

BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION) FINAL ORDER
WATER RIGHT NO. G40605-410 BY)
CRUMPLED HORN)

* * * * *

An Oral Argument Hearing was held before the Assistant Administrator of the Water Resources Division on Wednesday, January 7, 1987, at the Teton County Courthouse in Choteau, Montana. The Applicant Crumpled Horn and the Objector Montana Department of State Lands (DSL) presented exceptions to the Proposal for Decision entered April 2, 1986. Other parties participating in the Oral Arguments were attorney Charles Joslyn for Elizabeth Hawley, Curt Dyer for Brady Irrigation Co., Darlene Danzer representing the Danzer families, Dan Weist, and Ronald Otness. The DNRC has considered the exceptions, and responds to them as follows.

CRUMPLED HORN

The Proposal for Decision recommended denial of Application for Change of Appropriation Water Right No. G40605-410. The reason for denial was that the Hearing Examiner found insufficient evidence of the existence of the underlying right sought to be changed. Proposed Conclusion of Law 12, Proposal p. 26-27. The Proposal also noted that there was "some evidence" that the proposed means of diversion could interfere

with the rights of others. Proposed Conclusion of Law 6, Proposal p. 24. Crumpled Horn, during oral argument, excepted to both of these conclusions.

First, Crumpled Horn argues that exclusive jurisdiction to determine the existence of the underlying right lies with the Water Court. We do not agree. It is certainly true that final determinations concerning existing rights are the exclusive province of the Water Court. However, in considering applications to change existing rights, the DNRC must require a threshold showing by the Applicant that the underlying right exists. Absent such showing, the DNRC lacks jurisdiction to grant the change application. See Memorandum accompanying Proposal for Decision.

A DNRC finding of insufficient evidence of the existence of the underlying right in no way binds the Water Court, nor does the DNRC have authority to prevent the Applicant from using its claimed right as described in its SB 76 Claim. Proposed Conclusion of Law 13, Proposal at p. 27. Moreover, the Applicant may reapply for a change of use if the Water Court or another district court establishes the existence of the underlying right. For the time being, however, the Hearing Examiner's finding of insufficient evidence of the underlying right precludes DNRC approval of the change application.

Crumpled Horn next argues, in effect, that the record does not support the findings of insufficient evidence of the underlying right. Specifically, Crumpled Horn excepts to the Hearing Examiner's conclusion that there is no evidence the

water right has been used "within the last 70 to 80 years".

Proposed Conclusion of Law 10, Proposal at p. 26. Crumpled Horn argues that the 70-80 years nonuse finding is inaccurate in view of testimony by an objector that the ditches have not been used since the 1930's (50 years nonuse). See Proposed Findings of Fact 18. This argument is without merit.

The Montana Supreme Court has held that 40 years of non-use raises a rebuttable presumption of abandonment of a water right. 79 Ranch Inc. v. Pitsch, 40 St. Rep. 981, 666 P.2d 215 (1983).

Thus, 50 years of unexplained nonuse would still justify a finding that the Applicant failed to make a threshold showing of the validity of the underlying right. However, the Applicant's own testimony showed at most that the right may have been used as late as 1908, and there was other evidence that the dam had washed out in 1899 or 1900. Proposed Finding of Fact 9, Proposal at p. 15.

Contrary to Crumpled Horn's argument, this evidence is not contradicted by the objector who testified that the right was not in use when he came onto the land in the 1930's. The objector's testimony indicates non-use in the 1930's, but tells nothing about when the right was last used. Thus, the evidence was uncontradicted that the last use of the right was 70-80 or more years ago. When a Hearing Examiner's factual finding is based on uncontradicted evidence, the agency may not reject it. MCA 2-4-621(3).

Crumpled Horn next argues that the Hearing Examiner erred by failing to give effect to Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921). In presenting Mettler to the Hearing Examiner, Crumpled Horn correctly described it as a conflict between riparian and appropriative rights. See Transcript at p. 56. In Mettler, the plaintiff argued that the defendant's upstream appropriation for irrigation interfered with her riparian rights to water stock. The Supreme Court denied relief, holding that the common law doctrine of riparian rights is not recognized in Montana. 61 Mont. at pp. 170-171.

Mettler does not apply to this case, however, because here the stockwater rights involved are appropriative and not riparian. If appropriative stockwater rights are adversely affected, a proposed change can not be granted. MCA 85-2-402(2)(b). At any rate, in this case the Hearing Examiner's denial of the change was not based on the effects on other water users. The Proposal merely noted that there was "some" evidence the change "could" interfere with the rights of others. Proposed Conclusion of Law 6, Proposal p. 24. Thus, Crumpled Horn's Mettler argument is without merit.

At oral argument Crumpled Horn also reiterated its willingness to mitigate impacts on other users caused by the proposed change. Again, however, because the Hearing Examiner's proposed denial was not based on the effects to other users, this argument is not relevant.

Crumpled Horn also excepted to the Hearing Examiner's ruling that Ph.D dissertations offered as evidence by Crumpled Horn were inadmissible hearsay. Because that ruling occurred during the hearing on the Application for Beneficial Water Use Permit No. 51353-S410, it will not be addressed here.

