Gary Fritz

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS)
FOR BENEFICIAL WATER USE PERMITS NOS.) FINAL ORDER
26419-s40J, 26420-s40J, 26421-s40J,)
26422-s40J, 26423-s40J, 26424-s40J,)
26425-s40J, 26426-s40J & 26427-s40J)
BY THE U.S.DEPARTMENT OF THE INTERIOR)

* * * * * * * * * * *

There being no exceptions or objections to the Proposal for Decision entered in this matter, the same is hereby made final and is expressly incorporated herein.

WHEREFORE, Applications for Beneficial Water Use Permits Nos. 26419-s40J, 26420-s40J, 26421-s40J, 26422-s40J, 26423-s40J, 26424-s40J, 26425-s40J, 26426-s40J, and 26427-s40J are hereby denied and dismissed in their entirety.

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 8th day of June, 1982.

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

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

CASE # 26419

AFFIDAVIT OF SERVICE

FINAL ORDER

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

Cheryl 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 June 11, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Dept. of the Interior, Application No. 26419-27-s40J, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Bowdoin National Wildlife Refuge, Box J, Malta, MT 59538

2. Bureau of Rec., Box 2553, Billings, MT 59301, Attn: Code 452

3. Stuart C. MacKenzie, Attorney at Law, 411 Ohio St., Chinook, MT 59523

   For: Larry Listou, Chinook, MT
   Marian & Eldon Gilmore, Chinook, MT 59523
   Wallin Ranch Company, c/o Robert J. Schellin, Chinook, MT

4. North Chinook Irrig. Assoc., c/o Marge Matchett, Sec., Chinook, MT 59523

5. Havre Field Office, Bob Larson (inter-dept. mail)

6. Matt Williams, Hearings Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Cheryl Wallace

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

On this 11 day of June, 1982, before me, a Notary Public in and for said State, personally appeared Cheryl 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.

Judy Kohn
Notary Public for the State of Montana

Residing at Montana City

My Commission Expires 3/1/85

ANSF # 26419

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS NOS. 26419-s40J, 26420-s40J, 26421-s40J, 26422-s40J, 26423-s40J, 26424-s40J, 26425-s40J, 26426-s40J & 26427-s40J BY THE U.S. DEPARTMENT OF THE INTERIOR)	PROPOSAL FOR DECISION

* * * * * * * * * * *

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 matters was held in Havre, Montana.

STATEMENT OF THE CASE

The applications at issue herein all seek quantities of water to provide breeding and nesting habitat for waterfowl and shore birds on the Bowdoin National Wildlife Refuge in Blaine County, Montana. The Applicant appeared at the hearing in this matter and was represented by counsel Gerald Moore. The pertinent portions of the applications were duly and regularly published for three successive weeks in the Harlem News, a newspaper of general circulation printed and published in Harlem, Montana, and in the Chinook Opinion, a newspaper of general circulation printed and published in Chinook, Montana.

Objections to the granting of each and every of the applications at issue herein was filed with the Department of

CASE # 26419

Natural Resources on behalf of the estate of Martha Listou and by Larry Listou personally. This objection alleges generally that there are not unappropriated waters available for the Applicant's use, and that Applicant's use will adversely affect the prior water uses of these objectors. These Objectors appeared at the hearing in this matter and were represented by counsel Stewart MacKenzie of Burns, Solem, and MacKenzie.

Objections to the granting of each and every of the instant applications was also filed with the Department of Natural Resources and Conservation by Eldon and Marian Gilmore. This objection also alleges that there are no unappropriated waters available for the Applicant's use, and that Applicant's use would adversely affect the water rights of this objector. This Objector appeared at the hearing and was represented by counsel Stewart MacKenzie of Burns, Solem, and MacKenzie.

Objections were also filed to each and every of the applications at issue herein by Robert Schellin on behalf of Wallin Ranch Company. These objections allege that there are no unappropriated waters available for the Applicant's proposed use, and that Applicant's use would adversely affect the water rights of this Objector. This Objector appeared at the hearing in this matter.

