

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 19084-s411)
BY THE CITY OF HELENA)

* * * * *

Exception to the Proposal for Decision in this matter was entered on behalf of the Applicant City of Helena. (See attachment). However, the assertions contained therein must be rejected.

Appropriators in this state have vested rights to maintenance of the stream conditions at the time they made their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 838 (1908), Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909). Thus, no appropriator may change the purpose, manner or method of his use to the detriment of another. MCA 85-2-402, 403 (1979). Return flows are part and parcel of the stream conditions. Therefore, when the Objectors herein began using the Applicant's "wastewaters", their appropriations embraced this source of supply. Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1894). While this interest in such return waters undoubtedly is subject to the sponsoring appropriators "privilege" of abandoning his water right and to senior priorities on the ultimate source of supply, these concerns do not reach the circumstances herein.

A municipal entity has no special status as regards its needs for water, See Spokane Ranch, supra, and it may not enlarge its original appropriation to the detriment of other appropriators. Such an enlargement amounts to a new and independent appropriation, and must be tested according to the principles defining the same. See MCA 85-2-311 (1981 amend.)

"This 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, under the rule above stated, the court reached the proper conclusion to-wit, that the right to use this amount for this purpose must bear the date at which the change was made." Featherman v. Hennessy, 43 Mont. 310, 317, 115 P. 983 (1911).

Although the ultimate source of supply for the waters now claimed by the Objectors herein appears to be from points foreign to the natural drainage as regards these Objectors, this "trans-basin" aspect of the existing diversion of the Applicant is not availing in the circumstances herein. Generally, when waters that would not in the normal course of events be available for use in a particular drainage are made available by the exertions of man, such waters assume the status of "developed waters" and the exclusive use thereof belongs to the person whose labors have so contributed this supply. See generally, Smith v. Duff, 39 Mont. 832, 102 P. 984 (1909), Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933), Spaulding v. Stone, 46 Mont. 483, 129 P. 327 (1912), West Side Ditch Co. v. Bennet, 106 Mont. 422, 78 P.2d 78 (1938).

At least one of the obvious purposes of this doctrine is to reward such exertions that increase the supply of water in this

arid state. The Department notes that allowing the returns that necessarily will accrue from the use of such waters to form the appropriative supply for others will inevitably undermine the benefits of such development by detracting from the marketability of such rights. A developer wishing to substantially change such "foreign waters" may quickly find himself in rather unenviable positions. Although he is mandated to protect junior appropriators in the new drainage basin, he cannot compensate for new depletions to be generated by the new use by reducing his historic demand on their source of supply. Applicant's problems in this general regard are exacerbated by its relatively non-consumptive use. Were this Department writing on a clean slate, these unfortunate consequences may call for the rule advanced by the Applicant to the effect that all such imported waters remain available for the use of the developer absent the abandonment there. See Denver v. Fulton Irrigating Co., (Colo.) 506 P.2d 144 (1973).

However, the Montana Supreme Court has clearly indicated that these consequences will not attach to all of the developer's bounty. Rock Creek Ditch Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933), cited by the Applicant, is entirely inconsistent with the claims made in the instant matter. Therein, the plaintiff attempted to reclaim seepage waters that had percolated through its stockholder's land and had contributed to the flow of a certain creek. Plaintiff's and the stockholder's ultimate source of supply were waters derived from a separate drainage basin. The waters so augmenting the new drainage basin by

percolation and had been put to use by persons situated therein. The court refused to countenance the plaintiff's claims to the reuse of this water to the detriment of those who had come to depend on this source in the new drainage.

We reiterate that the general rule, applicable to the conditions in the case before us, is that the owner of the right to use the water--his private property while in his possession,--may collect it, recapture it, before it leaves his possession, but after it gets beyond his control it thus becomes waste and is subject to appropriation by another. (citations omitted) 93 Mont. at 268.

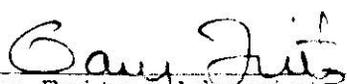
Moreover, the court therein characterized such trans-basin diversions as yielding nothing more than the typical usufructory interest in these foreign waters. That is, the importer does not own the corpus of the water, but only the right to use the same for some defined useful purpose. Indeed, the court therein declined to characterize such imported waters as developed ones, although it is difficult to glean what substantive results flow from this distinction. Since an importer of water into new drainage basins has only that interest in the water that is typical of any appropriator, (See generally Holmstrom Land Co. v. Ward Paper Box Co, 36 St. Rep. 1403, _____ Mont. _____, _____ P.2d _____ (1979)), the same principles govern each such water user insofar as they relate to the scope of his water claim.

Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927) is to the same effect. Therein the importing appropriators sought to sell waters surplus to their needs. Since the measure of water right parallels the needs of the appropriator, the purported sale of anything in excess thereof is void.

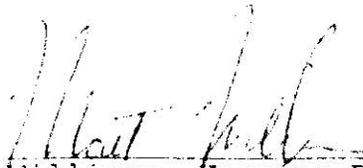
After the appealing defendants had used these waters for placer mining purposes and the water had drained below their land into Bivens Gulch, their jurisdiction over it ceased; it had subserved the purpose of their appropriation, and, as it could not drain back into the stream from which it was taken, it became waste, fugitive and vagrant water and subject to be treated as such, and the appropriators had no longer any jurisdiction over it or ownership in it. They did not own the corpus of the water; hence they had nothing to sell, and their attempted sale of the water or the right to use the same was wholly void. (citation omitted).

Thus, while prior appropriators' claims extend only to the natural flow of the source of supply as of the time of their appropriation, Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135, 35 P. 880 (1900), subsequent additions to this source of supply generated by returns from the use of foreign waters may form the basis for a new appropriation of the same by those existing appropriators. The record herein reflects that this is substantially what has occurred herein. Nothing else in the Proposal for Decision can fairly be read as leaving the Applicant in any other position than that it has formerly been in.

WHEREFORE, Application for Beneficial Water Use Permit No. 19084-s411 by City of Helena is dismissed and denied in its entirety.



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Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
STATE OF MONTANA

IN THE MATTER OF THE)
APPLICATION FOR BENEFICIAL)
WATER USE PERMIT NO. 19084-s411) OBJECTIONS TO PROPOSED DECISION
BY THE CITY OF HELENA, MONTANA)

On August 25, 1981, the hearing examiner in this action issued his proposal for decision. The applicant, the City of Helena, feels that this proposed decision is seriously in error.

In the first instance, the decision does not recognize the right of the City of Helena to stop discharging effluent from the Helena Sewage Treatment Plant. It must be remembered that evidence at the hearing showed the water from this plant is diverted, under right by the City of Helena, from Ten Mile Creek, the Hale underground water system, and the Missouri River Plant. None of these water sources are natural tributaries to Prickly Pear Creek.

Under the order proposed by the hearing examiner, the City of Helena will be forced to continue to operate the Helena Wastewater Treatment Plant, even if it should prove impractical. The City of Helena argues that if, in the future, it should become desirable or necessary to cease or alter the operation of the Wastewater Treatment Plant, the City of Helena is under no obligation to continue to discharge the above waters into Prickly Pear Creek. It is the feeling of the City of Helena that this should be recognized in the proposed order.

Next, it is the position of the City of Helena that the waters that are discharged from the Helena Sewage Treatment Plant are developed waters. In other words, these waters were placed into Prickly Pear Creek

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through the sole exertion of the City of Helena. As noted above, the waters placed into Prickly Pear Creek by the City of Helena come from the Ten Mile Creek, the Missouri River, and the Hale underground system.

The law in Montana is that such waters are not part of the natural flow of Prickly Pear Creek and that the developer of said waters, in this case the City of Helena, is entitled to the developed waters. Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909); Rock Creek Ditch and Flume Company v. Miller, 93 Mont. 248, 17 P.2d 1074 (1973).

The water being discharged from the Helena Wastewater Treatment Plant would not be there if the City of Helena did not divert waters from Ten Mile Creek and the Missouri River to that point. Such being the case, these waters have been developed by the City of Helena and the City of Helena should have first right as to their appropriation.

In addition, the owner of waters who releases said waters from artificial confinement can recapture the waters released before the waters are discharged into the natural course of the stream. See Am. Jur. 2d, Waterways, Section 222. This rule holds true unless the person releasing the water has abandoned said discharge. There was no evidence at the hearing which would show the City of Helena has abandoned the water discharge into Prickly Pear Creek.

