BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHTS NO. G-05081 AND G-05083 BY)
NEIL W. MOLDENHAUER)

FILMED
APR 9 1990

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The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. Timely exceptions were received on June 20, 1983 from Applicant Neil Moldenhauer (hereafter, "Applicant"), and Objector Kimpton Ranch Company (hereafter, "Objector"). For the reasons stated below, and after having given the objections full consideration, the Department accepts and adopts the Findings of Fact of the Hearing Examiner as contained in his June 9, 1983 Proposal for Decision, and incorporates them herein by reference, along with the additional Findings of Fact specified in this Order.

The Department also accepts and adopts Conclusions of Law numbers 1 and 2 as set forth in the Proposal for Decision, while expressly rejecting Conclusions of Law Numbers 3 through 5 pursuant to MCA § 2-4-621(3), which states in pertinent part, "The agency may adopt the Proposal for Decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision...."

App. Granted
see p. 12 (Dept. can make preliminary determination of ownership to water rights)

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Prior to extensive discussion of the Applicant's and Objector's exceptions, and so that the Departmental responses thereto may be more clearly understood, the Department expressly modifies the Proposal for Decision as follows:

LIST OF EXHIBITS

The Department hereby sets forth the list of the exhibits which were introduced at the April 29, 1983 hearing in In the Matter of the Application for Change of Appropriation Water Right Nos. G-05081 and G-05083 by Neil W. Moldenhauer, which list was inadvertently omitted from the Proposal for Decision in this matter.

The Applicant, Neil W. Moldenhauer, submitted fifteen exhibits in support of his Application in the above-entitled matter:

Applicant's Exhibits

1. Copy of Applicant's Application for Change of Appropriation Water Rights Nos. G-05081 and G-05083 with attached map showing location of existing and proposed points of diversion and of the fields irrigated by the appropriation right.
2. U.S.D.A. map of Helena National Forest with existing and proposed points of diversion, place of use, and Applicant's land marked thereon.

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3. Certified copy of decree distributing estate of Alfred H. Doughty (March 18, 1963).
4. Certified copy of quitclaim deed from trustee bank conveyancing Doughty properties to specified charities (April 3, 1963).
5. Certified copy of quitclaim deed from Minnie Doughty to specified charities (July 8, 1963).
6. Certified copy of warranty deed from charities conveyancing land to Gordon and Peter Brug (July 14, 1978).
7. Certified copy of agreement for sale of real property to Neil W. Moldenhauer by Peter and Nina Brug, and Gordon and Florence Brug (February 2, 1976).
8. Certified copy of warranty deed of real property to Neil W. Moldenhauer from Peter and Nina Brug, and Gordon and Florence Brug (February 2, 1976).
9. Statement of Claim for Existing Water Rights (SB76 Claim) for Irrigation No. 100283 by Kimpton Ranch Co. (Dec. 8, 1981).
10. SB76 Claim for Irrigation No. 100281 by Kimpton Ranch Co. (Dec. 8, 1981).
11. SB76 Claim for Irrigation No. 100285 by Kimpton Ranch Co. (Dec. 8, 1981).
12. SB76 Claim for Irrigation No. 100287 by Kimpton Ranch Co. (Dec. 8, 1981).
13. SB76 Claim for Irrigation No. 100283 by Kimpton Ranch Co. (Dec. 8, 1981).

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14. SB76 Claim for Irrigation No. 100288 by Kimpton Ranch Co. (Dec. 8, 1981).

15. SB76 Claim for Irrigation No. 100282 by Kimpton Ranch Co. (Dec. 8, 1981).

Applicant's Exhibits 1-15 were accepted into the record without objection.

The Objector, Kimpton Ranch Company, introduced eight exhibits in support of its objection to the above-entitled matter:

Objector's Exhibits

1. Copy of Kimpton Ranch Company's objection to the above-entitled application, accompanied by Statements of Claim for Existing Water Rights for Irrigation Nos. 100280 and 100283 and copies of the decreed water rights which form the basis for the SB76 claims.
2. U.S.G.S. map marked to show locations of the Hutcheson and Kimpton Ranches.
3. Certified copy of a correction deed on the conveyance of real property by specified charities to Kimpton Ranch Co. (June 1, 1978).
4. Copy of water commissioner reports on Crow Creek water users for periods of May 16 to June 16, 1972, and June 16 to July 9, 1972.
5. Photograph showing one of Kimpton Ranch Company's points of diversion (a pump diverting out of Crow Creek).

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6. Photograph of culvert which diverts water out of Crow Creek to a field on the Kimpton Ranch.

7. Photograph of ditch located on the east part of the Kimpton Ranch.

8. Copies of water commissioner reports on Crow Creek water users for periods of May 16 to June 16, 1973, June 16 to July 9, 1973, April 29 through May 28, 1974, May 29 through June 28, 1974, and June 29 through July 28, 1974.

Objector's Exhibits 1-3 were entered into the record without objection. Counsel for the Applicant objected to introduction of Objector's Exhibits 4-8 on the basis that no evidence should be allowed into the record which might contradict the Findings of Fact, Conclusions of Law, and Final Order in the August 27, 1975 Order in In the Matter of the Application for Change of Appropriation Water Right No. 2248-c41I by Kimpton Ranch Company. The Hearing Examiner accepted Objector's Exhibits 4-8, and testimony pertaining thereto, subject to possibly striking the material from the records upon a re-reading of the 1975 Order.

Upon review of the 1975 Order, the Department finds it to be admissible as a public document but finds that, due to lack of clarity of the decision and because of evidence that the Final Order in the matter was a result of settlement by the parties, the 1975 Order lacks the res judicata force of a decision on the merits. (For further discussion on this point, see Response to Applicant's Exception Number 2, infra). Therefore, Objector's

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Exhibits 4-8 were properly admissible for the purpose of showing actual water uses by the Objector, but the exhibits are not probative of ownership of the right to so use the water and have not been considered for that purpose.

The Department of Natural Resources and Conservation, through its representatives from the Helena Field Office, introduced seven exhibits on behalf of the Department:

Department's Exhibits

1. Copy of Public Notice which was published in the Townsend Star on November 11, 1982 and December 2 and 9, 1982.
2. Copy of the Notice of Hearing and Appointment of Hearing Examiner in In the Matter of the Application for Change of Appropriation Water Right No. G-05081 and G-05083 by Neil W. Moldenhauer.
3. Copy of September 10, 1982 Amendment to Statement of Claim for Existing Water Rights for Irrigation No. 05081 by Neil W. Moldenhauer.
4. Copy of September 10, 1982 Amendment to Statement of Claim for Existing Water Rights for Irrigation No. 05083 by Neil Moldenhauer.
5. Copy of February 8, 1983 letter from DNRC Helena Field Office to Neil W. Moldenhauer, listing four proposed permit conditions to Application for Change of Appropriation Right No. 05081.
6. February 8, 1983, letter from DNRC Helena Field Office to Kimpton Ranch Company in regard to Departmental

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determinations on ownership of water rights, and proposing authorization of applied for change in the above-entitled matter with four conditions.

