

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. 34,204-s42M BY DONALD H. CHAFFEE)

* * * * *

The time period for filing requests for hearing in accordance with the March 6, 1984 Interlocutory Order in the above-entitled matter has expired. The Department of Natural Resources and Conservation received a timely request for hearing from Applicant Donald Chaffee, stating his desire to continue with the permit application.

When contacted about possible hearing dates, the Objectors stated that they were not interested in continuing their objection, as long as the conditions which were set forth in the Interlocutory Order were made part of any permit which might be issued in this matter. Since the matters which the Applicant wished to discuss have been declared res judicata and therefore not reviewable at hearing, the Applicant notified the Department that he did not want to have a hearing on his application.

A determination therefore has been made that no hearing is necessary in this matter. The Final Order is being issued on the basis of the July 14, 1982 Proposal for Decision and the March 6, 1984 Interlocutory Order in this matter, and herein incorporates the Facts and Conclusions set forth in these documents by reference.

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WHEREFORE, the Department makes the following Final Order in the above-entitled matter:

ORDER

Subject to the express conditions, limitations, and restrictions listed below, Application No. 34,204-s42M is hereby granted to Donald H. Chaffee to appropriate and impound up to 35 acre-feet of water per annum, to be used between January 1 and December 31; 3.5 acre-feet per annum for stockwater, and 31.5 acre-feet per annum for recreational uses. The means of diversion is to be an earthen dam which spans a tributary of the South Fork of Cottonwood Creek in Wibaux County, and which will incorporate a drainage device. The point of diversion and point of use will be in the W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 16 North, Range 59 East, Wibaux County, Montana.

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

- a. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.
- b. Nothing herein shall be construed to affect or otherwise reduce the Permittee's 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 damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

- c. The Permittee shall not divert more water than is reasonably required for the purposes described herein. At all times when water is not reasonably required for these purposes, the Permittee shall allow and otherwise cause waters to remain in the source of supply. In no instance may the Permittee appropriate more water than the amount specified in the permit. The amount of water remaining in storage on December 31 of any given year shall be deducted from the Permittee's appropriation of water in the following year.
- d. The existing dam structure shall be modified to include a gated pipe drainage device capable of releasing inflow at any storage stage at a rate of flow necessary to satisfy the prior rights of the objectors.
- e. If necessary, the existing structure shall be rebuilt, and all construction and appurtenances necessary to accomplish the above modification to the structure shall be designed and installed in accordance with Soil Conservation Service plans and specifications, or plans and specifications prepared by a qualified professional engineer licensed in the State of Montana.
- f. Documentary evidence or depositions shall be presented to the Department attesting to the manner of construction

and adequacy of design of the modified structure, and to the safety thereof, prior to any construction.

- g. The Permittee shall comply with the above terms and conditions, and shall notify the Department of such compliance within one year from the date of receipt of the 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 30th day of May, 1984.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 31, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by Donald H. Chaffee, Application No. 34,204-s42M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Donald H. Chaffee, Box 312, Wibaux, MT 59353
2. Leroy Amunrud, Box 104, Wibaux, MT 59353
3. Butch Krutzfeldt, 1200 Pleasant, Miles City, MT 59301
4. Walter H. Rolf, Water Rights Bureau Field Office, Miles City (inter-departmental mail)
5. Peggy A. Elting, Hearing Officer (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 31 day of May, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Jan P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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1. Appropriators estopped from challenging permit conditions imposed on his water right in absence of showing of significant change in situation pp 11-12

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2. requirement of drainage device
3. Obj. entitled to their historic pattern of use pp 18-19

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 34,204-s42M BY DONALD H. CHAFFEE)

INTERLOCUTORY ORDER

* * * * *

The time period for filing responses to the Hearing Examiner's Proposal for Decision on the above-entitled matter has expired. One timely response, from Applicant Donald Chaffee, was submitted on July 28, 1982. For the reasons stated below, and after having given the Applicant's arguments full consideration, the Department of Natural Resources and Conservation (hereafter the "Department") accepts the discussion of the Hearing Examiner as contained in his Proposal for Decision, and incorporates it herein by reference.

Mr. Chaffee's response fails to meet the Hearing Examiner's directive that the Applicant show cause why his application should not be granted according to the terms and conditions of Permit No. 10,541-s42M, issued to Mr. Chaffee's predecessor in interest. Applicant was directed to make a threshold showing that the proceedings on Permit No. 10,541-s42M did not provide a full and fair opportunity to litigate the issues of unappropriated water and adverse affect to prior appropriators. Mr. Chaffee's arguments are not responsive to that directive, and he is hereby estopped from raising these issues in any further proceedings which may occur concerning the above-entitled matter.

