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# Are There Any Adjudicated Streams in Montana?

By ALBERT W. STONE\*

One day during the last two weeks of May, 1935, Charles Reeder, a rancher on Red Rock River in Beaverhead County, Montana, opened the headgate supplying his ranch with water. In so doing he was clearly in violation of the ruling of court-appointed water commissioner Charles E. Calvert, and of the court order issued by District Judge Lyman H. Bennett. Thereupon Mr. Reeder was convicted of contempt of court and fined. His neighbors, feeling secure at last from further trouble from Mr. Reeder, settled down to normal operations. But Mr. Reeder appealed his conviction to the Supreme Court and secured a reversal.<sup>1</sup>

All of this trouble had lately come to a valley whose waters had been adjudicated according to Montana procedure in 1899. The relative rights of the ranchers had seemed well settled long before the water-shortage of the 1930's induced Mr. Reeder to flout Judge Bennett's order and Commissioner Calvert's administration. The Commissioner, supported by the

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<sup>1</sup>State *ex rel.* Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935). The basis of the decision was that Mr. Reeder's rights had never been adjudicated, and to summarily relegate him to an inferior position might result in depriving him of a property right without due process of law. The necessary effect of Reeder's activities on the performance of the commissioner's duties was not fully considered, as the supreme court insisted on the view that a person taking water under an unadjudicated claim could not possibly interfere with the commissioner's administration of adjudicated claims. *Accord*, State *ex rel.* Pew v. District Court, 34 Mont. 233, 85 Pac. 525 (1906); State *ex rel.* Boston & Montana Con. C. & S. Min. Co. v. District Court, 30 Mont. 96, 75 Pac. 956 (1904).

So far as the due process point is concerned, the *Reeder* case appears to be on more solid ground than the *Boston & Montana Con. Min. Co.* case, *supra*, relied on by the court. In that case it appears that the contemner was a party to an injunction proceeding wherein he was enjoined. It was not argued that he was improperly before the court, that he had not personally subjected himself to the jurisdiction of the court, nor that there was any defect in the procedure so far as opportunity to be heard and defend is concerned. The objection was that there was insufficient evidence to sustain the plaintiff's claim, and that defendant's title should not be tried in an injunction proceeding. *But cf.* United States v. United Mine Workers of America and John L. Lewis, 330 U. S. 258 (1947); State *ex rel.* Silve v. District Court, 105 Mont. 106, 69 P.2d 972 (1937); State *ex rel.* Tague v. District Court, 100 Mont. 383, 47 P.2d 649 (1935); State *ex rel.* Zosel v. District Court, 56 Mont. 578, 185 Pac. 1112 (1919). The latter three cases are briefly discussed in note 14 *infra*. See also *Irion v. Hyde*, 107 Mont. 84, 81 P.2d 353 (1938), and *Parsons v. Mussibrod*, 59 Mont. 336, 196 Pac. 528 (1921), wherein parties to injunction proceedings were temporarily restrained in a water right suit. (See discussion at 27 *infra*.)

The other case relied on by the supreme court in the *Reeder* case, *supra*, was *Reeder* case, there had been no prior action affording relator the opportunity to ascertain his relative right to water. In both the *Reeder* and *Pew* cases the relator was hailed into court in answer to a "show cause" order, and restrained. (In the *Pew* case, relator brought certiorari to review the order—he was not in contempt.) As stated by Justice Brantley in the *Pew* case, at 237: "In other words the court . . . enjoined him in a summary proceeding, in a cause in which he claimed an independent right, finally and absolutely adjudicated that he had no such right, and that, too, upon summary notice of less than twenty-four hours." The *Pew* case may be distinguished from the familiar temporary injunction case on the ground that in the *Pew* case the trial judge apparently made a final adjudication.

Judge, decided that since Mr. Reeder's claim had never been adjudicated, he would have to go without water just like those whose priorities had been adjudicated as inferior. After the supreme court overruled the judge, did the ranchers on Red Rock River have any rights or priorities that they could count on during dry years?

The fierce contention of westerners for water resulted in a unique and indigenous legal structure which was called "the appropriation system."<sup>3</sup> But as population, industry and agriculture grew in the west, some of the basic ideas of the system were drawn into question: First, should a person be able to acquire an unchanging right to a large volume of water which would endure notwithstanding changing conditions in his community and state? Second, should there be a more rapid and conclusive determination and stronger enforcement of water rights to replace self-help and the delays of litigation which arise whenever there is a local water shortage? The pressures which raised these questions have forced changes in the legal structure.<sup>4</sup> All western legislatures have developed modifications to fit the needs of the different states. However, Montana's greatest departure from the appropriation system was short lived and occurred nearly a century ago.<sup>5</sup> Since then our legislature has found the original concepts of "first in time first in right" and individual enforcement of rights, sufficient for determining and administering water rights in Montana.<sup>6</sup> And along with that "hands off" policy, the legislature has never provided a procedure which would enable the owner of a water right to finally establish his priority by a conclusive adjudication.<sup>7</sup>

This article examines the workings of the Montana system, appraises how well it is serving us, and ventures a look into the future.

<sup>3</sup>For a discussion of the historical development of the "appropriation" systems of acquiring a right to use water, see WIEL, *WATER RIGHTS IN THE WESTERN STATES* c. 5 (3d ed. 1911); and for a succinct statement, see 27 R.C.L., *Waters* § 168 (1920).

<sup>4</sup>One observer declared as early as 1929: "At this point prior-appropriation has suddenly vanished. . . ." Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 *ROCKY MT. L. REV.* 248, 269 (1929).

<sup>5</sup>The first territorial legislature, which convened at Bannack in December, 1864, enacted that in the event of a water shortage on a stream, the nearest justice of the peace should appoint three commissioners to equitably apportion the water to the various localities, for the best interest of all parties concerned. *Laws of Montana 1864* (1st Session). This enactment however was not favored by the Montana Supreme Court. It held that such an apportionment was void for the reason that the three commissioners were exercising judicial powers which could not be granted to them under the organic act of the Territory. *Thorp v. Woolman*, 1 *Mont.* 168, 170 (1870).

