

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. 25170-g41B BY EAST BENCH GRAIN)
& MACHINERY, INC.)

* * * * *

We note at the outset that the waters claimed herein are not groundwaters, as they are "part of the surface water." MCA 85-2-102(8). The Applicant's pumping will induce recharge from the creek, although the amount thereof cannot be determined on this record. Moreover, the cone of depression associated with the pumping of Applicant's well will reach the Objector Forrester's wells. Thus, one source of supply is involved herein, and the rule of priority is the principle of allocation. See *Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1901) ("It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules." 39 Mont. at 390); see also *Perkins v. Kramer*, 148 Mont. 344, 423 P.2d 587 (1966); *Beaverhead Canal Co. v. Dillon*, 34 Mont. 135, 85 P. 880; *Spaulding v. Stone*, 46 Mont. 483, 129 P. 327 (1912); Mont. Const. Art. IX, Sec. 3(3); MCA 85-2-102(14); MCA 85-2-401.

We also note that dictum in *Ryan v. Quinlan*, 45 Mont. 521, 124 P. 512 (1912), may be read as establishing a different rule

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with regard to the "type" of waters at issue herein, but that case ultimately turned on the failure of the defendant to establish a tributary connection between the "percolating waters" at issue therein and the surface flow of the attendant stream. Here, the evidence points entirely in the other direction, and at any rate, the burden of proof is on the Applicant to show a lack of tributary connection. See MCA 85-2-311(7). Waters will be presumed tributary vis a vis a particular objector's use, see generally, Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975 (1951); Kuiper v. Lundvall, 187 Colo. 40, 529 P.2d 1328 (1974), cert. denied 421 U.S. 996 (1975), and an Applicant seeking a contrary conclusion must show, under the present state of the art, more than a mere lack of surface connection between the competing uses to establish the lack thereof. See Nelson v. C.E.C. Plywood Corp., 154 Mont. 414, 465 P.2d 314 (1970); Meeker v. East Orange, 77 N.J.L. 623, 174 A. 379 (1909).

The rule of priority applicable herein demands respect for Forrester's senior uses. While the Applicant is undoubtedly correct in noting that "first in time, first in right" does not equate with blind allegiance to the senior appropriator's historical manner of diverting his water, it also cannot be doubted that such diversion means are entitled to some protection in order to recognize the senior status of the historical use. The test is one of the reasonableness of the existing diversion, MCA 85-2-401, and the backdrop for its application is the sanctity of the prior appropriator's status

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with its concomitant impetus toward the development of the water resource by protecting the capital investment in the same. It is well to emphasize in determining the reasonableness of Objector Forrester's diversion means that Montana is not a "reasonable use" state, see *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953); *Canada v. City of Shawnee*, 179 Okla. 53, 64 P.2d 694 (1936); Restatement Second Torts, §858A, nor does this state recognize the doctrine of "correlative rights." See *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1902), 74 P. 766 (1903). A fortiori, Montana does not recognize with relation to the type of waters at issue herein the common law rule of absolute ownership, See *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955); *Meeker v. East Grange*, *supra*; *Long Irrigation*, p. 86 (2d ed. 1916), or the civil law rule of capture.

We cannot say that the Objector Forrester's means of diversion are unreasonable as a matter of law. The Applicant's proof falls far short of establishing the same, and it bears the burden of persuasion on this issue. MCA 85-2-311. Indeed, the Applicant's case is noteworthy for what it does not show. There is nothing in the record showing what amount of water, if any, is in the aquifer underlying the Objector Forrester's well. There is further nothing indicating what the average annual recharge to this aquifer is or whether the present rate of withdrawal from this aquifer exceeds this average annual recharge. Further, we have no information on the stage of development of water-dependent enterprises that may depend on

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this aquifer. We cannot say therefore, that the Objector Forrester is "commanding the whole flow of the stream" merely to extract and use a smaller portion thereof. See Colorado Springs v. Bender, infra.

