

October 17 & 18, 2023

23rd Annual Montana Water Law CLE Understanding Water Storage

I. Evolution of the Law Regarding Stored Water

a. Developed Water vs. Direct Flow

i. 1906: The Right to Appropriate Increases of Supply to a Stream Recognized (*Beaverhead Canal Co. v. Dillon Elec. Light & Power Co.*)

In *Beaverhead Canal Co. v. Dillon Elec. Light & Power Co.*, the Court explained:

“When an appropriation is made of the water of a stream, the rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made, and he has no interest in improvements subsequently made which increase the supply of water flowing in it. Therefore, if by his own exertions another increases the available supply of water in the stream, he has a right to appropriate and use it to the extent of the increase. This rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would not otherwise have flowed there. ... if Defendant Smith by his own exertions had increased the supply of water in Rattlesnake creek, he would have the prior right to such increased supply, and, of course, as against him the plaintiff would not have any interest in such water so caused to flow there by artificial means.”

34 Mont. 135, 85 P. 880, 882 (1906), citing Farnham on Waters & Water Rights, § 672d.

ii. 1909: Appropriators Claiming Developed Water Bear Burden of Proof that Their Actions Increased Supply to the Source (*Smith v. Duff*)

In *Smith v. Duff*, the Court reversed the lower court in Broadwater County which found Duff “entitled to the use of 160 inches of the waters of the Willow Swamp ‘as against every other party to this suit by reason of water developed by [Duff] by the draining of said Willow Swamp by the Willow Swamp canal.’” 39 Mont. 382, 103 P. 984, 986 (1909). However, the Court analyzed the character of the waters as follows:

“From the map in evidence it seems that the Willow Swamp covers an area of approximately a square mile. Further than this the record furnishes us with little information as to its character. It is referred to simply as a swamp. The so-called original channel of Swamp creek passes through a portion of it. Marsh creek is “the child of the swamp.” Whatever water it has produced in the course of nature undoubtedly is tributary to Crow creek. Whether the water which saturates the swamp comes from subterranean springs, or through percolation from higher adjacent lands, or whether it is in part supplied by a subsurface flow in the bed of the original channel of Swamp creek or in the lands adjacent thereto, we are not advised. Neither are we informed as to its surface flow during different periods of the year, except in the instances hereinafter referred to. It must not be forgotten that **the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules.**”

Id., citing *Buckers I. M. & I. Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62, 72 P. 49 (1902) (emphasis added).