An objection to Application No. 26422 was filed with the Department of Natural Resources and Conservation on behalf of North Chinook Irrigation Association. This Objector did not appear either personally or by representative at the hearing in this matter.

CASE # 26419

Objections to each and all the instant applications were also filed with the Department of Natural Resources and Conservation on behalf of the Water and Power Resources Service (now known as the Bureau of Reclamation) of the United States of America. However, the Applicant and this Objector now appear to be in agreement such that insofar as the Objector Bureau of Reclamation is concerned, the present applications can be approved with conditions substantially as following:

1. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of existing rights as provided by Montana Law.

2. The waters appropriated pursuant to this permit shall only be diverted during extreme high spring runoff or when the Bureau of Reclamation has been spilling at Vandalia Diversion Dam. During all other periods the Permittee shall allow the normal flow to pass his diversion to satisfy prior and existing water rights.

3. The Permittee shall contact the Bureau of Reclamation at Malta (Box R, Malta, Montana, 59538) at the start of each irrigation season to determine the current water supply conditions and the forecasted water availability for its use. Contacts shall be made by certified mail through the U. S. Postal Service with return receipt requested. The reservoirs to be constructed pursuant to the present permits shall be equipped with adequate drainage devices, channels, or other necessary means to satisfy prior and existing rights.

CASE # 26419

The Department of Natural Resources and Conservation appeared at the hearing and was represented by Bob Larson, Area Office Field Supervisor for the Department's Havre Field Office.

EXHIBITS

The Applicant offered two exhibits into the record, two-wit:

A-1. A map detailing the Applicant's proposed points of diversion with reference to the places of use of the Objectors Listou, Gilmore, and Wallin.

A-2. A copy of a memorandum with map attached prepared by Larry Brown, a Department employee, relating his forecast of the runoff to be expected from the drainage and the source of supply involved herein.

Exhibit A-2 was admitted over the objection of the Objectors Listou and Gilmore.

The Objectors Gilmore and Listou offered two exhibits into the record, two-wit:

A. Copies of the judgement and decree in Federal Land Bank v. Morris et.al..

B. Schematic diagram detailing Objector Gilmore's place of use and means and manner of diversion.

These exhibits were received into the record without objection.

The Hearings Examiner after considering the evidence herein, and now being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law.

CASE # 26419

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and by the appearance of the parties hereto, has jurisdiction over the persons involved herein.

2. Application No. 26419 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:35 a.m..

3. Application No. 26420 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:36 a.m..

4. Application No. 26421 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:37 a.m..

5. Application No. 26422 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:38 a.m..

6. Application No. 26423 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:39 a.m..

7. Application No. 26424 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:40 a.m..

8. Application No. 26425 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:41 a.m..

CASE #26419

9. Application No. 26426 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:42 a.m..

10. Application No. 26427 was duly and regularly filed with the Department of Natural Resources and Conservation on January 21 of 1980, at 9:43 a.m..

11. The Applicant is a person entitled to appropriate water in the state of Montana.

12. The Applicant intends to divert continuously throughout the year and store up to .7 acre-feet per year for wildlife purposes from April 1st through November 1st, inclusive, of each year. The point of diversion and place of use are intended to be in the SW1/4 NE1/4 NW1/4 of Section 6, Township 35 North, Range 18 East, all in Blaine County. The source of supply is claimed to be diffused surface water tributary to Hay Coulee.

13. The Applicant intends to divert throughout the year and store up to .7 acre-feet per year for wildlife purposes from April 1st through November 1st, inclusive, of each year at a point of diversion and place of use in the NE1/4 NE1/4 SW1/4 of Section 5, Township 35 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to McLaren Reservoir.

14. The Applicant intends to divert throughout the year and store up to .5 acre-feet per year for wildlife purposes from April 1st through November 1st, inclusive, of each year at a point of diversion and place of use in the SW1/4 SW1/4 SW1/4 of

CASE # 26419

Seciton 5, Township 35 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to McLaren Reservoir.

