THE EMERGENCE AND EVOLUTION - OF THE PRIOR APPROPRIATION DOCTRINE.

It is estimated that between 1840 and 1860 there were over 284,000 people that crossed the plains destined for Utah, Oregon and California. These people did not risk life and limb crossing the plains and settling the untamed lands without being confident that their claims would be recognized. The United State wanted these lands settled, and so did Mexico, and so did Great Briton.

It was generally recognized, that who ever was to settle these lands should claim them. And so, out of this situation, of competition between nations,1 of people finding themselves in a region where no formal government existed, came new doctrines of property recognition and social organization, not unlike that envisioned by John Locke.2

And nowhere were these new doctrines more fully expressed and developed then in the gold fields of California.

In his book, MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT, Charles Shinn wrote:

> [With] the discovery of gold in California, thousands of miners soon assembled in the foothills of the Sierra Nevadas over a very short period of time; and were soon forced, by lack of Territorial and State government, to organize for common-interest,

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--1. For a period of time in the late 1700's, it was common for citizens to petition Congress for right of preemption. Many pleaded for relief from being forced to purchase lands from "greedy capitalists", but others declared that the signers might have to abandon American territory and seek land in Spanish dominions unless preemption privileges were extended them. see *American State Papers, Public Lands, I, 68, 111, 163, 201; III, 122 ff; Annals of Congress, 5th Cong., 1st sess., Dec, 24, 1799, p. 210.*

--2. John Locke, in *The Second Treatise of Government,* wrote, "Of Property":

Though the Earth and all inferior Creatures be common to all Man, yet every Man has a Property in his own person. This no Body has any Right to but himself. The Labor of his Body and Work of his Hands, we may say are properly his. Whatsoever, then, he removes out of the State that Nature hath provided and left it in, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by his Labor something annexed to it that excludes the common rights of other Men.

and to enact and execute their own civil and criminal codes... Bayard Taylor was an appreciative observer of the Camps, which had in effect become the legal entities of the region. In describing their political features he wrote:

> "The disposition to maintain order, and secure the rights of all men, were shown throughout the mining-districts. In the absence of law, the people met, and adopted rules for mutual security... Alcaldes were elected, who had power to decide all disputes or complaints, and summon juries. When a new placer was discovered, the first thing done was to elect officers"...
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> Springfield District, whose leaders were men of New England, trained in town-meetings and local self-government, adopted a written document in 1852 which read:
>
> "That California, is and shall be, governed by American principles; and as Congress has made no rules and regulations for the government of the mining-districts of the same, and as the State legislature of California has provided by statue, and accorded to the miners of the United States, the right of making all laws, rules, or regulations that do not conflict with the constitution and laws of California, in all actions respecting mining-claims; therefore we, the miners of Springfield District, do ordain and establish the following rules and regulations."

In a land where no legal surveys existed a variety of new rules emerged, establishing the manner in which claims were to be staked, the doctrine of first use, first right, doctrines that eventually spread to other territories, and other states, that gained recognition from Territorial and State legislatures, from Congress, and from the Supreme Court.

On July the 26th, 1866, Congress recognized the possessory rights of the pioneers and settlers that had been acquired under local customs, laws and decisions of the Courts. Justice Sutherland, (who was from Utah and had an intimate knowledge of the West), Writing for the United States Supreme Court in the case, *California, Oregon Power Co. v. Beaver Portland Cement Co.* wrote:

> "In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes.
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> These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes from the raw elements about them, and threw down the gage of battle

to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and transformed dry and desolate lands into green fields and leafy orchards.

In the success of that effort, the general government itself was greatly concerned - not only because, as owner, it was charged through Congress with the duty of disposing of the lands, but because the settlement and development of the country in which the lands lay was highly desirable." *California, Oregon Power Co. v. Beaver Portland Cement Co.* (1935) at 145, 158.

Justice Stephen Field, writing for the United States Supreme Court in the case of *Jennison v. Kirk* (1879) recognized the development of Local Laws governing and defining property, he wrote:

"The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturist and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years - from 1848 to 1866 - the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Jennison v. Kirk, p. 458 Cited with approval; in *Jones v. Adams* p. 87.

Justice Fild went on to say "That the general purpose of the [1866] Act... was to give the sanction of government to possessory rights acquired under the local customs, laws, and decisions of the courts."

OTHER RIGHTS RECOGNIZED.

Although the recognition or sanction of existing rights of possession under the 1866 Act applied only to mining, water, homesteading, ditch rights-of-ways, and road rights-of-ways, the 1866 Act did establish precedence for recognition of other rights as well.