<sup>6</sup>Among western states Montana alone has no comprehensive statutes controlling the acquisition and administration of water rights, and has no centralization of that administration. SUBCOMMITTEE ON STATE WATER LAW, NATIONAL RESOURCES PLANNING BOARD, REPORT TO THE WATER RESOURCES COMMITTEE, *STATE WATER LAW IN THE DEVELOPMENT OF THE WEST* 99-111 (1943). Following litigation, however, a court commissioner may be appointed to administer the decreed rights. REVISED CODES OF MONTANA, 1947, § 89-1001 (hereinafter the REVISED CODES OF MONTANA are cited as R.C.M.).

Montana's present legislative framework, insofar as it deals with private water rights, is principally a codification of the law of appropriation rights as that law existed in its earlier days in the middle of the 19th century.

<sup>7</sup>The inconclusiveness of an adjudication, so far as strangers to the decree are concerned, has been recognized several times since the *Reeder* case. See, e.g., *Wills v. Morris*, 100 *Mont.* 514, 523, 50 P.2d 862, 865 (1935) (prior decree admitted in evidence against person not a party thereto, but with the explicit reservation that

## PERSONS NOT PARTIES TO THE ADJUDICATION

The basic provision in Montana law providing for stream adjudication by private parties is R.C.M. 1947, § 89-815:

In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff *may* make any or all persons who have diverted water from the same stream or source, parties to such action, and the court *may* in one judgment settle the relative priorities and rights of all the parties to such action. . . . (emphasis added)

This provision does not require the joinder of all water-users in the vicinity, nor is there any procedure whereby presently unknown persons who may later claim a superior right can be compelled to come forward and prove such claim or be barred.<sup>8</sup> The absence of this latter procedure, which would make a water adjudication an *in rem* proceeding and truly

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he is not bound thereby); *Sherlock v. Greaves*, 106 Mont. 206, 214 P.2d 87 (1937) (same); *Cook v. Hudson*, 110 Mont. 263, 284, 103 P.2d 137, 147 (1940) (same); and the earlier case of *Galiger v. McNulty*, 80 Mont. 339, 350, 260 Pac. 401, 403 (1927) (same); see *State ex rel. Swanson v. District Court*, 107 Mont. 203, 209, 82 P.2d 779, 782 (1938). *State ex rel. McNight v. District Court*, 111 Mont. 520, 111 P.2d 292 (1941), has an impact upon water administration much like the *Reeder* case. The district court instructed the water commissioner to distribute water under three separate decrees, integrating the various rights according to their decreed dates. The commissioner had been appointed in one of those three proceedings, which was the one in which *relatrix* was a party. Integrating the three decrees resulted in recognizing earlier decreed rights of a canal company. On writ of review the supreme court (with two dissents) held that the trial court's order to the commissioner to distribute under all three decrees was null and void. The reason: although all disputants had decreed rights, they had never before been parties to the same action, and hence their relative rights had not been adjudicated *inter sese*. The gist of the opinion is this (at 524): "Since the respective rights of *relatrix* and of the plaintiff have not been adjudicated as against each other, it is apparent that *relatrix's* rights cannot, in a summary proceeding of the nature in question, be subordinated to those of the plaintiff."

*State ex rel. Pew v. District Court*, 34 Mont. 233, 85 Pac. 525 (1906), is the real forerunner of the *Reeder* case, being essentially parallel to it. The *Reeder* case was cited with approval on the point in question in *Quigley v. McIntosh*, 110 Mont. 495, 500, 103 P.2d 1067, 1069 (1940), and *State ex rel. Mungas v. District Court*, 102 Mont. 533, 537, 59 P.2d 71, 73 (1936).

"Parties" as used herein means persons named in the proceeding, as distinguished from the "parties" in a quiet title action, who may also include "all persons, known or unknown, claiming, or who might claim, any right, title, estate, or interest." R.C.M. 1947, § 93-6204.

<sup>8</sup>R.C.M. 1947, § 89-829 requires a new appropriator on an already adjudicated stream to join all whose rights may be affected by the new appropriation. R.C.M. 1947, § 89-830 permits service by publication for this proceeding. However, since § 89-829 requires the petitioner to "give the names of all appropriators or claimants who have, or appear to have, rights in the source of supply," and no mention is made of unknown claimants, the proceeding has not been broadened to an *in rem* one.

Similarly, R.C.M. 1947, § 89-835 provides that one who is not a party to a decree may petition the court for an order establishing his relative right and making him a party to the prior decree. It incorporates the procedural provisions of §§ 89-829 and 89-830, *supra*. But the language is not mandatory. *State ex rel. McNight v. District Court*, 111 Mont. 520, 111 P.2d 292 (1941).

This section (89-835) is followed by a provision which appears to put teeth into the law. R.C.M. 1947, § 89-836: "Any person not a party, or privy, to a decree . . . who shall divert the water thereof when it shall be needed by another, without first complying with the terms of this act, shall be . . . punished by . . ."

Insofar as appropriators claiming a right acquired subsequent to the decree, and subsequent to 1921 are concerned, the enactment has teeth. In *Anaconda National Bank v. Johnson*, 75 Mont. 401, 244 Pac. 141 (1926), the would-be appro-

analogous to a quiet title action,<sup>9</sup> is the reason for the inconclusiveness of water-right adjudications. Private adjudication of streams in Montana remains an in personam affair with absolutely no binding effect upon unnamed persons who are not served so as to bring them personally before the court.<sup>10</sup> And since the principal value of a water right is its priority—its *relative* position with respect to other water rights—the failure to fix a final priority removes much of the value of an adjudication under the statute.<sup>11</sup>

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priator under those circumstances was denied a water right. And in *Donich v. Johnson*, 77 Mont. 229, 250 Pac. 963 (1926), the court held that these code sections provide the only method whereby an appropriation can be made from an adjudicated stream. But such a claim to so inferior a priority cannot be a threat to the adjudicated rights anyhow.

Section 89-836, quoted above, seems equally applicable to persons claiming a right prior to the adjudication. It has not been so applied, and the cases appear to stand in the way of such an application. *State ex rel. McNight v. District Court*, 111 Mont. 520, 111 P.2d 292 (1941); *State ex rel. Reeder v. District Court*, 100 Mont. 376, 47 P.2d 653 (1935); see also cases cited note 6 *supra*. None of those cases, however, involve a post-1921 adjudication combined with the assertion by a non-party of a post-1921 right which antedates the decree. Arguably, such a claim should be held to be subject to the condition of compliance with the 1921 legislation interpreted to be applicable to *all* post-1921 appropriations. The condition would be that if there is a later adjudication, this appropriator must have his appropriation adjudicated in order to maintain his right. As time goes by, the likelihood of such a situation arising becomes greater.