15. The Applicant intends to divert throughout the year and store up to 5 acre-feet per year for wildlife purposes from April 1st through November 1st, inclusive, at a point of diversion and place of use in the SE1/4 NE1/4 NW1/4 of Section 8, Township 35 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to Ridge Coulee.

16. The Applicant intends to divert throughout the year and store up to 1.5 acre-feet per year for wildlife purposes from April 1st to November 1st, inclusive, of each year. The point of diversion and source of supply is intended to be located in the NE1/4 SE1/4 SW1/4 of Section 31, Township 36 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to Hay Coulee.

17. The Applicant intends to divert throughout the year and store up to 4 acre-feet of water per year for wildlife purposes from April 1st through November 1st, inclusive, of each year. The point of diversion and place of use are intended to be located in the NE1/4 NE1/4 NW1/4 of Section 7, Township 35 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to Hay Coulee.

18. The Applicant further intends to divert throughout the year and store up to 3.5 acre-feet of water for wildlife purposes

CASE # 26419

from April 1st through November 1st, inclusive, of each year. The point of diversion and place of use are intended to be located in the NW1/4 NE1/4 NW1/4 of Section 7, Township 35 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to McLaren Reservoir.

19. The Applicant further intends to divert throughout the year and store up to 1 acre-feet per year for wildlife purposes from April 1st through November 1st, inclusive, of each year. The point of diversion and place of use are intended to be located in the SW1/4 NW1/4 SW1/4 of Section 6, Township 35 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to McLaren Reservoir.

20. The Applicant further intends to divert throughout the year and store up to 2 acre-feet of water per year for wildlife purposes from April 1st through November 1st, inclusive, of each year. The point of diversion and the place of use are intended to be located in teh SW1/4 SW1/4 SW1/4 of Section 6, Township 35 North, Range 18 East, all in Blaine County. The source of supply is intended to be diffused surface water tributary to Hay Coulee.

21.The Applicant intends to construct small dams to appropriate the amount of waters claimed herein. Said dams would be equipped with drainage type structures. These means of diversion are customary and adequate for Applicant's purposes, and said means will not result in the waste of the water resource.

CASE # 26419

22. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and it is not attempting to speculate in the water resource.

23. The waters that form the source of supply flow only sporadically at times of melting snow in the spring or at times of heavy thunderstorms in the summer. At such times if not encumbered such waters would make their way down through Hay Coulee and form part of the source of supply of McLaren Reservoir, or would contribute to the flow of Ridge Coulee. Except at times of spring runoff or intense rainstorms, any waters produced will seep into the ground and will not be available for use.

24. In most years, any waters impounded by the Applicant during spring snow-melt runoff will have evaporated and/or seeped out of said impoundments by around August 1st.

25. The use of the water claimed herein would be of material benefit to the Applicant, other persons, and the public generally by providing breeding and nesting habitat for waterfowl and shore birds. Small, shallow impoundments allow for proliferation of aquatic invertabrates as a food source for such birds, and also suit the territorial needs of such waterfowl during the breeding season.

26. The amounts of water claimed herein are a reasonable estimate of the quantity of water required for Applicant's purposes in view of the term and type of use intended and the diversion requirements dictated by the proposed places of use.

CASE # 26419

27. The Objector Gilmore flood irrigates approximately 400 acres of land from McLaren Reservoir.

28. Wallin Ranch utilizes the waste waters of Objector Gilmore for irrigation and stock watering when such waters are available.

29. The Objector Listou benefits from the flows at Ridge Coulee by the waters thereof naturally flooding his lands. Objector Listou has no particular diversion means for the water so accruing from Ridge Coulee.

30. There are no permits or water reservations which Applicant's proposed uses would adversely affect.

31. There are no unappropriated waters available for the Applicant during the times it seeks to divert and use the waters claimed herein.

