Minutes of Subcommittee on Water Rights

July 8 and 9, 1977

The meeting was called to order at 1:00 p.m. July 8 by Chairman Scully. All members were present except Representative Day who was excused. The primary purpose of the meeting was the conduct of a seminar on water law basis led by Professor Al Stone of the University of Montana Law School. Professor Stone conducted the suminar Friday afternoon and Saturday morning beginning at 9 a.m. Edited proceedings are attached.

The committee convened a short business session on Saturday, July 9 at 8 a.m.

The first item discussed was the next meeting at which Professor Frank Trelease would discuss the relationship of Montana water law to interstate and federal resources. The committee discussed the proposed costs of the session. Senator Turnage moved that Professor Trelease be retained. Motion carried unanimously.

The committee then discussed the committee budget and difficulties in obtaining the money to be spent. The money is in a Department of Natural Resources appropriation not directly available to the committee. A no warrant transfer would make the money available to be managed by the Legislative Council for the committee. Senator Turnage moved a no warrant transfer be approved. Motion carried unanimously.

The committee decided that Judge Lessley should make a presentation in October.

The committee discussed the need to attend water meetings in the region and state. Representative Scully said a member should attend the Five-State Water Conference, preferrably Senator Galt. The budget should reflect funds for this travel.

Representative Scully said he would appoint a Representative and a Senator to work with Bob Person on press releases for the committee.

The business meeting adjourned at 9 a.m.

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SEMINAR ON WATER LAW

Conducted by Professor Al Stone
for the Subcommittee on Water Rights

July, 1977

Al Stone: I had this brief outline distributed to you -- that was not for the purpose of showing you how we're going to progress during this meeting, although if it turns out that way, we'll just go straight through it in order. But I hadn't intended to do that. I intended this outline to raise a number of different questions that might ring a bell in your mind that we would want to discuss. So this is not intended to be the direction of the flow, but rather, I think, the direction of the flow should be determined by your interests, your questions, your comments, your declarations. So I really don't have it structured as would appear from having set up the outline. It is totally unstructured and we'll just see what kind of interests you want to discuss and I hope that I can help in that discussion.

Just as a start, I would like to quote to you from Daniel Webster, who said:

> "What do we want with this vast, worthless area, this region of savages and wild beasts, of deserts and shifting sands, and whirlwinds of dust, of cactus and prairie dogs. To what use could we ever hope to put these great deserts and those endless mountain ranges -- impenetrable and covered to their bases with endless snow."

That's where we are.

I thought you'd be interested in some physical facts with respect to the occurrence of water.

Some physical facts.

1. Occurance of water:	Million A'	% of fresh water
a. Oceans	1,060,000,000	
b. Total fresh water	33,016,084	100%
(1) Polar ice & glaciers	24,668,000	75.72%
(2) Hydrated earth minerals	336	0.001%
(3) LAKES	101,000	.31%
(4) RIVERS	933	.003%
(5) Soil moisture	20,400	.01%
(6) GW:		
a. To 2500 ft.	3,648,000	11.05%
b. 2500 to 12,500	4,565,000	13.83%
(7) Plants and animals	915	.003%
(8) Atmosphere	11,500	.035%
c. Hydrologic cycle (annual):		
(1) Precipiation on land	89,000	
(2) Stream runoff	24,460	

2. The 48 states average about 30"/yr., but with great

variation.

3. Montana outflow-runoff:

River:	Station:	Av. cfs.	A'/yr.
Clark Fk.	Heron	19,940	14,400,000
Kootenai	Libby	11,860	8,587,000
Yellowstone	Sidney	11,810	8,550,000
Missouri	Wolf Pt.	9,170	6,639,000

4. Comparisons:

	A'/yr.:	A' Storage:
Colo.R. aver. virgin flow 1922-67	13,700,000	64,000,000
Missouri R. at Kansas City	40,500,000	85,000,000
Columbia at mouth	180,000,000	55,000,000
Sacramento (at Sacto.)	17,400,000	?
San Joaquin (at Vernalis, btw. Tracy and Modesto.)	3,448,000	

Well, that's about the last I'll be dealing quite so much with just physical facts.

Appropriation vs. Riparian Systems of Water Rights

We are, as you all know, an appropriation doctrine state. We use the appropriation system for deciding who has water rights. Therefore, it is sometimes confusing when people refer to persons having riparian rights in Montana, or in the "Colorado doctrine" states. What we refer to there really is the right of access, navigation, and recreation or use of a water surface or of a stream rather than a system of water rights.

As in the case of the Confederated Salish and Kootenai Tribes v. Naimen, Judge Jameson found that the various landowners on the south half of Flathead Lake have federal common law riparian rights. If you were on another kind of lake in Montana where the south half was not owned within a reservation, you would probably be held to have riparian rights to wharf out to where you could utilize a canoe or motorboat and utilize a lake or stream.

So we have riparian rights, but we're not a riparian system state so far as water rights -- the use of water for consumptive or other purposes are concerned. We do distinguish between appropriation states and riparian states, although they all have that type of riparian rights.

Representative Roth: I would like to know what you mean by the "dual use of the word 'riparian'".

Al Stone: There is a dual use of the word. A riparian system of water rights is a system of sharing along a stream that is not "first in time, first in right" but rather that everybody along the stream gets to make a reasonable use of the stream. The earlier view of riparian rights was that everybody along the stream had the right to have the stream flow in its natural state as it always had without depletion, diminution, or alteration of its quality. But that was so restrictive that most of the riparian right jurisdiction, which would be most of the east coast and midwest, changed to the doctrine of reasonable use. That doctrine says that riparians can make a reasonable use of

the water. But they don't have a priority. It's a sharing -- everyone has equal right. In a riparian system you don't usually run into the doctrine of prescription or adverse use because there is no time limit when a person might want to exercise his riparian right. If he decides to put in a little garden in 1977, and the stream is already quite completely utilized, he's not preempted. The fact that he's later does not make any difference. The question is whether this is a reasonable use in comparison with the various other uses of the riparian stream.

Representative Roth: Doesn't this have to do with contiguity?

Al Stone: It has to be riparian land, yes. There are two doctrines on that. One is that of unity of title. A person may have a narrow bit of riparian land close to a stream and then buy some additional land contiguous to that. One doctrine is that so long as there is unity of title then it all has riparian rights.

The other doctrine is source of title. That is that you never can expand a riparian right and only that land that has been in single ownership which is riparian to the stream has riparian rights. Under the latter doctrine, riparian land continues to diminish because every time any land is cut off, it will never again have riparian rights.

That's the riparian system of water rights. The other sense in which I was using riparian was that we can all have land that is riparian to a stream or a lake and we get rights of access and utilization for purposes of boating, bathing, fishing, or something like that as a consequence of our having riparian land. And those are riparian rights also, but it's not a riparian system of utilization of water for domestic, industrial, mining, agricultural purposes, etc.

Representative Scully: How many states have the riparian system?

Al Stone: All of the states east of the 98th meridian -- east of that column of states which is North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. All of those were riparian doctrine states. Now a few of those states envied our appropriation system and a few of them adopted the appropriation system of water rights. They changed over utilizing what they called a police power -- sometimes with a constitutional amendment, but usually by statute. If I'm not mistaken, Tennessee is an appropriation doctrine state. In general, it's fair to say all the midwestern and eastern states started out as riparian doctrine states.

The riparian doctrine is so restrictive with respect to where you can use the water that most of those states have found it an unsatisfactory system. They want to be able to get the water away from the riparian land in order to make use of it for a city or industry or something like that. So they have gone to legislation. What they have ended up with is a combination, by legislation of the riparian doctrine with statutory permit systems. They come close to

approximating aspects of our own appropriation system.

Representative Scully: Under the mechanics of that system are there notice requirements or any of those kinds of things like you would have here for appropriation?

Al Stone: Yes. Where you have these changes by legislation, they usually will go for permits and notice, and all of that. The discussion of the riparian system is strictly by way of academic background for this committee. I don't think you are really going to care about detailed aspects of the riparian doctrine. You will be running into though, probably, problems in other western states that adopted what is known as the California doctrine of water rights.

The doctrine that developed in California is not too illogical a doctrine, but it is an awfully difficult one to work with.

All of the United States and its territories adopted the English common law -- that is the basis of our law. Under English common law, the riparian doctrine which I've just been talking about is the basic law of waters. So California thought, well, whenever anybody got a federal patent to land along a stream, then he took with that the federal government's riparian right. So you have the riparian doctrine in California.

Meanwhile, the '49ers and their successors were going and appropriating water -- just diverting it out of the watershed -- which is not a permissible thing under the riparian doctrine. California, in 1850 and 1852 passed statutes saying this was O.K. The only thing was that these people were on federal land and so the California statutes were really just an exercise in free speech by the California legislature.

In 1866 after Nevada was admitted to the Union and after the discovery of the Comstock Lode, Senator Stewart of Nevada got through Congress the Lode Mining Act of 1866, which is really the genesis of western water law. This act said that the rights of the miners both to their lode claims and to their use of water shall be maintained and protected. Thus it recognized the custom of "first in time, first in right" in the mining country, not only with respect to mining claims but with respect to water law.

So the California doctrine was, as worked out in the horrible old long case Lux v. Haggin, an 1886 case (it took them that long to work it out), you didn't acquire any water right under the appropriation doctrine before the Congress passed the Lode Mining Act of 1866. This was because these people were actually just trespassers on the federal domain. But there were federal patents under the Homestead Act of 1862 and other transfers of property from the federal government to private parties. They acquired riparian rights. So the oversimplified brief priority in California is: (1) the pre-1866 reparian grants from the U.S., then (2) pre-1866 appropriations which date as of 1866, and then (3)

post-1866 appropriations and riparian rights. And that's the gist of the California doctrine.

The California doctrine geographically forms sort of a parenthesis around the strict appropriation states. You have Washington, Oregon, and California along the Pacific coast and North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. All of the mountain states, Montana, Idaho, Wyoming, Utah, Nevada, Colorado, Arizona, and New Mexico are strictly appropriation states. All these states declare that the law of reparian rights was never a part of the law of the state.

Montana treated its water law strictly as appropriation from the beginning. This was declared as the situation in Mettler v. Aims Realty Co. in 1921.

The trouble with the California doctrine was how on earth to integrate systems where one person has a right to take water out of a stream and out of the watershed and another has the right to have that water flow past his land with equal sharing and no priority in water use. So essentially, it's an unworkable doctrine. It has some historical logic to it, but to try to administer two entirely different systems of water law on the same stream is a mess. (And this is a mess that we may be coming to with respect to some of the federal rights.) Therefore, all of the California doctrine states have really abandoned their riparian rights to the extent they can. They've limited riparian rights to what a person actually put to a beneficial use. Instead of saying a person has a right to have a stream flow past his land, they say riparians have a right to the amount of water they can prove they have actually put to a beneficial use during the three-year period prior to the passage of this statute. In California this was done by a 1928 constitutional amendment which was upheld in three California Supreme Court cases. (The Oregon Water Code of 1909, the Washington Water Code of 1917, the North Dakota Water Code of 1955, South Dakota in 1960, Nebraska in 1903, and Kansas in 1945 and 1947 statutes, Oklahoma in 1963, and Texas following the Belmont Plantations case in its stream adjudication act of 1967.) So they have really been unable to work with the California doctrine and have gone purely to statutory appropriations for all future water rights and they cut down their riparian right to what was actually put to beneficial use.

Representative Scully: Could you explain how Texas did this?

The Texas Stream Adjudication Act of 1967 provided for actual service of notice on every known riparian right and publication. The riparian right holders were required to supply proof of the actual quantity used during the three years prior to 1967. Since they had served everyone they could find and published notice, the act provides -- and it has been upheld -- that there will be no riparian rights that are not a part of the subsequent decree that follows. The Texas water rights board takes all the declarations and claims of riparian rights, reviews them, and prepares a preliminary decree which it submits to the Texas equivalent

of our district court. Then there is an opportunity for a hearing -- a considerably cumbersome process. Ultimately a decree is rendered and it is final -- there are no past existing rights following that adjudication, and there will be no future riparian rights because a 1917 statute said all water rights would be acquired by permit and appropriation.

Senator Turnage: Do any of these states that have converted to the Texas concept have a constitutional provision like ours?

Al Stone: Idaho's is probably the closest to ours, but they haven't had this particular problem. Some of these states did this conversion without any constitutional amendments, as in the case of the Oregon Water Code of 1909 and the Washington Code of 1917. Texas did not have a constitutional change.

Representative Koth: If it wasn't made constitutionally, who made the changes?

Al Stone: The legislature and the courts. In Texas the way was cleared by the Belmont Plantations Case which was a big complicated suit on the lower Rio Grande. The suit involved a good deal of research into Spanish and Mexican water law and it finally resulted in the Texas Supreme Court declaring that there are no inherent riparian rights under a Spanish or Mexican grant. You only got a water right if it were granted you. The mere fact of having riparian land along the Rio Grande did not confer a water right. So the legislature felt there was no problem of a whole bunch of ancient riparian rights and enacted the Stream Adjudication Act to simply strongarm the riparian rights that did exist.

So, except in California, this has been done without constitutional change.

Origins of the Appropriations System

This discussion aims at the Montana system of water law but it applies to all of the Colorado doctrine states -- Montana, Idaho, Utah, Wyoming, Nevada, Colorado, New Mexico, and Arizona.

The birth and development of western water law is intimately concerned with the development of mining law and mining policy in the United States. In England, the crown had an interest in mineral property beneath private land, and therefore when it established colonies in America, England had an interest in the minerals beneath private property in the colonies. Following the Revolutionary War, and before the formation of the United States, the colonies succeeded to the crown's rights in minerals. The Continental Congress, in the Ordinance of 1785, provided for the sale of land in order to try to raise money to pay for the Revolutionary War.

After the formation of the Union in 1789, attempts were made to raise money through the sale of public land as a capital

asset. That was pretty much of a failure. There was a long period of very few sales and very little mining activity. People just went out and settled on land but didn't pay for it. In 1807, Congress passed an act that prohibited the acquisition of any interest in public lands simply by settlement or occupancy. Still they weren't making much of their attempts to sell land.

Congress then passed the General Preemption Act of 1841 for the sale of 160A. grants for a $1.25 per acre but reserving all mineralized lands. That reservation of mineralized lands continues in our land and mining policy with respect to the settlement of the West.

The Treaty of Guadalupe Hidalgo of February 2, 1848 ceded to the United States a vast area of land which included all of California and Nevada and other lands. Just a week before it was signed, gold was discovered on January 24, 1848, at Coloma on the South Fork of the American River between Placerville and Auburn at Sutter's Mill. This was kept secret for about six weeks, then the gold rush commenced.

Although we think of the '49ers as people who traveled across the continent in various types of wagons and across the isthmus, it was actually an international gold rush. There were Welsh miners, German miners, Chinese miners, lots of Chileans, Mexicans, and people from all over the world. The population grew from 2,000 to 3,000 to between 200,000 and 300,000 in the course of three years.

These people came upon the federal domain. They didn't own the land. We didn't really have any mineral policy except the reservation of minerals. So they took the federal minerals and there really was no U.S. force to police this sort of thing. They spread up and down the mother lode country of California, from around Weaverville in the north to near Bakersfield in the south in the foothills of the Sierras. They never found the mother lode, but instead were mostly placer miners.

These '49ers were not owners of land, minerals, or water. They were actually trespassers on federal property and converters of federal minerals. At times the mining camps in the mother lode country were lawless and reckless areas. But they formed mining districts. The mining districts formed various rules and regulations which later were given the force of law. They also commenced their own system of law enforcement. Some of it was rather crude, like banishment of flogging, even capital punishment. But they did begin to establish order.

About that time national politics entered in and it was desirable to have a couple of senators from a free state because the slavery issue was arising. As a consequence of that aspect of politics, California was admitted in 1850 to the Union. The State of California promptly passed its own self-interest legislation, the Possessory Acts of 1850 and 1852, confirming the right of the miners to take the federal minerals, divert the federal water, and to occupy their mining claims in accordance with the customs of the various

mining camps.

Among the customs generally adopted in the camps was that the first person to stake out a claim had the first right to it. The first person to divert a stream to use his rocker or pan had the first right to that amount of water. This is the doctrine of "First in time, first in right" and is the embryo of our system of prior appropriation.

Still there was no basic federal policy except the reservation of all mineralized lands. So in U.S. v. Porrat in 1856 and in the U.S. Supreme Court case, the Castelero case in 1862, the '49ers were found to be trespassers. In 1863, President Lincoln issued a writ to remove the miners from the Almaden mine. This was based on that act of 1807 that said you can't acquire a right to real property by simply occupancy and possession.

The miners were thus threatened even though the U.S. really had no ability to enforce the writ against the two to three hundred thousand miners who had come to California. Another threat was the Homestead Act of 1862. The Homesteaders did have legal rights under federal law. Efforts were made nationally therefore to legitmatize the claimed rights of the miners to be on the public domain and take the gold and so forth. But the eastern interests were opposed. Hence, the issue of whether there should be free mining or whether the United States should get some royalty, lease, or rental -- some profit -- out of these people who were simply just grabbing the public minerals.

The issue of free mining had arisen by the time the Comstock Lode was discovered in 1859. The Comstock Lode at Virginia City, Nevada, about halfway between Carson City and Reno, was the richest lode of precious metal ever discovered. This discovery and its immediate exploitation made the issue of free mining even more critical. Probably the eastern interests would have passed legislation setting a different direction but for the Civil War. The Civil War came and the North wanted to pass the 13th and 14th Amendments to the U.S. Constitution. (Abolition of slavery and involuntary servitude in the 13th, and that all persons born in the U.S. or naturalized are citizens of the U.S.) So Nevada was admitted for that purpose in 1864. The 13th Amendment was passed in 1865 and the 14th in 1866.

Senator Stewart of Nevada was largely responsible for maneuvering through the Lode Mining Act of 1866. The Act recognized the customs and usages of the miners under the rules and regulations of the various mining camps. The Act also recognized their appropriation of water and said that should be "maintained and protected". It recognized the existing uses of water for all purposes although it only recognized the mining rights for lode mining. That, of course, was because of the value of the Comstock Lode. In 1870, the Act was broadened to recognize placer mining. In 1872 the law concerning metaliferous minerals that was and still is today the basic mining law was enacted.

Finally, the Desert Land Act of 1877 provided for the

settlement of western lands. This act provided for the use of water by prior appropriation reserving only to the United States the nonnavigable unused water for future appropriation.

The California doctrine states said there were no appropriations until 1866 when Senator Stewart got through the Lode Mining Act, which confirmed and maintained people in their use of water. But the Colorado doctrine states said that all the Act of 1866 did was to recognize the usages and customs of these arid states. Colorado was the first of these states to say that there were never any riparian rights in these states. They have always been appropriation doctrine states and the federal government has conceded our people's right to take water on a first in time, first in right basis out of the watershed if that's where it is needed. That recognition by Colorado in 1866 is really the genesis of western water law.

That is all I have to say about the origins of the appropriation system.

The Desert Land Act of 1877 is a pretty basic act to us. In the California-Oregon_?_Company_v._? Portland Cement Company, a U.S. Supreme Court case of about 1936, the court said the Desert Land Act in effect severed the land from the water and permitted the settlers in the west to acquire land. But when they acquired land, they got no water right. You get no riparian right from the federal government and no appropriation right either. All you do is patent the land. In some instances your land settlement act required people to irrigate or make use of water, but you didn't get your water right from the federal government. The act separated the land from the water and provided for people acquiring their water right through various state laws.

So it's based on the Desert Land Act and its predecessor acts, as well as the recognition of the customs that existed before then by which the State of Montana decides it can allocate water according to the system we had prior to 1973 and according to the 1973 Water Use Act.

Representative Roth: Didn't the Desert Land Act provide that you could obtain 320A. and they had to file and prove this filing by making proper ditches to the land?

Al Stone: The acreages are different in some areas, but that is correct. Ordinarily the settlers had to develop the land before they could get their patent. That usually required ditches and the application of water.

Representative Roth: Did they file before they made their ditches?

Al Stone: Yes. They filed on the land they wished to claim. Then they would have to prove up their claim by showing they had applied the water to a beneficial use. It was apparently conceded without question by the federal government that the people were aquiring their water pursuant to state water rights. so there was just a

separate means of acquiring land and water.