For the foregoing reasons, the City of Helena feels that the proposed decision of the hearings examiner is in serious error and must be revised to reflect the fact that since the water discharged from the Helena Wastewater Treatment Plant were solely developed by the City of Helena, that water belongs to the City of Helena. It is the recommendation of the City of Helena that the proposed order reflect these considerations

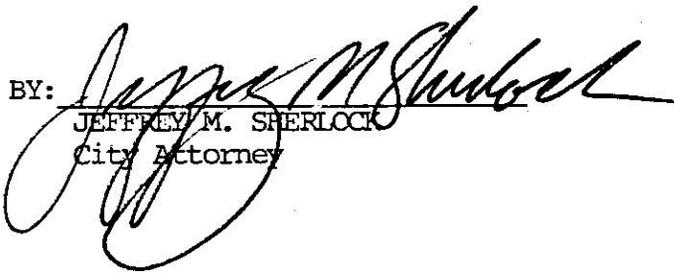
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and be altered so that the City of Helena may use the water as requested
in its application.

Respectfully submitted this 10th day of September, 1981.

THE CITY OF HELENA, MONTANA

BY:


JEFFREY M. SHERLOCK
City Attorney

CASE # 19084

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

(* * * * *)

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 19084-s411 BY)
THE CITY OF HELENA)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Helena, Montana, on July 31, 1981. The City appeared by its Director of Public Works, Richard Nisbett, and through its attorney David Hull. Objectors appearing were Don Burnham and Charles Graveley. The Department of Natural Resources and Conservation was represented at the hearing by T. J. Reynolds, Area Office Supervisor for the Helena Area Water Rights Field Office.

EXHIBITS

Applicant's Exhibits:

Applicant offered into evidence two (2) exhibits, to-wit:
A-1: A letter to the Department of Natural Resources and Conservation by an employee of Morrison-Maierle, Inc., with reference to the potential impacts of Applicant's proposed diversions on the physical stability of the Helena Valley Canal.

A-2: A map depicting the proposed place of use in green, with the red line purporting to represent the preliminary layout of the sprinkler pipeline system.

Applicant's exhibits were received into the record without objection.

Objector's Exhibits:

Objector Burnham offered into evidence a single exhibit, to-wit:

O-1: A copy of a Notice of Appropriation by B. H. Lichtwardt.

Objector Burnham claims to be the successor in interest to any and all rights represented by this notice.

This exhibit was received into the record without objection.

The Hearing Examiner, after considering the evidence herein, and now being fully advised in the premises, does hereby make these Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On June 13, 1978, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation on behalf of the City of Helena. This Application seeks 4.7 cubic feet per second up to 1700 acre-feet per year for new sprinkler irrigation of approximately 473.6 acres located in Sections 20, 21, and 22, in Township 10 North, Range 3 West, all in Lewis and Clark County. The proposed time of use is from April 15 to October 15, inclusive. The source of supply is claimed to be sewage effluent from the Helena Sewer Treatment

Plant, which is tributary to Prickley Pear Creek, and is to be diverted at a point in the SW1/4 SE1/4 SE1/4 of Section 17, Township 10 North, Range 3 West; all in Lewis and Clark County.

2. On January 3, 1979, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation by Don Burnham. This objection sets forth and claims the existence of certain water rights, and implicitly alleges that the granting of the Application in this matter would work injury to these rights.

3. On February 9, 1979, an objection to the granting of this Application was filed with the Department on behalf of the Helena Valley Irrigation District. This objection alleges generally that saturation of the proposed place of use by the irrigation claimed by the Applicant may work injury to the physical condition of the Helena Valley Canal by sloughing of the banks thereof or by pollution of the waters in the canal.

4. On February 14, 1979, an objection to the granting of this application was filed by Charles Graveley. This objection alleges generally that the Objector's point of diversion is located downstream from the point where the Applicant City currently discharges its effluent into Prickley Pear Creek, and that this source of water is required to fulfill this Objector's full appropriation.

5. The pertinent portions of this application were duly published for three successive weeks as provided by law in the Independent Record, a newspaper of general circulation printed and published in Helena, Montana.

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6. The Department has jurisdiction over the subject matter herein and jurisdiction over the parties hereto.

7. The Applicant is a person entitled to appropriate water.

8. The Applicant has a bona fide intent to appropriate water, and it is not attempting to speculate in the water resource.

