

MUDDYING THE WATERS: SIXTY-ONE YEARS OF DOCTRINAL UNCERTAINTY IN MONTANA WATER LAW

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INTRODUCTION

The development of water law in the western United States is an important case study of the refinement and abrogation of the common law in the face of existing practices and their comparative suitability to the unique climactic and institutional conditions in the arid West. Just as climate and industrial demands from agriculture and mining defined institutions in a bottom-up fashion along the western frontier, federal land policy also influenced the definition of institutions in a top-down fashion. We show how, in the context of Montana, the courts played an important role in the process of transitioning the state from an informal to a formal legal system, balancing the tensions created by conflicting statutory and case precedents, as well as by predominant industrial and agricultural uses of water along the frontier.

In the most arid of western states, this transition meant that the prevailing legal doctrine governing water rights became prior appropriation, although the means by and time at which this change occurred varied from state to state. Adoption of the doctrine of prior appropriation required the abrogation of the common-law riparian doctrine in place in the eastern United States. This change has been linked to both an economic and an institutional explanation. The economic rationale holds that a doctrine suited to the orderly disposition of the majority of water rights in areas where water was abundant did not map well to places where competing demands for water outstripped the available supply. The institutional explanation

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depends, instead, on the fact that the predominant uses of public land in the western states required resolution of water claims where the water user did not hold title to the land itself. This meant the riparian doctrine, which granted holders of a land title the rights to running water on or adjacent to their property, could not be directly applied to cases involving the rights to water appurtenant to uses of public land, such as mining. This question—whether the choice of institutions by ranchers and miners or the incompatibility of public lands with riparian water rights led to the emergence of the prior appropriation doctrine—is one we consider in the context of Montana. Montana ultimately took sixty-one years to settle the question definitively as to whether the riparian or prior appropriation doctrine governed the disposition of water rights in the state.

This sixty-one-year period provides an extended context to view the iterative process by which the formal water-rights regime eventually evolved into the prior appropriation doctrine. Unlike other western states such as Colorado, the Montana territorial and state legislatures provided an unclear statutory backdrop for the courts regarding the contexts in which prior appropriation and riparian-rights systems applied. This meant the Montana Supreme Court was presented with a series of cases that required the court to clarify territorial and state laws surrounding water rights. As the court interpreted the muddled statutory and case precedent, it avoided having to abrogate one doctrine in favor of another, in keeping with the notions of judicial deference that animate the canon of avoidance of legal conflict. However, in reconciling conflicting claims to water rights, the court slowly removed certain definitional components of the riparian doctrine in favor of those that, in contrast, defined the doctrine of prior appropriation. By the time the Montana Supreme Court stated with finality in 1921 that prior appropriation was the only doctrine governing water rights in the state, the court's previous decisions, and the bulk of water-rights users' choice for prior appropriation as reflected in the vast majority of cases, had already made the riparian doctrine of water rights dead-letter law.

Our analysis proceeds as follows. In Part I, we discuss the literature surrounding formalization of property rights regimes along frontiers, especially in the context of water rights in the United States West. In Part II, we detail the territorial, state, and federal statutes that governed the disposition of lands along the western

frontier, and how the means of land use and ownership that these statutes provided influenced the disposition of water rights. In Part III, we survey the Montana Supreme Court case law that defined water rights from 1865 to 1921. Our analysis in this section considers both the limited number of cases where the court considered the riparian doctrine, as well as the entirety of cases treating conflicts over water rights in this period. Through the avoidance of legal conflict and the recognition of the actual uses in practice, the Montana Supreme Court proved a complementary force alongside water users themselves in clarifying the law of water rights in the territory and State of Montana.

I. PROPERTY RIGHTS ALONG FRONTIERS

Property rights in the West developed in a complex dynamic in which prior, informal practices existed in varying degrees of tension with the application of a formal system of law and policies. In cases where the de facto uses of cattle ranches were at odds with the rights granted to individual settlers under the Homestead Act,¹ the de facto uses tended to carry the day because of the comparative ability of the ranchers to exercise collective enforcement. Although the threat of violence was rarely carried out, significant rents were dissipated as ranches consolidated range rights through fraud and employee claims, and continued to engage in self-enforcement.² The imposition of federal law surrounding mining was less distortionary, in that it recognized the informal practices and written codes that had emerged among mining camps to govern disputes surrounding claim locations long before the imposition of a formal authority governing these claims.³ These granular studies of the emergence of rights to land and minerals shed important light on the specific ways in which rights to property in frontier contexts have emerged in

1. The Homestead Act of 1862, 12 Stat. 392 (1862).

2. Lee J. Alston, Edwyna Harris & Bernardo Mueller, *The Development of Property Rights on Frontiers: Endowments, Norms, and Politics*, 72 J. ECON. HIST. 741 (2012).

3. See Paul A. David & Gavin Wright, *Increasing Returns and the Genesis of American Resource Abundance*, 6 INDUS. & CORP. CHANGE 203 (1997); Gary D. Libecap, *Distributional Issues in Contracting for Property Rights*, 145 J. INST. THEORETICAL ECON. 6 (1989); John Umbeck, *The California Gold Rush: A Study of Emerging Property Rights*, 14 EXPLORATIONS ECON. HIST. 197 (1977).

response to shocks that make resources comparatively scarcer.⁴ Our analysis studies the incremental definition of water rights in a context where statutory and case law were decidedly ambiguous as to certain critical aspects of the doctrine governing water claims.

However, the fact that formal law, at best, imperfectly corresponded to informal practices meant that the rules governing the uses of resources relied to some extent on self-definition and self-enforcement. Several studies have emphasized how bottom-up, collectively enforced institutions resolved disputes over property resources with relatively minimal conflict. One such study suggests that lawlessness, in a variety of contexts along the western frontier, was much less than suggested by popular depictions of the period.⁵ Another study examined cattle ranchers in Shasta County, California, in a more modern context and showed how enforcement patterns tended to rely on informal, individual practices, as opposed to the requirements created by formal authorities.⁶ Studies of the development of mineral law, surrounding one of the most valuable claims to that date in U.S. history, the Comstock Lode, emphasize how mining interests played a role in the statutory and judicial definition of mineral rights and how these same mining interests were more incentivized to do so as the value of minerals in question increased.⁷ The U.S. West was particularly likely to display this blend of customary and legal remedies in part because settlement of the frontier preceded the arrival of formal authorities in many places. In such a context, self-definition and self-enforcement led to the emergence of practices well-suited to the contextual demands of the frontier.

One example of such a practice, the extralateral right in mineral claims, displays the way in which institutions defined from the bottom-up can vary significantly from practices that emerged under the common law of Britain, the colonies, and the eastern states. The application of the common law over time can lead to jurisdictional variation due to the distinct fact patterns that emerge in each unique

4. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

5. See TERRY ANDERSON & P.J. HILL, *THE NOT SO WILD WEST: PROPERTY RIGHTS ON THE FRONTIER* (Stanford University Press 2004).

6. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (Harvard University Press 1991).