This doctrine, however, is not without exceptions. Federal rights do not stem from the Desert Land Act or any prior act such as the Act of 1866. It is an entirely separate system of water rights. We may thus have some California doctrine type problems with a couple of systems of water law.

This is illustrated in the Federal Power Commission v. Oregon surrounding the licensing of the Pelton Dam on the DesChutes River. The state opposed construction of that dam. The DesChutes was a nonnavigable river -- or at least conceded to be such for the purposes of the case. Oregon said that after the Desert Land Act you must follow state procedures to obtain a water right. Oregon said that building the dam would be too damaging to the salmon run on the DesChutes River. The district court and the ninth circuit followed what was then western water law and affirmed that the Desert Land Act had severed the water from the land and that water rights could be granted only under state procedures. The U.S. Supreme Court, however, said this was wrong. The Desert Land Act applies to public lands open to settlement. When the federal government withdrew land for Indian reservations and some for a power site, the land was withdrawn also from the application of the Desert Land Act.

In Arizona v. California, this was carried forward. The U.S. Supreme Court, in 1963, confirmed and extended the Pelton Dam case saying the U.S. had withdrawn wildlife refuges around Lake Mead, recreational areas around Lake Mead, about five or six Indian reservations along the Colorado River. When the U.S. withdrew those lands it also, without saying so, withdrew anyone's right to the water which those reservations would need for the purpose of the reservation.

We are concerned because those reservations (at least nearly all of them) have a priority date as of the day the reservation was created. A quantity of water that has not yet been determined (except on the Colorado in the case of Arizona v. California where the U.S. Supreme Court did quantify the amounts for various uses) was thus reserved. Now, today, we are concerned about rather large lawsuits in which the United States is a party and all other users on the stream are parties to try to quantify as well as to give a priority date to federal water rights. The federal government says that it has already been conclusively said that its rights do not stem from the Desert Land Act or any prior act.

Representative Scully: When we embark upon an all-out adjudication effort as we are trying to do now, do you anticipate that the federal government should be a party to that action and, if so, what are the chances of ending up in federal court rather than state court?

Al Stone: In the first place, I think that our general adjudication under 89-870 to 89-879 should include all water rights within the stream or source to be adjudicated. It

should include federal rights, groundwater rights, and it should include Indian rights.

If it weren't for the McCarran Amendment, that would have to be in federal court because it would be a suit against the federal government on a federal issue. The McCarran Amendment to the Department of Justice Appropriation Act, 1953 (43 USC 666) gives jurisdiction to the states when they are conducting a general adjudication of a stream to join all federal interests in order to get a complete adjudication. So you can have this proceeding in a state court. Furthermore, if it is stated in a state court, it is fair to say now that it will not be removed to a federal court. In recent history a Colorado case was removed from a federal court to a state court.

That is called the Aken case, Colorado River Conservancy District v. U.S. 424USRpts800, March 1976. There is quite a bit of jealousy between the federal government and state interests with respect to adjudication of waters. The federal government thinks that if you let this go through the state system, the federal interests, Indian interests, etc. are going to get short shrift. The state interests think not only that they can do it fairly by that they know more about western water law than the federal people. They have been dealing with water law in the state courts for a century now while water law has not been a subject for federal courts. Thus, the U.S. brought the Aken case in the federal court in

Denver. The state of Colorado then immediately started a state proceeding to adjudicate the same waters, roughly a parallel proceeding and then immediately moved for dismissal in federal court in deferance to that state action. That would be very unusual were it not for the McCarran Amendment.

The 10th circuit court reversed the district court and said the federal government did not have to defer to the state action and refused to dismiss the case. On appeal, the U.S. Supreme Court said that because there was no considerable proceeding yet in the U.S. District Court and where the state has a system for general adjudication of its streams and the state adjudication process is a going concern, it would be best for the adjudication to be carried on in the local state district court. There were a number of reasons given including that the state court is nearer the parties involved than was Denver. But basically they seemed to think state had an adequate system and that the policy of the McCarran Amendment was to permit states to go ahead and adjudicate all rights including federal rights. So I think there is no good chance that a state general adjudication would be removed to a federal court and there is a chance a federal attempt to adjudicate can be removed to the state court.

In order to parallel this case, a motion to dismiss should come at the inception of the case to assure that there would be no considerable proceeding in the federal district court.

Representative Ramirez: Were there any Indian water rights in that case?

Al Stone: Yes. They would be included in the action. There is a question with respect to Indian water rights which is at present unanswered. This case doesn't answer it except unless you infer some things from it and Arizona v. California. The extreme Indian position is that the Indians conveyed property to the United States reserving to themselves (in Treaty Reservations only) land and, by implication, water which belongs to them from primordial days. There is no priority -- the right extends back infinitely. Their rights can neither set in a system of priority nor quantified. To the extent that they need the water and can make use of it, they have that right.

With respect to other federal reservations, the reservation doctrine seems to be that there is a priority date. That is the date the reservation was created by act of Congress, by Presidential decree, or otherwise. Also the quantity of water needed for the purpose of that reservation can be ascertained. The issue should have been thrashed out in Arizona v. California but it didn't have to be because the Indian Reservations involved in that case were not treaty reservations. They were all executive order or Congressional enactment reservations. The U.S. Supreme Court, citing Winters v. U.S., which was a treaty reservation case, and citing indescriminately treaty and nontreaty reservation cases, allocated certain numbers of acre feet of water or enough water to irrigate the irrigable acreage whichever is less. In each instance, the right was given a priority date, the date of creation of the reservation, and a precise amount of water. If left open the question of whether on treaty reservations, which they did not deal with, there might be a different priority date or quantification. It is of some significance that the Supreme Court was apparently unconcerned about the fact that these were nontreaty reservations.

In the Aken case there are Indian Reservations involved. The U.S. Supreme Court again totally ignored whether there might be a difference between the two types of reservations. It said (p1240 Supreme Ct. Reporter) "The reserved rights of the United States extend to Indian reservations (Winters v. U.S.) and other federal lands such as national parks and forests (Arizona v. California)". That is an example of where they are mixing Winters, a treaty reservation case, with Arizona v. California involving nontreaty reservations without recognition that there is going to be any difference at all.

It may not be fair to extrapolate from that that the Supreme Court is going to go in the direction of saying the Indian water rights date from the date of reservation and are quantified on the basis of the purposes the reservation could reasonably make use of.

(In Winters, there is language going both ways. It is not a clear case on that point.)

Representative Ramirez: Do you think that the quantity of water that will be recognized by the Supreme Court as having been reserved by the Indian tribes will be the amount necessary to irrigate all the irrigable land or will it also include any amounts necessary for the development of their coal reserves?

Al Stone: I need to make a little bit of compound answer to that.

Where the Indian land is primarily agrarian land susceptible of irrigation and that is the principle use of it, the court will follow its past cases. For example, in Arizona v. California, the whole allocation is based upon irrigable acreage.

Now look at the case of the Paiute tribe at the base of the Truckee River where it drains into Pyramid Lake. The tribe has had a valuable fishery there. (In fact the world record cut-throat trout came out of Pyramid Lake -- something near a 40 pounder.) There is also a unique species of fish the Indians relied upon, the cui cui. The level of Pyramid Lake has been declining and since there is no outlet, the salmity has been increasing. The Paiute tribe wants to increase the amount of water coming out of the Truckee River. It seems probable that if they get past some procedural questions to the merits of the case, it seems unquestionable that the court would rule that an adequate amount of water should be reserved to maintain the fishery in Pyramid Lake. That is certainly not a particularly agricultural area, so the right wouldn't be given on the basis of irrigable acreage but on the basis of the need to maintain or increase the level of Pyramid Lake. So there is no strict limitation on irrigable acreage. (This case is pending in the U.S. District Court for the District of Columbia under Judge Gesell.)

The problem may come to whether the amount of water reserved at the time of the creation of the reservation is for the purposes of the reservation as seen at the time of its creation, which is one approach or whether it is reserved for whatever development the reservation may subsequently maintain. There you get into the question of coal development. There is also the question of whether the water is recovered for use on the reservation or for use off the reservation. If the later view is adopted that it is for the development of the reservation and is a developing water right and it can be used off the reservation, then why not sell it. The rights could be sold in any amount to an energy company or energy conservation company that has a use for the water. These questions are not definitively unanswerable now. But they are so much involved in litigation currently going on that there should be definitive answers in the (legally) near future-- two to three years.

Representative Scully: What was the status of the Colorado court's activity at the time the case was remanded?

Al Stone: Colorado has long had a system of adjudication and supplementary adjudications. Thus, subsequent rights

can be adjudicated every couple of years or so. Also people who had prior rights who did not come in on an earlier adjudication can come in and prove their right. That right will be tagged on to the most inferior right of the prior adjudication; i.e. if there was an adjudication in 1917, and a person wasn't in on it and he has a 1900 water right, that 1900 water right will be recognized as of after the 1917 right.

So Colorado started in its regular water code proceeding for supplementary adjudication. The United States argued in part that they did fit into that system. But the U.S. Supreme Court said that Colorado could make equitable provision for recognizing federal reserved rights in accordance with their system. If they abuse it, it is reviewable anyway.

Representative Scully: Do you think it makes a difference whether the state is diligently pursuing an overall adjudication process? Does it matter if the state is sitting on its duff as it may appear for the outside Montana is now? If we continue along the same course we are going now on the Powder and Tongue River and forget about the rest of the water in the state of Montana are we in for a shock?

Al Stone: Well, yes, we are going to have to show good faith adjudications of the streams or sources. The federal government can put us under a tremendous amount of pressure because the Department of Natural Resources and Conservation doesn't have the engineers, hydrologists, or lawyers to take on the resources of the federal government if it decides to adjudicate all streams on which the federal government has an interest. That would be nearly all the streams in Montana, because most streams either arise on a national forest or flow through a reservation or something similar.

There seemed to be some indication the federal government was going to pressure us in that way by starting suits as they did on the Tongue and Bighorn and contemplated starting one on the Blackfoot Reservation (which has not been started). The Department of Natural Resources is just pleading for time. We want to adjudicate these streams but we only have so many people and we are doing what we can. I don't know what the department plans to do on the Tongue and Bighorn. They contemplated proceeding on those adjudications to then ask for removal. The longer they wait, the less chance they have for removal; because if the proceeding goes on in federal court while the state waits, I don't think we'll be successful in removing it.

Representative Scully: Couldn't that possibly change the pattern for the whole state in so far as we are already in federal court on those two rivers now?

Al Stone: You might wind up in federal court on all of them, yes. We could if we don't have enough progress or capacity to progress in our adjudications. I guess that gets pretty close to the focal point of what you people are all here and concerned about.

Senator Boylan: We have, in Gallatin County, specific instances where instead of water being appurtenant to the land, it is owned by ditch companies in which the people are members. How did that get started?

Al Stone: Well, there are various kinds of water distribution organizations. In some areas water right owners formed a canal or ditch company in order to more efficiently deliver the water, but the water right was still individually owned.

There is also a situation where a group decides to irrigate and forms a company to acquire a water right and distribute water. Ordinarily this was done pro rata according to irrigable acreage. Some of these incorporated and issued stock. In those companies typically stock was also issued pro rata on the basis of irrigable acrage. The stock really represented a share in the water. In those companies, then, the stock was really appurtenant to the land and so was the water.

Where people wanted to get contracts with the Bureau of Reclamation and have the federal subsidy which really became essential to the West, the Bureau encouraged the formation of irrigation districts which had greater financial capacity. The Bureau would contract with the districts to build a project and contract with irrigators for the water.

On a larger scale, there are water conservancy districts which so far have not been formed in Montana, although we have a law enabling it.

Senator Boylan: I see problems in this area because of all the systems we now have -- the permit system, adjudicated rights, ditch companies and canal companies, laws where water was sold to ditch companies but people subscribed to those in addition to what their rights already were. So we have a conglomerate mess here in a lot of different ways. Of course everybody is very covetous of what they've got.

Al Stone: So you are concerned with how to determine what kind of right a person has?

I think that has to be dealt with in terms of the history and corporate papers available in each instance.

Representative Roth: If the U.S. enters a case -- even on an adjudicated stream -- doesn't the individual have the burden of proof as to his right? We have an adjudicated stream. If someone else comes in and claims a prior right, we will have to prove our right regardless of what the Department of Natural Resources does: Is that right?

Al Stone: You say you have adjudicated stream. It was adjudicated prior to the 1973 Water Use Act.

The matter is res judicata as far as the parties to the original suit are concerned, but it is not res judicata if there are new parties. Res judicata means those people have had their day in court, settled those issues, and have no

business coming back. If there are other parties such as DNRC or the U.S., which was usually not a party, then under Montana water law, the prior decree is only prima facie evidence of your right, it will help, it is evidence of your right, but it is not conclusive. That has been held in Wills v. Morris, Sherlock v. Grieves and quite a few other cases.

That is only fair. If a few people on a stream have a disagreement among themselves and sue one another to straighten out their water rights, and later on others not parties to that suit claim they are not getting an adequate amount of water bring an action. The first group really shouldn't be able to tell the latter they have a decree that is final and the others are concluded by it. That just isn't fair. But the first group should be able to show what they did prove in the first action and prima facie as presumption they probably have a right to that amount of water. But that is open to attack by those who enter now.

So the adjudicated stream in the future only serves as prima facie evidence of what a person's water right is. It must be protected in the courts.

Senator Boylan: So there are no federal statutes of water rights or water use, just statements by the Supreme Court?

Al Stone: Not of the sort of rights we're talking about, no. There is much federal activity in the area of water resources, but not the sort of appropriation rights we are talking about.

Representative Ramirez: If we really want to determine rights in state court then, we are somehow going to have to give the department the money and manpower to get as many adjudications going in state court as we can right away, aren't we? Otherwise we are going to leave these things decided in federal court.

Al Stone: Well, we at least should proceed more rapidly. I can't see the state leaving the financial capacity to adjudicate the entire state in ten years. You can't just take money from every state agency and institution and increase taxes to do this kind of crash job.

Senator Turnage: It is as important that we have a system as to actually begin work on every stream.

Al Stone: That's right. We need to show we are going about the job systematically and that we are making progress. I think it was reasonable for the Department of Natural Resources to decide to begin on the Powder River and move on from there. But we need to be able to show adquate progress.

Senator Turnage: If it gets out the chronology of the plan and a suit arises all the way across the state the mechanism is there to get into state court. So you are not locked into a rigid chronology set up by the department.

Representative Ramirez: But we already have two suits in

federal court. To that extent, we can't just say we have the mechanism so these cases should be dismissed until we get around to adjudicating the Tongue and Big Horn Rivers.

Al Stone: No. In order to fit into the Aken case, the Department would have to bring action in the state district court and then move for dismissal of the federal action.

Representative Ramirez: So every time a federal court action is instituted, we are not going to be able to stand on the fact we have a mechanism. We are going to have to begin doing something with it. We haven't done that yet.

Al Stone: I don't know whether we can. If they want to push us, I don't know if we can keep up.

These Tongue and Big Horn cases involve numerous parties and represent an effort on the part of the federal government to conduct a general adjudication, including federal rights. They are trying to do in federal court what the Department would be trying to do in state court.

Senator Turnage: So we have Aken case all over again.

Representative Scully: but the state court hasn't done anything.

Senator Turnage: Are we even in the state court?

Representative Scully: No.

Senator Turnage: You'd better write that in the book then, Bob. Let's jab somebody in the ear with this as a committee.

Al Stone: One consideration, Jean, is whether there might be some financial advantage to not being so jealous as to always insist that it always must be in the state court. Just let the federal agencies use federal resources to determine and adjudicate in federal court.

Senator Turnage: Well, there is merit in that, but we ought to preserve our rights. I think Montana will find a much more friendly forum in state courts than in the circuit court in San Francisco.

Al Stone: I agree. But in order for the federal courts to do this, they will have to go through the same due process steps the DNRC would have to go through. DNRC must notify everyone it can find by certified mail. That costs over $1.00 per mailing. Just on the Tongue that must have been a considerable expense. If the U.S. brings the suit in federal court, they have to pay that. so there are some economic advantages to letting them give notice and we'll fight before Judge Batten or Jameson.

Senator Turnage: I am really saying that we shouldn't sleep on our rights.

Al Stone: I agree. And we would have a more sympathetic forum with respect to state rights in the state courts. And that is recognized by the federal interests and that is why they want to go into federal court.

Senator Boylan: Well we had a problem with this in the last session. If you have a system that is working -- may be it is not the best, but it is working. If some people further down have a problem because they haven't filed or adjudicated, what happens to those who have done something? The people who have something now don't want to give it up for a new system. There may be problems down the river that need to be solved. But why do you need a new system to wipe out the old system?

Al Stone: Well, first you didn't have that level of security with the old system to begin with. That is proven in streams where litigation has been pursued over and over again.

Your question must be: now that we shift from the pre-1973 to the post-1973 adjudications, the pre-1973 rights must be more in jeopardy than they would have been had we not enacted the law. I don't think that is true. Their certainty of their water rights is likely to occur sooner than if they hadn't had the '73 act.

Take an example. Say you have a small stream that is tributary to a larger one. The people along the small stream have adjudicated their rights and are living peacefully. It is conceivable that DNRC could decide to adjudicate that stream under the 1973 Water Use Act. If that is all they do, there probably won't be much of a conflict and everyone will receive nearly the same right he has now. But it is likely they will want to coordinate the rights up and down the larger watershed. The DNRC is required to use the prior decree as a fact in conjunction with data gathered on the other tributaries and segments of the larger stream. Priority dates and quantities will then be given to each of the water users.

I don't know why that should make any particular physical or legal difference except that it would result in a <u>final</u> decree, which you don't now have. That decree is one that will be conclusive and will exclude the possibility of any nonstated prior existing rights.

Representative Scully: I think we should go over again the question about what seems to be a general feeling among many members of the public that a certain amount of water belongs to them, it has been adjudicated, they know how much it is, and the rest of the world can just go on by. If there must be a new system or statewide adjudication they feel that the state must guarantee them that they already have is theirs. So the end question becomes, can that be guaranteed or can't it? You've already answered that once, but it bears repeating because it is consistently the problem. Senator Boylan and Representative Roth are both asking that question. I know the answer is no, but can you camouflage it somehow?

Al Stone: That's right the answer is no. But I think I can give you a Pickwickian answer. What you had before the 1973 Water Use Act is what you will be decreed after the 1973 Water Use Act, but it very well may not be what you think you had.

I have some interesting cases that you who think you have such definitive, certain rights should know about.
The early appropriators declared excessive amounts of water and early decrees were clearly erroneous. They were very generous. Part of the explanation for the latter is contained in this short excerpt from the excellent discussion in Allen v. Petrich, 69MT373(at 377-379):

> "In water suits in which members of this court have been engaged, the trial judges have confronted with aged witnesses who testified to what took place in early days. These venerable men having more or less knowledge of what they testified about, frequently looked through magnifying glasses in attempting to recall forgotten things from bygone days. The difficulty encountered in attempting to do equal and exact justice upon testimony of this character is always great and sometimes insuperable."

In cases coming up since 1930, the Montana Supreme Court has been fairly skeptical with respect to early inflated decrees. In one way or another, the court has attempted to limit the amount of water to which a person is entitled.

There is a series of cases that lend a serious question to what kind of a right a person had prior to the 1973 act.

Power v. Switzer, 1898. In this case, the plantiffs came to a place called Uncle George's Creek and used the entire creek prior to the time we had any statutes for posting notice, filing, or any such thing. They just used the creek for mining and for agricultural purposes. It's pretty clear under other cases in our law that that would give them an appropriation right to the entire creek. After all, they had put the water to a beneficial use.

Later the plaintiff's needs declined to only about four inches for domestic purposes. They had given up some of their mining and the rest of the water was just turned out into wild hay.

The use had commenced in 1868. In 1895, the defendants moved in upstream from them and started brick manufacturing and diverted 15 inches of Uncle George's Creek. The case that ensued went to the Montana Supreme Court. That court used language appropriate to deciding how much a person is initially appropriating and applied it to someone who had put the entire Creek to a beneficial use and took the plaintiff's water away from him. They gave the plaintiff the right to four inches of Uncle George's Creek and the defendant who had a use for the balance of the creek was entitled to the rest of the water as a matter of water right rather than simply as a matter of water use. (That distinction being that the plaintiff shouldn't be able to

take at any time more than was needed at that time, but the water right which would seem to have been the entire Creek was cut down to four inches.)