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Mr. Chaffee was directed in the alternative to make a threshold showing that the permit issued pursuant to the former proceedings is manifestly unjust or inequitable in its terms. For reasons discussed below, Mr. Chaffee's arguments on this point are found not to reach the level of proof necessary to make a threshold showing. The Department hereby determines that the Applicant will not be accorded a full hearing on the present appropriative application, but will be limited to presenting evidence on certain specified issues. The Department can issue a permit only upon a showing of the statutory criteria; except for those issues already determined in prior hearing, the statutory criteria remain to be proven.

THEREFORE, based upon the files and records herein, the Department makes the following:

ORDER

1. That Applicant, if he wishes to continue with his permit application in full understanding that the conditions listed below will be attached to any permit which is issued, must submit additional information proving by substantial credible evidence that the permit criteria listed in MCA 85-2-311 are met on all uses for which Applicant has applied. Such evidence is to be presented to the Department at a hearing on Application for Beneficial Water Use Permit No.34,204-s42M.

2. That the scope of such hearing will be limited to the following extent:

a. Applicant is hereby estopped from presenting argument or evidence questioning the validity of the Objectors' claimed water use rights, and from presenting argument that the Applicant's dam structure as presently constructed has no adverse affect on such rights. Applicant must show that the permit criteria can be met when the mandatory drainage device is installed.

b. Applicant is additionally estopped from presenting argument or evidence regarding the necessity of requiring installment of a drainage device in Applicant's dam structure.

3. That any permit which may be issued in the matter of the Application for Beneficial Water Use Permit No. 34,204-s42M by Donald Chaffee will contain the following express conditions, limitations, and restrictions (in addition to any other conditions found through further proceedings in this matter to be necessary):

a. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

b. Nothing herein shall be construed to affect or otherwise reduce the Permittee's 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 damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

c. The Permittee shall not divert more water than is reasonably required for the purposes described herein. At all times when water is not reasonably required for these purposes, the Permittee shall allow and otherwise cause the waters to remain in the source of supply. In no instance may the Permittee appropriate more water than the amount specified in the permit. The amount of water remaining in storage on December 31 of any given year shall be deducted from the Permittee's appropriation of water in the following year.

d. The existing dam structure shall be modified to include a gated pipe drainage device capable of releasing inflow at any storage stage at a rate of flow necessary to satisfy the prior rights of the objectors.

e. If necessary, the existing structure shall be rebuilt, and all construction and appurtenances necessary to accomplish the above modification to the structure shall be designed and installed in accordance with Soil Conservation Service plans and specifications, or plans and specifications prepared by a qualified professional engineer licensed in the State of Montana.

f. Documentary evidence or depositions shall be presented to the Department attesting to the manner of construction and adequacy of design of the modified structure, and to the safety thereof, prior to any construction.

g. The Permittee shall comply with the above terms and conditions, and shall notify the Department of such compliance within one year from the date of receipt of the permit.

4. That Applicant must notify the Department, within 14 days of receipt of this Order, as to whether he wishes to continue with the permit application or to withdraw it.

If Applicant wishes to continue with the permit application, the Department shall set a date for hearing on the Application for Beneficial Water Use Permit No. 34,204-s42M by Donald H. Chaffee.

DONE this 6th day of March, 1984.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

MEMORANDUM

The above-entitled matter concerns an Application for Beneficial Water Use Permit by Donald Chaffee, who is applying for 35 acre-feet of water per year to be diverted by means of an earthen dam which spans a tributary of the South Fork of Cottonwood Creek in Wibaux County and creates a reservoir with a storage capacity of approximately 35 acre-feet.

The earthen dam was built by Neshem-Peterson, Inc. in 1975 for use in construction of a road that runs by the reservoir. The Department issued Neshem-Peterson Temporary Permit No. 7135-s42M, which authorized use for the period from April 1, 1976 to July 30, 1976, upon condition that a drainage device be installed in the dam. Nesham-Peterson applied for an extension of time in order to complete the road construction, and an extension was granted until September 30, 1977.

Neshem-Peterson agreed to a revocation of the Permit in an April 10, 1978, conversation with Department personnel. At that time, there had been no compliance with the permit condition requiring a drainage device.

Daniel Kukowski, who had purchased the property upon which the dam is located after construction of the structure, applied to the Department on November 30, 1976 for a provisional permit for the reservoir. The application requested 1 acre-foot of water per year for stockwatering and 29 acre-feet per year for fish, wildlife, waterfowl, and recreational uses.

Upon due publication of the notice of Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski, an objection was received from Reuben and Mae Amunrud, senior appropriators on the South Fork of the Cottonwood Creek. Mr. Kukowski's application went to hearing on April 25, 1978 at Glendive, Montana, for the purpose of hearing the objections to the application.

