

*Blues*

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR CHANGE OF APPROPRIATION	)	NOTICE OF OMISSION
WATER RIGHT NO. G 34573-76H BY	)	<u>AND CLARIFICATION</u>
CARRIE M. GREYER	)	
	)	
	)	
	)	
	)	

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The legal land description listed for the Place of Use in the September 10, 1986, Final Order in the above-entitled cause does not fully describe the place of use as contained in the record. To assure a complete and accurate record and to clarify the Final Order, the Department of Natural Resources and Conservation hereby notifies the parties that the legal land description in the Final Order is amended and changed as follows:

Place of Use [historic]: NWNE Section 10, T10N, R19W, Ravalli County, comprising 85 acres more or less.

Is amended to read:

Place of Use: NWNE Section 10 and NW Section 10 and S½NE Section 9, all in T10N, R19W, in Ravalli County, comprising 85 acres more or less.

And:

Place of Use [as approved for changel]: S½NW Section 4 and N½SW Section 4 and SWSWNE Section 4, all in T10N, R19W, in Ravalli County.

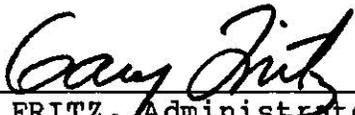
**CASE # 34573**

Is amended to read:

Place of Use:

S $\frac{1}{2}$ NW Section 4 and N $\frac{1}{2}$ SW Section 4  
and SWSWNE Section 4 and NWNWSE  
Section 4, all in T10N, R19W, in  
Ravalli County.

DATED this 3<sup>rd</sup> day of October, 1986.

  
\_\_\_\_\_  
GARY FRITZ, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, MT 59620

**CASE # 34573**

AFFIDAVIT OF SERVICE  
MAILING

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

DONNA ELSER, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 8, 1986, she depositing in the United States mail, first class, postage prepaid, the foregoing NOTICE OF OMISSION AND CLARIFICATION, addressed to each of the following persons or agencies:

1. Carrie M. Grether, 824 San Diego Rd., Berkeley, CA 94707;
2. Ron Bender, Attorney, 3203 Russell, Missoula, MT 59801;
3. Gary & Clarice Zabel, 5501 Cormoret Loop, Florence, MT 59833;
4. Ronald L. Meeks, P. O. Box 132, Florence, MT 59833;
5. David Ballinger, 5451 NE Est Side Hwy., Florence, MT 59833;
6. Mike McLane, Manager, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail);
7. Faye McKnight, Legal Counsel, DNRC (hand deliver); and
8. Gary Fritz, Administrator, Water Resources Division (hand deliver).

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

BY Donna Elser

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

On this 8<sup>th</sup> day of October, 1986, before me, a Notary Public in and for said state, personally appeared DONNA ELSER, 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.

John P. Gilman

NOTARY PUBLIC for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1987

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

*file +  
ex to  
K...  
9/10/86*

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION ) FINAL ORDER  
WATER RIGHT NO. G 34573-76H BY )  
CARRIE M. GREETHER )

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. Timely exceptions to the Proposal for Decision were filed by the objectors Gary and Clarice Zabel on August 7, 1984. Oral arguments were held before the agency in Missoula, Montana on July 9, 1985.

The Department of Natural Resources and Conservation (Department or DNRC) accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the July 20, 1984, Proposal for Decision, and incorporates them herein by reference. Based upon these Findings of Fact and Conclusions of Law, all files and records herein, and attached Memorandum to the Order, the Department makes the following:

ORDER

Application for Change of Appropriation Water Right G34573-76H is hereby granted to Carrie M. Grether to change a portion of the following described right.

*W025696*

**CASE # 34573**

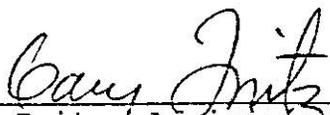
Source: Eight Mile Creek  
Priority Date: April 2, 1884  
Amount: 1414 gpm up to 510 acre-feet  
POD: SWSESE Section 3, T10N, R19W, Ravalli County  
Period of Use: April 1 - October 15  
Purpose of Use: Agriculture - Irrigation  
Place of Use: NWNE Section 10, T10N, R19W, Ravalli County,  
comprising 85 acres more or less

Of the aforesaid amount 840 gpm up to 255 acre feet annually  
is changed in the following particulars.

POD: SWSESE Section 3, T10N, R19W, Ravalli County

Place of Use: S $\frac{1}{2}$ NW Section 4 and N $\frac{1}{2}$ SW Section 4 and  
SWSWNE Section 4, all in T10N, R19W, in  
Ravalli County.

