

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. 24921-s41E BY REMI & BETTY JO)
MONFORTON)

* * * * *

Upon exception and objection to the Proposal for Decision entered in this matter by the Applicants Monforton the Objector Montana Power Company and the Objector Felsheim-Huckaba, the Department of Natural Resources and Conservation hereby enters this Final Order. The Proposal for Decision, except as explicitly modified herein, is hereby made a part hereof.

BURDEN OF PROOF

The Hearings Examiner in the course of the hearing in this matter enunciated a burden of proof standard corresponding with a "more likely than not" test. While not material to disposition of this matter, such a characterization was in error. MCA 85-2-311(7)(1981) provides that for an application of this character a prospective appropriator need only establish by "substantial credible evidence" that the statutory criteria for a water use permit exist. This verbiage amounts to a term of art, and it is inconsistent with any sort of preponderance test. This

latter burden has been accorded an explicit legislative description, and therefore it cannot enshroud and describe a burden of a varying description.

"Substantial credible evidence" means that quantum and quality of proof that will convince a reasonable man of the existence of any ultimate fact. It demands less in the way of proof than a preponderance test, but more than a standard of "probable cause".

In applying this test, the Department notes that "substantial credible evidence" does not precisely dovetail with the "substantial evidence" standard employed by the appellate courts of this state. This latter test embraces a measure of deference to the fact-finding tribunal in view of the cold and sterile record such appellate determinations necessarily rest upon. In contradistinction, the Department through its Hearings Examiner is able to assess and weigh the demeanor of the witnesses in making its findings of fact. See generally, MCA 2-4-621(3) (1981). Moreover, the agency is capable of utilizing its "experience, technical competence, and specialized knowledge" to adjudge that certain evidentiary claims are inherently improbable. See MCA 2-4-612(7) (1981). Substantial credible evidence thus involves a more exacting scrutiny than that comprehended by a "substantial evidence" factor and this degree of rigor has been exercised in the present circumstances.

MERITS

The exceptions entered to the proposal for decision by the applicants Monforton embrace issues relating to the relevancy and materiality of certain findings and conclusions entered in this matter, and to the legislative intent reflected by the criteria for a new water use permit. See MCA 85-2-311 (1981).

Applicants' arguments distilled translate into assertions that no proposed appropriation reflected by a new water use permit can adversely affect the rights of a prior appropriator, MCA 85-2-311(2) (1981), since as a matter of law any such new use must perforce be junior to those uses of any "prior appropriator". See MCA 85-2-401(2) (1981). Since the fundamental rule remains "first in time, first in right," or priority in time confers superiority in right, MCA 85-2-401(1), MCA 85-2-406(1) (1981), no adverse affect can result to prior appropriators as any permittee's use remains inferior and subject to the claims of prior uses.

In a similar fashion, Applicants claim that there is always unappropriated water available for new uses. Because a junior appropriator's claims embrace those waters not needed by a senior appropriator at any given time, and since the historic need of a senior appropriator bears no necessary or inevitable relationship to future need given at least the possibility of future abandonment of that senior right, it must follow according to the Applicants that there must always be unappropriated water available for new appropriations so long as the quantity of water claimed is physically available from the stream.

108712

In evaluating the cogency of these claims, it is instructive to inspect the experience of sister appropriation states under statutes with similar language. The gist of Applicants position as regards unappropriated water is reflected in Utah's counterpart of the present permitting process. By noting a state policy of encouraging the development of the water resource, and in light of the agency's lack of authority to finally resolve the contentions of the parties pursuant to the permitting procedure, the Utah courts read the "unappropriated" water issue as mandating only a determination that there is probable cause or a reasonable basis to believe that there is at any time surplus water available for the particular applicant's use. See generally, Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930); Rocky Ford Irrig. Co. v. Kents Lake Reservoir Co., 104 Utah 202, 135 P.2d 108 (1943), Whitmore v. Welch, 114 Utah 578, 201 P.2d 954 (1949), Lehi Irrig. Co. v. Jones, 94 Utah 367, 77 P.2d 362 (1938), United States v. District Court, Utah County, 121 Utah 1, 238 P.2d 1132 (1951), reh. den. 121 Utah 18, 242 P.2d 774 (1952).

This decisional equation is inapposite in Montana, however, by virtue of the governing statutes. The Montana legislature has particularized its intentions as regards the unappropriated water issue by delineating a triumvirate of factors that are to govern such a determination. See MCA 85-2-311(1)(a), (b), (c) (1981). Adoption of the Utah stance would plainly ignore these legislative mandates, especially that directive contained in MCA

CASE # 24921

85-2-311(1)(c) (1981) which requires an applicant to establish the existence of unappropriated water throughout the term of his proposed use. Moreover, while the Department acknowledges a directive of promoting the development and use of this state's water resource, See MCA 85-2-101 (1981), Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924), it cannot blind itself to the equally avowed purpose of protecting existing rights, MCA 85-2-311(2), MCA 85-2-101(4) (1981), Mont. Const., Art. IX, Sec. 3(1), nor abdicate its duty to accomodate these competing interests.

Applicant's arguments as to their potential adverse affect to prior appropriators also finds reflections in sister state permit proceedings. See Bullock v. Hanks, 22 Utah 2d 308, 452 P. 2d 866 (1969). Indeed, the high water mark of Applicants' approach is detailed in Beach v. Superior Court of Apache County, 82 Ariz. 17, 307 P.2d 911 (1957). Therein the Arizona court refused to grant standing to appeal from administrative permit dispositions on the part of objectors, since "first in time, first in right" left such persons without any interest which might be prejudiced by any such administrative determination.

This result fails to explain of course why such objectors had any right of participation even at the administrative level, and indeed commits the fundamental aberration of refusing effect to legislative provisions. See generally, MCA 1-2-101, 1-2-102 (1981). In short, Applicants argue herein that while the legislature assigned a duty to an applicant to establish that his

proposed water use will not adversely affect the rights of a prior appropriator, MCA 85-2-311(2) (1981), and that while the legislature further implemented this directive by enunciating differing standards of proof for water uses that it considered to threaten different sorts or degrees of adverse affect, compare MCA 85-2-311(6) (1981) with MCA 85-2-311(7) (1981), this same legislature by statutory fiat made such adverse affect impossible by simultaneously providing that permits "shall be issued subject to existing rights and any final determination of those rights made under this chapter. See MCA 85-2-312(1) (1981). Moreover, under this theory, the authority to "issue permits subject to terms, conditions, restrictions, and limitations...necessary to protect the rights of other appropriators", MCA 85-2-312(1) (1981), becomes mere surplusage and the culmination of a legislative feint. This "now you see it, now you don't" approach simply fails to give affect to legislative intent.

It is true as noted by the Applicants that the determination of unappropriated or "surplus" water, see Custer v. Missoula Public Service, 91 Mont. 136, 6. P. 2d 131 (1931), is inevitably a complex one, as its existence is predicated upon the constantly changing interplay of a variety of factors. However, the permitting process must remain a practical business for practical men. The record herein establishes that only twice in 20 years of recent record has the flow of the Missouri River exceeded the capacity of the turbines at Cochrane after August 1 and within the time of use proposed by the Applicant. In these instances,

the duration of spill was either so slight as to be of no practical significance or the spill occurred so late in the irrigation season that it is doubtful that any advantage could have been made thereof. (The depiction of water flow in MPC Exhibit J for 1969 is most probably a scrivener's error. It would truly be remarkable that two consecutive months would exhibit identical water flows.) It is enough to say that it would serve no useful purpose to license a prospective appropriator to attempt an appropriation after such date.

Applicant's arguments as to the undeterminable effects on unappropriated water of future acts of appropriators are not availing. The Department must assume that past is prologue, both in terms of physical supply and in terms of quantities in current use. That is, while Applicants are undeniably accurate in positing the appropriative claim as embracing only those waters that are reasonably required for the exercise of the particular appropriator's purpose at any given time, in the context of the permitting process, the "excess waters" thereby accruing to the source of supply are subject to the permitting applicant's claim only within the framework of the senior appropriator's particular use. Thus, if an unusually wet year occurs such that the senior irrigator's demand on the source of supply is less than the historic average demand, the remaining waters remain "unappropriated" insofar as an applicant for permit is concerned. Moreover, unappropriated waters exist for permittee's prospective uses where existing appropriator's uses do not

CASE # 24921

require continuous diversions. The interstices between historic times of diversion remain available for new uses.

The Department takes account of these circumstances. Thus, while the testimony of the Objector irrigators was to the effect that shortages are generally prevalent around the middle of July, as asserted by the Objector Felsheim-Huckaba, the Department notes that in water rich years existing soil moisture may extend the available supply, and in light of the ambiguous description of the middle of July, August 1 is an appropriate estimate of water shortages in unusually wet years. The Applicants' diversions cannot be "timed" after this date to alleviate the shortage in view of the continuous nature of Montana Power Company's use and the similar needs of the downstream irrigators that will yield demands on the source of supply coterminous with Applicant's needs.

Countenancing Applicants' assertions that describe the availability of unappropriated water solely in terms of subsequent failures to use prior appropriative claims at all encourages speculative claims to the water resource. After August 1 of any given year, Applicants' purported use must depend entirely on decisions by prior appropriators to forego their respective uses at least in some measure. Whether this will occur at all is entirely conjectural. A fixed and definite plan to appropriate water which is the hallmark of the appropriative claim simply cannot stand on such unsure footing. See generally Toohy v. Campbell, 24 Mont. 13, 60P. 296 (1900).