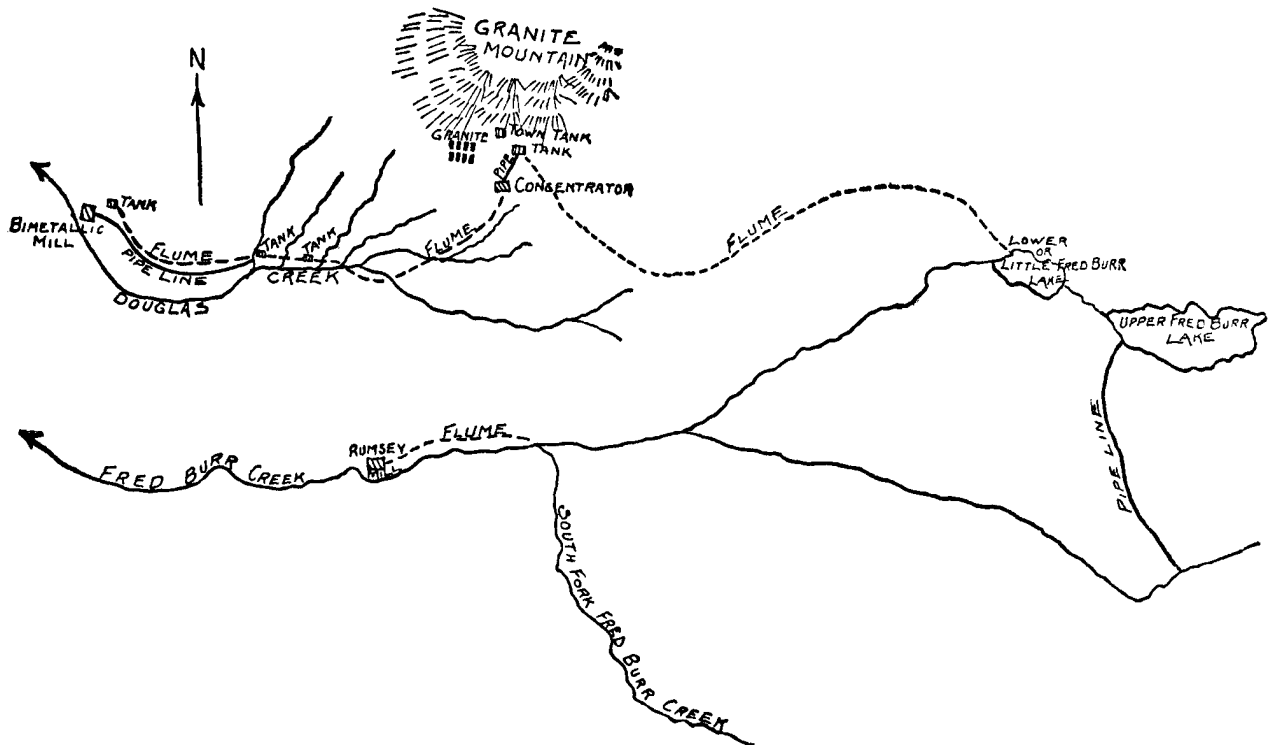
Thus, “[I]f the respondents have not added to the waters natural to Crow creek, they may not take any of them to the deprivation of prior appropriators.” *Id.* Rather, “[i]f by their own exertions they have developed a supply of water theretofore not a part of the waters of Crow creek and not before available to the users of the stream, they have the first right to take and use such increase.” *Id.*, citing *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.*, 34 Mont. 135, 85 P. 880 (1906). “It is only the actual increase resulting from the addition of water to a natural stream which would not otherwise pass down either its surface or subterranean channel to the benefit of other prior appropriators which the law recognizes as an increase of that character which can be diverted as against those entitled to its natural flow.” *Id.*, quoting *Buckers*. To be “entitled to the exclusive use of water by reason of its development” the claimant “must assure the court by satisfactory proof that he is not intercepting ***** the supply to which his neighbor is rightly entitled” and “prove that they developed” the water claimed “in addition to the natural supply” of the source. *Id.*, 39 Mont. 382, 102 P. at 987. In other words, an “assurance that in taking the alleged new supply they did not diminish the quantity of the principal stream.” *Id.*

The Court applied *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.* to reiterate the principal that “[r]emoving obstructions and making easy the flow of water ... does not [] imply that such work has tended to develop water” however, “where waters are impounded, as for instance in a swamp, with no natural means of escape, and one, by work done, releases them and provides a permanent supply of water for use which had theretofore not been available he may be said to have developed the water.” *Id.* However, “[t]his is quite a different matter from draining a swamp.” *Id.* Because the record was “absolutely barren of testimony indicating that the respondents through their exertions have *added* a single drop to the waters of Crow creek”

respondents were not entitled to the 160 inches of water granted by the lower court. *Id.* (emphasis added).

iii. 1910: Stored Water Not Available to Satisfy Downstream Direct Flow Rights (*Kelly v. Hynes*)

The Court explained that the “principal issues tried and determined” in *Kelly v. Hynes* was “the claim of right by the companies to maintain dams at the outlets of ... Upper and Lower Fred Burr lakes” which were the “apparent sources” of the north branch of Fred Burr Creek, and to which the company piped water from the middle fork of Fred Burr Creek into the Upper Fred Burr Lake, which are stored in the lakes and then flumed to the town of Granite and the mine and mill at Granite and the headwaters of Douglas Creek. 41 Mont. 1, 108 P. 785, 786 (1910). The Court’s opinion provides the following map:



Irrigators downstream on Fred Burr Creek contended that “the companies by these various devices seriously interfered with the natural flow of the stream, and thus deprived them of the amount of water to which they were entitled under their respective appropriations.” *Id.* Importantly, “[n]one of the water which was so diverted to the town of Granite or the works of the Granite Mountain Mining Company ever returned to Fred Burr creek...” *Id.* However, the Court found that the volume of Fred Burr Creek “is maintained at the heads of the ditches of the plaintiff and the other defendants by tributaries flowing into it *below* the dams.” 41 Mont. 1, 108

P. at 789 (emphasis added). Thus, because the outflow from the dams “except at flood seasons ... is almost nothing” and “so long as this condition exists” the company was “under no obligation to permit any flow from their reservoirs, whether it consists of the natural outflow or of the conserved flood water.” *Id.* In other words, the company is not required to “use the stored water to keep up the flow of the stream for the benefit of the ditch owners, before they are entitled to divert any to their own uses ... [t]he most that the ditch owners are entitled to claim at any one time is that the amounts to which they are respectively entitled shall flow to the head gates of their ditches ... [t]hey are entitled to nothing more.” *Id.*

iv. 1926: Downstream Users Limited to Natural Flow to the Extent of their Appropriations (*Donich v. Johnson*)

In *Donich v. Johnson*, the Court was faced with claims for stored water from users who installed dams at the outlets of natural mountain lakes which served as the headwaters for Racetrack Creek, a stream that had been part of a decree prior to the installation of the outlet dams. 77 Mont. 229, 250 P. 963 (1926). The Court went into detail to explain the various engineering and mathematical problems with attempting to discern natural flow from stored water under the circumstances of the outlet dams at each lake, seepage, evaporation, and rainfall. However, “where the inflow and outflow of the lake may be measured with reasonable certainty, the amount of stored water in the lake likewise may be computed with reasonable certainty” and “[w]here it is not possible to determine the amount of water coming into the lake the amount of stored water can be ascertained by computing the amount in the reservoir above the natural level of the lake.” 77 Mont. 229, 250 P. at 972. Importantly, the Court found that “each enlargement of a reservoir amounts to a new appropriation” but, “the principle should not be held to cover repairs, no matter how substantial, if the reservoir thereby is not made to hold more than was originally contemplated as indicated by the acts of the appropriator.” 77 Mont. 229, 250 P. at 972-73.

v. 1941: Released Stored Water Is Not Part of the Natural Flow, the One Fill Rule, and Indications of the Right to Carryover Storage (*Federal Land Bank v. Morris*)

The reservoirs in *Federal Land Bank v. Morris* “were constructed and maintained with the intention of holding more water than required for irrigation in any one year” and as such, the carrying capacity of each reservoir was more than double what the parties claimed a right to. 112 Mont. 445, 116 P.2d 1007, 1010-11 (1941). While “the language ‘an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same,’ was only added to our statutes in 1921” the Court went on to adopt the following analysis from *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, a Colorado case:

“These provisions mean that to each reservoir shall be decreed its respective priority, and this priority entitles the owner to fill the same once during any one year, up to its

capacity, and restricts the right, upon one appropriation, **to a single filling for any one year.** A double filling in effect would give two priorities of the same date and of the same capacity to the same reservoir, on the same single appropriation, which is impossible in fact and in law, and, if allowed, would violate the fundamental doctrine of the law of appropriation—he who is first in time is first in right—by making a junior superior to a senior reservoir appropriator. **Necessarily the capacity of a reservoir, which the statute expressly says is the extent of its appropriation, is what the reservoir will hold at one time, not what can be stored in it by successive fillings;** otherwise the capacity would vary, depending not on what the reservoir will hold, but on how many times it can be filled in one year. When we speak of the capacity of a barrel or bottle, we mean the number of gallons or ounces it will hold when filled once, not many times. ... The appropriation for a reservoir, in the nature of things, is measured by the quantity of water which it will hold at one filling. A reservoir appropriation, like that for a canal, cannot be made to do double duty.”