It seems more likely that the legislation will be held to apply only to persons whose claims date after the respective adjudications.

<sup>9</sup>See R.C.M. 1947, tit. 93, c. 62 for the procedure for quieting title.

<sup>10</sup>WEIL, *WATER RIGHTS IN THE WESTERN STATES* § 626 (3d ed. 1911). See also cases cited note 6 *supra*. Montana water-right suits have been erroneously referred to as essentially "quiet title" actions in *Sain v. Montana Power Co.*, 84 F.2d 126, 127 (9th Cir. 1936); *State ex rel. Reeder v. District Court*, 100 Mont. 376, 47 P.2d 653 (1935); *Whitcomb v. Murphy*, 94 Mont. 562, 566, 23 P.2d 980, 981 (1933), and *Patten, Water Rights in Montana*, 23 ROCKY MT. L. REV. 162, 169-170 (1950). Notwithstanding the foregoing authority, the analogy of the familiar statutory quiet title action (R.C.M. 1947, tit. 93, c. 62) is too imperfect to be helpful because the real value of a water right is its priority, not the judicial sanction of so many inches as of such and such a date. And as pointed out in note 8 *supra*, the water-right suit is not an action in rem, which is an obvious fundamental distinction.

The analogy of a water-right suit to the old equity bill of peace is more exact. As in that bill, a plaintiff may join diverse parties to avoid multiplicity where there is a community of interest in the subject matter of the action, and common question of law and fact. See *Crawford Co. v. Hathaway*, 67 Neb. 325, 369, 93 N.W. 781 (1903); *Lasky, From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 ROCKY MT. L. REV. 161, 189 (1929); *Chafee, Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1321-1328 (1932).

Where there has already been an adjudication, and then some additional person poses the threat of taking water under an unadjudicated claim, there is analogy to *quia timet*. The theory is that the claimant refuses to bring his action under R.C.M. 1947, § 89-835 and there is hazard in further delay which will make defense more difficult through loss of witnesses and fading memories. Plaintiff has an equitable interest in having his rights settled. An action may be brought *quia timet* to compel the claimant to litigate now his cause of action under R.C.M. 1947, § 89-835. See note 46 *infra*.

<sup>11</sup>However this does not leave the holder of adjudicated rights in a helpless position. The prior decree is *prima facie* evidence of the date and amount of his claim, R.C.M. 1947, § 89-839; *Wills v. Morris*, 100 Mont. 514, 522, 50 P.2d 862, 865 (1935) (and cases cited therein), and he may enjoin the obstreperous non-party as set forth at 27 *infra*.

### ADDITIONAL CLAIMS OF PARTIES TO THE ADJUDICATION

The same statute<sup>12</sup> raises a similar problem with respect to persons who were parties to a prior adjudication. Can a person who *was* a party, and whose right *was* adjudicated, come along later to assert that he had another *prior* right which was *not* adjudicated? Should he be permitted a second litigation with neighbors in another effort to improve his relative position?

The statute does not require a party to litigate with respect to all of his claims.<sup>13</sup> The statute apparently contemplates this situation: Two farmers may agree that the first farmer has a superior water right (say, *e.g.*, a 1940 right) but they disagree over the priority of their claims to additional water (as, *e.g.*, where each claims additional water as of sometime in 1955). So they litigate the relative priority of their 1955 appropriations. After that is all over, should it be thought to have any effect upon the 1940 right of the first farmer? The supreme court has handled such cases *ad hoc*, with cases holding each way.<sup>14</sup>

The supreme court is faced with the practical administration of justice, which would be greatly facilitated if parties put all of their rights in

<sup>12</sup>R.C.M. 1947, § 89-915.

<sup>13</sup>*Ibid.* (note the repetition in the statute of the permissive word "may"); *Missoula Light and Water Co. v. Hughes*, 106 Mont. 355, 374, 77 P.2d 1041, 1051 (1938); *Brennan v. Jones*, 101 Mont. 550, 562, 55 P.2d 697, 699 (1935); *Bennett v. Quinlan*, 47 Mont. 247, 253, 131 Pac. 1067, 1069 (1913); *Sloan v. Byers*, 37 Mont. 503, 513, 97 Pac. 855, 858 (1908). Indeed, in *Sloan v. Byers*, *supra* at 513, the supreme court questioned the power of the legislature to compel persons to litigate uncontested rights.

<sup>14</sup>On the one hand, see cases cited note 13 *supra*. On the other hand, see *State ex rel. Zosel v. District Court*, 56 Mont. 578, 185 Pac. 1112 (1919) (where, in an original application to review an order adjudging relator guilty of contempt, relator attempted to show that he had developed a new source of supply and therefore did not interfere with any decreed prior rights. Relator was a party to the original decree, which distinguishes the case from *State ex rel. Reeder v. District Court*, 100 Mont. 376, 47 P.2d 653 (1935), and *State ex rel. Pew v. District Court*, 34 Mont. 233, 75 Pac. 956 (1906). The relator's application was dismissed.); *State ex rel. Tague v. District Court*, 100 Mont. 383, 47 P.2d 649 (1935) (substantially similar to the *Zosel* case, *supra*, and expressly distinguished by the court from the *Reeder* case on the ground indicated above. Relator claimed a non-adjudicated right unsuccessfully.); and *State ex rel. Silve v. District Court*, 105 Mont. 106, 69 P.2d 972 (1937) (likewise similar to the *Zosel* case, *supra*, and where relator unsuccessfully tried to prove that his use of water did not interfere with the downstream prior decreed rights.) In each of the latter cases the contention was that relator was doing something which was not included or provided for in the decree. In each the relator lost. In each the supreme court opinion makes the claim appear quite transparent and weak. Perhaps that is the feature which distinguishes them from the cases cited in note 13 *supra*. But one hesitates to jump to a conclusion which can be manufactured so easily by a statement of a case which is intended to support a particular conclusion.