We understand that the above information described in terms of even orders of magnitude is costly to generate. The Department will assist when able in furtherance of its two-pronged duty of developing the water resources and protecting existing rights. See generally, MCA 85-2-102. However, nothing authorizes this agency to overlook the clear legislative allocation of the burden of persuasion. See MCA 85-2-311.

An applicant makes a prima facie showing of "unappropriated water" and "no adverse affect to prior appropriators" where the evidence indicates that there is water physically available for the appropriator's use in the quantities he seeks and where the evidence also indicates that the proposed use can be properly regulated in times of shortage in deference to senior demand. However, where an objector makes proof of existing water rights, an applicant must go further and demonstrate that his use will not, for all practical purposes, capture water otherwise required by established uses. The Applicant has failed in its proof in every regard.

The Applicant's arguments that the impacts of its use can only be ascertained after drilling its well and pumping the waters claimed ignore the burden of proof in this matter. We are quite prepared to say that the type and quantity of evidence

necessary to sustain this burden must have reference to the difficulties of projecting the effects of a proposed use in the groundwater context. Bright line precision is neither necessary nor possible. See generally, *Mathers v. Texaco, Inc.*, 77 N.M. 239, 421 P.2d 771 (1966); *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1963); *Cache LaPoudre Water Users Ass'n v. Glacier Meadows*, 191 Colo. 53, 550 P.2d 288 (1976); *State ex rel. Tappen v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968). *Donich v. Johnson*, 77 Mont. 229, 250 P. 936 (1926) ("As in other human problems, into which varying factors enter, it is not to be expected that results can be obtained with absolute mathematical certainty.") The proof required must answer to the exigencies of the particular circumstances. See *City of Rosell v. Berry*, 80 N.M. 110, 452 P.2d 179 (1969). Discovery procedures are available to an applicant to generate the requisite evidence. MCA 2-4-602, ARM 36.2.101.

The Department cannot "find" "unappropriated water" and "lack of adverse affect to prior appropriators" merely by conditioning the permit subject to the existance of the same. Such an approach emasculates the legislative standards. Moreover, it would encourage the proliferation of paper rights bearing little or no relation to actual uses on a stream, see *In re Monforton*, Dept. Order, 5/82, and assure irreparable damage to existing users. The attenuated connection between the pumping of a well and its effects often leads to little recourse for the senior user at the time of injury. See *City of Albuquerque v. Reynolds*, *Supra*, *Kuiper v. Well Owner's*

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Conservation Ass'n, 179 Colo. 119, 490 P.2d 268 (1971),
Fundingsland v. Colorado Groundwater Comm., 171 Colo. 487, 468
P.2d 835 (1970). Indeed, such pumping may result in permanent
damage to the aquifer's ability to store water.

The Applicant's arguments as to the lack of evidence
supporting a finding of adverse affect are unpersuasive. The
report of Rediske ignored the impact of the colluvial fan, a
geologic phenomenon associated with this type of area. The
report of Wetzel assumed a perfect recharge boundary with the
surface of supply. As explained below and admitted by Mr.
Wetzel, such an assumption, while valuable for analytical
purposes is decidedly inaccurate. While the Applicant regards
some of the references made from these reports as speculative,
the plain answer is that there is no other proof negating the
threat of adverse affect, and therefore the issue must be
decided against the Applicant.