DATED this 10<sup>th</sup> day of September, 1986.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, MT 59620

NOTICE

The Department's Final Order may be appealed in accordance  
with the Montana Administrative Procedure Act by filing a  
petition in the appropriate court within thirty (30) days after  
service of the Final Order.

MEMORANDUM

The Applicant in this case seeks a change of place of use and point of diversion. The proposed change involves irrigating approximately 85 acres at a higher location on the opposite side of Eight Mile Creek. The proposed new place of use will be sprinkler irrigated (the old place of use has historically been flood irrigated). The evidence on the record shows that the Applicant intends to divert 840 gpm up to 255 acre-feet per year to irrigate the proposed new place of use, while the remaining portion of the original right (574 gpm/255 acre-feet) will continue to be used at the historic place of use. Therefore, by improving the efficiency of her irrigation system the Applicant will increase the number of acres historically irrigated without diverting more water, and will "stabilize" the water source for use on a more regular and customary basis (see, infra, p 12).

The Proposal for Decision correctly identifies two issues that must be decided in this matter. The first is whether by salvaging water through his own efforts that would otherwise be irretrievably lost from the source of supply, the appropriator may extend her place of use if other appropriators are not harmed thereby. The second question then becomes whether an appropriator may "bootstrap the quantity of water salvaged by a water-saving practice to the priority date attendant to the old use." Proposal for Decision at p. 2.

In deciding these questions it is necessary to examine what waters may be salvaged by an appropriator, what limitations historic beneficial use places on an appropriative right, and to what extent an appropriator may extend his appropriation by using salvaged waters.

In Beaverhead Canal Co. v. Dillon Electric Light and Power Co., 34 Mont. 135, 140, 85 P. 880, 882 (1906), the Montana Supreme Court stated that "[i]f by his own exertions another increases the available supply of water in the stream, he has a right to appropriate and use it to the extent of the increase... [B]ut only [in] cases in which a supply of water is added to the stream which would not otherwise have flowed there." The reasoning in Beaverhead Canal Co. extends to the situation in this proceeding--by salvaging water from his existing entitlement the appropriator increases the supply of water through his own efforts. In doing so, he has the right to appropriate and use it.

The appropriator in this matter seeks to increase the supply of water available for use (irrigation) by salvaging water from her existing entitlement. The initial inquiry must be what waters can actually be made available to an appropriator through salvage. The term "salvage" may be defined as making available for beneficial use through water-saving practices water of acceptable quality from existing water entitlements that would otherwise be irretrievably lost to the source of supply. Irretrievable losses typically result from nonproductive evapotranspiration, evaporation, water loss through deep

percolation which is not physically or economically retrievable for use, return flows that are rendered unusable to other appropriators because of deterioration in water quality, etc. In order to be classified as salvaged, water must be prevented from being lost from a particular source.

To be considered "salvaged" water, any increase in the supply of water made available by an appropriators efforts must stem from an existing valid water right. Therefore, an appropriator must show that a valid water right existed from which he salvaged water and thereby is entitled to the increased supply.

The existence and extent of a valid water right arises from historic beneficial use of the water. As has been stated many times, beneficial use is the basis, measure, and limit of an appropriative right. McDonald v. Montana, Cause No. 85-468, 43 St. Rptr. 576 (April 8, 1986) (motion for rehearing pending). The doctrine of historic beneficial use establishes limits on every appropriation; an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of junior appropriators. In the Matter of the Application for Authorization to Change Existing Right No. 9782-C76M by Thomas and Linda Bladholm, Proposal for Decision, June 22, 1984, at p. 19; See, Basin Electric Power Coop. v. State Board of Control, 578 P.2d 557, 563 (Wyo. 1978). The doctrine of beneficial use limits an appropriator to that amount which is reasonably needed

for the purpose of use. The holder of an appropriative right acquires only the right to use water beneficially and, consequently, never acquires or retains a right to water which has been wasted. See §85-2-102(13), MCA; §85-2-301(1), MCA. Therefore, an appropriator may not acquire a right to salvaged water if the increase in water supply stems from water which was wasted in the first instance.

What constitutes a beneficial use, and conversely what use is wasteful, depends on the facts and circumstances of each case. See Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 45 P.2d 972, 1007 (Cal. 1935). A general definition of waste that has been used is "that amount of water which is lost to the appropriator which by a reasonable amount of labor or the expenditure of a reasonable amount of money upon his part might be saved" for useful purposes. 2 Kinney, Irrigation and Water Rights §912, (2nd Ed. 1912).