At any rate, there is authority both ways on the situation where a party to the adjudication later claims a prior unadjudicated right. The impelling reason for holding the party bound, at least in a contempt proceeding, is practical: the need for orderly administration of water rights where there is a water shortage. Against this, there is the statute which is permissively worded. As a practical matter, the supreme court's approach seems satisfactory: if the claim appears to be too frail, let the trial judge order the party to cease interfering. The matter goes back to the discretion of the trial judge. If title cannot be finally determined in a contempt proceeding, still it is inescapable that title must frequently be guessed at for temporary purposes, so long as there is an opportunity to litigate rights in full in another proceeding. See R.C.M. 1947, § 89-915. As a more theoretical matter, where the party is personally before a trial judge who has jurisdiction of the subject matter, he may be made to obey the trial judge's order, whether or not his claim looks substantial—and the enforcement is through contempt. (See cases discussed in this note.)

issue in one proceeding and then were barred from making additional claims.<sup>15</sup> The probabilities are that a party to a decree has put forward his best and earliest claims, as well as any inferior claims which may be litigated. This probability undoubtedly has had an influence upon those holdings of the supreme court in which the subsequent assertion of an earlier right has been summarily denied.<sup>16</sup> But without taking evidence in a full scale adjudication proceeding the court cannot be sure that any such claim is spurious,<sup>17</sup> and in view of the underlying statute<sup>18</sup> a claimant cannot be held to have failed in any obligation imposed on him by law. These two reasons balance the practical considerations, with the result that there can never be certainty in this area of the law.<sup>19</sup>

### GEOGRAPHICAL EXTENT OF ADJUDICATION

The first important determination which must be made by one who seeks a right to water, is whether his area of the stream has at any time been previously adjudicated. If it has, he must go through a court proceeding to obtain an appropriation.<sup>20</sup> On the other hand, if the area of the stream from which he desires to take water has not been adjudicated, he may obtain a water-right without going to court, and thus avoid costs and proceedings. In fact, in the latter case he has no business in court.

But our statutes which are very narrow when it comes to determining who is bound by an adjudication are outlandishly broad with respect to

<sup>15</sup>*Cf.* State *ex rel.* Silve v. District Court, 105 Mont. 106, 110, 69 P.2d 972, 974 (1937).

<sup>16</sup>See note 14 *supra*.

<sup>17</sup>See note 13 *supra*; see also note 6 *supra*.

<sup>18</sup>R.C.M. 1947, § 89-815.

<sup>19</sup>Whenever the law attempts to balance competing considerations, and permits the use of reasonable discretion to accomplish that balance, the outcome of borderline cases becomes uncertain. But many situations can nevertheless be handled with sure-footedness. The issue under discussion is likely to arise under R.C.M. 1947, § 89-1015 (complaint by dissatisfied water-user to obtain an order directing the commissioner to distribute in accord with the prior decree) in which the disobedient claimant will be served. If he is asserting the same old right which was adjudicated, of course the court and the commissioner may properly supervise his use. If he does not assert any right at all for taking water in addition to that awarded by the prior decree, a fortiori his rights will not be infringed upon by a restraining order. If he asserts a claim which seems to the trial judge patently insubstantial the trial court should have power to make a preliminary determination, just as in the ordinary case of a preliminary injunction. It should be a matter of discretion. If it appears that claimant's claim to an additional right is likely sound, the trial court should not restrain him, but should leave it for a more complete adjudication. This amount of guessing seems appropriate in a proceeding under R.C.M. 1947, § 89-1015 and the contempt proceeding which may follow; and there seems no reason to conclude that his rights are being finally determined, because R.C.M. 1947, § 89-815 does not preclude a claimant from bringing an action to formally adjudicate his claim. State *ex rel.* Silve v. District Court, 105 Mont. 106, 112, 69 P.2d 972, 975 (1937); State *ex rel.* Tague v. District Court, 100 Mont. 333, 391, 47 P.2d 649, 652 (1935); State *ex rel.* Zosel v. District Court, 56 Mont. 578, 581, 185 Pac. 1112, 1113 (1919).

<sup>20</sup>R.C.M. 1947, § 89-829 provides the procedure for appropriating waters of adjudicated streams, using the mandatory word "shall." Section 89-837 states that the failure to comply deprives the "appropriator" of the right to use any water, as against any subsequent person who does comply. Donich v. Johnson, 77 Mont. 229, 250 Pac. 963 (1926), held that this statutory method of appropriating from an adjudicated stream was made the exclusive method by the 1921 Laws. That case also is authority (at 245-246) that the very similar 1907 statutes (Laws of Montana, 1907, c. 185) were not exclusive. The 1921 Laws are in c. 228.

how many miles of stream are adjudicated.<sup>21</sup> It has not yet been determined how far upstream toward the tributaries, nor how far downstream toward the mouth, the waters of a stream are affected by a single adjudication. If these laws are not to be held void for vagueness<sup>22</sup> then the process of definition by the courts will have to work out some limiting rule of reason for the future.<sup>23</sup>

The most apparent and probable basis of limiting the geographical extent of an adjudication is economic: the effect will be limited to the directly affected economic area. An adjudication downstream on the Missouri or the Clark Fork likely will not have any significant effect at present because of the large volume of water and the lack of intense industrial use of it. So the effect of the adjudication will likely not be extended upstream or downstream. But an adjudication upon a stream where shortages of water frequently occur will likely be extended upstream and up tributaries, and then downstream until a large enough body of water is reached so that the economic effect of the adjudicated use is dissipated. This will result in the requirement that within the affected area, all new appropriations must be pursuant to the 1921 statutes,<sup>24</sup> requiring a court proceeding. The person seeking a new appropriation is at present left to guess at a proper interpretation of the facts and whether a court proceeding is required.

#### ADJUDICATION BY STATE ENGINEER

Since 1939 the State Engineer has been authorized to bring actions to adjudicate streams.<sup>25</sup> A primary legislative purpose was the establishment of a record of water use in Montana on interstate streams.<sup>26</sup> Even though private rights might not be conclusively settled *inter sese*, in negotiations with downstream states these decrees would be useful in establishing the

<sup>21</sup>R.C.M. 1947, § 89-815 employs the descriptive language: "plaintiff may make any or all persons who have diverted water from the same *stream or source*, parties." (Emphasis added, to set out the words which describe the geographical extent of the adjudication). Section 89-829 speaks chiefly in terms of "*source of supply*." Section 89-833 uses "*stream or source of supply*" together with some miscellaneous descriptions. Such descriptions are used in §§ 89-835, 836, 837, 839, 840, 841, 842 and 844. Occasionally the word "river" creeps in, but apparently it is not used in a manner to distinguish it from "*stream*."