The Final Order in the Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski incorporated a finding by the Hearing Examiner that "The Objector, Reuben Amunrud, has apparent prior existing water rights from the source of supply which, by law, must be protected if valid." The Final Order in the matter granted the provisional permit to Daniel Kukowski, subject to all prior existing water rights and to any final determination of prior existing water rights as provided by Montana Law, as well as to the following additional conditions:

- a. Documentary evidence or depositions shall be presented to the Department attesting to the manner of construction and adequacy of design of the existing structure.
- b. The existing structure shall be modified to include a drop-inlet type mechanical spillway capable of discharging prolonged base flows from the watershed in accordance with Soil Conservation Service design criteria and standards and specifications.
- c. The existing structure shall be modified to include a gated pipe drainage device capable of releasing inflow at any storage stage at a rate of flow necessary to satisfy prior rights of not less than 2 cubic feet per second.

- d. An operation plan mutually agreeable to the Permittee and Objectors for release of water to satisfy prior rights shall be submitted for incorporation in the terms of this permit.
- e. If necessary, the existing structure shall be rebuilt and all construction and appurtenances necessary to accomplish the above modifications to the structure shall be designed and installed in accordance with Soil Conservation Service plans and specifications and the aforementioned operation plan shall be submitted to the Department for review and approval prior to the start of construction of the required modifications.
- f. The Permittee shall comply with the above terms and conditions and shall notify the Department of such compliance within one year from the date of receipt of this permit.

Compliance with the permit condition requiring installation of a drainage device within a year of receiving the permit, which was issued July 10, 1978, should have been effected by the end of July, 1979. However, the drainage device was never installed.

Donald Chaffee, the current Applicant, purchased the land from Daniel Kukowski in April, 1981. Mr. Chaffee terminated Permit No. 10,541-s42M, which contained the permit conditions listed above, and applied for a new permit.

SUMMARY OF THE RECORD ON THE PRESENT APPLICATION

1. On June 11, 1981, the Department received an Application for Beneficial Water Use Permit No. 34,204-s42M by Donald Chaffee to appropriate 3.5 acre-feet of water per year for stock-watering and 31.5 acre-feet of water per year for fish, wildlife, and recreational purposes, for a total of 35 acre-feet of water per year from the South Fork of Cottonwood Creek, a tributary of Cottonwood Creek in Wibaux County, Montana. (In subsequent correspondence with the Department on January 17, 1983, Applicant requested that the source name be amended to read "an unnamed tributary of the South Fork of Cottonwood Creek.") The point of diversion is the existing reservoir in the W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 16 North, Range 59 East, M.P.M., in Wibaux County, Montana. The requested period of use for stock-watering, fish, wildlife and recreational purposes is January 1 through December 31, inclusive, of each year.
2. On August 13, 20, and 27, 1981, the Department caused to be duly published in the Wibaux Pioneer-Gazette, Wibaux, Montana, a newspaper of general circulation in the area of the water source, notice of the above Application for Beneficial Water Use Permit No. 34,204-s42M by Donald Chaffee.
3. On September 21, 1981, the Department received a timely objection to the above application from Leroy and Maye Amunrud, son and wife of Reuben Amunrud (deceased),

interposing the argument that the matter had been settled in the previous hearing on the Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski. Kukowski was predecessor in interest to Mr. Chaffee: Kukowski had owned the land to which the applied-for water right would be appurtenant and upon which the reservoir is located, and the hearing on Mr. Kukowski's application during his ownership of the property involved the same types of uses and substantially the same quantities now claimed by Mr. Chaffee, the same point of diversion, and the same objections by the same objectors.

4. Matt Williams, Hearing Examiner for the Department, issued a July 14, 1982 Proposal for Decision on Application for Beneficial Water Use Permit No. 34,204-s42M by Donald H. Chaffee, requiring Mr. Chaffee to "make a threshold showing that the former proceeding did not provide a full and fair opportunity to litigate the issues of unappropriated water and adverse affect to prior appropriators, and/or that such prior permit issued pursuant thereto is manifestly unjust or unequitable in its terms."

The Proposal for Decision further provided that the Department would consider any matters reflected in Rule 60, Montana Rules of Civil Procedure, in determining whether the Applicant should now be accorded a full hearing on the present appropriative claim. The Proposal then concluded with language directing Applicant Chaffee to "(S)how cause

why the present applciation (sic) should not be granted according to the terms and conditions of Permit No. 10,541-s42M. Affidavits and other documentation in support of said cause shall be submitted to the Department no later than July 26, 1982."