Conroe v. Huffine, 1914.
A person named Moore diverted an entire stream in 1868 to irrigate a total of seventy acres. Once again, this is a prestatutory appropriation. In litigation against a fellow named Atel in 1889, he was decreed the entire flow of the creek. The defendants were successors to the entire Moore right. So that right to the whole creek is represented in this litigation where the plaintiff has come in later desiring to irrigate. The plaintiff conceded the defendant's priority of 1808 but challenged the quantity of water, notwithstanding the fact that a right to the entire creek had been decreed to the defendant. The Supreme Court then limited the defendants exercise of the Moore right and the right itself to seventy inches for the irrigation of seventy acres. The Court said of this: "The necessity for the use and not the size of the ditch is the measure of the extent of the right." The tendancy of recent decisions of the courts in the arid states is to disregard entirely the capacity of the ditch and regard the actual beneficial use installed within a reasonable time as a test of the extent of the right. The ultimate question in every case is, how much will supply the actual needs of the prior claimant under existing conditions? So the decree of the Moore right to the entire flow of the creek was reduced to simply seventy inches of that creek because they only needed to irrigate seventy acres. The court considered seventy inches would be satisfactory to irrigate seventy acres. The prior decree was not res judicata because the plaintiffs had not been parties to that decree. Thus the decree could be introduced in evidence, but it didn't stand up as a right they actually had.

Gallagher v. McNutty, 1927 and Smith v. Duff, 1909.
An appropriator had used a given amount of water during a particular time or season of the year. The usual view is that when you get an appropriation, it gives you the right to take the water at any time during the year when you might need it. In these two instances, the parties had used the water for placer mining purposes during particular parts of the year. The court then limited them, when they changed to an agricultural use to taking that quantity of water during the same periods and only the same periods that they had previously used it. This limited them to the prior purpose of use.

Gilchrest v. Bowen, 1933.
This is a strange case. A fellow named Croak diverted and used all of the water of Antelope Creek, a tributary of the Judith River. He had a ditch that would carry 172 incnes and he irrigated 160A. He occupies that entire acreage and raised crops there. (Offhand, that would give him a water right of something between 160 and 172 inches. He had 160A. and a 172 inch capacity ditch, and he was probably using all the water in his ditch. Whatever he was putting to beneficial use, he should have had a water right to.) But then Croak decided not to settle upon 80 of those acres. So

he only patented and confirmed 80A. to himself. At page 57 of the opinion, the court recognized that Croak had about a 160 inch water right. Croak sold all of his land and his water right which finally rested in his successor, the defendant. In litigation with the plaintiff, the court said that he only got 80 inches of the Croak water right because he only got 80A., and he only would need 80 inches to irrigate 80A. That raises the question of what on earth happened to the other 80 inches of the Croak water right. It must have evaporated. The court said, inadequately I think, "defendant could acquire only sufficient water to irrigate the land he acquired, and on the record, he acquired at most a right to 80 inches of the Croak right."

Peck v. Simon, 1935.
The plaintiff had a 100 inch water right for mining purposes. This is similar to Power v. Switzer. He converted this to irrigation in 1882. In litigation, the court awarded him a 275 inch water right because that is all they thought he needed after he changed to irrigation.

Brennan v. Jones, 1936.
All the rights to Skalkaho Creek, a tributary to the Bitterroot River had been decreed in 1961. The early water rights were irrigating down on the lower Skalkaho. Junior rights then existed upstream. A canal company was bringing water in from the Bitterroot River to irrigate land and supply water to a city way downstream. It had to cross Skalkaho to do this. It would be to the water company's advantage to gain head in order to have more elevation for better distribution of the water. So they bought the early rights on the Skalkaho and delivered Bitterroot water to those people and sought to take out the early rights higher on the river. (The general doctrine in Montana is that you can't change the place of diversion or place of use to the detriment of junior appropriators. That probably would have been a sufficient doctrine to have settled this case to protect the junior water right owners if the change worked to their detriment, which it certainly did. The canal company thought it had bought the exact same number of inches of water right the early users had had and the right to take that amount out whenever it wanted, which was nearly constantly. The court finally said that even though all the rights had been decreed some 20 years earlier, the trial court would have to determine the mode of use of water in order to learn the effects on the junior users. The purchasers would then have to conform their withdrawals of water to what would have been demanded if the other people had continued to raise the same crops they had been raising when the sale of the water right was made. When a water right is purchased, the habits and water use techniques, and purposes of the appropriation of the seller are bought. Thus these things must be determined to show how much actual water is available for use. That aspect of this case was approved and quoted in Sherlock v. Grieves in 1938.

Quigley v. McIntosh, 1940.
This is the last case I'll cover on this subject. All the rights involved in this case were decreed in 1913. These parties had been decreed more water than they currently were

using or needed. So they began to expand their irrigated acreage. The expanded acreage was still within the land described by the original pleadings. The water used was still within the amounts decreed to them. They were however using more water than they had in fact been putting to a beneficial use. In this case they were denied the right to extend the use of water. The Court said, "It seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven cannot subsequently extend the use of that water to additional land not under actual or contemplated irrigation at the time the right was decreed to the injury of subsequent appropriators. Of course water must be appropriated if decreed under our system for some useful or beneficial purpose. The proof of the existence of some purpose and the use applied to the same as shown in the original cause, of necessity formed the basis of the awards finally given in the 1913 decree." I think the consequence of that is that the Court is saying the defendants were decreed some amount of water by a liberal court. So they have that water right and that the decree would not be upset. But they said the local court was going to have to determine exactly when -- to what hours and what days -- that right might be exercised. The approrpiator received the right for a particular purpose and is entitled to apply the right only to that purpose. So the amount of water in the decree only defines the rate at which the water may be used but the actual quantity is limited to the amount needed for the purpose of the appropriation.

These cases are intended to throw some question on the certainty and conclusiveness of the decrees prior to 1973.

Representative Scully: You said earlier in the discussion that you didn't think it would be feasible to begin adjudication state-wide. Last winter we looked at some other states and it seemed that many states have done this. They start on a state wide process and require that all persons claiming a right make their claim within a five-year period. Then the adjudication process would commence at a certain time. Do you think this might work?

Al Stone: I certainly think we should have a state-wide process of adjudication, and I think that is what we have commenced upon. The only thing is that as far as the state process is concerned, only the Powder River is affected. I was only concerned with the feasibility of putting the kind of money and personal that would be needed to adjudicate everything at once. That seems overwhelming, but it is conceivable. It would draw money from every other institution in the state in order to try to do that. Also, it has not been my observation that any state has tried to do that. Wyoming authorized the Board of Control to pick segments of streams or watersheds and commence on those. That is what is now happening also in Texas under the 1967 Stream Adjudication Act. I think most states that have attempted this sort of water right determination have gone by watershed or source of water step by step.

Representative Scully: Haven't they required by statute

that everyone in the state file a declaration within three to five years with the courts?

Al Stone: They have done that in some instances, and the Texas act does that. The act says, "On or before September 1, 1969, every person claiming any water right to which this section applies shall file with the water commissioner, a statement setting forth the dates and volume of use of water, other information as may be required by the commissioner to show the nature and extent of the claim" and so on. So it required everybody to claim their water right by that time.

Representative Scully: So you would agree that you almost have to adjudicate water on a drainage basis?

Al Stone: I think so. As a practical matter you do, not as a legal matter.

Representative Ramirez: What did Texas do after all these claims were filed by 1969?

Al Stone: Well, they are now deeply involved in the process of adjudicating. As they go from stream to stream and watershed to watershed, the commission not only publishes notice but gives notice by certified mail to everyone they can find. So even though there is a statutory requirement that all the people declare their rights the actual adjudication process is very similar to our own. I don't know whether there is an advantage to having all the declarations come in at once. One of the things that is a big concern to me is satisfying due process. We live in a good country and a free country with democratic institutions, but it makes it an expensive country. I was wondering as I thought about your problems for these meetings whether we could expedite our adjudications by limiting notification to publication, specifying in the statute that notice be given by full ads, half page ads, or whatever published a certain number of times. Then have people file declarations and consider that they have been given notice. If they don't care to make any claim, then consider that they have no water right. But I ran into some problems when I researched this and kind of blew my idea out of the water. The United States Supreme Court has overruled state courts that have upheld my idea. One of these cases was a water rights case another was an eminent domain case in Kansas. (Walker v. Hutchinson, 1956 United States Supreme Court Case) (Shroeder v. New York, 1962). The U.S. Supreme Court has followed these cases ever since. The danger of not giving due process is that you can go through this elaborate proceeding to conclusion and after all the money and years it has taken to get a decree and get a reversal. Then you have to start over again from scratch. So my position is that you should take no chance on due process because the cost of misjudgment is far too great -- the stakes are too big.

Representative Ramirez: What about having two publications? The first would notify people of the requirement to file. For those who file you could demonstrate notice. Then you

can pick up those that are ascertainable beyond that. Later another notice could be published for all the rest.

Al Stone: I think that would be satisfactory. In fact one case showed that where a person has actual notice he can't complain about lack of due process where the statute wasn't followed exactly.

Incidentally, because of the interrelationship between groundwater and surface water rights under the 1973 act, I don't think it is sufficient to just give notice to people associated with surface water features but should also notice anyone who might be drawing groundwater. Some wells are inside houses so the problem of giving adequate notice seems to me to be enormous. It is a major problem and a major expense.

Montana's Constitutional provisions and their effect.

The 1889 Constitution had only one provision with respect to water. It said that the use of all waters and the right-of-way over the lands of others for ditches shall be held to be a public use. Except for slight gammatical corrections, the 1972 Constitution copied that.

Pursuant to those provisions the court has liberally interpreted the use of water as a public use. The court has never closed the list of what is a beneficial use in the state. It finally comes to the question of whether a use is wasteful or has social utility. Eminent domain for persons who want access to water has likewise been supported. That has been upheld in Ellingbous v. Taylor and Sprat v. Helena Power Transmission Company. It has also been upheld by the U.S. Supreme Court in a Utah case, Clark v. Nash.

What waters can be appropriated?

Prior to 1973 it seems to have been the law in Montana that there had to be a watercourse in order for a person to have a water right or an appropriation. I think this was an erroneous view that was an adaptation of a rule of tort law in damages that when there is flood water and vagrant surface water, that that is not watercourse water. A person has a right to divert that water and to protect himself from it. You can't do that in a watercourse. So there is a distinction, but it ought only to apply in the case of damages as described. So there is a valid distinction between the water course and just ordinary surface drainage water but the distinction ought only to apply in the case of damage such as described. Montana started out with the distinction. For instance, damages of Fordham v. Northern Pacific Railway Company, which was where the railroad put an embankment that affected the flow of the Bitterroot River and damaged this fellow's property and he brought an action for the damages and the Court held that they had diverted part of a watercourse and so the railroad had to pay damages. In Lamunion v. Gallatin Valley Railway Company, the railway from Three Forks to Bozeman, they didn't put in an embankment and the water came down a swail and inundated a man, Lamunion, and the Court said, "that's just a swail

and doesn't look like much of a water course with grass growing in it a lot of the time so it is not a water course and so you don't get any damages. The railway had a right to divert the water however they wanted to."

Using water course for that purpose is one thing but saying that a person who can make an economically justifiable use and put it to beneficial use isn't taking out of a water course and doesn't get a water right, I think it is too bad. In Popham v. Holleron the water was seeping out of a canal and Popham went up the gulch and built a check dam to store the water and put it to a beneficial use. Holleron then went up the gulch and put a dam in above Popham and cut his water off. The court gave the right to Popham because the water was in a watercourse after it seeped out of the canal. They got into litigation and the Court said that it had to be a watercourse and that after the water seeped out of the canal and began to form rivulets that it was a watercourse. So Popham had an earlier right and he was entitled to prior right and Holleron had to let the water down to Popham.

That was followed by Doney v. Beatty, Hay Coulee in Blaine County, where people upstream on Hay Coulee were putting in little check reservoirs. Beatty, who was downstream and who had been using the water from Hay Coulee, sought to enjoin them from doing that. The Court said that up there were was not a watercourse and consequently Beatty could not get a water right against them and they could not be enjoined. The plaintiffs in Doney v. Beatty were all parties to a case of Federal Land Bank v. Morris which found Hay Coulee to be a watercourse, but that was downstream where the plaintiffs were.

I think under the subject of the Water Use Act, we may have eliminated that distinction. I hope we have. The definition is:

> "'Water' means all water of the state, surface and subsurface, regardless of its character or manner of occurance, including geothermal water."

From there on, the code only speaks of water generally, except for when it refers to groundwater or something like that. Then it tells how you appropriate water, and I think it may have eliminated that distinction between watercourse water and nonwatercourse water. I would hope so. So a person can make beneficial use of water that flows intermittently. However, in all of our adjudications under the 1973 Water Use Act, all of our water rights that we are worried about are subject to pre-1975 water rights. So the issue of whether or not a person was taking from a watercourse or not remains with us for litigation under the pre-'73 water use act. I guess you are all familiar with the importance of pre-1973 water law under the 1973 Water Use Act. 1972 constitutional confirmation of existing water rights. We are going to be continuing to deal with in pre-1973 water rights for however long it takes to adjudicate everything in the state.

Waste, drainage, and return flow waters may be appropriated by a lower appropriator as held in Newton v. Wiler, a 1930

case. But such lower appropriator doesn't get to compel the upper person to continue to waste water or continue to use water. He just has to hope that the water continues to come down to him. That leads to a neat controversial question, which I ought to get some discussion on. That is, can a person after making his use of the water (for which he appropriated it) recapture the water at the foot of his property and then put it in a sump and pump it up to the top of his property again and reuse it? Connected with that, can he make his use more efficient and then decide to put additional lands under irrigation under his original water right?

Representative Scully: I guess he wouldn't be able to do either one. You are limited to the original use for which the water right was appropriated.

Al Stone: There is a policy argument for saying that if a person can make more efficient use of the water he ought to get the benefit of it. Yet, there is a suspicion that it is not merely making better use of this water but if he starts irrigating an additional 80 acres or 160 acres, that there is some kind of cheating going on.

The early cases in Montana were quite liberal with respect to water use, and they would allow a person to expand his appropriation (pre-statute appropriation) like in Holna v. Garringer which is in No. 1, Montana Reports. They let him relate back his subsequent development to his original appropriation. In Rock Creek Ditch and Flume Company v. Miller, a 1933 case, water was imported from another watershed and by the Rock Creek Ditch and Flume Company, and this person who was a member of that company was utilizing that imported water for his irrigation and that increased the seepage and the water commenced larger volume flowing out of a spring which went into Wyman Creek and eventually into the main drainage. So the fellow who had done that irrigation with the imported water put a little sort of a weir up at the spring where it was commencing to escape from his property and started to reuse the water. This fellow Miller ripped out the works and said that they didn't have any right to that water and ultimately the Montana Supreme Court ruled that once the water had reached the spring and was tributary to the whole water system it became a part of the system of appropriation -- first in time, first in right -- in that drainage. The people who had imported the water had lost their right to use it. They had made their use of the water and could not recapture it.

Our code and the cases I quoted to you earlier are couched in terms of the fundamental being, the beneficial use of the water, the purpose for which you have made your appropriation. When you establish your appropriation and the water which you are appropriating will accomplish that purpose -- that is the limit of your appropriation. It is not a quantity of water but a purpose for the exercise of a franchise to utilize public property. The water belongs to the public. You get a franchise for a particular purpose, and after it has served that purpose, other people get to use that property. My answer would agree almost exactly

with what you said.

Representative Scully: Say you have someone who is in an area of a high water table and because of that high water table when you irrigate above him you have flood irrigation and water seepage that goes down into the two farmers that are below and say that one on one side or another decides that he is tired of that and he dredges in such a way that the seepage now comes into a channel that he has created and drains into it. As a result of that he dries up both his and the other land with the excess flood waters. So what he has done basically is channel that through a drainage ditch and let's say that he dumps into another creek that goes by. All he wanted to do was to get the bog out of his property and that's what he did. But the farmer next to him wanted to keep the flood irrigation water. Has he developed through his use of that flood water over the years a water right in such a manner that he could enjoying the other individual from further action in that drain or indeed even fill it in if it was possible.?

Al Stone: I don't think that I can give you a definitive answer but it seems to me that you are dealing in an area of real property law and whether the upland owner has over a sufficiently long period of time acquired prescriptive right to drain onto the lower owner and it sounds to me as though, and your hypothetical, that likely that has occured, that he has over the years wrongfully drained his water onto this lower landowner and made a bog of the thing and after five years of using the lower land this way it seems to me that he would acquire a prescriptive right to it. I think it is a little less of a water law problem than it is a real property- tort combination.

Senator Boylan: Of course you would probably come in on these impact studies. I got a little place there -- 140 acres -- out in Four Corners that used to be really boguy because people really heavily irrigated above. That has all gone into development now and, of course, that had an impact on this piece of property that I have that there is no water table there anymore. It used to have a real high water table. It is all these impacts -- I think everything may come into this part of it -- and it is an impact because now this land requires more irrigation which before it was subirrigated and then too, when you establish county roads they go in and build the roads up -- put a cut down in there -- and of course through wet areas -- it starts a cut down in there -- and of course through wet areas -- it starts collecting water. Then, of course, the people have been filing on this and once they created it then they come in down below and file on this seepage or drainage water for whatever that it may be. It may come back of course the environmentalists -- a lot of people are talking about impact and impact studies and maybe this will go into that part of it and all of these things. The impact of what you do has problems with somebody else.

Al Stone: It seems to me in John's illustration that it might be possible for the upland irrigator to enjoin interference with his drain. There is a reciprocal problem

that the downstream guy may be enjoying the use of the drainage water.

Representative Scully: Can you approach that from the -- what happens if you take the argument that what I've done is through my use of that water for years I've developed a beneficial use for that water and have thus appropriated the water. I'm talking about the farmer who was using the water which came down. The other farmer has drained away the water he was using. He has taken away water that has been beneficially used. We would not recognize that would we inasmuch as they haven't appropriated or diverted any water?

Al Stone: In the future, under the 1973 Water Use Act apparently you would not acquire a surface water right that way. (I don't quite think you call that groundwater when there is subirrigation). You have to impound, withhold, withdraw, or reservoir the water under the Water Use Act and you wouldn't acquire a water right. I'm not so sure that you wouldn't have acquired a water right prior to 1973, however. It is true that our code sections that have to do with appropriation of water speak of diverting and posting notice and posting a notice at the point of diversion or whatever. It was natural for our Legislature to think in terms of diversion partly because that was the principle way in which you could make the use of water at the time of 1885 and 1895 when these code sections were drafted, and partly because they intended to distinguish the appropriation system from the riparian system. They wanted people to know that you didn't get a water right because water was flowing past your place. You would have to make a use of it and they used the language of diversion probably as much for that distinction as for anything else. It does seem to me that that's the real heart of an appropriation is the beneficial use rather than the means of conducting the water to that use. I don't think it is a settled question.

The principal code section under which people appropriate water rights in Montana prior to 1973 was 89-810 to 89-812. That provides for posting of notice at point of diversion, and filing and telling where you were going to divert the water and all of that. It was held in Murray v. Tingly that that was not an exclusive means -- that that did not prohibit anybody from getting a water right by simply putting it to a use. I don't think that the code section controls and I think it is jumping to an unfortunate conclusion to say that a person who has made a good, economic use of water -- rely on it in developing his farm or his produce -- does not have a water right. I am sorry that our 1973 Water Use Act requires diversion, withdrawal, impoundment and so on for an appropriation. I think it simply should have said an appropriation is the acquisition of a water right pursuant to this act. It should not have gone into whether you needed a diversion.

Senator Galt: What if the upland farmer changes his method of operation -- does something, irrigates more efficiently -- and the downland farmer doesn't get any water from runoff.

Al Stone: This is answered in Montana cases in both Newton v. Wiler and in Popham v. Holleron. In Popham v. Holleron where they had the ditch that seeped water into Holleron Gulch, the Court said that Holleron had a water right but didn't have the right to compel the canal company to leak water and if they made their ditch more efficient or if they decided they didn't need the water anymore, they didn't have to run it in the ditch. In Newton v. Wiler, Mrs. Newton was making use of a drain ditch in somewhat of a similar situation as this and the Court said that she could have a water right based on drainage from the upper land but she did not have the right to compel him to waste water or have use of the water which you have the benefit of. This downstream person gets the water right but it is a conditional one upon the upper person needing the water and making probably somewhat inefficient use of it.