As pointed out above, the concept of beneficial use includes efficiency consideration. However, the law does not require absolute efficiency; a certain amount of inefficiency is sanctioned in order to allow for the beneficial use of water. An appropriator cannot be compelled to divert according to the most scientific method known. Worden v. Alexander, 108 Mont. 208, 215 (1939). Therefore, the determination that must be made in each case is whether the water use involved is an unreasonable use.

In determining whether water has been wasted, courts have considered several factors. These factors include the custom in the locality, the percentage of diverted water that is lost, the demands on the source of supply and the reasonableness of the use in relation to the needs of other appropriators, the economic circumstances of the user, and the quality of the construction and maintenance of physical structures. Water Waste - Ascertainment and Abatement, Utah L. Rev. 449 (1973). These factors merely help guide the court in making a determination of what waste is reasonable.

In determining the amount of water which the user applies to a beneficial use and to which he is entitled as a subsequent appropriator, the system of irrigation and common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard, although a more economical method might be adopted.

Worden v. Alexander, 108 Mont. 208, 215 (1939).

The result of this analysis is that there may be water loss in a physical sense but is not unreasonable loss and therefore not waste in a legal sense. If some inefficiencies in conveyance and use are reasonable and are a protected part of a water right (i.e., water loss in a physical sense but not waste under a legal definition) then a more efficient system could be installed and water salvaged. Therefore, as the Proposal for Decision points out, one who "improves his distribution system to a level beyond that required by law and thereby salvages a quantity of water for future use when no injury occurs to the other appropriators should be rewarded for his efforts."

Memorandum, Proposal for Decision at p. 4.

**CASE # 34573**

Another limitation inherent in the prior appropriation doctrine is that an appropriator is entitled only to that amount of water which he has historically used. The appropriator in this instant seeks to use the water saved on additional lands not covered by the original appropriation. The Proposal for Decision correctly states that the "issue herein is whether an appropriative right reflects a privilege to irrigate a particular tract or a privilege to take a defined amount of water from a source of supply for a particular purpose." Memorandum, Proposal for Decision at p. 1.

In reviewing this question, the case cited in the Proposal for Decision, Salt River Valley User's Association v. Kovacovich, 3 Ariz. App. 28, 411 P.2d 201 (1966), stands alone in holding that the measurement of a water right was limited by that amount that could be beneficially used at the historic place of use at any given time and an appropriator could not through water-saving practices apply the water thus saved to immediately adjacent lands. Kovacevich, 411 P.2d at 202. The Court's ruling in Kovacovich was based on the Arizona Water Code then in effect. A.R.S. §45-172 (1956). The Court found that under Arizona Law the water right attached to a specific tract of land--becoming "appurtenant" to it in the strictest sense.

Montana has never followed the "old appurtenancy rule" (as Arizona had done) which prevented the right from being subject to sale and use apart from the land benefiting from the right. See, Clark, Background and Trends in Water Salvage Law, 15 Mineral Law Institute, 421, 451 n. 81 (1969). In Montana, a

right to use water passes with conveyance of the land unless specifically reserved. §85-2-403, MCA. However, as the Montana Supreme Court stated in Castillo v. Kunnemann, 642 P.2d 1019 (Mont. 1982):

Prior to 1973, Montana case law consistently held that a water right could be transferred and disposed of apart from the land to which it was appurtenant. However, such transfer could not adversely affect other vested rights. See Sherlock v. Greaves, 106 Mont 206, 76 P.2d 87 (1938); Lensing v. Day and Hansen Security Co., 67 Mont. 382, 215, P. 999 (1923).

No Montana case has specifically addressed the question raised in Kovacovich. However, many of the Western states that have resolved this issue have held that the right to the water salvaged by means of artificial improvements goes to the person making the improvements. Pomona Land and Water Co. v. San Antonio Water Co., 93 P. 881 (Cal. 1908); Bosinger v. Taylor, 211 P. 1085 (Id. 1922); Big Cottonwood Tanner Ditch Co. v. Shurtiff, 189 P. 587 (Utah 1919). Given the different historical interpretation of the appurtenancy rule (as well as the policy reasons for rejecting the reasoning in Kovacovich) and the weight of authority against the ruling, it is unlikely that Montana courts would embrace the holding in Kovacovich.

Another element of the prior appropriation doctrine limiting the extension of historic beneficial use is the priority system; as between appropriators, the first in time is the first in right. §85-2-401, MCA.