CASE # 24921

The eddies of Applicants' arguments also undermine the directive of the permitting process to "provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan." MCA 85-2-101(2) (1981), Mont. Const. Art. 1X, Sec. 3(4). This centralized record system would be of little value or import if it reflected merely a paper collection of filings bearing little or no relation to actual uses on the stream. See generally, Basin Electric Power Cooperation v. State Board of Control, _____ Wyo. _____, 578 P.2d 557 (1978), Allen v. Petrik, 69 Mont. 373, 222 P. 451 (1924), McIntire, The Disparity Between State Water Rights Records and Actual Water Use Patterns, 5 Land & Water L. Rev. 22 (1970).

It is true that such records can never enjoy a perfect marriage with the existing regime on a stream system. For example, while an appropriator is entitled to the greatest quantity of water he can beneficially use, Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905), the actual use from year to year at least for agricultural pursuits will be some lesser amount. The driest years that prompt the greatest demand on the source of supply for

agriculture are perforce uncharacteristic of an "average" annual use.

The sorts of uncertainties cannot, however, be said to make the record-keeping system a futile hope such that any water claim, whatever its realistic import may be for future diversions from any particular source of supply, must be made a part of the paper reflecting actual uses from that source. Such a result leaves little purpose for the legislatively mandated system as such paper claims will inevitably becloud and frustrate any realistic appraisal of current water usage within the state.

Moreover, Applicant's claims are out-of-stride with the nature of appropriative right. The reach of an appropriative claim has been traditionally premised on the volume of water historically put to beneficial use, Green v. Chaffee Ditch Co., 150 Colo. 191, 371 P.2d 775 (1962), Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940), Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911), Whitcomb v. Helena Water Works Co., 151 Mont. 443, 444 P.2d (1968), not the volume of water that may subsequently become available through changes on the stream system. While such changes indeed inure to the benefit of subsequent appropriators, Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914), Huffine v. Miller, 74 Mont. 50, 237 P. 1103 (1925), they do so by providing the nucleus for new and extended uses by way of new appropriations.

Appropriators are entitled to maintenance of the stream conditions as of the time they make their respective

appropriations. See Dahlberg v. Cannon, 84 Mont. 68, 274 P. 151 (1929), Loyning v. Rankin, 118 Mont. 235, 165 P.2d 1006 (1946), McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (192?), Lokowich v. City of Helena, 46 Mont. 575, 129 P.2d 1063 (1913), Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974), Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1894). However, this fundamental doctrine cannot reach and describe any vested interest to any condition as spectral as potential non-uses by a particular appropriator. A change of an agricultural use to a domestic or municipal one cannot be said to be open to objection merely because the contemplated use is more likely to result in constant and consistent diversions throughout the years than that diversion pattern that might be forecasted for the historic use.

Where the availability of water depends on extraordinary hydrologic events or the non-use of existing rights, any current claim for an appropriation of water that embraces this supply reflects at least in part a sort of gleam-in-the-eye philosophy. Such waters are not "unappropriated waters" within the meaning of the statute.

Much the same can be said of the adverse effect to prior rights that the present claim for water pretends. It is true that all of the Objectors herein are inevitably senior to the Applicants asserted use, and are therefore in turn necessarily entitled to the full measure of their historic water use. However, where the Applicant intends to divert waters that by the evidence have never been historically available to him, it is a

CASE # 24921

rather pedantic conceptualism that denies adverse affect to prior rights by an incantation of the first in time, first in right litany. The difficulties of administering the various water rights on a stream are legion, see generally, State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239 (1940), Irion v. Hyde, 110 Mont. 570, 105 P.2d 666 (1940), Donich v. Johnson, 77 Mont. 29, 250 P. 963 (1926), Allendale Irrigation Co. v. Water Conservation Board, 113 Mont. 436, 127 p.2d 227 (1942), and said complexities increase geometrically with increasing reductions in stream flow as more and more rights collide. Moreover, the Department cannot completely ignore that this as yet unadjudicated source of supply has no sort of regulatory authority for day-to-day matters on the stream. Protection for existing rights must inevitably resort to the full gamut of the judicial process, a rather cumbersome process to deal with fluctuating conditions on the stream.

It is possible to give a narrower reading to the issue of adverse affect by recognizing the same only in situations in which the priority system per se is ineffectual in protecting water supply to senior appropriators. In groundwater situations, for example, the attenuated connection between diversions and effect created by the time lag involved in dewatering the aquifer may leave the senior appropriator with little redress for his water supply by the time of recognition of the injury. See Hall v. Kuiper, (Colo), 510 P. 2d 329 (1973), Kuiper v. Well Owner's Conservation Association, (Colo.), 490 P. 2d 268 (1971), City of

Albuquerque v. Reynolds, 71 N.M. 428, 379 P. 2d 73 (1963).

However, these are problems of degree and not principle, see State ex rel. Cary v. Cochran, supra, and such a crabbed reading is inconsistent with the broad reach of the statutory language. At any event, it is immaterial in the present circumstances, in light of the requirement for "unappropriated water".

"If a reservoir user has invaded the rights of a prior appropriator it does not follow necessarily that his right to maintain and operate his reservoir should be denied; although that result would follow were it made to appear that the construction and use of the reservoir necessarily will do so." Donich v. Johnson, 77 Mont. 229, 242, 250 P. 963 (1926)

In the circumstances of the present matter, diversions after August 1 of any given year will for all practical purposes capture water required for downstream use. This is adverse affect within the meaning of the statute. The statutes are simply not susceptible to an unrestrained reading of Quigley v. McIntosh, 88 Mont. 103, 290 P. 266 (1930).

In any event, the assertions of the Applicants herein are largely not relevant to the condition limiting diversions to such times that Montana Power Company's Cochrane Dam spills water. This particular limitation tracks with Applicants' digestion of prior appropriation principles in the dual concept of the "Rule of Priority" and the "Rule of Necessity". Although it is true that it appears that Montana Power Company in some spring months

may choose not to utilize its turbines at full capacity, waters in the Missouri River will inevitably seek their own level in such situations and spill over Cochrane. If Montana Power is not utilizing the whole flow of the Missouri River, the excess waters will fill the storage component associated with Cochrane and spill over it.

Nor is it true as contended by the Applicants that the Bureau of Reclamation's Canyon Ferry facility will totally control the pattern of spills at Cochrane. Although Applicants chose not to subpoena representatives of this entity, see MCA 2-4-104 (1981), the Department can note for present purposes through its experience on the upper Missouri, See MCA 2-4-612(7) (1981), that Canyon Ferry is senior to Montana Power Company's Cochrane Facility. Thus, by virtue of this senior status and the massive storage component at Canyon Ferry, the Bureau of Reclamation can indeed "control spills" at Cochrane to a large degree. However, this is fully consistent with the rule of priority. The Applicants as permittees have standing to control waste or additional uses amounting to new appropriations at Canyon Ferry. See generally, City of Helena v. Rogan, 26 Mont. 452, 68 P. 798 (1902), and to this extent have the capacity themselves to "control spills" at Cochrane. At any event, it is worth noting that without the Canyon Ferry hydroelectric use and attendant return flows, Montana Power Company's thirsty demands for power production would create even greater restrictions on upstream water use.

This analysis assumes that the Montana Power Company is not precluded from its historic practice of filling, refilling, and otherwise successively filling its reservoir for subsequent power production uses of the water so stored. In Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941), the court referred to the following language from a Colorado case in its discussion of the nature of storage appropriation.

"These provisions (referring to Colorado statutes on reservoir appropriations) mean that to each reservoir shall be decreed its respective priority, and those priority entitles the owner to fill the same once during any one year, up to its capacity, and restricts the right, upon one appropriation, to a single filling for any one year. A double filling in effect would give two priorities of the same date and of the same capacity to the same reservoir, on the same single appropriation, and, if allowed, would violate the fundamental doctrine of the law of appropriation - he who is first in time is first in right - by making a junior superior to a senior reservoir appropriator. Necessarily the capacity of a reservoir, which the statute expressly says is the extent of its appropriation, is what the reservoir will hold at one time, not what can be stored in it by successive fillings; otherwise the capacity would vary, depending not on what the reservoir will hold, but on how many times it can be filled in one year. When we speak of the capacity of a barrel or bottle, we mean the number of gallons or ounces it will hold when filled once, not many times. 112 Mont at 455 (citing Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 P. 729), see also City and County of Denver v. Northern Colo. Conserv. Dist., 130 Colo. 375, 276 P.2d 992 (1954), Wheatland Irrig. District v. Pioneer Canal Co., (Wyo.), 464 P.2d 533 (1970).

This language, while sweeping in terms, is bridled by the specific circumstances it arose out of. Read in context, it amounts to at most dictum, since the circumstances disclosed in

Federal Land Bank do not indicate that any appropriator was in fact seeking more water than could be accommodated by a single filling of the storage structure. A "one-fill" limitation is of course mandatory in such a situation, else the appropriator would exceed his announced appropriative intentions. Thus, Federal Land Bank merely reaffirms the time-worn concept that the measure of an appropriation is in all events bounded by the intentions of the appropriator. See Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912), Toohy v. Campbell, 24 Mont. 13 60 P. 396 (1900).