Representative Roth: Could that be called adverse possession?

Al Stone: No that is not adverse because you are not taking any right away from the upper owner. It would be adverse if you hurt the upper owner's right. By adverse use of water, although it is very rare that anyone has succeeded in getting a ruling from the Montana Supreme Court that he has successfully done so, we have had until 1973 the doctrine that you can get an adverse or prescriptive right to water. That will ordinarily have to occur in the sort of situation where upstream person, who has an inferior priority to a downstream person, takes the water when the downstream person did need the water and probably protested and the upstream guy felt that he had a prior right and was going to take it and deprived the downstream person of his water. It can also work in the other direction. The downstream person with an inferior right may go to the headgate of the upstream person who has a beter right and tell him that he has his headgate on and that he, the downstream person, is entitled to that water and deprive the upstream person of the water when he needs it. It is very difficult to prove a right by adverse possession in Montana because you have to prove you took the water when the upstream person wanted it and needed it because he has no right to water when he doesn't need it. He is supposed to let other people use it. This situation does not involve depriving anyone of water. It is making additional use of water which is what we are supposed to do.

Representative Scully: You touched a little bit on eminent domain in that. If I understood what you said, it bothered me a little bit in terms of the power of eminent domain lying to the individual for the beneficial use of water. I am having trouble constructing that in terms of how that is going to operate.

Al Stone: I am not talking about eminent domain of water rights but of eminent domain for right-of-way access ditch right to obtain water. In the case that went to the United States Supreme Court, Clark v. Nash, the plaintiff had a ditch through a very narrow canyon apparently, and utilized that to irrigate his place. The defendant wanted to bring

water to his place also. There was enough water in the source, but there was only room for one ditch. The defendant sought to enlarge the plaintiff's ditch, interfering with the plaintiff's property. Utah had a statute similar to ours and the defendant condemned the right to enlarge plaintiff's ditch and make joint use of the ditch that way to carry his water to where he wanted to use it. That was fought on the basis that here is a private individual trying to make use of eminent domain and that is not constitutional. The Supreme Court said that in the arid where water is a public use, the western states can decide that the private use of the water and the development of the water resource is a public use.

Representative Scully: So when we differentiate an eminent domain law in Montana from the water standpoint to the real property standpoint, is that you are declaring the water, even though I as an individual am using it basically for my private use, as a public use and allowing eminent domain to hold.

Al Stone: The Constitution supports that and it is not a new Socialistic idea because Ellinghouse v. Taylor is an 1895 case upholding it in the Montana Supreme Court.

Representative Scully: Yet we won't allow that in terms of a public use for say a recreational facility. If I as an individual want to start a dude ranch, I can't even get acess to it.

Al Stone: All of the western states tended to adopt the common law and to follow the law of the eastern states, but Justice Holmes in Loquetis(?) Land and Cattle Company v. Curtis said that the adoption of the common law of England by the western states is far from meaning that the patentees of a ranch on the San Pedro ought to have the same rights as owners of an estate on the Thames.

Representative Roth: You were talking about the reuse of water. In the first place the economically justifiable user and you had to deal someway to get it back on your property. If you had all the water in that stream and the first right, which probably included most of the water out of the stream, and you could if it was economical for you to put it back on your land someway, are you saying that that would be illegal?

Al Stone: For the future under the 1973 Water Use Act, for any change of use you have to get the permission of the Department of Natural Resource.

Representative Roth: What do you mean "change of use"?

Al Stone: It seems to me that there is a change. You are not using it the way you were using it before. I think you described the change. Instead of returning the water to the stream where others might use it, you have decided to recapture it and make more intensified use of the water. I think that that is a change that the Department of Natural Resources would say that you needed permission to do, and

then it is my guess that they are going to say that you had an appropriation for a particular purpose and you are trying to change the purpose of your appropriation. What you need is a new appropriation -- an additional one -- as of 1977. What do you say, Rick?

Rick Gordon: It would sound to me that there would be a need for a second water right for the increase in consumptive use. In other words, the amount that won't return to the stream for people who are downstream. There wouldn't be any question as to the validity of the first time around -- that would still remain under the old priority -- while the second application for water would probably constitute your new appropriation for a new set of consumptive uses because that would be that much more water that downstream people would not have the opportunity to use.

Al Stone: Moreover, under Conroe v. Huffine and Quigley v. McIntosh, I think that you would run into the same proposition under our pre-1973 water use act as a more extensive, intensive use of water. The people downstream were entitled to rely upon the development of the water works for the purpose of the original appropriation and don't come onto the stream and develop their works depended upon someone else making up his mind to later expand his use of water. I think that's basically not within the principal of a prior appropriation. As I have said in Wyoming and Colorado and probably in Arizona, your proposition, I think, would stand up. You could capture it on your own land and use it on the same place. Intensify your purpose and increase your consumptive use.

Representative Roth: If you pooled it up above and kept holding it and holding it. Say you were bringing it out in a ditch and you made a runoff to a reservoir and you held it there and used the rest. That would not constitute an illegality I wouldn't think.

Al Stone: The policy, I think, has always been to encourage reservoiring of water but that generally means -- a person will not generally reservoir water unless there is a shortage of natural water. If there is plenty of natural water, why would he build a reservoir.

Representative Roth: But there's never enough.

Al Stone: Well, that depends upon where you are.

Representative Roth: In our area and in most of the areas I've lived there's always been a shortage.

Al Stone: If a person is capturing spring runoff water, for example, which would otherwise go to waste, even though the stream may be fully appropriated and totally exhausted during the irrigation season, still a 1977 reservoir right could be a very valuable right, because you are capturing water which would otherwise go to waste and you should have first claim to that water. I really think that it is erroneous to say that a person has a reservoir right. It

seems to me that the beneficial use is the basis of a water right and that a reservoir is a means of making that use. A reservoir is amenas of delaying the application of the water for beneifical use. So, what you have, we'll say, is a very inferior appropriation to 1977 appropriation but it is to May and June water and nobody else can make any use of it. So you take this May and June water for your 160 acres or 5,000 acres, reservoir it, and then you have first claim to that water after this long delay holding it in your reservoir. It is a wide, slow place in your ditches. However, there is still quite a bit of speculation and the idea of there being a reservoir right as such apparently has some attraction.

Representative Scully: I would assume that that would hold true only so long as you could show that it is not interfering with the level of the stream.

Al Stone: After you release the water from the reservoir -- in the first place, if the reservoir is on the stream, you are going to have to let the normal inflow be the outflow, too, and then when you are releasing water to recapture further down, you have to make allowance for evaporation, seepage and only take the net amount which you are delivering to yourself downstream. Is that what you are asking?

Representative Scully: It appears to me that in Montana you could get yourself in a situation where reservoirs would control so much of the water that the stream flow would change. So that someone who may be controlling it through reservoir use of the water in upland country where it is going to be earlier in the spring, is going to be controlling so much water that the stream flow down below in the dry country which needs early irrigation would be reduced. Therefore, you would be interfering with someone else's water right through that reservoir.

Al Stone: Then you are sure invading their rights. Putting in a reservoir doesn't give you a prior right to a prior appropriation. As a physical matter, it usually will work out that there will be more water late in the year if water is reservoired and used upstream, because the return flow from upstream irrigation will provide a delaying action and will improve the condition of water recurrence in the dry part of the year.

Saturday morning -- Interbasin transfers -- Central Arizona Project

Al Stone: The Colorado River Basin, for which there has been a great deal of concern by the people in the locality about their water supply and the depletion of their water supply. Their was a great deal of concern, particularly rivalry, between the upper basin and the lower basin states because California was growing fast and increasing its consumptive use of water rapidly and the upper basin states in the earlier part of the century were not developing at the same rate in population and industry and agriculture. They tried to enter into a compact in order to divide the

water of the Colorado River and they didn't reach a very complete compact, which was signed in 1922 by every state except Arizona. What it did do was to divide the Colorado in bulk between the upper basin states and the lower basin states. They figured the upper basin states would get 7 1/2 million acre feet per year and the upper basin states would deliver to the lower basin states 7 1/2 million acre feet per year. They assumed a virgin flow at Lee's Ferry of 16.8 million acre feet in the 1922 compact. Arizona later ratified the compact. There still existed a controversy, a bitter one, between California and Arizona over how much water, should counted, be in Arizona's allocation. California was using about 5.2 million acre feet of water. Arizona couldn't use its water because the Colorado flows in deep canyons through Arizona and they wanted to establish a central Arizona project whereby they could pump water from down around one of the lower dams for about 300 miles or so into the Phoenix -- Tucson area, an expensive project. In order to obtain the water for that they needed to settle what California's priority was as against Arizona. The real issue was whether Arizona had to count the water in the Gila River as part of its allocation from Colorado and thus reduce Arizona's total amount or whether ARizona would get the Gila River for free and only count the Colorado allocation and increase what it would be entitled to by about a million or 1.2 million feet. Essentially, California lost that case in 1963, and the Gila River was free for ARizona and they did not have to count it in their entitlement. California was cut down to 4.2 million acre feet per year -- about 1 million acre feet less than California needed and was currently using. Following that, Secretary Udall came out just a few months after the California-Arizona decision, the decree was in 1964, I think, with a specific southwest water plan which considered the region's total supply of 16.4 million acre feet and the essential requirements 23.4 million acre feet a considerable deficit, and he proposed several things specifically. The Bridge and Marble Canyon Dams were tied into his proposal to construct a central Arizona project serving Phoenix and Tucson. Of course, increase energy and power as needed and was needed at that time. The Bridge and Marble Canyon Dams were tied into in order to sweeten the feasibility (economic aspects of the central Arizona project). The central Arizona project is economically unfeasible, it is a loser, it s terribly expensive and there is not going to be a great deal of revenue from it. But, if you can tie into it some hydrolically and physically unrelated, but profitable hydroelectric dams, which are economically feasible, then it makes the entire project look better economically. Even though if you tied Grand Coulee Dam into the central Arizona project it would make the central Arizona project look a lot better. That is the reason the Bridger and Marble Canyon Dams were brought in.

An aquaduct delivering Northern California water southward and actually not just merely to Los Angeles basin but Northern California water brought down by the large California aquaduct in the Mendota Canal over into Southern Arizona into the Colorado River Basin area and a large desalinization plant on the California coast in order to

supply California with the water that would then be taken. Secretary Udall's proposal brought out the conflict. Arizona wanted a guaranteed supply of water for its farms and cities and so they had the central Arizona project. Southern California wanted continued access to more water than it was guaranteed under the agreements of the 1920's in the California v. Arizona law suit. The upper basin states wanted guarnateed access to the water which they would need for future development and were not yet using. They needed Bureau of Reclamation dams and the use of the water during the dry summer season. The Pacific Northwest was scared, and it wanted to protect the Columbia and the Snake Rivers from thirsty Southwest which was casting covetous eyes on the affluent Columbia River. The conservationists and environmentalists wanted to maintain the Colorado River intact, free from more dams and the Bridge and Marble Canyon Dams were particular targets of the Sierra Club and they wanted to protect the Grand Canyon National Monument where both Bridge and Marble Canyon Dams were. They reached a resolution which gave everybody something. The Colorado River Basin Project Act of 1968 gave Arizona approval of the central Arizona project, California was guaranteed 4.4 million acre feet with priority over the central Arizona project. California got the protection it needed. It still doesn't get the water that it wants but it got protection and priority over the central Arizona project. The upper basin got 5 reclamation projects, Curisante, Flaming Gorge, Glen Canyon, Navajo, and one other large Bureau of Reclamation project, and Utah got an increased allocation of water to the Dixie project. The Pacific Northwest went along with this because it got a 10-year moratorium on any Federal planning per transbasin diversions and the conservationists won also. They got a committment that the Bridge and Marble Canyon Dams would not be built but the power by stream-thermalplants generating power from coal. So the conservationlists and environmentalists won -- they got the Four Corners plants. That is the real irony of it, I think.

The basic problem in the area is that the 1922 compact assumed a virgin flow of 16.8 million feet, as I said. As it turned out, after 1922 as the water was measured the average virgin flow was 13.7 million acre feet instead of 16.8. Over the last decade it has been only 12.1 million acre feet. So central Arizona uses 4.5 million acre feet which is twice what is available on a sustained basis. It produces specialty agriculture -- winter lettuce, vegetables, citrus, dates, melons, and these all require heavy irrigation. The average depth of the water table has dropped from 70 feet in 1940 to 200 feet in 1964, and in the source that I have, it estimated that it would drop to 300 feet by 1975. This is a nonreplenishable resource that amounts to about 2 1/2 million acre feet annually of unreplacable water. It is also getting more saline, poorer quality.

The central Arizona project is designed to save Arizona by pumping water 450 miles uphill to the Phoenix-Tucson area, approximately 1.2 million acre feet, at a cost of originally estimated around 1.4 billion dollars. That has gone up some

now. The Pacific southwest needs more water as soon as it can and the question is where are they going to get the water.

There have been a number of suggestions. They started out with a rather modest idea of how much water they might take say from the Columbia and where they might take it from the Columbia. As I mentioned yesterday, the Columbia flows somewhere between 180 million to 189 million acre feet per year. Keep that figure in mind when we talk about the Colorado flowing somewhere around 13.7 million acres a year. Vast difference. The Columbia has historically simply overflowed all of the dams on the Columbia during the spring runoff and dumped millions of acre feet into the pacific Ocean. I doubt that there will be any spill this year except for the purposes of allowing salmon fingerlings to go downstream. The chief engineer of Bonnerville Power tells me that when they finally install all of the generators -- additional generators -- for peaking power on the Columbia that only in flood years will there be any spill. The Pacific Northwest can use the water in the future -- all of it for power purposes, whereas the Southwest would like it for food, essentially agriculture. The initial estimate as to how much they would like to get from the Columbia was around 2 or 2 1/2 million feet but their estimates have gone as high as 13 million acre feet at the Dalles with a lift of 5,000 feet over mountains and transporting it 1,200 miles to Hoover Dam at a cost of about $11 billion. This would double the current Southwest water supply and that's, I guess, enough. Here's a map of the Colorado River Basin area where the dams are and that's just a brief rundown on that history.

You're more interested in the Missouri River Basin area than the Columbia. I don't have anything as specific on the Missouri. Having taught a summer in Texas, I know that Texas very desperately wants more water in their high plains area. In the area around Lubbock and Plainview in the high plains of Texas, they have been drawing water from the Ogalala formation and also the Panhandle of Oklahoma and that essentially is nonrechargeable. The recharge is so small that they're really mining the water just like you mine oil or coal and other minerals, because the recharge rate is negligible. Consequently the water table has been dropping in that area over a long period of time to the point where the pumping depth is so great that land values have been dropping over the last decade in that area. so Texas has looked over to its own east -- the Cypress River Basin and that area over by Louisiana -- to see about transporting some of its own water up to the high plains which involves always regional conflicts and also tapping the Missouri downstream from Fort Randall Dam and bringing water along the slope of the plains east of Denver down to the high plains area. They've been looking everywhere for water and I don't know what they are going to finally end up with. All of that area is water-short, much more so than we are here in Montana, especially in the Columbia drainage.

<u>The Wild and Scenic Rivers Act</u>

You wanted to talk about navigability or do you want to talk about the wild and scenic rivers act for a moment? The wild and scenic rivers act might be worth talking about just briefly because it has some relation to these inter-basin transfers, the Federal use of water and so on.

I have in mind the development of coal here in Montana and the need for the regulation of the Yellowstone River if you are going to have large energy conversion plants. It is not enough to say that the Yellowstone has an average annual flow of so many cubic feet per second or so many acre feet per year; it is the low flow which counts, and this year there will be an especially low flow. But every year the low flow varies from spring runoff to the winter time. In order to shore up the low flows, there is only one feasible method and that is to put in big storage dams to regulate the flow, catch the flood waters and release them during the low-flow period. I think that is going to be a critical thing for Montana. How can Montana deal with that?

I would like to read you an interesting story. It will only take a moment.

> One of the most hard-fought, and bitter legal and political battles concerned the Callas River which, though navigable, lies wholly in the State of Washington. The State Department of Game had evolved a comprehensive plan for the protection of anadromous, principally salmon and steelhead trout, which led to the legislative adoption of a Columbia River Sanctuary Act prohibiting the construction of dams over 25 feet in height on the Callas or other streams tributary to the Columbia. The City of Tacoma applied for a license from the Federal Power Commission to build two dams, 500 and 240 feet high, to produce power for its industries. The Federal Power Commission found a critical shortage of power existed in western Washington, issued the license over the objection of the state that the river should be left its substantially natural condition for recreational purposes. On the strength of the first Iowa case, (that's another case), the commission's power to issue the license was recognized by both state and federal courts. (State of Washington v. Federal Power Commission. This is a ninth circuit case and a State of Washington case). The state court then attempted to block the project by holding that the city, a creature of the state, had no power to condemn state property, a fish hatchery that would be inundated by one of the reservoirs. (City of Tacoma v. Taxpayers of Tacoma, a Supreme Court of Washington case.) The U.S. Supreme Court reversed on the ground that this issue had been involved in and decided by litigation involving issuance of the license and hence was res judicata. Pointing out that in the prior litigation it had been held that state laws cannot prevent the commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream under the dominion of the United States. The people of the State of Washington then

adopted by initiative the statute reaffirming the prohabition against dams over 25 feet high and adding "nor shall any such person, including a municipal corporation, obtain or use a federal license for such purpose. The city then, ironically enough, invoked the jurisdiction of the courts of the state whose public policy it had persistently flouted to again give assurance to prospective bond purchasers that the city is empowered by license from the Federal Power Commission to disregard the law of this State." (That's a quote from the Washington Supreme Court)

Holding this initiated law to be superseded and inoperative when it comes into conflict with the exercise of "paramount jurisdiction" of the United States to determine who shall build dams on navigable streams and at what height, the Court declared that the law did not, in any way, affect the right or authority of the city to proceed with the project in accordance with its license. From that it is very clear that as things have stood in the past, the Federal Power Commission could license a power company or consortium of power companies to build the Allenspur Dam or any other dam on the Yellowstone River, and there is absolutely no power or authority in the State of Montana which can inhibit that building. There is one thing, only one thing, which would restrict such a construction of dams on the Yellowstone. That is the Wild and Scenic Rivers Act, because once a stream has been placed under that act for study for inclusion within the act, it removes that stretch of stream from the jurisdiction of the Federal Power Commission to issue any licenses for obstructions in that stream. As I recollect reading in the newspaper, the Yellowstone River has been placed under that act for study for inclusion within Wild and Scenic River System from Yellowstone Park down through to 30 miles east of Billings.

For the time being, the Federal Power Commission could not license dams on the Yellowstone; ultimately there will be a decision whether to include the Yellowstone or parts of it within the wild and scenic river system and those parts that are included would be exempt from impoundments.

There is nothing the state of Montana itself can do but try to get the river so classified if it wants to preserve parts of the Yellowstone.

Representative Ramirez: What were you reading from just a moment ago?

Al Stone: . . . Yes, there are a whole series of these cases. State of Washington Department of Game v. Federal Power Commission, 207 Fed.2d391. City of Tacoma v. Taxpayers of Tacoma, 262 P.2d 214, 1953. Then a similarly entitled, 307 P.2d 567, 1957; and another one entitled the same, this is the appeal, 357 U.S. 320, 1958; and lastly, 371 P.2d 938, 1962.

Senator Galt: Going back to the Federal Power Commission, their authority rests, justs on navigable streams. Is that correct?

Al Stone: Yes. I guess we ought to go into navigability as a subject matter all by itself and then relate it to the Federal Power Commission.

The word "navigability" is chameleon in character. It takes on a different color depending upon what the setting is where it is found. It has a different meaning when it is used for different purposes. It arose out of Federal Problems. Admiralty jurisdiction of the United States was the problem in the Genesee Chief, an old case. Federal regulation of commerce was another problem. For those federal purposes byinlarge the Federal Government has adopted the test of the Danial Ball. That is an 1870 case involving the operation of a boat on the Grand River, a tributary of the Great Lakes and it establisned that we don't follow the British idea that navigable waters are those where the tide ebbs and flows, but it also includes waters which are susceptible of navigation, travel, trade and commerce in the ordinary modes of trade and commerce of the day. In a little time I could get you the exact quote of that but I think that I stated it quite accurately. It doesn't say that the river was used for trade and commerce in the ordinary modes of trade and commerce of the day but it says that the water is susceptible of such use. That is the Danial Ball test.