Notwithstanding this conclusion however, we have determined
that the Applicant should be accorded further time to develop
studies and data that will establish terms and conditions that
will protect prior users of this source of supply and at the
same time provide water for the intended uses. There is
evidence indicating that water may be available to the Applicant
with appropriate conditions and restrictions to protect
Forrester's existing use. By-pass pumping directly into
Rattlesnake Creek or a community well to provide for both
parties may be possible. In view of the urgency in developing
this State's water resources, the Applicant should be accorded

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further time to study and make proof of further arrangements that will protect Forrester and still yield some water for his own uses. See generally, *Mannon v. Farmers' High Line Canal and Reservoir Co.*, 145 Colo. 379, 360 P.2d 417 (1961), *Dettesesa v. Manassa Land & Irrigation Co.*, 151 Colo. 528, 379 P.2d 405 (1963); *Bales v. Hall*, 44 Colo. 360, 98 P. 3 (1908); *Ft. Collins Milling and Elevator Co. v. Larimer & Weld Irrigation Co.*, 61 Colo. 45, 156 P. 140 (1916), *City and County of Denver v. Colorado Land & Livestock Co.*, 86 Colo. 191, 279 P. 46 (1929), *Weibert v. Rothe Bros.*, ____ Colo.____, 618 P.2d 1367 (1980), *In re Rominiecki v. McIntyre Livestock Corp.*, ____ Colo. ____, 633 P.2d 1064 (1981).

We must also require a showing of how the Applicant's junior right will be administrable with regard to priorities on the stream. See generally, *Glacier View Meadows*, supra; *Hall v. Kuiper*, supra. That is, some method must be devised so that a ready calculation may be made of the extent of the Applicant's disturbance on surface stream flow, and the amount of time required for a cessation of that disturbance upon a curtailment of Applicant's pumping. See also *Raymond v. Wimsette*, 12 Mont. 531, 31 P. 537 (1892). We will not await extensive groundwater development to insist upon meaningful priorities. See generally, *In re Monforton*, Dept. Order, 5/82.

The Applicant's further arguments that volumetric measures of direct flow rights are inappropriate are not convincing. In fact, all appropriations have "built in" volumetric limits. See *Johnston v. Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 79

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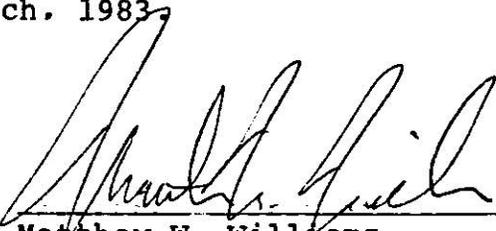
P.22, Cache LaPoudre Water Users Ass'n v. Glacier Meadows, 191 Colo. 53, 550 P.2d 288 (1976), Kelly Ranch v. Southeastern Colo. Water Conservation Dist., 191 Colo. 65, 550 P.2d 297 (1979), Green v. Chaffee Ditch Co., 150 Colo. 191, 371 P.2d 775 (1962), Van Tassal Real Estate & Livestock Co. v. City of Cheyenne, 49 Wyo. 333, 54 P.2d (Colo.), 926, Danielson v. Kerbs Ag., Inc. (Colo.), 646 P.2d 363 (1982). We do no more than make explicit what was formerly implicit. See also MCA 85-2-234(4)(b), Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940). The claim herein is inflated. If the Applicant succeeds in devising protective conditions, it will have to make further proof as to that quantity of water reasonably required for the irrigation of small grains. See Warden v. Alexander, infra.

The Proposal for Decision, except as explicitly modified herein, is made part hereof.

WHEREFORE, the Applicant is accorded until April 1, 1984, to make further studies to devise methods or conditions that will protect Objector Forrester's historic use and historic means of diversion. Further hearings will be had thereon on application of the Applicant.