112 Mont. 445, 116 P.2d at 1011, quoting 44 Colo. 214, 98 P. 729, 733-34 (1908).

And, quoting from Wiel on Water Rights:

“[A]s to artificial increase in the flow of a stream, the lower owner has no interest therein and cannot, as a matter of right, insist upon its being kept up or upon any advantages to be derived therefrom ... The prior appropriator further has no right to waters brought into the stream exclusively by the labor or artificial works of another man who has not intended to abandon them, for **such artificial increments are not part of the natural flow.**”

Id., quoting Wiel on Water Rights, 3d Ed., §§ 61, 279.

Thus, the Court in *Federal Land Bank v. Morris* held that “the laws of Montana that apply to the acquisition of running water equally apply to the storage and use of flood or waste water, and the doctrine of ‘first in time, first in right’ applies to both.” 112 Mont. 445, 116 P.2d at 1012. “[I]n any year, to store for use in that **or succeeding years** what he has a right to use, and also any additional amounts that others would not have the right to use, and that would otherwise go to waste” are what reservoir owners can claim a right for. *Id.* (emphasis added). The Court added: “It seems to be proper in protecting water that is carried over by the frugal for use in succeeding years.” *Id.*

→ Wells A. Hutchins’ treatise on Montana Water Law quoted this latter part of the Federal Land Bank decision, adding: “certain reservoirs had been constructed and maintained with the intention of holding more water than required for irrigation in any one year, for the obvious purpose of storing an extra supply during wet years for use in dry years.”

b. Balancing Storage Rights with Other Users' Rights

**i. 1984: No Duty to Keep Reservoir Full for the Benefit of Junior Users
(*Cate v. Hargrave*)**

Decrees which do “not specify days that water could be taken or a total volume of water” cannot be “interpreted as a right to an absolutely uninterrupted flow ... as it would sanction the senior appropriator’s expanded use to the detriment of subsequent appropriators beyond what could be beneficially applied.” *Cate v. Hargrave*, 209 Mont. 265, 272, 680 P.2d 952, 956 (1984) citing *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940). In *Cate v. Hargrave*, junior users along the shore of McGregor Lake “desire[d] that the level of the McGregor Lake be kept as high as possible for consumptive, aesthetic and recreational purposes” and asserted the senior, downstream user had “a responsibility to maintain the dam at the outlet of McGregor Lake and close the headgate in the dam in the fall when they are not irrigating.” 110 Mont. at 268, 680 P.2d at 954. The Court disagreed. The Court refused to “impose upon a downstream senior appropriator an affirmative duty to maintain a dam and headgate for the benefit of upstream junior water users” absent “a finding that operation of the dam injured [junior’s] interests” to which “our decision might be otherwise.” 110 Mont. at 273, 680 P.2d at 956. Moreover, the junior users “presented no evidence of a former pattern of use differing from what [senior storage owners] are using now, were using during the problem year of 1979, or presumably will be using in the future.” 110 Mont. at 271-72, 680 P.2d at 956.