7. Copy of the March 21, 1975 Proposal for Decision in In the Matter of the Application for Change of Appropriation Water Right No. 2248-c41I by Kimpton Ranch Company, and the August 27, 1975 Findings of Fact, Conclusions of Law, and Order in the same matter.

Department Exhibits 1-7 were entered into the record without objection.

AMENDED FINDINGS OF FACT

The Department hereby expressly accepts and adopts Findings of Fact 1-7 as set forth in the June 9, 1983 Proposal for Decision. The Department makes the additional Findings of Fact necessary to support the amended decision, as follows:

"Kimpton Ranch Company (the Objector) claims, in good faith, ownership to the same two water rights which Neil W. Moldenhauer (the Applicant) proposes to change."

This language was contained in the Hearing Examiner's Proposal for Decision as Conclusion of Law Number 3. The Department does not reject the substance of the proposed conclusion but, because of the rejection of proposed Conclusions of Law Numbers 4 and 5 the Department finds that the language

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contained therein is more properly designated as a part of Finding of Fact Number 6 for purposes of this Final Order.

8. On the basis of the record in In the Matter of Application for Change of Appropriation Water Right No. 2248-c41I by Kimpton Ranch Company, wherein the parties were the Objector in the present matter and the predecessor in interest to the present Applicant, and also on the basis of the record in the present matter, Applicant has shown historical use of the claimed water right.

AMENDED CONCLUSIONS OF LAW

The Department accepts and adopts proposed Conclusions of Law Numbers 1 and 2, while expressly rejecting proposed Conclusion of Law Number 4, modifying proposed Conclusions Numbers 3 and 5, and making additional Conclusions of Law as follows:

1. The Hearing Examiner's proposed Conclusion of Law Number 3 reads as follows: "Kimpton Ranch Company (the Objector) claims, in good faith, ownership to the same two water rights which Neil W. Moldenhauer (the Applicant) proposes to change." This Conclusion of Law is modified herein, as it is a statement more properly designated as a Finding of Fact. The Department does not reject the substance of this proposed conclusion. However, because of the rejection of proposed Conclusions of Law 4 and 5, the Department finds that the statement quoted above is more properly included as a Finding of Fact for purposes of this Final Order.

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2. Proposed Conclusion of Law Number 4 states:

> Pursuant to MONT. CODE ANN. § 85-2-402, the Department shall approve a change in the place of diversion, place of use, purpose of use, or place of storage if it determines that the proposed change will not adversely affect the rights of other persons. Without knowing the true owner of the two decreed water rights proposed to be changed, no meaningful determination of adverse affect can be made.

The Department hereby retains and affirms the following wording as Conclusion of Law Number 4 for purposes of this Final Order: "Pursuant to MCA § 85-2-402, the Department shall approve a change in the place of diversion, place of use, purpose of use, or place of storage if it determines that the proposed change will not adversely affect the rights of other persons."

The Department expressly rejects, as a matter of law, the Hearing Examiner's conclusion that "without knowing the true owner of the two decreed water rights proposed to be changed, no meaningful determination of adverse affect can be made."

It is true that the Department must make an initial finding of ownership in a change proceeding in order to reach a determination on the question of adverse affect.

As the Hearings Examiner points out in the Memorandum to his Proposal in this matter, an appropriator only can change an appropriation right that he possesses. Therefore, the Department initially must find that Applicant has made a showing of ownership of the right to be changed, e.g., that he is an "appropriator" for purposes of MCA § 85-2-402. Additionally, the Department must consider whether an objector has a vested water

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right upon which to base an argument of adverse affect. (As the Department has previously discussed, effect of the proposed change on another person's water rights appears to be the only basis for objection to an application for change of an appropriation water right. See Application for Change of Appropriation Water Right No. 138008 by Delbert Kunneman, Proposal for Decision, citing Miles v. Butte Electric and Power Company, 32 Mont. 56 (1904)).

However, questions of whether other existing uses of water will be affected can be answered as matters of fact, without making a final determination as to whether the Applicant is the proper legal owner of title to use of the water. United States v.District Court of Fourth Judicial District, 121 Utah 18, 242 P.2d 774, (1952). See also, City of Roswell v. Berry, 80 N.M. 110, 452 P.2d 179 (1969), Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944). Conclusion of Law Number 7, infra, discusses the reasons why no rights are lost to either party through a preliminary determination of ownership by the Department.

3. Proposed Conclusion of Law Number 5 states, "The Montana Department of Natural Resources and Conservation lacks jurisdiction to make a determination of the ownership of the two decreed water rights herein." Strictly speaking, this is correct. Final determination of ownership to water rights which vested prior to 1973 is solely within the province of the water court and its adjudication system, as set forth in MCA Title 85, Part 2, Chapter 2. However, as the Department has previously stated:

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> Determining the character of an existing right for the purposes of implementing the change statute has nothing to do with such a determination for purposes of adjudicating that right. The character of the proceedings are fundamentally of different orientations. A finding of no extant water right pursuant to a change proceeding merely determines that an applicant has not shown himself to be entitled to a change pursuant to the statutory provisions detaining the method and manner of making such changes. In the Matter of the Application for Beneficial Water Use Permit Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates; and In the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates (Hearing Examiner's Proposal for Decision, August 25, 1981).

A decision on ownership made for purposes of allowing the Department to proceed with a determination on whether a proposed change in water use will adversely affect other persons does not reach the res judicata level of finality such as is obtained in the adjudication process.

The adjudication process is designed to give finality to determinations of existing rights and of priorities, in order to provide a framework for subsequent regulation of the state's water resources. M.C.A. § 85-2-101(2), § 85-2-234(2). Determinations made in the change process do not carry the equivalent weight of finality. A change approval can be modified or revoked pursuant to MCA § 85-2-402(5), or it can be reduced pursuant to the adjudication process: "If the Department should authorize the change of a water right for a greater quantity of water than is subsequently recognized in the adjudication process, the change inevitably must be pro tanto reduced in

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conformity with the decree." Meadow Lakes, supra. The change could be eliminated completely if the water right involved subsequently is not recognized in the adjudication process.

Since a decision on an application for change does not carry the weight of finality on determinations of ownership, and since an appropriator does not obtain any rights through a change approval that are not contingent upon determination of ownership by the adjudication process, the Department is not usurping the water court's jurisdiction by making a preliminary administrative finding on ownership which enables the Department to perform its mandated function of authorizing or denying applications for change in water rights.

It has been stated with reference to the authority of the state government, "...No powers will be implied other than those necessary for effective exercise and discharge of the powers and duties expressly conferred." State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 338 (1936). See also Guillot v. State Highway Commission, 102 Mont. 149 (1936).

Conversely, however, the Department does have the implied powers necessary for its "effective exercise and discharge of the powers and duties expressly conferred." Id. Since the Department is charged with a statutory duty to administer the Water Use Act and has been delegated the power to issue change approvals, it follows that the Department is empowered to make such initial determinations on ownership of water rights as are needed to allow it to reach the decision on adverse affect required by MCA

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§ 85-2-402. Preliminary findings on ownership by the Department are made only for such limited purposes, and do not purport to be a final determination of ownership.