7. Gary D. Libecap, *The Evolution of Private Mineral Rights: Nevada's Comstock Lode*, 6 BUS. & ECON. HIST. 138 (1977).

context. However, the adoption of the common law from one context to an entirely new one is likely to generate areas where the existing law is so unsuited to the new context that gradual judicial clarification may be insufficient to overcome the problems created by the mismatch. The extralateral right in mineral claims was one such area; given the different valuable minerals that were deposited in the eastern as opposed to western states, mineral claims in the West were more likely to develop precious metals like gold and silver, which typically did not lay “flat,” vertically or horizontally.⁸ This is in part due to the nature of metallic deposits, but also because the western states, in contrast to those in the East, present much more topographical variation as a result of the underlying tectonic forces that thrust the mountains upwards. This means mineral deposits typically do not lie horizontally or vertically but instead tend to run diagonally, following the fall line of whatever mountain slope within which they are deposited. This led to the emergence of a practice that allowed the first locator of a lode to follow the lode until it terminated, provided the lode reached its apex within that claimant’s location.⁹ This customary practice was first institutionalized into mining-camp codes, and was eventually codified into law and judicial precedent in a number of western states. By taking into account the nature of mining in the mountainous West, the extralateral right reduced conflict by guaranteeing to a successful lode locator the right to follow the lode in any direction, provided they had located the point where the lode came closest to the surface.¹⁰ This reduced the potential for opportunistic claimants to locate their claim adjacent to an already productive lode and, instead, incentivized new claimants to discover original lodes to which they would be fully entitled.¹¹

The emergence of the extralateral right displays a number of general lessons surrounding the development of property rights along the western frontier. First, the federal, territorial, and state governments were typically confronting groups of resource and land users who had already developed a *de facto* set of rights governing their

8. See Theodore Francis Van Wagenen, *International Mining Law* (1918).

9. Wm E. Colby, *The Extralateral Right: Shall It Be Abolished?*, 4 CALIF. L. REV. 437, 456–57 (1916).

10. See David & Wright, *supra* note 3; Gary D. Libecap, *Government Support of Private Claims to Public Minerals: Western Mineral Rights*, 53 BUS. HIST. REV. 364, 369 (1979).

11. See VAN WAGENEN, *supra* note 8.

uses. To the extent that these uses did not conflict with larger legislative priorities, the informal practices presented one margin along which to reduce the costs of imposing formal, legal authority for the first time. These customary practices were especially cost reducing when they reflected climactic or geological constraints that made existing rights regimes less likely to function well. Similarly, the way in which the extralateral right encouraged the discovery of new lodes, as opposed to a legal conflict over the rights to an existing lode, both reduced the conflict likelihood and incentivized the productive development of the underlying resources in question. We argue that the emergence of the prior appropriation doctrine in Montana reflects these underlying patterns within a statutory context that did not directly reflect these existing practices. In particular, the climate and topography of Montana meant that the prior appropriation doctrine was better suited to the comparative scarcity of water and the need to irrigate far from a given water source.

In an environment of comparative scarcity like Montana, uses of water were more likely to come into conflict, but the law can itself create comparatively more or less conflict, depending on the clarity it provides to the participants governed by it. Competing resource uses that are given legal force will generate conflict, as rights holders under opposing doctrines seek to better settle their rights to justify investment and facilitate associated loans and sales. This is a specific expression of the general problem created by cases of legal conflict, which has led to a observable tendency on the part of courts to interpret cases in a way that avoids legal conflict between different statutes currently in force, both of which bear upon a given case in question and present potentially opposing interpretations of the issue in question.¹² The tendency for conflict under opposing legal regimes becomes more pronounced as scarcity increases. A resource user faced with a choice between a resource with a competing claimant

12. Where courts are confronted with potential legal conflict, they have been observed to employ a similar technique to the canon of avoidance of reaching a constitutional question when a case can otherwise be decided based upon factual, procedural, or legal factors. In cases of legal conflict, courts frequently seek to employ an interpretation of potentially conflicting statutes in a way that reconciles the law to prevent actual conflict between the possibly competing legal requirements of different statutes. See Carolos E. Gonzalez, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447 (2001).

or an unclaimed resource, with the same underlying costs to use, will choose the latter option due to the reduced legal costs associated with the specification and enforcement of the rights to the resource. The increasing value surrounding the definition and enforcement of a right as the underlying resource becomes scarcer directly implies that as the cost of an underlying resource use increases so, too, does the sensitivity of this use to imperfections and uncertainties in the rights structure surrounding its use and sale. In sum, in a context of resource scarcity where self-definition and self-enforcement of property rights preceded formal authorities, the extent to which the first laws of these authorities diverge from existing practices can create a direct possibility for legal conflict in ensuing periods.

II. RIGHTS TO WATER IN THE UNITED STATES WEST

In order to understand the fundamental ways in which these rights regimes differ, a brief discussion of prior appropriation and riparian-rights doctrines is warranted. The doctrine of prior appropriation is entirely distinct from the common-law doctrine of riparian rights. Unlike the common-law doctrine, the doctrine of prior appropriation depends fundamentally upon the principle of “first-in-time, prior-in-right.”¹³ This doctrine holds that one who appropriates the waters prior to another appropriator, and puts the water to beneficial use, has obtained an exclusive right to that amount of water.

The doctrine of [prior] appropriation extends the right to the use of the waters flowing in a natural stream to riparian and non-riparian lands alike, and it is immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which the waters are taken.¹⁴

Thus, under prior appropriation, the right to water is not contingent on the location of the land where the water is being used. The right to water instead depends upon the date of appropriation and whether the appropriated water is put to beneficial use. Beneficial use requires that those waters that were appropriated must be used for productive

13. ROBERT G. DUNBAR, *FORGING NEW RIGHTS IN WESTERN WATERS* (University of Nebraska Press 1983).

14. *Mettler v. Ames Realty Co.*, 61 Mont. 152, 159 (1921) (citations omitted).

purposes.¹⁵ Finally, once an appropriation has been made and put to beneficial use, abandonment can occur. Abandonment occurs when there is explicit evidence of intention to no longer use the waters. When there is abandonment, the water right reverts to public property and is then subject to appropriation or allotment to existing junior appropriators.¹⁶ As we will discuss subsequently, prior appropriation's characteristics of "first-in-time, prior-in-right," beneficial use, and abandonment provide a much more precise definition of the rights to water than the riparian doctrine does. This level of definition becomes increasingly beneficial as water is comparatively scarcer, a pattern in line with Harold Demsetz's insights regarding the development of property rights more generally.¹⁷ The English common law did not develop in contexts in which water was sufficiently scarce to warrant the additional costs of specifying and enforcing rights under a system like prior appropriation, which meant the vaguer and more flexible standard that the riparian doctrine provided was sufficient.

The common-law riparian doctrine creates a completely different rights regime for water. The riparian doctrine is derived from English jurisprudence, in which waters were "accustomed to flow . . . [neither] in a lower, or a higher, or a thinner, or a more rapid stream than before, or . . . diminished in any way."¹⁸ This system of water law was applied to the eastern United States through the application of the English common law in the original colonies. In this region, one water user's practice was unlikely to detract from another's, at least in terms of volume.¹⁹ In a context of such comparative abundance,

15. MONT. REV. STAT. § 12 (1881).

16. See *Power v. Switzer*, 21 Mont. 523 (1898); *Barkley v. Tielke*, 2 Mont. 594 (1877).

17. Harold Demsetz, *Some Aspects of Property Rights*, 9 J. LAW & ECON. (1966); See also Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. R. (1967).

18. HENRY DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLAIE*, (Travers Twiss, ed., Cambridge University Press 2012) (1880); ROBERT G. DUNBAR, *FORGING NEW RIGHTS IN WESTERN WATERS* (University of Nebraska Press 1983); see also Earl F. Murphy, *English Water Law Doctrines Before 1400*, 1 AM. J. LEGAL HIST. 103.