Certainly no Montana statute can fairly be read as interposing any obstacle to multiple fillings of a single reservoir. Therefore, to the extent that Windsor relied on a construction of Colorado statutes, the one-fill rule is inapposite to Montana Power Company's practices. Nor can a one-fill limitation find refuge within the "pioneer rule" that the measure of an appropriation is limited to the capacity of the diversion ditch. See generally, Holmstrom Land Co. v. Meagher County Newlan Creek, 36 St. Rep. 956, ___ Mont. ___, 605 P.2d 1060 (1979), Gilcrest v. Bowen, 95 Mont. 44, 24 P.2d 141 (1933). It is obvious that a direct-flow claimant cannot intend to appropriate more than his ditch will carry, but this common-sense maxim simply has no place within the confines of a storage appropriation. The very purpose of storage is to capture water at one point for use at a subsequent time.

The foregoing reading of Federal Land Bank is buttressed by reference to Whitcomb v. Helena Water Works Co., 151 Mont. 443, 444 P.2d 301 (1968). Therein, the defendant attempted to refill

its storage works at such times that junior direct flow claimants were in need of that supply. The court characterized such a practice as an extension of the historic use that quantified the right, and thus such additional usage was not protected by the original priority. See also Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911). No mention of Federal Land Bank's "one fill rule" was made in the disposition of that controversy. Rather, in accord with the flow of Montana water law, the additional use not part of the intention reflected in the initial appropriation was accorded a new priority, and this subsequent priority in turn held no sway over intervening appropriations.

The most cogent arguments that can be marshalled in support of a single fill limitation can be gleaned from the seminal case of Windsor, supra. Therein, the court focused on the fundamental distinction between direct flow and storage claimants.

"An appropriation awarded to a ditch may be limited not only as to volume by its carrying capacity, but also by time--that is, the use of water through it is limited by its carrying capacity, and as to duration by the necessity of use--and it may also be restricted to some particular season or time of year. All these characteristics do not apply to an appropriation for storing water in a reservoir."
98 P. at 733.

Since storage appropriators do not divert from the ultimate source of supply at times that parallel their time of need, subsequent or prospective direct flow users from the same source of supply may be handicapped in forecasting precisely when and how much water will be available for their respective uses. The

one-fill rule in this context encourages in a general way reservoir diversions during high flow spring run-off periods and concomitantly discourages and often times prohibits such diversions during the latter part of irrigating seasons when the source of supply runs low. See generally, Gwynn v. Phillipsburg, supra. Thus, this limitation incidentally works to promote the maximum use of the water resource while minimizing disputes between storage and direct flow claimants.

Moreover, application of a one-fill rule provides a simple index for determining the extent of a reservoir appropriation, particularly in quantifying claims for "carry-over" storage. See Federal Land Bank, supra. However, the invocation of such a limitation paints with a very broad brush. Such an unwieldy tool will inevitably lead to clumsy results in a subject matter whose scarcity requires relatively fine-tuned precision. Any concerns reflected by such a limitation can be more appropriately addressed by the time-tested dictates that no appropriator can divert more water than is reasonably required for his purposes, Gwynn v. Phillipsburg, supra, by the mandate that every appropriator employ a reasonable means of diversion, State ex rel. Crowley v. District Court, 108 Mont. 59, 88 P.2d 23 (1939), or by an equitable accommodation of the interests at state. See generally, Denver v. Fulton Irrigating Ditch Co., (Colo.), 506 P.2d 144 (1973).

The consequences of a mechanistic application of such a one-bite approach can be fairly inferred from the present record. Since Montana Power Company uses water continuously throughout the year, a one-fill-per-year rule inevitably requires an arbitrary application since the start and end of any annual period bears no relevance to the particular water use of power production. Moreover, under such a rule, any drawdowns in storage will result in a demand for a greater quantity of water to produce the same unit of electrical power due to the consequent loss of hydraulic head, thereby increasing the demand on the source of supply and further frustrating upstream use. Suffice it to say for present purposes that Montana Power Company is not required to construct a massive single storage structure where a refilling of a smaller impoundment meets its purposes so as to fulfill its duty to exercise a reasonable means of diversion. The one-fill rule in the present circumstances simply fails to hold water.

Montana Power Company's objection can be expeditiously dealt with by reference to its individual assertions.

Montana Power Company's objections to the procedure employed with reference to the issuance of a Proposal for Decision are unavailing. Beyond the failure to explain exactly how it has been prejudiced by the procedure employed, the statutory provisions reflected in the Montana Administrative Procedures Act simply do not detail any rights to brief the facts or law on any subject prior to the preparation of a proposed decision. If

CASE # 24921

18742

Montana Power Company desired a transcript to assist them in evaluating the Proposal for Decision, they need only have asked for one. See MCA 2-4-614(2) (1981).

Montana Power Company's demand that the report of Larry Brown be stricken is meritless. The report by its own terms does not purport to be determinative of Montana Power Company's claims, and therefore no prejudice ensues to this objector in any respect.

Montana Power Company's assertions that their "Notices of Appropriation" should be given probative effect is also denied. They are not necessary to the decision in this matter, and no prejudice accrues to this Objector by denying them any consequence. Montana Power Company's claims for the so-called "Broadwater Case" find themselves on equal footing, and are also denied.

Montana Power Company also complains extensively of what they describe as overly obtuse findings and conclusions. For example, Montana Power Company complains that Finding of Fact No. 20 indicates that the Missouri River carries water in excess of the capacities of the turbines at Cochrane Dam generally from April 15 to July 15, instead of June 15 as Montana Power Company believes is reflected by the evidence. It is true that there will be many years in which the waters of the Missouri River will fail to flow in excess of the capacity of Cochrane's turbines by June 15. However, it serves no useful purpose to quibble over what "average" is more or less representative of Missouri River

flows. There are a significant number of years in which the flow of the Missouri River will exceed Cochrane's turbine capacity in parts of July, and a description of such flows from April 15 to July 15 is clearly not so excessive as to distort the record or mislead the parties hereto. Suffice it to say that in light of the disposition of this application, Montana Power Company suffers no prejudice by the use of orders of magnitude to describe water quantities.

Nor will the Department otherwise amend the Proposal for Decision herein to specify a diversion limitation of July 15. The record reflects a significant number of years in which water will be available after such time so far as Montana Power Company is concerned, and at any rate the limitation of diversions to spills at Cochrane is sufficient protection for this Objector.

Objection is also interposed by Montana Power Company to the lack of findings and conclusions with respect to all of the dams or structures owned or claimed by the Montana Power Company on the Missouri River. The Department of Natural Resources and Conservation through its permitting process is not adjudicating the rights of the respective parties to this matter. Existing uses are contemplated only insofar as it is necessary to determine issues of unappropriated water and adverse affect to prior appropriators. Clearly, if the water courts of this state should decree the scope and extent of Montana Power Company's water rights in terms that differ from those disclosed herein, that disposition would prevail over any inconsistencies contained

herein, and the provisional permit would perforce be "denied" or modified in keeping with any such changes. See MCA 85-2-313 (1981).

The Department will not encourage jurisdictional clashes or interferences with the water courts, and for that reason will not make findings on existing uses when those findings are not necessary for decision. Although it appears that Montana Power Company owns other hydroelectric facilities on the Missouri River mainstem, there does not appear to be any realistic chance in light of the much higher turbine capacity of Cochrane that these other structures or facilities would have need of water at any time that Cochrane is spilling.

Montana Power Company also complains that the regulatory authority of the Department has not been exercised to a sufficient degree to protect its prior rights. So much of this argument that asserts that the onus of asserting one's claim to the water resource amounts to adverse affect has been adequately dealt with in the Proposal for Decision. The disposition of this matter does not leave the entire regulatory burden of protecting its rights on Montana Power Company. It cannot be gainsaid that any appropriator in this state must exercise his water rights with constant and diligent deference toward senior rights. Moreover, if a permittee should overstep his lawful claims upon the source of supply, his permit may be revoked. MCA 85-2-314 (1981).

In accord with Montana Power Company's objections, the Findings of Fact and Conclusions of Law are hereby amended so as to show Montana Power Company has utilized up to 10,080 cubic feet per second for production of power prior to July 1 of 1973, and is now capable of utilizing said quantity at Cochrane Dam for said purposes. Although such findings and conclusions are not necessary in view of the disposition of this matter, they are in track with the evidence herein and are included so as to make a complete record. The Findings of Fact are further modified to reflect a storage component associated with Cochrane Dam facility of 5870 acre-feet instead of 6250. The record herein is confusing as to whether the storage figures propounded by Montana Power Company reflected active storage or the entire storage component. However, no prejudice can accrue to Montana Power Company by finding a lesser storage amount in accordance with its petition.

The Findings of Fact will be further amended by adding language recognizing that the storage of water at Cochrane Dam provides hydraulic head which enables Montana Power Company to produce more electricity than without said storage or with a lesser volume of said storage. It is an indisputable fact that additional increments of water depth will yield more electricity per given volume of water.

AMENDED FINDINGS OF FACT

Finding of Fact No. 16.

The Montana Power Company has utilized up to 10,080 cubic feet per second for the production of power prior to 1973, and the Montana Power Company is presently capable of utilizing up to 10,080 cubic feet per second for the generation of electrical power at this facility. However, due to the naturally occurring lesser flows of the Missouri River during most parts of the year, Montana Power Company actually uses far less than 10,080 cubic feet per second for the production of power at the Cochrane Dam during most portions of the year.

Finding of Fact No. 18.

In conjunction with this direct flow use of water at the Cochrane Dam facility, up to 5870 acre-feet of Missouri River water is stored by Montana Power Company. These waters are also utilized for the production of electrical energy by drafting from storage to offset daily fluctuations in the flow of the Missouri River and to meet peak demands for electrical energy on a year-round basis. Montana Power Company fills, refills and otherwise successively refills this reservoir throughout the year to maintain at least approximately 5000 acre-feet of storage. This storage component provides hydraulic head for the production of energy, such that with this storage a given volume of water can produce greater amounts of electricity.