<sup>22</sup>See the excellent article, Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923).

<sup>23</sup>Montana cases do not yet delineate the geographical extent to be given an adjudication, but the absence of cases wherein the courts have looked upstream and downstream to see if the water involved in the suit was anywhere subject to an adjudication is persuasive that the statute simply is not being given a geographically broad interpretation.

If maximum geographic scope were given an adjudication (simple water-right suit between two farmers) on the Missouri, and another on the Yellowstone River, near the Dakota boundary, nearly all of the water east of the Continental Divide would be adjudicated. This results from an application of the frequently used words "stream" and "source," as well as from the description in R.C.M. 1947, § 89-844 of the "effect of decree," which includes "a tributary or feeder." Conceivably an adjudication far upstream would result in the entire "stream" below it being adjudicated (but probably not downstream tributaries).

<sup>24</sup>R.C.M. 1947, §§ 89-829-855.

<sup>25</sup>Laws of Montana, 1939, c. 185; R.C.M. 1947, §§ 89-846-855. The State Engineer brings such actions at the direction of the state water conservation board. R.C.M. 1947, 89-855.

<sup>26</sup>R.C.M. 1947, § 89-847.



need and use in Montana. That purpose is more efficiently accomplished through the county-by-county water resources survey. Therefore it is not surprising that the office of the State Engineer has emphasized this survey to the exclusion of actions to adjudicate,<sup>27</sup> as such actions have the same defects as private adjudications<sup>28</sup> in so far as unknown parties<sup>29</sup> or unlitigated claims<sup>30</sup> are concerned.

### COPING WITH THE SYSTEM

The problem which is most likely to vex lawyers, is how to protect a client against someone upstream taking his water under a *previously unasserted* claim of prior right.<sup>31</sup> The situation will arise when there isn't sufficient water to sustain all of the ranches, a situation so critical that a normal adjudication under R.C.M. 1947, § 89-815, or a typical proceeding to have a Commissioner distribute water pursuant to a prior decree,<sup>32</sup> without provisional relief, is inadequate because these normal processes are too slow.

<sup>27</sup>To date no actions to adjudicate have been brought under this law. Letter from Fred E. Buck, State Engineer, to author, Nov. 22, 1957.

<sup>28</sup>R.C.M. 1947, § 89-856. Presumably there is implied authority to serve process upon all persons in the area to be adjudicated, and that the procedure is intended to parallel an 89-815 action. The statute is not explicit.

<sup>29</sup>This chapter, Laws of Montana, 1947, c. 185 (R.C.M. 1947, §§ 89-846-855), makes no attempt to convert such suits to actions in rem. Hence the effect is the same as an action under § 89-815.

<sup>30</sup>Again, there is no provision to assure that parties will place all of their rights in issue. But see notes 48 and 49 *infra*.

<sup>31</sup>It makes no difference whether there has been a prior adjudication, except that if this upstream claimant was a party to one, there is a greater likelihood that a summary proceeding (*e.g.*, under R.C.M. 1947, §§ 89-1001 or 1015) would be successful. See discussion, note 19 *supra*.

This particular problem, of the surprise assertion of a long unexercised (or never exercised) right has a close connection to the law of abandonment. For with a statute such as Wyoming's, where non-user for five successive years amounts to abandonment (WYO. COMP. STAT. ANN. § 71-701 (1945)), such latent or dormant claims could not be asserted.

In Montana, the law of abandonment of water-rights was given an uncertain start in *Barkley v. Tieleke*, 2 Mont. 59 (1874), where a chain of title was worked out through abandonment (later disapproved in *McDonald v. Lannen*, 19 Mont. 78, 47 Pac. 648 (1897)). But by the time of *Meagher v. Hardenbrok*, 11 Mont. 385, 28 Pac. 648 (1891), the judicial handling of abandonment for this purpose had become crystallized, and this much was clear: to prove abandonment one had to prove *intent* to abandon. *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571 (1888); *McCaulley v. McKieg*, 8 Mont. 389, 21 Pac. 22 (1889). Since then the cases finding abandonment are extremely rare (see, *e.g.*, *Head v. Hale*, 38 Mont. 302, 100 Pac. 222 (1909)), and very obscure in application (*Power v. Switzer*, 21 Mont. 523, 55 Pac. 32 (1898)); notwithstanding that abandonment is made an issue in many water-right cases. *Irion v. Hyde*, 107 Mont. 84, 81 P.2d 353 (1938); *Mussellsell Valley F. & L. Co. v. Cooley*, 86 Mont. 276, 283 Pac. 213 (1929); *Rodda v. Best*, 68 Mont. 205, 217 Pac. 669 (1923); *Thomas v. Ball*, 66 Mont. 161, 213 Pac. 597 (1923); *Moore v. Sherman*, 52 Mont. 542, 159 Pac. 966 (1916); *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751 (1911); *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059 (1905); *Sloan v. Glancy*, 19 Mont. 70, 47 Pac. 334 (1897); *Smith v. Hope Mining Co.*, 18 Mont. 432, 45 Pac. 632 (1896); *Gassert v. Noyes*, 18 Mont. 206, 44 Pac. 959 (1896); *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054 (1895); *Kleinschmidt v. Greiser*, 14 Mont. 484, 37 Pac. 5 (1893). Not the least of the difficulties involved is the usual requirement that the burden of proof is upon the person asserting abandonment. *Thomas v. Ball*, 66 Mont. 161, 213 Pac. 597 (1923). The requirement of proving intent to abandon has been a most difficult hurdle, even though occasionally some hope is offered, *e.g.*, that ten years of non-user is potent evidence of intent to abandon. *Sloan v. Glancy*, 19 Mont. 70, 47 Pac. 334 (1897).

<sup>32</sup>R.C.M. 1947, § 89-1001 or 89-1015.