Proposed Conclusion of Law Number 5 therefore is modified to include the following additional language: "However, the Department does have administrative jurisdiction to make a preliminary finding of ownership for purposes of the change authorization proceeding only, since such a determination is necessary to effectuate the Department's duty to approve or deny the Application for Change in Appropriation Water Rights."

The Department makes the following additional Conclusions of Law:

6. Applicant has made sufficient showing of ownership of an appropriative water use right to justify the Department in proceeding to a determination of whether the proposed change of the right will adversely affect the rights of other persons. Applicant has filed S.B. 76 Claims (Statement of Claim for Existing Water Rights) for the two decreed rights involved in this matter. This constitutes prima facie showing of ownership. M.C.A. § 85-2-227. Applicant also has shown historical use of the water.

In the 1975 Order in In the Matter of Application for Change of Appropriation Water Right No. 2248-C41I by Kimpton Ranch Company, involving the Kimpton Ranch and Applicant's predecessor in interest, evidence was presented showing that the previous owner of both the ranch now owned by the Applicant and the ranch

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now owned by the Objector had continuously used the water rights in question on the Hutcheson Ranch (Applicant's ranch) for approximately 35 years, and that his successors in interest had continued to use them on the Hutcheson Ranch. This historical use was included in the Findings of Fact in the 1975 Final Order. The Order left the question of ownership of the water rights undecided.

The ownership question was addressed again in the hearing on the current application by Mr. Moldenhauer. Further evidence on historical use of the water rights on the Hutcheson Ranch was presented through the testimony of George Dundas, witness for Applicant. Bill Kimpton and Al Kimpton also testified that water had been used on the Hutcheson Ranch in the past, although they were uncertain as to the extent of the water use and as to what water right claims were being exercised. (Moldenhauer Transcript, pp. 82, 85, 101, 114, 117.)

It is clear from the records in the present matter and the 1975 matter that Applicant has evidence of historical use which supports his claim for existing water rights. Whether such evidence is sufficient to maintain ownership of the rights as against Objector's claims in the adjudication process is not for the Department to say: final determinations on claims for existing water rights must be made in the adjudication process. In any case, there is sufficient showing of beneficial water use to enable the Department to find the Applicant to be an "appropriator" for purposes of M.C.A. § 85-2-402, and to proceed to a determination on the question of adverse affect.

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7. The proposed change of point of diversion will not adversely affect the rights of other persons.

The basis for Kimpton Ranch Company's primary objection in this matter is that it claims ownership of the water rights for which Applicant has filed an application for change. The Objector has made no showing that the proposed change will result in adverse affect to its rights; for example, that Applicant's proposed change in point of diversion will prevent Objector from successfully irrigating his own fields. Objector instead argues that the adverse affect is to its ownership interests and that the Applicant is causing harm by using the water which both parties claim. (Objector's Exceptions to Proposal for Decision, p. 2).

It is evident from the record in this matter that the Objector is hoping the Department will settle the question of ownership of the disputed water rights, despite repeated explanations by the Department that it does not have jurisdiction to make such final determinations and that the parties should resolve the ownership issue in a court of competent jurisdiction. (See Department Exhibit Number 6, and the Proposal for Decision in this matter). The Department hereby reiterates that any considerations of ownership which have been addressed in order to reach a decision in this matter do not consitute a final determination on ownership, and consequently cannot of themselves serve as proof of adverse affect to the Objector.

The Objector's only other argument for adverse affect is based on the possibility that the Applicant's proposed change

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from flood to sprinkler irrigation will result in less return flow to the creek out of which both parties claim they are appropriating water.

The only evidence in the record on this issue is testimony presented at the hearing by the Applicant and by Department personnel. Applicant testified that it was his belief that the great majority of any runoff which resulted from flood irrigation of his fields did not get back to the creek because of the way the land lies (Moldenhauer Transcript, p. 38), and Applicant's son testified that he had never seen water gathering in the barrow pit along the road which lies between the fields and the creek (Transcript, p. 52). Department personnel T.J. Reynolds testified that probably a "portion" of the water returned to the stream (Moldenhauer Transcript, pp. 71-72).

The Applicant has argued that if the change to sprinkler irrigation results in any loss to the stream of return flow, the loss is compensated for by the presence in the creek of more water, since the requested flow rate under the change is only about half of the flow rate being used by the Applicant in flood irrigation. It is true that any loss of return flow which might result would probably be compensated for if only half as much water was being taken out of the stream; however, the total requested volume of water has been reduced by less than 5%. If the Applicant uses the entire acre-feet amount of water, at any one time he may only be diverting half the flow amount previously diverted, but he will be diverting that half nearly twice as often. As a result, the total of the loss to the source of

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supply might not change substantially or might be somewhat greater if more than 5% of the water diverted for flood irrigation returns to the creek.

However, in view of the fact that the limited evidence which was presented on the issue tends to indicate that no substantial amount of water currently reaches the creek as return flow and becomes available for appropriation by other water users, the Department has no reason to deny the change unless the Objector can show that whatever loss of water might occur because of the change will adversely affect its rights.

On this issue, the Objector offered very perfunctory evidence consisting of one sentence of testimony by William Kimpton, stating that he believes the proposed change in irrigation would have an adverse affect on them (Moldenhauer Transcript, p. 112), and a statement in the Objector's May 6, 1983 Brief in Opposition to Application stating, "Under these circumstances, the objectors would be adversely affected by the proposed change, because less water would return to the creek, and less water would be available for appropriation by the objector."

Whether the Objectors are in fact owners of a beneficial water use right and as such are entitled to appropriate waters from the creek is, of course, contingent upon final determination of ownership through the adjudication process.

If it is determined through the adjudication process that the Applicant owns the claimed beneficial water use rights, no water right exists upon which the Objector could base a claim of adverse affect to prevent the change. If the Objector is found

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to have the water right, the Applicant will no longer have any right to continue his appropriation of water, and will not have gained any vested right by his interim use of water as authorized herein.

Certainly it is possible that the adjudication process will recognize water rights in both the Applicant and Objector on the basis of historic use and make a final determination as to the relative priorities of the two use rights. If both parties have water use rights and the Objector is determined to be senior, in times of shortage the Objector will have the right to "call" or shut down the Applicant until his senior right is satisfied. This right would obtain to the Objector whether or not the change is approved. If, on the other hand, the Applicant is found to have a senior use right, he may exercise the change if Objector's junior right would not be adversely affected to the point where it cannot reasonably exercise its water right. MCA § 858-2-401(2), Quigley v. McIntosh, 110 Mont. 484, 103 P.2d 1067 (1940).

Assuming arguendo that Objector has a valid beneficial water use right, there is still insufficient evidence in the record herein to support a determination that the Objector will be affected by the proposed changes to the point where it cannot reasonably exercise its water right.