It has been stated that generally junior appropriators have vested rights in a continuation of stream conditions existing at the time of their appropriation,

thus entitling them to resist changes in points of diversion or use which materially affect their rights. Thayer v. City of Rawlins, 594 P.2d 951 (Wyo. 1979).

The pattern of historic use serves to define the "conditions of the stream" that subsequent appropriators have a vested right in. See, In the Matter of the Application for Authorization to Change Existing Right No. 9782-C76M by Thomas and Linda Bladholm, Proposal for Decision, June 22, 1984. A junior appropriator must be able to reasonably exercise his right under the proposed changed conditions.

A senior water right holder "cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was [established], to the injury of subsequent appropriators." Quigley et al. v. McIntosh et al., 110 Mont. 495, 505 (1940) (emphasis added). Therefore, an appropriator may extend his place of use to the extent it can be irrigated with water salvaged from an existing entitlement if other appropriators are not adversely affected thereby.

Given that other appropriators had no reliance on salvaged waters and there are no changed conditions on the source of supply, or they may reasonably exercise their rights under any changed conditions, policy considerations mandate the waters acquired by salvage be given the priority date of the original appropriation from which they were salvaged. It is the statutory policy of the State of Montana to provide for wise utilization, development, and conservation of its water

resources. §85-2-101(3), MCA. The State has an interest in promoting and facilitating efficiency and conservation efforts where appropriate. See Colorado v. New Mexico, 459 U.S. 176, 103 S.Ct. 539, 74 L.Ed.2d 348 (1982). As the Proposal for Decision points out, not awarding the original priority date would penalize efficiency efforts that should be encouraged. Allowing an appropriator to expand acreage with water salvaged from his original entitlement with the original priority date would act as an incentive to employ more efficient means to accomplish the purpose of use although not legally required to do so.

Under the analysis outlined above, the Applicant in this case is entitled to expand the place of use under her appropriation with water salvaged from existing entitlement. The evidence in this case shows that during the major portion of the irrigation season the Applicant diverts the entire flow of Eight Mile Creek. The Hearing Examiner found that under the circumstances of this case the use of the entire flow of the source of supply was reasonable and therefore water was historically beneficially used and not wasted. Memorandum, Proposal for Decision at p. 1.

Furthermore, the Hearing Examiner found that a change in the method of irrigation from flood irrigation to sprinkler would increase the overall efficiency of the system and thus increase the quantity of water available to the appropriator.

Memorandum, Proposal for Decision at p. 1. The acreage proposed to be added will not result in additional diversions from the

source of supply nor will it result in a disruption in the pattern or amount of return flows, consequently, no other appropriators will be adversely affected. Id. at 2. Therefore, through the Applicant's own efforts, she has made available from her existing entitlement, by water-saving practices, water that would otherwise be irretrievably lost to the source of supply which can be used to expand acreage into production without adversely affecting other appropriators. The Applicant, through this Change of Place of Use proceeding, is granted the right to extend her place of use to those acres irrigated with salvaged water and will retain the priority date commensurate with the original appropriation for those additional acres.

In addition to the expansion of acreage as discussed above, the Applicant also seeks to change the original place of use under her existing appropriation to a new place of use. §85-2-402, MCA. As part of the proposed change "[t]he Applicant will replace a flood irrigation system [at the new place of use]. A sprinkler irrigation system is substantially more efficient than a flood irrigation system, meaning that a substantially greater volume per unit of water diverted is actually made available to the crops with a sprinkler system." Finding of Fact No. 5, Proposal for Decision at 2. Therefore, the sprinkler system at the new place of use will make it possible to irrigate more crops simultaneously in the early part of the season and irrigate on a more regular basis later in the season. Memorandum, Proposal for Decision at 1.

An appropriator may change her place of use but in doing so she may not increase her water right. cf. Osnes Livestock Co. et al. v. Warren, 103 Mont. 284, 293 (1936) (in severing and transferring a water right away from the land to which it was originally appurtenant, the purchaser cannot enlarge or extend the right). In the instant case, Finding of Fact No. 2 states that the proposed "change in place of use will result in enlargement of water use both in time and quantity." Proposal for Decision at p. 2. This is not to say, however, that the appropriator enlarges her historical right.

The evidence on the record shows that the relatively inefficient flood system did not allow for simultaneous or late season irrigation on a regular basis at the old place of use. However, when water was available for simultaneous or late season irrigation the Applicant historically used it. Therefore, with the more efficient sprinkler system, the Applicant will irrigate more crops on a more regular and customary basis at the new place of use without diverting a greater amount of water. Memorandum, Proposal for Decision at 2; Findings of Fact Nos. 3-6, Proposal for Decision at 2.