5. Upon motion of the Applicant, an order was issued on July 26, 1982 by Matt Williams, extending the time of response to the Proposal for Decision to July 30, 1982.
6. On July 28, 1982, Donald Chaffee submitted a timely response to the Proposal for Decision, outlining his exceptions to the Proposal.

RESPONSE TO THE APPLICANT'S EXCEPTIONS

The Applicant, in his response to the Proposal for Decision, states that he contacted the Water Rights Field Office to discuss the situation and was advised to "cancel the permit held by Mr. Kikowski (sic) and reapply under his own name.....", if he did not want to retain the Kukowski permit for beneficial water use, with the permit conditions listed above, which was appurtenant to the land Applicant had purchased from Mr. Kukowski. In actuality, however, Mr. Chaffee was advised only that one of his options was to terminate Application for Beneficial Water Use Permit No. 10,541-s42M (by Daniel Kukowski), make a new application and attempt to show in the new application process that the former permit conditions were unnecessary. That this is the situation is stated by Mr. Chaffee himself, in his October 14, 1981 response to the Amunrud objection to his application.

"The refiling of the water rights was executed under the supervision of water rights personnel as per an option available to me as explained by Ronald J. Guse, Adm. Officer in a memo dated March 17, 1981 to the Miles City Area Office."

The memo Mr. Chaffee refers to indeed lists, as an option, termination of the then current permit and application for a new permit, a situation which would require Mr. Chaffee to go through the complete application process but which would allow him to argue and attempt to prove new permit conditions. The memo does not advise the Applicant to follow this route, nor does it suggest that merely reapplying for a new permit will allow the Applicant to avoid the permit conditions placed on the permit of his predecessor in interest absent a substantive change in circumstances between the prior permit situation and Mr. Chaffee's situation. No change which would justify altering or eliminating the permit conditions attached to the prior permit has been shown. As previously discussed, the same land, same reservoir, same uses of water, same objectors and objections are involved, as well as substantially the same quantity of water. Neither the record nor Mr. Chaffee's arguments indicate that anything has changed other than ownership of the land to which the water would be appurtenant. Those issues have been determined and those findings bind the parties hereto. McAllister v. Gravely, 159 Mont. 72, 495 P.2d 186 (1972), Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936).

Mere change of ownership does not form a basis for altering a finding by the Department regarding a particular water use. Beneficial Water Use Permits, which transfer with the sale of the property to which they are appurtenant unless specifically retained by the seller, (MCA 46-2-403 (1983)), retain the same permit conditions. Nor can Mr. Chaffee argue that he was unaware of the permit requirements at the time he purchased the property from Mr. Kukowski. His response to the Proposal for Decision states that he discussed the situation with the Miles City Field Office in January, 1981, prior to purchasing the land.

The Applicant was directed in the July 7, 1982 Proposal for Decision to show cause why his application should not contain the terms and conditions which were contained in Permit No. 10,541-s42M. Mr. Chaffee's response covered the matters discussed above, as well as specific arguments which will be responded to individually, prefaced by Applicant's statement of his argument.

1. Applicant first argues "The Amunruds claim filed August 10, 1956 is invalid", on the basis that Reuben Amunrud's 1956 Notice of Appropriation stated that the diversion of water was to be made by means of a pump, whereas in actuality a pump may not have been used by the Amunruds to divert water until 1977 or later. Mr. Chaffee contends that "since Mr. Amunrud failed to use his claim, he no longer has the right to assert it... see Sec. 85-2-404, M.C.A.", and that the application constitutes a reservation for future use.

Mr. Amunrud has filed SB76 claims for stockwater and irrigation. Under M.C.A. 85-2-227 (1983), filing of a SB76 claim for existing water rights constitutes prima facie proof of its content until the issuance of a final decree. The Amunruds, through their filed claims, have a prima facie showing of entitlement to water rights for irrigation and stockwater. Supplementing this showing is a Conclusion of Law which appeared in the 1978 hearing on the Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski: "The Objector, Reuben Amunrud has apparent prior existing water rights in the source of supply...quantification and final determination of the validity of such rights must await the adjudication process."

Furthermore, a complete reading of M.C.A. § 85-2-404 (1983), the statute on abandonment of appropriation rights which is cited by the Applicant, makes it clear that his "use it or lose it" argument that the Department should find the Amunrud appropriation right to have been lost through disuse is insupportable. Subsection (3) of M.C.A. § 85-2-404 (1983) states that existing rights may be presumed to have been abandoned only after such rights have been determined in accordance with the adjudication process.

