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Matthew W. Williams

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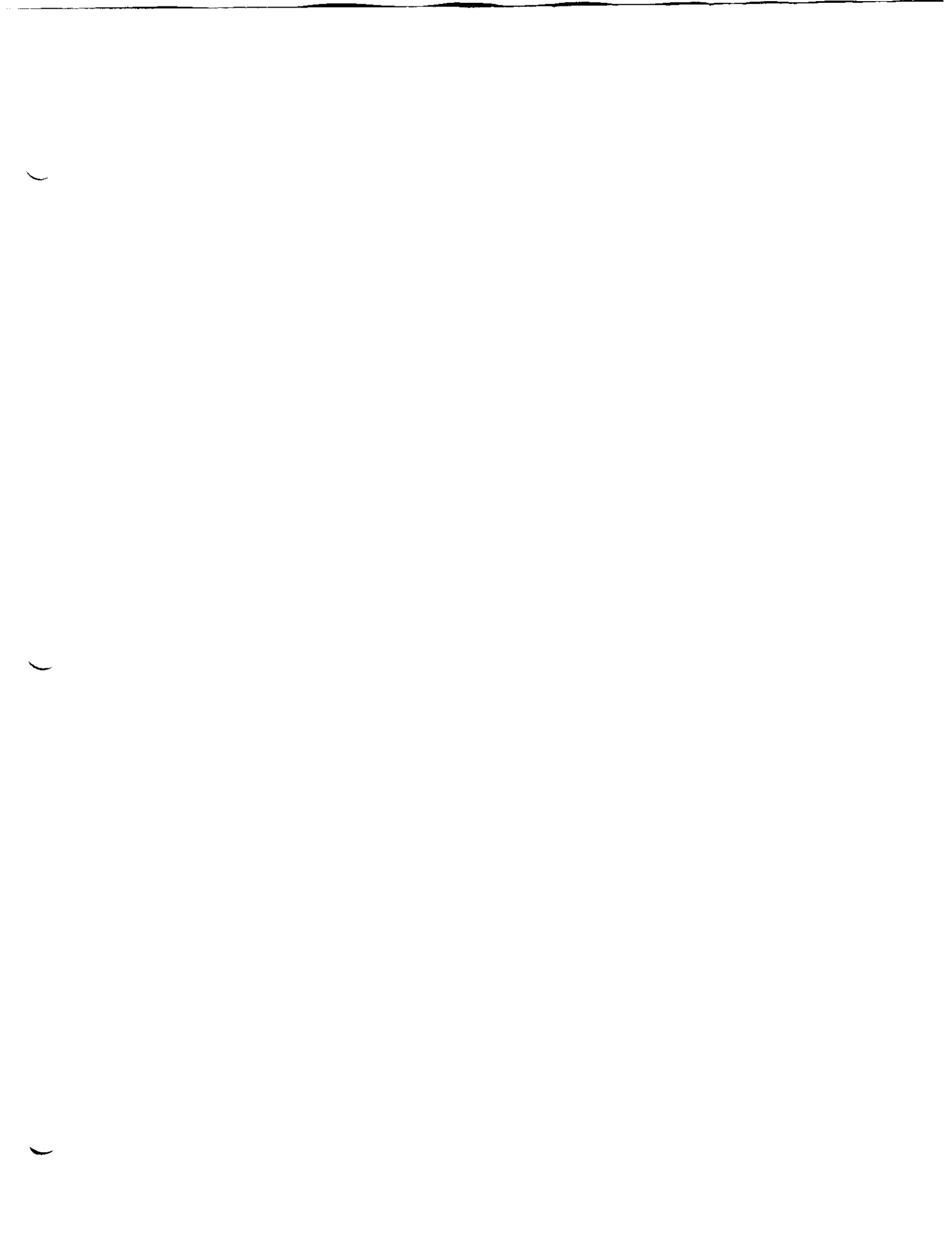
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Nurturing Public Values
in the Water Resource-The Montana Way

Matthew W. Williams

Montana Counsel
Moses, Wittemyer, Harrison & Woodruff, P.C.