The Applicant does not seek to expand the period of use (April 1-October 15), however, because of the increased efficiency of the system water will be available for late season irrigation on a more regular basis. It is the change of method of irrigation from flood to sprinkler, and not the change of place of use, that will make available a greater quantity of water for the Applicant's crops for a longer period of time on a

regular and customary basis. This enhancement of time and quantity of water use does not increase the Applicant's historic water right. A recent Montana Supreme Court case, Bagnell v. Lemery, 657 P.2d 608 (Mont. 1983) dealt with a similar issue.

[T]he District Court found defendants had made a continuous beneficial use of the Mahle Spring water since 1917. Defendants do not contend their water right increased by the construction of the dam between 1956 to 1958, but rather, they claim the dam merely stabilized defendants' water and made it available at later and drier times of the year. Thus, defendants have a priority date of 1917 which is when their predecessors first began to make a beneficial use of the spring water. Id. at 611 (emphasis added).

In this case, the change in method of irrigation on the proposed new place of use will have the same effect of stabilizing the supply of water and making it available at later and drier times of the year as adding a reservoir did in Bagnell. The applicant is therefore not increasing his water right but making it more reliable for his purpose of use without adversely affecting other appropriators. cf. Featherman et al. v. Hennessey et al., 43 Mont. 310 (1911) (changes in purpose of use from non-consumptive to consumptive amounted pro tanto to a new appropriation).

The Applicant must meet the criteria established under §85-2-402, MCA, in order for the Department to approve a change in appropriation right. §85-2-402(2), MCA, provides, in part, that:

[T]he department shall approve a change in appropriation rights if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

Agriculture is a beneficial use of water, §85-2-102(2)(a), MCA. The record also shows that proposed means of diversion, construction, and operation are adequate and substantially more efficient than the old system. §§85-2-402(3)(a) and (b), MCA. Therefore, the final issue is whether the Applicant has proven by substantial credible evidence that the proposed change in place of use and point of diversion will not adversely affect the water rights of other appropriators. §85-2-402(3)(c), MCA.

In their Exceptions the Objectors challenge the Proposal for Decision's Finding of Fact No. 9, which states: "The change in place of use will alter the quantity of seepage accruing from the respective places of use." Proposal for Decision at 3. The evidence in this case shows that change in place of use and change in method of irrigation "will to some degree reduce the seepage that historically percolated out of the root zone of the old place of use". Memorandum, Proposal for Decision at 2. However, the evidence also shows that the amount of seepage involved is of insignificant proportions and that historically this seepage did not rejoin the source of supply and, more specifically, did not historically rejoin the source of supply as surface flow at a time and place that benefited other

appropriators. Id. The Hearing Examiner found that other appropriators would not be adversely affected by the proposed change of place of use. Findings of Fact Nos. 8 and 10 and Conclusion of Law No. 2, Proposal for Decision at 3. These findings are based on substantial credible evidence on the record and are adopted herein. Therefore, the Applicant has met the statutory criteria for change in appropriative right and the change is thereby granted.

There is no evidence on the record to show that there is any surplus water over and above what is actually and necessarily used by the Applicant which would be available to subsequent water right holders if returned to the stream. §85-2-412, MCA.

Finally, in oral argument, one of the Objectors, Mr. Zabel, alleged that cottonwood trees downstream from the Applicant's property were dying. The trees are not on Mr. Zabel's property. Statements on the record indicate that the trees started dying as early as 1960 and the cause is not known. There is insufficient evidence on the record to indicate that Applicant's irrigation practices contribute in any way to the death of these trees or that the proposed change would affect the trees. It is therefore unnecessary to determine whether adverse affect on environmental or aesthetic values must be considered in a change of place of use proceeding involving "salvaged" water. See, Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., 539 P.2d 1321 (Colo. 1975).

AFFIDAVIT OF SERVICE  
MAILING

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

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 10, 1986, she deposited in the United States mail, First class postage prepaid, a Final Order by the Department on the Application by Carrie M. Grether, Application No. G 34573-76H, an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Carrie M. Grether, 824 San Diego Rd., Berkeley, CA 94707
2. Ron Bender, Attorney, 3203 Russell, Missoula, MT 59801
3. Gary & Clarice Zabel, 5501 Cormoret Loop, Florence, MT 59833
4. Ronald L. Meeks, P.O. Box 132, Florence, MT 59833
5. David Ballinger, 5451 NE East Side Hwy., Florence, MT 59833
6. Mike McLane, Manager, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail)
7. Faye McKnight, Legal Counsel, DNRC (hand deliver)
8. Gary Fritz, Administrator, Water Resources Division (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

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

On this 10<sup>th</sup> day of September, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, 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.