In his book, Golden Fleece in Nevada, Judge Clel Georgetta described the "prior appropriation doctrine" and its relationship to grazing upon the public lands of Nevada as follows:

> "In the early days a man claimed absolute ownership by "Squatters Right" to all the land he had fenced, as related in earlier chapters or this book. He also claimed the open range his livestock ran on through the doctrine of "Vested Rights." In Nevada, before the coming of the "bureaucrats" to administer the Taylor Grazing Act, water controlled the land. On the "summer range," a man said he had "appropriated" all the water sources his livestock drank from. If a stream ran down a canyon he claimed the watering rights on that stream. and no other man had the right to water his livestock there. ...The water belonged to him because he was there first and had "appropriated" it. Thus grew up in the West, what came to be known as the "Appropriation Doctrine," later put into written law by statute. The same Appropriation Doctrine applied to a stream of water a man had used for irrigation... In 1899 the Nevada Legislature passed an act (Statutes of Nevada 1899 Chapter 97 page 115), which recognized and protected a "vested right" in all water beneficially used prior to that date..."

Later in 1925, the Nevada Legislature enacted what came to be called "The Three Mile Law," which reads:

> Sec. 2. Whenever one or more persons shall have a subsisting right to water range livestock at a particular place, and in sufficient numbers to utilize substantially all that portion of the public range readily available to livestock watering at that place, no appropriation of water from either the same or a different source shall subsequently be made by another for the purpose of watering range livestock in such numbers and in such proximity to the water place first mentioned, as to enable the proposed appropriator to deprive the owner or owners of the existing water right of the grazing use of said portion of the public range, or to substantially interfere with or impair the value of such grazing use and of such water right."

And Section 4. reads:

> "Any person who, without the right so to do, shall on two or more separate days during any season, water more than fifty head of livestock at the watering place at which another shall have a subsisting right to water more than fifty head of livestock, or within three miles of such place, with the intent to graze the livestock so watered on the portion of the public range readily accessible to livestock watering at the watering place of such other person, shall be guilty of a misdemeanor..."

And the last paragraph of Section 6. reads:

> "The term "public range" as used herein means all lands belonging to the United States, and or to the State of Nevada, on which live stock are permitted to graze, including lands set apart as national forests and lands reserved for other purposes."

And then again in 1931, the State of Nevada reaffirmed its recognition of the rights of grazers, when the State Legislature pass Chap 226:

> "An Act relating to and requiring the grazing of livestock on public lands of the United States in the State of Nevada, protecting customary grazing uses thereon, making certain acts unlawful, and prescribing penalties and liabilities for violations of the act."

Section 1. of Chapter 226, or NRS 568.230 reads:

> It shall be unlawful to graze livestock on any part of the unreserved and unappropriated public lands of the United States in the State of Nevada, when such grazing will or does prevent, restrict or interfere with the customary use of such land for grazing livestock by any person who, by himself or his grantors or predecessors, shall have become established, either exclusively or in common with others, in the grazing use of such lands by operation of law or under and in accordance with the customs of the grazers of the region involved;..."

Although the rights of grazers were not recognized in the Act of July 26th 1866, they were recognized by state law, and in turn were sanctioned by Congress.

An example of this is the Act of May 23, 1908, 35 Stat. wherein it is stated: "...officials of the Forest Service designated by the Secretary of Agriculture shall, in all ways practicable, aid in the enforcement of laws of the States or Territories with regard to Stock, for the prevention and extinguishment of forest fires, and for the protection of fish and game...".

The United States Supreme Court has held in the race horse case that the police powers of the state of Wyoming over its game laws are superior to the solemn treaty rights between Congress and the Indians made before Wyoming was admitted into the Union. Mr. Justice White, who delivered the opinion of the Court, (Ward v. Race Horse, 163 U.S. 504) held that the act of Congress making a state of Wyoming "called into being a sovereign state, a necessary incident of whose authority was the complete power to regulate the

killing of game within its boarders." He places the game law on the same footing with the state stock law," providing for pasturage on the lands," and he says that the game law was "passed in the undoubted exercise of its municipal authority." He quotes with approval the statement of Mr. Justice Field, as follows:

> "But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people." (*Escanaba Co. vs. Chicago*, 107 U.S. 678.)

THE NATURE OF GRAZING RIGHTS.