Finally, Crumpled Horn excepted to scheduling on the same day the hearings on this change application and the Application for Permit No 51353-S410. Scheduling of hearings is a matter for the Hearing Examiner's discretion. ARM 36.12.203(2)(a). In this case, the Permit application was a "backup" in case the proposed change was denied. The POU for both Applications was nearly identical, and the objectors and the issues they raised were virtually the same in both cases. Furthermore, the hearings were held separately, although on the same day. There is no indication that the Hearing Examiner abused her discretion in scheduling these cases on the same day.

DSL EXCEPTION

On April 9, 1986, the DSL filed exceptions to the Proposal for Decision. DSL excepted to Proposed Conclusion of Law 7, which stated:

There is evidence that the proposed project would inundate lands belonging to Objectors Depner Farms and Department of State Lands. (See Finding of Fact 5.) This fact in itself would not necessarily mean that the Applicant's proposed project must be rejected, since the reservoir is a "public use" and the Applicant likely would be able to acquire the lands by payment of just compensation. See Constitution of Montana, Article IX § 3(2); MCA § 85-2-414. Whether or not the proposed project meets the "greatest public good - least private injury" statutory requirements (MCA § 70-30-110) is a question which the decision in this matter makes unnecessary to reach. Likewise, it is unnecessary to reach the question of access through State lands.

Specifically, the DSL excepts to the statement that state lands could be acquired by condemnation under Title 70, Chapter 30 of the Montana Code Annotated. DSL calls our attention to State ex rel. Galen v. District Court, 42 Mont. 105, 112 P. 706 (1910), which holds that fee title to school trust lands may not be acquired by condemnation. 41 Mont. at p. 114.

This Department does not need to rule on the question of whether state lands may be acquired by condemnation, since that point is unrelated to the basis for denying the proposed change. Thus, the pertinent section of Proposed Conclusion 7 is dictum, and lacks binding force in subsequent cases. Nevertheless, because Galen raises a question about the legal accuracy of the Proposed Conclusion, the Conclusion shall be deleted in its entirety from the Final Order in this matter.

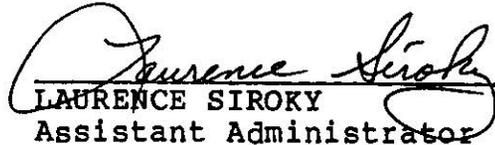
Based on the exception of the DSL, Proposed Conclusion of Law 7 of the Hearing Examiner is not adopted in this Final Order. All other Findings of Fact and Conclusions of Law, as well as the Memorandum, of the Hearing Examiner are accepted and adopted, and incorporated in this Order by reference. Based upon the Findings, Conclusions, and Memorandum, all files and records herein, and the Responses to the Exceptions, the Department of Natural Resources and Conservation makes the following:

ORDER

Application for Change of Appropriation Water Right No. G40605-410 by Crumpled Horn is denied.

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DATED this 13 day of February, 1987.


LAURENCE SIROKY
Assistant Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

NOTICE

The Department's Final Order may be appealed in accordance with Section 2-4-702 of the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
CHANGE OF APPROPRIATION WATER RIGHT) PROPOSAL FOR DECISION
NO. G40605-410 BY CRUMPLED HORN)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 12, 1985, in Choteau, Montana.

Crumpled Horn, the Applicant in this matter, was represented by David Chalmers, Secretary-Treasurer of Crumpled Horn.

Objector State of Montana Department of State Lands appeared by and through counsel Lyle Manley. Ron Roman appeared as a witness for the Objector.

Objector Depner Farms, Inc. was represented by Ross Depner, Secretary for Depner Farms.

Objector Elizabeth M. Hawley appeared personally.

Objector Danny L. Weist appeared personally. Ernest Weist appeared as a witness for the Objector.

Objector Ronald W. Otness appeared personally, and as representative for Objector Lyle E. Otness.

Objector Brady Irrigation Company was represented by Gordon Schlepp, Secretary of the Company, and by Harvey Wycomb, Treasurer of Brady Irrigation Company.

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Bob Larson, Field Manager of the Havre Water Rights Bureau Field Office, and Marvin Cross, Engineering Analyst with the Havre Field Office, appeared as staff witnesses for the Department of Natural Resources and Conservation (hereafter, the "Department").

STATEMENT OF THE CASE

On March 10, 1982, the Applicant filed an Application for Change of Appropriation Water Right seeking to change Appropriation Right G40605-410 from a past use of 1,785 gallons per minute ("gpm") up to 732 acre-feet per year for flood irrigation to 1,785 gpm up to 615 acre-feet per year for sprinkler irrigation. The claimed past use lists a point of diversion in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, Township 26 North, Range 4 West, and a place of use of 255 acres located in the E $\frac{1}{2}$ of Section 1, Township 25 North, Range 4 West, all in Teton County, Montana. The proposed change lists a diversion point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, Township 26 North, Range 4 West, and a new place of use: 215 acres in the W $\frac{1}{2}$ of Section 1, and 40 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, all in Township 25 North, Range 4 West, Teton County, Montana. The water would be diverted by means of a dam located at the new point of diversion.