Under these circumstances, the reasoning set forth in the Hearing Examiner's Proposal for Decision on the need for some degree of finality in administrative proceedings, in order to protect objectors from the necessity of participating in a possibly unlimited number of proceedings covering the same issues, dictates that the Applicant should be collaterally estopped from questioning the validity of the Amunrud claim to existing water rights.

2. Applicant's second argument states: "If valid, the Amunrud claim of August 10, 1956 must be held to be insufficient because of indefiniteness." This argument has two parts: one is that Mr. Amunrud's 1956 claim does not specify a point of diversion, and the second is that the Amunrud claim is on the South Fork of Cottonwood Creek, whereas the dam for Mr. Chaffee's reservoir is located on an unnamed tributary of the South Fork of Cottonwood Creek.

The water right claims filed prior to 1973 have been supplanted by the SB76 claim forms which owners of most types of pre-1973 appropriation rights have been required to file. The Amunruds made SB76 filings for stockwater and irrigation, and clearly indicated the legal description of their point of diversion on the South Fork of Cottonwood Creek on the SB76 claim forms. The validity and sufficiency of this information can be determined with finality only through the adjudication process.

Assuming, arguendo, that the Department is authorized to look beyond the SB76 claims, Mr. Chaffee's argument still is found to be without basis. The "Number 17" form on which Mr. Amunrud filed his August 10, 1956 Notice of Appropriation does not have a section entitled "point of diversion". Rather there is a section on "means of diversion" which has a place for the Applicant to list size and means of diversion, followed by the words "from said" and a blank. Mr. Amunrud completed the blank by filling in the word fork, referring to the South Fork of the Cottonwood Creek specified earlier in the form. On its face, the form does

not indicate that anything more specific is required. Even assuming that Mr. Amunrud's answer is not sufficiently detailed, however, the error is not of a magnitude to justify invalidation of the claim.

The fact that Applicant's reservoir is located on an unnamed tributary of the South Fork of Cottonwood Creek, whereas the Amunrud water claim is from the South Fork of Cottonwood Creek, does not invalidate the Amunrud objection. Since the stream where the reservoir dam is located is a tributary of, and therefore provides water to, the South Fork of Cottonwood Creek, the amount of water which is held out of the tributary necessarily affects the volume of the South Fork and thereby the water rights of the people who appropriate from it.

The Hearing Examiner in the 1978 hearing on the permit application by Daniel Kukowski stated: "There are, at times, unappropriated waters from the source of supply when the water could be put to the use proposed by the Applicant, and in the amount the applicant seeks to appropriate, however, the amount requested is not necessarily available every year nor throughout the period during which the Applicant seeks to appropriate", and concluded that the permit should be conditioned so as to protect the rights of prior appropriators. The fact that the present Applicant is applying for 5 acre-feet of water more per annum than Mr. Kukowski applied for suggests that there is now even more reason to require protection for prior appropriators.

The Applicant presents his speculations as to the amount of available runoff water in order to bolster his argument that the

Amunrud appropriation can be fulfilled by drainage occurring between the tributary where the reservoir is located and the Amunrud property. However, the January 14, 1982 field report prepared by the Miles City Water Rights Bureau Field Office, utilizing Soil Conservation Service guidelines, clearly indicates that Mr. Chaffee's figures on the amount of drainage available to the Amunruds from lands below the reservoir are inaccurate. Walter Rolf, the Area Office Supervisor, calculated that in a normal year there would be enough spring runoff water to satisfy use by the Amunruds and the reservoir application, but that dry years and the small summer runoffs might create problems.

3. "If Mr. Amunrud's claim is adjudged to be valid and sufficient, Mr. Chaffee's dam is still not interfering with that claim...By the time the run-off is of any benefit to Mr. Amunrud, the dam is at capacity; therefore, the run-off which is useful to Mr. Amunrud does go to him first." The Applicant argues a) that the spring run-off occurs while the ground is still frozen and therefore is not useful for the Amunruds' irrigation purposes, but is useful for filling Applicant's reservoir, and b) Amunruds have their appropriation amount satisfied by the spring run-off, and would have to let any water released from the dam at a later date go by without diverting it.

These arguments obviously contradict each other. If the Amunrud's are not able to use the early spring run-off for irrigation, either because the dam has intercepted it or because the ground which is to be irrigated is still frozen, their appropriation amount as evidenced by their SB76 claims for

irrigation cannot be satisfied by the run-off. Additionally, the Applicant apparently holds a misconception as to how an appropriator may utilize a beneficial water use permit: the fact that the spring run-off may contain enough water to satisfy the Amunruds' irrigation claim does not create a corresponding requirement that the Amunruds use the water for irrigation at that particular time.