DONE this 28th day of March, 1983


Gary Fritz, Administrator
Department of Natural
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Matthew W. Williams
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AFFIDAVIT OF SERVICE

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

Dorothy Millsop, Legal Secretary 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 *June 29*, 1983, she deposited in the United States mail, "first class mail", a FINAL ORDER by the Department on the application by East Bench Grain and Machinery, Inc., Application No. 25710-g41B, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Ray Forrester, Box 266, Dillon, Montana 59725
2. Marion Cross, Matador Cattle Co., 9500 Black Train Rd. SPI, Dillon, Montana 59725
3. Max G. Nield, East Bench Grain & Machinery, Inc., 310 S. Wyoming, Dillon, Montana 59725
4. T.J. Reynolds, Helena Area Water Rights Field Office (hand deliver)
5. Matt Williams, Hearing Examiner, DNRC, Helena, (hand deliver)

Dorothy Millsop
Department of Natural Resources

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

On this *29th* day of *June*, 1983, before me, a Notary Public in and for said State, personally appeared Dorothy Millsop, known to me to be the Legal Secretary 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.

Donald M. Intyre
Notary Public
Residing at Helena, Montana
My Commission expires *12/15/83*



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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 25170-g41B BY EAST BENCH GRAIN)
AND MACHINERY, INC.)

* * * * *

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 Dillon, Montana.

STATEMENT OF THE CASE

The present application seeks 2200 gallons per minute up to 415 acre-feet per year for new sprinkler irrigation of 235 acres more or less located in Section 21, Township 8 South, Range 8 West, Beaverhead County. The source of supply is claimed to be ground water, the waters thereof to be diverted at a point in the SW1/4 SW1/4 SW1/4 of Section 21, Township 8 South, Range 8 West, all in Beaverhead County. The aforesaid portions of the application were duly and regularly published for three successive weeks in the Tribune-Examiner, a newspaper of general circulation printed and published in Dillon, Montana.

An objection to the granting of the instant application was

filed with the Department of Natural Resources and Conservation on behalf of the Matador Cattle Company. This Objector did not appear either personally or by representative at the hearing in this matter.

An objection to the granting of this application was also filed with the Department of Natural Resources and Conservation by Roy Forrester. This objection claims and alleges generally that there is insufficient unappropriated water available for the Applicant's proposed use without adversely affecting this Objector's water use. Objector Forrester appeared personally at this matter and by Counsel Carl Davis.

The Department of Natural Resources and Conservation was represented at the hearing by T. J. Reynolds, Area Office Supervisor for the Department's Helena field office.

EXHIBITS

The Applicant submitted two (2) exhibits which were received into the record.

A-1: A copy of an aerial photograph upon which has been depicted the Applicant's proposed point of diversion and place of use, with reference to the Objector's points of diversion.

A-2: A memorandum prepared by a Department employée detailing an analysis of the effect of the Applicant's proposed diversions on the surface stream flow of Blacktail Deer Creek.

The Objector Forrester offered nine (9) exhibits, all of which were received into the record.

- 0-1: A copy of an aerial photograph depicting the point of diversion of this Objector's water in relation to the Applicant's proposed point of diversion.
- 0-2: A map prepared by the Department of Natural Resources and Conservation showing the Applicant's proposed point of diversion, the Objector's point of diversion, and other ground water diversions in the area.
- 0-3: A copy of a notice of appropriation which the Objector claims evidences one of his rights to the use of ground water.
- 0-4: A copy of a notice of appropriation which Objector Forrester claims evidences another of his groundwater rights.
- 0-5: A copy of a map depicting the proposed point of diversion of the Applicant, together with the Objector Forrester's points of diversion and place of use.
- 0-6: A copy of proposed rate increases for electrical service for irrigation.
- 0-7: A copy of the pertinent portions of a decree reflecting the Objector Forrester's rights out of Blacktail Deer Creek.
- 0-8: Compilations made by the Objector detailing the cost of each additional foot of pumping lift.

O-9: Compilations made by the Objector Forrester of the cost of deepening his well an additional 60 feet.

The Department tendered a single exhibit which was received into the record.

D-1: A memorandum prepared by a Department employee detailing his inspection of the probable effects of the Applicant's proposed water use on Objectors to this matter.

FINDINGS OF FACT

1. The Application was duly and regularly filed with the Department of Natural Resources and Conservation on December 8, 1979.

