for a specified use, at a specific location with a definite date of priority. An appropriative right depends upon continued use of the water and may be lost through non-use. Unlike riparian rights, these rights can generally be sold or transferred, and long-term storage is not only permissible but common.

There are four essential elements of the prior appropriation doctrine: Intent, Diversion, Beneficial Use, and Priority In all states with the prior appropriation doctrine, the acquisition of water requires that the appropriator demonstrate an intent to appropriate the water, divert the water, and apply it to beneficial use. Historically, intent was indicated by on-the-ground acts such as site surveys, land clearing, preparation of diversion points, and most importantly, posting of notice. Today, however, intent is generally indicated by the application for a permit. Another essential component of a prior appropriation water right is diversion. Historically, a physical diversion of water was required in order to acquire a water right.

This requirement has diminished as states have implemented various instream flow programs. A point of diversion, however, is still an essential element of a consumptive use water right. Beneficial use is perhaps the most important characteristic in defining a prior appropriation water right. Beneficial use is used to determine whether a certain use of water will be recognized and protected by law against later appropriations. The justification for beneficial use criteria is to prevent waste. Since water is a scarce resource in the west, states must determine what uses of water are acceptable. Beneficial uses of water have been the subject of great debate, and each western state has an evolving system for evaluating what uses of water are considered "beneficial"

The final essential feature of the prior appropriation doctrine is the priority of a water right. As described above, the first appropriator on a water source has the right to use all the water in the system necessary to fulfill his water right. In western states, there are few restrictions on who can hold an appropriative water right. Therefore, both private and public entities hold rights. An appropriative right does not depend on land ownership, but some states do require that the water is appurtenant to the land on which it is used. In general, appropriative water rights are transferable property

State of New Mexico 72-1-3. Declaration of water rights vested prior to 1907 Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents

Nevada Revised Statutes: CHAPTER 533 - ADJUDICATION OF VESTED WATER RIGHTS; APPROPRIATION OF PUBLIC WATERS

NRS 533.085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water,
ADJUDICATION OF VESTED WATER RIGHTS

ADJUDICATION OF WATERS MONITOR VALLEY STATE OF NEVADA OFFICE OF THE STATE ENGINEER

The State Engineer ruled that he has the authority under Nevada law to recognize vested rights to water livestock irrespective of land ownership, and that livestock water rights would be adjudicated by the number of livestock, source, ownership and priority date without a specified quantity of water.

Blm.GOV Western States Water Law

Vested rights are rights that do not have to go through the application process. Vested rights to surface water are those rights for which the work to establish beneficial use was initiated prior to March 1, 1905 (the date of adoption of Nevada's water law). Vested rights from underground sources are those rights initiated prior to March 22, 1913, for artesian water and prior to March 22, 1939 for percolating water. The extent of all vested rights on a water source is determined through the adjudication process (see below).

South Dakota In 1907, the state legislature affirmed the doctrine of prior appropriation by enacting legislation authorizing the state engineer to administer appropriation of surface water. A major addition to the water rights laws occurred in 1955. Legislation was enacted making use of ground water also subject to the doctrine of prior appropriation. In addition, a provision was inserted allowing anyone to claim a vested water right for water uses predating March 2, 1955. The 1955 legislation also transferred the authority to issue water right permits from the state engineer to a citizen's board with a chief engineer making recommendations to the board. This citizen's board is now known as the Water Management Board and consists of seven members appointed by the Governor.

Montana Water Use Act Part 1 General Provisions 85-2-101 (2)

(2) A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

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[Water Rights Laws In The Nineteen Western States, Wells Hutchins, published by United States Department of Agriculture, page 329; "Existing right" means a right to the use of water which would be protected under the law as it existed prior to the effective date of this act." Mont. Rev. Codes Ann. 89-867(4) (Supp. 1973)]

(4) Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

(6) It is the intent of the legislature that the state, to fulfill its constitutional duties and to exercise its historic powers and responsibilities to its citizens living on and off reservations, comprehensively adjudicate existing water rights and regulate water use within the state. It is further the legislature's intent that the state, to the fullest extent possible, retain and exercise its authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights, and resolve issues concerning its authority over water rights and permits, both prior to and after the final adjudication of water rights. In furtherance of this legislative intent:

(a) all permits issued are provisional, and it is the intent of the legislature that this status provide enforceable legal protection for existing rights; and

(b) any judicial determination of the state's authority to issue provisional permits on or off reservations should be decided in the appropriate state forum. **History:** En. Sec. 2, Ch. 452, L. 1973; R.C.M. 1947, 89-866; amd. Sec. 1, Ch. 497, L. 1997.

The 1972 Montana Constitution Article IX, Section 3 (1) states : All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. The language of R.S. 2339 appears on every land patent owned by Ronnie Korman and Maxine Korman and state land patents in Townships 27N, 28N Range 34 E.

The following copies of land patents issued and certified by the Bureau of Land Management, General Land Office Records for sections sixteen and thirty-six:

T 27 N R 34 E Sec. 16 N2, E2SE4 , T 28 N R 33 E Sec. 36 All , T 28N R 34 E Sec. 36 E2E2

Patent Number 1117278, page one : under provisions of Act of Congress approved June 21, 1934 (48 Stat. 1185) by Act approved January 25, 1927, upon the acceptance of the Plats of Survey by the General Land Office as stated herein

Page 11: Township twenty-eight north of Range thirty-three east. The east half of the east half and the west half of the southwest quarter of Section thirty-six. Plats accepted June 27, 1918

Page 14: Township twenty-eight north of Range thirty-four east. The Sections sixteen and thirty-six. Plats accepted March 15, 1922.

Page 16: subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs,

laws, and decisions of courts. Dated twenty-second day of September, 1943.

Patent Number 1117726, page one: under the provisions of the Act of Congress approved June 21, 1934 (48 Stat. 1185), by the Act approved January 25, 1927 (44 Stat. 1026), upon the acceptance of the Plats of Survey by the General Land Office as stated herein

Township twenty-seven North of Range thirty-four east. The north half and the east half of the southeast quarter of Section sixteen. Plat accepted March 15, 1922.

Page 2: subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts. Dated fourth of January, 1994.

Interior Decision Arizona states that the state takes title encumbered with vested and accrued water rights that pre-date issuance of land patent. United States General Land Office Historical indexes show 'title to vest to state; subject to prior rights.'

"Questions And Answers On The United States Public Land Laws And Procedure" by Joseph R. Rohrer, L.L.M. of the General Land Office, 1912:

"Public lands" or "public domain," are synonymous terms used to describe lands subject to sale or other disposal under general law. (Newhall v Sanger, Barker v Harvey)

Lands considered surveyed under the public land laws when surveyor has finished his work on the ground? No; the surveyor's work must first be approved by the surveyor general and then accepted by the Commissioner of the General Land Office. Lands are not surveyed or identified or subject to entry until approval of survey and filing of the plat by the Commissioner's direction in the local land office.

Title to school lands: If the land has been surveyed, upon admission of the state; if not surveyed at time of admission of the state, then not until they are surveyed, for until surveyed the sections and townships have no existence as such.

What is meant by (1) "vacant land open to settlement;" (2) "unreserved and unappropriated lands"? Land which is unoccupied; the term does not describe land merely "not taken or appropriated of record" (2) Lands which are not included within any military, Indian, or other reservation, or in a national forest, or in a withdrawal by the government for reclamation or other purposes, or which are not covered or embraced in any entry, location, selection, or filing which withdraws them from public domain

The following is in the Montana Code Annotated:

75-7-104. Vested water rights preserved. This part shall not impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States. **History:** En. 26-1516 by Sec. 7, Ch. 463, L. 1975; R.C.M. 1947, 26-1516.

87-5-506. Vested water rights preserved and emergency actions excepted. This part shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States or operate in emergencies such as floods, ice jams, or other conditions causing emergency handling. **History:** En. Sec. 6, Ch. 10, L. 1965; R.C.M. 1947, 26-1506.

2) The Priority Affidavit was filed with the Clerk and Recorder in accordance with Article IX, Section 3 (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. That present system was filing notice with the Clerk and Recorder of the county where the property was located and publishing notice.

I have provided this information as well as the pertinent parts of Water Court case 41-G to DNRC Director Sexton and there are exhibits in affidavits of Maxine Korman recorded in the records of Valley County Clerk and Recorder . The Director ignored this and returned all the information to me.

Under the maxim of “ a thing similar is never exactly the same”, a Statement of Claim is not a Declaration of Vested Water Right. The intent of filing the Priority Affidavit was to assert ownership of R.S. 2339 vested and accrued water rights. Neither the BLM, nor the DNRC objected to our notices in the Glasgow Courier. A Statement of Claim created by the legislature of the state of Montana is not a granting act of the federal government and cannot and does not convey the fee to what was originally public domain as R.S. 2339 originally conveyed the fee to our predecessors, the early day stockmen, who first put the water to beneficial use of stockwatering.

4) Ronnie Korman and Maxine Korman offer an affirmative defense for failure to file for those particular water rights that the Montana State Board of Land Commissioners DNRC Trust Land Management has filed claim.

“ United States v. Murdock (U.S.C.A. 10th Cir. No. 95- 4071) said Murdock’s failure to act was “excusable” because he relied on what Navy personnel had told him. We did the same thing by filing only on patented land because we were following the information of DNRC employees. Information given was Montana law says we can’t file and , we are lessees and lessees can’t own water rights.. Correspondence of DNRC, affidavits of Ron Korman, Maxine Korman support the affirmative defense of Ron Korman and of Maxine Korman. We relied on their information and so we have an excusable defense.

We had no intention to forfeit or abandon any water rights that we knew were ours.

Abandoned property as defined by Ballentine's (3d. 1969) Property to which an owner has voluntarily relinquished all right, title, claim and possession with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not reclaiming future possession or resuming ownership, possession, or enjoyment. This is not the case with respect to these particular water rights. We have continued to try to file for vested water rights and the record of forms, correspondence and the citing of MCA 85-2-306(6)(d) show the DNRC has absolutely refused to allow us to file and have only accidentally accepted the latest filings and then attempted to reverse by issuing a refund since the DNRC had cashed the check.

The DNRC , DNRC Director Sexton and Legal Counsel Tim Hall have on multiple occasions acted to deceive us to have us rely on their statements or refuse to respond to certain of the questions of Ron Korman and Maxine Korman. This was done so we would voluntarily and unknowingly relinquish vested water rights on the aforementioned sections. . This choice of wording is deceptive and misleading. Ballentine's Law dictionary defines fraud as deceit, deception operating prejudicially on the rights of another, and so intended, by inducing him to part with property or surrender some legal right (23 Am Jur 2d s 2)

85-2-306. Exceptions to permit requirements 6) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

(d) 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 and that is 40 acres or larger .

MCA 85-2-306(6)(d) is a bar to filing for future impoundments of the original appropriative rights and is in contradiction with *Gila Water Co. v. Green*, 27 Ariz.318:That the vested and accrued water right carried with it the future right of impoundment and is a retroactive alteration of the vested and accrued appropriative right. As these are vested rights that arose on the public domain and that pre-date the state receiving land patent, then : *Fallini v. Hodel*, 963F. 2D 275 (1992) that BLM's decision effected a regulatory takings of Fallinis' water rights in violation of the Fifth Amendment is a similar analogy. These are vested rights protected under the Federal Constitution and the United States Supreme Court held in *Miranda v. Arizona* that no state may legislate or make rules that abrogate rights secured under the Constitution. The Vested Rights Doctrine in Black's law dictionary, Constitutional law. The rule that the legislature cannot take away a right that has been vested by a court's judgement; specif., the principle that it is beyond the province of Congress to reopen a final judgement issued by an Article III court.

To: Kim Overcast, New Appropriations Manager

From: Tim D. Hall, Chief Legal Counsel ~ *t'*

Date: December 21.2007

Re: Stockwater Pits and Reservoirs - Pre-1973 and Post-1973

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. § 85-2w222. 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 85w2-212. 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.

Form 627 for EXEMPT Rights was discontinued as of Jan. 1, 2009. A review of United States Supreme Court and other court cases as well as the elements of the

Prior Appropriation doctrine and appropriative right show that MCA 85-2-306(6)(d) as applied to lands that are not patented parcels but now state grant sections and lands that were originally public domain to which no homestead patent issued, but are lands the United States Federal Court of Claims recognize as "fee" lands by virtue of ownership of vested stockwater rights is retroactive alteration of the Prior Appropriation Doctrine and vested and accrued appropriative rights by application of the riparian doctrine and retroactive alteration of rights protected by the Federal Constitution by Montana Water Use Act . The appropriative right originated on public domain , independent of land ownership.

R.S. 2339 is a granting act of the Federal Congress. A confirmation by a law is as fully for all intents and purposes, a grant as if it contained in terms a grant de novo. Act of Congress as Grant- Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law.

A grant of this character is at least equivalent to a patent; in some respects, it has been regarded as a higher evidence of title than a patent, since it is a direct grant of the fee by the United States.

[Am Jur Public lands, Rohrer General Land Office, citing Deseret Salt Co. v. Tarpey]

(New Orleans v. The United States, 35 U.S. 662, 1836: It is enough for this court in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government)

1-1-205. Terms relating to property and decedents' estates. Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(4) "Real property" means lands, tenements, hereditaments, and possessory title to public lands.

7-2-2510. Effect of name change on vested rights and existing laws. (1) The change of name provided for in this part shall not impair or work a forfeiture or alteration of any vested rights.

81-5-101. Moving livestock from customary range forbidden. (1) A person who willfully moves or causes to be moved any cattle, horses, mules, swine, llamas, alpacas, bison, or sheep from their owner's customary range without the permission of the owner shall upon conviction be punished by imprisonment in the county jail not exceeding 6 months or by a fine not exceeding \$500, or both.

Organic Act of Territory of Montana, sec. 6. Provided, however, That in all the claims of vested rights thereunder, the party claiming the same shall not, by reason of anything in this section contained, be precluded from making and testing said claim in the courts of said territory

Public Lands; Definitions and Distinctions.- The term "public land" usually signifies such government or state land as is open to public sale or other disposition under general laws. Land to which any claims or rights of others have attached does not fall within this designation. Vacant lands are such as are absolutely free, unclaimed and unoccupied. [Am Jur 1d. Public Lands] Additionally, Joseph R. Rohrer, L.L.M., General Land Office, "Questions and Answers On The United States Public Land Laws and Procedures", 1912 : "Define "public lands". "Public lands" or "Public domain" are synonymous terms used to describe lands subject to sale or other disposal under general law. (Newhall v. Sanger, 92 U.S., 761-763, Barker v .Harvey, 181 U.S. 481-490) Bouvier's Law Dictionary A Concise Encyclopedia of The Law Public Lands. Such lands as are subject to sale or other disposition by the United States, under general laws. Newhall v. Sanger, 92 U.S. 761, Bardon v. R. Co., 145 U.S. 535.

Ballentine's 1916 Public lands. Such lands as are open to sale or other disposition under general laws

Ballentine's 3d. 1969 Public domain The public lands of the United States or a state. *Barker v. Harvey*, 181 U.S. 481, 490. Public land Land of the United States or a state, particularly land open to public sale or other disposition under general laws. A term of varying senses, depending largely on the context in which it appears and the special circumstances of the case. *Kindred v. Union Pac. R. Co.* 225 U.S. 582. Federal lands. See public lands.

Black's law dictionary 7. 1999 Public land. Unappropriated land belonging to the federal or a state government; the general public domain

Public domain. Government owned land

The Water Court has jurisdiction over the issues raised:

3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under [85-2-309](#) or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly. (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under [85-2-309](#) or concerning the determination and interpretation of existing water rights within the judge's division as specified in [3-7-102](#) that are considered filed in or transferred to a judicial district wholly or partly within the division.

(4) The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree. **History:** En. Secs. 1, 6, Ch. 697, L. 1979; amd. Sec. 4, Ch. 80, L. 1981; amd. Sec. 4, Ch. 596, L. 1985; amd. Sec. 4, Ch. 604, L. 1989; amd. Sec. 1, Ch. 174, L. 1997

85-2-216. Venue for water rights determinations. All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [85-2-212](#). **History:** En. Sec. 6, Ch. 697,

L. 1979 **85-2-222. Exemptions.** Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452 Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of [85-2-221\(1\)](#). **History:** En. Sec. 11, Ch. 697,

Prior Montana water law :

89-801. (7093) What waters may be appropriated. The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

Appropriation Made on Public Domain by Settler

A settler on lands which were a part of the public domain could make a valid appropriation of water thereon. Galahan v. Lewis, 105 M 294, 300, 72 P 2d 1018.

6) Ca. Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) The Act of 1866 and Desert Land Act had effectively severed the title to all non-navigable water from the public domain. The prior Montana water law, the waters appropriated for stockwatering of any stream, ravine, coulee, spring, lake or other natural source of supply are appropriative rights, Revised Statute 2239 vested and accrued water rights.

Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 171-173, 295 Pac. 772 (1931) The general rule that to constitute a valid appropriation of streamflow there must be an actual diversion, does not apply to an appropriation for watering livestock in natural watering places formed by natural depressions [Water Rights Laws In The Nineteen Western States, 1977, Wells Hutchins, published by United States Department of Agriculture] The exempt water right classification operates in such a way as to make them not exist:

Chief Water Judge Loble to the EQC that the exempt rights cannot be brought into the water court or any court in the state; that exempt rights do not show up on a decree. Maxims in Montana Code Annotated : “That which appears not to exist is to be treated as if it does not exist. “ The original appropriative rights for the beneficial use of stockwatering, created, recognized, sanctioned and confirmed according to local law, custom and decisions of courts will not be able to be proven to exist, will not be defensible and will not be enforceable. Likewise, the conveyance of the fee to the use of those lands by virtue of the appropriative stockwatering rights will not be able to be proven to exist, will not be defensible and will not be enforceable.

Hutchins Water Rights Laws, page 330 with respect to the Final Decree:
“ On the basis of the preliminary decree and any hearing that may have been held, the court shall enter a final decree. If no request for a hearing was filed, the preliminary decree automatically becomes the final decree. The final decree shall include, among other things, the name of the owner of the right, the amount of water, the date of priority, the purpose and place of use, a description of the land to which the right is appurtenant, the source of the water, the place and means of diversion, and the approximate time of year the water will be used.

The final decree in each existing right determination is final and conclusive as to all existing rights in the source or area under consideration. After the final decree there shall be no existing rights to water in the area or source under consideration except as stated in the decree. On the basis of the final decree, the Department shall issue a certificate of water right to each person decreed an existing right.

Forfeiture and Abandonment of Grants or Rights Thereunder. To create an abandonment of a claim, there must be not only an omission, but an intent to abandon. But a voluntary formal relinquishment restores the land to the public domain (Am Jur 1d. Public lands)

Exempt, as in free of an obligation which is binding on others, freedom or release from duty or obligation not granted to others (Ballentines 3d. 1969) however Am Jur (1d) Exemption Not a vested right, but one the validity of which is to be determined in most instances by conditions which exist at the time when the privilege is claimed. It is a right, moreover, which is purely personal to the one in whose favor it exists, and he may waive it or be estopped to assert it

Articles in the Prairie Star and Agri-News quoting Department of Natural Resources Director Mary Sexton in March 16, 2007 Agri-News Montana Legislative Update: Vested water on federal lands : “We’re buying time and process with the interim study. We need a thorough review on this issue. An interim study will give us time for that thorough review,” says DNRC Director Mary Sexton (referring to exempt water rights.)

DNRC attorney Tim Hall, in the same article :” Exemption left such water right holders seemingly without a court to validate their rights. It is important to find a court to get these rights adjudicated. We have to find a way to get these claims through the court system, whether that is the Water Court that will eventually disappear, or District Court.”

With respect to HB711, the bill To Recognize Vested Water Rights on Federal Land, we would ask the court to take notice that Ron Korman and Maxine Korman initiated that legislation after requesting that the EQC evaluate Montana’s water law in light of the United States Federal Court of Claims decision in Hage v. U.S. where the court found that Hage owned vested water rights on his grazing allotments and because of those vested water rights that he owned the “fee” to those lands that those waters serviced. Kormans appeared at that EQC meeting and submitted written testimony and continued to bring information and questions to the various interim committees since.

Representative Rick Jore didn’t think that the law as it is follows Montana’s Constitution and he thought we were right so he carried the bill HB711 “To Recognize Vested Water Rights on Federal Land” for us. The week before the bill hearing, the DNRC lawyer, Tim Hall called several times and talked to me. He kept trying to get me to agree to call the water rights “existing” because he said that’s what they are. He kept telling me that I did not want ‘vested’ because “vested” didn’t mean what I thought it meant and didn’t do what I thought it did. [Affidavit of Maxine Korman] He also faxed us a 30 page draft of his bill.

Prairie Star, June 22, 2007, Director Sexton :” As Montana continues to adjudicate its water rights, those with stock ponds are starting to question whether or not they should file for adjudication on the water in their ponds. The question is where do

you want to do that and who is going to pay for the processing,” said Sexton. “The rights need to be defined and put in the process to be implemented before the final decrees.”

Mr. Hall had written an amicus brief that Director Sexton provided . I have submitted written request to Director Sexton three times about the following:

I had asked you for any and all documents related to and explaining why Montana, modeling its water law after Idaho in creating a classification of exempt rights, has been allowed to proceed in a state-wide adjudication while being in violation of the McCarran Amendment.

The DNRC brief stated Idaho had been challenged about “exempt rights” by the federal government because “exempt rights” violated the federal McCarran Amendment and not all parties and not all water rights were a part of the adjudication. The federal government pointed out that this is not then a general stream adjudication.

The DNRC brief then goes on to say that the federal government has not challenged Montana’s “exempt rights” and adjudication, to the DNRC’s knowledge.

I am requesting any and all documents and records explaining how and why Montana is being allowed to violate the federal McCarran Amendment, even as neighboring state Idaho was not and had to remedy its law.

Director Sexton, if you do not respond and produce the requested records and documents within ten business days of your receipt of this certified letter, I will interpret that as your intent to commit fraud by deliberately withholding material information that is adverse to my interests.

The Director has never provided any response or acknowledgement.

7) I had also submitted requests to the Bureau of Land Management State office in Billings

Theresa M. Hanley responded : “Your July 13, 2009 letter requests information about legal strategies implemented by the United States in the Montana water rights adjudication. The United States is represented by the Department of Justice in the Montana water adjudication. Litigation strategy documents are not public records and are not available under your request.”

State Director Terland responded to my request and stated that the BLM filed claims for its uses of all known water sources on public lands. With respect to the exempt rights and the McCarran Amendment: in the Idaho adjudication, the Department of Justice and the State of Idaho entered into a stipulation that specified how these “de minimus” livestock and domestic water rights would be handled to resolve the McCarran adequacy issue. The statutes governing the adjudication in Montana and Idaho are state laws and are different. Whether the Montana adjudication would meet the standards of the McCarran amendment is not a decision that would be made by the BLM.

With respect to “exempt”, “etheric” water rights, water rights in a ‘state of mystery’:

Excerpted from

Adjudication of the Waters of the Monitor Valley. State of Nevada Office of The State Engineer:

Citing U.S. v. City and County of Denver

"Until the enactment of the McCarran Amendment, [footnote omitted] however, the prior appropriation system in Colorado could not be applied to the adjudication or administration of water rights of the United States, because Congress had not consented to the determination of such water rights by state courts. As a sovereign, the United States was privileged to withhold such consent."²⁰

[T]his Court noted that the sovereign immunity of the United States created an anomaly in the adjudication of water rights:

"We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure - and this is equally true from the standpoint of the United States as well as Colorado and its citizenry." (Citation omitted.)

¹⁹43 U.S.C. § 666.

²⁰U.S. v. City and County of Denver, 656 P.2d 1, 8 (Colo. 1982).

Just as the federal sovereign claims which are nowhere listed and are etheric and in an uncorrelated state of mystery, so are the legislatively created "exempt" rights. If forced to accept the classification of exempt, for originally RS 2339 vested and accrued appropriative rights, as previously stated, these will be non-existent rights. These rights pre-date state land patent and due to the granting act of the federal Congress, these rights secured the ownership of the fee to the lands these waters service. These waters have been put to beneficial use as part and parcel of stockgrazing from time immemorial. Ron Korman and Maxine Korman have filed in the records Valley County Clerk and Recorder the Declaration of Acceptance of Land Patent that shows acceptance of the lands and appurtenances as heirs and assigns to the original patentee. The predecessors full vested legal title pre-dates the state receiving land patent and the Prior Appropriation Doctrine originated as one who first appropriated water on what was originally public domain acquired an exclusive prior right. We are asserting ownership of vested water rights that originated on Sections 16 and 36 that were at first beneficial use, public domain. Montana Use Act, 85-2-306(6)(d) is an attempt to retroactively extinguish the Prior Appropriation Doctrine, retroactively extinguish vested water rights and apply the riparian doctrine to those sections.

'use' generally implies commercial for profit industrial or artificial person business activity under license from some govt agency that has statutory power & duty to regulate that kind of person & that kind of USE. some abbreviated definitions of USE websters 1828:act of handling or employing in any manner & any purpose,but especially for a profitable purpose & use is 2 kinds:that which employs a thing without destroying it;or the employment of a thing which destroys or wastes it as the use of water for turning a mill. Ballentines 1969 beneficial ownership recognized in equity (equitable characterization of a right which should be recognized even tho it is not a legal right or title) Equity(term having variety of meanings)an interest in property which a court of equity will protect;a title which is not a legal title & is enforceable only in a court of equity,title derived thru contract or relation & based on recognized equitable principles*EQUITABLE WASTE acts which at law would not be deemed waste but in court of equity are regarded as waste from their manifest injury although such acts aren't inconsistent with legal rights of the party who commits them.Black's:application or employment of something esp long-continued for purpose for which it is adapted. conditional use a property subject to special controls and conditions. a conditional use is one that is suitable to a zoning district,but not necessarily to every location within that district

Ballentines 1916 vested right power one has to do certain acts or to possess certain things according to the law of the land.vested water right,see accrued water right.Ballentines 1969 vested right immediate fixed right of present or future enjoyment.vested estate absolute,unconditional and indefeasible interest. contingent right a right which depends on the performance of some condition or the happening of some event before some other event. expectant right (expectancies) mere possibility not coupled with an interest, something so inchoate as to have no attribute of property. Black's vested has become a completed,consummated right for present or future enjoyment & invest a person with full title to property.vested right a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. conditional right a right that depends on an uncertain event;a right that may or may not exist. expectant right a right that depends on continued existence of present conditions until some future event occurs;a contingent right.

Statement of Claim not a Declaration of Vested Water Right. "Exempt Water Right" not a vested right as a vested right cannot be taken without consent. We object to denial of right to claim as, recognition and adjudication of all vested water rights; (vested water rights pre-date Water Use Act) in what is supposed to be a general streamwide adjudication and we object to the retroactive alteration of the Prior Appropriation Doctrine- the ownership of water right independent of land ownership and conversion to application of riparian principle- ownership of water right must be same as ownership of land; as applied to these sections 16 and 36.

Supplement to Objection forms submitted by Ron Korman and Maxine Korman

MAXINE KORMAN - SUPPLEMENT TO NOTICE OF OBJECTION AND REQUEST
FOR HEARING MONTANA WATER COURT, LOWER MISSOURI DIVISION
BEAVER CREEK TRIBUTARY OF MILK RIVER – BASIN 40M

SUPPLEMENT TO OBJECTION FORMS TO
“STATEMENTS OF CLAIM” FOR VESTED WATER RIGHTS OWNED BY Ronnie
D. Korman and Maxine Korman

- 1) “Statement of Claim” 40M164811 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 2) “Statement of Claim” 40M164812 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 3) “Statement of Claim” 40M164813 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 4) “Statement of Claim” 40M164814 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 5) “Statement of Claim” 40M164815 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 6) “Statement of Claim” 40M164816 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 7) “Statement of Claim” 40M164817 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 8) “Statement of Claim” 40M164818 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 9) “Statement of Claim” 40M164819 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 10) “Statement of Claim 40M164820 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 11) “Statement of Claim” 40M164821 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT
- 12) “Statement of Claim” 40M164822 Stock Should be recognized and filed as a
DECLARATION VESTED WATER RIGHT

13) "Statement of Claim" 40M164823 Stock Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

14) "Statement of Claim" 40M164824 Domestic Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

15) "Statement of Claim" 40M164825 Domestic Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

16) "Statement of Claim" 40M164826 Irrigation-Flood Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

17) "Statement of Claim" 40M164827 Irrigation-Flood Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

18) "Statement of Claim" 40M164828 Irrigation-Flood Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

PROVISIONAL PERMIT:

40M46590 IRRIGATION-FLOOD, STOCK LARB CREEK Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

Predecessor in interest land patent case entry file shows entry in summer of 1914 on location on Larb Creek. Subsequent change in place of use, point of diversion, change in beneficial use not a change to the original priority date. Original priority date pre-dates passage of Montana Water Use Act

40M31620 RESERVOIR- IRRIGATION, STOCK Should be recognized and filed as a DECLARATION VESTED WATER RIGHT

Predecessor was putting the unnamed tributary of Larb Creek coulee waters to beneficial use for stockwatering and stockgrazing, beginning in the 1890's. Subsequent change in place of use, point of diversion, change in beneficial use not a change to the original priority date. Original priority date pre-dates passage of Montana Water Use Act

1) Ronnie Korman and Maxine Korman are objecting to the classification as "Statement of Claim", as these claims involve the Prior Appropriation Doctrine vested and accrued appropriative water rights that originated originally on public domain. The appropriative right is recognized as vested property and protected under the federal Constitution. [Water Rights in the Western States, Wiel, page 127]. These water rights should have been recorded as DECLARATION OF VESTED WATER RIGHT.

Ronnie Korman and Maxine Korman have recorded their DECLARATION OF ACCEPTANCE OF LAND PATENT as heirs and assigns to such legally described lands and appurtenances as described on the land patents. Land Patent case entry files for patentee Willis Hammond show construction of a reservoir for stock. This originated on what was originally public domain. This became a vested right upon issuance of Land Patent. Hammonds subsequently recorded a Declaration of Vested Groundwater Right according to prior Montana water law.

Land Patent case entry file for patentee Adlore Martin show construction of a stockwater reservoir. This originated on what was originally public domain. This became a vested right upon issuance of Land Patent.

Land Patent case entry file for patentee Edward Rath shows construction of a well. This originated on what was originally public domain. This became a vested right upon issuance of Land Patent.

Land Patent case entry file for John Petterson show construction of a well. This originated on what was originally public domain. This became a vested right upon issuance of Land Patent.

2) Ronnie Korman and Maxine Korman are entering their objections as Pro Se litigants, relying on *Caldwell v. Miller* (790 F. 2d 589, 595, 7th Cir. 1986) that Pro Se litigants are not held to the same stringent standards applied to formally trained members of the legal profession and are to be liberally construed. Additionally, *Haines v. Kerner*, (404 U.S. 519, 520-21, 1972) that Pro Se complaints are to be liberally construed and should be dismissed for failure to state a claim only if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

Ronnie Korman and Maxine Korman ask the court to accept the Priority Affidavit of Vested Water Rights, recorded in the Valley County, Montana Clerk and Recorder office and published for three consecutive weeks in the Glasgow Courier.

This was done for two reasons:

1) that although the Montana Supreme Court in *Mettler v. Ames Realty* stated that Montana is a Prior Appropriation Doctrine state and that the riparian doctrine was never suited to Montana, Title 85 Water Use does not recognize the vested water right, does not define the vested water right and makes no provision for recording and confirming the adjudication of the vested water right. 85-2-313 is the only mention of vested right

85-2-313. Provisional permit A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department. **History:** En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(4); amd. Sec. 8, Ch. 497, L. 1997.

Rev. Stats., sec 2339: “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; “

Rev. Stats., sec. 2340: “All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.” [Wiel, Water Rights in the Western States, 1908, pages 21, 22]

Definition – A water right of appropriation is real estate, independent of the ditch for carrying water, and independent of ownership or possession of any land, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose; and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water or in the channel of the stream [Wiel, page 129]

By the congressional acts, the government acquiesced; the kind of vested and accrued right grew up which the government by said acts of Congress promised to protect [Wiel, page 159]

Ballentines A Law Dictionary, 1916- Appropriated. Under constitutional provision, water held not appropriated until applied to beneficial use.

Vested water rights. See Accrued water rights.

Accrued water rights. Meaning within U.S. Rev. Stats., 2339, 2340, U.S. Comp. Stats. 1901, p. 1437, 7 Fed. Stat. Ann., pp. 1090, 1096, defined where jurisdiction had not recognized doctrine of prior appropriation.

Accrue. To accumulate and become a part of something; to ripen or spring into existence, as a right of action.

Ballentine’s 3d., 1969 Accrue. To become complete by development.

Vested water rights See accrued water rights.

Accrued water rights. Rights in waters which have vested prior to the adoption or enactment of a constitutional or statutory provision affecting the right of appropriation (56 Am J 1st Wat sec 295)

The word existing- To be; to have being; to come into existence; to have existence. Existing. Existent; in existence.

Existing equity. An existing right enforceable in equity, if not at law

Existing use. A familiar term in zoning ordinances and regulations usually employed in characterizing a nonconforming use excepted from the application of the ordinance or regulation, and meaning an actual, as distinguished from a mere contemplated, use, existing at the time of the ordinance or the passage of the regulation, but not necessarily a use in actual operation at that time or a use which utilizes the entire tract involved.

Use. A beneficial ownership recognized in equity

Webster's 1828 dictionary had defined vest as to put in possession of; to come or descend to; to take effect as a title or a right; accrue as Something that accedes to, or follows the property of another; to be added.