19. With the industrialization of the nineteenth century, some economic uses of water in the East began to exceed the level that was considered "reasonable" under the riparian doctrine, which led to the judicial clarification of the common law in the East surrounding when industrial users could appropriate in excess of this amount. See DONALD PISANI, *WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850–1920* (University Press of Kansas 1996). Nonetheless, for the purposes of our analysis, the riparian doctrine as we define it remains accurate to describe how legislators and courts in the West understood the doctrine as a whole.

a standard that allowed for any reasonable use up to the point where other users' amounts were affected was more than sufficient to govern water users' rights disputes. The Montana Supreme Court's consideration of this doctrine aptly summarizes the underlying intent: "[H]e who owned land upon the banks of a running stream, or land over which the same flowed, had the right to have the waters thereof flow down, to or over his land, undiminished, materially, in quantity or quality."²⁰ The common-law doctrine of riparian rights grants relatively unfettered access to water rights to those landowners directly adjacent to the waters. Those landowners can appropriate and use those waters for their desired needs so long as these uses do not detract from the ability of other riparian rights holders to do the same. The riparian doctrine does not include the prior appropriation requirement of beneficial use; there must only be "reasonable use."²¹ This standard gives the riparian rights holder comparatively expansive liberty in the use of the waters. Unlike prior appropriation, which affirmatively requires the beneficial use of waters, riparian rights holders can use or not use waters to the extent they desire, limited only by those unlikely instances where the volume or nature of their use impinges upon the ability of others to act similarly.

As between these two doctrines of water rights, what about prior appropriation made it well-suited to conditions in the arid West? Two distinct explanations have formed surrounding the emergence of prior appropriation in the face of an existing doctrine that was well-established in the eastern states, whose legal systems served as templates for their more junior, western cousins in many other areas of substantive law. The first surrounds the economic benefits associated with the prior appropriation doctrine in climates where water was scarce. The second has to do with the specific nature of the law underlying land and water rights in the arid West.

The comparative scarcity of water in the West and the need to irrigate land far from a given watercourse implied significant economic benefits to prior appropriation.²² The doctrine facilitated coordination and created lower levels of disputes, as compared to the

20. *Thorp v. Freed*, 1 Mont. 651, 653 (1872).

21. Samuel C. Wiel, "Priority" in *Western Water Law*, 18 YALE L.J. 188 (1909).

22. Bryan Leonard & Gary D. Libecap, *Economic Analysis of Property Rights: First Possession of Water in the American West*, (Nat'l Bureau of Econ. Research, Working Paper No. 22185, 2016).

riparian doctrine's vaguer standard of "reasonable use."²³ Coordination among users (and between users and landholders, whose lands were needed for an irrigation right of way) was required due to the scale of construction, expense, and manpower that many irrigation projects in the arid West entailed. For example, one early case in Montana involved an irrigation canal whose construction cost over \$23,000 (greater than \$320,000 in 2015), which serviced mining claims valued at \$15,000 and \$20,000, respectively.²⁴

These high financial and coordination costs have an important implication. Both from a static and dynamic perspective, coordination over which water-rights regime to employ would reduce the transaction costs to participants within the industry. From a static perspective, coordinating two incompatible rights regimes would reduce the potential for costly disputes. In the frontier context, the use of prior appropriation before the formal adoption of a water allocation system meant that this was likely to be the least costly regime. Furthermore, from a dynamic perspective, subsequent entrants along the frontier, even if presented with a choice between legal regimes for water, faced costs associated with choosing a less dominant rights regime, especially in a context of scarcity, where it became increasingly likely that all water rights had prior claimants in times of drought.

The amount of public land in the West, and the inability of mineral claimants to own the land they mined meant the riparian doctrine was fundamentally incompatible with existing federal law governing public lands in the West. Riparian water rights vested with title to land adjoining or containing a watercourse. However, many of the uses of public lands, such as mining and forestry, did not grant the land user title to the land itself; instead, these individuals were granted a use right to extract mineral or timber as against other claimants. This meant that any individual seeking to use water in the process of extracting and refining minerals could not obtain rights to water they needed under the riparian doctrine because of their "defect" in title from the perspective of the riparian doctrine. Furthermore, the nature of settlement on the western frontier

23. Stephen N. Bretsen & Peter J. Hill, *Irrigation Institutions in the American West*, 25 *UCLA J. ENVTL. L. & POL'Y.* 283 (2006–2007).

24. *Woolman v. Garringer*, 1 Mont. 535 (1872); *U.S. Inflation Rate, 1872–2016*, INFLATION CALCULATOR, <http://www.in2013dollars.com/1872-dollars-in-2016> (last visited Jan. 11, 2017).

demanded an allocative regime to water that did not depend on the underlying title to the land. Water disputes among settlers who were technically trespassing on public lands prior to the passage of the Preemption Law were customarily resolved according to prior appropriation, which played a large part in the federal statutory recognition of customary practices preceding the creation of law governing public lands in the West.²⁵

In Montana, water rights, especially early on in the territory's history, necessarily depended on a blend of self-definition and self-enforcement.²⁶ This makes Montana, like many frontier contexts, one where participants had a significant role in the definition of the rights regimes governing their resource uses. The most readily evident example of this is when the frontier government recognized informal practices, such as mining-camp codes and customs, which also received federal and state statutory recognition in a number of western states.²⁷ In contrast, the Montana legislature did not unambiguously recognize existing practices relating to water. However, this does not mean the actions of settlers in Montana could no longer influence the definition of formal law when it came to water rights. We will argue subsequently that the choice of water-rights regimes by settlers actually influenced the incremental definition of which rights regime would prevail in the Montana courts, an outcome consistent with the role participants played in defining the rights regimes governing resource use along the western frontier, both before and after the imposition of formal territorial and state control.

III. LAND AND WATER LAW IN THE TERRITORY AND STATE OF MONTANA

Prior to the creation of territorial and state authorities, settlers arriving on the western frontier were confronted with two institutional

25. See Donald J. Pisani, *A Critique of Western Water Law in the Nineteenth Century*, 18 W. HIST. Q. 15 (1987).

26. See ROBERT G. DUNBAR, *FORGING NEW RIGHTS IN WESTERN WATERS* (University of Nebraska Press 1983); PISANI, *supra* note 19; James E. Sherow, *The Fellow Who Can Talk the Loudest and Has the Best Shotgun Gets the Water: Water Regulation and the Montana State Engineer's Office, 1889-1964*, 54 MONTANA: MAG. OF WESTERN HIST. 56 (2004); Brian Shovers, *Diversions, Ditches, & District Courts: Montana's Struggle to Allocate Water*, 55 MONTANA: MAG. OF WESTERN HIST. 2-15 (2005).

27. Gary D. Libecap, *Government Support of Private Claims to Public Minerals: Western Mineral Rights*, 53 BUS. HIST. REV. 364, 369 (1979).

regimes governing the disposition of land, resources, and water. The first of these were the informal practices that frontier communities developed to clarify rights to resources and land and to resolve associated disputes. However, the presence of informal practices did not mean that there were no laws governing the disposition of federal lands, prior to the definition of these public lands as a territory or a state. Three federal land laws, for example, played an important role in the settlement of Montana. The Preemption Act of 1841,²⁸ passed September 4th of that year, is the first federal law that defined the rights of settlers in obtaining public lands from the federal government. This Act allowed any head of the family, widow, or single male over the age of twenty-one, who settled upon public lands by inhabiting and making improvements upon the land, to be authorized to purchase title to the land for \$1.25 an acre, for up to 160 acres.²⁹ The passage of the Preemption Act is significant in the history of U. S. public land law, for it was the first time the federal government formally recognized the rights to land for individual settlers in the West. Preemption allowed a formal means to secure a title to previously owned public lands and as such is the first piece of the patchwork of federal law that influenced the patterns of settlement on western lands.