[Signature]  
Notary Public for the State of Montana  
Residing at 11 1/2, Montana  
My Commission expires 10/1/87

**CASE # 34573**

App'l rec'd  
7/2/81

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT NO. 34573 BY CARRIE M. GREYHER )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Stevensville, Montana.

8/20/82

STATEMENT OF THE CASE

The Applicant herein seeks to change a portion of an existing right to a new place of use. The old place of use was in the SWSESE, Section 3, T10N, R19W, all in Ravalli County. The new place of use is in the S $\frac{1}{2}$ NW, and the N $\frac{1}{2}$ SW, and the SWSWNE, and the NWNWSE of Section 4, T10N, R19W. The application also seeks permission to change the point of diversion, although the new point of diversion will be on the other side of the creek from the old point.

Objectors to this application were filed with the Department of Natural Resources and Conservation by Ronald Meeks, Gary and Clarice Zobel and David Bollinger. Only the Zobels and Mr. Ballinger actually appeared and testified in this proceeding.

The pertinent portions of this application were duly and regularly published for three successive weeks in the Ravalli Republic, a newspaper of general circulation printed and published in Hamilton, Montana.

### FINDINGS OF FACT

1. The Grether Place takes all the water in the source of supply except for minor amounts during April and May.
2. The change in place of use will result in an enlargement of water use both in time and quantity.
3. The acreage of the old place of use and the acreage of the new place of use is substantially identical, but not all the acreage of the old place of use was customarily and regularly irrigated. Agricultural production on the old place of use was rotated on various parcels of land across the historic place of use. Irrigation of the new place of use will be substantially more regular and customary.
4. The change in place of use will not result in a greater demand at the headgate.
5. The Applicant will replace a flood irrigation system with a sprinkler one. A sprinkler irrigation system is substantially more efficient than a flood irrigation system, meaning that a substantially greater volume per unit of water diverted is actually made available to the crops with a sprinkler system.
6. The sprinkler irrigation system will provide more water for use on the crops than the historic flood irrigation system.
7. The Objectors hereto have had a full and fair opportunity to litigate the issues herein, and have had meaningful notice and a meaningful opportunity to be heard.

8. The point of diversion will be changed to a point directly across the McCalla Creek from the present point of diversion. The change in point of diversion will not cause injury.

9. The change in place of use will alter the quantity of seepage accruing from the respective places of use.

10. The change in place of use will not cause injury.

#### CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and over the parties hereto, MCA 85-2-402 et seq.

2. The change in place of use and point of diversion will not adversely affect other water users.

3. The Applicant is entitled to use the quantity of water salvaged by the replacement of his flood irrigation system with a sprinkler one to extend the time and acreage of the historic irrigation.

WHEREFORE, based on these findings of fact and conclusions of law, the following proposed order is issued.

Application for Change of Appropriation Water Right  
34573-c76H is hereby granted to Carrie M. Grether to change a portion of the following described right.

Source:	Eight Mile Creek
Priority Date:	April 2, 1884
Amount:	1414 gpm up to 510 acre feet
POD:	SWSESE Section 3, T10N, R19W, Ravalli County

Period of Use: April 1 - October 15  
Purpose of Use: Agriculture - Irrigation  
Place of Use: NWNE Section 10, T10N, R19W, Ravalli  
County, comprising 85 acres more or  
less

Of the aforesaid amount, 840 gmp up to 255 acre feet annually  
is charged in the following particulars.

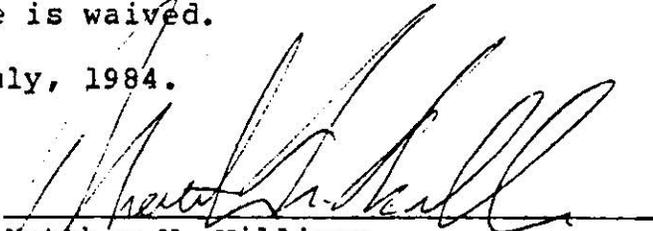
POD: SWSESE Section 3, T10N, R19W, Ravalli  
County  
Place of Use: S $\frac{1}{2}$ NW Section 4 and N $\frac{1}{2}$ SW Section 4 and  
SWSWNE Section 4, all in T10N, R19W, in  
Ravalli County

Provided that the Applicant republish the proposed  
change and have further proceedings thereon if  
necessary. Present objectors are bound by the terms of  
the above disposition.