"Grazing rights" are of the same nature as "water rights", both grew out of the necessity for survival. Whereas the economic success of raising crops west of the 100th meridian is dependent on irrigation, so too, in the arid regions of the West commercial success in the livestock industry requires that sheep and cattle be run on the public range.

While these rights may not confer any title or estate in the land, such rights are subjects of equitable protection - perhaps more accurately described as a usufructuary right.

In a paper presented in Sparks, Nevada on Nov. 3, 1990, Harry W. Swainston explained the usufruct nature of water rights.

> One of the first principles of water law as stated by one of the early western scholars of the subject, Samuel C. Wiel, is that the running water of a stream is, as a corpus, the property of no one - expressed according to common law and civil law sources as being in the "negative community", "common", "publici juris", "the property of the public", or the property of the State in trust for the people." *Wiel, S. C., "Water Rights In The Western States"*, 3d ed., vol. 1. Sec. 63 (1911).
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> Most western state statutes or state constitutions contain statements to this effect. Generally speaking, as far as state regulation and control of the actual use of flowing waters is concerned, the private ownership in the corpus of the water does not exist. The private right to capture, possess, and beneficially use the public waters does exist and is protected by law. These rights of capture and use are known as "water rights". A water right is a right to the use of water, accorded by law. See National Reclamation Association, "Desirable Principles of State Water Legislation", p. 2 (1946). The right to use the water is generally known as a usufructuary right to distinguish the right to an ownership of the fluid itself.

In *Red Canyon Sheep Co. v. Ickes*, 98 F. 2d. 308, 69 App D. C. 27, the Court expressed a similar comparison:

> "We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress. ..."
>
> "There are well known situations where equitable protection is accorded to rights or interest which do not come within the category of vested interests in property. Among these are cases involving water rights, both the rights recognied under the rule of prior appropriation in the Western states and riparian rights. While the owner of a water right has a vested interest in that right, the right itself is something less than the full ownership of property because it is a right not to the corpus of the water but to the use of the water. *Gunnison Irrigation Co. v. Gunnison Highland Canal Co.* 52 Utah 347 p. 852 (1918)."

It is not that grazing rights do not have parameters. As water rights can be canceled for non-use or abandonment, so are grazing rights subject to cancellation for non use, or for the protection of resources.

IT WAS NOT THE INTENT OF CONGRESS TO ABRIDGE EXISTING RIGHTS.

Section 1 of the Taylor Grazing Act reads; "Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands..."

Section 701 (a), of the Federal Land Policy and Management Act, FLPMA, reads; "Nothing in this Act, or any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." And then again, under (h) of the same section 702, it is stated; "All actions by the Secretary concerned under this Act shall be subject to valid existing rights."

The "Wilderness Act" of July 2, 1964, also recognizes existing rights, under Section 4 (c) it states; "...subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area..." And under (d) (2), it is stated; "the grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue..."

Forest Service regulations also recognize existing rights; 36 CFR 313.3 (b) reads; Existing valid rights, reservations easements, leases, permits, agreements, contracts and memoranda of understanding affecting these lands shall continue in full force and effect so long as they remain valid in accordance with the terms thereof.

And 36 CFR 219.10 reads; *Plan implementation*. As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights, all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan.

Valid existing rights included many things. Unlike the conditions that existed east of the Mississippi where rainfall was abundant and crops did not have to be irrigated, water in the West was critically important. So too was the right to use "wood, stone gravel and clay" found on the public lands. Over much of the West there was no timber. Homes, corrals, and outbuilding were made of whatever material was available, be it adobe, rock, or quaking aspen poles. In the State of Nevada, between 1880 and 1960, juniper post were cut and hauled from the public lands by the thousands, upon thousands - not only for the purpose of fencing the private lands, but also for the division of the range.

Miners too were recognized as having the right to use the native materials wherever they were found upon the public lands - to shore up their drifts and tunnels - and for homes or whatever was needed. And in the Fall of the year, the people in town, and people on ranches, everyone, went out upon the public lands to gather their yearly supply of wood.

We citizens continue to make use of these resources. Even today, with the exception of wire and steel post, all of the materials used for fencing and correl building come from the public lands. And when we pour concrete we use sand and gravel from local gravel pits, located on the public lands. And we continue to use clay and wood found the public lands.

And the rights of the people to the use of these things are recognized. The "Organic Administration Act" of 1897, 16 U.S.C. 477, reads:

> "The Secretary may permit, under regulations to be prescribed by him, the use of timber and stone found upon national forests, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such national forests may be

located."