The solution does not lie in any esoteric procedures peculiar to water law.<sup>33</sup> The problem presents a case in equity, and the solution lies in familiar equity proceedings. A complaint may be filed which states the facts of insufficient water and the impending irreparable injury to plaintiff's property interests.<sup>34</sup> The complaint should also set forth the facts with respect to any prior adjudication<sup>35</sup> and whatever else is within the positive knowledge<sup>36</sup> of plaintiff with respect to the defendant's claim.<sup>37</sup> Plaintiff should pray for a temporary restraining order,<sup>38</sup> *ex parte* if speed is essential<sup>39</sup> or upon an order to show cause if more time may be taken.<sup>40</sup> The ultimate purpose of the complaint should be to adjudicate the claim and right of the defendant in relation to plaintiff's rights.<sup>41</sup> It may also seek to adjudicate defendant's right in relation to any other parties to a prior decree if there was one.<sup>42</sup> In the latter case the additional parties must of course be served as defendants.<sup>43</sup> The complaint should plead as one cause of action a simple adjudication under R.C.M. 1947, § 89-815, using the prior decree, if any, as evidence supporting the adjudicated rights.<sup>44</sup> Other possible causes of action may of course be pleaded also.<sup>45</sup> One such possibility would be a cause similar to that provided by R.C.M. 1947, § 89-835, resting upon a demand that equity recognize the need for such relief on the part of persons whose claims have been adjudicated. That code section is not designed for the use of such persons, but rather for the

<sup>33</sup>The lawyer has had sufficient warning that where the upstream claimant is neither party nor privy to a prior decree, the solution does not lie in the water-law statutes. *State ex rel. Reeder v. District Court*, 100 Mont. 376, 47 P.2d 653 (1935), and see note 6 *supra*.

<sup>34</sup>See, *e.g.*, the quotation from the complaint in *Parsons v. Mussigbrod*, 59 Mont. 336, 339, 196 Pac. 528, 529 (1921).

<sup>35</sup>In two water-right injunction cases there is no indication that there ever was a prior adjudication. *Irion v. Hyde*, 107 Mont. 84, 81 P.2d 353 (1938); *Parsons v. Mussigbrod*, 59 Mont. 336, 196 Pac. 528 (1921).

<sup>36</sup>One may not obtain a temporary restraining order unless the complaint is verified, and the facts therein are stated as of plaintiff's positive knowledge rather than on information and belief. R.C.M. 1947, § 93-4205; and see the references to allegations "positively verified" in *Parsons v. Mussigbrod*, 59 Mont. 336, 339, 196 Pac. 528, 529 (1921).

<sup>37</sup>The complaint may be supplemented by further elaboration of facts in an accompanying affidavit. R.C.M. 1947, § 93-4205.

<sup>38</sup>See generally R.C.M. 1947, §§ 93-4202-4210.

<sup>39</sup>R.C.M. 1947, §§ 93-4202, 4205, and 4206; *Irion v. Hyde*, 107 Mont. 84, 81 P.2d 353 (1938); *Parsons v. Mussigbrod*, 59 Mont. 336, 196 Pac. 528 (1921).

<sup>40</sup>R.C.M. 1947, §§ 93-4202, 4208.

<sup>41</sup>As was approved in the *Parsons* and *Irion* cases, note 39 *supra*.

<sup>42</sup>Thus the underlying cause of action is an adjudication under R.C.M. 1947, § 89-815, and it accomplishes the same objective that a proceeding brought by the defendant under R.C.M. 1947, § 89-835 would accomplish.

Of course an action under § 89-815 may be brought against the defendant even where there is not the imminent peril which calls for an injunction.

<sup>43</sup>See R.C.M. 1947, § 89-815.

<sup>44</sup>R.C.M. 1947, § 89-839; *Wills v. Morris*, 100 Mont. 514, 522, 50 P.2d 862, 865 (1935), and cases cited therein.

<sup>45</sup>*E.g.*, to have a water commissioner appointed under R.C.M. 1947, § 89-1001; or to have such a commissioner distribute the water in accord with a prior decree under R.C.M. 1947, § 89-1015; or to recover damages for the harm which has occurred by reason of defendant's taking of water. *Caveat*: damages cannot be pleaded in Montana where others are made parties, and these others are not affected by this cause of action. R.C.M. 1947, § 93-3203. For a form of quia timet relief, see note 46 *infra*.

use of persons who were not parties to a prior decree. Hence the gist of the cause last suggested would be *quia timet*.<sup>46</sup>

The immediate purpose of the action is to obtain an injunction which will save the client's ranching or farming operation. Albeit any injunction or restraining order is within the discretion of the trial judge, nevertheless the case is one wherein the remedy may properly be granted.<sup>47</sup>

It is suggested that in any adjudication proceeding the parties may obtain some degree of protection for the future by pleading that the other parties to the action have certain specific rights and *no others*, and by insisting that the decree recite that the parties have no other rights, enjoining all of the parties from taking water other than as decreed.<sup>48</sup> The protection obtainable by such a pleading and decree is not yet certain.<sup>49</sup> How germane to the litigated claims is this lately asserted prior right? It is at least arguable that the purpose of the proceeding was to settle *all* of the water rights of the parties and that the factual issues were sufficiently broad to have included any later asserted unlitigated right. Thus any second suit between the same parties should be barred under the doctrine of *res judicata*.

### THE PRESENT AND THE FUTURE

In some fundamental respects, Montana is in a delightful position with respect to the state of its water law. The legislative arm of the government has been restrained<sup>50</sup> so that Montanans are not saddled with bureaus, inspectors, administrative agencies and the like. On unadjudicated streams (or perhaps unadjudicated parts of streams) a person may take water and acquire a right to it without asking the permission of the government.<sup>51</sup> And individual freedom of action has survived in such robust health that it is possible at any time for an upstream user to upset an established

<sup>46</sup>The complaint should set forth that the defendant has a cause of action under § 89-835 which defendant will not himself prosecute at the present time, and that plaintiff needs the protection of a prompt adjudication before time washes away memories and witnesses. See note 10 *supra*.

<sup>47</sup>R.C.M. 1947, §§ 93-4204, 802, and 4206.

<sup>48</sup>This was apparently done in the adjudication involved in *State ex rel. Silve v. District Court*, 105 Mont. 106, 69 P.2d 972 (1937), for the supreme court quotes the prior decree as follows (at 110): ". . . and that all parties to the decree were 'restrained and enjoined from in any manner using or diverting the waters of Davis Creek or Martin Creek and their tributaries in any other manner or in any other amounts than' as decreed."

This form of decree aided the supreme court in holding that relator's diversion constituted *prima facie* a violation of the decree, and a contempt. Relator's application for a writ was denied.