NOTICE

Exceptions and objections to this Proposal for Decision must  
be filed with Gary Fritz, Administrator, Water Resources  
Division, 32 South Ewing, Helena, Montana, no later than 20 days  
after service of this Order. Said filings must include a demand  
for oral argument, or the same is waived.

DATED this 20<sup>th</sup> day of July, 1984.

  
Matthew W. Williams  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, Montana 59620  
406/44-6698

AFFIDAVIT OF SERVICE

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

Dorothy Millsop, Legal Secretary of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 2, 1984, she deposited in the United States mail a PROPOSAL FOR DECISION by the Department on the Application by Carrie M. Grether, Application No. 34573, for a Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Carrie M. Grether, 824 San Diego Rd., Berkeley, California 94707
2. Gary & Clarice Zabel, 5501 Cormoret Loop, Florence, Montana 59833
3. Ronald L. Meeks, P.O. Box 132, Florence, Montana 59833
4. David Ballinger, 5451 NE East Side Hwy., Florence, Montana 59833
5. Dave Pengelly, Missoula Area Office Supervisor, (inter-department mail)
6. Matt Williams, Hearing Examiner, DNRC, Helena (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Dorothy Millsop  
 )  
 ) ss.

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

On this 2nd day of August, 1984, 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.

Laurel D. MacIntyre  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 12/15/84

MEMORANDUM

The seminal issue herein is whether an appropriative right reflects a privilege to irrigate a particular tract or a privilege to take a defined amount of water from a source of supply for a particular purpose.

The Applicant herein will replace a flood irrigation practice with a sprinkler system. This alteration will substantially increase the efficiency of the overall system, meaning that a substantially greater proportion of the amount diverted will actually be available to the crops. The inefficiencies of the former flood system limited irrigation across the historic place of use to particular tracts thereof. The relatively inefficient system also commonly precluded late season irrigation on most or all of the historic place of use, as the available supply would not answer to both crop and diversion demands.

The sprinkler system, however, will allow for increased irrigation of land area at any given time. More crops can be simultaneously irrigated in the early part of the season, and more crops can be irrigated in the latter part of the season. The Applicant thus will extend the time and quantity of use by virtue of the present change in the place of use.

No increase in diversions from the source of supply will be occasioned by this new irrigation scheme, however. Historically, the waters that supplied the old place of use were diverted out of a ditch that served a far greater acreage than the old place of use at issue herein. Indeed, the Applicant's agricultural

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operations commonly divert virtually the entire flow in the source of supply, except at times of spring snow melt in April and May. The quantity of water so diverted is and was reasonable in view of the crop demands and the concomitant requirements implicit in the distribution scheme. Thus, while the Applicant will irrigate more crops on a more regular basis at his new place of use, no additional demand will be placed on the source of supply at the headgate.

Nor will this increased irrigation otherwise threaten downstream users by a disruption in the pattern or amount of return flows. It is, of course, evident that the increased efficiency associated with sprinkler irrigation will to some degree reduce the seepage that historically percolated out of the root zone of the old place of use. However, it is unlikely that such seepage is of any significant proportion in view of the relatively small acreage involved. Moreover, it is unlikely in view of the down/gradient ditch that any of this seepage rejoined the source of supply as surface flow, let alone at a time and place where it would be of use to downstream appropriators. Finally, the historical seepage will at least in part be replaced by seepage from the new place of use. Without more telling proof by the Objectors, it must be concluded that this alteration in seepage will not result in injury.

We are thus left with the naked proposition of whether an appropriator may bootstrap the quantity of water salvaged by a water-saving practice to the priority date attendant to the old use. In Salt River Valley User's Association v. Kavocovich, 3

Ariz. App. 28, 411 P.2d 201 (1966), an appropriator improved his ditch system and attempted to use the waters saved thereby on additional lands. Although no injury was threatened by this practice to other appropriators, the court refused to countenance this increased use as a product of the original appropriation. The court noted that the measure of the water right was limited by the amount that could be beneficially used at the historic place of use at any given time. The appropriator had a corresponding duty to make waters not needed at any given time available to other appropriators. Since the waters saved by increasing the efficiency of the distribution system were not needed for the purposes of the appropriation, such waters must be left in the source of supply.