The time period during which a person with a beneficial water use permit may make use of his appropriation is delineated by the permittee's "historical use", i.e., the periods of time during which the appropriators normally have used water for the purposes for which they have claimed the water. Holstrom Land Co. v. Meagher County Newlan Creek Water District, 36 St. Rep. 1403, 595 P.2d 360 (1979). Historically, an appropriator uses water for irrigation during months when the crops require it, not during times when the ground is frozen. Enough water may be present during spring run-off to fulfill the Amunruds' claim for irrigation, but they are entitled to use the water incrementally during periods of need instead, up to the total amount of their filed appropriation.

Since the Amunruds are entitled to make withdrawals during the entire period of their historical use of water, Mr. Chaffee's dam may indeed be interfering with the Amunrud claim for existing water rights. By the time the Amunruds have need for water at the end of the irrigating season, the waters in the reservoir may have been drawn down by evaporation, seepage, and consumptive use by the Applicant to a level where water is not coming over the spillway.

Even if Amunruds have finished irrigating by the time the reservoir is drawn down below the level of the spillway, other water uses are being foreclosed whenever this situation occurs. The Amunruds have filed SB76 claims for existing stockwater use rights, with a claimed period of use extending from Jan. 1 to December 31, inclusive, of every year. The transcript in the Kukowski hearing indicates that this need for year-around instream stockwater was one of the bases for the Amunrud objection to Kukowski's Application for Beneficial Water Use Permit for the reservoir, and for their September 15, 1981 objection to the present application on the same matter.

Amunruds therefore have needs for their claimed water which apparently exist during time periods before the reservoir reaches capacity and starts spilling, and after the reservoir is drawn down and stops spilling. In addition, the reservoir as presently constructed could forestall any water whatsoever from reaching the Amunruds from the tributary where the dam is located if the year or season is a dry one and the reservoir doesn't reach capacity.

In both of the previous beneficial water use permits issued for waters in the reservoir, (Temporary Permit No. 7135-s42M to Nesham-Peterson, Inc. and Permit No. 10,541-s42M to Daniel Kukowski), it was found necessary to include a permit condition requiring installation of a drainage device in the dam in order to satisfy the Amunruds' water rights. Applicant has made no showing of a change in conditions, other than the transfer of ownership of the land where the reservoir is located.

Applicant's argument that the dam is not interfering with the Amunrud's claimed existing rights is contradicted by findings made at the hearing on Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski, as well as by Applicant's lack of proof on the issue.

The equitable considerations which dictate the need for collateral estoppel of relitigation of certain issues in this matter, previously set forth in the Proposal for Decision and in the discussion of Objectors' claimed water rights in Exception Number 1, suggest that the Applicant be collaterally estopped from further argument concerning the necessity of installing a drainage device in the dam. Any permit which is issued in this matter will be conditioned on modification of the existing dam structure to include a drainage device capable of releasing inflow at any storage stage at a rate of flow which will satisfy prior water rights.

4. "All the water in the area is unsuitable for irrigation purposes." Applicant argues that, due to high levels of sodium and saline in the water, it is impractical for Amunruds to exercise their claimed water rights for irrigation. If Applicant is attempting to show that Amunruds do not have a beneficial use for water released from the reservoir, and hence that there is no need for a drainage device, the argument has already been answered: the Amunruds have prior claims to existing water rights which must be protected. State ex rel Crowley v. Dist. Court 108 M. 89, 88 P.2d 23 (1939), MCA § 85-2-401(1) (1983).

Even if the irrigation claims were not to be taken into consideration, the Amunruds claim uses such as stockwatering which require water to reach their property in as constant a flow as weather conditions will permit.

If the Applicant is making the argument in an attempt to mitigate permit conditions, e.g., to show that the suggested flow-through amount of 2 cfs is excessive, he still has not made a supportable argument. Assuming arguendo that the high sodium and saline levels shown in water tests of Applicant's reservoir, spring, and well are representative of the levels of these minerals in the water that the Amunruds use for irrigation, the Applicant has offered no proof that the Objectors cannot or do not use the water for irrigation with some degree of success. The record indicates that the Objectors and others in the area have been using the water for irrigation for many years; a fact that contraindicates the Applicant's contention that use of the water renders the land it is applied to unsuitable for growing.

5. "Any major modification will weaken the structure."

The possibility that modifying the dam to include a drainage device might weaken the structure does not weigh on the question of whether or not a drainage device should be installed; that question has been answered. Installation of a drainage device has been determined to be necessary in order to protect existing water rights.

Applicant has made no showing as to why installation of a drainage device, if done properly, should weaken the dam structure. However, the possibility that modification of the dam

structure could render it unstable weighs toward the question of whether or not the Application for a Beneficial Water Use Permit should be granted, since a finding that installation of a drainage device would render the dam unsafe would necessitate denying the permit application, pursuant to MCA § 85-2-311(c).