Stroud's Judicial Dictionary (1d. 1890) Accrue- Title "accrues" when the instrument creating it, or the fact constituting it, first becomes operative

Vest- To 'vest', generally means to give the property in; it is a word which has acquired a definite meaning, carrying with it definite legal consequences. As applied to estates in land, to vest, signifies the acquisition of a portion of the actual ownership; the acquisition, not of an estate in possession, but of an actual estate.

Water Rights: Division of Water Resources - U.S. Fish and Wildlife Service

ADJUDICATION OF WATER RIGHTS An adjudication is an administrative or judicial determination of all rights to use water in a particular stream system or watershed, to establish the priority, point of diversion, place and nature of use and the quantity of water used among the various claimants. These stream or watershed adjudications can be initiated by a water user (including the United States) or by the State. The United States may be joined in an adjudication if the requirements of the McCarran Amendment are met.

APPROPRIATION DOCTRINE Water laws developed in the arid Western States--where water supplies are limited and often inadequate--are known as the Appropriation Doctrine. This doctrine is essentially a rule of capture, and awards a water right to a person actually using the water. It has two fundamental principles: First in time of use is first in right (i.e., the earliest appropriator on a stream has the first right to use the water), and Application of the water to a beneficial use is the basis and measure of the right.

BENEFICIAL USE Beneficial use is a cardinal principle of the Appropriation Doctrine. It has two components: the nature or purpose of the use and the efficient or non-wasteful use of water. State constitutions, statutes, or case law may define uses of water that are beneficial, those uses may be different in each State, and the definition of what uses are beneficial may change over time. The right to use water established under State law may be lost if the beneficial use is discontinued for the prescribed period of time (see Abandonment and Forfeiture).

VESTED RIGHT An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.

BLM.gov Western States Water Laws **Prior Appropriation:**

The prior appropriation doctrine, or "first in time - first in right", developed in the western United States in response to the scarcity of water in the region. The doctrine evolved during the California gold rush when miners in California needed to divert water from the stream to locations where it was needed to process ore. Customs and principles relating to water diversion developed in the mining camps, and disputes were resolved by simple priority rule. According to the rules of prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use. In other words, those with earliest priority dates have the right to the use of that amount of water over others with later priority dates

There are four essential elements of the prior appropriation doctrine: Intent, Diversion, Beneficial Use, and Priority In all states with the prior appropriation doctrine, the acquisition of water requires that the appropriator demonstrate an intent to appropriate the water, divert the water, and apply it to beneficial use. Historically, intent was indicated by on-the-ground acts such as site surveys, land clearing, preparation of diversion points, and most importantly, posting of notice. Today, however, intent is generally indicated by the application for a permit. Another essential component of a prior appropriation water right is diversion. Historically, a physical diversion of water was required in order to acquire a water right.

The final essential feature of the prior appropriation doctrine is the priority of a water right. As described above, the first appropriator on a water source has the right to use all the water in the system necessary to fulfill his water right. In western states, there are few restrictions on who can hold an appropriative water right. Therefore, both private and public entities hold rights. An appropriative right does not depend on land ownership, but some states do require that the water is appurtenant to the land on which it is used. In general, appropriative water rights are transferable property

State of New Mexico 72-1-3. Declaration of water rights vested prior to 1907 Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents

Nevada Revised Statutes: CHAPTER 533 - ADJUDICATION OF VESTED WATER RIGHTS; APPROPRIATION OF PUBLIC WATERS

NRS 533.085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water,
Blm.GOV Western States Water Law

Vested rights are rights that do not have to go through the application process. Vested rights to surface water are those rights for which the work to establish beneficial use was initiated prior to March 1, 1905 (the date of adoption of Nevada's water law). Vested rights from underground sources are those rights initiated prior to March 22, 1913, for artesian water and prior to March 22, 1939 for percolating water. The extent of all vested rights on a water source is determined through the adjudication process (see below).

South Dakota In 1907, the state legislature affirmed the doctrine of prior appropriation by enacting legislation authorizing the state engineer to administer appropriation of surface water. A major addition to the water rights laws occurred in 1955. Legislation was enacted making use of ground water also subject to the doctrine of prior appropriation. In addition, a provision was inserted allowing anyone to claim a vested water right for water uses predating March 2, 1955. The 1955 legislation also transferred the authority to issue water right permits from the state engineer to a citizen's board with a chief engineer making recommendations to the board.

Montana Water Use Act Part 1 General Provisions 85-2-101 (2)

(2) A purpose of this chapter is to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

[Water Rights Laws In The Nineteen Western States, Wells Hutchins, published by United States Department of Agriculture, page 329; "Existing right" means a right to the use of water which would be protected under the law as it existed prior to the effective date of this act." Mont. Rev. Codes Ann. 89-867(4) (Supp. 1973)]

(4) Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

(6) It is the intent of the legislature that the state, to fulfill its constitutional duties and to exercise its historic powers and responsibilities to its citizens living on and off reservations, comprehensively adjudicate existing water rights and regulate water use

within the state. It is further the legislature's intent that the state, to the fullest extent possible, retain and exercise its authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights, and resolve issues concerning its authority over water rights and permits, both prior to and after the final adjudication of water rights. In furtherance of this legislative intent:

(a) all permits issued are provisional, and it is the intent of the legislature that this status provide enforceable legal protection for existing rights; and

(b) any judicial determination of the state's authority to issue provisional permits on or off reservations should be decided in the appropriate state forum. **History:** En. Sec. 2, Ch. 452, L. 1973; R.C.M. 1947, 89-866; amd. Sec. 1, Ch. 497, L. 1997.

The 1972 Montana Constitution Article IX, Section 3 (1) states : All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. The language of R.S. 2339 appears on every land patent owned by Ronnie Korman and Maxine Korman and state land patents in Townships 27N, 28N Range 34 E.

The book “Questions and Answers On The United States Public Land Laws And Procedure”, by Joseph R. Rohrer, L.L.M. Of the General Land Office

What is meant by entry; what is its legal effect? The word is of generic signification and includes all methods of acquisition of the equitable title to public lands (public lands and public domain were synonymous :” Define “public lands”. “Public lands” or “public domain,” are synonymous terms used to describe lands subject to sale or other disposal under general law. Newhall v Sanger; Barker v Harvey) It is a contract with the government. By entry and payment, made in the district land office, the purchaser secures a vested interest in the property and the right to a patent therefor (Cornelius v Kessel; Parsons v Venske)

When does a claimant get legal title to land? When he has performed all the acts prescribed by the law, including the payment of the purchase price, he has the equitable title; but he does not get the legal title until patent issues and is recorded (Wirth v Branson; Moore v Robbins; U.S. v Schurz)

What is the nature of a patent to lands issued by the proper department of the government? It has a double aspect; the patent is to be regarded both as a deed of conveyance of the title and also as an adjudication of the right of the patentee (Beard v Federy)

The following is in the Montana Code Annotated:

75-7-104. Vested water rights preserved. This part shall not impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States. **History:** En. 26-1516 by Sec. 7, Ch. 463, L. 1975; R.C.M. 1947, 26-1516.

The following is in the Montana Code Annotated:

87-5-506. Vested water rights preserved and emergency actions excepted. This part shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States or operate in emergencies such as floods, ice jams, or other conditions causing emergency handling. **History:** En. Sec. 6, Ch. 10, L. 1965; R.C.M. 1947, 26-1506.

2) The Priority Affidavit was filed with the Clerk and Recorder in accordance with Article IX, Section 3 (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. That present system was filing notice with the Clerk and Recorder of the county where the property was located and publishing notice.

I have provided this information to DNRC Director Sexton and there are exhibits in affidavits of Maxine Korman recorded in the records of Valley County Clerk and Recorder .

Under the maxim of “ a thing similar is never exactly the same”, a Statement of Claim is not a Declaration of Vested Water Right and as evidenced by the Provisional permit section in the Montana code, a Provisional permit is not a vested right. These are retroactive alterations to Revised Statute 2339 vested and accrued appropriate water rights that pre-date Montana Water Use Act. A Statement of Claim, Provisional permit, or “Exempt right” created by the legislature of the state of Montana is not a granting act of the federal government and cannot and does not convey the fee to what was originally public domain as R.S. 2339 originally conveyed the fee to our predecessors, the early day stockmen, who first put the water to beneficial use of stockwatering.

The intent of filing the Priority Affidavit was to assert ownership of R.S. 2339 vested and accrued water rights. Neither the BLM, nor the DNRC objected to our notices in the Glasgow Courier.

A Statement of Claim created by the legislature of the state of Montana is not a granting act of the federal government and cannot and does not convey the fee to what was originally public domain as R.S. 2339 originally conveyed the fee to our predecessors, the early day stockmen, who first put the water to beneficial use of stockwatering.

We have continued to try to file for vested water rights and the record of forms, correspondence show the DNRC has absolutely refused to allow us to file. The DNRC , DNRC Director Sexton and Legal Counsel Tim Hall have on multiple occasions acted to deceive us to have us rely on their statements or refuse to respond to certain of the questions of Ron Korman and Maxine Korman.

This was done so we would not voluntarily and unknowingly relinquish vested water rights in an uninformed exchange for some type of equitable right.

Ballentine's Law dictionary defines fraud as deceit, deception operating prejudicially on the rights of another, and so intended, by inducing him to part with property or surrender some legal right (23 Am Jur 2d s 2)

With respect to those appropriative rights now on patented lands that were originally created on public domain, *Gila Water Co. v. Green*, 27 Ariz.318:That the vested and accrued water right carried with it the future right of impoundment and is a retroactive alteration of the vested and accrued appropriative right.

. These are vested rights protected under the Federal Constitution and the United States Supreme Court held in *Miranda v. Arizona* that no state may legislate or make rules that abrogate rights secured under the Constitution. The Vested Rights Doctrine in Black's law dictionary, Constitutional law. The rule that the legislature cannot take away a right that has been vested by a court's judgement; specif., the principle that it is beyond the province of Congress to reopen a final judgement issued by an Article III court.

. The appropriative right originated on public domain , independent of land ownership.

R.S. 2339 is a granting act of the Federal Congress. A confirmation by a law is as fully for all intents and purposes, a grant as if it contained in terms a grant de novo. Act of Congress as Grant- Every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law.

A grant of this character is at least equivalent to a patent; in some respects, it has been regarded as a higher evidence of title than a patent, since it is a direct grant of the fee by the United States.

Am Jur Public lands, Rohrer General Land Office, citing *Deseret Salt Co. v. Tarpey*] -10-

The Water Court has jurisdiction over the issues raised:

3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under [85-2-309](#) or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly. (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under [85-2-309](#) or concerning the determination and interpretation of existing water rights within the judge's division as specified in [3-7-102](#) that are considered filed in or transferred to a judicial district wholly or partly within the division.

(4) The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree. **History:** En. Secs. 1, 6, Ch. 697, L. 1979; amd. Sec. 4, Ch. 80, L. 1981; amd. Sec. 4, Ch. 596, L. 1985; amd. Sec. 4, Ch. 604, L. 1989; amd. Sec. 1, Ch. 174, L. 1997

85-2-216. Venue for water rights determinations. All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in [85-2-212](#). **History:** En. Sec. 6, Ch. 697, L. 1979

Prior Montana water law :

89-801. (7093) **What waters may be appropriated.** The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

Appropriation Made on Public Domain by Settler

A settler on lands which were a part of the public domain could make a valid appropriation of water thereon. *Galahan v. Lewis*, 105 M 294, 300, 72 P 2d 1018.

Later water law, Montana Water Use Act Exemptions. Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452 Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of [85-2-221\(1\)](#). **History:** En. Sec. 11, Ch. 697,

Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 171-173, 295 Pac. 772 (1931) The general rule that to constitute a valid appropriation of streamflow there must be an actual diversion, does not apply to an appropriation for watering livestock in natural watering places formed by natural depressions [Water Rights Laws In The Nineteen Western States, 1977, Wells Hutchins, published by United States Department of Agriculture] The exempt water right classification operates in such a way as to make them not exist:

Chief Water Judge Loble to the EQC that the exempt rights cannot be brought into the water court or any court in the state; that exempt rights do not show up on a decree. Maxims in Montana Code Annotated : “That which appears not to exist is to be treated as if it does not exist. “

The original appropriative rights for the beneficial use of stockwatering, created, recognized, sanctioned and confirmed according to local law, custom and decisions of courts will not be able to be proven to exist, will not be defensible and will not be enforceable. Likewise, the conveyance of the fee to the use of those lands by virtue of the appropriative stockwatering rights will not be able to be proven to exist, will not be defensible and will not be enforceable.

Exempt, as in free of an obligation which is binding on others, freedom or release from duty or obligation not granted to others (Ballentines 3d. 1969) however Am Jur (1d) Exemption Not a vested right, but one the validity of which is to be determined in most instances by conditions which exist at the time when the privilege is claimed. It is a right, moreover, which is purely personal to the one in whose favor it exists, and he may waive it or be estopped to assert it

Hutchins Water Rights Laws, page 330 with respect to the Final Decree:
" On the basis of the preliminary decree and any hearing that may have been held, the court shall enter a final decree. If no request for a hearing was filed, the preliminary decree automatically becomes the final decree. The final decree shall include, among other things, the name of the owner of the right, the amount of water, the date of priority, the purpose and place of use, a description of the land to which the right is appurtenant, the source of the water, the place and means of diversion, and the approximate time of year the water will be used.

The final decree in each existing right determination is final and conclusive as to all existing rights in the source or area under consideration. After the final decree there shall be no existing rights to water in the area or source under consideration except as stated in the decree. On the basis of the final decree, the Department shall issue a certificate of water right to each person decreed an existing right.

Articles in the Prairie Star and Agri-News quoting Department of Natural Resources Director Mary Sexton in March 16, 2007 Agri-News Montana Legislative Update: Vested water on federal lands : "We're buying time and process with the interim study. We need a thorough review on this issue. An interim study will give us time for that thorough review," says DNRC Director Mary Sexton (referring to exempt water rights.)

DNRC attorney Tim Hall, in the same article : " Exemption left such water right holders seemingly without a court to validate their rights. It is important to find a court to get these rights adjudicated. We have to find a way to get these claims through the court system, whether that is the Water Court that will eventually disappear, or District Court."

Prairie Star, June 22, 2007, Director Sexton :” As Montana continues to adjudicate its water rights, those with stock ponds are starting to question whether or not they should file for adjudication on the water in their ponds. The question is where do you want to do that and who is going to pay for the processing,” said Sexton. “The rights need to be defined and put in the process to be implemented before the final decrees.”

Mr. Hall had written an amicus brief that Director Sexton provided . I have submitted written request to Director Sexton three times about the following:

I had asked you for any and all documents related to and explaining why Montana, modeling its water law after Idaho in creating a classification of exempt rights, has been allowed to proceed in a state-wide adjudication while being in violation of the McCarran Amendment. The DNRC brief stated Idaho had been challenged about “exempt rights” by the federal government because “exempt rights” violated the federal McCarran Amendment and not all parties and not all water rights were a part of the adjudication. The federal government pointed out that this is not then a general stream adjudication. The DNRC brief then goes on to say that the federal government has not challenged Montana’s “exempt rights” and adjudication, to the DNRC’s knowledge.

I am requesting any and all documents and records explaining how and why Montana is being allowed to violate the federal McCarran Amendment, even as neighboring state Idaho was not and had to remedy its law.

Director Sexton, if you do not respond and produce the requested records and documents within ten business days of your receipt of this certified letter, I will interpret that as your intent to commit fraud by deliberately withholding material information that is adverse to my interests.

The Director has never provided any response or acknowledgement.

I had also submitted requests to the Bureau of Land Management State office in Billings Theresa M. Hanley responded : “Your July 13, 2009 letter requests information about legal strategies implemented by the United States in the Montana water rights adjudication. The United States is represented by the Department of Justice in the Montana water adjudication. Litigation strategy documents are not public records and are not available under your request.”

State Director Terland responded to my request and stated that the BLM filed claims for its uses of all known water sources on public lands. With respect to the exempt rights and the McCarran Amendment: in the Idaho adjudication, the Department of Justice and the State of Idaho entered into a stipulation that specified how these “de minimus” livestock and domestic water rights would be handled to resolve the McCarran adequacy issue. The statutes governing the adjudication in Montana and Idaho are state laws and are different. Whether the Montana adjudication would meet the standards of the McCarran amendment is not a decision that would be made by the BLM.

With respect to "exempt", "etheric" water rights, water rights in a 'state of mystery':

Excerpted from

Adjudication of the Waters of the Monitor Valley. State of Nevada Office of The State Engineer:

Citing U.S. v. City and County of Denver

"Until the enactment of the McCarran Amendment, [footnote omitted] however, the prior appropriation system in Colorado could not be applied to the adjudication or administration of water rights of the United States, because Congress had not consented to the determination of such water rights by state courts. As a sovereign, the United States was privileged to withhold such consent."²⁰

[T]his Court noted that the sovereign immunity of the United States created an anomaly in the adjudication of water rights:

"We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure - and this is equally true from the standpoint of the United States as well as Colorado and its citizenry." (Citation omitted.)