These provisions remain on the books today, 36 CFR 223.5 reads:

> "Free use may be granted to individuals for firewood for personal use, except that such use may be limited to bona fide settlers, miners, residents and prospectors living within or immediately adjacent to the National Forest when the available supply is insufficient to meet the total demand. Free use may be granted to such bona fide settlers, miners, residents and prospectors for minerals, for fencing, building, mining, prospecting and domestic purposes."
>
> Section 5. of the Taylor Grazing Act reads; "...nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, building, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act."

Another right recognized is the right to hunt and fish. Within the last portion of Section 1, of the Taylor Grazing Act it is stated; "Nothing in this Act shall be construed as in any way altering or restricting the right to hunt of fish..." Section 302 (b) of the Federal Lands Management Act reads; "...nothing in this Act shall be construed as authorizing the Secretary concerned to require federal permits to hunt and fish on pubic lands or on lands in the National Forest System..." And under special provisions (4) - (8) of the 1964 Wilderness Act, it is stated; "To the extent that is not incompatible with wilderness preservation, the Secretary of Agriculture shall in national forest wilderness areas designated by this Act, permit hunting and fishing."

It was never the intent of Congress to exclude the citizens of the western states of the right to the use of the resources within their communities. Congress wanted the West settled, they wanted the people to prosper, and they recognized that conditions were different in the West. And so new doctrines pertaining to land use practice did emerge, and they were encouraged - doctrines that encouraged mining and ranching and mineral exploration - and they did encourage the people to be build roads and highways - and they did encourage ranching and the practice of public land grazing.

And if successful settlement meant that the people should have the right to the free use of the water, wood, stone, gravel, and clay found upon the public lands, then so be it. And when roads and ditches were needed for successful mining and agricultural practices they too were recognized.

Perhaps one of the best decisions written explaining the important relationships of various rights as they existed on the public lands was that written by District Judge Peirson M. Hall in

the case, *United States v. 9,947.71 Acres of Land*, which discussion follows:

> "...when the government granted mining rights on the vast mountainous, and often impassable, areas of the West which were in public domain, accessible only by passing over the public domain, it granted, as a necessary corollary to mining rights, the right not only to pass over the public domain but also a property right to the continued use of such roadway or trail, once it was established and used for that purpose. To realize the force of the proposition just stated, one need but to raise their eyes, when traveling through the West to see the innumerable roads and trails that lead off, and on, through the public domain, in the wilderness where some prospector has found a stake (or broke his heart) or a homesteader has found the valley of his dreams and laboriously and sometimes at very great expense built a road to conform to the terrain, and which in many instances is the only possible surface access to the property by vehicles required to haul heavy equipment, supplies and machinery."
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> "If the builders of such roads to property surrounded by the public domain had only a right thereto revocable at the will of the government, and had no property right to maintain and use them after the roads were once built, then the rights granted for development and settlement of the public domain, whether for mining, homesteading, townsite, mill sites, lumbering or other uses, would have been a delusion and a cruel and empty vision, inasmuch as the claim would be lost by loss of access, as well as the investment therein, which in many cases of mines required large sums of money, before a return could be had."

IT WAS THE INTENT OF THE TAYLOR GRAZING ACT TO PROTECT THE RIGHTS OF GRAZERS.

The primary purpose of the Taylor Grazing Act was "To stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; [AND] <u>to stabilize the livestock industry dependent upon the public range</u>".

During the Congressional debate leading up to the passage of the Taylor Grazing Act, there was extensive debate over the alleged overgrazing of the public lands. Many of the Western representatives believed that there was no need for federal management, that the grazing use of the public lands had already been adjudicated, and that in reality it was only the bureaucrats that wanted the legislation passed.

In testimony before committee, Senator Pittman stated that "in Nevada under state laws controlling water, stockmen [had] districted the state so as to prevent overgrazing by one man overrunning another man's range." He said:

> "And it has been working out quite satisfactorily. Quite naturally, after years of working out this same process to protect the ranges our stockmen are very uneasy about disturbing a condition they have so successfully met after years and years of effort and quite considerable litigation."

What Senator Pittman was referring to was the two state statutes passed in 1925 and 1931, providing for the recognition of water rights on public lands, the rights of such right holders to the use of all grazing within three miles of that water.

But such testimony as that of Senator Pittman did not sway agency heads. They were determined that the western public lands were to come under their management; sighting at every opportunity the great need for federal management to stop "overgrazing" and "excessive soil erosion". The primary proponents were; Fred Johnson, Commissioner of the General Land Office in the Department of Interior; Herman Stabler, of the Geological Survey; E. A. Rockford, Assistant Forester; R. G. Pool, Assistant Solicitor of the Department of Interior, and Harold Ickes, Secretary of the Interior.