2. The Applicant intends to use water for the irrigation of small grain crops, with rotation to alfalfa hay. The Applicant does not intend to conduct full surface alfalfa irrigation.

3. The Applicant intends to irrigate approximately 235 acres comprised of 25 acres in the NE1/4 and 35 acres in the NW1/4 and 105 acres in the SW1/4 and 70 acres in the SE1/4 of Section 21, Township 8 South, Range 8 West, all in Beaverhead County.

4. The Applicant's source of supply will be groundwater. Ground water as used herein shall be taken to refer to water beneath the ground whether or not such waters are tributary or interconnected with any surface stream.)))?

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5. The Applicant intends to divert the water at a rate up to 2200 gallons per minute. The waters will be diverted by a well, thence conveyed to the place of use by pipelines for ultimate application by a sprinkler system.

6. The Applicant intends to use the waters claimed herein from April 15 to October 15, inclusive, of any given year. This period represents times during which the Applicant can put the water to the use proposed by it.

7. Applicant's intent to use up to 415 acre-feet per year is speculative. The volume is predicated on full-surface alfalfa irrigation, which is not Applicant's present intention.

8. The irrigation of grain-type crops will require the use of water for irrigation through approximately the first part of July in most years. Alfalfa irrigation is customarily conducted on consecutive crops for the entire growing season.

9. The Objector Forrester uses groundwater for irrigation purposes from two (2) points of diversion. This particular water use was instigated in the early 50's and has been historically exercised since then.

10. Objector Forrester also uses groundwater for domestic use.

11. The Objector Forrester also uses the waters of Blacktail Deer Creek for irrigation purposes, and has historically used such waters.

12. All the Objector Forrester's uses reflect rights senior to Applicant's proposed use.

13. Blacktail Deer Creek is between the Applicant's proposed

point of diversion and any of the points of diversion of groundwater of the Objector Forrester.

14. Blacktail Deer Creek is not a "perfect recharge boundary" in that the waters thereof will not supply to the aquifer all the waters withdrawn by any particular groundwater user. However, Blacktail Deer Creek is an effluent stream such that the waters thereof do contribute to the surrounding aquifer in some indeterminable amount.

15. The aquifer in this area is also recharged from runoff from adjacent coulees, irrigation ditches, and flood irrigation systems. The aquifer in this general area is typically at its highest level during irrigation months.

16. There are waters available in the amounts the Applicant seeks throughout the period during which he seeks the use of the water from the underlying aquifer. However, if Applicant's well is finished in the colluvial deposits characteristic of the bench area, the volume of water claimed herein could not be diverted without the construction of a well whose depth would be economically prohibitive in light of Applicant's proposed use. The transmissivity values, or the capacity of the aquifer to transmit water, are much lower in the colluvial deposits than those associated with the alluvial materials from which the Objector Forrester diverts.

17. The Objector Forrester's means of diverting his groundwater are reasonable and customary for their intended purposes, and said means do not result in the waste of the water resource.

18. The Objector Forrester's well has experienced surging in the immediately preceding years. This surging is created by water availability problems and is not attendant to difficulties with this Objector's well or well equipment.

19. The Objector Forrester uses ground water for agricultural purposes as a supplemental source of supply for stream flow out of Blacktail Deer Creek. In a typical year, steadily decreasing flows of Blacktail Deer Creek require supplemental groundwater for irrigation purposes from approximately the middle of July.

20. In recent years there have been a significant number of high capacity wells drilled and finished in this general vicinity.

21. Any significant use of ground water by the Applicant will create a cone of depression that will intercept the Objector Forrester's most immediately adjacent well, causing a lowering of the water table below the bowls of the existing pump in the same. The use of water on any sustained basis for Applicant's purposes would require the deepening of Objector Forrester's well.

22. The use of water pursuant to Applicant's purposes will result in a substantial increase in Objector Forrester's pumping costs.