Therefore, based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:

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ORDER

Subject to the conditions, limitation, and restrictions listed below, Application for Change of Appropriation Rights Nos. G-05081 and G-05083 is hereby granted to Neil W. Moldenhauer to divert 100 miners' inches (1120 gallons per minute) up to 385 acre-feet per year, between May 1 and October 15 of each year, for sprinkler irrigation of 160 acres of land in the S½SW¼ Section 29, E½SE¼ Section 30, the N½NW¼ and W½NE¼ Section 32, Township 6 North, Range 1 East, Broadwater County, Montana; such diversion to be made at the proposed point of diversion in the SW¼NW¼NW¼ Section 32, Township 6 North, Range 1 East, in Broadwater County.

This change authorization is issued subject to the following express conditions, limitation, and restrictions:

1. This change authorization is subject to all prior existing water rights in the source of supply.

2. This change authorization is subject to any final determination of existing water rights as provided by Montana Water Law. Approval of the change by the Department is not to be construed as a validation of the water rights claimed by the parties in this matter. All claims for existing water rights are subject to possible modification under adjudication proceedings.

3. Issuance of this change authorization shall not be construed to reduce the Applicant's liability for any damages caused by the change, nor does the Department in issuing this authorization in any way acknowledge liability for damages caused by exercise of the change authorization.

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4. The Appropriator shall install an adequate headgate or diversion structure at the point the water is diverted from the source of supply, or shall install an adequate water flow measuring device at a location as near as practicable to the point of diversion.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 20th day of March, 1984.

Gary Fritz

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
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MEMORANDUM

The Department hereby responds to the exceptions made by Applicant and Objector to the Proposal for Decision; since the Applicant is the proponent of the Order, his exceptions will be responded to first.

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Applicant's Exception 1: The proposed decision ignores the substantive requirements of MCA § 85-2-402.

Applicant argues (a) that the language of MCA § 85-2-402(2) requires the Department to approve a proposed change where it determines that such change will not adversely affect the rights of other persons, (b) that the Hearings Examiner states as a proposed Conclusion of Law that the Department does not know the true owner of the rights proposed to be changed and therefore no meaningful determination on adverse affect can be made, (c) and that therefore the Department "must issue the permit" since there has been no finding of adverse affect. (Applicant's Brief, p. 3).

It seems clear from the statutory language that Departmental approval of a proposed change is to be based on an affirmative act (determination of no adverse affect), rather than a negative act (making no finding on the issue of adverse affect). Whether approval of a proposed change actually is mandatory when no meaningful determination of adverse affect is possible need not be addressed in this case, however. It is sufficient to hold that, on the facts of this case, a meaningful determination as to adverse affect can be made and therefore the Department has a mandatory ministerial duty to act.

Applicant's Exception 2: The Proposal for Decision impermissibly refuses to consider the Department's own prior Order.

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Applicant argues that the Department's August 27, 1975 Order in In the Matter of Application for Change of Appropriation Water Right No. 2248-c41I by Kimpton Ranch Company must be considered binding on the Department as to its Findings and Conclusions, as res judicata. The Hearing Examiner's refusal to consider the Order as binding, and his dismissal of it as "confusing", are designated by the Applicant as "impermissible". (Applicant's Brief, p. 3).

As the Department has previously noted, res judicata is a judicial doctrine, and a party to an administrative proceeding is not entitled as of right to its protections. In the Matter of the Application for Beneficial Water Use Permit No. 34204 by Donald H. Chaffee, Proposal for Decision (1982). The equitable concerns that underlie the doctrine of res judicata may dictate that the branch of res judicata known as collateral estoppel be applied in certain instances in administrative proceedings to ensure that parties to a proceeding are not unduly burdened by repeated litigation of an issue which has been decided; however, that concern is not justified in the present case. The issue of ownership of the water rights in dispute was never squarely addressed or decided in the 1975 Order, the wording of which is decidedly ambivalent.

The Department cannot fault the Hearing Examiner for finding the 1975 Order to be confusing. If counsel for the Applicant considers it not to be so, it is more likely the result of his espousal of the Applicant's cause than a result of an impartial reading of the Order. Indeed, the Applicant's exception quotes only those portions of the Order from which an interpretation favorable to the Applicant may be gleaned. The fact that such a

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favorable interpretation can be reached, however, owes less to the substance of the Order than to the vagueness of its wording. Conclusion of Law Number 2, "The subject water right was decreed to the Riverside Ranch, but for many years has been used on the Hutcheson Ranch", for example, is susceptible of more than one reasonable interpretation.

Such lack of clarity is compounded by the fact that the reasons for denial of the change application were never specifically articulated. The Order also did not contain any explanation for the deletion of the proposed Conclusion of Law Number 3 which had been part of the Proposal for Decision and the substitution of an entirely different Conclusion in the Final Order.

Testimony at the April 29, 1983 hearing on the present matter indicated that a settlement among the parties in the 1975 proceeding may have been crucial to the final decision. Bill Kimpton, testifying on the 1975 decision, stated: "All we did was apply to change the point of appropriation. We were denied that. In the process the Hearing Examiner kind of got a little farther than the original application. He didn't just deny the change and let it go at that, then we came back in and spoke to several people in the Department and the lawyer for the objectors helped us get it straightened out.... and then, after that, it came back signed by Mr. Ferris....". (Moldenhauer Transcript, p. 110). Indeed, the wording of 1975 Final Order exactly repeats the wording of a document containing proposed Findings of Fact, Conclusions of Law, and Order submitted jointly by William Kimpton and Charles Gravely

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(attorney for the objectors) on June 13, 1975. Speculation is therefore inevitable on the question of whether a settlement was responsible for the deletion from the Final Order of proposed Conclusion of Law Number 3: "The Brug Brothers apparently acquired the subject water right with their purchase of the Hutcheson Ranch in 1973, and it is therefore not available for change by either Mr. Grandchamp or the Applicants."

Because of the inherent lack of clarity in the 1975 Order, and because of evidence substantiating a finding that the 1975 Order was, at least in part, the result of a stipulation or settlement of some kind among the parties, the Order lacks the res judicata force of a decision on the merits. See Perkins v. Kramer, 148 Mont. 355, 361, 423 P.2d 857 (1966), a water rights case where the state Supreme Court determined that, in resolving issues, it was not limited to the provisions of an agreement between the parties which was clearly intended to "promote an amicable settlement of the dispute."

Applicant's Exception 3: The Proposal for Decision technically denies the Applicant the use of his water right.

Applicant argues that, because the Hearing Examiner proposed that a decision on the application be postponed until a court determination on ownership of the decreed water rights in question could be made, Applicant is thereby precluded from exercising his water rights.

The Department rejects, as a matter of law, the argument that a denial of a change authorization to this or any other applicant

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denies them the use of their water right. A change application, if denied, simply leaves the Applicant with the same right to use of water that he had before applying to the Department for a change authorization. The fact that the Applicant is involved in the change authorization process for a change of point of diversion of his water right does not preclude him from exercising that right at the original point of diversion in the interim.

Although it may be burdensome, due to natural disaster or other change in circumstances, to continue to exercise the right as it existed prior to Applicant's application for change, such a situation is not the result of Departmental action in this matter and cannot in itself provide sufficient basis for granting a change.