No Montana case appears to have specifically passed upon the question involved herein. The principles the Salt River court relied on, however, are firmly entrenched principles of Montana law. An appropriator may divert no more than necessary to satisfy current need, and every appropriator has the concomitant duty to leave in the source of supply all water in excess of that need. See Conraw v. Huffine, 48 Mont. 437, 138 P 1094 (1914), Clausen v. Armington, 123 Mont. 1, 212 P. 2d 137 (1940), Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 250 P 11 (1926).

This principles, however, are sophistic when employed to answer the underlying question of whether an appropriator may increase his appropriation by water salvage where no injury occurs to other appropriators. The need the doctrine answers to includes a measure of water sufficient to fulfill the necessary

evaporative and seepage losses attendant to the ultimate use. An appropriator need not irrigate in the most scientific manner available, i.e., reasonable efficiency being all that is required. See Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939), State ex rel. Crowley v. District Court, 108 Mont. 891, 188 P.2d 23 (1939). This reasonable efficiency standard expressly countenances some measure of "waste" so as to fulfill the underlying use, and indeed the rule protects this quantity of "waste water" as against the claims of subsequent appropriators. See Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922).

It would be anomolous to sanction such "waste" generally, but to deny the use of this "waste" to one who improves his distribution system to a level beyond that required by law and thereby salvages a quantity of water for further use when no injury accrues to the other appropriators. The rule authorizing a limited amount of seepage and evaporative loss exists to promote the use of the water resource. The costs associated with absolute efficiency would impede the central aim of the appropriation doctrine; the use of the water resource. It will not do to invite a legal conceptualism serving the latter to abrogate its purpose and deny an appropriator that which the overlying doctrine purports to encourage. The Salt River decision has been widely criticized for this very reason, and it is herein deservedly interred. See Note, 46 Ore. L. Rev. 243 (1967), see generally, Salt Lake City v. Gardner, 39 Utah 30, 114 P. 147 (1911), Big Cottonwood Tanner Ditch Co. V. Shurtliff, 56 Utah 196, 189 P. 587 (1919), Logan Land Co. v. Logan City, 72 Utah 221, 269 P. 776 (1928).

The Hearings Examiner understands that the focus of this doctrinal dispute is not over the use of the salvaged water per se, but rather on what the proper priority date for the use of the salvaged water should be. There is no question that waters salvaged by water-savings practices is subject to use. The question is whether that use should bear a priority date commensurate with the priority date for the original use that spawned the salvaged water.

Awarding a new priority date, however, runs afoul of the tenets and purposes of the appropriation system. As noted above, such a result penalizes efforts that which ought to be encouraged. Moreover, it would afford other appropriators a virtual windfall. As exhaustively explained in In re Bozeman, the measure of an appropriation is bounded by the historical use of the water resource. See, Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940), Whitcomb v. Helena Water Works Co., 151 Mont. 443 (1968), Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911). Since the evidence herein indicates that the water that will serve the extended use was not historically available to downstream users when the underlying right was in priority, it would be legal conceptualism run wild to frustrate the water-saving efforts of the Applicant by awarding the water so salvaged to those users that have not historically relied on such water. The Applicants are entitled to extend the time and acreage of their use under the priority date attendant to the underlying appropriation.

#### LEGAL TITLE

One of the objections herein claims that a portion of the rights claimed by the Applicant is actually held by the complaining Objector. As explained in In re Bozeman, such an objection speaks to matters outside this agency's jurisdiction. The issues framed by objections premised solely on questions of legal title are solely legal, and require no expertise of any administrative agency for their resolution. For these reasons, this particular objection is stricken.

#### UNFAIR NOTICE

The public notice of this matter does not accurately describe the Applicant's intentions, and indeed this notice is misleading in its description of the proposed change. The notice indicates that the Applicant desires to change the place of use of 1414 gpm up to 510 acre feet annually, and intends to use 840 gpm up to 255 acre feet annually on the new place of use.

Any reasonable mind would infer from the foregoing that the changed use will result in a reduction in demand on the source of supply. (1414 gpm to 840 gpm). However, this is apparently an inaccurate description of the actual plan. No reduction in diversions will be occasioned by the Applicant's change. What the Applicant in fact intends is to change a portion of the 1414 right to a new place of use. The remaining portion will remain devoted to its historic use.

Such notice is not meaningful notice, and it does not comport with statutory requirements. See MCA 85-2-307. For this reason, republication must be made before the proposed disposition becomes effective.

However, since the parties that actually objected and participated herein did not object to the character of the notice, and since such parties have had a full and fair opportunity to litigate their claims herein, it is appropriate to preclude them from resisting further the proposed change. Therefore, the present objectors are collaterally estopped from objection further to the present change of water right. In re Kenyon Noble, Dept. Order.