¹⁹43 U.S.C. § 666.

²⁰U.S. v. City and County of Denver, 656 P.2d 1, 8 (Colo. 1982).

Just as the federal sovereign claims which are nowhere listed and are etheric and in an uncorrelated state of mystery, so are the legislatively created "exempt" rights. If forced to accept the classification of exempt, for originally RS 2339 vested and accrued appropriative rights, as previously stated, these will be non-existent rights; unable to be proven to exist, to defend and to enforce.

The word 'use' generally implies commercial for profit industrial or artificial person business activity under license from some governmentt agency that has statutory power & duty to regulate that kind of person & that kind of USE. that which employs a thing without destroying it; or the employment of a thing which destroys or wastes it as the use of water for turning a mill.

. Ballentines 1969 beneficial ownership recognized in equity (equitable characterization of a right which should be recognized even though it is not a legal right or title) Equity (term having variety of meanings) an interest in property which a court of equity will protect; a title which is not a legal title & is enforceable only in a court of equity, title derived thru contract or relation & based on recognized equitable principles*EQUITABLE WASTE acts which at law would not be deemed waste but in court of equity are regarded as waste from their manifest injury although such acts aren't inconsistent with legal rights of the party who commits them. Black's: application or employment of something esp long-continued for purpose for which it is adapted. conditional use a property subject to special controls and conditions. a conditional use is one that is suitable to a zoning district, but not necessarily to every location within that district

Ballentines 1916 vested right power one has to do certain acts or to possess certain things according to the law of the land. vested water right, see accrued water right. Ballentines 1969 vested right immediate fixed right of present or future enjoyment. vested estate absolute, unconditional and infeasible interest. contingent right a right which depends on the performance of some condition or the happening of some event before some other event. expectant right (expectancies) mere possibility not coupled with an interest, something so inchoate as to have no attribute of property. Black's vested has become a completed, consummated right for present or future enjoyment & invest a person with full title to property. vested right a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. conditional right a right that depends on an uncertain event ;a right that may or may not exist. expectant right a right that depends on continued existence of present conditions until some future event occurs ;a contingent right.

-VESTED RIGHT

It is **only a vested right** which cannot be taken away except by due process of law. *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N.W. 97 (1939); *Crump v. Guyer*, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331 (1916)

The word "property" as used in the Due Process Clause refers to vested rights, and there is no reference to mere concessions or privileges which may be bestowed or withheld at will. *Senior Citizens League v. Department of Social Sec. Of Wash.*, 38 Wash. 2d 142, 228 P.2d 478 (1951).

A mere subjective "**expectancy**" is **not an interest in property** protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570, 1 I.I.R. Cas. (SNA) 33 (1972).

To have a property interest in a benefit protected by procedural due process, **a person must have more than an abstract need or desire** for it, and he or she must have more than a unilateral expectation of it; in short, **he or she must have a legitimate claim of entitlement** to it.) *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548, 1 I.E.R. Cas. (SNA) 23 (1972).

Accordingly, the revocation of such qualified rights does not amount to deprivation of property without due process of law. *State v. Durein*, 70 Kan. 1, 78 P. 152 (1904).

(In recognition of the Commerce Clause of the US Constitution, it has often been declared that a state cannot make the payment of a license [permit] tax or the securing of a license [permit] a condition to carrying on interstate commerce and cannot tax the privilege of carrying on interstate business.)

The substantial **value of property lies in its use**; if the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right. *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).

The Constitutional right to acquire, possess and protect property is not limited to any particular **amount of property**. *Hamilton v. Williams*, 145 Fla. 697, 200 So. 80 (1941).

Under the constitutional provision that private property shall not be taken or damaged for public use without just compensation, **owner has absolute right to damages whenever his property is taken** or damaged for public use, and it is **immaterial** whether **the damages are ascertained before or after the injury, since such right is a 'Vested property right'** *People ex rel. O'Meara v. Smith*.

Vested:

Under the decisions of this state, **the word "vested"** has a well-understood meaning. It is **used to define an estate**, either present or future, the **title** to which has become **established in some person** or persons and **is no longer subject to any contingency**. *Snortum v. Snortum*, 193 N.W. 304, 305, 155 Minn. 230.

Vested and Accrued Right

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 right"** within Rev.St.U.8. §§ 2339,2340, 30 U.S.C.A. §§ 51, 52, which is superior to rights of subsequent entry-man and **carries with it right of way or easement for impounding water**. *Gila Water Co. v. Green*, 232 P. 1016, 1017, 27 Ariz. 318.

Vested Right

A **"vested right"** has been defined briefly as an immediate, fixed right of possession or future enjoyment. *Young v. Jones*, 54 N.E. 235, 236, 180 111. 216

A **"vested right" is property** which the **law protects**. *Hoelt v. Supreme Lodge Knights of Honor*, 45 P. 185, 186, 113 Cal. 91, 33 L.R.A. 174.

A "vested right" is absolute, complete and unconditional in itself. *State ex rel. Wayne County v. Hackmann*, 199 S.W. 990, 991, 272 Mo. 600.

A "vested right" is a right which **is fixed, unalterable, or irrevocable.** *Miller v. Johnstown Traction Co.*, 74 A.2d 508, 511, 167 Pa. Super. 22.

A "vested right" is power to do certain actions or possess certain things lawfully and is **substantially a property right** which may be created either by common law, statute or contract. *Scamman v. Scamman*, *Ohio Com.Pl*, 90 N.E.2d 617, 619.

A "vested right" is one which **is absolute, complete and unconditional** to exercise of which no obstacle exists and which is **immediate and perfect in itself and not dependent upon a contingency.** *Hutton v. Autoridad Sobre Hogares De La Capital, D.C. Puerto Rico*, 78 F. Supp. 988, 994, 999.

A "vested right" **is a property interest so substantial in character that its destruction or deprivation cannot be justified by the objectives in view.** *Vernon Manor Co-op. Apartments Section I, Inc. v. Salatino*, 178 N.Y. S.2d 895, 901, 15 Misc. 2d 491.

From the Paragon Foundation publication "The Loop" article by Mr. G.B. Oliver, Executive Vice President: "VESTED RIGHTS"

Justice William Paterson stated clearly in *Horn's Lessee v. Dorrance* (1775) "So that any law taking one person's freehold and vesting it in another without compensation must be seen as inconsistent with the principals of reason, justice and moral rectitude...

Contrary to the principals of social alliance in every free government."

Justice Joseph Story's opinion in *Wilkins v. Leland*:" The fundamental maxim of a free government seems to require that the rights of personal liberty and private property should be held sacred." The adoption of the Fourteenth Amendment served to strengthen the "vested rights" doctrine under federal Constitutional law.

CONSTITUTIONAL LAW [WIEL,2D.,1908]

p.72 : WATER PROPERTY OF THE PUBLIC OR STATE. Established either by judicial decision or statute or both, as an essential principle, that the water of all natural streams is the property of the public or of the State. All waters within the State are declared to be "property of the public" (or to "belong to the public") Montana Constitution, article 15.

p.73: The courts lean toward construing such a declaration as meaning, in an old phrase of the law, that waters are "publici juris," and free for all to take, under State police power regulation.

p.75 : the declaration that water is the property of the State: “Such rights are under the protection of the fourteenth amendment to the federal constitution, which protects property against all State action that does not constitute due process of law.”

p. 106: prior appropriator has a vested right that can be taken only on eminent domain proceedings and payment of compensation (denial of priority unconstitutional)

p. 217: State Engineer (administrative agency); United States circuit court has held an action by State Engineer in issuing permits to be void where his action injures existing appropriators, and that a permit issued by the State Engineer is of no avail if it is shown in court that the appropriation would injure prior appropriators. An injunction will be granted in spite of the permit. That the power of the State Engineer is open to collateral attack in court by injunction or other process as held in the Federal case, can hardly admit of doubt; for the statute certainly cannot constitutionally give him power to authorize interference with vested rights.

Water Rights in the Western States, Wiel, 3rd, 1911:pages 1101, 2. The general rule seems to be that the jurisdiction of water officials is over the ‘natural resources’, but it would seem they do not have jurisdiction over the water after it has been diverted. In an early Montana case it was held that a statute conferring on commissioners the power to apportion the water of any creek according to the legal rights of the parties is unconstitutional as conferring upon them judicial powers (Thorp v. Freed, 1 Mont. 651, per Knowles, J., and Thorp v. Woolman, 1 Mont. 168 That the powers are judicial)

p. 1103 VESTED RIGHTS PROTECTED. As is true of administrative officers generally, irrigation or water officials cannot authorize acts injuring existing owners; their action is invalid where it has that effect (Federal - Trade Dollar Co. v. Fraser, 148 Fed. 587; Waha Co. v. Lewiston Co., 158 Fed. 137) They cannot cut down vested rights. Their authorization cannot legalize a wrong upon existing claimants, nor abridge their rights. A permit is of no avail against existing owners with whose rights it conflicts. The effect of the State Engineer’s action upon vested rights is open to judicial inquiry in the Federal courts as well as the State courts.

p. 1105 DECISIONS OF WATER OFFICIALS NOT CONCLUSIVE UPON COURTS. Since the authority of the water officials is administrative and not judicial, and they have no power to impair vested rights, their decision as to what existing rights are is not conclusive. Their action based upon a mistaken interpretation of existing rights will be open to collateral attack in court, by injunction or other process, as will also the action of other parties whom they may have authorized or in whose favor they may have decided

p. 219: APPLICATION FOR PERMITS. Making filings of maps or applications does not alone constitute an appropriation, Filings under an unconstitutional statute are void. A verified statement filed and introduced in evidence is not evidence of title, and cannot be held to be constructive notice if the statute under which the same was filed has been declared unconstitutional.

p. 280 THE RIGHT IS INDEPENDENT OF MODE OF ENJOYMENT. By appropriating a stream the law has always considered that a right of property was conferred, and being property, the owner may enjoy it as he will, so long as he does no injury to others. The law, hence, has always regarded the right as independent of means or place or purpose of use or of point of diversion. The litigation upon this question has always been addressed to the contention that the right was limited to its initial mode of enjoyment, and that a change forfeits priority and can only be made by new appropriation. The decisions now passed into legislation, almost universally, and with but a few exceptions, decided against the contention, and have settled the rule that change of means, place, or purpose of use or of diversion does not forfeit priority. "A priority to the use of water is a property right which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the right of others. (Seven Lakes etc. Co. v. New Loveland etc. Co. Colo. 93 Pac. 485) (Wiley v. Decker, 11 Wyo. 496, 73 Pac. 210.) (Coffin v. Left Hand Ditch Co. 6 Colo. 443)

p. 311: Court Decrees.(Due Process) The Montana court has held that a decree cannot bind persons who were not parties to the action and who had no connection with the litigation.

The "Exempt Right" has converted a vested water right, a right that cannot be taken without consent, due process of law and just compensation to a non-existent barren right. The federal McCarran Amendment calls for all owners (parties) of water rights and all water rights to be accounted for and brought into an adjudication if the adjudication is to be considered a general streamwide adjudication when the federal government has water rights in that adjudication. The Montana legislatively created "Exempt 'Right'" denies those rights and the owners of those rights the right to appear in court and in a final decree. To quote Wiel:" this violates a rule "as old as the law, that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court" (Terrell v. Allison, 21 Wall.293, U.S. Sup. Ct. Rep.) A final decree cannot bind persons who were not allowed to be parties to the action (general streamwide adjudication) and who were denied connection with the litigation.

From page 166 SURFACE TRIBUTARIES. It is proper to look upon the stream as not merely consisting of the channel and flow, but as a composite body in which the upper branches and tributaries are an integral part. The right to these tributaries is then identical with the right to the stream, on the principle that the whole includes the sum of its parts. The appropriator of a stream has a right to its tributaries and to all its sources.

Under VESTED RIGHTS in the INDEX are the following: See Constitutional Law; Due Process of Law, appropriation is, reserved in land patents, State Engineer's interference with, "vested and accrued right" as used in Federal statutes. when appropriation becomes.

Wiel, 3rd, 1911, p. 1228 that it is a truism of law that an act of the legislature conflicting with constitutional provision must fall. All of the acts of the legislature regulating or attempting to regulate the public use of waters so appropriated are subordinate to the provisions of the constitution and to be valid, must be in harmony therewith.

Page 203, 2nd. Ed. See also Rossmiller v. State, 114 Wis. 169 where it was held among other things that the legislature has no such arbitrary power under our constitutional system, as that of changing the nature of the ownership of property by its mere fiat. It can no more accomplish that result in that way than it can change the laws of nature by legislative declaration.

The right to the use of the water as part of the land once vested in its private grantee (the grantee of the United States via Land Patent), the State has no power to divest him of that right except on due compensation. (Lux v. Haggin)

The legislatively created 'Statement of Claim' is not recognition, sanction and confirmation of prior perfected vested and accrued appropriative rights and is not DECLARATION OF VESTED WATER RIGHT. This is a retroactive legislative alteration of vested water rights. The legislatively created 'Provisional permit' is not recognition, sanction and confirmation of prior perfected vested and accrued appropriative rights. This is a retroactive legislative alteration of vested water rights. The legislatively created 'Exempt' "water right" is not recognition, sanction and confirmation of prior perfected vested and accrued appropriative rights and is not DECLARATION OF VESTED WATER RIGHT. This is a retroactive legislative alteration of prior perfected vested and accrued water rights.

We object to denial of right to claim as, recognition, sanction and confirmation and adjudication of ALL VESTED WATER RIGHTS (vested water rights pre-date Water Use Act) in what is supposed to be a general streamwide adjudication and we object to the retroactive alteration of the Prior Appropriation Doctrine.

Supplement to Objection Forms submitted by Ronnie Korman and Maxine Korman

Sept. 5, 2007
Ron and Maxine Korman
P. O. Box 162
Hinsdale, Mt. 59241

Director Mary Sexton
Department of Natural Resources and Conservation
1625 Eleventh Avenue
P.O.Box 201601
Helena, Mt. 59620-1601

Director Sexton,

We received your ½ page response of August 17 to our numerous previous requests to have our questions answered concerning our vested water rights. Your letter indicates “claimed exempt water rights.” Once again, we intend to make this perfectly clear that our interest is not in claiming exempt water rights. Our interest is in our ability to record and have our vested water rights recognized and protected in the water adjudication. Neither your comments, nor Mr. Hall’s five page memorandum addressed, nor answered any one of the questions that we had repeatedly asked to have answered on a point-by-point basis concerning our vested water rights. Based on the information that you sent, we must assume that you are telling us that at no time during Montana’s territorial or state history, anywhere within its boundaries, has there ever been a vested water right created, put to beneficial use?

We request and expect you to respond and clearly answer if this is the case or if our understanding is incorrect. As before, we request appropriate legal authority/citation supporting your answer. As before, we remind you of American Jurisprudence (63C Am. Jur. 2d) Public Officers and Employees, sec. 247: “fraud in its elementary common law sense of deceit – and this is one of the meanings that fraud bears (483 U.S. 372) in the statute. See *United States v. Dial*, 757 F.2d 163, 168 (7th Cir 1985)- includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public. You as a public official have a fiduciary duty to protect the interests of those you serve. Your failure to respond to our specific requests on a point-by-point basis is a breach of fiduciary duty. We also again, remind you of *U.S. v. Prudden*, 424 F.2d 1021 (5th Cir 1970) “Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.” With these facts in mind, we expect your unambiguous response to our very clear and straight-forward question within ten to fifteen business days of your receipt of our certified letter.

Sincerely,

Oct. 3, 2007
Ron and Maxine Korman
P. O. Box 162
Hinsdale , Montana 59241

Director Mary Sexton
Department of Natural Resources and Conservation
1625 Eleventh Avenue
P.O. Box 201601
Helena , Montana 59620-1601

Director Sexton,

We are enclosing a copy of our correspondence to you of September 5,2007. That correspondence served the purpose of specifically asking one question and specifically instructing you that we expected an answer from you to that question.

This is our SECOND REQUEST to have that question answered. We repeat the previous correspondence:

“We received your ½ page response of august 17 to our numerous previous requests to have our questions answered concerning our vested water rights. Your letter indicates “claimed exempt water rights.” Once again, we intend to make this perfectly clear that our interest is not in claiming exempt water rights. Our interest is in our ability to record and have our vested water rights recognized and protected in the water adjudication. Neither your comments, nor Mr. Hall’s five page memorandum addressed, nor answered any one of the questions that we had repeatedly asked to have answered on a point-by-point basis concerning our vested water rights. Based on the information that you sent , we must assume that you are telling us that at no time during Montana’s territorial or state history, anywhere within its boundaries, has there ever been a vested water right created, put to beneficial use?