Applicant's Exception 4: Approval of the application is in no way a grant of a 311 permit.

The Department agrees with this argument by the Applicant. If the water court determines that ownership of the water rights claimed by both parties belongs to the Objector and not to the Applicant, the applicant must cease use of the water. As the Applicant states, "Quite clearly, the Applicant would obtain no vested right to the use of the water by his exercise of a presumed right in the interim." (Applicant's Brief, p. 7). It is no longer possible to acquire a water right simply by putting the water to use. MCA § 85-2-301.

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Applicant's Exception 5: The Proposal for Decision does not comply with the substantive and procedural requirements of the Water Use Act.

The Department rejects this argument, which is based on the erroneous contention that "When the Department fails to comply with the statutes regarding time requirements for hearing, it is compelled to approve the permit." (Applicant's Brief, p. 9). The Department remains steadfast in its position that the statutory time periods are directory rather than jurisdictional, and that failure to act within them does not trigger a mandatory duty in the Department either to approve or to deny any permit or change application. See Carey v. Montana Department of Natural Resources and Conservation, Civil Cause No. 43556 (First Judicial District, 1979); Sullivan v. District Court, 122 Mont. 1 (1948), In re Pitsch, Application No. 9357-s40A.

When the legislature intends for automatic permit issuance if a department fails to act within the stated time period, it expresses itself clearly. For example, in MCA § 82-4-337, the statute which provides for issuing operating permits for metal mine reclamations, subsection (1)(c)(iii) states, "Failure of the board to act upon a complete application within the extension period constitutes approval of the application, and the permit shall be issued promptly upon receipt of the bond as required in § 82-4-228."

A review of the statutory time periods set forth in the Water Use Act reveals no similar directive. If the Department was divested of jurisdiction to act after the time periods expire, no permits or change authorizations could issue in such cases, since

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the Department has sole authority to authorize changes or new uses. The authorization cannot arise by operation of law. MCA § 85-2-301.

The Applicant's additional procedural argument, that Objector's failure to request a hearing is fatal to his objection, is based upon a misreading of the statutes Applicant cites. MCA § 85-2-310 does not require the Objector to request a hearing, although it gives the Applicant the right to request one. MCA § 85-2-308, which deals with objections, requires the objector to file his objection by the date set by the Department in § 85-2-307(2) and specifies the information to be included in an objection, but does not contain any language which requires that the Objector also request a hearing.

Since MCA § 85-2-310 provides for a hearing prior to Departmental denial or conditioned approval of an application for change, the Department finds that the matter was properly before the Hearings Examiner and expressly adopts Conclusion of Law Number 2 herein by reference.

Objector's Exception 1: Finding of Fact Number 7 should be deleted from the Order.

Proposed Finding of Fact Number 7 states: "The Applicant has recently purchased and installed a side-roll sprinkler irrigation system at the proposed point of diversion. At the time of this hearing, the applicant had planted crops in his 160 acre tract of farm land and is now awaiting Departmental approval to commence irrigation."

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Objector argues that this finding shoud be deleted, since "(w)hether or not the Applicant has incurred any expenses in connection with the proposed application is irrelevant to the granting of a permit." (Objector's Brief, p. 1). The Department substantially agrees with this statement. Although such expenses indicate that Applicant has present bona fide intent to complete the change as applied for, the Department does not use the fact of Applicant's financial outlay to weigh in Applicant's favor. However, the Department cannot agree with the Objector that Finding of Fact Number 7 should be rejected.

In order to reject or modify a proposed Finding of Fact, the Department must comply with the relevant provisions of the Administrative Procedures Act. MCA § 2-4-621(3) states, in pertinent part, "The agency in its Final Order.....may not reject or modify the Findings of Fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Upon reviewing the complete record, the Department can find no basis for such a determination. The Department hereby expressly finds that the Finding of Fact concerning expenses incurred by the Applicant, while not crucial to the decision, is based upon competent substantial evidence, and that the proceedings herein fully complied with the essential requirements of law.

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The Department agrees with the Objector's exception that the Proposal for Decision lacked findings on crucial issues, and has supplemented the proposed Findings of Fact with additional findings sufficient to support the order herein. The Department notes, however, that the Hearing Examiner made sufficient findings of fact to support the proposed decision; there was no error or oversight in this regard. Further findings of fact are necessary only because the Department rejects the proposed Conclusion of Law which suggests that the Department could not act in this matter until ownership of the water rights in issue had been determined by a court of competent jurisdiction.

Objector's Exception 2: Proposed Conclusions of Law 4 and 5 are erroneous.

As indicated above, the Department concurs with this position. The Department does indeed lack jurisdiction to adjudicate the ownership and extent of water rights, but it can, and must, make the preliminary administrative findings essential to its function in authorizing changes in water uses.

However, the Department rejects the Objector's contention that "the Department has jurisdiction and authority to make a determination of ownership, and is bound to make such a determination when the issue is presented in connection with an application for change of appropriation." (Objector's Brief, p. 2). This is incorrect, for the reasons discussed previously.

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Objector's Exception 3: Violations of Statute.

The Objector states that the Applicant has been appropriating water from the proposed point of diversion applied for in this matter, without having been granted a permit. Objector asserts that if Applicant is found to be in violation of the statute for appropriating water without a permit, such a determination is sufficient grounds for denial of the permit. Applicant currently has filed claims for appropriation rights (Water Rights Nos. G-05081 and G-05083), and therefore is not "appropriating water without a permit." Objector's argument clearly must be that Applicant has changed the point of diversion of his appropriation, without having received Departmental authorization for the change.

Objector submits that the Department has the authority to deny or revoke a permit for the misconduct of the applicant, pursuant to MCA § 85-2-402(5). This is a novel and unsupported reading of the law. MCA § 85-2-402(5) reads:

> If a change is not completed as approved by the Department or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the Department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

This language deals only with actions the Department may take on a change that has already been approved. There is no indication that this particular section was meant to apply to actions by an Applicant which predate a change authorization.

The statutory provision which applies to a change in

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appropriation rights without authorization is MCA § 85-2-122: "A person who violates or refuses or neglects to comply with 85-2-301, 85-2-402(1), and 85-2-403(3), any order of the department, or any rule of the board is guilty of a misdemeanor." Nothing in this language supports Objector's argument that the Department may impose sanctions against the Applicant and deny the application because of a possible statute violation. The Department does not have the discretionary power to substitute its own penalties for those specified in the statutes; to impose an additional penalty or alternate penalty is clearly beyond the Department's jurisdiction.

The procedure for enforcement of MCA § 85-2-122 is for the Department to request legal assistance for prosecution of suspected violations, pursuant to MCA § 85-2-116. This is the sole means to correct unlawful uses of water. Had the legislature intended to provide alternate penalties for violations, it could easily have expressed its intent. It did not provide the Department with the power to reject a change application as a means of penalizing a violator, nor did it include "no statute violations" as an additional criteria for issuance of change authorizations.