The second federal land law is the Homestead Act of 1862,³⁰ which was passed on May 20th of that year. This law provided any person the right to claim up to 160 acres of public lands. In order to formalize the right to land, a settler first had to file an application in the local land office prior to entry upon the land, affirming that he or she was the head of the family, twenty-one years of age, and a citizen of the United States. Upon filing and payment, the settler was permitted to enter the land and was subsequently required to cultivate the land for five years, after which period the title to the land passed to the landowner.³¹ This Act expanded upon the Preemption Act of 1841 by allowing a straightforward method to formalize lands intended to incentivize settlers to move west. Even more so than the Preemption Act, the Homestead Act of 1862 greatly defined the settlement of the western territories during this period.

28. The Preemption Act of 1841, 5 Stat. 453 (1841).

29. *Id.*

30. The Homestead Act of 1862, 12 Stat. 392 (1862).

31. *Id.*

The last federal land law that aided in the settlement of western lands was the Desert Land Act, formally known as the Act of March 3, 1877.³² The Act provided any person, who was a requisite age, the ability to purchase title to desert lands for up to 140 acres at \$0.25 per acre.³³ Because the Desert Land Act required successful irrigation of the land in order to obtain title, the Act allowed for the appropriation of water, which in practice required prior appropriation on federal lands. The significantly discounted price reflects the government's growing recognition of the unique challenges that the arid climates of the West posed to agriculture and industry. The ability to obtain lands under the Desert Land Act can be understood as another step in the gradual refinement of rights to public lands begun by the Preemption Act and Homestead Act.

Federal mining laws also aided in the settlement of western lands. Three federal laws passed from 1866 to 1872 defined the extraction of minerals from western lands. On July 26, 1866, Congress passed the Lode Law of 1866,³⁴ which is the first federal statute with substantive influence regarding mining, water, and claimants to land. This law declared the public domain free and open to all citizens of the United States for the exploration and production of minerals. In order to secure water for the purpose of mining, the Lode Act stipulated,

[W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same recognized by the local customs, laws, and the decision of the courts . . . owners of such vested rights shall be maintained and protected the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed.³⁵

The Act also incorporated the basic rules and customs of the mining districts and gave congressional approval for protected mining rights on public land.³⁶ The Lode Act was subsequently codified with the

32. Desert Land Act, ch. 107, 20 Stat. 377 (1877).

33. *Id.*

34. An Act Granting Right of Way to Ditch and Canal Owners Over Public Lands, and for Other Purposes, § 2-9, 15 Stat. 251, 251 (1866) [hereinafter the Lode Act] (the Lode Act is the colloquial understanding of this Act).

35. *Id.*

36. Despite the Lode Act's granting of public lands for mineral exploration, the law did not authorize the patenting of placer claims; it instead only treated claims over lodes or veins

placer mine legislation in the Mining Law of 1872.³⁷ This law then became the defining federal law governing mineral extraction on public lands through the end of our analysis in 1921.

In the subsequent section, our detailed case survey from 1865 to 1921 shows that land users made claims either under mining laws, the Homestead Act, or the Preemption Act—to the extent that the factual record in a given case contains such a detail. One example serves to display how the patchwork of federal laws created the possibility for significant uncertainty surrounding the rights to land and water. Claims made under the Preemption Act were seen as legitimizing a trespass on federal lands, but this very trespass raised a question as to who had a right to the water this trespasser was using.³⁸ The same reasoning that caused the Preemption Act to formalize the “claims” of de jure trespassers led to the recognition of the right to the water that these trespassers had been utilizing for beneficial uses as against any other users on the public lands, who would also have been trespassers, as both were using the land prior to federal recognition of the legality of doing so.³⁹ The extension of this prior water right to include cases of irrigation⁴⁰ follows directly from the contexts found in the arid West where the appropriated water’s most economically productive use was often far from the rugged ravines and canyons where the water flowed. In cases where claims were instead being made under the various mineral laws, depending upon when a specific mineral claim was located, a similar result obtained, but for different reasons. Because title to

of minerals. The distinction between these types of claims depends upon where within the earth the minerals are situated. Under a lode, the minerals are embedded in the underlying firmament itself, while placer minerals are those which have been eroded by waterways and lie within the sediment of the waterway. This oversight led Congress to pass the Placer Act of 1870, H.R. 562, 41st Cong. (2d Sess. 1870), which expanded upon the Lode Act of 1866 to include patent claims for placers.

37. The Mining Law of 1872, ch. 152, 17 Stat. 91–95 (1872).

38. *Thorp v. Freed*, 1 Mont. 651, 667 (1872).

39. *See id.*; *see also Parks v. Barclay*, 1 Mont. 514, 517 (1872).

40. The right to appropriate water for mining or milling purposes, resting in this country before the act of congress above referred to, upon the grounds that no one owns the property, and that the appropriation is for a beneficial purpose, establishes a principle that certainly ought to allow the appropriation of water for the purposes of irrigation. In this latter case no one, it would be presumed, owned the water, and the appropriation would be for a beneficial use.

Thorp v. Freed, 1 Mont. 651, 659 (1872).

the land itself did not vest with a mineral appropriator, no right to water could vest along with title. This created a variety of means by which economic activities on public lands, whether they were agricultural or mineral, were construed to require prior appropriation. The federal land laws, and the existing, customary prior appropriation practices, thus played an important role in determining the rights to water for those users claiming rights. This also created a margin that influenced the rights of private land users, both in the coordinative sense we describe in earlier sections and also to the extent that a private landholder, whether making their claim under the riparian or prior appropriation doctrine, had to contend with a set of users on federal and formerly federal lands who claimed the prior right to water under federal law.

With the preceding federal laws providing a backdrop for defining the rights of resource users on public lands and the means of acquiring public lands, Montana water-law statutes developed in stages. The Bannack Statutes were the first territorial legislation to address the issue of water. The Bannack Statutes provided

any owner or holder of a possessory right or title to land on the bank or margin of a stream, or in the neighborhood of any stream, should be entitled to the use of the water of such stream for the purpose of irrigation, and to a right of way for his ditch, if necessary, over intervening property.⁴¹

These statutes asserted both prior appropriation and the incongruous requirement for equitable apportionment by specially appointed county commissioners in times when water was scarce. The Bannack Statutes not only created a confused version of the doctrine of prior appropriation but also stated that the “common law of England, so far as the same is applicable and of the general nature, and not in conflict with the special enactments of this Territory, shall be the law and rule of decision, and shall be considered as of full force until repealed by the legislative authority.”⁴² Absent a specific abrogation of the riparian doctrine contained within the common law adopted by the territorial legislature, these statutes necessarily recognized both doctrines of water law.

41. WELLS A. HUTCHINS, *THE MONTANA LAW OF WATER RIGHTS* (Montana Agricultural Experiment Station, Montana State College 1958).

42. *Laws of the Territory of Montana, 1864–1865*, Mont. Laws, 365.

Given the extent to which fundamental characteristics of the two doctrines are at odds with one another, this very recognition caused legal uncertainty. As a result, these statutes were replaced in 1869 by the Act to Repeal the Act of January 12th, 1865. This Act allowed anyone holding valid title to land the right to the use of waters for the purpose of irrigation; and in instances where the water in question was claimed under prior appropriation, those appropriations were to be considered valid.⁴³ The Act of 1870 became codified in the Revised Statutes of 1872. However, it should be noted that despite this clarification in the water law, the Legislative Assembly never explicitly abrogated the common-law doctrine of riparian rights, an oversight that would take the court decades to overcome.