We request and expect you to respond and clearly answer if this is the case or if our understanding is incorrect. As before, we request appropriate legal authority/citation supporting your answer. As before, we remind you of American Jurisprudence (63C Am. Jur.2d) Public Officers and Employees, sec. 247 : “fraud in its elementary common law sense of deceit – and this is one of the meanings that fraud bears (483 U.S. 372) in the statute. See United States v. Dial, 757F.2d 163,168 (7th Cir 1985) – includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public. You as a public official have a fiduciary duty to protect the interests of those you serve. Your failure to respond to our specific requests on a point-by-point basis is a breach of fiduciary duty. We also again, remind you of U.S. v. Prudden, 424 F.2d 1021 (5th Cir 1970) “Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.” With these facts in mind, we expect your unambiguous answer to our very clear and straight-forward question within ten to fifteen business days of your receipt of our certified letter.”

April 4, 2007
Ronnie & Maxine Korman
Box 162
Hinsdale, Montana

Director Mary Sexton,
Department of Natural Resources and Conservation
1424 Ninth Avenue box 201601
Helena, Montana

Director Sexton,

Please find enclosed a copy of a letter we received from the Department of Natural Resources and Conservation New Appropriations Program Manager, dated March 15, 2007. This was concerning two letters that we had addressed to you in regard to our certified copy of our duly recorded Affidavit of Vested Water Rights. We are surprised that this response came from the New Appropriations Program Manager. Our vested water rights are not new appropriations.

We are somewhat confused with the contents of the letter and are hopeful that you will clarify these issues for us. The letter stated in part, the department is retaining our documents, but they won't be included in the adjudication process. Does this mean that our vested water rights will not be adversely affected by the adjudication process. We would like to ask you to provide us with the appropriate parts of the Montana Water law that address this. Does this mean that we will not be denied due process, as well? Again, we would be very appreciative of you providing us with the relevant Montana Water law. Also, since your agency is the central water rights and filings repository, we request your agency provide us with notice of any adverse filings by other parties against any of our vested water rights within the exterior boundaries of our map that you have in our file. The letter also states the claims filing process ended on July 1, 1996. We would very much appreciate you providing us with the pertinent Montana Water law that specifically addresses vested water rights.

We want to thank you in advance for your timely assistance and look forward to receiving your response within ten to fifteen days of your receipt of this letter.

Sincerely,

Ron Korman, _____

Maxine Korman, _____

Feb. 28,2007
Ronnie and Maxine Korman
P O Box 162
Hinsdale, Mt. 59241

Director Mary Sexton,
Department of Natural Resources and Conservation
1625 Eleventh Ave.
Helena,Mt. 59620

Director Sexton,

On Feb. 5,2007, we sent the following letter to you via certified mail.The return receipt is dated Feb.6, 2007,indicating it was received by your office. Could you please respond to us in writing and inform us that our record of ownership of several vested water rights has been included in the record and will be included in the adjudication?We realize you are extremely busy, but ask that you respond in a timely manner.

Thank you for your prompt attention.

Sincerely,

Maxine Korman

Feb. 4,2007
Ronnie & Maxine Korman
P O Box 162
Hinsdale, Mt. 59241
Ph. 406-648-5536

Director Mary Sexton,
Department of Natural Resources and Conservation
1625 Eleventh Ave.
Helena, Mt. 59620

Director Sexton,

Please note the following documents that we would like to call to your attention: a copy of our letter to the Glasgow office of Department of Natural Resources and Conservation, our recorded Affidavit of Act of 1866 Vested Water Rights, our official allotment map certified by the Bureau of Land Management, as well as the deed,.We are submitting these documents for the record of our proof of ownership under the provisions of Article II, Section 3 and Section 17 and Article IX, Section 3 of the Montana Constitution.

_____,Ronnie Korman

_____,Maxine Korman

Feb. 4, 2007
Ronnie & Maxine Korman
P O Box 162
Hinsdale, Mt. 59241
Ph. 406-648-5536

Glasgow Department of Natural Resources
& Conservation
224 Sixth St. South
P O Box 1007
Glasgow, Mt. 59230-1007

The following documents: affidavit of Act of 1866 Vested Water Rights, official allotment map certified by the Bureau of Land Management and deed are being submitted for the record of our proof of our ownership. We are submitting these under the provisions of Article II, Section 3 and Section 17 and Article IX, Section 3 of the Montana Constitution..

_____, Ronnie Korman

_____, Maxine Korman

November 6, 2007
Ron and Maxine Korman
Box 162
Hinsdale, Montana

Glasgow Dept. Natural Resources and Conservation
Box 1269
Glasgow, Montana

Enclosed please find a copy of your letter concerning period of diversion. We want to be sure that we understand the question. By signing the forms, we are verifying that water may be diverted from the reservoir year round (January 1 to December 31)?

Also, enclosed are abstracts 40m164817 and 164824 showing priority date was amended by claimant on 10/5/92. Because these were for well with an earlier priority date we don't recall changing the date and don't know why we would have changed the date.

Therefore, we are requesting copies of documents concerning change.

You will also find pages certified by the BLM for cooperative range improvements.

Since Montana water law states the federal authority must be cited for claimed water rights, we request copies of any and all filings for these as well as documents that show the federal authority that these filings may have been made under.

We would appreciate your answer about our understanding that by signing the forms we are verifying that water may be diverted from the reservoir year-round right away. As soon as we know we have understood the question, we will make every effort to have the forms returned to you in time.

Thank you in advance for your help with the above listed issues.

July 6, 2007
Ronnie & Maxine Korman
P O Box 162
Hinsdale , Montana

Glasgow Department of Natural Resources

We need to request various copies of documents from our file and from our predecessors file. We would like to request any and all applications, correspondence ,etc. from predecessors under the names of Hammond (Myron , Dan, Willis) Rath (Edward, Alice) Baylis, Eklund, Petterson,Korman (Frank, Earl, Ralph, Terence/Terry) We also would like copies of any and all Declarations of Vested Water Right, Certificate of Water Right,as well as any other water right issued.We request that these documents be certified by the DNRC.

Thank you very much for your help in obtaining all these documents for our records.

Sincerely,

Ron Korman

Maxine Korman

JUNE 22, 2007

Ronnie Korman
Maxine Korman
Post Office Box 162
Hinsdale, Montana

Director Mary Sexton,
Department of Natural Resources and Conservation
1424 Ninth Avenue
Box 201601
Helena, Montana

Director Sexton,

We are providing you with copies of our letter concerning a realty transfer, the required Water Right Ownership update and copies of the previous water right updates. We have corrected the update records to reflect our ownership of vested water rights and are also including a duly recorded and noticed Affidavit of Vested Water Rights per the provisions of Article II, Section 3 and Section 17 and Article IX, Section 3 of the Montana Constitution. We prefer to retain our vested water rights as such and do not choose to impair them or destroy them by accepting a mere exempt or mere statement of claim. We also would like to call a discrepancy to your attention. Original "exempt" certificates had the "cloud on our title" in the remarks section that these rights may be a problem; may be on public land and ownership of this right may be questionable- appear to be on federal land. Please see enclosed copies of Ballentine's legal dictionary, Black's law dictionary and Bouvier's law dictionary with regard to the legal definition of "public land." The discrepancy that I would call to your attention is that remark does not appear on the updates. Could you clarify why there is a difference? We also are providing a copy of our letter, dated May 15, 2007, sent by certified mail and addressed to you. The receipt indicates you received the letter, containing our requests on May 21, 2007. At this time, we have again, received no response from you.

Due to previous response/lack of response to our multiple requests to have our questions answered on a point-by-point basis, we must assume that:

- (1) Montana Water Use Act of July 1, 1973 does not recognize our Vested Water Right. If our assumption is incorrect, please clearly demonstrate and provide legal authority/citation.
- (2) Under the Montana Water Use Act of July 1, 1973, we must assume that our Vested Water Right is not enforceable and is not protectable. If our assumption is incorrect, please clearly demonstrate and provide legal authority/citation.
- (3) Under the Montana Water Use Act of July 1, 1973, our Vested Water Rights will be adversely affected by the water adjudication. If our assumption is incorrect, please clearly demonstrate and provide legal authority/citation.
- (4) Under the Montana Water Use Act of July 1, 1973, our Vested Water Rights were destroyed. If our assumption is incorrect, please clearly demonstrate and provide legal authority/citation.

- (5) The destruction of a Vested Water Right (Property Right) is a Takings. If our assumption is incorrect, please clearly demonstrate and provide legal authority/citation.
- (6) The destruction of a Vested Water Right (Property Right) is a denial of due process. If our assumption is incorrect, please clearly demonstrate and provide legal authority/citation.
- (7) The Montana Water Use Act of July 1, 1973 has denied us our Constitutionally guaranteed right to defend our property in a Court of Law. If our assumption is incorrect, please clearly demonstrate and provide legal authority/citation.

We repeat the citation from American Jurisprudence (63 C Am. Jur. 2d) Public Officers and Employees, sec. 247 : “fraud in its elementary common law sense of deceit – and this is one of the meanings that fraud bears (483 U.S. 372) in the statute. See United States v. Dial, 757 F.2d 163, 168 (7th Cir 1985) – includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public. You as a public official have a fiduciary duty to protect the interests of those you serve. Your failure to respond to our specific requests on a point-by-point basis is a breach of fiduciary duty

We also now call to your attention to U.S. v. Prudden, 424 F. 2d 1021 (5th Cir 1970) “Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.”

We have acted in good faith and have sent many requests to you in your official capacity asking that our questions be clearly responded to and answered on a point-by-point basis. We now look forward to receiving your response within ten to fifteen business days.

Sincerely,

Ronnie Korman,_____

Maxine Korman,_____

From Maxine Korman

TO

MONTANA WATER COURT
WATER ADVISORY COMMITTEE
MONTANA DNRC
VALLEY COUNTY COMMISSIONER DAVE PIPPIN
SENATOR JON BRENDEN

RE

PROPOSALS CORRECTING MONTANA WATER USE ACT
WATER USE ACT RETROACTIVE ALTERATION PRIOR APPROPRIATION
DOCTRINE; DIVESTMENT VESTED AND ACCRUED WATER RIGHTS

The original concerns that prompted my husband and I to try to get the WATER USE ACT corrected with HB711 and continue to appear before the various water committees that have been created have not been addresses in any of the proposals. As I review the proposals, I don't see where any of the points I have raised in the proposal submitted and in the Supplements submitted to the Water Court have even been acknowledged or responded to. Therefore, we cannot agree to any proposed "correction" that does not actually and accurately provide for a complete and valid water adjudication of previously vested water rights as stated in the legal encyclopedia AMERICAN JURISPRUDENCE. " An adjudication must be reasonably construed, however, and cannot be held ordinarily to apply to appropriations which at the time have not been made nor to diversions not applied to beneficial use. Obviously, a decree based upon indefinite findings, which does not determine the essential rights of all the parties, and leaves a material part of the controversy undetermined cannot be upheld on appeal .

Claimants whose rights had accrued prior to the adoption of a constitutional provision for the creation of a board of control having supervision of the waters of the state, and prior to the enactment of a statute creating such board, and vesting in it power to adjudicate and determine priorities of rights must submit proofs of their rights, in the adjudication proceedings, the same as claimants acquiring rights after the Constitution and statute.

(AM JUR WATERS ADJUDICATION OF PRIORITY)

I would be happy to provide a copy of that page of AM JUR to be included in the record.

It is our contention that one of the material facts that has not been addresses is that the water rights that pre-date the WATER USE ACT are vested water rights, should have been recognized as, defined as and proceeded through the adjudication as VESTED WATER RIGHT. It is also our contention that the WATER USE ACT is imposing a retroactive alteration, and possibly divestment of pre-existing vested water rights.

AM JUR WATERS

Appropriation has reference to a means or method of acquiring a vested and continuing right to take a definite quantity of water from a natural watercourse or other body of water

Nature and Incident of Right. The right of a prior appropriator to the use of water of a stream, in the absence of statutory or constitutional provisions existing at the time of its acquisition qualifying it is a property right of which he cannot be deprived without compensation, and which is invested with the usual incidents of property rights.

It has frequently been stated that every state is free to change its laws governing rights in respect of its natural watercourses, and to permit the appropriation of flowing water for such purposes as it may deem wise, and such constitutional or statutory declarations have generally been upheld as valid and effective in so far as they do not interfere with EXISTING VESTED RIGHTS (emphasis added is mine) and such provisions will not be permitted to operate to the IMPAIRMENT OR DESTRUCTION OF VESTED RIGHTS (emphasis added mine)

I would be happy to provide copies of those pages of AM JUR to be included in the record.

Excerpted from the proposal we submitted: The recommendation of Ron Korman and Maxine Korman is that all water rights that pre-date the 1972 Montana Constitution and under the 1973 Water Use Act be required to be filed as Declaration of Vested Water Right.

Attached Supplements to Objection & Request for Hearing re EXEMPT FILINGS, STATEMENTS OF CLAIM (water rights on patented lands) OBJECTIONS BLM FILINGS and excerpts from Nevada Water Engineer Report will hopefully provide enough information that the Advisory Committee agrees there are serious flaws that need to be properly corrected in order to have an accurate, valid and defensible general water adjudication showing all accurate, valid and defensible water rights.

The Prior Appropriation Doctrine is a federal granting statute RS2339 (Am Jur A granting act conveys the fee the same as if land patent had issued) - Mt. S. Court Smith v. Denniff that the state, like the federal government, granted water rights on unsold state lands

pre-Water Use Act cases contain language such as vested water right, vested and accrued water right, "existing within the meaning of accrued." However, Kormans have several documents from DNRC that there is no vested water right, vested has no significant meaning.

I will forward to the Water Court correspondence from us to DNRC Director and responses from DNRC Director as well as DNRC legal counsel.

There are also documents available from the Valley County Clerk and Recorder in which DNRC Director and legal counsel cite the WATER USE ACT in order to prohibit owners of direct from source water rights from filing on state lands and also on lands BLM asserts ownership of water rights. We recorded an affidavit in which we provided Director Sexton a certified copy of a state land patent showing survey and issuance of patent well after waters from the creek had been appropriated, a page from the general land office book stating the state didn't get title until after issuance of land patent and Interior Decision Arizona. She sent a letter returning all the documents and refusing to respond to the information.

[We have provided copies of state land patents to the DNRC Director showing these land patents read " subject to vested and accrued water rights" (the language of RS 2339) The Director has also been provided Interior Decision Arizona (the state took title with the land encumbered with prior vested and accrued water rights) and A T West & Sons (if there are already vested and accrued water rights and the land is withdrawn or disposed of, there must be sufficient easement for the exercise of those rights). The department still blocks us from being able to file for vested water rights on those sections, even after reminding the department of Water Court case 41g. The director returned all the information to us & in her letter said she couldn't keep it.

I have also asked the Director about pre-Water Use Act law re Declaration of Vested Groundwater Right. She provided me with a copy of DNRC amicus brief *Mildenberger v. Galbraith*.]

The only vested water right is in **85-2-313. Provisional permit** A person may not obtain any vested right to an appropriation obtained under a provisional permit . However vested water right and a savings provision of such vested water right appears in the majority of state-federal water compacts.

Also in MCA: **75-7-104. Vested water rights preserved.** This part shall not impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States.

History: En. 26-1516 by Sec. 7, Ch. 463, L. 1975; R.C.M. 1947, 26-1516.

87-5-506. Vested water rights preserved and emergency actions excepted. This part shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States or operate in emergencies such as floods, ice jams, or other conditions causing emergency handling.

History: En. Sec. 6, Ch. 10, L. 1965; R.C.M. 1947, 26-1506.

How is the vested water right defined?

How do we determine who are the owners of vested water rights?

Early territorial documents (section 6 Memorials and Resolutions Territory of Montana Fourth Session 1868) contained a section stating claims of vested rights could still be brought into courts. Also, 75-2-2510. Effect of name change on vested rights and existing laws.(1) The change of name provided for in this part shall not impair or work a forfeiture or alteration of any vested rights.

Our proposal that is posted on the Water Court website is incomplete and because that information is relevant to our conclusion that the state of Montana in applying the WATER USE ACT is committing a retroactive alteration, divestment of pre-existing vested water rights, a violation of constitutional law and a takings of property. To attempt to create a consistent complete record the following is what was not included on the Water Court site:

Water Rights: Division of Water Resources - U.S. Fish and Wildlife Service

ADJUDICATION OF WATER RIGHTS

An adjudication is an administrative or judicial determination of all rights to use water in a particular stream system or watershed, to establish the priority, point of diversion, place and nature of use and the quantity of water used among the various claimants. These stream or watershed adjudications can be initiated by a water user (including the United States) or by the State. The United States may be joined in an adjudication if the requirements of the McCarran Amendment are met.

VESTED RIGHT An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.

Prior Appropriation:

Unlike a riparian right, an appropriative right exists without regard to the relationship between the land and water. An appropriative right is generally based upon physical control and beneficial use of the water.

