

**Opinion No. 41**

**June 9, 1947**

Honorable Sam C. Ford  
Governor of Montana  
State Capitol Building  
Helena, Montana

Dear Governor Ford:

You have submitted the following

letter to me for an opinion on the legal questions involved therein:

"UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF RECLAMATION  
Washington 25, D. C.

April 18, 1947

"The Honorable  
Sam C. Ford  
Governor of Montana

"My dear Governor Ford:

"As you know, one reason for delaying the institution of construction of the proposed Canyon Ferry project has been the uncertainty that exists as to whether the necessary water rights could be acquired under State Law as required by Section 8 of the Reclamation Act. It is my understanding that the Montana Power Company has made a number of different appropriations between the years of 1892 and 1928 which it contends cover the full flow of the stream. It is also my understanding that the extent of the rights covered by the appropriations of Missouri River waters have never been adjudicated so that uncertainty exists as to whether the Montana Power Company can support its contentions or whether there would be waters in the stream available for use by the United States in sufficient quantities to make possible the operation of the Canyon Ferry project, if constructed, in a manner that would not impair or interfere with the rights of prior appropriators.

"You suggested at the conference with Secretary Krug on April 16 that you believed an official expression of opinion could be obtained from State authorities on this subject. If such an opinion could be furnished, I believe that this would facilitate progress on the Canyon Ferry project.

"Sincerely yours,  
"Michael W. Strauss (signed)  
"Commissioner."

The prompt construction of the Canyon Ferry Reservoir is of major importance to the people of the State of Montana. It is true that the Montana Power Company and its pre-

decessors in interest took steps to appropriate waters from the Missouri river between 1892 and 1928. It is impossible that such appropriations vest in such company "the full flow" of the river. Such a claim if valid must mean that the possession and right of use of this great river has passed from the state and people of the state into the complete ownership or control of one great corporation. This result is, of course, impossible.

"By natural law itself these things are the common property of all: air, running water, the sea, and with it the shores of the sea."

Inst. Justinian bk. 2, tit. No. 1, quoted Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, at 257, 17 Pac. (2d) 1074.

Control of its waters is a valid exercise of the Police Powers of the state. The Montana Constitution provides:

"The police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the state." Art. XV, Sec. 9, Constitution of Montana.

The conclusion is inevitable that no purported appropriations of the Montana Power Company can cover the full flow of the Missouri River. A contrary holding would 'infringe the equal rights of individuals' and 'the general well being of the state.'

The status of the Missouri River as a navigable stream is definitely established by Act of Congress, approved June 4, 1812 (2 Stat. 743), providing for the Government of the Territory of Missouri, which included the present State of Montana. Section 15 of this Act provides:

"And be it further enacted. That \* \* \* The Mississippi and Missouri Rivers and the navigable waters flowing into them, and carrying places between the same, shall be common highways and forever free to the People of the said territory

and to the citizens of the United States, without any tax, duty or impost therefor."

The State of Montana has provided that it shall be the owner of all land below the water of a navigable lake or stream. Revised Codes of Montana, Section 6674.

"The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.'"

Appalachian Electric Power Company, 311 U. S. 377, 424.

It is necessary to secure Federal authority to obstruct a navigable stream and to use the water power inherent therein.

Economy Light and Power Company v. United States, 256 U. S. 113, 120.

A license or permission from the Federal government was required in order to lawfully construct the dams of the Montana Power Company across the Missouri River.

The predecessors of the Montana Power Company and such company, in order to secure valid rights to dam the Missouri River, had only to comply with the same requirements as any other individual or company.

The Power Company has never asked for or received permission from the State of Montana to build dams upon its lands beneath the Missouri River. Its possession thereof is therefore that of a trespasser. It never secured the necessary permission or licenses from the United States. Therefore, its dams are maintained contrary to the laws of the United States.

Because the Power Company is a trespasser and is maintaining dams in the Missouri River contrary to the laws of the United States its rights have not and never can ripen into such rights as will give it the control of the full flow of the Missouri River and deprive the people of the right to this full development for irrigation or

power. This new irrigation is absolutely necessary to the well being of the state and its people.

Even if we assume, without conceding, that the rights of the Power Company are valid to the extent of its prior necessary beneficial use, such rights could not prevent the United States from acquiring the necessary water rights under state law as required by Section 8 of the Reclamation Act.