9. The Applicant intends to use 4.7 cubic feet per second up to 1700 acre-feet per year for new sprinkler irrigation of grasses and/or hay on 473.6 acres more or less. This place of use is comprised of 53.8 acres more or less in the NE1/4 of Section 20, Township 10 North, Range 3 West; 74.5 acres more or less in the NE1/4 and 105 acres more or less in the NW1/4 and 33.1 acres more or less in the SE1/4 of Section 21, Township 10 North, Range 3 West; and 72 acres more or less in the NW1/4 and 85 acres more or less in the SW1/4 and 50.2 acres more or less in the SE1/4 of Section 22, Township 10 North, Range 3 West. The Applicant intends to use the waters claimed herein from April 15 to October 15, inclusive, of each year.

10. The Applicant intends to divert the waters claimed herein from waters or sewage effluent accruing from the Helena Sewer Treatment Plant at a point in the SW1/4 SE1/4 SE1/4 of Section 17, Township 10 North, Range 3 West, all in Lewis and Clark County. The ditch structure which carries the waters that forms Applicant's source of supply is tributary to Prickley Pear Creek.

11. Applicant's intended use of water for the cultivation of hay and/or grass is a beneficial one. Without the benefit of

irrigation waters, the lands described as the place of use could not at least produce the yields of these same lands when irrigated.

12. The Applicant's proposed means of diversion are adequate. The Applicant proposes to pump the water claimed herein from a ditch-type structure connecting the Helena Valley sewage treatment plant with Prickley Pear Creek. Thence, the water will be conveyed by pipeline to a point under Custer Avenue, and thence through a pipeline system for the sprinkler irrigation of the proposed place of use. Sprinkler irrigation of the place of use is technically feasible, and little water will be lost in conveyance pursuant to this system. Indeed, this Hearing Examiner can officially note that sprinkler irrigation is among the most efficient means of applying water to agricultural or irrigational purposes.

13. The record reflects no permits or water reservations which this instant application may conceivably affect.

14. The sewage effluent that forms the source of supply for Applicant's claim herein flows at an approximate rate of 3.2 to 3.3 million gallons per day.

15. Objector Don Burnham either on his own behalf or through Dave Baum flood irrigates some 300 acres for the production of alfalfa hay and small grains. At least one half of this acreage derives its irrigation water solely from the waste water or sewage effluent that forms the source of supply of Applicant's claims. This acreage has been historically irrigated for the above-described purposes prior to 1973.

16. Objector Graveley flood irrigates 50 to 55 acres for the cultivation of grasses and hay at a point immediately northeast of the confluence of Prickley Pear Creek and the ditch-type structure carrying the sewage effluent that forms the source of supply for Applicant's claims herein. Objector Graveley's diversion point is approximately 100 yards downstream from this confluence. Objector Graveley irrigates three to four times a year depending on the particular conditions in any given year, with each individual irrigation taking from some five (5) to ten (10) days, depending on the particular conditions in any given year. These lands were historically irrigated for grasses and small grain crops prior to 1973.

17. Both objectors herein use water substantially during the same time frame requested by the Applicant herein.

18. The Prickley Pear Creek inevitably goes dry in any given year. This condition occurs typically in June, and almost always by July 1 of any given year.

19. Objector Graveley depends on the sewage effluent or waste water from the Helena Valley Sewage Treatment Plant for at least the second cutting of any alfalfa hay, and in typical years relies on said waters during the month of June.

20. The Application in this matter was filed with the Department of Natural Resources and Conservation on June 13, 1978, at 2:03 p.m.

21. There are no unappropriated waters available for the Applicant in the amounts Applicant seeks to appropriate, or

during the times during which the Applicant seeks the use of the water herein.

22. Diversions pursuant to Applicant's claims will work injury to prior appropriators.

23. The Applicant's claims herein are less than the volumetric measure of 10,000 acre feet per year and they are less than 15 cubic feet per second as a flow measure.

24. The claim of the Applicant for 4.7 cubic feet per second up to 1700 acre-feet per year is not unreasonable. This amounts to approximately 3.6 acre-feet per acre for even the driest years.

25. The operation of the diversion works and the irrigation of the lands described herein as the place of use, if properly managed, will not generate pollution of the waters in the Helena Valley District Canal, nor will it in any way affect the physical ability of this canal structure.

CONCLUSIONS OF LAW

1. MCA 85-2-311 (1981 amend.) provides generally for the issuance of permits for new water uses:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

Although the instant application was filed at a time when the precursor to this statute was still in effect, (See MCA 85-2-311

(1979)), the change in some of the statutory language made by the 1981 legislature merely clarified former legislative intent and therefore no prejudice accrues to the Applicant by the application of the foregoing statute to the instant matter.