32. Any diversions by the Applicant pursuant to its announced plans would necessarily capture water otherwise required for downstream use.

33. Applicant's proposed water use will adversely affect the rights of prior appropriators.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and by the appearance of the persons, has jurisdiction over the parties hereto. See generally MCA 85-2-301 et.seq. (1981).

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

CASE # 26419

resource. See generally Toohey v.Campbell, 24 Mont. 13, 60 P. 396 (1900), Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898).

3. The Applicant's proposed use would be of material benefit to itself, other persons, and the public generally, and it therefore belongs to the class of uses that can be regarded as beneficial. See MCA 85-2-101(2)(1981).

4. The Applicant is a person entitled to appropriate water pursuant to the laws of Montana. See MCA 85-2-101(10)(1981).

5. The amounts of water claimed by the Applicant herein are a reasonable estimate of the quantity of water required for Applicant's purposes, and said amount would not result in the waste of the resource. See generally Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

6. There are no permits or water reservations which Applicant's use will interfer with.

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

8. The Objectors Gilmore, estate of Martha Listou and Larry Listou, and Wallin Ranch all have prior rights to waters that form the Applicant's proposed source of supply.

9. There are no unappropriated waters available for the Applicant's use.

The record indicates that the waters the Applicant intends to

CASE # 26419

e are tributary to McLaren Reservoir except for those waters aining into Ridge Coulee. McLaren Reservoir has failed to ill water except on extremely rare occasions. The Hearings aminer notes that the capacity of the reservoir or ditch is not nclusive as to the extent of prior use, see generally Worden v. lexander, supra, but the record otherwise demonstrates that all the waters historically running into said reservoirs are put use by downstream appropriators. Thus, for those waters that re tributary to Hay Coulee, there are no surplus or appropriated waters available for Applicant's use. See enerally Custer v. Missoula Public Company, 91 Mont. 136, 6 P.2d 31 (1931).

The Objector Gilmore claims a prior right to the use of the resource through rights decreed in the Hay Coulee djudication reflected in Federal Land Bank v. Morris. See 112 ont. 445, 116 P.2d 10.007 (1941). Although this Applicant was ot a party to that adjudication, the decree culminating from the ame is clearly evidence of the Objector Gilmore's existing right o the use of water. See Wills v. Morris, 100 Mont. 514, 50 P.2d 62 (1935); Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940). he decree itself, unfortunately, is somewhat enigmatic. On ppeal, the Supreme Court in very laudatory terms extolled the irtues of carry-over storage, but simultaneously neglected to lecree any quantity of storage for such purposes over and above he quantity of water reasonably required for the claimant's urpose in any given year. On remand, in Paragraph 8 of the

CASE # 26419

decretal portion of the decree, the court provided for carry-over storage in terms of supplies excess to any party's needs. That is, the decree provides that certain parties to that adjudication may divert for carry-over storage once all of the claimants' rights have been satisfied.

Despite this language, however, the Hearing Examiner concludes that the court did not mean to characterize carry-over storage as a mere priviledge to be foregone in the event of subsequent demand on the source of supply. The court instead probably meant to protect such carry-over storage to the extent of the difference between the capacity of the reservoir and the amounts decreed for use in any particular year. This right to divert for carry-over storage is a right attendant to McLaren Reservoir, and it is a right senior to the use proposed by the Applicant herein. Moreover, the circumstances indicate that this quantity of carry-over is reasonable in the present circumstances. See generally State ex rel. Crowley v. District Court, supra. The vagaries in flow associated with Hay Coulee make the impoundment of water in high flow years for use in subsequent years a reasonable means of diverting water for the Objector Gilmore's use.

Gwinn v. City of Philipsburg, 156 Mont. 194, 478 P.2d 855 (1970) is not to the contrary on the general issue of carry-over storage. Therein the defendant city was found to be impounding waters in excess of its actual needs. Although no express mention was made of carry-over storage, it is clear by the facts

CASE # 26419

in the opinion that such carry-over would be surplus to the needs of the city, since reliable recharge could be expected in the next ensuing year.