The Danial Ball is 77 U.S. 557 and I am quoting from page 563, it is an 1870 case:

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

We are talking about Federal purposes. This arose out of whether the Federal Government had the power to license boats and to impose fees for the use of waterways and admiralty jurisdiction in the event that there were injuries or sinkings or damages and so on. The British crown owned the land under navigable water to high water mark. In Britain they felt that generally navigable waters were those in which the tide ebbed and flowed but at any rate, the crown owned the bed and banks of the navigable waters. After the Revolution the colonies took over that ownership. That was upheld in Martin v. Waddell- 41 U.S. 367, 1842, involving a dispute over an oyster fishery off the coast of New Jersey.

The colonies conceded a number of things to the Federal government on the formation of the Union but they did not grant to the Federal government any ownership of the lands underneath their waters and so the colonies had those waters.

Then there arose a jurisdictional dispute between the Federal Government and parties in interest in Mobile Bay, Alabama. Alabama was not a colony and so who owned the bed

of Mobile Bay? The U.S. Supreme Court in Pollard, lessee, v. Hagan, 44 U.S. 212, 1845. It involved the ownership of the bed of Mobile Bay in Alabama. Alabama did not succeed to the ownership of that bed through the crown because it hadn't been a colony. But, it was admitted to the United States so the United States Supreme Court applied equal footing doctrine that if the colonies are going to get the beds under navigable waters off of their coasts then new states that are admitted to the Union are going to succeed to the same kind of rights that the colonies had so Alabama was conceded the bed to Mobile Bay. Likewise then, it follows that all of the coastal states succeeded to the beds of their navigable waters.

In subsequent cases that doctrine is extended inland to inland navigable waters. It is important for title purpose particularly in the public states; when a territory became a state there was essentially no change in land ownership as the territory was publicly owned by the Federal Government and now it became a state and the Federal Government still owned the land. People had to go out and patent the land, homestead it and operate under the Desert Land Act and so forth in order to acquire title. The Federal Government continued to own all the land but because of Martin v. Waddell and Pollard, lessee, v. Hagan, if therewere navigable waters in that newly admitted state upon the admission of that state, under the equal footing doctrine, the state acquired title to the bed and banks of its navigable waters on the date of admission to the Union. That is consistent with those prior two cases.

There is a string citation in Waters and Water Rights, Volume 1, at page 207, listing probably 20 cases which follow that.

The states in the old Northwest Territory -- Michigan, Minnesota, Ohio, Missouri, Illinois -- quite a few of those states thought that therefore they got title to their navigable waters; and, of course, if the water is nonnavigable, the Federal Government continues to own the land and the land under the water and when it makes a conveyance the riparian grantee takes to the center of the stream or if he owns both sides, he takes the entire bed of the stream. If it is navigable, the State is going to own it and quite a few of these states thought that they could develop their own tests of navigability. As a consequence of that, you have land titles in some of those states determined by individual state tests. There is quite a disparity among those tests and here you get such things as a saw log test or something like that for purposes of navigability. Those cases are erroneous -- they are wrong. Probably they won't be redone; things will be left stand because ownership is not so important as control anyway.

The proper test was laid out by the U.S. Supreme Court in Holt State Bank. The significant dates for this purpose are around 1926 to 1927. I won't give you those citations right now. The U.S. Supreme Court said that it was a Federal question not a State question -- who gets title to the beds and whether or not it is a navigable stream. Essentially it

went to the Danial Ball as the Federal Test. Was the stream susceptible of being used in its ordinary condition as a highway for commerce for which trade and travel was or might be conducted in the customary modes of trade and travel on water? That is navigability for title. That is not a precise test but it gives some kind of an idea that it must be a fairly substantial stream usable commercially for transportation. For commerce, essentially, the Danial Ball test is alright but instead of looking to a date when a state was admitted to the Union for you to determine title, navigability may later arise and that was established in the New River case which is Appalachian Power Company v. The United States, 311 U.S. 377, 1940. The United States commerce power jurisdiction is quite broad and if the stream can be rendered navigable by improvements and developments. In 1977 it may become navigable for commerce purposes whereas it wasn't navigable for title purposes and it might not have been navigable for commerce purposes until we had the technique in 1977 to develop and improve the streams so they would be useful for trade and travel upon water and customary modes of trade and travel upon water.

I want you to be conscious that we are making a switch. We are going to stop worrying about the relationship of the Federal Government to the states which detemines who gets title to the bed and the jurisdiction of the Federal Government to control trade and travel on navigable waters, and we are going to think about the relationship of the state to its own citizenry, which is not a Federal question. The state's control of the state's waters -- the public waters of Montana or of any other state. Some of the states automatically thought that if the water is nonnavigable then the citizen owns the bed -- they used the Federal test for title purposes -- and it is not state water and if it is navigable, then the state owns the bed and the public has its right of access. Some states recognize that since this is no longer a Federal question then they could develop their own definition of navigability and proceeded to do so using, in many instances, such a thing as the saw log test and later the Court more frankly said that if it was susceptible to substantial recreational use by the public because it will float recreational vehicles or is usable for fishing, they would call the river navigable. It is navigable for state purposes even though it is not navigable for commerce, it may be not navigable for title -- it is navigable for the State of Idaho or California or something like that. I think that you ought to get some examples of that.

In North Dakota a stream is nagvigable when the waters may be used for the convenience and enjoyment of the public whether traveling for trade purposes or pleasure purposes (the Court erroneously intended this test to apply for title purposes as well as for public recreation and state commerce purposes).

The State of Washington for a particular purpose said that if it will float shingles, it is navigable. (That reminds me, when the U.S. Supreme Court gets one of those big cases like Arizona v. California, it can get itself tied up for 10

years trying one of these cases. They appoint, therefore, a special master who is essentially the trial judge for the Supreme Court. He takes the evidence and gives a report to the Supreme Court. In his report to the U.S. Supreme Court the master in the Arizona v. California Case said apparently a stream is navigable for Federal purposes if it will float a Supreme Court opinion).

In New Mexico the United States built the Conchos Dam on the South Canadian River and when the U.S. built the dam they condemned the dam site and they condemned a flowage easement to all the submerged land under the reservoir. It is a condemnation action but you don't actually buy title to the land. You buy the right to flood it. You have to pay for that. The title to the land belonged to the Red River Valley Ranch Company. So there came a conflict. The South Canadian River was not a navigable stream but here was a nice, big body of water which people wanted to go and put boats out on and fish over the privately owned land of the Red River Valley Ranch Company. The New Mexico Supreme Court in 1945 held that since the waters are public waters and they are not in trespass upon this person's land, and the public waters are to be put to a beneficial use by the public, that the public had the right to utilize the waters even though the waters were over private land. The dissenting opinion said that one time a man's home was his castel, but nowadays, apparently, a fly rod and reel will serve as a writ of entry.

A very similar rationale was used in the Wyoming case of Day v. Armstrong in 1961. In this case, the plaintiff sought a declaration of his right to float the nonnavigable upper area of the North Platte River across the defendant's land. The stream was nonnavigable for title purposes. Therefore, the ranch company owned the bed of the stream as well as the banks and the land on both sides. The Wyoming Court expressly went on the basis that the state had a right to have the water flow through that person's land and that if the water wasn't trespassing, there was a right-of-way. If the stream was of a sufficient size to be susceptible of sufficient substantial public use, the public could use it and would not be in trespass. It didn't go so far as to say that you could wade the stream but that as long as you could float it and make incidental use of the bed of the stream by pushing it off of rocks and rapids and things, the public could make use of it over the privately owned land.

In California in a more recent case, People v. Mack, 1971, relying largely on the text in this book, this action was to compel private land owner to remove wires and fencing and bridges across the Fall River. A mandatory judgement for the removal was granted by the trial court and affirmed by the Appellate Court of California. the Court agreed that the stream was not navigable under the Federal test for title. The bed was privately owned and was not susceptible to a useful commercial purpose. However, the Court went on to say,

> "It is extremely important that the public not be denied use of recreational water by applying the narrow and outmoded interpretation of navigability nor is the

question of title to the bed of Fall River relevant. The modern determinations of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows:"

Now they are telling you a definition of navigability but notice that we are not dealing with a Federal question here at all, we are dealing with an internal California problem.

"Members of the public have the right to navigate and to exercise the incidence of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft. The Federal test of navigability does not preclude a more liberal state test establishing a right of public passage whenever a stream is physically navigable by small craft."

Lastly, since it is a rather recent case, a 1974 Idaho case, a close neighbor of ours. Southern Idaho Fish and Game Association v. Picabo Livestock, Inc. Here some fishermen who also belonged to the Southern Idaho Fish and game Association were fishing this Silver Creek and they got kicked off. So the Southern Idaho Fish and Game Association brought an action for declaratory judgment on behalf of itself, its members, and the general public for declaration of the right to utilize the waters of Silver Creek. The trial court said that the basic question of navigability is simply the suitability of a particular water for public use, ruling for the plaintiffs, the fish and game association. In affirming, the Idaho Supreme Court said, and I think this is the last quotation I will read at you:

"Appellate urges this Court to adhere to the test of navigability that is used in Federal actions where title to stream beds is at issue. However, the question of title to the bed of Silver Creek is not at issue in this proceeding. This is not an action by the State of Idaho or respondent to quiet title to the bed of a navigable stream. It is an action to declare the rights of the public to use a navigable stream. The Federal test of navigability, involving, as it does, property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft."

There is another developing line of authority that I think may make a little more sense or may be more logical and that is to simply abandon the word navigability and simply ask the question of whether the use of a particular body of water by the public is a nuisance because the stream flows through somebody's barnyard and is just a little creek or whether it is a stream which is susceptible of substantial and important public recreational use. Thus deal in whether things are public waters or essentially private waters for recreational purposes.

The Federal Power Commission's jurisdiction is essentially based on commerce power of the United States and the Federal

Power Act requires a license for anyone who is going to build a dam on any of the navigable waters of the United States and on any waters that will affect the navigable capacity, which means that they can require a license for substantial tributaries and so forth. This is a little irrelevant but I think I have to say it to be complete: the language of the act says that if the hydroelectric project will affect commerce. In the Union Electric case which was decided a little over a decade ago, the U.S. Supreme Court really broadened the previous interpretation of the Federal power act by saying that if you are building a dam on a nonnavigable stream where it has no effect on navigability but that the electric power will be shipped interstate or will affect the interstate transmission of electricity, then it affects commerce and comes under the Federal power act. That is an irrelevancy for our purposes because we are not in the utility business and that doesn't have anything to do with navigability at all. That just goes straight to the commerce power of the U.S. and not navigability. I would like to give an illustration, especially for the nonlawyers here, of the extent of the commerce power of the United States when Congress chooses to draw on the full measure of its power. Congress does not normally choose to draw on the full measure of its commerce power and wisely so. This is probably why we elect representatives. Way back in the 30's when Secretary Wickard was Secretary of Agriculture, we commenced to have quotas of things that you could grow and in this case it involved wheat. As I recollect the facts of this case, and some of you may want to correct me if I make some errors, Filburn was growing wheat on his own property and he was utilizing the wheat for his own consumption for his animals and domestically. As I recall, none of it was being shipped out of the state and I think it was being consumed all on his own property. Congress had, for purposes of agricultural stabilization and for depression purposes in the 30's, enacted the Agricultural Adjustment Act and restricted the quotas that could be grown. So the Secretary of Agriculture and his agents went after Filburn for exceeding his quota. He said that they had no jurisdiction over him as he was not an interstate commerce. He was just growing and consuming himself. It went to the U.S. Supreme Court which said that the wheat he did grow did affect interstate commerce. If he didn't eat it himself he would have to buy it from somebody else who was shipping it. So when Congress draws on its full authority under the commerce clause, there is scarcely any activity which is not subject to the control of the Federal Government. That cigarette that is burning there and the pages that are being turned here all involve commerce in the sense of the full Constitutional authority of Congress.

Congress doesn't elect to put the Missouri River in box cars and ship it to Washington, D.C.; they have that power under the commerce clause but there is quite a difference between Congress's power and what Congress will choose to do.

The Army engineers -- I think this is quite ironical -- in 1972 under the amendments to the Water Pollution Control Act, which is really a new act all by itself but is called an amendment to a prior act, were given jurisdiction over

dredging and filling operations in navigable waters. In its definition of navigable waters it has a vague phrase that navigable waters means waters of the United States. I think quite properly that the Army engineers interpreted that in its entire context as meaning navigable waters under the Danial Ball test or substantial tributaries that will affect navigability. So the Army engineers drew up regulations limiting their own jurisdiction to waters which would fit the Danial Ball test or substantial tributaries to it.

Somebody was filling land in Florida and a good conservation, environmental outfil called National Resources Defense Council, a very respectable outfit, wanted the Army engineers to get in there and control and stop this dredging and filling in Florida. The Army engineers said that it didn't fit their regulations because it doesn't really affect any navigability, it doesn't fit the Danial Ball test and so the National Resources Defense Council took the Army engineers to Court. In NRDC v. Calloway, who was the Secretary of the Army, the court told the engineers that their regulations were wrong. That definition of navigability in the Federal Water Pollution Control Act saying that by navigable waters we mean the waters of the United States, is intended to draw upon the full authority of Congress to regulate commerce. The Corps was ordered to redraw its regulations so as to reach the full extent of the Congressional authority over commerce as it affects water. So the Army engineers -- and here you have a conservationist, environmentalist group which is ordinarily fighting the Army engineers, trying to restrict their authority and keep them out of places -- lost the case. The NRDC won -- the Army gets to go anywhere and control dredges, fills and anything to the smallest tributaries. Their current regulations, unless they have been superseded since I've looked, may not go as far as the Court ordered. They go up to tributaries carrying 5 cubic feet per second or more, and ponds of 5 acres or more. It seems to me that that is disobedience of the Court order. They should go to all water. They should go to your drinking fountains out here. Their regulations also include any stream that is used to grow crops that are used in interstate commerce. That could involve the Lost River of Idaho which arises in Idaho and sinks in Idaho, but it does grow potatoes. Or any stream which is used recreationally by people travelling interstate. That is the jurisdiction of the Corps of Engineers. It also was overwhelming to the Corps of Engineers. They decided that they would have to do it in stages kind of like we are doing racial integration, all deliberate speed. They would divide it into three phases.

Phase one will essentially do what they have been doing, principal navigable strems and tributaries. Phase two will move into smaller tributaries. Past three they will try to move into the full extent that their regulations go to. They would do it in three-year stages. This case resulted in the Army engineers having far greater scope to their operations.

That is probably enough on navigability, isn't it?

Senator Galt: Has there been any court case in Montana like

the one decided in Idaho and Washington?

Al Stone: In Gibson v. Kelly, an 1895 case, the issue involved accretions along the banks of the Missouri River, a navigable stream by whatever definition you wish. Some, I would say, intruder came and started occupying this increased land, accretion, that the Missouri River had washed up. The original land owner and this person who was a squatter got into litigation. The case had to use the Federal definition of navigability for title, although in 1895 that had not really been established. It also said that the land owner had title to the accretion or increase of this land and the intruder had no right there. Gibson v. Kelly also said, curiously, that although this land is owned to low water mark by the adjacent land owner, it is subject to the rights of the public for passage and navigability and so on over the strip in question.

More significantly, maybe, is the case of Herron v. Sutherland, a 1925 case. Sutherland had gone up the Missouri to the land of Herron and Sutherland had been hunting and fishing on Herron's land and had fished in a pond which is entirely surrounded by Herron's land and fished in a little creek on Herron's land. In each of the allegations of the complaint it alleged that Sutherland had trespassed on the upland. So the case is not a neat case. The court said that it would seem clear that a man has no right to fish where he has no right to be. So it is held uniformly that the public have no right to fish in a nonnavigable body of water, the bed of which is owned privately. That is Herron v. Sutherland, 74 Mont. 587, p. 596, 1925. It is not a well-considered case.

What happened in the case procedurally, I think, is important. Herron filed his complaint alleging all these various trespasses and they were trespasses on the fast land in every allegation of the complaint. Sutherland demured. He told the court he would not even answer that as plaintiff hadn't stated a cause of action, which was ridiculous. The demure was overruled. The Court said that he had stated a cause of action. Sutherland refused to answer and so he suffered judgement by default. Incredibily, Sutherland appealed. He didn't make any appearance in the Montana Supreme Court, but he did appeal and file a very sparse brief. Essentially, it almost looked collusive because there wasn't any fight. There was a perfectly good cause of action stated and it was unnecessary for the court to decide the issue of title to the bed or right to be in water over privately owned beds. Justice Holloway concurring in the affirmance of the trial court justice said that the appeal does not merit serious consideration and should be disposed of summarily. That was page 602, and I think that was probably right.

You might consider what rights a person has on a nonnavigable lake. If you buy yourself a little summer cabin on a lake which is nonnavigable for title purposes but is certainly navigable for canoeing or fishing motor purposes. Do you think that when you go to your summer cabin that you can paddle your canoe around the entire lake

in the evening and enjoy it or do you think that you are restricted to that little bit of the nonnavigable for title lake which is directly over your land ownership, and once you get off that you are trespassing on somebody else's land?

Senator Turnage: Sutherland says you are trespassing.

Al Stone: The common law view really developed, not from water law, but from real property law. The older cases, especially from the East, adhere to a real property view that if you own the land then you own everything down under that land and you own everything else up to the sky and so each person owns a little portion of a nonnavigable-for-title lake. This doesn't make common sense and isn't the way you would understand. I think, what you could do on a lake where you have a summer cabin. I am not talking about Flathead Lake. It would have to be some relatively small lake that doesn't fit the Danial Ball definition of trade and travel under ordinary means of commerce.

Commencing with the Beach v. Haynor, a Michigan case, 173 No. West 487, 1919, a common use rule for people on non-navigable lakes was established stating that you all have a mutual right to the surface of the lake even though you all actually own the bed of the lake.

A series of interesting cases arose out of the State of Washington, starting with Snaraly v. Javer, 1956, on Engel Lake. There a resort owner on this lake, which was nonnavigable for title purposes, would rent boats and various equipment to the general public to go out and enjoy the lake. Apparently they threw beer cans around and relieved themselves on other people's property and were pretty much a nuisance. The Supreme Court of Washington did two things. They declared that Washington would follow the common use rule that everybody who was riparian to that lake had the use of the entire surface of the lake but that these riparian rights could be abused. They said this resort owner and his guests had abused it, and they enjoined him from leasing boats or having guests use the lake for two years or until he could come up with a plan for controlling the conduct of his guests.

Then came Botten v. State in 1966 in Washington. The Washington Fish and Game Department had acquired access to the Phantam Lake just outside Seattle. Then it permitted the public to come and duck hunt and fish and so on and landowners complained about abuses there. The Washington Supereme Court acted similarly in that case. It said that the public does have the right to the entire surface of the lake, because it has access to the lake, but they are making nuisances of themselves and the Fish and Game is enjoined from opening that area to the public until it comes up with a plan for proper policing and control of public use so that they don't make nuisances of themselves.

The strength of the interest of the various landowners in the utilization of the entire surface of the lake was

brought out best in Bork v. Sarich, a 1968 Washington case. It was a suit to enjoin construction of an apartment building which would extend out over Bitter Lake in Seattle.

> "Pending trial on the merits, defendants proceeded as rapidly as possible with construction of apartment number one and the concrete slab to support it. The slab projects 130 feet and is 77 feet wide. Beneath it the lake is filled with dirt and pilings of steel beams are used to support it. The trial court granted an injunction and ordered the removal of all structures and fills. In affirming that judgement and order the court said, 'All riparian owners along the shore of a natural nonnavigable lake shore in common the right to use the entire surface of the lake for boating, swimming, fishing, and other similar riparian rights so long as there is no unreasonable interference of these rights by other respective owners'."

So this fellow had to remove his slab and fill which projected 130 feet into the lake and was 77 feet wide and supported by steel girders. It seems to me that the natural view of ownership of a nonnavigable lake for title purposes is the people would expect to have the use of the entire surface of the lake. I would expect, if a case came before the Montana Supreme Court today, that the Montana Supreme court would follow the State of Washington and the State of North Dakota and Wyoming, Idaho, Oregon, and California, Arizona, and New Mexico as well as the cases from the old Northwest: Michigan, Minnesota, Ohio, Missouri. I think that the law is becoming pretty clear in the area -- far clearer than when Herron v. Sutherland when it was scarcely considered but nevertheless decide back in 1924 or 25.