CASE # 24921

AMENDED CONCLUSIONS OF LAW

Conclusion of Law No. 12.

Said conclusion is hereby amended to reflect that Montana Power Company has historically used up to 10,080 cubic feet per second of the flow of the Missouri River to produce electrical power for sale and has currently the capacity and need to use such a quantity of water on occasion.

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

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 24921-s41E is hereby granted to Remi and Betty Jo Monforton to appropriate 1575 gallons per minute up to 400 acre-feet per year for new sprinkler irrigation. The source of supply shall be Cold Springs from an existing ditch diversion located in the SE1/4 SW1/4 SW1/4 of Section 6, Township 2 North, Range 2 West, all in Jefferson County. Said water will be diverted from this ditch structure in a point in the NE1/4 NW1/4 SE1/4 of Section 12, Township 2 North, Range 3 West, all in Jefferson County. The place of use shall be 331 acres more or less comprised of 80 acres in the NW1/4 and 100 acres in the SW1/4 of Section 12, Township 2 North, Range 3 West; 35 acres in the NE1/4 and 66 acres in the SE1/4 of Section 11, Township 2 North, Range 3 West; and 50 acres in the SE1/4 of

CASE # 24921

Section 2, Township 2 North, Range 3 West, all in Jefferson County. In no event shall waters provided for herein be diverted from the above-named source of supply prior to April 15 of any given year nor subsequent to August 1 of any year. The priority date for this permit shall be October 24, 1979, at 12:30 p.m.

This permit is issued subject to the following express conditions, restrictions and limitations.

A. This permit is subject to all prior and existing rights, including, but not by way of limitation, the right of the Objector Sonny Huckaba to irrigate 300 acres more or less out of the Boulder River in accordance with his historical demand on that source of supply, and that right of Objector Frank Shaw to irrigate 300 acres more or less out of the Boulder River. This permit is also subject to any final determination of existing rights as provided by Montana law. Nothing herein shall be construed to authorize diversions by the Permittees to the detriment of any senior appropriator.

B. This permit is also subject to the right of Montana Power Company to use waters derived from the Boulder drainage for the production of electrical power at its Cochrane Dam facility on the Missouri River mainstem. The Permittees shall not divert water pursuant to this permit unless and until said Cochrane Dam facility is spilling water. "Spilling" as used herein refers to waters passing over the impoundment structure of Cochrane Dam.

C. Nothing herein shall be construed to affect or reduce the Permittees liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for any damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

D. The Permittees shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the above-described purposes. At all times when water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the water to remain in the source of supply Cold Springs.

E. Permittee shall diligently adhere to the terms and conditions of this order. Failure to adhere to the terms and conditions may result in the revocation of this permit.

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 1st day of March, 1982.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872

Matt Williams
Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

CASE # 24921

AFFIDAVIT OF SERVICE

FINAL ORDER

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on March 3, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Remi & Betty Jo Monforton Application No. 24921, for a Permit to appropriate Water, addressed to each of the following persons or agencies:

1. Remi & Betty Jo Monforton, Whitehall, MT 59759
2. Mr. L. R. Huckaba, P. O. Box 6, Cardwell, MT 59721
3. Jessie S. Felsheim, P.O.Box 8, Cardwell, MT 59721
4. Dave Moon, Moore, Rice, O'Connell & Repling, P.O.Box 1288, Bozeman, MT 59715
5. William Leaphart, 1 No. Last Chance Gulch, Helena, MT 59601
6. Norma & Ernest Tebay, Rt. 2, Box 2104, Whitehall, MT 59759
7. Martin B. Carey, Boulder, MT 59632

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Cheryl Wallace

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

On this 3rd day of March, 1982, before me, a Notary Public in and for said State, personally appeared Cheryl L. Wallace, known to me to be the Typist, 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.

[Signature]
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

RECEIVED

RECEIVED OCT 3 1981 Extra

APR 05 1982

MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE) PROPOSAL FOR DECISION
PERMIT NO. 24921-s41E BY)
REMI AND BETTY JO MONFORTON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Whitehall, Montana, on June 22, 1981. The Applicants appeared by counsel Perry Moore and David Moon of Moore, Rice, O'Connell and Refling. Objector Montana Power Company appeared through counsel Ronald Waterman and K. Paul Stahl of Gough, Shanahan, Johnson and Waterman. Objector Felsheim-Huckaba appeared by counsel William Leaphart.

STATEMENT OF THE CASE

On October 24, 1979, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by Remi and Betty Jo Monforton. That application seeks generally 1575 gallons per minute up to 623 acre-feet per year for new sprinkler irrigation from April 15 to October 15, inclusive, of each year. The place of use is proposed to be 331 acres more or less located in Sections 2, 11, and 12, in Township 2 North, Range 3 West, all in Jefferson County. The proposed

CASE # 24921

APR 12

point of diversion is from an existing ditch structure in the SE1/4SW1/4SW1/4 Section 6, Township 2 North, Range 2 West and thence from a pump to be located in that ditch in the NE1/4NW1/4SE1/4 of Section 12, Township 2 North, Range 3 West all in Jefferson County. The source of supply is claimed to be Cold Springs, a tributary of the Boulder River. The pertinent portions of this application were published for three successive weeks in the Boulder Monitor, a newspaper of general circulation printed and published in Boulder, Montana, and in the Montana Standard, a newspaper of general circulation printed and published in Butte, Montana.

On August 29, 1980, an objection to the granting of this application was filed on behalf of the Montana Power Company. This objection alleges generally that the proposed appropriation is from Cold Springs in Jefferson County, Montana, and upstream from the Canyon Ferry, Hauser, Holter, Black Eagle, Rainbow, Cochrane and Marony dams and reservoir impoundments, and that there is insufficient unappropriated water available for the proposed use without adversely affecting the downstream water rights of the Montana Power Company and other senior appropriators.

On September 12, 1980, an objection to the granting of this application was filed by Norma and Ernest Tebay. This objection alleges generally that there is insufficient unappropriated water available for the proposed use. The Tebays did not appear either personally or by representative in this matter, but submitted a

letter bearing the identification of Objector's Tebay Exhibit No. 1 as reasons for their objection.

On September 22, 1980, an objection to the granting of this application was filed with the Department by Martin Carey and Mary Leavitt. This objection alleges that there is insufficient water in Cold Springs to satisfy the Objector's claimed water right and Monforton's proposed appropriation. These Objectors did not appear at the hearing either personally or by representative.

On September 2, 1980, an objection to the granting of this application was filed by Jessie S. Felsheim and Susanne L. Hückaba. This objection alleges generally that the waters of Cold Springs have already been appropriated and put to use by others downstream and implicitly claims that the diversions pursuant to Monforton's application would work injury to Objector's claimed water right.

At the outset of these proceedings, Frank Shaw moved to intervene as an objector. Mr. Shaw did not receive actual notice of the pendency of these proceedings, and claims a use of water downstream from the proposed appropriation that may be detrimentally affected by this application. In a similar fashion, Mr. McDowell, Mr. Walt Dutton, and Mr. Jim Simonish also moved to intervene as objectors and claimed the use of water through a joint ditch downstream from Applicant's proposed appropriation which such use they claim may be affected by the granting of this particular application. The Applicant objected to such intervention, on the basis that they may be unable to

respond to any of the evidence propounded by such persons. This objection was denied at that time, but Applicants were specifically afforded an opportunity to make claims of prejudice at such times that any of the aforesaid persons might proffer evidence. Only Frank Shaw testified in this matter, and that testimony was not claimed by Applicants as being prejudicial, nor do the circumstances otherwise indicate that Applicant was unfairly surprised by any of this testimony.

EXHIBITS

The Applicant offered into evidence three exhibits, to-wit:

A-1 and A-2: Maps purporting to show the Applicant's proposed place of use and proposed point of diversion.

A-3: A memorandum consisting of 19 pages prepared by Larry Brown, formerly a hydrologist with the Department of Natural Resources and Conservation, purporting to detail the potential affect of Applicant's diverisions on the source of supply.

A-4: A report compiled and prepared by a Department employee entitled "Analysis of Water Availability on the Missouri River Above Canyon Ferry Reservoir".

Objector Felsheim-Huckaba offered into the record a single exhibit, to-wit:

O-1 (Felsheim): A map purporting to show this Objector's place of use in relation to the Boulder River.

Objector Montana Power Company offered into the record thirteen (13) exhibits, to-wit:

O-A through O-G: Copies of Notices of Appropriation claimed to evidence water rights Montana Power Company now owns or claims.

O-H: A schematic of the upper Missouri River drainage showing the relative locations of various dams claimed to be owned or operated by the Montana Power Company in relation to various tributaries of the Missouri River.

O-I: A graph digesting elements of Montana Power Company's claimed water rights, the source of which appears to be the Notices of Appropriation referenced above and as reflected in a certain judicial proceeding known as the "Broadwater Case".

O-J: A graph of the average daily flow of the Missouri River near a structure known as Marony Dam. The data for the same was secured from United States Geological Survey gaging records.

O-K: A digest of data of 20 years duration showing those relative times that the waters in the Missouri River flowed at rates in excess of 10,000 cubic feet per second.

O-L: A digest of data showing the relative occurrence of spills at Bureau of Reclamation's Canyon Ferry facility and at the Montana Power Company's Cochrane Dam facility.