<sup>49</sup>The supreme court in *Sloan v. Byers*, 37 Mont. 503, 513, 97 Pac. 855, 858 (1908), questioned whether the legislature could compel persons to litigate, and have decreed, rights which others were not contesting. Arguably, the trial court would be similarly limited. And an allegation in a pleading that the defendant has no other or further rights might be construed strictly in view of the context of the proceeding, as with an application of the rule *ejusdem generis*. Such is the nature of legal risks. The plaintiff nevertheless is entitled to contest defendant's rights to the water, and the plaintiff is in a better position than the legislature to compel the defendant to litigate his rights. Moreover, the plaintiff has considerable freedom to frame the issues so as to have an adjudication as broad as needed. *State ex rel. Silve v. District Court*, 105 Mont. 106, 110, 69 P.2d 972, 974 (1937).

<sup>50</sup>See notes 4 and 5 *supra*.

<sup>51</sup>See discussion at 24 *supra*.

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routine of water distribution by taking water under claim of an unadjudicated prior right.<sup>53</sup>

This absence of real control and regulation could exist nowhere but in a state which combines a sparse population<sup>54</sup> and meager economy<sup>55</sup> with an abundant water supply.<sup>56</sup> There has indeed been a relatively small volume of litigation over water rights in the Montana Supreme Court in recent years.<sup>57</sup> In the balance which must be reached between regulation and

<sup>53</sup>Either as one who was not a party to the prior adjudication (see discussion at 21 *supra*); or as one who was a party but who has a prior right which was not an issue in the prior adjudication (See 23 *supra*); or simply as a water-user on a stream which has not yet been adjudicated.

<sup>54</sup>"Montana is a state of great expanses and relatively few people. . . . According to recent U. S. Bureau of Census estimates, Montana in 1956 had about 638,000 people. . . ." MONTANA STATE UNIVERSITY, THE MONTANA ALMANAC 161 (1957 ed.). Montana ranks 43rd among the states in population. U. S. BUREAU OF CENSUS, DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE U. S. 13 (1956).

<sup>55</sup>The STATISTICAL ABSTRACT OF THE UNITED STATES, 1956, U.S. BUREAU OF CENSUS, *op. cit. supra* note 53, reports the following: personal income in the U. S. in 1954 amounted to over \$285 billion, of which Montana's share was just over \$1 billion (at 299); Montana had 0.37% of the personal income of the United States (at 302); total assets of banks in the U.S. in 1954 was over \$232 billion of which Montana's share was \$727 million (at 435); total taxable payrolls in the U.S. 1st quarter, 1953, totaled nearly \$34 billion, of which Montana's share was \$81 million (at 490); and the value of farms in the U.S. in 1954 was estimated at \$76 billion, of which Montana's share was \$1¼ billion (at 622); the value of farm products sold in the U.S. in 1950 was \$22 billion, of which Montana's share was \$279 million (at 629); cash receipts from farm marketings and government payments for the U.S. in 1955 was \$29 billion, of which Montana's share was almost \$396 million (at 639); Montana ranked 22nd in value of mineral production in 1953 (at 726); Montana ranked 43rd in 1953 among the states in value added by manufacture (at 805); Montana ranked 38th among the states in expenditures for new plant and equipment in 1953 (at 807); in value of crops, Montana ranked 3rd in wheat in 1955 (at 664), 3rd in barley, 1955 (at 667) and 7th in sugar beets, 1954 (at 679).

"Timber processing is the most important of Montana's manufacturing industries. . . . Lumber is the most important product of Montana's forest industries. . . . In 1952 and 1953, according to some authorities, production exceeded one billion board feet. This constituted approximately 3 percent of the nation's total." MONTANA STATE UNIVERSITY, THE MONTANA ALMANAC 218 (1957 ed.). "Total crude oil production in the state in 1956 amounted to approximately 21,700,000 barrels. While this output was less than one percent of the total United States production, it was the highest ever recorded for the state and was 146 percent greater than the 1946 output." *Id.* at 229.

<sup>56</sup>Approximately half of the flow of the Columbia River has its source in the northern Rocky Mountain section of the basin. 2 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION 5 (1950). When the flow of the Missouri and its tributaries is added to the Montana tributaries of the Columbia, it is estimated that 36,000,000 acre feet of water flows out of the state annually. Address by Fred E. Buck, State Engineer, before Pacific Northwest Development Assoc., 1953.

<sup>57</sup>West Publishing Company's Pacific Digest lists only seventeen Montana Supreme Court cases under "Waters and Water Courses" decided between July 1, 1945 and May 17, 1957. Of those seventeen cases, none challenged a prior adjudication, and only eight involved a dispute over a right to water. *Midkiff v. Kincheloe*, 127 Mont. 324, 263 P.2d 976 (1953); *Stearns v. Benedick*, 126 Mont. 272, 247 P.2d 656 (1952); *Meine v. Ferris*, 126 Mont. 210, 247 P.2d 195 (1952); *Lamping v. Diehl*, 126 Mont. 193, 246 P.2d 230 (1952); *Clausen v. Armington*, 123 Mont. 1, 212 P.2d 440 (1949); *Doney v. Beatty*, 124 Mont. 41, 220 P.2d 77 (1950); *Perkins v. Kramer*, 121 Mont. 595, 198 P.2d 475 (1948); and *Lying v. Rankin*, 118 Mont. 235, 165 P.2d 1006 (1946). Of the remaining nine cases, one involved a public water supply (*Crawford v. City of Billings*, 297 P.2d 292 Mont. 1956), two involved the right to store water and the care of a reservoir (*Richland County v. Anderson*, 129 Mont. 559, 291 P.2d 267 (1955); *Farmers Union Oil Co. v. Anderson*, 129 Mont. 580, 291 P.2d 604 (1955)), two involved a real property dispute over rights of way for conducting water (*Stalcup v. Cameron Ditch Co.*, 300 P.2d 511 (Mont. 1956); *Hansen v. Galiger*, 122 Mont. 418, 208 P.2d 1049 (1949)), two more involved

freedom it looks as though our legal structure may be well adapted to the relative simplicity of our problems. Although there is real difficulty with our rudimentary system when water shortages occur in particular areas or during particular years,<sup>57</sup> for the most part we get along fairly well and enjoy the freedom which is the prime attribute of our system.