Representative Roth: What did you say about the abandoning of the word "navigable"?

Al Stone: I said that some courts are simply saying that we aren't going to use the word "navigable". We are going to consider whether the water is susceptible to substantial public use. I don't know that it makes any difference whether you use the word "navigable" in a state since as they did in People v. Mack in California, which I quoted from, and the Picabo Livestock case.

Al Stone: It seems to involve so much confusion and that is because of these different meanings. I'm now using navigability in the title sense, a Federal commerce sense, and a state control of its water sense. I don't mean the same thing each time. So that is a good reason for trying to get away from it, I think. There is a reason for staying with it and that is that people are used to using it. It is hard to break a habit.

Abandonment of a water right:

The Montana Code used to read "the appropriation must be for some useful or beneficial purpose and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases, but questions of

abandonment shall be questions of fact and shall be determined as other questions of fact."

So you can abandon your water right, but it is pretty hard for somebody to prove that you did it because a person who alleges abandonment has to prove that you did it because a person who alleges abandonment has to prove that you abandoned and that you intended to abandon your water right. That's been nearly impossible to prove in Montana. I think that perhaps Power v. Switzer is an abandonment case. That's the one I told you about the appropriation of all the water is Uncle George's creek and then later on why some people came in and put in a brick factory and started using 15 inches of water and the court finally said that the original appropriator that his water right was. The court didn't say that it had been abandoned, but I cannot rationalize the case in any other way so it may be an abandonment case in Montana.

There is a case called Head v. Hale where a person had a water right and he left the state and never came back, died, didn't leave any heirs or successors, and the court said that the water right had been abandoned. That seems alright until you get technical about it, and that is that the court has always said that you have to prove an affirmative intent to abandon: this guy was dead and couldn't have had any intent.

Abandonment is raised in so many lawsuits in Montana because it is an easy issue to raise. You claim that the fellow had abandoned his right, therefore, there is more water there and I've got a good appropriation, but in case after case that is thrown out and it is virtually impossible to prove cases of abandonment. It has proved so in Montana. That statute was repealed by the 1973 Water Use Act so that we no longer will abandon under that statute. We have replaced it. 89-894 says, "If an appropriator ceases to use all or part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed considered abandoned and shall immediately expire".

(That is essentially the same as the section we had before 1973)

> "(2) If an appropriator ceases to use all or part of the appropriation right or ceases using his appropriation right according to its terms and conditions for a period of ten (10) successive years and there was water available for his use, there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used."

That doesn't say that if you don't use it for ten years that it is automatically abandoned. It says that if you don't use it for ten years and the water was available, that it creates a prima facie presumption that you have abandoned

your water right. That makes it a little easier to prove abandonment if there have been ten successive years of nonuse when the water was available. I don't really think that makes a very big difference in our water law.

Paragraph 3:

> "This section does not apply to existing rights until they have been determined in accordance with this act."

What existing rights have been determined in accordance with this act? Not one in the whole state of Montana.

We are now adjudicating the Powder River and I don't know when that adjudication will become final but when it does become final, then it will be possible for some people to abandon their water rights on the Powder River. They can't do it now under this statute because the rights haven't yet been determined. They can't abandon them under 89-802 because that has been repealed. Right now there is no statute in Montana affecting (as a practical matter) any existing water right in the entire state.

That concerns me a little bit. I wasn't sure that the Legislature intended to not have any law of abandonment in Montana and so I thought that probably we would revert to the common law abandonment.

In Corpus Juris Secundum, a legal encyclopedia, the common law of abandonment is defined as follows:

> "Abandonment of property or a right is the voluntary relinqueshment thereof by its owner or holder with the intention of terminating his ownership, possession, and control and without vesting ownership in any other person."

I don't know but I think that that probably is the law of abandonment in Montana now that we know we don't have any statute controlling it.

Arugably, the Legislature intended to not have any law of abandonment and maybe that argument will prevail if anything ever comes up. I suspect it is the common law of abandonment but I don't know. What do you think, Gene?

Senator Turnage: I would agree. Don't we have a basic statute recognizing the common law?

Al Stone: Yes, I think we have it in our Constitution.

Senator Turnage: To take the other view that there is no law would be to leave a hiatus that just would not be rational.

Al Stone: What would you do in Head against Hale where the guy goes off to California and dies and leaves nobody?

Senator Turnage: Somebody must own that land even if the county took if for taxes. Wouldn't they acquire all of the

water rights that went with it?

Al Stone: But you are supposed to acquire your water right in privity with the prior owner.

Senator Turnage: Well, if the county took it for taxes, they took everything he had.

Al Stone: Call it appurtenant and acquire a water right, too? It's possible.

Senator Turnage: Somebody owned that land even though he went off and died somewhere.

Al Stone: They might have avoided the abandonment thing in that case itself. There is a statute governing abandonment but it only applies to rights that have been determined under the 1973 Water Use Act and there aren't any rights determined yet under the 1973 Water Use Act. We are just starting on the Powder River now. There is no right to which this statute can apply.

Gordon McOmber: On that committee that reshaped that law and as it was first prepared, the water rights were considered abandoned if they hadn't been used for ten years. The burden of proof was then upon the former owner. Some members wouldn't go for that. The burden of proof was removed from the former owner. I should point out that at that time the Department of Natural Resources had intended to adjudicate all of these rights long before now. So that has some bearing on the problem.

Al Stone: Is there any more to be said about it then? What would you like to talk about next. On the list you had before, you have sale or lease of waters, regional authority-- and I'm not sure what we ought to talk about that -- preference systems. The 1967 Legislature, I believe, established a water use priorities committee of the House, chairmaned by George Darrow. Its charge was to look into what priorities or preferences there should be. Should domestic use have a priority over agriculture, agriculture over mining and mining over manufacturing? That sort of thing. It brought out conflicts among various regions of the state because in some of the western parts of the state recreation is a more important use than recreation is in some of the eastern parts of the state. so the members of the committee found themselves in conflict with one another. They considered it to be a very difficult problem and a politically sensitive one and perhaps an unprofitable one to try to establish a statwide system of preferences.

Some other states have systems of preferences. Texas has a list of eight of them, and I can't recollect what other states do have preferences. Curiously the preferences have not been implemented in those states. It carries with it a connotation that if you are using water for a lower purpose, an inferior purpose, and I want to use water and I have a higher priority purpose, that I have the preference to the water. Our legislature has declared that my use is more in the public interest than your use so I can take your water

right. That could either be by simply issuing permits, conditional upon no one subsequently wishing to use the water for higher purpose, in which case your right terminates. This would be a condition in your permit and you would get no compensation, I would think, under that sort of a conditional water right. Or it could be one that the preferred right has the right of condemnation of the inferior right. In the states that have preferences, they haven't been exercised in that way. The changes of use of water by compulsion have almost all been city of such and such versus Smith, etc., where the municipality needs the water supply and has not condemned under the preference system set up in the water code but has condemned under the code of civil procedure in the ordinary condemnation provisions of the statutes. So they aren't even using the preference priority which they have in their statute.

I think that if you want to get into the desirability of establishing a preference system and the procedure by which it works, you're going to have to give a good deal of time to it. I think I would start out with the question of why do you need it. If you can't answer that question of why do you need it.

Senator Turnage: Wouldn't any preference system have to be post adjudication under the 1973 act unless you want the condemnation?

Al Stone: You can go by condemnation. I don't see how you could do it by confiscation except with respect to subsequently issued permits -- conditional permits.

For example, someone wants to construct a highway and he is going to need to take water out of a creek for the next -- well, if he is going to do it on someplace like that Lookout Pass, he is going to need water for 50 years to construct a highway. You could at least issue him a water right which was temporary and that his water right would expire when construction ceased. Or, we can give you a year and a half water right and you can apply for an extension if needed. This is a terminable water right and I think that it is permissible for the legislature to authorize the department to issue -- it already has authorized the department to issue temporary water rights -- but you could also issue a conditional one based on preferences in the use of water. We think that this is a more valuable use than that and so if somebody else comes along with a higher use, then yours terminates. You could do that. It would make a lot of people mad.

Representative Roth: Your saying that if the preference can change, the priority can change.

Al Stone: Yes.

Senator Turnage: What do you think about whether we need it or not?

Al Stone: I can't see any good use in it. I can see a lot of trouble.

Representative Ramirez: Al, I really agree with you having run into quite a bit of trouble myself on that. I think that the only reason we might have needed it here before is because of the reservations on the Yellowstone.

Al Stone: We have a preference in that we have downgraded changes to industrial use and industrial appropriation of water in the Yellowstone Basin.

Representative Ramirez: There are really two kinds of preferences. One where you say you are going to prefer some rights over others. Then there is one where you say that if there is shortage you are going to cut off certain rights sooner than you cut off others. It seems to me that you still need some preferences for that latter situation where if you have a severe drought you are going to have to make choices.

Al Stone: Unitl we have to, I wouldn't abandon the appropriation system -- first in time, first in right. We may come to a situation where there is a need for water for a hospital for operation of kidney transplant machines or something and that we will give then water even though it cuts out an early irrigation use or something. Until we get to the point where we really see a strong public interest in this out of time priority, I don't know why we can't continue to operate in first in time, first in right.

Mind you, we also have the mechanism of change of use of water so that the hospital can go out and buy a water right if it is valuable enough -- buy an early water right the way a city goes out and condemns an early water right for municipal water supply. We are not frozen that we can't put the water to better public uses. If it is a better public use it will be more valuable to the purchaser than it is to the seller and it will be transferred voluntarily.

Senator Boylan: Why couldn't the industrial people go in and buy all the first in time, first in right?

Al Stone: They can under our system except for the moratorium we have right now.

Representative Scully: That isn't going to hold true like in a current situation in California where they have, as I read it anyway, taken an early right and basically disregarded it for a later right just in agriculture. For example, the fruit trees. As I understand it they have actually taken someone who has a lettuce crop and they are closing their ability to use their prior appropriated water and directed that water to be used in the fruit tree area of agriculture because the public interest is in maintaining the orchard as opposed to an annual crop that can be easily planted.

Al Stone: I think you are correct. I think that is what is happening in the drought in California. I also think it should happen that the crop that takes years to develop should be saved and somehow disaster relief should be given to those who won't get their water. I don't know whether it

is being done on a voluntary basis by just repaying them.

Senator Galt: I think maybe you've made one little misstatement, Professor. I don't think these water rights are available for sale without the Department of Resource's permission.

Al Stone: That's true but the code directs them to approve the sale. "An appropriator may not change the place of diversion, purpose of use or place of storage except as permitted under this section and approved by the department."

I think probably the next code section is the transfer.

> "The right to use water under a permit or certificate of water right shall pass with the conveyance of the land or transfer by operation of law unless specifically exempted therefrom. All transfers of interest in appropriation right shall be without loss of priority. The person receiving the appropriation interest shall file with the department notice of the transfer on a form prescribed by the department. An appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant or sell the appropriation right for other purposes or to other lands or make the appropriation right appurtenant to other lands without obtaining prior approval from the department. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the change might adversely affect the right of other persons, notice of the proposed change shall be given in accordance with 881 and a person can object and they may have a hearing on it."

Senator Turnage: That requires the department to justify its position.

Al Stone: It has to find that it will adversely affect the rights of other persons and that would be, for example, where other persons are dependant upon the return flow. (Grand v. Jones) This is a codification of the prior law in Montana.

Senator Galt: May I read one more paragraph?

> "An appropriator of more than fifteen (15) cubic feet per second may not change the purpose of use of an appropriation right from an agricultural use to an industrial use."

That would almost prohibit industry from buying an agricultural right, wouldn't it?

Al Stone: I think so. For the time being.

Representative Ramirez: When I hear you read that statute, I notice something that makes me wonder whether it really is

quite the same as the prior law because it doesn't say that it can't adversely affect the right of anyone else who owns a water right. It says it can't adversely affect the rights of any other person. That is considerably broader because then you are talking about any adverse affect on any person. For example, let's say that someone likes to use a stream for fishing. They don't own a water right. That could certainly adversely affect them so it is quite a bit broader than someone adversely affected because they own a water right down stream.

Al Stone: But that is consistent with our prior statute which said that:

> "The person entitled to the use of water may change the place of diversion if others are not thereby injured."

So I don't think it is any broader. That was repealed in 1973.

Representative Ramirez: I would say that that was before the day of the lawsuit by special interest groups.

Al Stone: Yes, but that statute would be just as usable for that purpose, I think.

Representative Scully: Let's have you talk about leasing of water.

Al Stone: I think that I will utilize my prepared material because it will save you time.

I guess this issue of change of use ties in with sale, lease, and that sort of thing. Perhaps I will start out with what I had previously prepared on change of use and then go into that which is appropriate to you.

89-803, (that's that statute that I read that is pre-1973) permitted changes in the point of diversion, place and purpose of use, so long as it caused no injury to others. Many cases have been concerned with such changes and they have given the statute straight-forward construction.

Probably the last case to be decided under that statute, which was repealed in 1973, was Thompson v. Harvey, 164 Mont. 133, 1974, decided under pre-1973 law. Thompson owned early decreed rights to 125 inches from Deep Creek near Townsend, with which he irrigated 80 acres. He sought in this action to change the change of diversion of 75 inches 4 1/2 miles upstream on Deep Creek to irrigate 80 more acres. Defendants had inferior rights and were upstream. They obtained their water by means of an exchange. They purchased water from the state's Missouri-Broadwater canal which supplied Thompson. Then they took the Deep Creek water for themselves. If Thompson's diversion were moved upstream, he could no longer be supplied from the Missouri-Broadwater Canal and so the defendant's inferior water rights would have to give way to supply his senior right to Deep Creek. The court found that such a change would be unfair to the junior appropriators and denied

Thompson the right to change.

Frequently the change in place of use results from a city purchasing water rights to transport the water out of the watershed for municipal purposes. Except for the possible eminent domain element, the fact that it is a city makes no legal difference. The biggest problem in the deprivation of other user's rights is the deprivation of other user's rights to return flow. Generally, such a purchaser can only remove the amount of water which his predecessor consumed, as in this Brennen v. Jones, Skalkaho Creek, case here. If there was previously a 50 percent return flow then only 50 percent of the purchase right can be taken.

In Spokane Ditch and Water Company v. Beatty, 1909, the City of Helena was permitted to take its purchased water which had been used out of the watersned for placer mining but not permitted to take its purchased agricultural water right out of the watershed.

Creek v. Bozeman, Gasser v. Noyd, and ____? v. City of Helena, are to the same effect. Brennen v. Jones, which was previously discussed, is more restrictive. The purchaser would have to conform his taking of water to the pattern established by his grantors' uses and purposes.

Efficiency of use.

The 1973 Water Use Act, 89-892, continues the policy of the repeal section, 89-803, only adding that ny change must have the approval of the Department of Natural Resources and Conservation. It is believed that the case law developed under the prior code section remains applicable to the new section and I should have added that subparagraph which says that there is a restriction with respect to sale for industrial purpose. This deals with developed water. We will talk about that now.

Lease or temporary transfer of water rights. It is clear that one may appropriate water for the purpose of delivering it to others as in the case of the ditch companies, irrigation and conservation districts, and other service organizations and associations. R.C.M. 89-823 - 826 and 89-867, Bailey v. Tintinger and Sherlock v. Greaves.

If one has an ordinary appropriation, ordinary agricultural or industrial appropriation, which is excessive to its current needs, he must have the water in the stream for other appropriators or return it to the stream for them. Just take as much as you need. R.C.M. 89-805, Gallager v. McNulte, Tucker v. Missoula Light and Railway Co., Brennen v. Jones.

In Sherlock v. Greaves the court found that since it was inconsistent for an agricultural appropriator to sell or lease water, which this one was doing by permitting the residents of Radersburg to purchase water from it, the appropriator had to become a public utility, possibly under the jurisdiction of the Public Service Commission and required to continue servicing the residents of Radersburg.

For an explanation of the effect and interpretation of R.C.M. 89-823 - 826, consistent with the foregoing, see Rock Creek Ditch and Flume Company v. Miller, 93 Mont. 243, pp. 263-264, 1933. That deals with lease or temporary transfer. The gist of it is that you can be a public service corporation or association or even a public service individual and appropriate water for the purpose of distributing and selling, but if you are appropriating it for the purpose of irrigating this acreage here, then that is the purpose of your appropriation and if you don't need it for this, you have to leave it in the stream for other people.

With respect to the sale of a water right, we just got through discussing that. You could sell a water right under our prior code principally by case law but also supported by statute. You could simply sell your water right. Ordinarily, a water right goes with the land considered to be appurtenant and if you sell your real property which is irrigated then the water right will automatically go with the deed without you saying so. You can withhold it -- reserve it from the deed -- and sell the land without the water in which case if you aren't applying for some other purpose, I guess you become a "walking water right", I hope it's called an easement in gross. It means that it is

personal to you.

Rep. Scully: How do we ever reconcile that with the basic philosophy that it is a beneficial use and a public commodity?

Al Stone: I suppose it results in a threat to subsequent development on the stream that this person who has this water right in gross, which means that he has no place to use it and the water is available for use by others. If others come in and develop their water, this person may buy some land where he can now once again make use of the water. It seems to me that it is a rare situation that we are talking about. We do have some cases in court that you can have a water right in gross. I can see some practical purposes in permitting it. I might plan to buy some land downstream on Lolo Creek and have a water right upstream on Lolo Creek and decide that since I have an early water right upstream, to sell the land but reserve the water right, and then acquire this land downstream which has an inferior water right and apply my superior water right to it, trying to make allowance for what effect that might have on other water users.

Rep. Scully: What if you just take it from the position, though, that you've used it for beneficial use all these years and you are just offered a ton of money to sell it. Could you sell it?

Al Stone: That is consistent with making the highest and best use of our water, because the reason you were offered a ton of money to sell it is because someone else can make greater and more economic use of the water.

Rep. Scully: It appears to me to be in direct conflict with the philosophy that the water is a priviledged use of a public commodity rather than a private piece of ownership.

Al Stone: You are in agreement with Justice Calloway in Allen v. Petrich, in 1969 Montana Reports, who said that he thought that a person ought not be able to sell a water right. It is public property and that if there is a sale that should be considered an abandonment and the new water user should take out a new appropriation. He did not so hold. He said that is not the law but the Legislature ought to enact that.

I don't know whether you ought to enact it or not. It may be another one of those questions that is not worth the bother.

Unknown guest: The City of Townsend had that problem. For years they had a water right they had purchased to serve the city of Townsend. The State came along and said that Deep Creek is not fit for human consumption. They went to wells and they end up having this water right and no use for it. So they put it up for sale. There is a fight over it now that I am involved in. I, for one, don't think they should lose that valuable right without consultation.

Senator Boylan: You have the subdivisions now, too. I've bought water that's gone into where land has gone into subdivision and so they have retained the water rights, the people that owned the land, and so they separated that from the land. Then I took it out of the creek and bought it and made use of it on the land that I presently have. I think Lessley ruled down there that if you took these water rights and so divided them down that it would be of no useful purpose. It wouldn't flow. So he said you couldn't subdivide it down into that small a quantity. Therefore, it went back to the ditch company for sale to somebody else.

Al Stone: It would seem to me that if there are no special provisions made, that since an agricultural water right is appurtenant to the land that if the land is simply subdivided and chopped into a hundred pieces, that each person would be entitled as an appurtenant to his 1/100 to 1 % of the water. Judge Lessley says no?

Senator Boylan: It becomes that when you go into that division, it no longer flows because of diversion, etc.

Al Stone: There are solutions to that. We have an old Montana case where a guy was entitled to 1/3 interest in a reservoir, a ditch and a water right. The trouble was that his point of diversion was several miles down the ditch beyond where his 2/3 owner would divert water. The Montana Supreme Court decreed that this 1/3 owner was entitled to 100% of the water two days a week. None of it the rest of the time. You could with these hundred owners in a subdivision say that these ten people are entitled to water every tenth day and thus get enough head to irrigate or some such physical solution. Legally, it seems to me that that may be the law in Gallatin County, but it doesn't sound to me like it is a real good property law. What would you say Jack?