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AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 20, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Applications by Neil W. Moldenhauer, Application Nos. G-05081 & G-05083, for an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Neil W. Moldenhauer, Box 126, Winston, MT 59647
2. William T. Boone and Randy J. Cox, Attorneys at Law, 201 W. Main, 301 Central Sq. Bldg., Missoula, MT 59802
3. Kimpton Ranch Co., Box 33, Toston, MT 59643, Attn: William R. Kimpton
4. Dale E. Reagor, Atty., P.O. Box 1144, Helena, MT 59601
5. T.J. Reynolds, Helena Field Office (inter-departmental mail)
6. Gary Fritz, Administrator (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 20th day of March, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G-05081 & G-05083 BY NEIL W. MOLDENHAUER	))))	PROPOSAL FOR DECISION

* * * * * * * * * * *

The above-entitled matter came on for hearing before Kent B. Roberts, a Hearing Examiner with the Department of Natural Resources and Conservation, on April 29, 1983, in Helena, Montana. The record was closed on May 13, 1983.

Neil W. Moldenhauer (hereinafter the "Applicant") was represented by Randy J. Cox and William T. Boone of the law firm of Boone, Karlberg and Haddon, Suite 301 Central Square, 201 W. Main, Missoula, Montana, 59802. Kimpton Ranch Company (hereinafter the "Objector") was represented by Dale E. Reagor of the law firm of Luxan and Murfitt, P.O. Box 1144, Helena, Montana 59601. T.J. Reynolds and Jim Beck, representatives from the Department's Helena Field Office, appeared at the hearing.

STATEMENT OF ISSUES

The issues in this proceeding are (1) whether the Applicant's proposed change will adversely affect the water rights of the Objector; and (2) whether the Department has the jurisdiction to make a determination of the ownership of contested water rights.

Based upon all the proceedings herein, the Hearing Examiner makes the following:

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FINDINGS OF FACT

1. On September 10, 1982, an Application for Change of Appropriation Water Right was filed with the Department on behalf of the Applicant. The Applicant proposes to change the point of diversion of two decreed water rights which he claims to own a one-half interest as tenant in common. In his filed Application, the Applicant claims that the past use of water has been 4,490 gallons per minute (400 miner's inches (MI)) up to 800 acre-feet per year out of Crow Creek, a tributary of the Missouri River. The past use rate of flow was computed by combining the entire rate of flow for the two decreed water rights, instead of combining just the "half-interest" rate of flow for the decreed rights (which for the two rights combined would be 2,245 gallons per minute (200 MI)). The waters are further claimed to have been used historically from May 1 to October 15, inclusive, of each year for the flood irrigation of 160 acres of farm land located in the S½W½ of Section 29, the SE¼ of Section 30 and the N½ of Section 32, all in Township 6 North, Range 1 East, in Broadwater County. The present point of diversion is claimed to be in the SE¼SE¼NE¼ of Section 23, Township 6 North, Range 1 West, in Broadwater County. The Applicant proposes to change the point of diversion to a point in the SW¼NW¼NW¼ of Section 32, Township 6 North, Range 1 East, in Broadwater County. The Applicant further proposes to divert only half of his claimed one-half interest in both water rights (i.e., about 1,120 gallons per minute (100 MI) up to 385 acre-feet per year) to sprinkler irrigate his 160 acres of farm land from May 1 to October 15, inclusive of each year.

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2. On November 25, December 2 and 9, 1982, a Notice of Application (hereinafter "Notice") was published in the Townsend Star. The Notice set January 13, 1983, as the deadline for filing objections to the Application.

3. On January 3, 1983, an objection to the granting of the Application for Change was filed with the Department by Kimpton Ranch Company. The stated basis of the objection was that the Kimpton Ranch Company claims ownership of the same two decreed water rights which the Applicant proposes to change in his Application.

4. On April 22, 1983, the Administrator issued the Notice of Hearing, scheduling a contested case hearing for April 29, 1983. A copy of the Notice of Hearing was served on the same day by mail on all parties.

5. The reason the Applicant proposes to change his point of diversion is to facilitate irrigation of his 160 acres of farm land. Prior to 1981, the Applicant has claimed that the water was delivered to his land during each irrigation season through a ditch known as the Doughty Ditch and was diverted by a headgate located about three miles upstream from the Applicant's property. In 1981, during a flood, the headgate facilities were completely washed away along with a significant portion of the upper end of the ditch. Rather than rebuild the headgate and continue to use the old point of diversion, the Applicant decided that it would be cheaper, more efficient and more effective to change the diversion point to a place downstream near his irrigated land.

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6. The two water rights which Applicant and the Objector claim to own were originally decreed to the Riverside Land and Livestock Company in Smith v. Duff, No. 236 (9th J.Dist. Ct. May 27, 1907). The decreed water rights are for half interests in 100 MI and 300 MI from Crow Creek, with priority dates of May 1, 1873, and May 1, 1878, respectively. The other one-half interests for the two water rights are owned by another individual, and that ownership is not contested by either party. Both parties have filed Senate Bill 76 claims for a one-half interest in the 1873 water right (for 50 MI) and a one-half interest in the 1878 water right (for 150 MI).

7. The Applicant has recently purchased and installed a side-roll sprinkler irrigation system at the proposed point of diversion. At the time of this hearing, the Applicant had planted crops in his 160 acre tract of farm land and is now awaiting Department approval to commence irrigation.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Montana Department of Natural Resources and Conservation has jurisdiction of the parties and the subject matter of this hearing, except as noted below.

2. The Montana Department of Natural Resources and Conservation gave proper notice of this hearing, and all relevant substantive and prodedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

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3. Kimpton Ranch Company (the Objector) claims, in good faith, ownership to the same two water rights which Neil W. Moldenhauer (the Applicant) proposes to change.

4. Pursuant to MONT. CODE ANN. § 85-2-402, the Department shall approve a change in the place of diversion, place of use, purpose of use, or place of storage if it determines that the proposed change will not adversely affect the rights of other persons. Without knowing the true owner of the two decreed water rights proposed to be changed, no meaningful determination of adverse affect can be made.

5. The Montana Department of Resources and Conservation lacks the jurisdiction to make a determination of the ownership of the two decreed water rights herein.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

PROPOSED ORDER

That the Department postpone its decision to grant or deny the Application for Change of Appropriation Water Right Nos. G-05081 and G-05083 until a court of competent jurisdiction determines the ownership of the two decreed water rights proposed to be changed.

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DONE this 9th day of June, 1983.

Kent B. Roberts

Kent B. Roberts, Hearing Examiner
Department of Natural Resources and Conservation
32 South Ewing, Helena, MT 59620
(406) 449-3962

NOTICE

This Proposal is a recommendation not a final decision. Any party adversely affected may file exceptions to this Proposal. Such exceptions must be filed with the Hearing Examiner by June 20, 1983. Notice is hereby given that a final decision shall not be made until after the expiration of the period for filing exceptions.

MEMORANDUM

The purpose of this Memorandum is to set forth the reasoning used by the Hearing Examiner in this Proposal for Decision. The Memorandum is divided into three parts. The first part (I) discusses how the burden of proof is allocated between the parties in a change of appropriations hearing. The second part (II) attempts to explain why the Hearing Examiner has concluded that the Department does not have the authority to make a determination of the ownership of contested water rights. The third part (III) sets forth the reasons for this unusual Proposed Order.