2. Pursuant to this section, the Department has jurisdiction over the subject matter herein, and by the appearance of the parties hereto, has jurisdiction over the persons involved herein.

3. The Applicant is a person entitled to appropriate water. MCA 85-2-102(10). The record reflects some confusion as to precisely who is the "real party in interest" in this matter, and hence who should be regarded as the appropriator. The place of use appears by the evidence to be owned and controlled by the City-County Airport. The irrigation of the place of use will also be controlled by this authority. The evidence does not descriptively indicate what the precise relationship is between the City of Helena and this City-County Airport entity.

However, this confusion is of immaterial proportions in the present matter. It sufficiently appears from the evidence that the Applicant City has been acting with reference to this particular application at least in part by the direction or request of the City-County Airport. Whether this relationship assumes the status of an agency is unclear, but it nonetheless appears that the application of the waters claimed herein to beneficial use will not be frustrated by the actions of any airport authority. Even if, however, potential divisions of authority should subsequently preclude the operation of

Applicant's plan, it is plain that for this reason Applicant will be unable to complete its appropriation, and therefore the same will inevitably lapse. See generally 85-2-312(2), MCA 85-2-315 (1979).

4. The Applicant has a bona fide intent to appropriate water and is not attempting to speculate in the water resource. See generally, Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900). Although uncertainties are reflected in the record upon the part of the Applicant as to the exact amount of acreage to be irrigated and as to the precise method of irrigating this place of use, these ambiguities stem from the lack of a definitive expression of the amount of water the Applicant may be entitled to as a result of this permit process. This does not indicate a lack of intention upon the part of Applicant to actually apply waters to the beneficial uses that it claims. It is unreasonable to accord Applicants the duty to invest sufficient resources such that every detail of the proposed appropriation is flushed out in circumstances where the amount of water actually made available for these purposes might cause substantial reworkings of these plans.

5. The Applicant's place of use is proposed to be 473.6 acres more or less. These lands are comprised of 53.8 acres in the NE1/4 of Section 20, Township 10 North, Range 3 West; and 74.5 acres in the NE1/4 and 105 in the NW1/4 and 33.1 acres in the SE1/4 of Section 21, Township 10 North, Range 3 West; and 72 acres in the NW1/4 and 85 acres in the SW1/4 and 50.2 acres in the SE1/4 of Section 22, Township 10 North, Range 3 West.

6. Applicant's proposed means of diversion are adequate. Sprinkler irrigation methods are among the most efficient means of applying water to agricultural or irrigation purposes, and no water will be wasted pursuant to Applicant's methods. See State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

7. The use of the waters as delineated herein will not cause the pollution of any of the waters in the Helena Valley District Canal, nor will such use in any way affect the physical stability of this structure. Such deleterious consequences suggested by the foregoing are not the inevitable consequence of Applicant's plan. While it may be true that mismanagement of these appropriative works may work such injuries, it is entirely speculative as to whether this mismanagement will occur. At any rate, certainly nothing in this Order could be read as authorizing the Applicant to create such disturbances.

8. The permit in this matter, if issued, would have a priority date of June 13, 1978, at 2:03 p.m. That is the date and time at which the Application in this matter was regularly filed with the Department of Natural Resources and Conservation. See MCA 85-2-401(2) (1979).

9. The Applicant has failed to show by substantial credible evidence that unappropriated water exists in the source of supply in the amounts the Applicant requests and for the time that the Applicant seeks the use of the water. The evidence shows that the waters accruing from the Helena Valley treatment plant in the form of sewage effluent have already been appropriated and put to

use for all practical purposes by other persons. Using Applicant's own evidence as to the flow of this sewage effluent, it is evident that Applicant's claims will leave only some 150,000 to 200,000 gallons per day in the source of supply throughout the irrigation season. Objector Burnham on the other hand, assuming that only one-half of his holdings are irrigated from this source of supply and further assuming that his irrigation efficiency is roughly equivalent to that claimed by the Applicant herein, would require the equivalent of a continuous diversion of the full amount of this supply in the waste water ditch for a continuous period of some 55 days in order to cover his place of use. Plainly Applicant's claims in these circumstances simply fail to hold water.