As I understand, the purpose of the Canyon Ferry Storage Project, is to put to full beneficial use all of the waters of the Missouri River. In other words, when the Canyon Ferry Reservoir is completed the Missouri River will be a controlled stream. Waters heretofore wasted will permit extensive new and supplemental irrigation and greater development of power. Our very economic life depends upon using every drop of water. The right to put wasted waters to new and beneficial use is fundamental in western water right law.

"It is the policy of this and all western states to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes."

Worden v. Alexander, 108 Mont. 208, 216, 90 Pac. (2d) 160.

This company's claim of control extends over a distance of hundreds of miles.

Control of the Missouri River must be retained for the welfare of the people as a whole. No claim of property right for an increased use of water by the power company should be permitted to prevent its full development. In no western state has any such right ever been recognized.

During the last fifty years, the Montana Power Company and its predecessors in interest have sought to make appropriations of water from the Missouri River and have constructed certain dams, reservoirs and power plants to be used in the generation of electricity for sale. The amounts of such appropriations, as stated in notices of appropriations filed, bear no accurate relation to the

extent of actual needs or beneficial use of the waters of the Missouri River.

Such purported appropriations at the various plants of the Power Company are as follows:

Canyon Ferry:

25,000 cubic feet per second, or 1,000,000 miners inches.

Hauser:

37,840 cubic feet per second.

Holter:

73,120.09 cubic feet per second.

Black Eagle:

25,000 cubic feet per second, or 1,000,000 miners inches.

Rainbow:

25,000 cubic feet per second, or 1,000,000 miners inches.

Ryan or Volta:

25,000 cubic feet per second, or 1,000,000 miners inches.

Moroney:

25,000 cubic feet per second, or 1,000,000 miners inches.

These purported appropriations are greater than the total flow of the river save under unusual conditions. They certainly do not indicate in any true measure the extent of the water rights, if any, in the Power Company.

In 1939 the Montana Power Company filed an action in the District Court of the United States in and for the District of Montana against the Broadwater-Missouri Water Users Association, the State Water Conservation Board, Sam C. Ford, C. H. Raymond, E. B. Donohue, O. S. Worden and D. P. Fabrick as members of, and constituting the State Water Conservation Board. In this case the Montana Power Company abandoned its claim to the excessive and fantastic water rights described above. It was awarded certain water rights in the District Court. This decision of the District Court was reversed in the Circuit Court of Appeals for lack of jurisdiction in the District Court.

Broadwater Water Users Association, et al v. The Montana Pow-

er Company, 139 F. 2d, 998.  
- - - \*\* Defendants Exhibit M  
Tr. 16-17.

The following references are from the transcript on Appeal in such case: For 22 years from 1919 to 1940 the average annual flow at Holter Dam was 3,074,419 acre feet, the average annual use was 1,960,815 acre feet and the annual spill or waste was 1,113,604 acre feet. At Holter Dam 63.78% of such total flow was used and 36.22% of the total flow was spilled or wasted without being put to any beneficial use.

The Bureau of Reclamation has for many years made extensive studies of the waters of the Missouri River and the use of such waters, and of course, is in much better position than I am to determine the amount of such waters. I am confining this opinion primarily to the legal questions involved.

Holter Dam is the point of control on the river. This proposed construction at Canyon Ferry does not decrease the amount of water available for power. It not only increases same but makes the supply decidedly more dependable.

Since the water which may be used for power is increased and not decreased by the construction and operation of the Canyon Ferry Reservoir there can be no claim made that such construction and operation deprives the Power Company of water previously used by it or to which it was entitled if any. This construction and not any development or water rights of the Montana Power Company would make such additional water available for beneficial use.

This project will be operated under a water right of the Bureau of Reclamation. It will be constructed by the Bureau of Reclamation with public funds for the benefit of the public, and not for the benefit of any private person or corporation. Therefore, it is my opinion, in which I have no doubt, that any court, state or national, which would hereafter adjudicate this question must reach the conclusion that this water conserved by the Canyon Ferry Project could and would be put to beneficial use by

the Bureau of Reclamation free from any claim from the Montana Power Company.

The Canyon Ferry project is, as I understand, a multiple purpose project. It will lead to unlimited benefits for all the people. The Power Company and its right to use the waters of the Missouri River, if any it has, must coordinate, or be subordinated to the right of the people to a full irrigation and power development for society in general.

The State of Montana is entitled to this development at once. The Power Company has no right to prevent this construction.

I hope and trust that this opinion will "facilitate progress on the Canyon Ferry Project," as you suggest. On behalf of the people of the State of Montana, I urge that this State may now be favored with the immediate commencement and prompt completion of this project which is absolutely necessary for its future well being and continued economic progress.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General