Can such an idyllic situation endure in the world of tomorrow? The nation's demands for water are multiplying by the day.<sup>58</sup> Stringencies in the use of water are being forced upon industry and agriculture because the nation's demand is surpassing the supply of water in many regions.<sup>59</sup> Yet, critical as the problem is, it is still one of maldistribution rather than of a total national shortage of water.<sup>60</sup> To remain strong the nation is being forced to turn to areas which have water but which have not yet attracted industry. It may be anticipated that industries which rely upon volumes of water for their existence, will be attracted to Montana. Simultaneously downstream demands in the Missouri basin will compete for the flow of our water.<sup>61</sup>

In a fast changing world many of the institutions which have served mankind well in the past are tested and found inadequate. Such appears to be the fate of our water law, which is soon to be faced with inevitable future demands that the system was not designed to accommodate.

But Montanans need not submit to the breakdown of the present legal structure in water law, nor need we impose on our citizenry a bureaucratically cumbersome and complicated system such as has resulted in some other states.<sup>62</sup> There is an opportunity at present to compromise with the future. The general adequacy of our water supply and our laws at present

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land, this time the ownership of the land adjacent to, or under a watercourse (*Heland v. Custer County*, 127 Mont. 23, 256 P.2d 1085 (1953); *City of Missoula v. Bakke*, 121 Mont. 534, 198 P.2d 769 (1948)), and two involved proceedings under the Carey Act (*Habets v. Carey Land Act Board*, 126 Mont. 46, 244 P.2d 511 (1952); *Valier Co. v. State*, 123 Mont. 329, 215 P.2d 966, *cert. denied*, 340 U.S. 827 (1950)).

<sup>57</sup>Over twice as many water-law cases reached the Montana Supreme Court in the period 1930 to 1939 as did during the period 1945 to 1957 (reported in the preceding footnote). The early 1930's were dry years in Montana, and led to the cases which very nearly upset our legal system. (*E.g.*, the *Reeder* case, note 1 *supra* and its progeny discussed in note 6 *supra*.)

<sup>58</sup>"Water used by industry (including cooling water) is expected to increase 170 percent during the next 25 years, or from 77 billion to 215 billion gallons per day." Krause, *The Relationship of Federal Activities to Municipal and Industrial Water Supply*, 3 COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON WATER RESOURCES AND POWER (1955). "We have reached a point in our economy when only rarely can use be made of water for some particular purpose without adversely affecting its use for some other purpose." 3 *Id.*, Hoyt, *Completion for the Use of Water* at 1095, 1099.

<sup>59</sup>3 *Id.* at 1099. The December, 1950, Report of the National Association of Manufacturers and the Conservation Foundation expresses concern over the nation's ability in terms of water resources, to provide for national safety and future peace.

<sup>60</sup>Krause, *supra* note 58, at 1233, 1236-7. See also MORRELL, OUR NATION'S WATER RESOURCES—POLICIES AND POLITICS 7 (1956).

<sup>61</sup>Downstream states are using more and more water, and at any time may demand that less water be dissipated through irrigation in Montana. In the Missouri basin the downstream demands which have received the most discussion are for water to maintain navigable depths, and to meet requirements for sanitation and domestic use. Hoyt, *supra* note 60, at 1095, 1105.

<sup>62</sup>*E.g.*, California, whose water laws are contained in four fat volumes and whose legislature has lately become accustomed to many amendments and revisions. The system is replete with boards, divisions, etc.

is a blessing which bestows upon us time and freedom to plan. We can have far more simple and orderly laws and procedures by a relatively small effort now than we can possibly attain after the water-use problem becomes complex with numerous special interests and a legal structure which has contributed to the chaos.<sup>63</sup> We have the example of all of the other western states before us,<sup>64</sup> to learn from their mistakes and profit by those features of their laws which are simplest, fairest, and best suited to the future which we face.

### CONCLUSION

Are there any adjudicated streams in Montana? For a person trying to acquire a new right to water there most definitely are "adjudicated streams," for he cannot secure an appropriation in many streams without the court procedures prescribed for acquiring a right on an adjudicated stream. If there has been any litigation over the waters of the "stream or source of supply"<sup>65</sup> it most certainly is "adjudicated" for such persons.<sup>66</sup>

But in the sense that the words "adjudicated streams" would ordinarily connote, there are no adjudicated streams in Montana. There is no proceeding available whereby the water in a stream can be finally allocated among users or uses. And although the value of a water right is its position relative to prior rights, the law does not guaranty a stable relative priority.

<sup>63</sup>Just one example of the inefficiency which we are currently able to accommodate but which will become intolerable, is the possibility of multiple litigation as described by Chief Justice Callaway in *Anacounda National Bank v. Johnson*, 75 Mont. 401, 410, 244 Pac. 141, 144 (1926): "Experience has shown that after the rights of all of the parties taking water from a stream had been adjudicated, a subsequent appropriator would appear upon the scene, tap the stream and ruthlessly take the water, disregarding the decreed rights and flaunting [sic] the orders of the commissioner appointed by the court to distribute the water according to the terms of the decree. The only remedy the prior appropriators had was to commence a suit against the new appropriator, the result being that all of the rights of the stream had again to be adjudicated; and after that decree was entered if another subsequent appropriator took the water the same process had to be gone over again."

With the 1921 legislation this identical difficulty will not occur if the claimant is asserting a right subsequent to the prior adjudication. But the same problem and procedure remains where any pre-1921 claim, or any pre-adjudication claim is asserted.

<sup>64</sup>*E.g.*, Wyoming, whose laws on water are contained in fewer pages than our own, but which exercises ownership and control of nearly all waters in the state. WYO. CONST. art. 8, § 1, and art. 1, § 31; WYO. LAWS c. 107, § 4 (1947); WYO. COMP. STAT. ANN. § 71-407 (Supp. 1949). Appropriations are initiated by application to the State Engineer for a permit. WYO. COMP. STAT. ANN. §§ 71-238, 249 (1945). There can be no latent claims or rights under the Wyoming system because of the constitutional provisions, because the statutory procedure for acquiring a right is exclusive (*Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 30, 236 Pac. 764, 768 (1925); *Laramie Rivers Co. v. LeVasseu*, 65 Wyo. 414, 431, 202 P.2d 680 (1949)), and because failure to make use of appropriated water for five successive years is abandonment and results in forfeiture of the right (WYO. COMP. STAT. ANN. § 71-701 (1945)).

<sup>65</sup>Referring to the broad statutory language quoted in note 21 *supra*, and discussed at 24 *supra*.

<sup>66</sup>See discussion at 24 *supra*.

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