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I. ALLOCATING THE BURDEN OF PROOF AND STANDARD OF PROOF IN A CHANGE OF APPROPRIATIONS HEARINGS.

A. The burden and standard of proof on the Objector regarding adverse affect.

Under Section 85-2-402(1), MCA, an appropriator may not change the place of diversion, place of use, purpose of use or place of storage (hereinafter "change") unless such change is first approved by the Department. The statute in subsection (2) further provides that the Department shall approve the proposed change if the change will not adversely affect the rights of other persons. Unfortunately, this 1973 statute does not indicate which party bears the burden of proof or what the standard of proof is in a change of appropriations hearing. Pre-1973 change statutes in Montana, which permitted an appropriator to make changes, also did not state how the burden of proof was to be allocated. However, the Montana Supreme Court has interpreted similarly worded pre-1973 change statutes and consistently held that the Objectors to a change proceeding have the burden of proving that they will be adversely affected.

In Hanson v. Larson, 44 Mont. 350, 120 P. 229 (1911), the Court affirmed an appropriator's right to change the place of use, unless Objectors showed injury therefrom. The Objectors' proof of adverse affect was held to be an affirmitive defense. The Hanson Court, in affirming this principle, stated the following:

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> "It would seem logical then, that the burden is on the party who insists that such change has affected him adversely, to allege and prove the facts; or, in other words, that the restrictions in Section 4842 above are matters of defense." Hanson, 44 Mont. at 353.

Since Hanson, the Montana Supreme Court has reiterated the position that the Objectors to a change bear the burden of proving that they will be adversely affected. This rule has been upheld when the appropriator sought to change the place of use by increasing the irrigated acreage, McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1974); and when the appropriator changed the point of diversion, Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 P.2d 370 (1933) and Lokowich v. City of Helena, 46 Mont. 575, 129 P. 1063 (1913). Although these cases were decided prior to the 1973 Water Use Act, which granted jurisdiction to the Department to authorize changes of appropriation, the Legislature has never amended the change statutes to alter the Montana Supreme Court's case law "rule" for allocating the burden of proof. See generally, Holmstrom Land Co., Inc. v. Ward Paper Box Co., ___ Mont. ___, 605 P.2d 1060, 1075 (1979).

Because the Objectors to a change of appropriation hearing bear the burden of proving injury, it is necessary to know what standard of proof the Objectors need to present to meet their burden. On this issue, Montana Supreme Court decisions are not very helpful. The Court has never specifically articulated what "quantum" of evidence the Objectors need to present to meet their burden. Likely, the Court has tacitly employed the test that

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Objectors must prove they will be adversely affected by a "preponderance of the evidence".[1]

In proving injury, the Objectors must do more than just allege that their water rights will be adversely affected by the change of appropriation.[2] In McIntosh, 159 Mont. at 84, the Court required the Objectors to quantify the expected injury:

> "Here plantiffs [Objectors] have no adequate measuring devices to determine to any degree of accuracy the amount of water they are receiving under the respective rights. It is necessary for them to prove that they are being deprived of water to which they are lawfully entitled."[3]

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[1] This approach would be consistent with the general rule that the party who has the burden of proof in administrative hearing must normally prove a fact by preponderance of the evidence. 3 DAVIS, ADMINISTRATIVE LAW TREATISE 255 (2nd ed. 1980). Higher standard of proof, such as the "clear and convincing" and the "substantial credible evidence" standards (which are applicable to the issuance of new appropriation permits), do not apply to change proceedings since neither the Legislature nor the Court have specifically prescribed these higher standards. Cf., 85-2-311(6) and (7), MCA. The "rock bottom" minimum standard "at the fact-finding level of civil litigation "i.e., preponderance of the evidence, should be utilized. Charlton v. Fed. Trade Comm'n, F.2d 903, 907 (D.C. Cir. 1976.)

[2] According to Frank J. Trelease, the preeminent scholar in western water law, an application for change "should not be denied on the mere basis of possibilities and potentialities, or on grounds that injury might occur from a violation of the order permitting the change." Trelease, Changes and Transfers of Water Rights, 13 ROCKY MTN. MIN. L. INT. 507, 527 (1967); see also, DONEY, MONTANA WATER LAW HANDBOOK §4.2.3, n.312 (1981) ("Showing theoretical or technical injury alone will not suffice. Thrasher and Hanson id. ").

[3] In a subsequent case, Thompson v. Harvey, 164 Mont. 123, 519 P.2d 963 (1974), the Court reaffirmed the case law rule that the Objectors must show a decrease in the quantity of available water which infringes on their water right. In Thompson, the Court refused authorization to change a point of diversion, having found that the Objectors satisfied their burden of proof:

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In summary, the Montana Supreme Court has consistently held that the Objectors have the burden of proving actual injury. See generally, Riggs, The Idaho and Montana Procedures for Obtaining Water Use Permits --- Possible Sources for Improvement of Wyoming Law, 10 LAND & WATER L. REV. 535, 474 (1975). Implicit in the Court's decisions are the evidentiary requirements that the Objectors bear not only the burden of production on the injury issue, but also the burden of ultimate persuasion. See, CLARK, 5 WATERS AND WATER RIGHTS §412.1 p. 163 n.2 (1972); 1 HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 632-633 (1971).

B. The burden and standard of proof on the Applicant regarding adverse affect.

The Applicant bears the burden of producing sufficient evidence such that reasonable minds might differ as to whether the proposed change will adversely affect the Objectors' water rights. This approach mitigates against the Applicant being required to "ferret out all of the ways in which the others might per chance be injured and offer proof in negative thereof as part of its affirmative case". Tanner v. Humphreys, 87 Utah 164, 48 P.2d 484, 489 (1935). For as "a practical matter, those who protest will most likely be better situated to know wherein they

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(n.3 cont'd)
"It was also uncontroverted that the change in point of diversion would lead to an increased use of water because of the increase in acreage to be irrigated in a time of use. But a decrease in available water and increase in use of the water that is available represents injury to those individuals who will be deprived of water as a result is indisputable." Thompson, 164 Mont. at 137.

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will be injured than will the plaintiff [Applicant]". Id. Upon fulfillment of this burden by the Applicant, the burden will shift to the Objectors to establish by preponderance that their respective appropriations will be adversely affected by the Applicant's proposed change. See, 1 HUTCHINS, supra.

II. THE MONTANA DEPARTMENT OF RESOURCES AND CONSERVATION HAS NO STATUTORY AUTHORITY TO DETERMINE OWNERSHIP OF CONTESTED WATER RIGHTS.