O-M: A graph depicting the average runoff of the Missouri River, computed by a ten-year running average, from approximately the 1890's to the present time period.

PRELIMINARY MATTERS

The parties hereto made certain evidentiary objections during the course of this proceeding. Chief among these is Montana Power Company's and Objector Felsheim-Huckaba's objections to the receipt of a memorandum prepared by Larry Brown, a former employee of the Department of Natural Resources and Conservation. This evidence was received into the record over said Objectors' claims of prejudice due to the unavailability of Larry Brown at

the hearing for cross-examination purposes and hence the hearsay character of the statements made therein. Although there is no affidavit of service in the record, apparently the Applicants herein had subpoenaed Mr. Brown to appear at the hearing.

However, for unknown reasons, Mr. Brown failed to so appear.

It is difficult to reconcile the exculpation of these proceedings from the common law and statutory rules of evidence with the right of cross examination reflected in the Montana Administrative Procedures Act (See MCA 2-4-612(5) (1979)), particularly since such right of cross examination has been characterized as a fundamental constitutional right and the same is apparently not waived by the mere failure to conduct discovery and subpoena the actual declarant. See Hert v. J. J. Newberry, Co., 35 St. Rep. 1345, _____ Mont. _____, 587 P.2d 11 (1978) (tribunal therein similarly not bound by common law rules of evidence). However, in light of the disposition of the present matter, the Montana Power Company and other Objectors were not prejudiced by the receipt of this memorandum. Moreover, the report by its own terms is at best inconclusive as regards the scope and extent of Montana Power Company's rights and as regards any adverse affect upon them by Applicant's proposed diversions.

Objection was also made by the Applicant to the receipt of any of the Notices of Appropriation propounded by Montana Power Company. Montana Power claims that such notices evidence their rights. It is not necessary to decide whether the "prima facie" statutory derivatives of such filings survive the repeal of the sponsoring statutes. The point was apparently assumed without

decision in Holmstrom Land Co. v. Ward Paper Box Co., 36 St. Rep. 1403, _____ Mont. _____ P.2d _____ (1979). At any rate, the self-serving character of the statements made therein must be supplemented by proof of use of the quantity of water claimed over a reasonable period of time. Holmstrom, supra. In the circumstances of the present matter, these notices are no necessary ingredient to the disposition made herein.

Objection was also made by the Applicant to the receipt into the record of any findings of a certain water master reported in the so-called "Broadwater" case. See Montana Power Co. v. Broadwater-Missouri Water Users' Ass'n., 50 F. Supp. 4 (D. Montana 1942). That matter purported to determine the same rights Montana Power Company claims herein, except for those related to the Cochrane Dam facility, in relation to alleged interferences by upstream appropriators. However, the case was ultimately reversed on appeal for want of subject matter jurisdiction. See 139 F.2d 998 (9th Cir.) (1944). Clearly, none of the statements reported in this case are determinative of Montana Power Company's rights as regards the Applicants: A judgment speaks through its decretal language, and a voided determination necessarily stands mute. Galiger v. McNulty, 80 Mont. 339, 260 P.401 (1927). Moreover, Applicants herein were not parties to that matter. See Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935). Whether or not these master's findings are entitled to any probative value, however, demands a closer inspection of the affect of a finding of lack of subject matter jurisdiction. It is well settled that such a determination

reflects a conclusion that a particular court had in fact no power to adjudge the particular dispute before it. That is, any purported adjudication of the matter is entirely void. See generally Sloan v. Byers, 37 Mont. 503, 97 P.855 (1902). The purported judgment cannot consequently make any sort of a prima facie case for the Objector Montana Power Company, nor is it entitled to any stare decises effect. It does not inevitably follow from this, however, that all of the subsidiary end-products of a litigation subsequently found wanting for lack of subject matter jurisdiction are void for all purposes. See generally, Doggett v. Johnson, 79 Mont. 499, 257 P.267 (1927). Unless the error involving the subject matter jurisdiction is egregious, the same or similar motive for the cross examination of witnesses in the similar action would exist notwithstanding the power of the court to ultimately determine the issue before it. Moreover, the solemnity of the occasion reflected in the oath of the witnesses is not necessarily vitiated by a subsequent reversal on appeal. These are elements of the probativeness of statements made in the course of a proceeding that are not necessarily affected by jurisdictional concepts. See generally, MRE Rule 804(b)(1). It is true that at least some of the language in In Re Colbert's Estates, 51 Mont. 455, 153 P. 1022 (1915), went further in similar circumstances to the effect that such evidence is tainted by the lack of the power of the court to entertain the same. It is not necessary, however, to finally resolve this matter in the present circumstances. The Hearing Examiner notes that the master's report is permeated with

hearsay, and it is perforce conclusionary. The Applicant herein is also without opportunity personally to examine the witnesses from whose testimony the findings therein were predicated upon. Such infirmities certainly detract from the weight of such declarations for present purposes, and in the circumstances herein the "Broadwater" matter has played no necessary part in the disposition of this application.

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

FINDINGS OF FACT

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

2. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and are not attempting to speculate in the water resource.

3. The Applicants intend to appropriate 1575 gallons per minute up to 623 acre-feet per year for new sprinkler irrigation from April 15 to October 15, inclusive, of each year. The Applicants intend to divert the aforesaid quantity of water from Cold Springs through an existing ditch diversion located in the SE1/4SW1/4SW1/4 of Section 6, Township 2 North, Range 2 West, all in Jefferson County. The water will thence be diverted by a pump

from said ditch in the NE1/4 NW1/4SE1/4 of Section 12, Township 2 North, Range 3 West, all in Jefferson County. The Applicants intend to use the aforesaid quantity of water on 331 acres more or less, which acreage is comprised of 80 acres in the NW1/4 and 100 acres in the SW1/4 of Section 12, Township 2 North, Range 3 West; 35 acres in the NE1/4 and 66 acres in SE1/4 of Section 11, Township 2 North, Range 3 West, and 50 acres in the SE1/4 of Section 2, Township 2 North, Range 3 West, all in Jefferson County.

4. The Applicants intend to use the waters claimed herein for the irrigation and cultivation of alfalfa and small grain crops.

5. The type of use contemplated by the Applicants is a beneficial one, as the use of water for that end would be of material benefit to the Applicants, and as water is required for these purposes in order to produce sufficient crop yields.

6. There are surplus or unappropriated waters in Cold Springs in the amounts the Applicants seek to appropriate at some time in most years.

7. The source of supply Cold Springs is tributary to the Boulder River. Said river characteristically and perennially dewater above the point of confluence with Cold Springs Creek by the middle of the summer, such that the waters from Cold Spring Creek provide the only significant source of supply for downstream water users on the Boulder River.

8. The Boulder River is tributary to the Jefferson River, and the Jefferson River is in turn tributary to the Missouri

River mainstem. The waters of Cold Springs by gravity flow best to augment the Missouri River at any point, and/or serve to "push" other waters in the Missouri River system downstream by providing additional hydraulic head.

9. The Objector Sonny Huckaba, successor in interest to Jessie Felsheim, irrigates some 300 acres by flood irrigation out of the Boulder River, and out of sources foreign to this drainage. Such acreage has been historically irrigated prior to 1973.

10. The Objector Shaw uses the waters of the Boulder River to irrigate approximately three hundred (300) acres, and has historically prior to 1973 so used such waters.

11. The means of diversion employed by Objectors Felsheim-Huckaba and Shaw are customary for their intended purposes, and cannot on this record be said to result in the waste of water.

12. The Applicants' proposed means of diversion are adequate. The Applicants intend to pump the waters from Cold Springs Creek from an existing ditch diversion by means of a pump, thence through a series of pipe lines to be ultimately applied to the place of use by a system of sprinkler irrigation. Said means are customary for Applicants' intended purposes, and will not result in the waste of the water resource. Indeed, the Hearing Examiner can officially note that sprinkler irrigation is amongst the most efficient means of applying water to agricultural purposes.

13. After July 15 of any given year, the Objector Shaw and the Objector Felsheim-Huckaba typically and characteristically

have difficulties diverting sufficient quantities of water for their irrigation needs.

14. After August 1 of any given year, there is insufficient water in the source of supply to fulfill any of Applicants' claims.

15. The Montana Power Company owns and controls a structure known as the Cochrane Dam located on the Missouri mainstem below Great Falls, Montana. The waters of the Missouri River mainstem are used by Montana Power Company through the operation of this impoundment structure to generate electrical power for sale.

16. The Montana Power Company has utilized up to 10,000 cubic feet per second for the production of power prior to 1973, and the Montana Power Company is presently capable of utilizing up to 10,000 cubic feet per second for the generation of electrical power at this facility. However, due to the naturally occurring lesser flows of the Missouri River during most parts of the year, Montana Power Company actually uses far less than 10,000 cubic feet per second for the production of power at the Cochrane Dam during most portions of the year.

17. The Montana Power Company is ready and able to use on a consistent basis approximately 9500 cubic feet per second at any given time if and when it is available in the Missouri mainstem for the production and sale of electrical energy. The turbines at Cochrane Dam are run to full capacity only at times of peak demand for electrical service, as production of energy at this rate creates vibrational problems for these turbines at this hydroelectric facility.

18. In conjunction with its direct flow use of water at the Cochrane Dam facility, up to 6,250 acre-feet Missouri River water is stored by Montana Power Company. These waters are also utilized for the production of electrical energy by drafting from storage to offset daily fluctuations in the flow of the Missouri River and to meet peak demands for electrical energy on a year-round basis. Montana Power Company fills, refills, and otherwise successively fills this reservoir throughout the year to maintain at least approximately 5,000 acre-feet of storage.