It was not until 1885 that the legislature made a distinctive departure from the riparian doctrine. In An Act Relative to Water Rights, the legislature endorsed the definitional components of prior appropriation including “first-in-time, prior-in-right”; beneficial use; time of appropriation; and the proper filing of an appropriation.⁴⁴ This Act was a significant alteration in the legislative definition of the doctrine of prior appropriation rights, but with it the legislature omitted once again to abrogate the doctrine, whose legal applicability in the state the courts had already long interpreted as being a necessary consequence of the territorial legislature’s adoption of the common law in 1865.⁴⁵ The statutory timeline of Montana, from the Bannack Statute’s ill-defined water-rights regime to the Act of 1885’s more explicit water-rights regime, exposes the evolving influence statutes had on the development of water rights in the State of Montana.

43. [A]ny person or persons, corporation or company, who may have or hold a title, or possessory right or title, to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams and creeks in said Territory for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof: *Provided*, That in all cases where by virtue of prior appropriation, any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient let therein for those having a subsequent right to the waters of such stream for the such purpose of irrigation.

Act to Repeal the Act of January 12th, 1865, 1869–1870 Mont. Laws 57 (also entitled An Act to Repeal an Act Entitled “An Act to Protect and Regulate the Irrigation of Lands in Montana Territory,” Approved January 12th, 1865, and to Make Provisions for the Construction of Ditches and the Irrigation of Agricultural Lands).

44. An Act Relative to Water Rights, 1885 Mont. Laws §§ 1–6.

45. *See* Bailey v. Tintinger, 45 Mont. 154 (1912).

It is within this muddied statutory context that the supreme court of Montana interpreted conflicting water-rights claims, a question we turn to in detail in the following section.

IV. MONTANA CASES DEALING WITH RIPARIAN DOCTRINE

The importance of water to industrial and agricultural development along the western frontier is clear. Whether it was raising crops on a homestead, watering cattle on a ranch, or processing ore at a mine, the predominant economic activities along the frontier all required water. Given climatological conditions in the West, there was simply not enough water available to satisfy every potential water user's demands. In legal and economic terms, the comparative scarcity of water meant disputes surrounding the use of water were more likely, which led to the development of the prior appropriation doctrine in many western states. This scarcity and, hence, the significant economic value of water, also meant water rights were (and are) a perennial topic of litigation in the West. In Montana, the supreme court was confronted with these types of disputes nearly from its inception.⁴⁶ In this section, we treat every example from the record of the supreme court of Montana where the court considered the competing water-rights doctrines that persisted in the state until 1921. The court, in avoiding overt conflict between the competing doctrines, gradually reconciled the cases in a way that whittled away at core components of the riparian doctrine, until there was so little left to distinguish it that by 1921 the court abrogated the riparian doctrine outright.

The first time the court treated both the riparian and prior appropriation doctrines came in 1870 with the case of *Thorp v. Woolman*.⁴⁷ Both Thorp and Woolman owned a ranch on the same creek, and following a drought in 1869, their irrigative uses became more than the creek could supply. In resolving the competing claims presented in the case, the court recognized that both landholders adjoining a given stream had the right to use water, a determination entirely consistent with the riparian doctrine.⁴⁸ However, the court also decided the case by awarding the adjacent landholder with an older

46. See *Caruthers v. Pemberton*, 1 Mont. 111 (1869).

47. *Thorp v. Woolman*, 1 Mont. 168 (1870).

48. *Id.* at 171.

water claim the right to use it as against the competing claimant.⁴⁹ In a jurisdiction governed unambiguously by the riparian doctrine, such an outcome would be entirely at odds with the requirement that no adjacent landholder's use materially affects the use of another. In a climate where there was not nearly enough water to go around, the riparian requirement quickly fell before the reality that the first user to settle upon a stream had an equitable expectation to the use of the water, sufficient for the economic purposes that supported his or her settlement there. The case also noted another existing controversy pertaining to whether the prior appropriation doctrine applied to private as well as public lands, but given that the prior appropriation doctrine required the same result, it was "not necessary for the court to determine, in this case, whether or not the doctrine of appropriation applies to ranchmen as well as to miners, concerning water rights."⁵⁰ The distinction between ranchmen and miners directly suggests private versus public lands because miners were, necessarily, entrants upon the public lands whereas ranchers were, much more commonly, titled land holders, which meant the riparian doctrine could apply to them in theory, at least from a formal, legal perspective. This latter question as to the applicability of the prior appropriation doctrine on private versus public lands is one that remained unresolved until the case we consider from 1912.

Just two years later in 1872, the court again confronted the conflicted state of land and water laws in *Thorp v. Freed*.⁵¹ Of the three justices on the court, one recused himself from the case and the other two reached opposing conclusions about the intent of the legislature and the state of water law in the territory. This case illustrates a clear example of the costs of legal conflict: when judges cannot reach a unified conclusion on how to resolve legal ambiguity, such judicial conflict can itself further obscure the law for those governed by it. On the one hand, in considering the conflicting authorities surrounding water law in the territory, Justice Knowles recognized the classic explanations regarding the development of property and natural-resource law on the western frontier in those instances where it departed from the existing doctrine in the East.⁵² Justice

49. *Id.*

50. *Id.*

51. *Thorp v. Freed*, 1 Mont. 651 (1872).

52. *Id.* at 654, 656.

Knowles stressed both the unique topography in the West⁵³ as well as more general concerns of welfare and equity⁵⁴ animating the prior appropriation doctrine's emergence. However, Justice Knowles ultimately adopted a position of judicial deference, noting that: "the question of whether or not a law is for the good of the people in our Territory, is a matter for legislative, and not judicial, consideration."⁵⁵ In contrast, Justice Wade looked at the 1865 territorial statute and concluded that "looking at the whole statute, we say most unhesitatingly, that the whole purpose of the statute was to utterly abolish and annihilate the doctrine of prior appropriation, and to establish an equal distribution of the waters of any given stream in the agricultural districts of the territory."⁵⁶ Justice Wade also concluded that "so in this arid country should the waters of any given stream be divided equally among the farmers for purposes of irrigation,"⁵⁷ notwithstanding the impossibility of such a requirement given the scarcity of water in the arid West. *Thorp v. Freed*, without a clear holding and with stark opposition between the positions of the two judges, deepened the uncertainty as to the applicability of the riparian doctrine in Montana in the face of prior appropriation.

Following *Thorp v. Freed*, the court was not presented with another case requiring treatment of the riparian doctrine until 1899 in *Haggin v. Saile*.⁵⁸ This case was an action for an injunction to restrain the defendants from diverting water that the plaintiff claimed, based upon having settled in the canyon in 1883 when plaintiff Saile first began using the adjacent waters. However, sometime that same year the plaintiff ceased to use the waters, which led the defendant to claim abandonment of the earlier riparian claim. In deciding the

53. Surely the climatic and physical conditions of this country cannot be such to create a law so at variance with natural equity and so fatal to the improvement and prosperity of our best agricultural districts. It must be apparent to all that the best agricultural lands in this Territory are not at the sources of the streams. Our broad valleys, as a rule, are better adapted by nature for settlement and agriculture than our narrow and rocky canons and mountain gorges.

Id. at 654.

54. "[C]onsiderations of the general welfare of the country and the principles of natural equity should guaranty to the prior appropriator of water for such use the first right to the use of the same . . ." *Id.* at 654–55.

55. *Id.* at 653.

56. *Id.* at 668.

57. *Id.* at 676.