Any permit issued in this matter will include a requirement that plans for the modification and actual construction thereof must meet specifications, set by the Soil Conservation Service or by a qualified engineer licensed in Montana, which are designed to ensure the structure will meet dam safety standards. If the Applicant cannot document the adequacy of the proposed structural modification and of the construction methods used, the permit may be modified or revoked by the Department.

6. "It would be harmful at this point to destroy the dam."

The Applicant currently is appropriating water without a permit, and hence is in violation of the law. MCA §§ 85-2-301, 85-2-305. He may need to breach the dam in any case in order to avoid making an illegal appropriation of water: if he chooses to go to a hearing on this matter and is granted a Beneficial Water Use Permit, the dam may have to be breached in order to install the drainage device which has been determined to be necessary to protect the rights of other appropriators. MCA § 85-2-312(1). If the Applicant does not continue with his Application for Beneficial Water Use Permit, or his application is denied subsequent to the hearing, he must remove the dam structure from the drainage.

Applicant argues that the reservoir provides a source of water to wildlife which otherwise would be lost to the area. If the Applicant is granted a Beneficial Water Use Permit, breaching the dam to install the required drainage device should not permanently harm the reservoir as a water source. Mr. Chaffee could retain a holding pond to use for stockwatering while construction is taking place, and the fish that he claims are present in the reservoir as a result of stocking could be maintained in the pond.

If the Applicant intends to breach the dam permanently rather than comply with the drainage device requirement, it is indeed possible that a source of water will be lost to certain types of wildlife, notably waterfowl. Unfortunate as this result may be, it cannot be avoided. "It is a fundamental rule that the vested rights of other users or senior appropriators cannot be impaired by storage and delayed use. " 5 R. CLARK, WATERS AND WATER RIGHTS, 84 (1972). See, Gwynn v. City of Phillipsburg, 156 Mont. 194, 478 P.2d 855 (1971), Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941).

In the present case, the claimed use rights of the Amunruds may not be impaired by Applicant's use of the reservoir for water storage. Installation of a drainage device in the dam structure has been determined to be necessary in order to protect the Amunruds' water rights. Applicant must take the required measures to avoid impairment of those rights, even though wildlife watering may be affected to some undetermined degree as a result.

In addition, since the Applicant does not own the wildlife which he claims would be injured, see generally Herrin v. Sutherland, 74 Mont. 587, 601, 241 P. 348 (1975); State ex rel. Visser v. Fish and Game commission, 150 Mont. 525, 437 P.2d 373 (1968) on state ownership of wild animals and game, it seems probable that Applicant would not be found to have legal standing to assert water uses by wildlife as a basis for non-compliance with the proposed permit conditions or as a use for which he may appropriate water.

MCA § 85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) and (3), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) 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.

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AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 6, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by Donald H. Chaffee, Application No. 34,204-s42M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Donald H. Chaffee, Box 312, Wibaux, MT 59353
2. Leroy Amunrud, 2116 24th St. W., Billings, MT 59102
3. Walter H. Rolf, Water Rights Bureau Field Office, Miles City (inter-departmental mail)
4. Peggy A. Elting, Hearing Officer (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 6th day of March, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Judy John

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

CASE # 34204

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. 34204 BY DONALD H. CHAFFEE)
)

* * * * *

The Objector Leroy and Maye Amunrud have interposed the objection of res judicata in the above-entitled matter. Said Objector avers that Applicant's predecessor in interest and this Objector having previously participated in a hearing involving substantially the same water use claimed by the Applicant in this matter, and said Objector has submitted public records as evidence of such proceedings.

The Department has not heretofore squarely addressed the effect of prior hearings between the parties or those in privity of interest therewith as regards the issues of "unappropriated water" or "adverse affect to prior appropriators." See MCA 85-2-311 (1981). In the analagous judicial realm, a judgment on the merits is final and conclusive between the parties and those in privity of interest therewith for the particular cause of action litigated. See generally, Missoula Light & Water Co. v. Hughes, 77 P.2d 1041, 106 Mont. 355 (1938); Brennen v. Jones, 101 Mont. 550, 55 P.2d 697 (1931); Smith v. Krutar, 153 Mont 325, 457 P.2d 459 (1969), McIntosh v. Graveley, 159 Mont. 72, 195 P.2d 186

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(1972), Meagher County Newlan Creek Water Dist. v. Walter, 169 Mont. 358, 547 P.2d 850 (1976); Smith v. Musselshell County, 155 Mont. 376, 472 P.2d 878 (1970), Compare Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940), Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938); but see Perkins v. Kramer, 148 Mont. 355, 423 P.2d 857 (1966).