Natural Resources Law Center
University of Colorado School of Law
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I. Historical Overview

A. Montana has numerous nationally and internationally acclaimed fishery resources. Historically, however, there were few legal mechanisms to protect these resources against competing water uses and water related activities. See generally, Stone, Legal Background on Recreational Use of Montana Waters, 32 Mont. L. Rev. 19 (1971).

1. As a practical matter, some of these water resources needed little legal protection, as they exhibited a significant surplus of supply over existing demand.

2. Direct protections for fish and wildlife flows in the form of "instream appropriations" were necessarily inartful tools, because Montana streams and rivers had not been adjudicated. Hence, there was no practical way of protecting such an appropriation, even if it was legally cognizable.
 - (a) Some rights on some rivers and streams were

"adjudicated" historically, but the results thereof bound only those persons that were parties to that action, or those in privity of interest therewith. Hence, the terms of such decrees could never be enforced against absent users. See, State ex rel. Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935); see also, Stone, Are There Any Adjudicated Streams in Montana?, 19 Mont. L. Rev. 19 (1957).

B. Early Attempts at Instream Appropriations

1. In Paradise Rainbows v. Fish and Game Comm., 148 Mont. 412, 421 P.2d 717 (1966), the Court in dictum purported to recognize the concept of a public interest in streams with significant fishery resources. It is difficult to tell from the opinion whether the Court was acknowledging a possible "public appropriation" by use of the fishery resource, or whether the Court was referring to an implicit limitation on existing users to protect the fishery resource.

- (a) The Montana's Fish, Wildlife and Parks has read the case as reflecting a legal basis for public appropriations. Hence, this

agency has filed a small number of claims for instream protection on water resources where substantial public use of the resource has been demonstrated, and where that use has been further reflected by the construction of public access sites or other manifestations of intent to appropriate.

(b) "Murphy" rights resulted from legislative provisions authorizing instream flows on Montana's premier fisheries. Such rights are, however, subject to uses "more beneficial to the public." See 89-301(2), RCM 1947. The Department of Fish, Wildlife and Parks is now seeking to adjudicate these rights.

C. Division Requirements and Beneficial Use

1. Paradise Rainbows, supra, was the first Montana case to indicate that instream uses may be beneficial ones, and that a diversion may not be necessary for an appropriation. Compare, Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938) (diversion required), see also, Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936)

(swimming hole beneficial use) (dictum), Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940) (fish pond beneficial use) (dictum).

II. In 1973, Montana refabricated its water law structure through adoption of the Montana Water Use Act. See MCA 85-2-101 et. seq. The Act called for the adjudication of all rights to the use of water with priority dates senior for July 1, 1973, see MCA 85-2-211 et. seq.; created an administration permit system for water rights initiated after July 1, 1973, see MCA 85-2-301 et. seq.; and specified a procedure whereby waters could be reserved for future uses and instream uses. See MCA 85-2-316.

A. Reservations are Montana's Primary Mechanism for Protecting Instream Flows.

1. Public bodies or agencies may reserve waters "to maintain a minimum flow, level, or quality of water". MCA 85-2-316. The reservations are appropriations of water with priority dates commensurate with their time of creation. Such uses are, however, subject to review, at least once every ten years, to confirm that "the objectives of the reservation are being met". MCA 85-2-316(10).

2. The Missouri River Basin is currently the subject of the reservation process. Applications for reservations are due by July 1, 1989. MCA 85-2-331.

3. Reservations are granted by the Board of Natural Resources and Conservation, a quasi-judicial entity, upon a showing of need and public interest. MCA 85-2-316(4)(a).
 - (a) The need for water, and hence the size of the reservation, is statutorily limited for instream flows. Instream flows cannot be greater than 50% of the average annual flow of gauged streams. MCA 85-2-316(6). "Gauged stream" is not defined. Ungauged streams are allocated at the discretion of the Board.