The most critical aspect of the Objector Gilmore's use with respect to the issue of unappropriated water is the admission of said Objector that he has substantially increased his irrigation since the date of the decree adjudicating Hay Coulee. In 1921 the legislature in this state enacted provisions detailing an exclusive method of appropriating water on previously adjudicated streams. See 89-829 et seq., R.C.M. (1947). By the terms thereof, persons seeking post-adjudication appropriations must obtain court approval of their planned water use. Failure to obtain such approval results as a matter of law and frustration of any attempt to secure a water right. Anaconda National Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926); Hanson v. Southside Users' Ass'n., 167 Mont. 210, 537 P.2d 325 (1975). Extensions or enlargements of existing uses amount to new appropriations. Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911).

The threshold issue to the imposition of these provisions is of course the number of water users that must be joined in an action so as to make that action answer to the legislative intent of an "adjudication" for the purposes of the 1921 statute. See generally 89-815 R.C.M. (1947); Stone, Are There Any Adjudicated Streams in Montana?, 19 Mont. L. Rev. 19 (1957). It is not necessary to resolve this issue, however, because the Hearings

CASE # 26419

Examiner cannot say with any degree of conviction that but for this Objector's extended use, the water use properly decreed to such Objector would otherwise have been provided by the flows of Hay Coulee. The burden of proof is on the Applicant. MCA 85-2-311 (1979); See Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944).

The use of the tail waters of Gilmore's use by Wallin use would not appear to be effected by the foregoing. If the Objector Gilmore has a right to the use of the waters of McLaren Reservoir, it is clear that the Objector Wallin may make use of the tail waters accruing therefrom. See Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930). Any other rule would sanction the waste of the water resource. See generally Allen v. Patrick, 69 Mont. 373, 222 P. 451 (1924).

The final issue concerning unappropriated water concerns the use of the waters accruing from Ridge Coulee by the Objector Listou herein. This Objector apparently has no means of diversion for the waters accruing from said coulee, but instead benefits from the flows thereof by the natural flooding of his land. In Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938), the court opined that "(o)ne of the essential elements of a completed appropriation is the diversion of water." 106 Mont. at 216. That statement was not necessary for decision therein, as it appears that even had the defendants completed their appropriation, the priority date thereof would have been junior to the complaining prior appropriators. In other contexts,

CASE # 26419

Montana has indicated that any requirements of a diversion must merely suit the needs of the appropriator. See Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1950); Paradise Rainbow v. Fish and Game Comm., 148 Mont. 412, 421 P.2d 717 (1966).

Indeed, the verbiage of diversion encountered in the various opinions dealing with water disputes appears to be merely a convenient description of judicial insistence that the appropriator actually be using the waters of the source of supply. See Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922); compare Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912). A "diversion" without a use is not an appropriator, see Westside Ditch Co. V. Bennet, 106 Mont. 422, 78 P.2d 78 (1938) (drainage project does not give rise to priority date); Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898), since an appropriation is a usufructary interest, and it is the use of the water resource that is protected. Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936), Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., 36 St. Rep. 956, 605 P.2d 1060 (1979). Thus, if natural conditions provide a natural means of diversion, it would be a rather pedantic conceptualism that denies an appropriative claim where such waters have been put to use.

It is apparent, of course, that a particular means of diversion may be important in establishing the requisite appropriative intent. See generally Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900). Incidental benefit from water does not constitute an appropriation. Power v. Switzer, supra. The

CASE # 26419

g case is distinguishable from the present circumstances, e the Listou's cattle operation makes it clear that this ctor has intended and now intends to use the waters accruing Ridge Coulee for irrigation purposes.

Nor may a diversion requirement be any longer predicated on a ry that such diversion mechanisms give notice to the world of existence of an appropriative claim. The very objection d herein informs the Applicant of the existence of the same re this Applicant attempts its appropriation. See MCA -301 (1981). Moreover, the adjudication process now in full g fully answers to this alleged purpose in a far more sfactory manner. "When the reson of a rule ceases, so should rule itself." MCA 1-3-201 (1981).