**ii. 2016: No Duty to Release Water Above and Beyond Natural Flow
(*Granite County v. McDonald*)**

McDonald owned senior direct flow rights to Flink Creek, diverted downstream of Georgetown Lake. Granite County owned the dam and hydroelectric facility at Georgetown Lake and owned Flint Creek storage rights for power generation. 2016 MT 281, ¶¶ 3-4. The historical decree provided that “during the irrigation season, [Granite County’s predecessor] must ‘let, turn down, and cause to flow in the channel of [Flint Creek] below its electric plant, not less than 1200 miner’s inches [30 CFS] of water.’” ¶ 12, quoting the Decree from *Montana Water, Electric and Mining Co. v. Schuh* (1906). However, the decree also recognized “that the downstream users’ rights were limited to the natural flow of Flint Creek” and enjoined the downstream users “from demanding that the Company release ‘any greater amount of water than the average natural flow of said stream which in the irrigating season of each year does not exceed 12000 miner’s inches or 30 [CFS].” *Id.*

McDonald argued that Granite County was required “to maintain a constant flow of 30 CFS in Flint Creek below the Georgetown Lake dam during irrigation season, regardless of the amount of natural flow into the lake.” ¶ 7. Granite County contended that it is only obligated “to assure that the natural inflow of Flint Creek passes through Georgetown Lake and hydroelectric facility

for release back into the natural channel” and thus was “not required to release storage water from the reservoir when the natural inflow from Flint Creek falls below 30 CFS.” ¶ 7.

The Water Court held that the decree did not “obligate the owner of Georgetown Lake to supplement the natural flows of Flint Creek with storage water” and as such, “Granite County’s water rights are not subject to a condition requiring use of storage water from Georgetown Lake to maintain 30 CFS flows in Flint Creek throughout the irrigation season.” ¶ 18. The Montana Supreme Court agreed: “The Water Court therefore properly construed the prior Decree by concluding that a downstream appropriator has no rights to water stored behind an upstream dam as long as the dam operator releases the natural inflow into the stream below the dam.” ¶ 21.

iii. Adding Storage to a Direct-Flow Right

1. Storage Can Be Added to a Direct-Flow Right So Long as Existing Rights are Uninjured (*Whitcomb v. Helena Water Works Co.* (1968))

In *Whitcomb v. Helena Water Works Co.*, Helena had direct flow rights from Ten Mile Creek prior to the 1903 Decree, but sometime after 1903, “developed a rather complex system of storage reservoirs[.]” 151 Mont. 443, 445, 444 P.2d 301, 302 (1968). The dissatisfied water user action was precipitated by junior right holders because “the City actually only measured the water after it left the settling pond in its pipe to Helena” and “locked its headgates, ignored the water commissioner, and ... ran its water collection system as if junior rights had no rights at all.” 151 Mont. at 446, 444 P.2d at 302. Thus, the junior users argued “the City can not continue to store water when other users are cut off.” 151 Mont. at 447, 444 P.2d at 303. The City relied upon Kinney (“In general it may be said that the owner of a priority for direct irrigation is entitled to use his discretion as to whether he shall store the water up in reservoirs for future use or use it immediately[.]” 151 Mont. at 449, 444 P.2d at 304, quoting Kinney on Irrigation and Water Rights, 2nd Ed., Vol. 2, p.1477 (1912)) and Colorado law (“on the other hand, if the rights of other appropriators upon the stream are materially injured, no change can be made from direct irrigation to storage” *Id.*) to argue that it was entitled to store its decreed water rights. **The Court agreed with the City and explained “[a]fter examining all of the authorities cited, we think the rule allowing storage is dependent upon the lack of interference with other rights.” *Id.***

2. 1958 Storage Reservoir Added to 1917 Direct-Flow Right Not Deemed a New Appropriation Without Increase to 1917 Flow Rate and Staying Within One-Fill Rule (*Bagnell v. Lemery* (1983))

In *Bagnell v. Lemery*, Lemerys’ predecessors held rights to Mahle Springs, tributary to Ashley Creek, from as early as 1917 for domestic purposes, stock water, irrigation, and for a “duck pond used in raising domestic fowl for commercial purposes.” 202 Mont. 238, 240, 657 P.2d 608, 609

