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## Title to state water rights not secure unless vested water rights owned

Friday, February 29, 2008 1:45 PM MST

To the editor:

The Montana Water Users Act of 1973 does not recognize vested water rights.

Montana was one of the territories where settlement law was based on Mexican law. The courts have said Mexican law resembled the law of prior appropriation and not riparian law.

The federal Congress codified the split-estate prior possession (prior appropriation) doctrine with the Act of 1866 and following Confirmatory acts of Congress such as those granting the Act of 1866 and the Livestock Reservoir Act of 1897 it had the same effect as the issuance of a patent.

These all recognized acquisition of private rights on federal land. The water rights were recognized as "vested and accrued" and the Interior Decision Arizona states the vested water rights is its own estate.

Interior Board of Land Appeals decision, A.T. West and Sons said clearly that whenever federal land is withdrawn or disposed of and there are vested or accrued water rights, there must remain sufficient easement for the exercise of that right.

The United State Supreme Court in several cases has stood by the legal definition that, "It is well settled that all lands to which rights or claims of another have attached is not public land."

Montana was the last prior appropriation doctrine state to pass permitting law and unlike the other states that had pre-existing water rights recognized as vested, the water use act merely offered statements of claim or exempt.

The "exempt" will not show up on a basin decree and there will be no court to go to if for example, the BLM filed for stockwater and wildlife rights court will assume all parties agree with the law.

If private vested water rights are lost, it will not be considered a takings because there was no action to challenge the Montana Water Users Act as to

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whether it retro-actively destroyed vested water rights and denied due process.

The State of Montana Natural Resource Information System provides a way to check by legal description what water rights are filed.

By going to [www.nirs.mt.gov](http://www.nirs.mt.gov) and selecting Interactive map, township and range and the water tab, it is possible to see what water rights are on file for that legal description.

The Bureau of Land Management has filed for stockwater rights using a beginning priority date of 1934. In spite of the United States Supreme Court ruling in *U.S. vs. New Mexico*, in which the court held under that Prior Appropriation Doctrine, stockwater rights on federal land belongs to the stock permittee and federal agencies cannot hold stockwater rights.

The agency did not at that point pull those earlier filing sand has continued with that practice.

Idaho, which is also a prior appropriation doctrine state, last year had an Idaho Supreme Court ruling that also upheld the rancher's ownership of vested stockwater rights and the denial of ownership by the federal government.

The agency has also filed wildlife water right claims even though the ownership of wildlife may not be in the federal government as the appropriative right is based on who actually puts the water to beneficial use. The BLM didn't have a mandate to manage wildlife until the Federal Land Policy Management Act of October 1976.

Any priority dates for wildlife should not pre-date that and in any event, the rancher's vested stockwater rights make the rancher the senior water right holder. It's interesting to note that when the BLM has filed dual claims, the stockwater amount is usually less than the wildlife. The two together usually account for the whole volume in an impoundment.

Since the U.S. Supreme Court had already ruled on the issue of stockwater rights, the rancher could file an "Estoppel by Judgement" in the Water Court to have those federal stockwater claims dismissed. If these claims are not objected to, the BLM will come out with default decrees, and the rancher will have lost those all important senior vested stockwater rights.

If you would like to prove your land title back to the original patents, the easiest way to get a copy of the U.S. Geological Survey maps. These are the maps that hunters use.

Draw around your boundaries, and then, draw an arrow to the patented parcels and on that line write the name of the patentee.

Trace the documents from the latest document showing your title of ownership by following the chain of transactions listed in the township plat book back to the land patent recorded in the courthouse records.

General land office records such as certified land patents may be obtained by ordering on [www.glorerecords.blm.gov](http://www.glorerecords.blm.gov) and obtaining the case entry file records that go with the land patent.

To secure the rights in the land that was granted by the government to the original patentee, it is necessary to file a declaration of a land patent.

The issuance of a patent served two purposes: to convey title not just to land, but to water rights as well, and to adjudicate or quiet title the rights of the



patentee.

Any form of deed is color of title to real estate and not only the land patent is perfect and indefeasible title: good even against the government. The chain of title, including the declaration of land patent, is known as an "offer of proof."

Maxine Korman

WIFE member

Hinsdale, Mont.

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