As noted in Section I of this Memorandum, the primary issue in any change proceeding is whether the proposed change of appropriation will adversely affect the water rights of those persons who have filed objections to the application for change. In this case, because the Objector has claimed, in good faith, the same two decreed water rights which the Applicant proposes to change in his application, a secondary issue has emerged. That is, whether the Department has the jurisdiction to determine ownership of the contested water rights. Both parties have briefed this issue and present differing points of view. The Applicant, at the hearing and in his briefs, has vigorously asserted that the Department has no such jurisdiction. See, Applicant's BRIEF AND SUPPORT OF APPLICATION, pp. 4-5 (filed May 6, 1983) and REPLY BRIEF IN SUPPORT OF APPLICATION, pp. 1-2 (filed May 13, 1983). Not surprisingly, the Objector's position is contrary to that of the Applicant's. See, Objector's BRIEF AND OPPOSITION TO APPLICATION, pp. 3-4 (filed May 6, 1983) and REPLY BRIEF OF OBJECTOR, pp. 2-4 (filed May 16, 1983).

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In Conclusion of Law No. 5, the Hearing Examiner has determined that the Department is not granted the authority under Montana law to make a determination of who owns the two water rights at issue in this proceeding. MCA title 85, chapter 2 (commonly referred to as the Water Use Act) establishes a system for the determination and interpretation of existing water rights. That system, has set forth in Section 85-2-211 et. seq., MCA, grants to the water judges the sole authority to determine and interpret existing water rights. Section 85-2-216, MCA, provides that "all matters concerning the determination and interpretation of existing water rights shall be brought before . . . . the water judge . . . . "

The Water Use Act makes it clear that it is a water judge and not the Department who determines the "matter" of who owns a water right. Section 85-2-234(4)(a), MCA, requires that a water judge state in the final decree, inter alia, the owner of the existing water right. No comparable language is found in the Water Use Act that delegates to the Department the authority to make a determination on the ownership of existing water rights.[4] Consequently, that decision is reserved to a water judge under the procedures outlined in Section 85-2-211 et. seq., MCA.

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[4]The Objector cites to Sections 85-2-308(2) and 85-2-402 to support its contention that the ownership of the water rights is an issue which can be determined by the Department. Section 85-2-402 merely describes what the Montana Supreme Court has determined to be the Objectors burden on any objection to an Application for Change. See, Section I of this Memorandum. Section 402 provides no authorizing language in and of itself to enable the Department to make a

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III. IN A CHANGE PROCEEDING, WHEN THE OBJECTOR CLAIMS THE WATER RIGHTS WHICH THE APPLICANT PROPOSES TO CHANGE, A DETERMINATION OF ADVERSE AFFECT CANNOT BE MADE UNTIL THE OWNERSHIP ISSUE IS RESOLVED.

The basic principle governing any change proceeding is that an Appropriator can change only what he has or owns. In the Matter of the Application for Beneficial Water Use Permit Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates; and in the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates (Dept. Final Order, October 6, 1981) Since an Appropriator cannot in a normal course of exercising his appropriative right expand or otherwise enlarge his historical beneficial use without obtaining a Section

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(n.4 cont'd)
determination of ownership. With respect to Section 85-2-308(2), that section requires that the Objector show that he has property, a right or interest, and that such property, right or interest would be adversely affected by the proposed change. Simply because the Department may consider the property interests of the Objector does not a priori grant the authority to make a determination as to the actual ownership of those rights. As noted above in the text, that decision is reserved to the water judges under Section 85-2-211 et. seq., MCA.

If the Department were to make a determination of ownership, there is distinct possibility that the determination made may conflict with the preliminary and final decrees which will be issued by a water judge concerning these same two claimants. In the Examiner's opinion, it is doubtful that the Legislature ever intended to create an adjudication system whereby the Department was empowered to issue advisory opinions. Thus, in the interest of avoiding a conflicting determination of ownership, the Department should defer the issue of ownership to a water judge.

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85-2-311 (hereinafter "311") permit, it is clear that the same cannot be done under the guise of a Section 85-2-402 (hereinafter "402") change proceeding. In other words, new uses cannot be bootstrapped into old priorities by the use of a change proceeding. Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911).[5]

Proof of the existence of a water right (which also includes proof of ownership) in a change proceeding is necessary in order to give effect to the Legislative intent disclosed in the 311 permitting process for new water uses. See, Section 85-2-301 et. seq., MCA. Therein, the Legislature has mandated that prospective appropriators demonstrate and establish the existence of specifically detailed criteria when a new appropriation is desired. Section 85-2-311, MCA. At least some of the enumerated criteria go beyond a simple finding of "no adverse affect to the rights to other persons". Section 85-2-311(2), MCA. The Legislative intent reflected in these additional criteria (Section 85-2-311(1) and (3)-(7)) cannot be circumvented by

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[5]In Featherman, the Court noted that the change to agricultural purposes

"was a change in the original use and resulted in a consumption of the quantity so diverted to the new use, and therefore amounted pro tanto to a new appropriation. Such being the case . . . the right to use this amount for this purpose must bear the date at which the change was made." Featherman, 43 Mont. at 317.

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enlarging the existing use or creating a new water use through a change proceeding. In this case, approving the proposed change, when ownership of the two water rights proposed to be changed is unresolved and contested, may indeed result in the granting of a 311 permit through the 402 change proceeding. However, the Department will never be certain if it is granting a 311 appropriation or approving a 402 change until it is determined who owns the two decreed water rights.

Moreover, until that determination is made, the Hearing Examiner beleives it is not possible to make a meaningful determination of adverse affect. The Hearing Examiner is simply unable to determine whether the parties have sustained their respective burdens of proof when ownership of the decreed rights is clouded. The issue of ownership must resolved before a determination of adverse affect can be made.[6]

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[6]The Applicant argues that, since the Department lacks the authority to determine ownership, he must only make a prima facie showing of ownership of right in question whereupon it then becomes the Objector's burden to demonstrate injury. See, Applicant's BRIEF AND SUPPORT OF APPLICATION, pp. 4-9 and REPLY BRIEF AND SUPPORT OF APPLICATION, pp. 1-3. According to the Applicant, the filing of Senate Bill (S.B.) 76 claims for the two decreed rights in and of itself satisfies the requirement of a prima facie showing ownership to the water rights at issue. Although the Applicant's argument is appealing, the Hearing Examiner has rejected it. The Objector has likewise filed S.B. 76 claims for the two decreed rights and thus, has rebutted or equalized the Applicant's prima facie showing. See, Finding 6. The remainder of the evidence relied upon by the Applicant is either unpersuasive (the Department's 1975 Order) or is the type of evidence that should be presented before a water judge (the testimony of George Dundas).

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Therefore, the Hearing Examiner has proposed that the parties resolve the ownership issue in a court of compentent jurisdiction. See, Proposed Order. Section 85-2-231(1)(d), MCA, provides that a water judge may issue "an interlocutory decree or other temporary decree if such decree is necessary for the orderly administration of water rights prior to the issuance of a preliminary decree." Cf., Section 85-2-406(2), MCA.[7] Once the ownership issue is resolved, the Department will then be able to render a meaningful decision on the Applicant's proposed change.

K.B.R.

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[7]Section 85-2-406(2) reads as follows:
"When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to Part 2 of this chapter, any party to the controersy may petition the district court for releif. The district court from which relief is sought may grant such injunctive or other relief whcih is necessary and appropriate to preserve property rights or the status quo pending the issuance of the final decree."

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