23 The use of the water claimed herein will be of material benefit to the Applicant, and therefore such a use of water constitutes a beneficial use. However, the 415 acre-feet of water per annum is an unreasonable quantity of water for

Applicant's purposes.

24. The Objector Forrester cannot reasonably exercise his water use from his groundwater sources under the changed conditions that would be prompted by Applicant's use.

25. The Applicant's proposed use will not interfere unreasonably with other planned uses or developments for which water has been reserved or for which a permit has been issued.

26. The Applicant's proposed means for diversion are adequate and customary for its intended purposes, and said means of diversion will not result in the waste of the water resource.

27. Applicant's proposed water use will adversely affect the right of Objector Forrester to use the ground water resource. Applicant's proposed water use will have a de minimus effect on the surface flow of Blacktail Deer Creek. Said interference with the flows of Blacktail Deer Creek would not result in an adverse effect to Objector Forrester's use of the waters flowing in the same.

28. The Applicant's proposed point of diversion is located 1100 to 1200 feet away from Objector Forrester's nearest well.

CONCLUSIONS OF LAW

1. MCA 85-2-311 (1981) directs the Department of Natural Resources and Conservation to issue a new water use 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).

2. The Applicant must establish the aforesaid criteria by substantial credible evidence. MCA 85-2-311 (7) (1981).

3. The use of the water claimed herein would be of material benefit to the Applicant, and therefore such a use belongs to the class of uses that can be regarded as beneficial. MCA 85-2-102 (2) (1981).

The use of up to 415 acre-feet per year is an unreasonable estimate of the quantity of water required for Applicant's purposes, however. See generally, Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905), Worden v. Alexander, 108 Mont. 200, 90 P. 2d 160 (1939). The aforesaid volume was predicated on full service alfalfa irrigation. The lesser demands for irrigation water associated with small-grain crops will not prompt the need

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for such a volume on an annual basis. The appropriator's intentions in all instances fix the measure of the appropriation. See Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

4. The Applicant's proposed means of diversion, construction, and operation of its appropriative works are adequate and customary for their intended purposes, and said means of diversion will not result in the waste of the water resource. See generally, State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P. 2d 23 (1939).

5. The Applicant's water use will not interfere with any planned use of the water resource for which a permit has been issued or for which a reservation has been made.

6. There are waters available in the aquifer in the amounts the Applicant seeks to appropriate and during the time during which the Applicant seeks the use of the water. The record presents some uncertainty as to whether the Applicant's location of its point of diversion is so situated that it will ultimately penetrate the alluvial geology that is capable of producing the amounts of water the Applicant claims herein. The evidence indicates that the colluvial fan on the upper bench area will exhibit transmissivity values of such a low order that the depth required of any well finished in this material would be so marked that the cost of such well would be prohibitively expensive for the amount of water claimed herein. The alluvial material, however, appears to have characteristics sufficient to

yield sufficient water pursuant to Applicant's purposes.

Whether or not Applicant will actually finish its well in these alluvial materials can only be tested by actual construction of the well.

7. The Applicant's proposed water use will adversely affect the right of Objector Forrester to use the groundwater resource. The evidence herein establishes that the effect of Applicant's pumping will be to draw down the water level at the Objector Forrester's nearest well below the bowls of the pump in the same. This will necessitate the deepening of Objector Forrester's well, and the equipping of the new well with a more powerful pump so as to enable the Objector Forrester to divert his historic quantity of water. Moreover, these drawdowns associated with Applicant's use will involve increased cost to Objector Forrester due to the greater pumping lift.

Expert testimony herein unfairly dramatizes the effect of Applicant's pumping. That is, the experts assumed continuous diversions by the Applicant, which is not reasonably to be expected in view of Applicant's purposes. Thus, the drawdown cones forecasted by these experts would be somewhat lessened by the intervening accretions to the source of supply. However, the evidence is nonetheless convincing that Applicant's proposed pumping will necessarily create drawdowns at Objector Forrester's nearest well in excess of that well's capacity to produce water.