The Hearings Examiner notes that diversion by natural means -times result in a wasteful and unreasonable means of . See State ex rel. Crowley v. District Court, supra. er, the Applicant has not made such waste to appear in the nt circumstances. The manner and condition of water rence in Ridge Coulee and the gentle slope to the land may d argue for the Objector Listou in this regard.

0. The Applicant's proposed water uses would adversely t the rights of prior appropriators. The record herein ates that diversions by the Applicant would have the table and necessary effect of depriving downstream priators of some measure of their historic water use. While

CASE # 26419

the Applicant's claimed amounts may be small in relation to downstream needs, this does not in and of itself sanction the Applicant's threatened interferences. The Hearings Examiner cannot say that the deprivations attendent to Applicant's use would be trifling, and therefore they cannot be disregarded.

This is true despite the fact that some of the Objectors to this matter may utilise long and leaky ditches. See generally Wheat v. Cameron, 64 Mont. 494, 210 P.2d 761 (1922). The Hearings Examiner cannot say such means are unreasonable for these Objectors' purposes. The prior appropriation system demands respect for senior rights even as against a multitude of small and in and of themselves relatively innocuous uses.

It may also be true that the benefits that may be derived from Applicant's use would outweigh any detriment to the Objectors herein. Whatever the force of this position in a riparian state, these concerns simply have no place in a "first in time, first in right" system. See In re Monforton, Dept. Order, 3/82. Transfers of water to new and more productive uses are matters of the marketplace in this state, see MCA 85-2-402 (1981), as such enterprising persons or entities ought to be able to pay more for such water than it is worth to the holder of the existing use.

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

CASE # 26419

Applications for Beneficial Water Use Permits Nos. 26419-s40J, 26420-s40J, 26421-s40J, 26422-s40J, 26423-s40J, 26424-s40J, 26425-s40J, 26426-s40J, and 26427-s40J are hereby denied and dismissed in their entirety.

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 June 7, 1982.

DONE this 4th day of May, 1982.

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

CASE # 26419

AFFIDAVIT OF SERVICE

PROPOSAL FOR DECISION

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

Cheryl Wallace, an employee of the Montana Department of Nat Resources and Conservation, being duly sworn on oath, deposes and says: Tha pursuant to the requirements of Section 85-2-309, MCA, on **May 14**, he deposited in the United States mail, "certified mail", an Order by the Department on the application by **Dept. of the Interior**, Appl No. **26419-27-s40J** for a Permit to Appropriate Water, addressed to each of t following persons or agencies:

1. **Bowdoin National Wildlife Refuge, Box J, Malta, MT 5953**
2. **WPRS, Box 2553, Billings, MT 59301, Attn: Code 452**
3. **Stuart C. MacKenzie, Attorney at Law, 411 Ohio St., Chin MT 59523**
   For: Larry Listou, Chinook, MT
   Marian & Eldon Gilmore, Chinook, MT 59523
   Wallin Ranch Company, c/o Robert J. Schellin, Chi
4. **North Chinook Irrigation Assoc., c/o Marge Matchett, Sec Chinook, MT 59523**
5. **Havre Water Rights Field Office, Bob Larson (inter-dept.**
6. **Matt Williams, Hearings Examiner (hand deliver)**

DEPARTMENT OF NATURAL RESOURCES AND CO

by Cheryl Wallace

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

On this **14th** day of **May**, 19**82**, before me, a Notary P in and for said State, personally appeared **Cheryl Wallace**, known t to be the **Typist**, of the Department that executed this in ment or the persons who executed the instrument on behalf of said Department, acknowledged to me that such Department executed the same.

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

Judy Koha
Notary Public for the State of Montana

Residing at **Montana City**

My Commission Expires **3/1/85**

CASE # 26419