19. Montana Power Company also claims the right to use approximately 47,500 acre-feet of water stored in the Bureau of Reclamation's Canyon Ferry facility. These rights are claimed to be based on contract, although the document evidencing the agreement is not in the record. Montana Power Company's interpretation of this agreement is that the first waters drafted out of storage in Canyon Ferry in any given year are contract waters.

20. The Montana Power Company typically uses all of the available waters in the Missouri River mainstem for the production of electrical power at its Cochrane Dam facility except during months of high spring flow in the Missouri River system. These months during which the Missouri River carries water in excess of the capacity of the turbines at Cochrane Dam are generally from approximately April 15 to approximately July 15. However, the precise times at which the flows of the Missouri exceed the capacity of the turbines at the Cochrane facility in any given year necessarily vary widely around the

above-described parameters due to the peculiar conditions of water supply within the Missouri River system during such times.

21. Whenever water is not being used by Montana Power Company to produce electrical power at the Cochrane Dam facility and/or whenever water is not being diverted for storage for subsequent use for power production by Montana Power Company at the Cochrane facility, such waters will inevitably spill over the impoundment structure known as Cochrane dam. Such spills have historically occurred on a relatively continuous basis during early spring months in which the waters of the Missouri River are in their high-flow stage. However, in particularly dry years, no waters of the Missouri River may spill over Cochrane due to Montana Power Company's use of the whole flow of the Missouri River for power production on a continuous basis at this hydroelectric facility.

22. Whenever such spills occur at Cochrane Dam facility, there are unappropriated waters available for the Applicant. The historical records of the spills at Cochrane Dam disclose that in most years there are unappropriated waters in the source of supply at the flow rate that the Applicants seek to appropriate the water.

23. There are not unappropriated waters in the amount the Applicants seek to appropriate throughout the period during which Applicants seek the use of the water. The evidence shows that in any given year, diversions after August 1 will in practically every case take waters otherwise destined for use upon either Objector Shaw or Objector Felsheim-Huckaba's properties.

Moreover, the historical record of spills at Montana Power Company's Cochrane Dam facility shows that surplus waters will not be available to the Applicants in most years after July 15, and in some years there may be no unappropriated waters available for Applicants' intended use. The records of spills at the Cochrane Dam facility also tend to show that there will be many years in which the Applicants herein will be unable to commence diversions as early as April 15, as there will be no surplus or unappropriated waters available for Applicants' use at that time.

24. Any diversions made by the Applicants herein in the amounts they seek to appropriate will have no measurable effect on the flow of the Missouri River at or near the Cochrane Dam facility. The effect of a deprivation of so much water as Applicants' proposed uses would consume on the production of electricity at the Cochrane facility is measurable, however, and such deprivation is material.

25. Diversions by the Applicants herein at any time other than on or about the times when Montana Power Company's Cochrane Dam facility is spilling will inevitably capture waters that would otherwise be utilized for electrical power production or would otherwise push other waters downstream for such electrical power production, and thus such diversions will adversely affect the Objector Montana Power Company at such times.

26. Applicants' intended use of the water herein will be highly consumptive. That is, a great proportion of the amount diverted will be actually used by the crops and lost to the source of supply. Indeed, this Hearing Examiner can officially

note that the cultivation of alfalfa hay is amongst the highest consumptive uses of the water resource.

27. In light of the disposition of this matter, it cannot be said that Applicants' diversions will interfere unreasonably with other planned uses for which permits have been issued. There are no water reservations apparent on the face of the record which may be potentially affected by the exercise of this permit.

28. After August 15 of any given year, diversions by the Applicants according to their plans would for all practical purposes capture waters otherwise required for downstream water users. Diversions after such time will adversely affect such appropriators.

29. The Objectors herein all use the waters of the source of supply at those times that the Applicants seek the use of the water.

30. In light of the disposition of this matter, an attempted appropriation of 623 acre-feet is unreasonable. Based on the acreage, and the number of irrigations intended, the Hearing Examiner finds that 400 acre-feet of water is the most that can be reasonably used for Applicants' intended purposes in any given year.

CONCLUSIONS OF LAW

1. MCA 85-2-311 (1981 amend.) provides generally for the issuance of new water use permits. That section mandates the

Department to issue such a permit if the following conditions or criteria exist:

- (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).

This application was filed at a time when the precursor to the above-cited provision was in effect. See MCA 85-2-311 (1979). However, the statutory changes cannot be read to affect the substance of the former legislative intent. The minor language changes merely clarify the reach and scope of the statute. What was formerly implicit is now explicit. The only

modification that arguably affects the Applicants herein is the explicit allocation of the burden of proof to the applicant found in MCA 85-2-311 (7) (1981 amend.). However, this allocation was implicit in the former provision. Compare MCA 85-2-311 (6) with MCA 85-2-311 (2) (1979). Moreover, this allocation of the burden of proof is consistent with the general proposition that the proponent of a rule or order has the burden of establishing all facts necessary for it. See MCA 26-1-401 (1979).

2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and they are not attempting to speculate in the water resource. See Toohey v. Campbell, 24 Mont. 13, 60 P.396 (1900).

3. Applicants' intended use of the water for the production and cultivation of grains and hay is a beneficial one. Such a use is agriculture within the meaning of MCA 85-2-101(2) (1979).

4. The appropriation of 1575 gallons per minute up to 623 acre-feet per year is an unreasonable quantity of water for the intended purpose in light of the disposition of this application. The evidence shows that the Applicants in any given year pursuant to the permit to be issued in this matter will be able to be reasonably use at most 400 acre-feet per year. The Applicants are entitled to the greatest quantity of water that they can beneficially use pursuant to their disclosed intentions, but an unreasonable quantity is equivalent to waste. See Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Sayre v. Johnson, 33 Mont. 15, 81 P.389 (1905).

The evidence adduced at the hearing relating to the issue of whether there exists sufficient unappropriated water for Applicants' intended purposes is immaterial. An applicant is entitled to complete an appropriation of whatever waters that are in fact unappropriated, and which may be diverted without injury to other appropriators. A water use permit merely licenses a prospective appropriator to initiate his intended appropriation. Any rights evidenced by such a permit remain inchoate or conditional in nature, until such time as that permittee actually applies the waters countenanced by the permit to beneficial use. See MCA 85-2-312(2) (1979), MCA 85-2-315 (1979). If in fact the waters countenanced by the permit are insufficient for Applicants' purposes, and the Applicant is otherwise not capable of securing an additional quantity of water, it is inevitable that the Applicants' plans will fail and that the appropriation will lapse. See also MCA 85-2-315(1) (1979).

Any contrary readings of the statutory criteria would lead the Department far afield in the evaluation of an application for a permit. Such theories would require administrative determinations of whether the prospective economic benefits to be derived from the use of the water would successfully amortize the capital investment represented by the diversion works themselves, coupled with all costs of maintenance and repair. Such a decisional equation would not be complete, of course, without an ascertainment of whether revenues garnered by the use of the water would generate sufficient yield to satisfy existing debts encumbering the place of use and the various equipment

incidental to the enterprise. Moreover, such determinations would have to be exercised prospectively, such that the Department and the applicant would have the unenviable task of attempting to define market conditions for the agricultural end products throughout the term of Applicant's debts. The applicant cannot be charged with the duty of establishing the price of hay ten years hence. The Department, likewise, can find no authority pursuant to the Water Use Act to dictate to prospective appropriators exactly how and when they are to spend their monies. The far reaching consequences attendant to these theories demonstrate that they are odds with any legislative intentions disclosed by the permitting process.

Awarding to any applicant the amount of any unappropriated water available without injury to other appropriators also implements "the policy of this state to encourage the use of the water resource. See MCA 85-2-101(3) (1979). A prospective appropriator should not be required to purchase any quantity of water that "runs free in this state's river systems". A prospective water user thus must be able as a threshold matter to determine exactly what quantities of water remain available for his intended uses in any source of supply. Other water users have no cause for objection in this regard. Indeed, allowing existing water users to insulate available waters in the source of supply based on the assertion that these waters are not sufficient for Applicant's purposes is in effect to allow such appropriators the privilege of commanding substantial quantities of river water merely to extract and use a smaller portion

thereof. An appropriator's rights do not carry so far. See State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

5. The priority date for this permit is October 24, 1979, at 12:30 p.m. That is the date and time at which the Application was duly and regularly filed with the Department of Natural Resources and Conservation. MCA 85-2-401(2) (1979).

6. The point of diversion is to be located from an existing ditch diversion in the SE1/4SW1/4SW1/4 Section 6, Township 2 North, Range 2 West, all in Jefferson County. From this ditch, the water is to be conveyed to the place of use by means of a pump located in the NE1/4NW1/4SE1/4 Section 12, Township 2 North, Range 3 West, all in Jefferson County.

7. The source of supply is to be Cold Springs, which is a tributary of the Boulder River, which is in turn a tributary of the Jefferson River, which is in turn a tributary of the Missouri mainstem.

8. The Applicant's proposed means of diversion are adequate. They are technically feasible and customary for the intended use, and they will not result in the waste of the water resource. See State ex rel Crowley, supra.

9. The place of use will be 331 acres more or less comprised of 80 acres in the NW1/4 and 100 acres in the SW1/4 of Section 12, Township 2 North, Range 3 West; 35 acres in the NE1/4 and 66 acres in the SE1/4 of Section 11, Township 2 North, Range 3 West; and 50 acres in the SE1/4 of Section 2, Township 2 North, Range 3 West, all in Jefferson County.