In western states, there are few restrictions on who can hold an appropriative water right.

Therefore, both private and public entities hold rights. An appropriative right does not depend on land ownership, but some states do require that the water is appurtenant to the land on which it is used. In general, appropriative water rights are transferable property.

State of New Mexico 72-1-3. Declaration of water rights vested prior to 1907 Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration

Nevada Revised Statutes: CHAPTER 533 - ADJUDICATION OF VESTED WATER RIGHTS; APPROPRIATION OF PUBLIC WATERS **NRS 533.085 Vested rights to water not impaired.** 1. Nothing contained in this chapter shall impair the vested right of any person to the use of water,

ADJUDICATION OF WATERS MONITOR VALLEY SOUTHERN PART

STATE OF NEVADA OFFICE OF THE STATE ENGINEER 80 With the other dry-land States, Nevada was granted control of its natural waters by the law of 1866 ... , and for many years its citizens appropriated irrigation and stock waters (along with those used for mining and smelting) without any very definite regulations. In 1905 the State legislature passed a law establishing a method of obtaining the right to put waters to beneficial use. Water appropriations that were already established at the time of the passage of this act were recognized as vested rights, for both irrigation and stock water.

82 The USFS objected to the determination of vested water rights wherein the non-federal claimants no longer have a valid federal grazing permit, because no beneficial use of the waters is occurring by the non-federal claimants. The State Engineer finds that the claims filed in this proceeding are for vested water rights held by the successors to the early stockmen who grazed the range livestock⁹⁸ on 98NRS § 533. 485 (2) · on the public · range⁹⁹ .. ,99NRS § 533.485 (1) . wherein the beneficial use was occurring prior to 1905 is prior to control of the public lands by the federal entities that currently issue grazing permits. The State Engineer concludes that the claims filed for vested water rights for stockwatering purposes wherein the ability of the claimant to put the waters to beneficial

use is currently impaired does not invalidate the claims filed for watering livestock - 1905 is when Nevada passed permitting law

The State Engineer ruled that he has the authority under Nevada law to recognize vested rights to water livestock irrespective of land ownership, and that livestock water rights would be adjudicated by the number of livestock, source, ownership and priority date without a specified quantity of water.

Water Rights: Division of Water Resources - U.S. Fish and Wildlife Service

ADJUDICATION OF WATER RIGHTS

An adjudication is an administrative or judicial determination of all rights to use water

VESTED RIGHT An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.

Blm.GOV Western States Water Law

Prior Appropriation:

. According to

the rules of prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use.

Unlike a riparian right, an appropriative right exists without regard to the relationship between the land and water. An appropriative right is generally based upon physical control and beneficial use of the water

. Unlike riparian rights, these rights can

generally be sold or transferred, and long-term storage is not only permissible but common

Vested rights are rights that do not have to go through the application process. Vested rights to surface water are those rights for which the work to establish beneficial use was initiated prior to March 1, 1905 (the date of adoption of Nevada's water law). Vested rights from underground sources are those rights initiated prior to March 22, 1913, for artesian water and prior to March 22, 1939 for percolating water. The extent of all vested rights on a water source is determined through the adjudication process (see below).

State of New Mexico 72-1-3. Declaration of water rights vested prior to 1907 Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration

Oregon If water was used prior to enactment of the 1909 water code and has been used continuously since then, the property owner may have a "vested" water right. Each vested right will be determined through the courts in an adjudication proceeding.

South Dakota provision was inserted allowing anyone to claim a vested water right for water uses predating March 2, 1955

AM JUR WATERS - Public Authorization and Regulation- It has frequently been stated that every state is free to change its laws governing rights in respect of its natural watercourses; such constitutional or statutory declarations have generally been upheld as valid and effective in so far as they do not interfere with existing vested rights; such provisions will not be permitted to operate to the impairment or destruction of vested rights

AM JUR WATERS ADJUDICATION OF PRIORITY - After the priorities of claimants to the use of public water, any matter actually and legally determined by final decree, in the absence of fraud or collusion, becomes res judicata, at least to the public and the parties participating in the proceedings.

It has, however, been held that if the statute does not impose any penalty upon a claimant who fails to appear and submit proof of his claim, an existing claimant is not concluded by a determination in adjudication proceedings, if he has not appeared, and his right has not been considered

An adjudication must be reasonably construed, however, and cannot be held ordinarily to apply to appropriations which at the time have not been made nor to diversions not applied to beneficial use. Obviously, a decree based upon indefinite findings, which does not determine the essential rights of all the parties, and leaves material part of the controversy undetermined, cannot be upheld on appeal.

DNRC AMICUS BRIEF MILDENBERGER V. GALBRAITH

page 22 The law as passed provided in part:(1)The department shall establish a centralized record system of all existing rights.... begin proceedings to determine existing rights. 2 questions- are all records in the centralized system equally valid and recognizing the correct nature of the property right; exempt compared to statement of claim? are all existing

rights as reflected in all records to be adjudicated if the only water rights are those that are shown on a final decree?

page 29 Some may argue that exempting such large numbers of rights, and such potentially large rights, flies in the face of what is supposed to be a comprehensive adjudication

page 30 If the exemption statute is not liberally construed to provide for existing water rights exempt from the adjudication, many farmers, ranchers, and other water users who did not file exempt rights will lose valuable water rights after they were informed such rights were not required to be filed.

page 31 Idaho began its adjudication allowing for exemptions for domestic and stockwater claims & began its adjudication allowing decrees to contain exempt or excepted rights, if filed, but the federal government challenged Idaho's exceptions for domestic and stockwater claims, arguing an adjudication without stockwater and domestic claims would not be a general stream adjudication under the McCarran Amendment. The United States and Idaho executed & filed "Stipulation for Establishment of Procedure for Adjudication of Domestic & Stockwater Claims" whereby Idaho was required to serve all users of water within the Snake River Basin.

Footnote The McCarran Amendment, 43U.S.C.666, waives the United States sovereign immunity from general stream adjudications, but requires all water right claimants be joined as parties. In Montana's adjudication, the United States has not, to the DNRC's knowledge objected to Montana's exemption statute.

page 32 Thereafter the Idaho district court issued an order stating that de minimis domestic and stockwater claims had to be included in the general adjudication, but that the adjudication of those excepted rights was deferrable.

If under Montana law, the only water rights that exist are on a final decree and in the maxims of the Montana code that says that which appears not to exist is to be treated as if it does not exist, then the practical application would be that certain water rights would cease to exist & be unenforceable & indefensible rather than a vested right that cannot be taken without consent, due process and just compensation?

page 33 if the Colorado state engineer finds that the vested water rights of others or any other existing well will be materially injured, he shall deny the permit.

Montana Administrative Register 2/14/08 What was not addressed in 1979, however, was any kind of process that described where and how such exempt rights could be established later on, which court had jurisdiction, and what the process was for proving them. At this point any water user who did not file claims for exempt water rights faces the issue of how to establish judicially their water right. If a water user tries to file a claim with the district court, the district court will most likely say it does not have jurisdiction to adjudicate exempt water rights; only the Water Court can adjudicate water rights

MCA, further states that, "all matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division..." If someone tries to file such exempt water rights with the Water Court, the Water Court could likely find that the claims filing period concluded July 1, 1996, and that it does not have jurisdiction to accept, process, and adjudicate those claims within this adjudication. Although valid, exempt rights not voluntarily filed are not abandoned because they were not filed.

However, at present, there is no clear forum in which they can be proved and adjudicated. Anyone trying to go to either the district court or the Water Court would likely face expensive litigation costs just to try to establish which court has jurisdiction.

The department allowed exempt water users to file a Form No. 627, Notice of Exempt Water Right for notice purposes only. This is not a form that puts the water rights into the general adjudication conducted by the Water Court. The department has no authority for creating or receiving this form.

In essence, a Form No. 627 is simply a piece of paper on file with the department. It is not a claim in the adjudication, and the department's acceptance of the Form No. 627 in no way establishes or confirms a water right. Many water users, however, are under the mistaken impression that filing a Form No. 627 confirms or establishes an exempt water right.

The department does not want to promote the impression that filing a Form No. 627 establishes or confirms a water right and is removing the form.

Part of an earlier letter from the DNRC:

THE ACKNOWLEDGEMENT DOES NOT GRANT YOU A WATER RIGHT. It merely contains information about water use that you provided to the Department. Further, it is issued with the following statements, " THIS WATER RIGHT IS IDENTIFIED AS EXEMPT FROM THE ADJUDICATION PROCESS BY THE MONTANA WATER COURT PURSUANT TO 85-2-222, MCA(EXEMPT RIGHTS ARE BASED ON INFORMATION AND EVIDENCE PRESENTED BY THE OWNER. THE BURDEN OF PROOF OF THE RIGHT REMAINS WITH THE OWNER.) THIS ACKNOWLEDGEMENT IS NOT INTENDED, NOR IS IT THE INTENT TO BE CONSTRUED TO CONSTITUTE RECOGNITION OR ADMISSION BY THE STATE OF SUCH WATER RIGHTS, NOR AS EVIDENCE OF THE USE OR PRIORITY OF USE IN ANY ADJUDICATION PROCEEDINGS UNDER THE LAWS OF THE STATE OF MONTANA."

What that means is that sometime in the future you are still responsible to prove in a court of competent jurisdiction the water right claimed in the Notice.

The Department understands that there are ownership questions surrounding these Notices, but the Department will not decide that issue. Nor will the Department take sides in the resolution of the issue.”

Nevada Engineer Report & McCarran Amendment

31 Prior to the enactment of the McCarran Amendment in 1952¹ under the principles of sovereign immunity, the United States was exempt from the jurisdiction of state district court water right proceedings. Thus, there was no statutory authority waiving the United States’ sovereign immunity which would have allowed it to be involuntarily joined as a party.”Until the enactment of the McCarran Amendment¹ [footnote omitted] however, the prior appropriation system in Colorado could not be applied to the adjudication or administration of water rights of the United States, because Congress had not consented to the determination of such water rights by state courts. As a sovereign, the United States was privileged to withhold such consent „20 U.S. v. City and County of Denver, 656 P.2d 1, 8 (Colo. 1982).

continues: This Court noted that the sovereign immunity of the United States created an anomaly in the adjudication of water rights:

"We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure-and this is equally true from the standpoint of the United States as well as Colorado and its citizenry.

Hutchins Water Rights Laws Nineteen western States

International Law affecting water rights: p120 The power of Western States to create water rights is limited by treaties with Canada and Mexico (p119 Treaties into which the United States enters with other countries become part of the supreme law of the land and take precedence over State law to the extent there is conflict)

p121 treaty establishes use preferences the Commission (United Nations) is to follow in disposing of applications. Most preferred are uses for domestic and sanitary purposes; next are uses for navigation; lowest in preference are uses for power and irrigation. A use substantially conflicting with a use of higher precedence must not be allowed.

p132 Columbia River Basin Treaty the treaty does not in terms pre-empt State jurisdiction over any particular aspect of water law but the treaty materially affects the amount of water in the Columbia available for appropriation under State-created rights. Also, the limitation of compensation

available under the treaty appears to make it impossible for an appropriator whose allotment is curtailed (in order to impliment the treaty of preference of power production) to obtain compensation. It is therefore clear that the State-created rights of appropriation are not property when in conflict with activities authorized by the treaty, and a hazard of potentially severe economic losses to appropriators exists.

p139 Conclusions Treaties of the United States with Canada and Mexico have not explicitly pre-empted private water rights created by the various States adjoining the two frontiers. However, by apportioning the waters of international and transboundary streams, and by establishing classes of preferred water uses, the treaties do limit the States' ability to create water rights. Only uses fitting within the national share of water, and within the hierarchy of uses may be effectively established by the States. Any State-based right to use water is susceptible to obliteration should it conflict with future treaty provisions. Whether the private owners of such rights are compensated for their loss depends on the terms of the treaty, or separate congressional action- there is no constitutional requirement that they be paid. To the extent the international agencies refine the treaty-established prefereces in water use, the possibility exists for planning the water uses of an entire river basin, without regard to State or national boundaries.

85-2-102. Definitions (12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

earlier Montana cases used the word "existing" within the meaning of accrued and Am Jur phrased it existing vested right. Does this definition mean that those vested and accrued water rights now on state lands are protected as vested rights?

Does this definition mean that those vested and accrued water rights that originated on then public domain land, including now patented lands are protected as vested rights?

Within the context of Hutchins International Boundary Water Treaties, how do we differentiate water rights that are true appropriative rights which are vested property protected under the Federal Constitution and may be brought into the United States Court of Federal Claims for a takings claim under the Tucker Act?

Which water rights are state-based and may be obliterated without a takings claim arising? What does "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973 mean?

There have also been letters from the DNRC-one of which is recorded in the Valley County Clerk&Recorder when ranchers tried to file for reservoirs:

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) MeA). See the enclosed memo dated December 21, 2007 from Tim Hall, Chief Legal

Counsel.

The Water Use Act at Mont. Code Ann. § 85-2-306 (6) & (7)
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 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.

This is ignoring that the possessory interest is in the appropriative right- the right to the use of the water and the attendant ownership of the fee.

This is not what the Prior Appropriation Doctrine is, rather the riparian principle.

This conflicts with the Montana Supreme Court in Smith v. Denniff and history of cases recognizing the vested and accrued water right carried with it the future right of impoundment. DNRC reasoning doesn't even reflect the reason for this legislation based on the legislative history document that Joe Kolman provided to Valley County Commissioner Dave Pippin. It appears the Water Use Act is a retroactive alteration of the Prior Appropriation Doctrine and the Water Use Act retroactively at the least, alters or possibly destroys previously vested rights. Under constitutional law, that is illegal and an illegal law can impose no burden or penalty and anything done under it is null and void.

The quotation from Am Jur is that an illegal law protects no one.

I had the opportunity to visit with Justice Rice at his mother-in-law's retirement as Hinsdale postmaster about water rights ranchers hadn't filed because they've been told they don't own them and they are just lessees. This wasn't just because of not making the effort to file but because of what DNRC and BLM tells them. He said the law is clear and ignorance of the law is no excuse. You didn't file so you forfeited.

85-2-226. Abandonment by failure to file claim. The failure to file a claim of an existing right as required by [85-2-221\(1\)](#) establishes a conclusive presumption of abandonment of that right.

We now have in writing that the Water Use Act is used to take water rights. The Nevada Water Engineer Report from 1996 shows what the federal government has been told in water adjudications, including repeating US Supreme Court, 1978 U.S. v. New Mexico that the ranchers own the stockwater rights, not the federal government.

75 PRIVATE RIGHTS ON PUBLIC LANDS

The USFS objects to the issuance of stockwater rights to private grazing permittees on federal lands on the grounds that those private permittees have no right or claim to an interest in federal property or resources associated with permitted use of federal property, and it is prohibited under the terms of federal grazing permits and law. The USFS also objected to the issuance of stockwater rights which are appurtenant to the cattle which use the federal estate instead of being appurtenant to the federal land where the intended federal benefit from grazing occurs. The USFS further objected to those identified proofs or permits determined to be valid, specifically alleging that: the claimants failed to establish a proper chain of title and exclusive use nor does the evidence support title and

or use; (b) the proofs or permits demonstrate an illegal or expanded use and change in point of diversion and place of use; (c) the historical record does not support the priority dates, irrigated acres claimed, season of use or uses; (d) the water right has been abandoned or forfeited; (e) the amount of water determined necessary for irrigation exceeds the duty of water established in the Preliminary Order (f) the use of water will interfere with the proper management and use of federal property in violation of federal and state law; and (g) the claimant no longer has a valid federal grazing permit., thereforeI no beneficial use of the waters is occurring by the non-federal claimants.

76 PRIVATE RIGHTS OR CLAIMS TO AN INTEREST IN “FEDERAL PROPERTY” OR RESOURCES ASSOCIATED WITH PERMITTED USE OF FEDERAL PROPERTY

The USFS argues that it is seeking to fulfill the directives of Congress by acquiring state water rights that enable the government to operate its grazing program on the national forest and it cannot allow private individuals to thwart the directives of Congress and monopolize the grazing land of the national forests by acquiring exclusively-owned stockwatering rights on the national forests. The USFS alleges that as a matter of law a private party may not own water rights for stockwatering purposes where the point of diversion and place of use are on the national forests.