Congressman Ayers of Montana objected to such allegations. Before the House committee of Public Lands, he testified:

> "Mr. Chairman, the sheep barons and cattle kings and the greedy destroyers of the Public Domain exist only in the imagination of this bureaucratic setup, and the people who have made more money off the livestock industry than the livestock man himself... This bill gives the Secretary practically dictatorship over our livestock industry of the west and can be compared to the dictatorship of Russia. It gives him power that rightfully belongs to the States... "This bill is federalism in the extreme... The only persons who would benefit from this legislation is a bunch of bureaucrats here in Washington who have taken it upon themselves the task of seeing how much more power they can get".

Congressman Scragham from Nevada testified:

> "Yes, I have seen every one of those 110,000 square miles of the public domain in my State. I have been over a great deal of it on foot or on horseback. I have seen it from an automobile and an airplane. I have seen personally every square mile and I know what I am talking about. What has been

presented here as facts are merely the options of those in the various bureaus in Washington who seek to create another gigantic bureau at an expense of some two millions of dollars that will be saddled on the taxpayer".

And Congressman Carter from Wyoming testified:

> "Mr. Chairman, and Gentlemen of the Committee, I appear here in opposition to H.R. 6462, [The Taylor Grazing Act]... It is clothed in highly perfumed and sugarcoated words to deceive the true intent and purpose of the bill. The title should read: 'A bill to take away from the livestock industry of the west the free use of 173,000,000 acres of public domain, abolish the 640-acre homestead and the Desert Entry laws, and retard the political and economic growth of the west'... On December 23 last, Secretary Ickes, [of the Department of Interior] by way of interview, had an article in the Saturday Evening Post entitled "The National Domain", in which he stated that he would be for this bill provided certain changes were made. Then on January 5, less than two weeks later, the gentleman from Colorado, [Mr. Taylor], introduced the bill under consideration, which reads as if an antenna was attached to the mouth of Secretary Ickes". "If it were not against the rules of the House, we could call this the "Ickes Bill."

In response Secretary Ickes stated:

> "Gentlemen of the Committee. All that the Department of Interior wants to do is to maintain and upbuild the range for the benefit of the local interest. Now in doing that, we have no intention to run amuck in any state or in any area and drive stockmen off the ranges or deprive them of rights to which they are entitled either under state laws or by customary usage".

This statement by Secretary Ickes is very important, for it clearly demonstrates that Mr. Ickes and others of that time well understood the doctrine of Preemptive Rights established by local law and custom and rules of the courts. It is also a clear indication that by passing the Taylor Grazing Act, it was not the intent of Congress to extinguish such rights.

Such intent was also illustrated in a official memorandum to Daniel Beard, Deputy Assistant Secretary Land and Water resources, from Deputy Solicitor Frederick N. Ferguson, dated January 19, 1979. Solicitor Ferguson wrote:

> "There is no indication in the [Taylor Grazing] Act itself, in subsequent case law, or in the legislative history that the Act in any way was meant to diminish or impair established valid rights. In fact, the opposite appears to be true. Congress in enacting the legislation took care to protect

valid interest. The Act says: "Nothing in this Chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law..." Sec. 315

Solicitor Ferguson went on to say:

"During hearings of the House Committee on Public Land and Range Management and of the Senate Committee on Public Land and Survey, most of the opposition to the bill stemmed from fear that enacting the legislation would somehow impair already established rights. Both the Secretary of Interior Ickes, and Representative Taylor from Colorado, the prime sponsor of the bill, repeatedly assured the Committee's members that no rights were being impaired and that it was not the intention of the legislation that any existing rights be impaired. Ickes said, We have no disposition to abridge or interfere in any respect with existing law, rights, or customs." At page 14: Senate Committee on Public Land and Survey, 73rd Cong., 2d Sess. (1934)."

"Taylor said, "The bill tries to and I am sure it does protect all vested water rights, and in fact vested rights of all kinds; ...there was no intention to destroy anybody's rights. If the Language in the bill does not protect them we will be glad to have it done." At page 31 and 33, Senate Committee on Public Land and Survey, 73rd Cong., 2d Sess. (1934)."

"The Taylor Grazing Act, by its language, provides the Department of Interior a framework of control and management of the public lands. It was not intended to nor does the language in any way, abrogate existing rights." (See Document 16, Solicitor Ferguson's memorandum)