10. There exists unappropriated water in the amounts Applicants seek, but not throughout the April 15 to October 15, inclusive, period during which Applicants seek the right to divert waters from the source of supply. The evidence shows that the Applicants' source of supply, Cold Springs, almost inevitably forms the only source of supply for appropriators on the Boulder River during late summer months. Water availability problems for these downstream irrigators typically arise when the upper reaches of the Boulder River begin to dry up. This condition typically occurs sometime in July, and the credible evidence demonstrates that after the end of July in any given year the waters of Cold Springs are required to meet the demands of those irrigating out of the Boulder River. The report of Mr. Brown propounded by the Applicants is discounted insofar as it is at variance with the testimony of those with day-to-day familiarity with the source of supply. However, the estimated flow figures contained therein for the Boulder downstream from Cold Springs are generally consistent with the description of said flow by the Objectors herein. The relatively slight variations in flow after July attest to the substantial contributions of the "constant-flow" features of Cold Springs.

Unappropriated or surplus waters will also not generally be available to the Applicants after the middle of July in any given year due to the uses of the Objector Montana Power Company. The evidence of the historic flows of the Missouri River in relation to Montana Power Company's uses of this water for power production demonstrate that as a general matter surplus waters

are only available from approximately May through the middle of July. However, in some water-rich years water will be available to the Applicant in spite of Montana Power Company's claims from April 15 to approximately August 1.

11. So long as any permit in this matter is conditioned such that diversions by the Applicant are prohibited after August 1, no adverse affect to other appropriators on the Boulder River will occur. It is true that in many years water depletions to such downstream appropriators will occur at far earlier periods. However, the fundamental rule of water allocation in times of scarcity remains that he who is "first in time is first in right". See 85-2-401(1) (1979); MCA 85-2-406(1) (1979). The first to put the waters of this state to beneficial use is entitled to the maintenance of that use against the claims of all those coming after him. The Applicants therefore must divert water at their peril. Interferences with prior rights will breed actions for damages and injunction by those whose prior rights have been infringed. See Tucker v. Missoula Light & Ry. Co., 26 Mont. 452, 68 P. 798 (1902); Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921). The permit exercised by such a junior appropriator may also be subject to revocation. See MCA 85-2-314 (1979).

Although the Department may "issue a permit subject to terms, conditions, restrictions and limitations it considers necessary to protect the rights of other appropriators" (See 85-2-312(1) (1979)), under the circumstances of the present matter, it is not feasible to condition the present application to protect the

irrigators out of the Boulder beyond the inevitable "subject to all prior and existing rights". Fashioning a fixed-time for curtailment of Applicants' diversion such that even relatively sporadic interference with prior rights would be prevented would have untoward consequences. It is a well-known fact that the creeks, streams, and rivers of this state typically follow the characteristic pattern of high-flows during snow-melt runoff, followed by gradual depletions as this source of supply is exhausted. The precise magnitude and timing of these occurrences will vary according to the particular conditions of water supply affecting the stream in any given year. The inevitable consequence, therefore, of conditioning a permit such that no interference with prior rights is conceivable is to test the measure of unappropriated water according to the driest years on record. This procedure in turn inevitably mandates and encourages the waste of vast quantities of the state's water resources contrary to the explicit policies of the Montana Water Use Act. See generally MCA 85-2-101 (1979).

Another may appropriate without regard to the consent of the prior appropriator. Subject to the rule of priority, later comers may make appropriation, each in succession being required to respect the appropriation of all who came before him. Later appropriations may be made of the surplus over what has been appropriated by prior appropriators, or of any use that does not materially interfere with prior appropriators," Custer v. Missoula Public Service Co., 91 Mont. 136, 143-145, 6 P.2d 132 (1931), See also, Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940).

It is true that new water uses in such situations may impose some sort of regulatory burden on other water users should such

new comers overstep the bounds of their claim on the source of supply. However, this is a necessary incident of the development of this state's water resources.

"One should not be permitted to play the dog in the manger with water he does not or cannot use for beneficial purposes when other lands are crying for water. It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated." Allen v. Petrick, 59 Mont. 373, 379, 222 P. 451 (1922).

Equally, one cannot escrow vast portions of this state's water resources merely to conveniently exercise present rights. See State ex rel Crowley, supra. Certainly, for example, saddling existing appropriators with their proportionate share of the expense of a water commissioner to distribute the waters in accordance with the appropriators' respective rights cannot be countenanced as injury. See McIntosh v. Graveley, 159 Mont. 172, 495 P.2d 186 (1972). Moreover, since water commissioners are inevitably subject to human error, it necessarily follows that even the burden of judicially rectifying these errors is not adverse affect and not injury.

Moreover, conditioning permits such that no potential exists for interferences in every instance is inconsistent with the legislative directive that priorities be assigned to permittees. See MCA 85-2-401(2) (1979). "First in time, first in right" means nothing if there are never instances where claims to the water resource exceed supply.

Insofar as irrigators on the Boulder River are concerned in these circumstances, the regulatory power of the Department is exercised sufficiently so long as Applicant's diversions are adequately metered such that their affect on the source of supply can be ascertained at any given time, and so long as diversions are prohibited after that date at which the credible evidence shows that there is no surplus waters available in any given year. See Donich v. Johnson, 77 Mont. 229, 250 P.963 (1926). It serves no useful purpose to license a person to complete an appropriation of water that by the evidence will not be available to him.

12. The significance of the scope of Montana Power Company's claims invites a brief excursion into the fundamentals of the appropriation system so as to provide a foreground for the resolution of the present matter. In Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921), Montana unequivocally joined the other western states in repudiating the common law notion of riparian rights as governing the distribution of the water resource. The incidents of the riparian system were and are entirely unsuited to conditions in the "Great American Desert". Thus, the riparian notions of confining the use of water to lands contiguous to the stream were rejected in favor of authorizing the use of water wherever such use would be of material benefit to the appropriator. Unlike his counterpart in the lush countrysides of common law England, the landowner in the West might find himself at great

distances from the source of water that would put his land to its most productive use. Such a riparian marriage of land to water thus unreasonably impeded the full development of Montana's resources.

Equally fundamental to this shift of attention towards the encouragement of the development of the water resource was the appropriation system's emphasis on the protection of the capital investments required to put this water to beneficial use. Although the physical factors determining the amount of water available in the source of supply may continue to plague an appropriator, uncertainties as to supply threatened by man-made alterations were curtailed by the appropriative doctrine. Unlike the riparian features of "reasonable use" and sharing in times of shortages, the talisman of the appropriation system is the exclusivity of use by any appropriator. The hoary maxim of "qui prior est tempore, portior est in jure," while having given way to the intelligible formula of "first in time, first in right," remains as the fundamental tenet of the appropriation doctrine. The first to apply water to a beneficial use is entitled to the maintenance of that use against all subsequent appropriators. MCA 85-2-401(1) (1979); MCA 85-2-406(1) (1979).

Applying these basic principles to the instant matter, it appears from the record that Montana Power Company has historically used up to approximately 10,000 cfs of the flow of the Missouri River to generate electrical power for sale

and stands ready and has the capacity to produce and market on a consistent basis that quantity of electricity that would be produced by a flow of 9,500 cubic feet per second. The Missouri River, however, does not now nor has it historically passed such large quantities of water on any consistent basis. Rather, this river reflects the typical pattern of relatively high flows during spring snow-melt run-off periods, followed by tapering off periods culminating in a more or less constant "base-flow" rate. It therefore appears that Montana Power Company uses, albeit in a non-consumptive manner, the substantial part of the entire flow of the Missouri River during substantial portions of any given year. Moreover, in extremely dry years, Montana Power Company's claims may require the entire flow of the Missouri at its Cochrane Dam facility throughout the year.

This use of such large quantities is not intrinsically at odds with any features of the appropriative system. An appropriator is entitled to the "whole flow of the stream" so long as he can make beneficial use of it. See Mettler v. Ames Realty Co, supra, Meine v. Ferris, 120 Mont. 210, 247 P.2d 195 (1952). Nothing in the record suggests that Objector Montana Power Company is using an unreasonable quantity of water for its power production purposes, nor does the evidence in any way suggest that this Objector's means of diverting or capturing the waters for such purposes is unreasonable. See generally, Woodward v. Perkins, 108

Mont. 208, 90 P.2d 160 (1944), State ex rel Crowley v. District Court, supra.

The sole and critical issue is thus whether these Applicants' diversions that are relatively far removed from the mainstem of the Missouri will "adversely affect" the thirsty demands of Montana Power Company for power production. It is well settled in this general regard that a prior appropriator's claims embrace of all those waters that accrue to his ultimate source of supply. That is, diversions by a senior on any particular water course are protected against encroachments created by subsequent diversions on tributaries thereto. See Helena v. Rogan, 26 Mont. 452, 68 P. 798 (1902); Forrester v. Rock Island Oil Co., 133 Mont. 333, 323 P.2d 597 (1958); Rock Creek Ditch Co. v. Miller, 93 Mont 248, 17 P.2d 1074 (1933); Spaulding v. Stone, 46 Mont. 483, 129 P. 327 (1912), Perkins v. Kramer, 121 Mont. 595, 199 P.2d 475 (1948).

The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes, which in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute. Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135, 141, 85 P. 880 (1920).