(1983). In 1958, Lemerys completed construction of a dam impounding Mahle Spring water, the purpose of which “was to stabilize [Lemerys’] water supply and [Lemerys] claim no increase in the amount of their water right via the construction of the dam.” *Id.* In 1957, Bagnell began using water from Ashley Creek for stock purposes, which “would become completely dry and [Bagnell] would approach defendant Lemery and ask him to release water from his dam” which Lemerys did until 1978. 202 Mont. at 241, 657 P.2d at 609. After Lemery “refused to release additional water” to Bagnell, Bagnell sought “to adjudicate the parties’ water rights and to enjoin [Lemerys] from interfering with the tributary waters of Ashley Creek.” *Id.*

The District Court found that Lemerys had a right to 110 GPM or 178 AF-Year with a priority date of 1917, and Bagnell’s rights were “limited to any available water in Ashley Creek or any surplus water from [Lemerys’] dam.” *Id.* Specifically, the District Court found that Lemerys continuously beneficially used 110 GPM of Mahle Springs water since 1917, and because Lemerys “claim no increase in the quantum of their present water right by reason of the completion of their ASC dam in 1958 above the 1917 water right” and even though “the commercial fish farm created an additional beneficial use since 1961” there was no increase in their water rights. 202 Mont. at 242, 657 P.2d at 610.

Bagnell argued “her right is prior to defendants’ because her predecessor began using water in Ashley Creek in 1957 and defendants did not complete their dam of the Mahle Spring water until 1958” in violation of Section 89-810, R.C.M. 1947. 202 Mont. at 243, 657 P.2d at 610-11. However, defendants Lemerys “do not contend their water right increased by the construction of the dam ... rather, they claim the dam merely stabilized defendants’ water and made it available at later and drier times of the year.” 202 Mont. at 244, 657 P.2d at 611. The Court concluded:

“[D]efendants have a priority date of 1917 which is when their predecessors first began to make a beneficial use of the spring water. ... defendants’ use began in 1917 and did not increase after the construction of the dam[.] ... Defendants’ action to release water out of the dam was either a mere gratuity or transfer of surplus water.”

202 Mont. at 245, 657 P.2d at 611.

The Court further distinguished the situation in *Bagnell v. Lemery* with *Whitcomb v. Helena Water Works Co.*: “The City’s actions worked to deprive prior downstream appropriators of the full or even partial use of their decreed rights. This Court held the city could not continue to store water when it would cut off other users who had prior rights.” *Id.* However, Lemerys “built and maintained a reservoir to stabilize their water supply and to operate a commercial fish farm. The record shows the reservoir is filled in the spring when runoff is at its peak” and Lemerys “use the water in the reservoir as a focal point of their irrigation system as well as for their commercial fish farm.” 202 Mont. at 245, 657 P.2d at 611-12. Thus, while Bagnell argued the flow rate decreed by the District Court of 110 GPM “is excessive in that it allows defendants multiple

fillings of their reservoir” the Court explained that it found no error in the District Court’s findings:

“The defendants have shown the prudence to catch the spring run-off to fill their reservoir. After the reservoir has been filled in the spring, defendants have a decreed right to retain the incoming spring water at the rate of 110 gallons per minute. This does not constitute a double filling of the reservoir. Any excess over 110 gallons per minute must be allowed to pass through the reservoir and onto plaintiff’s property.”

202 Mont. at 246, 657 P.2d at 612.

3. 20th Century Storage Reservoirs Added to 19th Century Direct-Flow Rights Relate Back to 19th Century Priority Dates When Reservoir Owner’s Use Stayed Under Direct-Flow Right Flow Rates and within Pre-Reservoir Period of Diversion (*Teton Co-op. Reservoir Co. v. Farmers Co-op. Canal Co.* (2015))

In *Teton Co-op. Reservoir Co.* (“TCRC”) *v. Farmers Co-op Canal Co.* (“FCCC”), the reservoirs at issue were constructed in 1912 and 1942, however, the Court held that storage rights associated with those reservoirs were entitled to the priority dates of their direct-flow appropriations of 1895 and 1897. 2015 MT 208.