Blacktail Deer Creek cannot be said to be a perfect recharge boundary such that all demands generated by Applicant's use of the groundwater resource will be recharged by this surface stream. While such an assumption may be valuable for analytical purposes, it is perforce an improbable state of affairs.

However, it is also reasonable to assume that some recharge will occur to the aquifer from this surface stream. The fact that the Objector Forrester has been unable to measure the effect of the pumping of his own wells on the surface flow is not conclusive. In view of the type of instruments this Objector utilizes to measure water, and the distances involved between the measurements, it is highly improbable that such measurements would be precise enough to identify the quantity of water that would in the normal course of events be lost to the aquifer.

Moreover, the evidence in the record justifies a conclusion that various coulees, irrigation ditches, and flood irrigation systems also provide substantial accretions to this aquifer.

These additions to the water supply will be offset, however, by the greater extent and steepness of the cone of depression resulting from Applicant's use in the direction of the Objector Forrester's well. The evidence indicates that the land bordering the Applicant's place of use is made of colluvial materials that will probably exhibit relatively low transmissivity values. The inability of this material to yield water must be compensated for by additional waters in the alluvial material. Thus, the cone of depression associated with

the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions."

It is thus incumbent upon every appropriator to devise and maintain a reasonable means of diverting his appropriative amount, but no appropriator is compelled to resort to a method or manner of diversion that is unreasonable under all the circumstances. One cannot "command the whole flow of the stream" merely to extract and use a minor portion thereof, Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, but equally one cannot gainsay that every appropriator is entitled to some quantity of water in the source merely to conveniently exercise his appropriative right. State ex rel. Crowley, supra, Colorado Springs v. Bender, 148 Colo. 458, 366 P. 2d 552 (1961).

The difficulty, of course, is in elucidating the calculus of factors that are to govern a determination of "reasonableness". Whatever their identity and interplay, however, the reasonableness of the means of diversion must read against the purposes of the prior appropriation doctrine. The fundamental impetus for the "first in time, first in right" doctrine was the need for security of the capital investments required to divert and use water in the regions of the West. Although the physical factors determining the amount available in a source of supply may continue to plague an appropriator, uncertainties as to supply threatened by man-made alterations were curtailed by the appropriation doctrine. The sanctity of the senior status thus encourages the development and use of this state's water

resources by protecting such a user against subsequent encroachments of that use.

The evidence demonstrates that groundwaters at issue herein are hydraulically interconnected with the flow of Blacktail Deer Creek, and thus the rule of priority applies to the present dispute. See MCA 85-2-401(1) (1981), MCA 85-2-406(1) (1981), Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), Perkins v. Kramer, 148 Mont. 355, 423 P. 2d 587 (1966). The Objector Forrester is clearly a senior appropriator of the groundwater resource, and the reasonableness of his well diversion must show some deference to that senior status.

It is true that the depth of Objector Forrester's well may be somewhat shallow in terms of what appears to be the customary depth of present-day high capacity irrigation wells in the area. However, the drawdowns threatened by Applicant's use do not from this fact alone fall on the Objector's shoulders. The Objector is not entangling the greater portions of the aquifer against all subsequent uses merely to extract the top portions thereof. The problem revealed by the present record is one of well spacing. That is, if Applicant's well could be moved a greater distance away from Objector Forrester's well, the concomitant drawdowns would be substantially less.

An appropriator can be expected to drill his well to a depth that will not frustrate all later resources of the same aquifer. However, no appropriator can by the construction of his diversion means protect himself against subsequent wells placed at improvidently short distances from his historic

Applicant's use will reach further in the direction of Objector Forrester's well than the opposite direction into the colluvial materials.