There is nothing in the record inconsistent with Objector Burnham's evidence that substantially all of the water in the source of supply is utilized throughout the irrigation season. The flood irrigation practices that describe Burnham's methods commonly create diversions of a substantially greater quantity of water than the plants or crops themselves may utilize. This requirement flows from the need of an "excess" quantity of water to "push" the waters actually required by the crops to all parts of the place of use. Moreover, while an appropriator cannot prevent reasonable changes by later appropriators in the condition of water occurrence (See 85-2-401(1) (1979)), it is likewise not incumbent upon such an appropriator to utilize the most efficient means of diversion possible. It is common knowledge that a portion of the waters in any source of supply

are required merely to facilitate the diversion of some lesser quantity, and thus the mere fact that waters run by any particular diversion point does not in and of itself establish the existence of unappropriated water. See State ex rel Crowley, supra.

Such waters that do flow past objector Burnham's diversion points are also utilized by Objector Graveley. As Prickley Pear commonly goes dry, these waters often form the only source of supply for Graveley's irrigation requirement. The foregoing comments with reference to flood irrigation and the necessity of securing sufficient amount of water in the source of supply to facilitate a means of diversions apply equally to this objector. Although there is some evidence that the lands now occupied by Objector Graveley had been sown to small grains in the past, this without more does not preclude the Objector from the more intensive water use corresponding to the cultivation of hay. Whether an appropriator who has solely and historically devoted his water to the irrigation of grains can subsequently attempt to convert his operations to the production of hay without securing an additional appropriation or without otherwise changing his water rights in conformity with the statutory requirements need not be decided herein. It is well known that the cultivation of small grains is often incident to the larger enterprise of alfalfa production, as it serves to put the land to use at such times when new stands of alfalfa are being cultivated, or as it functions as a companion or nurse crop during such early phases of alfalfa growth.

The "timing" of diversions by these parties is also not likely to alleviate the scarcity of water reflected by the record. All parties to this matter claim water for the same purposes, and thus the need for the same will likely arise during the same general time. Diversions by the Applicant would almost inevitably capture waters otherwise destined for use on downstream appropriator's lands.

The Applicant's evidence with reference to the flow of waters in the source of supply in 1935 is not material or germane. It is true that this is approximately the date of the Notice of Appropriation which Objector Burnham claims as evidence of his rights. However, a person prior to July 1, 1973, that being the effective date of the Montana Water Use Act and the advent of the permitting process, could complete an appropriation by simply diverting the water and applying the same to beneficial use. See generally, Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935), Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949), Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897), Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912). While additions to the amounts historically diverted may affect the priority dates to be accorded those incremental appropriations, this is in no way relevant to Applicant as it finds itself junior to even such new uses.

It is true that the foregoing rule does not apply to those appropriators taking water from a source of supply that has been adjudicated. Potential appropriators from such sources after 1921 must comply with specific statutory formalities, or be

deprived of the amount of any water used as against the claims of a subsequent appropriator that so complies. See generally Anaconda National Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926), Hanson v. So. Side Canal Users Asso., 167 Mont. 210, 537 P.2d 325 (1975). However, Applicant herein has wholly failed to proffer any evidence as to whether and to what extent the source of supply herein has been adjudicated, and as to whether and to what extent this adjudication affects or otherwise modifies Objectors' claims herein.

10. Applicant has failed to show by substantial credible evidence that diversions pursuant to its claims will not work injury to prior appropriators. It is true that both Objectors herein are inevitably senior to any potential water use upon the part of the Applicant, and therefore are entitled to the full measure of their appropriation notwithstanding the Applicant's water needs at any particular time. MCA 85-2-401 (1979). However, it appears by this record that practically any diversion made by the Applicant would have the necessary and inevitable effect of depriving one of these senior appropriators of the full measure of their water needs. This is injury within the meaning of the statute. See Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926). Although the Department is with the authority to "issue a permit subject ot terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators" (See MCA 85-2-312(1) (1979)), and although it appears that there may be some modest or minimal amounts of water available to the Applicant during early spring months, the record

does not provide a sufficient basis for quantifying this amount so that Applicant's diversions would not inevitably injuriously affect other appropriators.

WHEREFORE, based on the Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued.

Application for Beneficial Water Use Permit No. 19084-s41I by the City of Helena is hereby denied and dismissed in its entirety.

This Proposed Order is offered for the review and comment of all parties of record. Written objections or exceptions to this Proposed Order must be filed with and received by this Department by September 11, 1981.

DONE this 26th day of August, 1981.



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
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