58. *Haggin v. Saile*, 23 Mont. 375 (1899).

issue, the court employed a beneficial use calculus to consider the opposing water rights of the two parties,⁵⁹ ultimately determining that the riparian right holder had effectively abandoned any claim they had to the water through non-use.⁶⁰ A finding that a riparian right holder can abandon his or her right through non-use is at odds with the riparian standard of reasonable use determined by the right holder, which is governed only by the requirement that such use (or non-use) not materially impair the water to which other riparian rights holders are similarly entitled.⁶¹ Thus, the case effectively imposed a beneficial use requirement upon those instances when Montana water users believed their rights emanated from the riparian doctrine. Like the earlier case that found riparian landowners' water claims were governed by "first-in-time, prior-in-right," *Haggin* transformed one of the definitional components of the riparian doctrine from the reasonable use requirement to the beneficial use requirement of the prior appropriation doctrine.

One year later, the court again examined the tension between the riparian and prior appropriation doctrines in *Smith v. Denniff*.⁶² Smith's appropriation of water from the public domain to nonriparian lands presented the question of whether riparian land subsequently granted to a railroad created a superior right to the one Smith had created through appropriation from the public domain. This case is notable because the court summarized the water laws in the state, to that point. In weighing the requirements under each doctrine, the court noted how the right to prior appropriation for beneficial purposes was necessarily at odds with the reasonable use granted to every adjacent landholder, and the State's preference for beneficial use meant that "to this extent the doctrine of prior appropriation

59. "The suggestion that the plaintiff has rights as a riparian holder can have no force as against defendant Saile, who in June, 1883, actually diverted and appropriated water for beneficial uses under the statutes of the territory recognizing the right of appropriation." *Id.* at 381.

60. [A] voluntary nonuser of water by a purchaser of a water right, without any intention to resume use thereof, and without the assertion of possession or title for a number of years after purchase, and where such a purchaser has permitted the water to be taken, appropriated and used by others adversely for a period of years, warranted an inference of abandonment.
Id. at 381.

61. See Wiel *supra* note 21.

62. *Smith v. Denniff*, 24 Mont. 20 (1900).

may be said to have abrogated the common law rule.”⁶³ The court also noted that any vested prior appropriation right necessarily created a servitude upon upstream riparian lands, a clear subjugation of riparian rights in the face of prior appropriation statutes and practice.⁶⁴ Despite the case not fully abrogating the riparian doctrine, due to the court preserving the right of prior riparian landholders to the waters of a given stream, the partial abrogation in *Smith* speaks volumes as to the extent to which the court’s periodic avoidance of legal conflict had ultimately vitiated one doctrine in favor of another.

The final barrier that remained separating the heavily modified and weakened riparian doctrine from the system of prior appropriation rights was removed by the court in the 1912 case of *Bailey v. Tintinger*.⁶⁵ This was the issue that had persisted since the court tried to reconcile what it interpreted as the common-law requirement of private riparian land ownership with the problems that such a requirement created in the context of water use by mineral claimants on public lands. An extensive amount of lands irrigated by several companies forced this suit, to determine the relative rights of the parties to the waters.⁶⁶ In *Bailey*, the court determined that the right to appropriate water does not depend on the land on which the appropriated water is being used. The court, at the same time, declared that all water rights prior to 1885 were governed by the rules and customs of settlers,⁶⁷ effectively ignoring and overwriting the first two decades of statutory and judicial treatment that we consider in our analysis, here. In so doing, the court held that ownership of the

63. The doctrine of ‘prior appropriation’ confers upon a riparian owner, or one having title to a water right by grant from him, the right to a use of the water of a stream which would be unreasonable at the common law, and to this extent the doctrine of prior appropriation may be said to have abrogated the common-law rule.

Id. at 23.

64. *Id.* at 25.

65. *Bailey v. Tintinger*, 45 Mont. 155 (1912).

66. *Id.* 160–61.

67. “[T]he time from the earliest settlement to 1885, during which period the rights were determined exclusively by the rules and customs of settlers . . .” *Id.* at 167;

In other words during the first period of our history above, there was but one method of making an appropriation, and that was by complying with the rules and customs of the pioneer settlers; while during the period since 1885, two distinct methods are prescribed, the first by complying with the rules and customs of the early settlers, and the second by complying with the terms of the statute.

Id. at 172.

land upon which water was used was irrelevant to the application of the governing doctrine⁶⁸ and so removed the last component distinguishing a riparian right from a prior appropriation right in the State of Montana. Perhaps unsurprisingly, the court noted outright, upon surveying the bulk of precedent before it, that “[i]t is impossible to harmonize the decisions of the courts upon the subjects presented.”⁶⁹

This understandable sentiment presages the final time the court considered the question of the riparian doctrine in Montana. In *Mettler v. Ames Realty Co.*,⁷⁰ the court held that: “[t]he common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865.”⁷¹ A drought in 1919 caused Ames Realty Company, the prior appropriator to the waters of Prickly Pear Creek, to change its place of diversion. The new point of diversion caused Anna Mettler, who claimed the right to the waters through the riparian doctrine, to be below the place of diversion, resulting in a severe diminution in the quantity to which she had been accustomed to use in her ranch. As a result, she sued Ames Realty Company to return the flow of the waters, undiminished in quantity. Given that the court outright abrogated the riparian doctrine from the date of territorial formation onwards in the case, Mettler’s claim went unrecognized in the face of Ames Realty’s prior right. In one fell swoop, absent legislative repudiation of the doctrine, riparian rights were formally abandoned in favor of prior appropriation. More potently, the court stated with finality that the prior appropriation doctrine had always been the letter of the law in the state, notwithstanding the conflicted sixty-one years of statutes and case law that we survey here. Upon first blush, the court’s interpretation of the preceding sixty-one years of precedent appears quite bold. However, when the set of cases are taken into account that slowly hollowed out the riparian doctrine until it was a mere legal fiction resting on top of the underlying reality of prior appropriation, the court’s action in *Mettler* appears more like a formality than a sweeping abrogation.

68. The court construed the holding in *Smith* by defining “that the appropriator need not be either an owner or in possession of land in order to make a valid appropriation for irrigation purposes.” *Id.* at 175.

69. *Id.* at 177.

70. *Mettler v. Ames Realty Co.*, 61 Mont. 152 (1921).

71. *Id.* at 170–71.

V. DISCUSSION

These cases display a number of factors that constrained or influenced the decisions of the Montana Supreme Court when rights under the riparian doctrine would have conflicted with water rights under the prior appropriation doctrine. Just as territorial, state, and federal statutes influenced the court, so too did the existing practices of settlers along the frontier, based in the economic realities created by the unique topography and aridity of the West. Operating within these constraints, the court slowly reconciled the conflicting doctrines until prior appropriation carried the day in law as well as in practice.

First of all, the statutes that the Montana territorial and state legislatures passed regarding the disposition of water rights unsurprisingly played a large role in the court's treatment of disputes that emerged surrounding claims to water.⁷² Every case we analyze, in detail, contains a reference to the statutory backdrop governing these claims. However, as our analysis displays, the statutes more often created confusion than provided clear guidance to the court as to how to handle claims emerging from conflicting water-rights doctrines. Nonetheless, animated by a desire to avoid overt legal conflict, the court took the existing statutory requirements seriously when balancing the different statutes whose conflicting requirements did not provide sufficient guidance to water users in Montana.