The mere fact that a number of high capacity irrigation wells have been drilled in this aquifer in the recent past is not persuasive as to the lack of adverse effect. Firstly, there is no evidence that such wells are not in fact having substantial impacts on one another. In light of the depth of these recent wells, even significant impacts in water level would not necessarily result in an actual deprivation of water for any particular use associated with any of these wells. Moreover, the operation of these new wells is at least relatively coterminous with the onset of the surging problems associated in the Objector Forrester's well.

The Hearings Examiner also notes that Applicant's use of water for the irrigation of small grain crops will require irrigations extending only to the first part of July, at best. The Objector Forrester, on the other hand, does not commonly use groundwater to supplement his surface stream rights out of Blacktail Deer Creek until approximately the middle of July. However, it cannot be determined on this record the length of time required for the effect of Applicant's diversions to be dissipated by the accretions from surface water sources. Particularly is this true in light of the unquantifiable effects of other pumpers on this particular source of supply. Moreover, the Hearings Examiner cannot decipher a basis for regulating Applicant's uses in those years when marginal surface stream

flows on Blacktail Deer Creek would force the Objector Forrester to begin use of the groundwater resource at earlier times.

Whether these effects amount to and embrace an adverse effect requires a careful analysis of the interest at stake. The record reveals that the problems attendant to Applicant's prospective appropriation are not those of a scarcity of water per se for the purposes of the appropriation. Rather, the issue is whether the instant application will unlawfully interfere with the Objector Forrester's manner of diverting his water from the common pool. Prospective appropriators

"cannot now argue that they are limited by the amount but not the means of prior appropriations, however reasonably efficient under the circumstances, or that so long as they leave the exact amount of plaintiff's appropriation in the river at his point of diversion, they have no further duty and that it is his worry (the prior appropriator's) and not their's how or whether he can divert it upon his land. His right (the prior appropriator's) is to divert and use the water, not merely to have it left in the stream bed; that is the essential difference between riparian and appropriation rights." State ex rel. Crowley v. District Court, 108 Mont. 89, 98, 88 P. 2d 23 (1939).

Much scholarly attention has been given of late to the issue of the protection of the means of diversion in the groundwater context. See generally, Wayman v. Murray City Corp., 23 Utah 2d 97, 458 P. 2d 861 (1969), Mathers v. Texaco, Inc., 77 N.M. 239, 421 P. 2d 771 (1966). MCA 85-2-401 (1) provides that "(p)riority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or

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point. This distinction calls for a stricter treatment of prospective appropriators whose points of diversion are a menace to senior users solely by reason of their location. The Hearings Examiner notes that the Applicant is unable to move his well site further away from Objector Forrester's without limiting himself to the water-short colluvial fan. However, the spacing of Objector's wells are not unreasonable in view of his place and manner of use, and the Objector cannot be charged with this Applicant's unforeseeable difficulties.

The diversion means, including the depth of the wells, of Objector Forrester are reasonable ones. The Applicant must therefore pay the costs associated with the deepening of the well and the attendant extra pumping costs involved in the higher lift, should it desire to exercise its claimed water use. State ex rel. Crowley, supra, Colorado Springs v. Dender, supra.

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

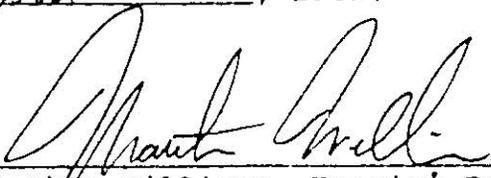
Application for Beneficial Water Use Permit No. 25170-g41B by East Bench Grain and Machinery, Inc. is hereby denied and dismissed in its entirety, unless Applicant elects to pay the costs of deepening Objector Forrester's well and the increased costs of pumping from the additional depth. Said election shall be made within the time period provided for below for objections generally. If the Applicant so makes such an

election, further findings and/or hearings well be made or held to determine the appropriate cost.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before May 7, 1982.

DONE this 22nd day of April, 1982.


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

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