 - (b) The Department of Fish, Wildlife and Parks utilizes the "wettered perimeter method" to determine adequate fish flows. See, Guidelines for Using the Wettered Perimeter Program, Montana Dept. of Fish, Wildlife and Parks (1984).

 - (c) Typically, adequate winter flows are the

most limiting factor for Montana's fish populations. Hence, instream flows need not necessarily interfere with irrigation demand, and indeed return flows from flood irrigated acreage may enhance winter flows.

(d) The Department of Fish, Wildlife and Parks has undertaken studies to estimate the economic value of instream values as part of the necessary public interest showing. Through surveys, economic value is measured through "travel cost" methodologies (how much cost is incurred to use the resource) and "willingness to pay" methodologies (how much cost would a user be willing to pay to use the resource).

(e) As a practical matter, none of the measures for instream flow will provide complete protection until the completion of the adjudication. There simply is no cost effective manner to enforce the priority until such time. Such instream flow protections are necessary, however, to maintain the status quo, and protect the existing resource against further depletions arising from contemplated

increases in consumption attendant to changes of senior water rights.

III. Diversions, Beneficial Use and Common Law Trappings

- A. It is unknown whether the Montana Water Use Act abrogated the diversion requirement, if one existed. "Appropriate" means to "divert, impound, or withdraw (including by stock for stock water) a quantity of water." MCA 85-2-102(1). The DNRC has intimated there is a diversion requirement in denying permits for instream flows to private parties.
- B. Beneficial use now "means a use of water for the benefit of the appropriator, other persons or the public, including. . . fish and wildlife. . . and recreational uses". MCA 85-2-102(2). This language may mean that private persons and entities may appropriate water, for the stated purposes, at least insofar as the supply is actually diverted. The DNRC has indicated, however, that these "public uses" are reflected in the statutory definition of beneficial use only to plainly embrace the reservations.

VI. Montana's environmental laws may also work to protect instream

amenities. See generally, The Emerging Relationship Between Environmental Regulations and Colorado Water Law, 53 U. Colo. L. Rev. 597 (1982).

A. While Montana's Constitution provides that the "state and each person shall maintain and improve a clean and healthful environment," Art. IX, Sec. 1, this provision is not self-executing. Montana Wilderness Association v. Board of Health and Environmental Sciences, 559 P.2d 1157 (Mont. 1976).

B. Montana has a baby NEPA. MCA 75-1-101 et. seq. In the case of new appropriations for 4000 or more acre feet per year, or 5.5 cfs or more, the applicant is taxed for the EIS. MCA 85-2-124. It is unknown whether an EIS is proscribed by negative implication for proposed uses below this threshold.

1. It is unknown whether the adequacy of flows for fish and wildlife purposes can be examined in an EIS. It may be that the reservation process is the unique and exclusive method of protecting such interests. But see Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm., 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

C. Montana's Natural Steambed and Land Preservation Act,

MCA 75-7-101, creates a permit system for projects involving a "physical alteration or modification of a stream", MCA 75-7-103(5). Such projects are reviewed by the local conservation district and the Department of Fish, Wildlife and Parks. Disagreements are subject to arbitration. See MCA 75-7-114.

D. Water quality laws can have direct impacts on water uses.

1. Montana enforces the nondegradation policy of the Clean Water Act. See ARM (Administrative Rules of Montana) 16.20.701 et. seq.
2. Because of the relatively large biological oxygen demand in the popular Flathead Lake, detergents and cleansers containing phosphorus have been largely banned. See, MCA 75-7-401, ARM 16.20.1201.
3. Beavers can be expensive. Disputes are evolving where the federal land managers have reintroduced beavers in watersheds providing municipal supplies. Beavers generate giardia, mandating costly water treatment measures.