Rep. Ramirez: I think there may be a different law in Gallatin County.

Senator Boylan: Of course, this water was within a ditch company with stock issued, which may be not appurtenant to the land.

Rep. Scully: It seems to me that if you run back through the basic philosophies of water law that the water is an agricultural right that is appurtenant to the land and it is put to the highest and most beneficial use in terms of what the public eye and needs are. All of a sudden you break those two and say that it is easy for you to sell your water right. It is no longer appurtenant to the land or that beneficial use. Historically we have treated and limited people's water rights to a specific beneficial use at a particular time and in a particular location and then turn around and say go ahead and sell it. This doesn't seem to square with me.

Al Stone: The sale cannot adversely affect other appropriators on the stream, other water users, and consequently, and what the purchaser gets is that which was

consumptively used in most instances. He may have a use which is more economically beneficial -- more socially justifiable -- than the prior use.

Rep. Scully: But there is no determination of that.

Al Stone: Well, there is determination in the market place.

Senator Boylan: But you take the city that's got stored water and now they want to bet into the decreed water. The want to buy one that is right next to Bozeman and subdivide it. They will take it out clear to the mouth of the canyon now. It is fluid. Therefore, if they change the point of diversion, then we wouldn't have the use of that fluid or volume right.

Rep. Ramirez: I really think, though, that you come back to the reason that in the survey that was run by the Department of Natural Resources, the only question to which there was a unanimous answer was whether there ought to be a preference system. A hundred percent of the people who answered that questionnaire said there ought to be. I know there were divergent interests. It wasn't stacked in that sense. There were industrial people, enviromentalists, and everyone else. You get to the question, I think, of whether you want economics to be the sole determining factor of who can own a water right or to what use that water is going to be put. Maybe there should be some other guidelines or preferences or something that should enter into it.

Al Stone: Would you want to direct the Department of Natural Resources as you have with respect to industrial water rights? You know, we have this system of reservation of water rights. Maybe that is an adequate answer to the economic determinism fault. A city, a state agency, can ask for a reservation of water for future uses or for instream in uses. Of course, it won't take priority over prior rights.

Rep. Ramirez: By the same token, one of the problems that I have with the reservation, right now, is that once again we didn't give the Board of Natural Resources any direction, any guidelines or anything else. The only standard is that their decision in public interest. Once again, you have a group of people actually making decision as to how this water should be used in the future without any standards or anything else.

Al Stone: In that Section, 89-890, that deals with reservations, there might be a preference with respect to what water should be reserved for and the department should be more inclined to reserve it for municipal use. Somebody is going to have to decide what gets preference.

Rep. Scully: It's amazing to me that in the public hearing that we had last winter, the agricultural people said that there ought to be a preference system and they always place agriculture as second or third and number one was municipal use. I've wondered this. If we were to do that, implement a priority system as suggested by Senator Lowe last time,

does that have any kind of effect in an interstate situation. Does it give any authorization for say a city like Minneapolis. In the federal circles and looking at Montana water laws and preference system, Montana recognizes and gives a priority to municipal use above an agriculture use. If we were to engage in an interstate compact, is it possible that that can cause problems.

Al stone: Not so much in a compact procedure. Interstate compacts universally have to be ratified unanimously by all the states involved. Assuming you have competent compact negotiators, and ordinarily these have to be ratified by the state legislature, I don't think you are in particular hazard through the compact process. The problem with the compact process is that the states hate to compromise their vital interests and it is awfully difficult for them to agree on a compact that does anything and there is usually veto power put in that anything that directly affects an affected state is subject to that state's veto. Aside from that, you could get into interstate litigation. There have been interstate cases. In responding to that same question with respect to an interstate case, yes. The U.S. Supreme Court has not excluded any factors into considering the allocation of water between Colorado and Kansas on the Arkansas River between Colorado, Wyoming and Nebraska on the Platt and in Arizona v. California, the U.S. Supreme Court has considered everything and they certainly take into consideration as one of many, many factors the state's own evaluation of the importance of particular uses of the water. The Supreme Court has generally tended to protect developed investments and users of water; it has not been so consistently but in general it has.

Kansas v. Colorado: The supreme Court said that depriving Colorado of the development use of the Arkansas River would be unfortunate because Colorado could make better use of the water than some of the existing uses in Kansas. They were ready to contemplate a reduction in activity in Kansas for the benefit of Colorado. That is a little untypical of the U. S. Supreme Court but as a consequence, Kansas was able to actually expand its irrigation and because the use of Colorado delayed the flow and Kansas got a better flow of the Arkansas River.

Relationship between surface and groundwater

Al Stone: Why don't you have the Department of Natural Resources over there explain the physical interrelationship between groundwater and surface water?

Lawrence Siroky: Most western states aren't familiar with the water laws that deal with both surface water and groundwater. In most cases they are recognizing one affecting the other. From a strictly -- just taking the physical situation -- normally your groundwater level comes down and meets your water level so that the flow in the river is due, depending upon the season, of course, both from the gourndwater inflow and the surface water runoff. Streams we call influent, there is groundwater going into this stream. Streams we call effluent, there is water going

out of the stream into the groundwater situation. It is just an opposite situation. Your goundwater level will be taking water from the stream. An area near Missoula up near the Hoerner-Waldorf plant, water comes into the stream from the goundwater at that location and then down below Missoula water comes out of the stream into the goundwater. So there are two situations on the same stream within ten or fifteen miles of each other.

The problem comes when the relationship comes into effect when we have appropriators over here with wells in the goundwater aquafer, sometimes this aquafer may be called unconfined. In that case there is no confining barrier. In a case where it is confined, you may have your gravels and soils with bedrock and clay. There may be a confined layer underneath and water-bearing strata. There are two situations you run into there. One is an artisian situation. It is either artisian flowing or not flowing. There may be enough pressure water so that at some point the water would rise to the natural level. They would call that an artisian well. It is an unconfined situation in this other situation. There is an appropriation of water at this point. The withdrawal from that well causing a draw down effect, which could be predicted with various engineering formulas and hypotheses, depending upon the gravel characteristics and the size of the storage area and the efficiency of the well. All affect this draw down here. When you start drawing this well down, eventually instead of this river now being receiving the groundwater, it will be losing groundwater in this particular situation. This well, even though it is for goundwater appropriation, affects surface water rights.

Another little problem we have run into in the department, in fact we are involved in a case right now -- a challenge case. We will say that this is an artisian situation but it is not artisian flowing. There are several domestic wells in this aquafer. Then somebody plunks down an irrigation well. In that case the water had been at this point (illustrated on board) when the well was put in and the situation you see northwestern Montana and northeastern Montana is that they will put a tap here that runs out over a small hill and put it into a tank. That way they don't have to put in a windmill or anything like that. The draw down caused by the irrigation well causes a drop in pressure in the other wells. The way the law is now is that you are not entitled to a particular level, pressure, or manner of occurrence as long as you can reasonably exercise your right.

Does this man now have to move his pump, he had just a regular old suction pump. The only way he can get sufficient water now is with a submergable pump? He had a pump in there before but now he can't draw as deeply with the suction pump. You are limited to 20 foot withdrawals because anything bigger than that turns the water to vapor before you get it up.

Those are the situations we have run into relating groundwater hydrology with water law.

Senator Boylan: Then does the right in time have anything to do with that?

Lawrence Siroky: It is still first in time, first in right, and groundwater and surface water are related when you get to this situation. So the man on the river is first in right, etc. The problem we get into is proving that there really is a connection and that's where it gets into the engineers, the hydrologists, and the geologist opinions and interpretations in a court.

Al Stone: In addition to his having the first right in time, as he just said a moment ago, priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artisian, pressure of water level, if the prior appropriator could reasonably exercise his water right under changed condition. So there isn't an absolute prohibition that this guy can't destroy this person's means of taking the water. You can't destroy his water right but is is a question of degree. How much interference this person can cause ot this person. This is the law but the law hasn't set forth the parameters of how you determine what is reasonable under the circumstances.

Lawrence Siroky: I hope this Chalmers case does set the parameters, because it is really difficult for us to administer the law. There are about four or five wells that have been affected. Whether they have been adversely affected or not is a question of fact.

Rep. Scully: What happens when you have a confined aquafer thats not replenished in any way?

Lawrence Siroky: Eventually, various states have taken different policies on that and in this state I don't think there is a policy yet. In a case where you have a confined or unconfined aquafer, the recharge to these aquafers may be from precipitation and snow melt. In Pondera County in the Teton area the aquafer there that I described is recharged by the snow melt and the rainfall in the immediate area. The recharge may be from an affluent river like the Clark Fork that I described. When you get to the situation where there is more water being taken out of the aquafer than the average annual recharge, then eventually the artisian pressure is going to reduce on an artisian situation, or the groundwater level will decrease.

In Colorado they have taken the policy that they will allow mining of the aquafer on a hundred year basis so that they will issue permits until enough water is allocated on that aquafer that it will be dry in a hundred years. They have taken that policy on one particular aquafer that I know of. The state of Nebraska has a similar policy.

Al Stone: In New Mexico the Legislature has authorized the State Engineer to set such limits. It is not a state-wide thing, and I know that in one particular aquafer they decided that it would have either a forty or fifty year life

until it becomes economically dry. That is a sufficient length of time for people to recover their investment. In the meantime it will get more and more expensive for them to use it until eventually they are through.

Lawrence Siroky: It appears in our statute, I think, that as long as the five criteria if it is applicable, apply and are satisfied, we would have to give the permit regardless of whether the aquafer was confined or not.

Al Stone: Until it was declared a controlled groundwater area. In the event that goundwater withdrawals are in excess of recharge, or that excessive groundwater withdrawals are very likely to occur in the near future, because of consistent and significant increases in withdrawals from within the groundwater area, or that significant disputes regarding priority of rights or priority of type of use are in progress within the groundwater area, then the department can hold hearings and declare a controlled groundwater area at which time no further permits will be issued and if it is to be drawn down they can order a lessening of the withdrawal in order of priority.

Lawrence Siroky: Do you think we could deny permit for those reasons?

Al Stone: I think you would have to control groundwater area.

Senator Turnage: How do you establish a controlled groundwater area?

Al Stone: Through this process in the codes -- hearing and a declaration that it is a groundwater area.

Senator Turnage: To what degree to certainty can you determine the parameters and the aquafers?

Lawrence Siroky: It takes a lot ot study. The U. S. Geological Survey has done most, if not all, such studies in the state and not very many of them have been done. It takes a long time and many years of record to find out what these characteristics are. I firmly believe that if we are going to administer groundwater rights, we need to know more about the aquafer characteristics.

Al Stone: A person may appropriate groundwater in a controlled area only by applying for and receiving a permit from the department in accordance with the Montana Water Use Act. In otherwords, you apply for permit just like you do for a stream or anything else. The department may not grant a permit if the withdrawal would be beyond the capacity of the aquafer or aquafers in the groundwater area to yield groundwater within a reasonable or feasible pumping lift, in case of pumping development, or within a reasonable or feasible reduction of pressure in cases of artisian development.

I think that the department is certainly constrained once it

is a controlled area it seems that there is already enough trouble there.

Senator Boylan: You're issuing permits lots of times without having made these studies now aren't you?

Lawrence Siroky: That is right. The law requires it for an appropriation over 15 cfs that there be clear and convincing evidence that water is available and that existing water rights will not be adversely affected. Only in those cases would we need a study. In the other cases, if there is no evidence shown by either side of an adverse effect and it is shown that there is water available for appropriation, the hearing officer takes the evidence that is presented. That is sometimes the sorry part of it. There should be more evidence presented.

Al Stone: Outside of a controlled groundwater area there is no constraint upon a person drilling and commencing to appropriate groundwater. It is just that after he completes his well within sixty days he is supposed to file a notice of completion and his date of priority dates from the filing of notice of completion if it is a small well with a capacity of less than a hundred gallons per minute.

Senator Boylan: How may controlled groundwater areas do we have now?

Lawrence Siroky: There is only one controlled area and that is in the south, extreme east part of the state. In that situation an oil company came in and they were pumping water into the oil wells.

Al Stone: Something that this committee ought to look into is some of the lack of coordination between the old sections in the groundwater code, that would be Title 89, Chapter 29. How those sections coordinate with the 1973 Water Use Act which is Chapter 8 of Title 89.One of the things that I have in mind is that the goundwater code as in 2916 provides for an administrative finding of priorities. That is really your adjudicaton statute with respect to the groundwater code and it provides a procedure whereby the department can ascertain the priority date and the quantity of groundwater that a person is entitled to have. In effect it ignores the fact that there is an interrelationship between groundwater and surface water, as we have just been told, and simply says that we are going to find the priorities of groundwater. If you will recollect, the 1973 water act also provides a general adjudication of water rights, including groundwater rights, surface and groundwater rights,and so with respect to groundwater, there are two separate means of getting an adjudication of your water right. One is through section 2916 of Title 89, that is the groundwater code and will determine exclusively groundwater rights; the other is the general adjudication under the Water Use Act. They conflict. The Water Use Act will include groundwater rights and the groundwater code will not. The groundwater code, 2916, subparagraph (3), provides for including surface water people as parties but I think it is meaningless. It says:

"Hereafter in a hearing for the ascertainment and finding of priorities involving rights to the use of groundwaters, all appropriators of groundwater or surface water in a particular controlled area or subarea shall be included as parties and notified in the manner provided in 2914."

The next code section is 2917. It describes the scope of the administrative hearing. There it deals exclusively with finding the priority of rights and the quantity of groundwater to which each appropriator who is a party and is entitled. Your surface water appropriators, to the extent that they are included as parties, are really included as party spectators and not participants. They are not going to determine their rights under the groundwater code. It seems to me that that section ought to be repealed or replaced with a section stating that the determination of groundwater rights will be conducted under 89-870-879 of the 1973 Water Use Act.

Another area of possible conflict, I think, is in administration of groundwater. In 2932 we have provided for goundwater supervisors and the department may appoint one or more groundwater supervisors for each designated control area and may appoint one or more supervisors at large. They are under the direction of the Department of Natural Resources. Yet, in the 1973 Water Use Act, we declare that the district courts shall administer the adjudications and the distribution of water under the adjudications of the Water Use Act. So, where you have a determination under the groundwater code, you have got the supervisors under the department and where you have a determination either previously under the prior to 1973 law or under the 1973 Water Use Act you have the district court in charge of the supervision. It is easier probably to amend the old groundwater code and put them all under the district court. You don't need two different sets of supervisors. In fact, they could conflict.

Lawrence Siroky: What about the appointment of supervisors and the determination of rights for a controlled groundwater area before a general determination is done?

Al Stone: If it is a controlled groundwater area, as we now stand, you would have groundwater supervisors under the Department of Natural REsources. Since there has been no adjudication, either pre or subsequent to 1973. I believe that Chapter 10 of Title 89 continues to apply just as it did before, whenever there was so-called adjudicated stream or there had been a significant adjudication in a stream area, under 89-815, an appropriator could ask the district judge to appoint a water commissioner to distribute the water and none of that has been repealed. There has been some editorial changes in 89-1061 but it is essentially the same. So you still have water commissioners distributing water out of the Gallatin or the various streams. It seems to me that with the effort of the 1973 Water Use Act to integrate surface water and ,roundwater, which I think it does very well until it is loused up in Chapter 29, you could have your water commissioners controlling your

goundwater area as well as the surface water area.

Rep. Scully: Senator Turnage would like some of the highlights of the Act.

Al Stone: Let's start out with the major features of the act. I guess to me there are only two. The first major feature to appear in the act is the one which you are so very much concerned with, and that is that it provides for final determination of existing water rights as of the date of the adjudication. That is what is happening on the Powder River. It provides for looking into all manner of data which will assist the department in trying to get the information necessary to report to the district judge, and it provides for due process, service by publication to people that you can't find out about, service by certified mail for people when you can ascertain their names and whereabouts, and it provides for the department to file a report with the district judge and what that report, called a petition, should say. Then the district judge issues a preliminary decree and people who don't like anything in that have an opportunity for a hearing and that is where there is really going to be the overwhelming, massive, multiparty, multi-issue lawsuit. Ultimately, that results in the final decree naming everybody who has a water right in the area -- surface or groundwater -- although you can appeal the decree, either upon appeal and the decision there, or the decree itself is final. There are no other rights in the source. That is final decree. The code is quite emphatic. "The final decree and 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." Either you are in the decree or you've got no right. You can get a future right -- you can ask for a permit to appropriate water -- but nobody has any past right.

Senator Turange: How about penetrating the decree on change of circumstance in the future? In other words the decree is final. Then years down the road things have changed. What happens then? Somebody comes in and wants to make an appropriation.

Al Stone: Anybody can ask for an appropriation after the decree. That gets to the other principle feature of the 1973Water Use Act and that is that henceforth there is only one means of acquiring a water right in the future in Montana and that is by permit from the Department of Natural Resources. There is a minor exception to that and that is that in an uncontrolled groundwater area for wells with a capacity of less than 100 gallons per minute you can go ahead and drill the well without anybody's permission but then you must file a notice of completion within sixty days and your water right dates from that. Aside from that minor exception, there is only one way of acquiring a water right in the future and that is by application for a permit. That is true with respect to the Bitterroot River and it will be true after the final adjudication of the Powder River.

Rep. Ramirez: Everything on the Powder River affects people downstream on the Yellowstone because the Powder River runs into the Yellowstone. So if you adjudicate the Powder River, what happens when you are adjudicating the mainstream of the Yellowstone? How can you dovetail all these things together os that the whole state knows exactly where it stands?

Al Stone: Hopefully some of these things are going to be so geographically distant from one another that you are not going to have a regulate a tributary of the Big Hole River in order to affect rights on tne Musselshell. I think for the most part that is true but you are correct logically that any big watershed is an interrelated thing and you could reach a situation where you might have an earlier right downstream on the Yellowstone which is entitled to water before somebody on the Powder River. I guess I think that the Legislature should enact something in the nature of Whitcomb v. Murphy. You take these various decrees and to the extent hydraulically necessary, people have their rights according to priority regardless of whether they are in the same adjudication or not. That is, that person you are referring to downstream on the Yellowstone would nave a right to enjoin an inferior appropriator on the Powder if it was necessary for that to occur for him to get this water. I don't know the extent to which this is mostly theoretical and academic. It certainly is a legal possibility.

Rep. Ramirez: What worries me is that I think the department of Natural REsources has indicated that they were actually going to go in smaller areas then say the whole Powder. Are they going to actually dovetail them all together?

Lawrence Siroky: The attempt is to have one decree for the entire Powder River Basin, so that these packages -- hearing, distribution, etc. -- that this package will be large enough to work with.

Al Stone: There is going to be a big problem in administration as you are recognizing. A person with perhaps a high priority on a tributary is not getting sufficient water, he may need to enjoin the most inferior right which affects him. It may not be on that tributary. It may be on some other tributary -- but the most inferior tributary that affects nim. we are going to have centralized records and it seems to me that it is not going to be so difficult after the adjudications are completed to find out who has the most inferior right which affects this particular person.

Rep. Ramirez: In other words, the person who has an adjudicated right, let's say in the Powder River, and he has got a 1963 right and he's got a fairly inferior right, a lot of people have them; but he thinks that as soon as the 1962 rights on the Powder River are satisfied that he comes next. He might not come next if his right affects a 1893 right on some other tributary. His adjudication is not really going to protect him completely.

Al Stone: It will protect him against any further attack on his priority or his quantity of water. That is a lot of protection and a lot of certainty. He never was sure that he was going to get water in a particular year because that depends upon the clouds and the rainfall. Now you have added one more uncertainty for him which is a legal theory that it is possible that there is water in the Powder but someone else has a better right to it on the mainstream of the Yellowstone. There is certainly going to be a delicate problem for the Legislature to consider and that is whether you can integrate decrees where the parties were not parties in the same piece of litigation, the problem of the McKnight case. I would think under the police power of the state and the difficulty of water administration, that you probably could get by with legislation integrating the decree where the department goes through publication and takes all its data and so forth, and you have a conclusive determination of priority and quantity. You could integrate them.

Rep. Ramirez: Theoretically, to end up with the best system possible, you would want a decree on each major drainage.

Al Stone: I think so. Some of them you might need more than one decree. It would be nicer if you have one decree per major tributary. If you permit one decree per drainage and as a drainage the whole Yellowstone Basin, that would be nice, but that is far too cumbersome and complicated.