This is, of course, in keeping with the substantive protections afforded the senior appropriator by the appropriation

doctrine. The hallowed "first in time, first in right" would be substantially undermined if subsequent water users could curtail existing uses by the simple expedient of drawing off tributary waters.

Nothing in the record in the present matter indicates that the flow of Cold Springs does not eventually augment the flow of the Missouri River above Montana Power Company's Cochrane facilities. That is, Applicants' evidence is insufficient to demonstrate on this record that Cold Springs does not contribute to Missouri mainstem flow throughout the period of use requested by the Applicant in light of the established connections between such watercourses. See Ryan v. Quinlan, 45 Mont 521, 124 P. 512 (1912); Perkins v. Kramer, supra. More to the point, the evidence is insufficient to show that Applicants' proposed appropriation, being of a consumptive nature, will not reduce the contribution of Cold Spring flow to the Missouri system through such period of intended use. See generally, MCA 85-2-311(5) (1981 amend.)

The use of such waters as contemplated in this application will thus result in an adverse effect to Montana Power Company unless the same is properly conditioned. The evidence shows that unless Montana Power Company's Cochrane Dam facility is "spilling" water, the flow of the Missouri is insufficient to supply this Objector with the full measure of its historic water usage. Diversions upstream throughout such periods that Cochrane fails to spill will only augment such depletions. It is true that the affect of Applicants' diversions on the Missouri

mainstem in the amounts requested herein will be immeasurable at any given time. This does not make Applicants' threatened interferences trifling, however. There may be circumstances in which a prior appropriator may suffer minor depletions due to the engineering difficulties inherent in quantifying and regulating various uses on the stream. "As in other human problems, into which varying factors enter, it is not to be expected that results may be obtained with absolute mathematical certainty." Donich v. Johnson, 77 Mont. 229, 253, 250 P. 936 (1926), see also Allendale Irr. Co. v. State Water Conservation Board, 113 Mont. 436, 127 P.2d 227 (1942). However these concerns may relate to the difficulties in prescribing conditions for any particular application so as to forestall interferences with prior rights, they cannot be heralded in carte blanche fashion to license encroachments where adverse affect is evident based on the uncertainties involved in ascertaining the precise measure of that adverse effect.

The plain inference from the evidence herein is that Montana Power Company is already being "adversely affected" by a multitude of junior diversions on the upper reaches of the Missouri drainage. Applicants' proposed diversions will at times simply add to these depletions. Although Applicants' proposed diversions may be slight in comparison with Montana Power Company's significant demands on the water resource, this again merely goes to the extent of adverse affect and not its existence per se. In light of all the substantive protections accorded a prior appropriator, it would be anomolous to sanction a multitude

of small and relatively innocuous uses of water that in the aggregate would represent major depletions to downstream uses. Such a piecemeal approach denies individual accountability where such singular diversions, also form the predicate for marked injury and frustration of water-dependent enterprises. The "finger-pointing" this approach suggests contemplates a procedural flexibility that is belied by the substantive doctrine it serves to implement. The tail cannot be allowed to wag the dog in such a fashion.

The Hearings Examiner further notes that not all of Applicants' claimed water will survive the necessary evaporative and seepage losses that will necessarily accrue enroute to the Missouri River mainstem. However, this does not militate against the conclusion reached herein. An appropriator may insist that sufficient waters be left upstream so that the full amount of his appropriation may be secured at his point of diversion.

Under the theory of the law of this State relating to water rights, the prior appropriator may insist that the water remain in the stream, from which he has the right of prior appropriation, so long as any useful quantity thereof would reach his point of diversion, if allowed to remain. He is entitled to insist that all of such water remain, in order to carry the flow down to his point of diversion, although a large portion of it would be lost by evaporation and percolation. He has the right to the prior use of the water of the creek, and while he may be entitled to a stated quantity only, it may require much more than that quantity in the creek to carry the amount he is entitled to down to his point of diversion. Raymond v. Wimsette, 12 Mont. 551, 560, 31 P. 537 (1892).

The difficulty inherent in the present matter, and the gravamen of Applicants' claims as regards Montana Power Company's

claims, revolves around the temptation to find that Applicants' proposed use of water is simply more beneficial than that of power production and that therefore their relatively slight interferences should be tolerated, especially in light of this State's dependence on its agricultural community. However, such an analysis smacks of the riparian "reasonable use" concept, and it forms no part of the prior appropriative scheme. The implementation of more productive or beneficial uses of water are matters of the market place in this State, as such enterprising persons ought to be able to pay more for the existing use than it is worth to its holder. See MCA 85-2-402, 403 (1979). The significant and continuous demands for water by power production enterprises demonstrates most markedly the "selfish" characteristics of the prior appropriation system. "So, the rule of priority of right was adopted, in order that the few who were first might live and live well rather than that the many should starve or else eke out a miserable existence." Kinney on Irrigation, Sec. 780. When the legislature in this State intends to subordinate such power production to other uses of the water resource, it expressly so states. See MCA 85-1-122 (1979).

Whenever the Cochrane Dam facility fails to spill, the inevitable and necessary effect of diversions made pursuant to the present application is to curtail power production by Montana Power or to force this Objector to make up the same by the more expensive process of coal-based production. This is adverse effect within the meaning of the statute. See generally Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926).

13. The evidence justifies a conclusion that the present application and permit pursuant thereto can be conditioned so as to protect the prior rights of the Montana Power Company by restricting Applicants' diversions to those periods during which Montana Power Company's Cochrane Dam facility spills water. See generally, MCA 85-2-312(1) (1979). Such spills occur on a relatively continuous basis throughout certain portions of most years, and form a readily ascertainable event. Moreover, such an index will vary with the conditions on the stream in any given year and with the precise extent of the Montana Power Company's use of the water resource for power production.

The fact that others may use the waters of this state in a wasteful fashion or otherwise illegally so as to reduce the time frame during which such spillage occurs at the Cochrane Dam facility does not affect the Applicants herein insofar as their use relates to that of Montana Power Company's. The senior appropriator's remedies are cumulative and not severable. The fact that other uses on the stream system may be interfering with the exercise of a prior right certainly cannot license others to further interfere with the same. Such a junior appropriator's remedy is to enjoin such inferior and/or illegal uses in order to protect his own use against the claims of a senior water user. See City of Helena v. Rogan, 26 Mont. 454, 68 P. 798 (1902).

It is true that the permitting process and the statutes governing the same should not be construed in such a way so as to insulate and protect such wasteful uses of the water resource

against legitimate claims to its use. Thus, it may be appropriate in circumstances when an applicant propounds evidence reasonably indicating waste on the part of a water user to condition a permit such that an applicant may be afforded an opportunity to enjoin such waste without forfeiting priority. However, the record herein does not so reasonably establish waste by any particular user of the water resource.

There will be some timing problems associated with the above-stated condition. However, the relatively modest periods required for water to flow from Cold Springs into the Missouri River mainstem will not frustrate this condition for the purposes of the permitting process. Such delays will only require the Objector herein to utilize the waters stored in its impoundment structure.

14. The application as limited herein will not unreasonably affect a planned development for which a permit has been issued, nor will it affect any water reservation.

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

Subject to the terms, restrictions, and limitations described below, Application For Beneficial Water Use Permit No. 24921-s41E is hereby granted to Remi and Betty Jo Monforton to appropriate 1575 gallons per minute up to 400 acre-feet per year for new sprinkler irrigation. The source of supply shall be Cold Springs from an existing ditch diversion located in the SE1/4SW1/4SW1/4

of Section 6, Township 2 North, Range 2 West, all in Jefferson County. Said waters will be diverted from this ditch structure at a point in the NE1/4NW1/4SE1/4 of Section 12, Township 2 North, Range 3 West, all in Jefferson County. The place of use shall be 331 acres more or less comprised of 80 acres in the NW1/4 and 100 acres on the SW1/4 of Section 12, Township 2 North, Range 3 West; 35 acres in the NE1/4 and 66 acres in the SE1/4 in Section 11, Township 2 North, Range 3 West; and 50 acres in the SE1/4 of Section 2, Township 2 North, Range 3 West, all in Jefferson County. In no event shall waters provided for herein be diverted from the above-named source of supply prior to April 15 of any year or subsequent to August 1 of any given year. The priority date for this permit shall be October 24, 1979, at 12:30 p.m.

This permit is issued subject to the following express conditions, restrictions, and limitations.

A. This permit is subject to all prior and existing rights, including, but not by way of limitation, the right of the Objector Sonny Huckaba to irrigate 300 acres more or less out of the Boulder River in accordance with his historical demand on that source of supply, and that right of Objector Frank Shaw to irrigate 300 acres more or less out of the Boulder River. This permit is also subject to any final determination of existing rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the Permittees to the detriment of any senior appropriator.

B. This permit is also subject to the right of Montana Power Company to use waters derived from the Boulder drainage for the production of electrical power at its Cochrane Dam facility on the Missouri River mainstem. Whenever this Cochrane Dam spills water, diversions by the Permittees will not adversely affect the above-described use. "Spilling" as used herein refers to waters passing over the impoundment structure of Cochrane Dam.

C. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for any damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

D. The Permittees shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the above-described purposes. At all times when water is not reasonably required for these purposes, Permittees shall cause and otherwise allow the waters to remain in the source of supply Cold Springs.

E. Permittees shall diligently adhere to the terms and conditions of this Order. Failure to adhere to the terms and conditions may result in the revocation of this permit.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. Exceptions and objections to this Proposed Order must be filed with and received by the Department of Natural Resources and Conservation on or before October 30, 1981.

DONE this 30th day of September, 1981.



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962