The Hearings Examiner notes that *res judicata* is a judicial doctrine, and a party to an administrative proceeding is not entitled as of right to its protections. However, the concerns that underpin that judicial doctrine may form an administrative counterpart in the present circumstances, to the extent that the interests served by that doctrine are reflected in the posture of the administrative proceedings.

It will be noted that unlike the judicial realm, the administrative determinations made on a new water use permit are not likely to result in inconsistent demands on a person by state authority. Any new water use permit is of necessity subject to all prior water rights, the terms of any permit notwithstanding. MCA 85-2-312(1) (1981). The Department is not adjudicating the respective rights of the parties to a new water permit proceeding, but rather is merely determining whether a prospective appropriator should be entitled to take a place along the ladder of priorities on a particular watercourse. Compare, MCA 85-2-406 (1981), MCA 85-2-211 et. seq. Moreover, the rights now claimed by this Applicant amount to a new cause of action in that the priority date for the use claimed herein is different from that involved in the prior proceeding. See MCA 85-2-401.

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Notwithstanding the original character of this cause of action, however, the branch of res judicata known as collateral estoppel may nonetheless serve to enshroud determinations made in the former proceeding with a force of finality in the present one. See Gessel v Jones, 149 Mont. 418, 427 P.2d 295 (1967); Brennen v. Jones, 101 Mont. 550, 55 P.2d 697 (1936). The Objector to this matter is entitled to some measure of protection under the rubric of collateral estoppel, else a permit applicant would be free to litigate and relitigate his appropriative claim and ultimately undue legitimate objections merely by dogged determination. A person may be entitled to his "day in court", but such person may properly be limited to a single appearance.

The Applicant in this matter claims the land to which the present water right will be appurtenant to through a party to the prior proceeding. While an objector may have to deal consecutively with new and independent claims to the watercourse that he depends on by persons not parties to or in privity of interest with persons involved in prior proceedings, the importance of the finality of administrative proceedings demands additional protections where a prospective appropriator attempts to relieve himself of perceived burdens in prior permits by abandoning the same and attempting to subject that objector to new proceedings involving the identical issues. See generally, Bradco Supply Company v. Larson, 36 St. Rep. 1506, ___ Mont. , ___ P.2d ___ (1979), Rierson v. State of Montana, 37 St. Rep. 627, ___ Mont. ___, ___ P.2d ___ (1980). The hearings

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examiner notes that the application of the foregoing will in some circumstances work harsh results, but such results are outweighed by the need for finality of administrative determinations.

On averment of the Department, it appears that the present proceeding is predicated on the Applicant's dissatisfaction with conditions attached in the former permit requiring a drainage tube, particularly since it appears that the reservoir actually constructed was not so equipped making it now markedly expensive to attempt to retrofit such storage structure with such a device. Accepting the truth of these allegations for present purposes, they do not argue on their own for a modification of the above-stated rule. One may not appropriate water in this state after July 1 of 1973 except in accordance with the permitting process. MCA 85-2-301 (1981). Failure to observe such requirements is a misdemeanor. MCA 85-2-121 (1981). This Applicant cannot place himself in a better position than his predecessor in interest where the foundations of his claim is the wrongful act of the one through which he claims.

Therefore, it is appropriate that the Applicant be directed to make a threshold showing that the former proceeding did not provide a full and fair opportunity to litigate the issues of unappropriated water and adverse affect to prior appropriators, and/or that such prior permit issued pursuant thereto is manifestly unjust or unequitable in its terms. Further, the Department will consider any matters reflected in MRCP 60 in determining whether this Applicant should now be accorded a full hearing on the present appropriative claim. (See attachment).

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The requirement of a drainage tube, however, must be made a condition of any permit issued in this matter merely because of the nature of Applicant's claim. The Applicant proposes to impound up to 35 acre-feet per year pursuant to his purposes in a reservoir with a capacity of 35 acre-feet. An appropriation is measured at the "headgate" of the appropriative works, meaning that seepage and evaporative losses are an incident to and part of the appropriative claim, wheat v. Cameron, 64 Mont. 494, 210 p.761 (1922). Thus, without a drainage structure, the Applicant would be unable to operate his reservoir to assure that only 35 acre-feet at most was taken in any given year, and that additional amounts would not be impounded to compensate for seepage and evaporative losses.

WHEREFORE, based on the foregoing the Applicant Chaffee is hereby directed to show cause why the present application should not be granted according to the terms and conditions of Permit No. 10,541-S42M. Affidavits and other documentation in support of said cause shall be submitted to the Department no later than July 26, 1982.

DONE this 11 day of June, 1982.

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

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