4. A proposed coal development on Cabin Creek in British Columbia precipitated water quality concerns for the North Fork of the Flathead in Montana. The matter is before the International Joint Committee, a quasi-judicial body created by the Boundary Waters Treaty between the United States and Great Britian, 36 Stat. 2448. See generally, Cabin Creek and International Law - An Overview, Wilson, Public Land Law Review, Vol. 5, pp. 110 (1984).

- E. The entire river corridor from Anaconda to the Milltown Dam on the Clark Fork is now a Superfund site. Mounting evidence indicates that heavy metal contamination from mining is constraining trout populations.

- F. Montana has recently embraced the public trust doctrine in determining stream access issues. See Montana Coalition for Stream Access v. Hildreth, 684 P.2d 324 (Mont. 1984).
 1. It is unlikely that this doctrine will impact water allocations in the form of perfected appropriations. See National Audubon Society v. Superior Court (Mono Lake), 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, cert. denied, 104

S.Ct. 413 (1983). The Court found the public trust implicit in Montana's Constitution, and Art. IX, Sec. 3(1) thereof specifically confirms all existing rights to the use of water. But see generally, Fitzpatrick v. Montgomery, 20 Mont. 181, 50 P. 416, (1897) (Rights to water must be exercised with reference to general condition of country and necessities of people).

2. The public trust may create a sort of substantive duty to evaluate the environmental, economic, and social consequences of issuing permits for new appropriations, See, United Plainsmen Association v. North Dakota State Water Comm., 247 N.W.2d 457 (N.D. 1970).

V. Federal Reserved Rights

- A. Federal reserved water rights may also result in significant instream flows.

1. Of peculiar importance in this dimension is any water right attendant to wild and scenic rivers. A segment of the Missouri River downstream of major agricultural areas has been so designated. See, 16 U.S.C. 1284(c); 16 U.S.C. 1274(14).

B. Tribal water rights may also result in important instream flow protections in Montana. See United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

1. A dispute has arisen in Montana between the confederated Salishi and Kootenai Tribes and various allottees of reservation land. These allottees use water for irrigation; the Tribes want the resource to maintain and enhance the fishery resource. There is not enough for both. See generally, United States v. Adair, supra; Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092, Getches, Water Rights on Indian Allotments, 26 S.Dak. L. Rev. 405 (1981).

2. The compact between Montana and the Assiniboine and Sioux Tribes authorizes the Tribes to use the Tribal water right as defined therein for instream protection. See MCA 85-20-201, Art. III, Sec. D.

VI. Hydroelectric Power

A. Montana's numerous hydroelectric facilities may have already created substantial instream flow protections. The Montana Power Company built several largely run-of-the-river hydroelectric facilities on the

Missouri mainstem around the turn of the century. The Bureau of Reclamation constructed another such facility on the mainstem in the late forties, replete with a relatively massive storage component (Canyon Ferry). These water uses usurp virtually all of the natural flow of the Missouri, and hence have the capacity to maintain instream flows throughout the upper Missouri water shed.

Substantial identical results may be attributed to Washington Water Power's Noxon Rapids plant on the Clark Fork, and Montana Power Company's Ennis plant on the Madison.

1. The Bureau of Reclamation and the Montana Power Company have moved to close the upper Missouri Basin to new direct flow appropriations. The Department of Natural Resources and Conservation, which administers the new permit program, determined that such a result would contravene the federal intent evident in the construction of the Bureau's Canyon Ferry facility and that the Bureau was in any event employing an unreasonable means of diversion in maintaining storage solely for possible long term drought. In Re Brown, DNRC (1983). The matter is on appeal.
2. Hydroelectric facilities like the Bureau of

Reclamation's Missouri Canyon Ferry facility and Yellowtail Dam on the Bighorn River create significant tailwater fisheries. The reliability of releases from long term storage and the temperature of the water from such releases have created astounding trout fisheries.