72. For example, the court in *Bailey* tried to briefly summarize the existing statutes governing water within the state:

In 1870 our legislature passed an Act (Laws 1869–1870, p. 57) which apparently undertook to limit the right to appropriate water for irrigation purposes to persons or corporations having title to, or possession of, agricultural lands. (Tucker v. Jones, 8 Mont. 225, 19 Pac. 571.) The act recognized the rights acquired or to be acquired under the rules and customs of the early settlers; but there was not any attempt made to prescribe any other method by which such rights might be secured. By an act of February 1877, the right of a person or association of persons or a corporation to appropriate water to sell, rent, or otherwise dispose to others was authorized. In 1885, however, there was a distinct departure made by the Legislature in enacting a statute under the title, “An act relating to water rights.” These several acts were carried forward in the compilation of 1887, as chapter 74, Fifth Division, Compiled Statutes, and with some modifications into the Civil Code of 1895, as title 8, division 2, part 4; and again, with slight amendments and additions, into the Revised Codes of 1907, as sections 4840–4891, and now constitute the law of appropriation of water so far as controlled by legislation. *Bailey v. Tintinger*, 45 Mont. 154, 166–67 (1912).

Second, the cases clearly display the court's deference to the common law, which the Montana territorial legislature adopted in 1865. Due to the legislature not clearly abrogating the riparian doctrine (if this had even been the intent of the legislature, given their unclear statutory treatment of water law in 1865), the Montana Supreme Court wrestled with how to square a common-law requirement for riparian water rights with federal and territorial statutes that referred to elements of the prior appropriation doctrine. For example, in *Thorp v. Freed*, the rigorous debate between Justice Knowles and Justice Wade on the application of the Bannack Statutes exposes the court's difficulty in squaring conflicting water-rights doctrines. Justice Knowles's opinion supports the notion that the legislative intent was to create the right to prior appropriation.⁷³ On the other hand, Justice Wade argued in his opposing opinion that the Bannack Statutes demand "equal distribution of the waters of a stream among all the parties concerned in such waters."⁷⁴ This juxtaposition between the two justices' opinions as to the appropriate way to interpret the requirements of the Bannack Statutes highlights the difficulty inherent in squaring conflicting elements of water rights under unclear statutory requirements. Years later, in *Smith v. Denniff*, the court again wrestled with the interpretation of the riparian doctrine within the confines of existing prior appropriative requirements. The court in *Smith* actually went to great lengths to square the riparian doctrine with prior appropriation rights granted by statute, construing the riparian right holder to be the state or federal government, whose permission to appropriate water was the equivalent of transferring the riparian right to the prior appropriator who did not own land on the banks of a water source.⁷⁵

73. This statute, as far as it could, established and recognized the right of appropriation of water for agricultural purposes If it is claimed that this statute does not recognize the doctrine of "prior in time, prior in right," the answer to this is, that when the law gives a man the right to divert water from a stream to irrigate his land to the full extent of the soil thereof, and in pursuance of this law he goes and digs a ditch, or constructs machinery for the purpose of taking water from a stream for this purpose at a great expense, the principles of equity come in and say that no other man can come in and divert this water away from him. That he is prior in time in availing himself of the benefits of such a statute, and his rights are prior to any subsequent appropriator.

Thorp v. Freed, 1 Mont. 651, 657 (1872).

74. *Id.* at. 668.

75. "[Person] A. has absolute title in fee to riparian land. Under the statutes of Montana he is clothed with the right, by compliance with the provisions of the statute, to appropriate

It is also quite clear from the case law that the incompatibility of federal lands with the riparian doctrine influenced the court's definition of water law in Montana. As early as 1870, the court noted how

[t]here are many reasons for holding that this very statute recognizes or establishes the doctrine of appropriation of water for irrigation, *limiting, however, the right to appropriate to persons owning land* upon the banks of the stream from which the same is taken, and also limiting the quantity of water he can appropriate to what is necessary to irrigate his land.⁷⁶

This indicates that although the common law and statutes created a legal conflict surrounding rights to water on private lands, the prior appropriation doctrine had legal influence within the territory and state from 1865 onwards, due to the incompatibility of riparian rights with federal land uses that did not grant title of the land itself to the natural-resource user. This tension appears again in *Smith v. Denniff*, when the court ultimately interpreted the state and federal governments as the riparian rights holders on all lands that had not passed into private hands; any water appropriated on such property to irrigate lands further away necessarily made subsequent upstream, riparian-rights claims subservient to it.⁷⁷ Furthermore, federal law afforded some recognition of customary practices that had existed prior to federal, territorial, or state statutory treatment of water rights on lands in the arid West, due to the reality that people had settled on federal land as trespassers long before federal land law caught up to the realities on the ground. This meant that the prevalence of prior appropriation as a customary practice played a role beyond the court's recognition of the practice; the very nature of claims brought before the court, often emanating from claims to water on public lands, partially determined the predominant doctrine within the state.

The cases we survey above where the two doctrines were given explicit consideration by the court also display the concerns of economic efficiency and the specific demands of productive activity in

a water right, subject, of course, to the vested rights of prior appropriators." *Smith v. Denniff*, 24 Mont. 20, 24–28 (1900).

76. *Thorp v. Woolman*, 1 Mont. 168, 171 (1870) (emphasis added).

77. *Smith v. Denniff*, 24 Mont. 20, 25 (1900).

the dry and rugged, arid West, which have long been argued to have led to the emergence of the prior appropriation doctrine. The court's early arguments in favor of the prior appropriation doctrine were typically justified through an appeal to equity.⁷⁸ However, even at these early stages the court recognized that the unique climate, topography, economic efficiency, and legal certainty of the state were critically important in animating the characterization of prior appropriation, while simultaneously being faithful to the principles of equity.⁷⁹ Recognition of the value of water to economic pursuits along the frontier persists throughout the period we survey,⁸⁰ and the court closes the period in which the riparian doctrine tenuously existed with a clear appeal to both the economic and climactic arguments, as underlying the fundamental preference for the prior appropriation doctrine in the arid West.⁸¹

78. Any tribunal, governed by the established principles of law, making an apportionment of water in accordance with what is just and equitable, would be compelled to hold that the one who first located the land, and claimed the water, was entitled to sufficient to irrigate his land; for equity declares that he who is first in time is first in right.

Thorp v. Woolman, 1 Mont. 168, 171–72 (1870).

If we were called upon to say what were the necessities of this country, in regard to the use of water for the purposes of irrigation, we should reply that there was a demand that water should be used for that purpose, and that the considerations of the general welfare of the country and the principles of natural equity should guaranty to the prior appropriation of water for such use the first right to the use of the same, to the extent of his necessities for domestic purposes, the quenching of the thirst of himself or animals, and for agricultural purposes.

Thorp v. Freed, 1 Mont. 651, 654–55 (1872).

79. Surely the climatic and physical conditions of this country cannot be such as to create a law so at variance with natural equity and so fatal to the improvement and prosperity of our best agricultural districts. It must be apparent to all that the best agricultural lands in this Territory are not at the sources of the streams.

Thorp v. Freed, 1 Mont 651, 654 (1872).

80. The opinions in both *Haggin* and *Smith* highlight how the beneficial-use requirement was tied to productive economic activity. *Smith v. Denniff*, 24 Mont. 20, 29–30 (1900); *Haggin v. Saile*, 23 Mont. 371, 380 (1899). Furthermore, the decision in *Smith* rested in part on the right of a given right holder to sell to another who proceeded to put the water to a different beneficial use, a principle designed to increase the likelihood that water was being applied to its highest-valued uses. *Bailey* also displays these considerations, in that the case distinguishes the right to water—as vesting with irrigation companies—upon the time of completion of irrigation-ditch construction, not at the time water was actually put to beneficial use, as was the case in a number of other western states. *Bailey v. Tintinger*, 45 Mont. 154, 164–65 (1912).