Specifically, FCCC was successor to two Teton River direct-flow, decreed rights: a June 15, 1895 right for 300” and an August 1, 1897 right for 4,000”. ¶ 3. Harvey Lake Reservoir was built in 1913, and Farmers Reservoir was built in 1942, in which FCCC stored portions of its direct-flow rights to release “when diversions from the Teton River were unavailable or inadequate.” ¶ 5. During the Statement of Claim filing period, FCCC filed claims for the 1895 and 1897 rights and “claimed use of Harvey Lake and Farmers Reservoir as part of those rights.” ¶ 6. During the Temporary Preliminary Decree adjudication, TCRC objected and asserted “that FCCC’s reservoirs were not part of its 1895 or 1897 rights and were instead new, independent appropriations not entitled to the priority dates of either claim.” ¶ 7.

The Water Court held that “the reservoirs did not expand Farmer’s 1895 or 1897 rights” and as such “did not represent new appropriations of water.” ¶ 8. Thus, “the Water Court concluded that the reservoirs were not part of the original irrigation system, it nonetheless concluded that the reservoirs could be used as part of the 1895 and 1897 rights because they did not expand the period of diversion, volume, or flow rate of those rights.” *Id.* On appeal, TCRC reiterated its argument that adding storage to direct flow water rights requires treating the new storage as a new appropriation with a priority date of the first use of storage, not of the first use of the direct flow right. ¶ 11.

The Court reiterated principles from *Bagnell v. Lemery*, *Fed. Land Bank v. Morris*, and *Whitcomb v. Helena* “for the proposition that **storage may be added to direct flow right so long as the water user does not store water at a rate exceeding the volumetric flow rate allowed by its direct flow right or at times outside of the diversion period allowed by the direct flow right.**” ¶ 12. Thus, the Court held that the Water Court correctly “found that FCCC’s reservoirs did not expand the 1895 or 1897 rights since the amount of water it diverted and its period of diversion were the same both before and after the reservoirs were constructed.” ¶ 13. The Water Court based its findings on extensive testimony indicating “that since at least 1963, FCCC or its predecessors in interest have received their 4,300 miner’s inches as it was available, either diverting all or a portion of the water to its reservoirs or to its irrigation systems” and “never received more than 4,300 miner’s inches.” ¶ 24. Because “it never stored or used more than [4,300 miner’s inches]” “FCCC’s water use did not increase after the reservoirs were constructed[.]” ¶¶ 24-25. Thus, the addition of the reservoirs to FCCC’s direct-flow rights did not constitute new appropriations dated as of the date of construction of the reservoirs.

a. See also, *Midkiff v. Kincheloe* (1953)

In *Midkiff v. Kincheloe*, Plaintiff/Appellee Kincheloe’s rights stemmed from the construction of dikes and dams between 1916 and 1949 on Home Creek, an ordinarily dry creek absent spring runoff and freshets. 127 Mont. 324, 325, 263 P.2d 976, 976 (1953). Defendant/Appellant Midkiff dammed Home Creek above Kincheloe’s property in 1949. *Id.* The District Court found in favor of Kincheloe and ordered Midkiff “to install a headgate at the bottom of his dam to consist of a pipe 30 inches in diameter or other aperture of equivalent size, or to open the dam.” 127 Mont. at 325, 263 P.2d at 976-77. On appeal, Midkiff argued that most of the dikes on Kincheloe’s lands were constructed prior to the construction of Midkiff’s dam and reservoir. 127 Mont. at 327, 263 P.2d at 977. The Court found “at least three of [Kincheloe’s] dikes were constructed after [Midkiff’s] dam was built. Several others were enlarged, repaired or completed after [Midkiff’s] dam was completed.” 127 Mont. at 327, 263 P.2d at 978.