Rep. Ramirez: Where do you draw the line?

Al Stone: I think you draw the line right where the Legislature drew it, and that is the department may select and specify areas or sources where the need for determination of existing rights is most urgent and first begin proceedings under this act to determine the existing rights in those areas or sources. I don't think the Legislature should try to make that decision. I think it is a good place to place it -- in the outfit that is going to have to do the adjudication. The Department has to say that they are going to do the Powder and get our experience there. They may find it awful and when they do the next one they will split it up or take more.

There is the adjudication process and the complications. Then the act provides for the permit system for appropriating water rights. That starts with 89-880. A person files an application for permit and the department publishes notice of the application and people can object that if you allow this appropriation it is going to damage me or cause some injury. If it seems substantial the department can hold a hearing and ultimately take action and approve or disapprove or modify the application and issue a permit in such form as won't harm other people. It has to take into consideration six specific things. In 89-885, none of which refer to the public interest but only whether they are going to unappropriate water, others won't be adversely affected, means of diversion are adequate, it is a beneficial use, it will not interfere unreasonably with others, or with the reserved rights, and it isn't for 15 cfs or more. If it is for 15 cfs or more, you must prove by

clear and convincing evidence that the rights of a prior appropriator will not be adversely affected. That is a little bit redundant, because if the rights of other appropriators are to be adversely affected, it is already stated.

Senator Turnage: Under criterion two you don't have to have any evidence that they are adversely affected except subjective fear. But it you want to grab a little more water you have to have clear and convincing proof.

Al Stone: I don't think that subparagraph (6) improves it at all but don't really care one way or the other very strongly.

Lawrence Siroky: There is an amendment to (1) there this last legislature clarifies that there has to be appropriated waters at the time that the water is requested to the extent that the application has been applied for. That's one of them. It does limit when a permit can be issued if the water ins't available there at all times.

Al Stone: It seems like if there is water there at times that is available for appropriation, if a person could make use of it, that a permit should be issued for using that water at times when it is available. I was unaware of that 1977 change.

Those are the two principal features of the act to me, Gene. There are a lot of other aspects to the act. It starts off with definitions and the powers and duties of the department and board and I will get into that determination and appropriations.

Senator Galt: Will you stop when we get to reservations?

Al Stone: Well, we are just about there. 89-890 provides for the reservation of the water.

Senator Boylan: We get to talking about adjudication and all and now we come along, and this was a big hangup in the last session, what is a reservation of water? Is it adjudication? Do you reserve a beneficial use?

Al Stone: The 1973 Water Use Act treats a reservation as an appropriation. Its definition of appropriate means to divert, impound or withdraw, including stock water, quantity of water or in the case of a public agency to reserve water in accordance with section 89-890. It is an appropriation of sorts, but it doesn't require, as you point out, the immediate application of water to the beneficial use. The reservation itself may be a beneficial use, as is claimed by Fish and Game for example, or it may be a reservation for future use and as you've seen in publications in the paper, I think, the Department of Natural Resources says that the City of Billings, the City fo Columbus and so forth, have applied for reservation of so many cubic feet per second or acre feet per year or both and that is not for present use. On the other hand a city ought not to be limited to a water right to what it is presently using. A city ought to be

able to obtain a water right for something in excess of what it is using right now so as to provide for future growth unless you can demonstrate that a city has no hope for future growth. That certainly is one of the purposes for reservation and the department is going to have to decide how far ahead can a city look. The statute doesn't tell the department and the city will ask for an enormous amount of water, say that it is going to apply it to beneficial use sometime within the next hundred years to two hundred years, or something like that. The department is going to have to look at those and look at the various competing requests for reservations and develop some sort of rule of thumb.

Senator Boylan: Wouldn't priorities come in here?

Al Stone: Well, they do come within the system of priorities. The reservation has a priority date as of the time the department grants the reservation. Unlike an ordinary appropriation where you relate back to when you apply for appropriation the reservation will be effective as of the time they grant you the reservation so that there will be -- and of course it does not supercede preceding priorities. It is just added on top and then there would be a heirarchy of reservations according to priority of date. Is that what you were referring to?

Senator Boylan: But say somebody comes along now and makes a reservation and maybe they get the ditch dug and finally get the water out and somebody is still sitting here saying that they are going to need the water for future use and have made a reservation but they haven't put it to use and the ditch company has.

Al Stone: If the reservation precedes the ditch company, it has a higher priority, then the ditch company took its right subject to the reservation of water by the City of Billings.

Senator Boylan: But if they both made the reservation the same day but one put it to use before the other one?

Al Stone: Putting the water to the use doesn't appear to me to be incorporated within the reservation idea of the code. Your priority date is the date you were granted the reservation and not the date you put it to beneficial use. Also they can review reservations. Every ten years they have to.

There aren't a group of criteria to guide the department in how much. I think the department is going to have to get some kind of rule of thumb, maybe by regulation that a municipality can look 35 years ahead. I'm not going to tell the department what they are going to do, I am just using hypothetically, that you can plan so far ahead and you have to have a high degree of proof of the likelihood that you are going to need a given amount of water by the end of that period. The department should, if they don't come up with very persuasive proof, either deny the reservation or cut the reservation down to what it appears to the department to be a reasonable amount. The department does have the authority for that. They certainly can't just grant all of

the reservations that are being requested because the Yellowstone River doesn't have that much water.

Senator Boylan: What about downstream. Are they going to take out a reservation? If they haven't made use of it then how much is that going to affect downstream interstate appropriators.?

Al Stone: If we get into interstate litigation, the fact that it hasn't been put to use will be one of the factors that will be considered. Such a case is in the original jurisdiction of U.S. Supreme Court. It wouldn't start out in district court in Billings or anything like that. It starts in the U.S. Supreme Court. The United States has to give consent to be joined because the United States would be affected in this suit and there have been cases when the U. S. has refused to join in the suit so the parties have been kicked out.

Colorado, New Mexico, and Texas all rely upon the Rio Grande River which arises in the San Luis Valley in Colorado and flows down through Sanata Fe and Albuquerque and Elephant Butte Reservoir and then at the border between Texas and New Mexico for a long ways. They did enter into a three-state compact which they allocated the water of the Rio Grande. The Colorado appropriators being upstream at least had a physical advantage. They just went ahead and took the water that they wanted and far exceeded what had been allocated to them in the interstate compact. New Mexico was also in violation at times. Texas brought an action against them in the U.S. Supreme Court and Colorado and New Mexico pleaded that since there were Pueblo Indian rights involved and the United States represented the Indians, that there was a non-joiner of a necessary party, the United States, and that you couldn't settle the action. So they asked for dismissal and the United States refused to enter the case so the U.S. Supreme Court kicked them out. In effect, if the United States doesn't cooperate, why texas can't get -- what do we do, have war, or do we settle these things in court? Since then, New Mexico has cooperated and New Mexico and Texas brought another suit which was filed, I believe, in 1967 and the U.S. did consent to join that suit. The parties entered into a stipulation to suspend action in the case. That was probably in 1972. I could be quite a ways off on those dates. I wrote the Attorney General of Texas this spring to find out what has happened in the case because there is no further record and he says that they entered into an amicable agreement with Colorado that Colorado would adhere to the interstate compact and also use less then they are entitled to until they have paid back the overdrafts which they have agreed to that they will bring them back into the U.S. Supereme Court.

We could have interstate litigation on the Missouri by any of the downstream states on the Missouri saying that Montana is now commencing to use -- I don't see how they would complain about water we're not using when it is simply reserved for future use in Montana. They'd have no reason to sue us. They are getting their water. The law of gravity is supplanting the law of water. Then we commence

to use water by irrigation districts who have reserved the water and by municipalities whose use is not awfully consumptive usually so it might not be too troublesome. So there is less water downstream for the various purposes of downstream estates. Yes, we could be hauled into the U.S. Supreme Court and a factor would be that Montana hasn't needed the water; it's been relied upon by Missouri or Kansas or some downstream state for industrial development and vast irrigation of valuable fields for food and all those things we have taken into consideration in deciding what sort of allocation of the Missouri River would be appropriate. It is almost a problem of economic and social planning by the U.S. Supreme Court.

Then we have priorities and you don't get a priority through the condition of water occurrence. So they can lower your water table if you can still get water reasonably. You can exchange water. You can turn water into a channel and take it out further down. We have already discussed changes in appropriation rights and transfers in appropriations rights and abandonment in appropriation rights and supervision of water distribution. That is kind of an important section, 89-896.

> "The district court shall supervise all water commissioners."

That really incorporates by reference our old Title 89, Chapter 10. I think we can continue on just the way we've been doing that. Subdivision 2 of 896 provides, and I think the intent of this is to replace 89-815, a means for individual appropriators to drag one another into court without making a great big adjudication of it. You can just have two people suing each other or 5 people suing each other. It doesn't have to be a great big Powder River adjudication. You do have to notify the Department of Natural Resources wants to make a big deal of it , it is their option to take over, send out the certified mail and go through all that, but I think it is designed not for that purpose although it can be used for that. It is designed to enable people to have their small lawsuits and not get into a great big case.

Senator Galt: So the Department is the only one with the authority to adjudicate a stream?

Al Stone: Yes.

Senator Galt: I know an attorney who feels that is unconstitutional.

Al Stone: He's got an awfully lot of precedent to fight against in Wyoming, New Mexico, Arizona, California, Texas, and Nebraska.

Senator Galt: There are two people arguing ona small stream in Wheatland County. One of the land owners lives in Texas and he hired an attorney to get this matter resolved and get the stream adjudicated. Well, Jim Moore was the attorney and he evidently called the Department of Natural Resources

and they said no way, they didn't want anything to do with it.

Al Stone: You are using adjudication in two different ways. The department way of adjudicating a stream means, in effect, a quiet title action, which is finally going to settle everybody's rights on the stream. That's what the Department means by adjudication. What we are talking about is simply a judgement which is an adjudication of water rights between two, three...

Senator Galt: They wanted to get the whole stream in.

Al Stone: If they get everybody in, and if everybody will admit in their pleadings that these are all of the rights which they claim, they will in effect accomplish the purpose of an adjudication so far as that stream is concerned. It won't settle their rights because it will only be prima facie evidence when the department comes in 25 years from now to adjudicate that along with the other little tributaries.

Senator Galt: If you can't get them to all come in an adjudicate, just the two, the department won't say to go ahead and adjudicate. You've got two fellows and they go to court and get their little problem solved. But, if there are ten water righters they might be going into court every year.

Al Stone: That's the way we've always done it in this state.

Senator Galt: Why not adjudicate the stream?

Senator Turnage: We haven't got the time or the money.

Al Stone: That's it right there.

Rep. Scully: If the farmers and ranchers want to pay a nominal fee to put it in there...

Senator Galt: Maybe all of them don't want to have the adjudication.

Al Stone: Just a nominal fee like a thousand dollars! I think that 89-896 is an essential provision in the code because it does permit this piecemeal adjudication where you are not getting that final carved-in-stone adjudication which the department conducts in its major adjudications under 89-370 to 879.

It is broad enough so that the district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo and so on. The code prohibits waste.

Waste is a subject for discussion in itself because it is related to what is a beneficial use. There is a fine economic line to be drawn between whether the withdrawal of

water is wasteful. As an example, in some areas it may be that it is now wasteful not to put in sprinkler irrigation. Yet, that certainly would have been a beneficial use in the past; that is, ditch irrigation would have been a beneficial use in the past; that is, ditch irrigation would have been a beneficial use. It still is, but there may come a time that the need for efficiency in water use will result in what is now a beneficial use becoming a wasteful use.

Rep. Roth: What about this legal assistance here on 89-899, No. 2.

Al Stone: No. 2? "If an appropriator who is a citizen of Montana becomes involved in a controversy to which any agency of the Federal Government or another state is a party, the Department may in its discretion intervene as a party or provide necessary legal assistance to the citizen of Montana."

Rep. Roth: That takes care of the Department but it doesn't take care of us as individuals.

Al Stone: I can only think of one case in which Montana had private litigation that was interstate and that was on Piney and Sage Creek. The case is Loyning v. Rankin. The original suit was brought into Federal courts and that case was Morris v. Bean and it went all the way to the U.S. Supreme Court, in which the Wyoming appropriator was considered to have the prior appropriation, prior in time to the Montana appropriator.

At any rate, the Federal court did adjudicate according to priorities, just plain dates of appropriation, with respect to this Montana and Wyoming appropriation. Then the downstream appropriator moved up onto the smaller tributary to commence to take water and the Montana Court held that the two streams were not tributary, one to the other, and therefore, the priorities established in the Federal decree didn't apply because the streams as a matter of fact were not tributary. That was just private litigation and the parties had their own counsel and it was interstate litigation.

The section you refer to 89-899(1)...

Rep. Roth: It seems to me that they have nothing to worry about and we have to carry the burden of protecting our own water right. It seems like it's unfair. It doesn't matter how much litigation they go into they will get it taken care of. But we will have to stand the burden of ours.

Al Stone: It certainly is not an unusual thing for the individual who is trying to protect his right to pay for that protection.

Rep. Roth: Yes, but on the other hand, so much more protection. They can go to any lengths, according to this; any kind of legal assistance they need then can acquire. An ordinary person could't afford that kind of legal assistance so they have an unfair advantage. Maybe that is normal but

it isn't right.

Al Stone: That is one of the problems that our legal system has been facing. Frequently justice can't be done because of the disparity in economic resources of the adversary.

Rep. Roth: If that is true, then the department will have advantage.

Al Stone: The department doesn't have any particular advantage here. Whenever the department is in litigation it has attorneys, yes. This one only says that when a citizen of Montana becomes involved against another state or agency, it must be a federal agency or agency of another state.

Senator Turnage: I think that the problem is that subparagraph (2) wasn't concerning you. I don't know how many parties the defendant will be in the adjudication. The role of the state will be interesting. Are we going to take an adversay position against all of the defendants? I was just trying to envision how this trial is going to work.

We have 50 people and they are all parties. The state of Montana is the plaintiff. They are going to sue all of these people and the complaint will say that all of the people reportdely have a water right. Come over and establish your right or we will declare that you haven't got any.

I'm talking about the duty of the department to adjudicate or to favor the adjudication of all of these rights. Is the department going to take an adversary role against all of them?

Al Stone: I think the judge is going to demand that the department brief and support its recommendations. To some extent the department will probably disagree with some of them and will probably agree with some of them.

Rep. Ramirez: I've always thought that the department would come in and say what they think each party has. At that point the burden is going to shift to the individual to show that he has more than what the department has allocated. How much of an adversary position that's going to put the department in, I don't know. I would think that the department would try to defend what its data has shown.

Lawrence Siroky: According to the Water Act you have a preliminary hearing.

Al Stone: The act describes this as a hearing on objections that such a hearing is going to amount to a full scale, complicated trial, I think.

Senator Turnage: Do you anticipate that this is going to be a jury trial?

Al Stone: I look upon this as an equitable proceeding and there is no constitutional right to a jury in an equity

proceeding. It is going to result in a decree. You describe it as a decree rather than a judgement. I think it would complicate it that much more if it were to be a jury trial.

Rep. Roth: Can they demand a jury trial?

Al Stone: I don't think so. What do you think, Jack?

Rep. Ramirez: I don't think it is a case where there is a jury trial. This has to be in the nature of an equitable action. It can't be anything but that. I do agree also that it wouldn't hurt to say something here. It just wouldn't work to have a jury.

Al Stone: It might be an amendment you want to recommend.

Lawrence Siroky: Normally our procedure in the Powder is to go out an collect the point of diversion, the place of use, etc. The next thing to do is go talk to the claimant. You are not going to find the date of first use by looking; you find out by talking to them. We've got dates and aerial photos helping place that date. A lot of times the facts of the case pretty much agree with what we find. If there are some errors, they are human errors. The real dispute comes into your legal questions, questions of due diligence, dates of first use, dates of priority with the posting of notice and so on. The Department of Natural Resources is going to argue what due diligence is. Our recommendation will be point of diversion, place of use and so on, and then we will take maybe a policy which would be set eventually by the judge.

Senator Turnage: Maybe we ought to consider in our amendments any of the procedural hangups that we can avoid such as equity and the role of the department.

Maybe the department's position ought to be that they will be required to bring forth the factual background.

Al Stone.: Gene, I wonder whether we should copy the U.S. Supreme Court in an interstate adjudication where Nebraska sues Wyoming. It goes to the U. S. Supreme Court, the U. S. Supreme Court appoints a special master. In this case it would be the Department of Natural Resources, apparently. That's what we have here. The Department files to have a determination and get an order to notify everybody and then the judge says to go ahead. The department can make its report the same way a special master does to the Supreme Court, a complete report with recommendations, actually a drafted decree. Then the U.S. Supreme Court asks for briefs and oral argument. Then they say you haven't covered some of these things well enough and so we will rebrief this area and have more oral argument on this area. Those are multi-faceted suits. The Department could, I think, step out of it after rendering its complete report, recommendations, and proposed decree to the court, get out and let the court provide the people with their day in court and it can have as many days in court as it wants.

Senator Turnage: The taking of testmony and the factual evidence would be taken at the master's hearing. Then the report would be submitted and the court would hear the legal argument.

Al Stone: I think that some consideration should be given to having the department take the facts and make the report and have the arguments before the district court.

Senator Turnage: That should be discussed anyway. John doesn't like that idea. I think I know why. Administratively lawyers don't feel as confident.

Senator Boylan: I don't think the property owner either feels that an agency of government is strong enough in his property right.

Senator Turnage: I think it should be discussed and maybe the only practical way you can get adjudications. First of all, the department will come out with it's recommendations or it will have recommmendations probably before the hearing or it will have what it thinks ought to be recommended. There might be a tendency for them to defind their preconceived notions.

Rep. Scully: Not only that, but it seems to me that the department is going to be in a different position in terms of state policy. The executive branch of the government is definitely going to have an interest in every adjudication, be it the Department of Health, Natural Resources, Water Quality, Fish and Game, etc. It seems to me that once you are doing that you are allowing the executive branch of the government to make a ruling in something that they have an inherent interest in.

Senator Turnage: There was an amendment introduced about four years ago and the department had some proposal about administrative adjudications. Does anybody remember that? It didn't pass.

Gordon McOmber: That particular situation was brought up in some disputes in Pondera Coulee. They didn't want to go through a full-blown adjudication. They just wanted somebody to come out there and determine the facts and they would accept them when we found them. They would abide by that until a final determination is done. It doesn't look like the department has any authority to administratively determine water rights, so there was a bill introduced to do that.

Al Stone: Of course the department could intervene in one of these small suits simply as a party without it being a full-blown massive adjudication. You might get the services of the department in that way.

Senator Turnage: That's what is contemplated in here now, isn't it?

Al Stone: Yes, it says so.

Senator Turnage: Of course I can understand the department's reluctance. We ought to consider the procedural aspects of this thing.

Rep. Scully: Any other comments or questions?

Rep. Ramirez: This is off the subject of adjudication. This is back on reservations again. On 89-890(6), the board has the right to extend, revoke, or modify the reservations under certain circumstances. I would just like to know what your understanding of what the power of the Board of Natural Resources would be to someday in the future after they have granted a reservation to modify that.

Al Stone: I don't have any better way of knowing what they are going to use as their criterion than you do. They obviously have the power to extend, revoke or modify. I guess they have to look to see whether their city is growing the way they anticipated and claimed that it would or the aquatic life seems to be suffering under the reservation as it exists or thriving. I don't know what they are going to look at in a particular case.

Rep. Ramirez: Do you agree that these couldn't be modified just because one use might look better at that time than another use but should only be modified if -- and for example, let's take the Fish and Game. The Fish and Game has a big reservation. The purpose of their reservation was to protect the fish and wildlife, and they're still protecting the fish and wildlife but now it looks like it would be more economically beneficial to the state to use that water for irrigation. Could you change it under this language to irrigation? Or as long as the Fish and Wildlife is meeting its original objective you wouldn't be able to change it?

Al Stone: I think there is broad discretion. Even though that last sentence is qualified only by saying that where the objectives of the reservation are not being met. You have to look to subparagraph(3) to see the objectives and the justification for the reservation -- the purpose, the need, the amount of water necessary -- that the reservation is in the public interest. If the public interest changes, the objectives of the reservation being met. I kind of think that it is fairly wide open.

Rep. Scully: If there are no further questions, then Professor Stone, thank you very much. I think this was very worthwhile.