81. [T]he common-law doctrine of riparian rights is unsuited to the conditions prevailing in the arid or semiarid states of the Rocky Mountain region, and for

Out of sixty-one years of jurisprudence defining water doctrine in Montana, only six of 109 cases treat riparian rights to the extent of defining them or their interaction with other statutory requirements or customary practices. *Mettler* also directly indicates that it took until a drought in 1919 for a riparian right to come into direct conflict with a prior appropriation right.⁸² In comparison to the extensive amount of clarification that the prior appropriation doctrine required,⁸³ riparian rights did not appear to have generated significant controversy within the state and never required treatment beyond the cases we analyze in detail, here. The notion that difficult cases are much more likely to make it to the highest court of a given jurisdiction⁸⁴ further supports our interpretation that water rights holders within the State of Montana very infrequently operated under the assumption that they had riparian rights to water. Unfortunately, the lower-court record upon which the cases were determined is not available for our analysis. Thus, we are unable to examine the question of whether claimants appear to have believed in good faith that they had a riparian right to the water, or if they

that reason, never prevailed, or, if ever recognized, was thereafter repudiated, and therefore neither the United States nor the patentee has such rights, and that it is competent for any state so situated to adopt the doctrine of appropriation as the only means through which the beneficial use of water flowing in the natural streams may be enjoined, and that the appropriator derives his right from the state in the exercise of local sovereignty.

Mettler v. Ames Realty Co., 61 Mont. 152, 161 (1921).

82. *Id.* at. 157

83. The Montana jurisprudence begins by defining the basic canons of prior appropriation rights to appropriate waters governed by the Bannack statutes. *Tucker v. Jones*, 8 Mont. 225 (1888); *Thorp v. Woolman*, 1 Mont. 168 (1870). The court later held that dates of appropriation are determined by the earliest appropriator. *Columbia Mining Co. v. Holter*, 1 Mont. 296 (1871). The court also held that appropriations can be made for mining purposes. *Taylor v. Stewart*, 1 Mont. 316 (1871). The court also held the concepts of abandonment. *Gassert v. Noyes*, 18 Mont. 216 (1896); *Middle Creek Ditch Co. v. Henley*, 15 Mont. 558 (1895); *Atchison v. Peterson*, 1 Mont. 561 (1872). Similarly, the centrality of irrigation to productive use of water in Montana meant that over the same period, the court defined a variety of legal principles related irrigation under prior appropriation. The court held that change of diversion cannot deprive subsequent appropriators. *Gassert v. Noyes*, 18 Mont. 216 (1896). Congruently, the right of way has been recognized by the Constitution of the State of Montana and the compiled statutes of 1887. *Glass v. Basin Mining & Concentrating Co.*, 22 Mont. 151 (1899); *Ellinghouse v. Taylor*, 19 Mont. 462 (1897). Lastly, the court defined an appurtenance as anything used and related to the thing to which it appended. *Hays v. Buzzard*, 31 Mont. 74 (1904); *Donnell v. Humphreys*, 1 Mont. 518 (1872).

84. See Arthur Corbin, *Hard Cases Make Good Law*, 33 YALE L.J. 78 (1923); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1109 (1975).

raised the claim opportunistically because of the ambiguity created by Montana's statutory and case-law precedent.

Furthermore, a doctrine like riparian rights to water would have required significant clarification in an arid state like Montana, given the impossibility of productive uses along a watercourse never interfering with one another, especially in times of drought. A dearth of cases treating riparian rights indicates water claimants self-selected into prior appropriation. This supports the arguments surrounding the comparative economic efficiency of prior appropriation given the scarce nature of water in the West and the need for allocative certainty, which was required by the high coordination and investment costs of irrigation projects. This suggests there were significant gains to coordinating a rights regime in an environment where self-definition and self-enforcement of property was at least partially the norm.

In summary, a comprehensive picture of the disposition of water-rights claims early in Montana's history requires an understanding of the variety of factors that constrained or influenced the supreme court of Montana as it adjudicated these claims. First, the court was constrained by federal law governing the disposition of public resources and lands as well as the statutory backdrop created by the territorial and state legislatures. Notably, this statutory backdrop included the adoption of the common law, which contained the riparian doctrine, whose incompatibility with public land uses influenced the development of the relevant case law. Similarly, given the unique climate and topography of the arid West, concerns of equity and economic efficiency also animated the court as it navigated potentially conflicting doctrines in light of the facts of each case. The court's deference to the common law alongside statutory requirements created a doctrine of water rights that in practice was defined by both the court's gradual reconciliation of legal conflict as well as coordination among water users themselves around the doctrine of prior appropriation. These dual means of doctrinal development are both apparent in the Territory and State's supreme court water-rights jurisprudence throughout the period we have surveyed.

CONCLUSION

The territory and State of Montana was confronted with an institutional problem similar to that facing many arid, western states: the riparian doctrine was simply incompatible with realities in the

West and so was modified or abrogated entirely in favor of the prior appropriation doctrine. Our analysis of case law from the supreme court of Montana supports this contention. In the context of Montana, both prevailing explanations for the abandonment of the riparian doctrine are apparent. The doctrine was incompatible with pre-existing and predominant uses of public lands, given that these lands were already governed by prior appropriation in a de facto sense and given that title to public lands did not pass to mineral claimants, a requisite for the application of the riparian doctrine. Furthermore, the riparian doctrine was ill suited to an area where water was sufficiently scarce such that all participants could not use water without detracting significantly from the uses of other, competing settlers. However, unlike some western states, Montana did not settle definitely upon the prior appropriation doctrine until 1921; in the interim, the court was presented with a muddied set of statutory and case law that forced it to repeatedly consider the conflict between the water-rights doctrines. In resolving cases in a manner faithful to statutory intent, equitable resolution for the interests of the participants, and the canon of avoidance of legal conflict, the court slowly removed core components of the riparian doctrine until prior appropriation was the de facto law of the land. It was only after the conclusion of this process that the court abrogated the riparian doctrine entirely.

The Montana example carries a number of lessons regarding the development of property rights along frontiers. The case law clearly displays how scarcity drives changes in property rights, for a number of the cases we analyze in detail were only brought to court once a drought made two competing settlers' uses of water incompatible. Also, unclear or internally inconsistent statutes can take a long time to unravel, for the court ultimately took sixty-one years to whittle away at the riparian doctrine before abrogating it, something the legislature of the Montana Territory could have done at the outset in 1865. Similarly, even when directly indicative of avoidance of legal conflict, judicial reconciliation of conflicting law can ultimately rewrite the law itself. In cases where this conflict emerged, the court slowly removed components of the riparian doctrine in the face of the hard truth that not every landowner in the territory and state could use water in a way that did not detract from others' uses. Finally, our analysis of the entirety of the case law treating water

rights from 1865 to 1921 suggests that participants along frontiers can directly influence the definition of the law through their choices within a context of doctrinal ambiguity. The vast majority of disputes treating water rights that made it to the supreme court of Montana required clarification of the prior appropriation doctrine, as opposed to reconciliation between the competing riparian and prior appropriation doctrines.

Thus, our analysis is situated in a historical context that sheds light on a number of questions of interest to legal scholars. The Montana Supreme Court's treatment of water law over sixty-one years displays elements of both legal-formalist and legal-realist understandings in the development of law. The letter of federal law clearly influenced the development of water law through the court's recognition of the incompatibility of public lands with the riparian doctrine. The federal law (and conflicting state statutory treatment) had an effect but ultimately fell to the comparative prevalence of use of one doctrine over another. Similarly, the court repeatedly recognized arguments taking into account the comparative scarcity of water in the West and how the riparian doctrine was insufficient to resolve claims surrounding competing uses of water when there was not enough water to go around. In sum, both institutional and economic explanations for the emergence of the prior appropriation doctrine hold water in Montana.