The ranchers who settled this part of Nevada were there long before the USFS even existed and had been beneficially using the waters for stockwatering and irrigation purposes. Under the prior appropriation system of acquiring water rights, the earliest documented use is of critical importance in establishing a right of use. The State Engineer finds that the water the USFS is arguing about is not “federal property.” Notwithstanding its ownership of water forming part of the public domain, the United States for a period of years silently acquiesced in the creation of private appropriative rights in water on the public domain under customary local uses. When it was confronted with the customary system of water allocation in the West however the federal government was relegated to the position of recognizing accomplished facts and, in a series of statutes passed in the last half of the nineteenth century, Congress rejected the alternative of a general federal water law. In 1866, Congress provided statutory protection to water users who had relied upon the customary legal system in the western states for allocating water by prior appropriation. The Act of July 26, 1866 (1866 Act) provided:” [W]henever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized by the local customsI laws, and the decisions of, courts the possessors and owners of such vested rights shall be maintained and protected. in the same . Next , the Act of July 9/i-1870, made it clear that the rights of patentees of federal lands were subject to the appropriative rights recognized by the 1866 Act Finally; the Desert Land Act of 1877 reaffirmed the rule . that private rights in waters on the public domain were to be governed by the appropriative doctrine ...

By virtue of these acts, Congress determined that water rights on the public domain could be acquired under state law embodying the appropriation doctrine. It thereby largely acquiesced in comprehensive state control over the appropriation of water, including

water on federal lands, at least with respect to rights that could be asserted by private appropriators. The United States Supreme Court has interpreted these acts as expressing congressional recognition of and acquiescence in water rights law developed by the western states: "Congress intended [by these acts] 'to recognize as valid the customary law with respect to the use of water which had grown up' among the occupants of the public land under the peculiar necessities of their condition. *California v. United States*, 438 U.S. 645, 656, 98 S.Ct. 2985, 2991, 57 L.Ed.2d 1018, 1027 (1978) .86 86 *United States V. City and County of Denver*, 656 P.2d 1, 7-8 (Colo. 1982) . 89 See *Ca. v. U.S.*, 438 U.S. 645, 653-663 (1978) *Federal Power Comm, v. Oregon*, 349 U.S. 435 (1955); *Ca. Ore. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *U.S. v. Rio Grande_Dam .and Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770 (1889). The USFS notes that these statutes are often cited for the general proposition that the acquisition and use of water on the public domain is governed by state law, and argues that although this statement is sound as a general matter, it is not true when applied to stockwatering rights . The USFS argues that the provisions were not intended to apply to stockwatering on the public lands, and even if they did encompass stockwatering they were . superseded by subsequent I more specific directives of Congress which preclude the issuance of private stockwatering rights on public land

79 The USFS argues that since these statutes did not specifically state " stockwater" it was excluded from the provisions which separated the water from the land . However, this legal argument is completely contradictory to a statement made by the United States Department of Agriculture in 1933 which said that stockwatering was within the definition of agriculture. In a United States Department of Agriculture Bulletin U. S. Dept. of Agricul ture The Public Domain of Nevada, Technical Bulletin No. 301, p. 33 (1933). The following is found: the mining law of 1866 established the principle of the right to put water to beneficial use outside its natural channels without returning it undiminished in quantity, as required by riparian law. It also established the priority-of-use right, which is so important for irrigation. This law was primarily written to settle the mining troubles and to give properties worth millions of dollars a legal status. Much of the California mining was placer mining and required water to wash out the gold. So the customs and their change to laws took care of mining water rights and included the use of water for agriculture as well. Waters used for mining and agricultural purposes were recognized as under the jurisdiction of the State. Later expansions of the meaning of the phraseology have included stock water along with the waters used for mining and agriculture. It is now possible under the existing State water laws for an applicant to have allotted to his use by the State engineer the water – wells, spring, or seeps – found on the public lands, without the need of owning the land upon which it arises.⁹¹ (Emphasis added.) ⁹¹Id. At 32. The same publication just quoted has other references which show that the USFS recognized the ownership of private stockwater rights on the public lands.

80 Wi th the other dry-land States, Nevada was granted control of its natural waters by the law of 1866 ... , and for many years its citizens appropriated irrigation and stock waters (along with those used for mining and smelting) without any very definite regulations. In 1905 the State legislature passed a law establishing a method of obtaining the right to put waters to beneficial use. Water appropriations that were already

established at the time of the passage of this act were recognized as vested rights, for both irrigation and stock water. Future appropriations under this law are to be made through the State engineer who keeps a record of all official allotments.

It does not get much clearer that the private stockman can hold water on the public lands than the Supreme Court's holding in *v. New Mexico* wherein it ruled: The United States contends that, since Congress clearly foresaw stockwatering on national forests reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to the individual stockwaterers. We agree .. (Emphasis added.) In the files of the office of the State Engineer is a letter dated September 25, 1961, wherein the BLM stated that the State Engineer should grant the water right to the present range user. While the United States Government has apparently changed its position regarding who should own the stockwater rights on the federal lands, this shift in position cannot change the history that for over 100 years stockmen have owned the stockwater rights on the public lands. The Taylor Grazing Act at 43 U.S.C. 315 (b) recognized the existence of prior privately owned water rights on the public lands and the continued existence of those rights in the very fact that it recognizes a preference for grazing permits to go to landowners within or near the grazing district engaged in the livestock business or who own water rights. The Act also states that nothing in the Act shall be construed in any way to diminish or impair any right to possession or use of water for agriculture that was vested under existing law validly affecting the public lands. For the United States to now argue that stockwater does not come under the definition of agriculture goes completely against history and law. The State Engineer finds that both history and law support. Issuance of water rights to private persons for stockwatering on the public lands and concludes that stockwatering rights may be granted to private citizens on the public lands including those lands encompassed by the national forests.

82 CLAIMANTS CHAIN OF TITLE AND PROOF OF USE. The USFS and the BLM argue that the claimants failed to show title and exclusive use and the evidence does not support title and/or use. The non-federal claimants chain of title to the privately held base home ranch for the proofs filed in this proceeding pertain to lands that in some instances were patented and in others are possessory claims to lands controlled by the federal government. The State Engineer is authorized and is responsible for maintaining water right files and accompanying documents. Water rights transfer with the land to which they pertain unless there is a specific reservation of the water rights in the document of transfer. *97 97ZeZZi v. Jackson*, 72 Nev. L50, 297 P.2d 10B1. (1956). The documents submitted to support the claims of vested rights in this adjudication proceeding are the only evidence available to the State Engineer. Documents which convey an interest in land with appurtenant water rights include the right to beneficially use the water sources incidental to those "Patented" The record of the ownership transfer of the lands included in the various proofs is the only documentation on file in the office of the State Engineer to determine if the claimant is the successor in interest to the individual that first put the subject waters to beneficial use. The State Engineer finds that the private claimants in this adjudication are the successors in interest and are deemed to be the recipient of the vested water rights as evidenced by the documents filed demonstrating their chains of title.

83 The USFS objected to the determination of vested water rights wherein the non-federal claimants no longer have a valid federal grazing permit, because no beneficial use of the waters is occurring by the non-federal claimants. The State Engineer finds that the claims filed in this proceeding are for vested water rights held by the successors to the early stockmen who grazed the range livestock⁹⁸ on 98NRS § 533. 485 (2) · on the public · range⁹⁹ .. ,99NRS § 533.485 (1) . wherein the beneficial use was occurring prior to 1905 is prior to control of the public lands by the federal entities that currently issue grazing permits. The State Engineer concludes that the claims filed for vested water rights for stockwatering purposes wherein the ability of the claimant to put the waters to beneficial use is currently impaired does not invalidate the claims filed for watering livestock

Because **85-2-226. Abandonment by failure to file claim.** The failure to file a claim of an existing right as required by 85-2-221(1) establishes a conclusive presumption of abandonment of that right contains the phrase conclusive presumption there is nothing ranchers can bring in to alter the outcome nor can a judge override this. However, if an individual or a company ignored what the United States Supreme Court told them, as well as Nevada state courts and the Idaho Supreme Court in 2002, and still tried to represent to people that they own water rights that they don't own, that would be fraud.

85-2-226 needs to have conclusive presumption changed & provide for admission of affidavits to file for those water rights. U.S. v. Murdock, Reliance Defense. An individual cannot be held liable if relied upon the information given by agency employees.

If as individuals, we are supposed to be held to the standard of ignorance of the law is no excuse, then the state should as well. The Water Use Act should recognize, define and provide for the record of vested water rights even though it doesn't.

The Water Use Act should provide that all water rights that actually exist can be proven to exist and are on the final decree even though it doesn't.

It's sort of like the rule that all pro se litigants will be held to the same standard as licensed attorneys, in conflict with

Caldwell v. Miller (790 F. 2d 589, 595, 7th Cir. 1986) that Pro Se litigants are not held to the same stringent standards applied to formally trained members of the legal profession and are to be liberally construed. Additionally, Haines v. Kerner, (404 U.S. 519, 520-21, 1972) that Pro Se complaints are to be liberally construed and should be dismissed for failure to state a claim only if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

We believe that a vested water right should be identified as such and if we agree to anything else, that potentially in the future we will be found to have waived vested water rights. We also believe that if we help pass a law, that in the future we can't claim a damage. Therefore, unless water rights that pre-date the 1972 Constitution are recognized to be existing vested rights and are required to be recorded as shown by the various other

states as a vested water right, we will have to maintain a record that we object and have no intention of waiving or forfeiting vested water rights.

On the other hand, if it is assumed, we all know all the laws, including attorneys for the DNRC and the DNRC Director, we question why the state goes to such lengths to not recognize a vested water right. For example, when we tried to get HB 711 passed, Mr. Hall had faxed a 30 page fix to the bill. He called repeatedly during the week before the hearing and urged me to call these water rights existing because that's what they are. He told me I didn't want vested because vested didn't mean what I thought it meant and didn't do what I thought it did.

For these reasons our recommendation is simply that pre Water Use Act water rights be recorded as Declaration of Vested Water Right and show up in the adjudication as such.

Respectfully submitted,

Ron Korman

Maxine Korman

Hinsdale, Montana

From: bloble@mt.gov
To: kormanmax@hotmail.com; scassel@nemont.net
Subject: Water Adjudication Advisory Committee June 1 Telephone Conference
Date: Thu, 26 May 2011 22:32:47 +0000

FYI

If you are interested in attending the Water Adjudication Advisory Committee telephone conference on June 1 at 4 PM, attached is some background information on the purpose of the call.

Bruce Loble

Montana Water Court

Based on written information presented to us by DNRC, Montana no longer recognizes a vested water right?

This is a retroactive alteration of the Prior Appropriation Doctrine?

This is a retroactive divestment of vested and accrued water rights that pre-exist the state getting title to now state grant lands?

This is a retroactive divestment of vested and accrued water rights that pre-exist the management of state lands later managed by the DNRC?

Based on information related to international boundary water treaties in Hutchins, water rights under the WATER USE ACT (including those confirmed upon issuance of land patent on now patented fee lands, those on now state grant lands and lands that were first public domain and now recognized by the United States Court of Federal Claims as FEE LANDS) that are obliterated will not be able to be presented in the United States Court of Federal Claims for a takings under the Tucker Act?

If legal counsel for the state of Montana/DNRC fails to provide the remedy to the MONTANA WATER USE ACT to file VESTED WATER RIGHTS in the water adjudication, then the state intends to participate in the takings of valid pre-existing vested and accrued water rights?

If legal counsel for the state of Montana/DNRC fails to provide the remedy to the MONTANA WATER USE ACT and fails to recognize pre- WATER USE ACT water rights as VESTED WATER RIGHTS, then they have failed to address material facts and preliminary decrees won't be able to be upheld on appeal?

Will legal counsel for the state of Montana/DNRC explain publicly why they refuse to recognize VESTED WATER RIGHTS?

Will legal counsel for the state of Montana/DNRC explain publicly the efforts to blatantly mislead someone who asserts that they own vested water rights that pre-exist the WATER USE ACT and the 1972 Constitution?

We respectfully request that this document be posted on the Water Court website in its entirety this time.

Ron Korman
Maxine Korman

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
GLASGOW WATER RESOURCES REGIONAL OFFICE



BRIAN SCHWEITZER
GOVERNOR

222 6TH STREET SOUTH
BOX 1269

STATE OF MONTANA

(406) 228-2561
FAX (406) 228-4706

GLASGOW, MONTANA 59230-1269

October 29, 2007

KORMAN, MAXINE
KORMAN, RONNIE D
PO BOX 162
HINSDALE, MT 59241

Re: Reservoir Period of Diversion Documentation (See enclosed Abstracts)

Dear MR. & MRS. KORMAN,

Per Supreme Court Claim Examination Rules, the DNRC needs to identify the period of diversion for all reservoirs in the Milk River Basin. The period of diversion for the enclosed reservoir abstract(s) was not requested on the original claim form on file with DNRC. The period of diversion reflected on the abstract is the same as the period of use. This may be incorrect.

It is very important that you sign and return the enclosed abstract(s) to the DNRC Glasgow Regional Office; PO Box 1269; Glasgow MT 59230. The abstract will be placed within the claim file and will eliminate an issue remark being added to the claim. If the information is not received within 30 days, your water right will reflect the following issue remark:

**THE PERIOD OF DIVERSION FROM THE SOURCE INTO STORAGE
CANNOT BE IDENTIFIED.**

If the issue is added, you will be required to litigate the matter with the Water Court.

Please call the Glasgow Regional Office at 406-228-2561 if you have any questions or prefer to give verbal confirmation to the historic period of diversion on this claim.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Paula Hoyer".

Paula Hoyer, Craig Karge, Pam Weinmeister
Glasgow Water Resources Regional Office

Enclosure

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
GLASGOW WATER RESOURCES REGIONAL OFFICE



BRIAN SCHWEITZER
GOVERNOR

222 6TH STREET SOUTH
BOX 1269

STATE OF MONTANA

(406) 228-2561
FAX (406) 228-8706

GLASGOW, MONTANA 59230-1269

November 14, 2007

Received Nov, 15, 2007 ml

Ron & Maxine Korman
PO Box 162
Hinsdale MT 59241

RE: Reservoir period of diversion

Dear Mr. & Mrs. Korman:

In response to your questions concerning my letter dated October 29, 2007. By signing the abstracts you would be verifying that water can be diverted into or caught by the reservoir year round. Not diverted out.

Regarding statement of claims 40M-164817 and 40M-164824, they were amended in 1992 by Terry Korman. The original claims forms showed the priority date as the date that well construction was started. Since this well was constructed between 1962 and 1973 it needed to be recorded at the county and was on March 29, 1971. Per claim examination guidelines the priority date should be the date the well was filed on at the county. I have enclosed copies of the amendment forms for your information.

Concerning your request for water right filing information on BLM land, you are welcome to come to the Glasgow Water Resources Regional Office and research information we have and make any copies you need. There is a 25¢ per page charge for copies.

Thank you for your attention to this matter. If you have any questions, please call me at the number above.

Sincerely,

Paula Hoyer
Water Resource Specialist

Enclosures:
Copy of amendment forms

For further information concerning your water rights, go to the DNRC Website. <http://www.dnrc.mt.gov/wrd>

"AN EQUAL OPPORTUNITY EMPLOYER"

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION



BRIAN SCHWEITZER, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

 DIRECTOR'S OFFICE (406) 444-2074
 TELEFAX NUMBER (406) 444-2684

 PO BOX 201601
 HELENA, MONTANA 59620-1601

November 15, 2007

Ronnie & Maxine Korman
 PO Box 162
 Hinsdale, MT 59241

Dear Mr. and Mrs. Korman,

I am responding to your letter of November 5, 2007, asking me again about "vested" water rights. You specifically state, "Our interest is in our ability to record and have our vested water rights protected in the water adjudication."

I previously sent you an August 16, 2007 memorandum written to me by our Chief Legal Counsel that discussed the adjudication and that addressed issues regarding uses that were exempt from the filing requirements of the adjudication. Because you continue to have questions regarding the adjudication and the term "vested," I have enclosed copy of the 1961 Groundwater Code for you to look at. Subsection 3 (h) does contain a reference to the term "vested." The reference is in regard to the use of a form entitled a "declaration of *vested* groundwater rights." That statute has since been repealed, and Mont. Code Ann. § 85-2-306 discusses how groundwater rights can be claimed in the adjudication. Groundwater law in Montana is complicated and has a long history. Therefore, I have also enclosed a brief on groundwater law filed with the Montana Supreme Court in 1991 by our Chief Legal Counsel. I hope both of these enclosures will be helpful to you in understanding Montana's adjudication.

For further clarification of the adjudication and how it affects you, I suggest you contact the Water Court in Bozeman. Thereafter, I suggest you contact a water attorney of your choosing with any questions.

I understand you continue to have questions about the adjudication, but this will be my final reply to your requests for information on "vested" water rights and their place in the adjudication. I feel the DNRC has truly tried to answer your questions.

Sincerely,

Mary Sexton
 Director

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
GLASGOW WATER RESOURCES REGIONAL OFFICE



BRIAN SCHWEITZER
GOVERNOR

222 6TH STREET SOUTH
BOX 1264

STATE OF MONTANA

(406) 228-2561
FAX (406) 228-8706

GLASGOW, MONTANA 59230-1269

November 26, 2007

Received Nov 27

Ron & Maxine Korman
PO Box 162
Hinsdale MT 59241

RE. Reservoir period of diversion

Dear Mr. & Mrs. Korman:

In response to your questions concerning my letter dated November 14, 2007. By signing the abstracts you would be verifying that water can be diverted into or caught by the reservoir year round. This is the only element of the water right that will be effected by signing and returning the abstracts.