3. In western Montana, in the area drained by the Columbia River System, additional instream flow protections arise by virtue of the hydroelectric operations thereon. In the Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. 839 et. seq., Congress moved to enhance the fishery resource and mitigate the damage to such instream amenities arising from the intense hydroelectric development of the Columbia Basin. Pursuant to the act, a regional council has prepared a fish and wildlife plan, which binds the Bonneville Power Administration. The costs attendant to this plan are borne by the region's ratepayers. See 16 U.S.C. 839b(h).

- (a) This act has resulted in a 4000 cfs minimum flow on the Kootenai River, a schedule of releases out of Hungry Horse Reservoir on the south fork of the Flathead, and off site enhancement for the sorely depleted

Bitterroot River by the purchase of stored water.

VII. Recent statutory changes

A. As a result of Sporhase v. Nebraska, 458 U.S. 941 (1982), Montana amended its statutes providing for out of state diversions. As part of this process, public interest type criteria were added to the permit process for new appropriations and changes of water rights.

1. Applicants for permits to use in water in excess of 4000 acre feet or more and 5.5 cfs or more must now demonstrate that their proposed use is reasonable. MCA 85-2-311(2)(c). "Reasonableness" is determined by examining:

- (i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;
- (ii) the benefits to the applicant and the state;
- (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

- (iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;
- (v) the effects on private property rights by any creation of or contribution to saline seep; and
- (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the DNRC. MCA 85-2-311(2)(c).

2. Changes in the place of use or the purpose of use of water rights that encompass diversions of 4000 or more acre feet and 5.5 cfs or more must meet the same "public interest" type criteria for new appropriations. MCA 85-2-402(3)(b). In addition, the decision of the department must be "affirmed" by the legislature. MCA 85-2-402(4)(b). Similar legislative approval must accompany any such change of water rights for diversions out of state. The statute contemplates that the legislature must separately determine those factors specified for any diversions for out of state use. See MCA 85-2-402(c).

- (a) There are probably serious constitutional

difficulties with the legislative approval provisions. The sections appear to assign judicial powers to the legislature, thereby running afoul of Montana's separation of power. See generally, Art. IX, Sec. 1. If such an approval is in fact an exercise of legislative power, it is difficult not to characterize the same as a special act which is prohibited by Montana's Constitution. See Art. V, Sec. 14. ("The legislature shall not pass a special or local act when a general act is, or can be made, applicable".)

3. Applicants for any permit to appropriate water which will involve transporting water outside the state must, in addition to "regular" statutory criteria, show that the proposed use of water is not contrary to water conservation in Montana or the public welfare of Montana citizens. MCA 85-2-311(3)(b). The latter criteria are determined by considering:
 - (i) whether there are present or projected water shortages within the state of Montana;
 - (ii) whether the water that is the subject of

the application could feasibly be transported to alleviate water shortages within the state of Montana;

- (iii) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water. MCA 85-2-311(3)(c).

- (a) It is interesting to speculate as to what deference would be accorded the factual findings made by the state if the ultimate disposition is attacked as violating Sporhase. Obviously, review of the legal adequacy of the standards themselves is inadequate if the state has unfettered discretion to determine the controlling facts. See generally, City of El Paso v. Reynolds, 597 F.Supp 694 (D. New Mexico 1984); F. Strong, The Persistent Doctrine of Constitutional Fact, 46 N.C.L. Rev. 223 (1968).

- 4. Montana now has a "water leasing" program. MCA

85-2-141. The legislation delegated to the Department of Natural Resources and Conservation the authority to lease up to 50,000 acre feet of water. The Department of Natural Resources and Conservation may acquire the subject water rights either by appropriation or purchase, but they must be exercised out of existing or future reservoirs. MCA 85-2-141(3). The Department must assure itself that the relevant criteria for new appropriations are satisfied, but no EIS review is required unless 4000 acre feet a year or more and 5.5 cfs or more is consumed. No legislative approval is necessary.

- (a) The cynics among us may ponder whether the statutory provisions for out of state diversions are designed to authorize the same only when payments were made to the state for the "lease" of water.

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