The Court recognized that Kincheloe’s construction of the dikes was to spread the extent to which Kincheloe’s direct-flow rights could be used over his lands, however, “[t]o the extent that [Kincheloe] increased the amount of water that he put to a beneficial use after [Midkiff’s] dam was constructed, his rights are inferior to those of [Midkiff].” 127 Mont. at 328-29, 263 P.2d at 978. Because the Court could not “determine how much additional water was applied to a beneficial use by [Kincheloe] as a result of the enlargement or extension of his project after [Midkiff’s] dam was completed[.]” “additional evidence should be received bearing upon those features of the case” but:

“The Court properly held that [Midkiff] has a right to capture and retain whatever water he needs whenever [Kincheloe’s] rights have first been satisfied. This is nothing more than permitting [Midkiff] to capture water that would otherwise be wasted. We think, however, that instead of a pipe being placed at the bottom of [Midkiff’s] dam, the flow of

the water should be controlled by flash boards or other device to the end that [Midkiff] may capture and retain in his reservoir whatever water may flow in the stream at a given time in excess of the rights and needs of [Kincheloe].”

127 Mont. at 329, 263 P.2d at 978.

II. Water Court Claims Examination Rules Regarding Stored Water

Rule 10. RESERVOIRS.

Rule 10(a). Identifying reservoirs. When stored water is claimed, the legal land description of the impoundment structure, onstream and offstream designation, and the period of diversion will be identified. When available, the following reservoir data will be included: (1) dam height; (2) surface area; (3) reservoir depth; (4) maximum reservoir storage capacity; and (5) reservoir name.

Rule 10(b). Reservoir data. ... (3) **When the claimed volume is greater than 15 acre-feet and less than 50 acre-feet**, and data are not sufficient to identify the size of the reservoir, ... the claimant may be contacted or the size of the reservoir may be estimated by the department. ... (4) **When the claimed volume is greater than 50 acre-feet**, the claimant will be contacted pursuant to Rule 44, W.R.C.E.R. A questionnaire may be sent to the claimant. In addition, an on-site visit may be conducted pursuant to Rule 44, W.R.C.E.R. Information to be obtained may include: (i) dam height; (ii) surface area; (iii) reservoir depth; (iv) maximum reservoir storage capacity; (v) date constructed; (vi) period of diversion into storage; (vii) period of use from storage; (viii) volume of use per year; (ix) carry-over storage; and (x) number of fills per year.

III. DNRC’s Claims Examination Guidance Regarding Stored Water

“Naturally occurring lakes which have had the surface artificially raised, altered, or volume increased due to human activities will be treated as a reservoir only on those claims using the storage.” 2013 Claims Examination Manual, p. 282. However, “[a] reservoir or [groundwater] pit should only be identified as an element of a water right if control ... of the reservoir or pit is part of the exercise of that right.” 2013 Claims Examination Manual, p. 341.

POD: “The POD of an off-stream reservoir should identify where the water is diverted from the source for conveyance to the reservoir... The POD of an on-stream reservoir will be the location of where the impoundment structure crosses the source.” 2013 Claims Examination Manual, p. 307. “If control ... of the reservoir is not part of the right, the POD for the right should be where the water is diverted from the reservoir to the POU.” *Id.*

Priority: “A reservoir may appear ... to have been constructed or enlarged later than the claimed priority date.” 2013 Claims Examination Manual, p. 350. “If the reservoir was constructed or enlarged later than the claimed priority date ... An implied claim may be an option.” *Id.*

Period of Use and Diversion: “The **period of use** guidelines for reservoirs are the guidelines for the purposes for which the water is used. For example, a reservoir for sprinkler irrigation would have the irrigation guideline appropriate for the respective climatic area. If more than one use is associated with a reservoir, the period of use guideline may differ between the individual claims to the reservoir.” 2013 Claims Examination Manual, pp. 382-83. “The **period of diversion** is the period in a calendar year when water is diverted, impounded or withdrawn from the source.” 2013 Claims Examination Manual, p. 388.