The period of use information on the abstracts is the time frame that water may be diverted or used from the reservoir. You can use the abstracts to verify what has been claimed.

Concerning your request for copies, you are welcome to come to the Glasgow Water Resources Regional Office and research files we have and make any copies you need. There is a 25¢ per page charge for copies.

Thank you for your attention to this matter. If you have any questions, please call me at the number above.

Sincerely,

A handwritten signature in cursive script that reads "Paula Hoyer".

Paula Hoyer
Water Resource Specialist

Enclosures:

For further information concerning your water rights, go to the DNRC Website: <http://www.dnrc.mt.gov/wrd>

"AN EQUAL OPPORTUNITY EMPLOYER"

May 15, 2007
Ronnie and Maxine Korman
Box 162
Hinsdale, Montana

Director Mary Sexton,
Department of Natural Resources and Conservation
1424 Ninth Avenue, box 201601
Helena, Montana

Director Sexton,

Please note the attached copy of a letter that we sent via certified mail, addressed to you. The letter was dated April 4, 2007 and the receipt indicates that you received this on April 9, 2007.

The purpose of this letter is to repeat our request to have the following questions answered on a point-by-point basis.

- (1) We had asked if, based on the response from your agency, our vested water rights will not be adversely impacted by the adjudication. Please provide the appropriate sections from the Montana water law that address this.
- (2) Does this mean that we will not be denied due process, as well? Again, please provide us with the relevant sections of Montana water law that answer this question.
- (3) Also, since your agency is the central water rights and filings repository, we had requested that your agency notify us of any adverse filings by other parties against any of our vested water rights. At the present time, we have had no response.
- (4) Your agency letter stated the claims filing process ended on July 1, 1996. We had previously requested you provide us with the pertinent Montana water law that specifically addresses vested water rights in Montana and the method of recording same.
- (5) We now request that if you are unable to respond to these and answer point-by-point, that you obtain and provide us with a written legal opinion.

We call your attention to 63 C Am. Jur. 2d(American Jurisprudence) Public Officers and Employees, sec 247

“Fraud in its elementary common law sense of deceit – and this is one of the meanings that fraud bears (483 U.S. 372) in the statute. See *United States v. Dial*, 757 F.2d 163, 168 (7th Cir 1985) –includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public. You as a public official have a fiduciary duty to protect the interests of those you serve. Your failure to respond to my specific requests on a point-by-point basis would be a breach of fiduciary duty.

We look forward to your response, answering our questions and providing the appropriate legal citations. Thank you in advance for your cooperation and assistance.

Sincerely,

Ron Korman _____

Maxine Korman _____

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BRIAN SCHWEITZER, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074
FAX: (406) 444-2684PO BOX201601
HELENA, MONTANA 59620-1601

MEMORANDUM

TO: Mary Sexton, Director

FROM: Tim Hall, Chief Legal Counsel 

DATE: August 16, 2007

RE: Water Rights Exempt from Filing in the Adjudication

As we have discussed previously, the Department is receiving a number of letters from water users asking that it recognize their "vested" water rights. The water rights in question are mainly stock use water rights that were not claimed during the claims filing period of the adjudication. The purpose of this memo is to set out some of the pertinent history of the adjudication to help answer some of the questions associated with the issue of establishing these "exempt" water rights, and use this memorandum as the Department's response when such letters and filings are received.

In the late 1970s the legislature decided to exempt certain water uses from the *filing* requirements of the adjudication ("exempt" water rights). As Montana prepared for its statewide general stream adjudication, in order to cut down on the numbers of claims that would have to be dealt with, the decision was made that not *all* valid water rights had to be claimed. Pursuant to Mont. Code Ann. § 85-2-212, and Montana Supreme Court Order No. 14833, a person asserting a claim to an existing right to the use of water arising prior to July 1, 1973, for sock use based upon instream flow or ground water sources was not required to file a claim in order to valid abandonment of the claim. **Claims that were not mandated to be claimed could be voluntarily filed, however.** The following statute was passed in 1979:

85-2.222. Exemptions. Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court issued under Sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 12975, are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed.

Because of the above statute, and perhaps to save a \$40 filing fee, many water users did not file claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources. It is important to understand that although these types of claims were exempt from the filing requirements, it did not mean that they were not valid water rights, or that they would be deemed abandoned if not filed. In *re Adjudication of Existing Yellowstone River Water Rights*, 253 Mont. 167, 832 P.2d 1210 (1992). It simply meant that these valid water rights did not have to be claimed in the course of the adjudication. What was not addressed in 1979, however, was any kind of process that described where and how such exempt rights could be established later on – which court had jurisdiction and what was the process for proving them? The claims filing period ended on April 30, 1982, but was later extended to July 1, 1996. Mont. Code Ann. § 85-2-221(3). For a history of the adjudication, see Donald Duncan MacIntyre, *The Adjudication of Montana's Waters – A Blueprint for Improving the Judicial Structure*, 49 Mont. L. Rev. 211, 215-265 (1988).

At this point any water user who did not file claims for exempt water rights faces the issue of how to judicially establish their water right. If a water user tries to file a claim with the district court, the district court will most likely say it does not have jurisdiction to adjudicate exempt water rights – only the Water Court can adjudicate water rights. *Mildenberger v. Galbrath*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991); *State ex rel. Jones v. District Court*, 283 Mont. 1, 7, 938 P.2d 1313, 1316 (1997); *Hidden Hollow Ranch v. Fields*, 2004 MT 153, ¶ 27, 321 Mont. 505, 513, 92 P.3d 1185, 1191. And if someone tries to file such exempt water rights with the Water Court, the Water Court will most likely say that the claims filing period concluded July 1, 1996, and that it does not have jurisdiction to accept, process and adjudicate those claims within this adjudication. Although valid exempt rights not voluntarily claimed are clearly not abandoned, there is also no clear forum right now in which they can be proved and adjudicated. Anyone trying to go to either the district court or the Water Court would likely face expensive litigation costs just to try to establish which court has jurisdiction. For that reason, as we have discussed, a legislative solution needs to be explored. As you recall, an attempt was made by our Department last session to amend a bill to put forward a solution, but time ran out and the bill was not able to be amended. Perhaps the Interim Water Policy Committee can review this issue.

Many water users now faced with the situation of trying to establish their exempt water rights, rather than trying to establish them in a district court or the Water Court, now attempt to solve their dilemma by filing various kinds of documents with the Department. The Department has for some time allowed exempt water users to file what is called a Form 627. This is not a form that puts their water rights into the general adjudication conducted by the Water Court. Rather, it is only a form that allows water users to lodge a record of their claimed exempt rights with the Department, and to receive notice of various activities that may affect their water rights. Form 627 states on its face that:

A person who claims to have a water right that is exempt may file this form for the purpose of receiving notice from the Department of permit applications, change authorizations, or reservations that may

affect the owner's water right. *Filing this notice does not relieve a person of the responsibility of establishing the existence of the water right.* Acceptance of this form by the Department does not constitute a recognition by the State of Montana that the right is a valid existing water right.

(Emphasis added.)

In essence, a Form 627 is simply a piece of paper on file with the Department. It is not a claim in the adjudication, and the Department's accepting and filing of the Form 627 in no way establishes a water right. At most, it may be a piece of evidence in some future legal proceeding, in a court with proper jurisdiction, to adjudicate the exempt water right. Many water users, however, are under the mistaken impression that filing a Form 627 does something to establish an exempt water right. Water users have been sending **various papers to the Department claiming to have "vested" water rights**, and they ask the Department to make sure their "vested" exempt water rights are included in the adjudication. Sometimes those letters are accompanied by ownership update forms of "Affidavits of Vested Water Rights" or other documents, and we are told that those update forms, claims, or affidavits have been recorded in the local county courthouse. We are informed by some of the letters that the water user prefers to retain their vested water rights and does not choose to "impair them or destroy them by accepting a mere exempt or mere statement of claim." Water users claim their vested water rights are harmed by the adjudication, and even allege there has been a takings. Some letters also have lengthy demands for answers to legal questions they have regarding the redress of all the wrongs they allege to have occurred to them from the adjudication.

The "Hage" decision, 51 Fed. Cl. 570 (2202), seems to be partly behind the filings with the Department by exempt water users claiming "vested" water rights. In that case before the federal court of claims ranch owners who alleged that their water rights were taken when the federal government suspended and canceled their grazing permit established that they had appropriated and maintained water rights in certain bodies of water.

The issue of whether an individual can appropriate water on federal land by complying with state procedures has already been addressed in Montana. See *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within the Missouri River Basin Drainage Area, Between the Musselshell River Between the Musselshell River and Fort Peck Dam in Garfield, McCone, Phillips, Prairie, and Valley Counties, Montana*, Montana Water court (Case No. 40E-A, June 29, 2005). In that case, the United States objected to 104 stock water claims, filed by 22 claimants in the Missouri River Basin between the Musselshell River and Fort Peck Dam. The Water Court in response to a motion for partial summary judgment ruled in part as follows:

Montana law, as it existed prior to the Water Use Act of 1973, recognized and acknowledged the right to appropriate and

impound private stockwater rights for livestock grazing on federal public lands. It did not require the exclusive use, dominion or control of water in order to appropriate a private water right, nor did it require the appropriator to hold an easement or interest in, or the intent to patent, the place where the water right was appropriated or used.

The Acts of 1866, 1870, and 1877 acknowledged and confirmed the right to appropriate private stockwater rights in accordance with Montana custom and law.

The Act of January 13, 1897, the Stock Raising Homestead Act of 1916, and Public Water Reserve No. 107 do not preclude or preempt state law with respect to the appropriation of private stockwater **rights on the water sources involved in this case.**

The Taylor Grazing Act of 1934 did not preclude or preempt the right under Montana law to appropriate private stockwater rights for livestock grazing on lands classified by the Act.

The right of the Claimants, under pre-July 1, 1973 Montana law, to appropriate private stockwater rights on federal public land was not without limitation. Whether federal regulations or agreements in effect at the time of any individual appropriation affected the right to appropriate such rights must be decided on a case-by-case basis.

Water Court Case No. 40A-E Order at 3.

The Water Court also made clear the case was not final and stated, "None of these partial summary judgment rulings as set forth above, or as discussed in the accompanying Opinion, constitute an ultimate finding of fact or conclusion of law with respect to any individual water right claim in this case." *Id.*

In another Water Court case involving water right claims on federal land, *In the Matter of the Adjudication of the Existing Rights to the Use of all the Water, Both Surface and Underground, Within the Jefferson River Drainage Area, Including all Tributaries of the Jefferson River in Broadwater, Gallatin, Madison, Jefferson and Silver Bow Counties, Montana*, Montana Water Court (Case No. 41G-190, July 19, 205), Judge Loble applied the analysis contained in Case No. 40A-E to uphold claimed stock water rights against objections filed by the BLM and the Forest Service.

Therefore, the issue here isn't so much whether water users claiming exempt water rights would be able to successfully obtain state water rights on federal land, the issue is what is the forum for doing so.

The word "vested" has no special significance in regard to exempt rights not claimed in the adjudication, yet it is used by water users in the papers they submit to the Department as if our Department must instantly recognize them as "vested," give them some elevated legal protection, and include them in adjudication decrees. The Department does not have any power to do anything with the papers received, other than just file them, and has no power to insert them into any existing adjudication decrees. As far as the significance of the term "vested," it is important to note that that word cannot be found anywhere in the Montana Constitution where water is discussed, and has no special meaning under Montana law. 1972 Mont. Const. Art. IX, § 3 reads:

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

(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 the 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.

Thus, it is not clear why water users expect using the word "vested" will force the Department to do something special with the papers they file with it.

In sum, the Department can do little more than keep such letters and papers in its records and respond with copies of this memo that lets water users understand the nature and history of exempt water rights. I hope this brief memorandum will serve to let explain to water users the pertinent history of the adjudication pertaining to exempt rights.

**DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION**

BRIAN SCHWEITZER, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074

FAX: (406) 444-2684

PO BOX 201601

HELENA, MONTANA 59620-1601

August 17, 2007

Ronnie and Maxine Korman
PO Box 162
Hinsdale, MT 59241

Dear Mr. & Ms. Korman,

I am responding to your letter to me this year enclosing various papers with this Department concerning claimed exempt water rights. Although we are keeping those of record here, you should know that by sending those documents to us your water rights are not thereby being included in the adjudication. The claims filing process for the adjudication ended on July 1, 1996.

I have attached a memo written to me that discusses the history of the adjudication and it addresses issues regarding stockwater uses that were exempt from the filing requirements of the adjudication. I know that you have many questions regarding the status of exempt water rights, and I hope the enclosed memo is helpful.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary Sexton", with a dashed line extending from the end.

MARY SEXTON
Director

Enclosures

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
GLASGOW WATER RESOURCES REGIONAL OFFICE



BRIAN SCHWEITZER
GOVERNOR

222 6TH STREET SOUTH
BOX 1269

STATE OF MONTANA

(406) 228-2561
FAX (406) 228-8706

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,

A handwritten signature in cursive script, appearing to read "Denise Biggar".

Denise Biggar
Water Resources Specialist
Phone number: 406-228-2561
E-mail address: dbiggar@state.mt.us
Mailing address: P.O. Box 1269, Glasgow, MT 59230

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION



BRIAN SCHWEITZER, GOVERNOR

1625 ELBENTH AVENUE

STATE OF MONTANA

 DIRECTOR'S OFFICE (406) 444-2074
 TELEFAX NUMBER (406) 444-2684

 PO BOX 201601
 HELENA, MONTANA 59620-1601

To: Kim Overcast, New Appropriations Manager
 From: Tim D. Hall, Chief Legal Counsel *TDH*
 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.

November 5, 2007
Ron and Maxine Korman
Box 162
Hinsdale, Montana

Director Sexton
Dept. Natural Resources and Conservation
Box 201601
Helena, Montana

Director Sexton,

On October 3, 2007 we sent a letter by certified mail to you and the card indicates you received it on October 5, 2007. We have included a copy of the October 3 correspondence for your convenience and reference. This letter, as does the previous one, yet again serves the purpose of specifically asking one question and specifically instructing that we expect an answer from you to that question. This is our THIRD REQUEST to have this one question answered. We repeat the previous correspondence:

“We received your ½ page response of August 17 to our numerous previous requests to have our questions answered concerning our vested water rights. Your letter indicates “claimed exempt water rights.” Once again, we intend to make this perfectly clear that our interest is not in claiming exempt water rights. Our interest is in our ability to record and have our vested water rights recognized and protected in the water adjudication. Neither your comments, nor Mr. Hall’s five page memorandum addressed, nor answered any one of the questions that we had repeatedly asked to have answered on a point-by-point basis concerning our vested water rights. Based on the information that you sent, we must assume that you are telling us that at no time during Montana’s territorial or state history, anywhere within its boundaries, has there ever been a vested water right created, put to beneficial use? We expect your clear, straight-forward and unambiguous answer if our interpretation and assumption is correct or incorrect.

As before, we remind you of American Jurisprudence (63C Am. Jur.2d) Public Officers and employees, sec. 247:”fraud in its elementary and common law sense of deceit-and this is one of the meanings that fraud bears(483U.S.372) in the statute. See United States v. Dial, 757F.2d 163,168(7thCir1985)-includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public. You as a public official have a fiduciary duty to protect the interests of those you serve. Your failure to respond to our specific requests on a point-by-point basis is a breach of fiduciary duty. We also again, remind you of U.S.vPrudden(5thCir 1970)

“Silence can only be equated with fraud when there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.” With these facts in mind, we expect your unambiguous answer to our very clear and straight-forward question:”are you saying that at no time has there ever been a vested water right within the boundary of Montana” within 10 to 15 business days of your receipt of our letter.

November 5, 2007
Ron and Maxine Korman
Box 162
Hinsdale, Montana

Glasgow Dept. Natural Resources and Conservation
Box 1269
Glasgow, Montana

Enclosed please find a copy of your letter concerning period of diversion. We want to be sure that we understand the question. By signing the forms, we are verifying that water may be diverted from the reservoir year round (January 1 to Dec. 31)?

Also, enclosed are abstracts 40m164817 and 164824 showing priority date was amended by claimant on 10/5/92. Because these were for well with an earlier priority date we don't recall changing the date and don't know why we would have changed the date. Therefore, we are requesting copies of documents concerning that change.

You will also find pages certified by the BLM for cooperative range improvements. Since Montana water law states the federal authority must be cited for claimed water rights, we request copies of any and all filings for these as well as documents that show the federal authority that these filings may have been made under.

We would appreciate your answer about our understanding that by signing the forms we are verifying that water may be diverted from the reservoir year-round right away. As soon as we know we have understood the question, we will make every effort to have the forms returned to you in time.

Thank you in advance for your help with the above listed issues.