The pertinent portions of the Application for Change were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on August 11 and 18, 1983.

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Subsequent to the filing of the Application for Change, several alterations occurred. On March 30, 1982, the Department received from the Applicant a Statement of Claim for Existing Water Rights ("SB76 Claim") No. 40605 which claims an 1899 filed appropriation right with a past use of 1,000 miner's inches of water to irrigate 320 acres in the W $\frac{1}{2}$ of Section 1, and 40 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, Township 25 North, Range 4 West, Teton County, Montana. This claim overlaps, in part, the Application. Further communication with the Applicant made it clear that the Applicant actually intends to irrigate 360 acres; 100 + acres assertedly already irrigated under the claimed 1899 right, and 255 acres which would be subtracted from the past irrigated acreage and changed to a new place of use.

On September 8, 1982, the Applicant filed changes to the Statement of Claim for Existing Water Rights, with an affidavit by Leslie Chalmers stating that the original Claim had been filed "for what we intended to do rather than for how the water was used in the past." The alterations included changing the acres irrigated to 3,330 acres, and listed a volume of 896 acre-feet per year. (As the affidavit explains, this volume was arrived at by computing the estimated storage volume for the original dam, not the crop irrigation requirement. The Havre Field Office subsequently has recommended the volume for this SB76 Claim be based on crop requirement, rather than asserted reservoir capacity.) The affidavit also states that the Applicant would prefer to utilize "the old dam site and storage" for the project proposed in the Change Application.

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Eight timely objections to the Application were filed. The State of Montana Department of State Lands objected to the Application for Change, stating that the location of the existing and proposed reservoir is within the boundaries of State-owned land (alleging trespass on the part of the original dam builders), and noting that the Applicant is not the lessee of the land in question and does not have any agreement with the State or easement onto the property. The objection states that the water impounded by the proposed reservoir would inundate land leased out for grazing.

The Montana Department of State Lands' (hereafter, "State Lands") objection further alleges that the Applicant's old diversion structure has not been used for approximately 80 years and that the claimed water right should be considered abandoned. An additional stated issue is the concern of the current lessee of the State lands in question, and of other surrounding land owners, about the safety of the proposed structure.

Brady Irrigation Company submitted an objection which alleges that the proposed project would flood out Brady Irrigation Company's diversion and canal, "cutting off water supply to 35 users plus the town of Brady." The Brady Irrigation Company also refers to "findings and court hearing data" in the hearing held on Application for Beneficial Water Use No. 17123-s410 by Edwin A. and Roy Gebhart as a basis for its objection.

Depner Farms, Inc. objected to the Application on several bases. It alleges that the proposed diversion dam is unstable and "probably will wash out in a flood," that the ground is

unsuitable for irrigation, and that the proposed irrigation will cause a large saline seep problem. Depner's objection states that the Applicant should be held responsible for reclamation of saline seep areas, including payments for land lost to saline seep on surrounding farms.

Elizabeth M. Hawley filed an objection which states that she has been advised to object to applications for water within five to ten miles of her water source. She also lists as a concern that flood or over-irrigation may cause seepage areas close to the Applicant.

Danny L. Weist objected to the Application in conjunction with the Montana Department of State Lands in reference to the state land property which Mr. Weist is leasing. Mr. Weist's objection questions the validity of the Applicant's "old" water right, stating that the place of storage was never used, that water hasn't been used, and that there is a height elevation from the old dam location to the claimed place of use.

Agua Fria Ranch, Inc. objected to the Application, alleging that the proposed use of water is not a beneficial use because the irrigation will adversely affect the Objector by accelerating saline seep on Agua Fria Ranch, since Agua Fria Ranch borders the Applicant's property on the east, "and the natural flow water is in an easterly direction at the situs of the proposed use."

Ronald W. and Lyle E. Otness filed an Objection to the Application, alleging that the proposed use could adversely affect the "prior" water right of the Objectors by increasing the saline seep problem on the Objectors' land, which is "½-mile from

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Applicant's land that would be irrigated if permit issued." The Objection states that the Objectors will agree to permit issuance only "if Applicant can conclusively prove that proposed use shall not accelerate the saline seep problem now prevalent in this area."

Gumbo, Inc. filed an Objection stating their concern that water backed up from the proposed dam structure, will cause the Objectors to lose grazing land along Muddy Creek and may affect a low crossing on the creek which is their only access to county roads. Gumbo also states that saline seep is a likely problem due to the higher water and to the irrigation.

Subsequent to the Objection period, Agua Fria Ranch, Inc. withdrew its Objection to the Application, stating that the Objector no longer felt the Application would affect Agua Fria. (Notice of Termination of Objection, dated August 30, 1984.)

EXHIBITS

The Applicant submitted nine Exhibits for admission into the record in this matter:

Applicant's Exhibit 1A is a letter from the State of Montana Secretary of State's office, signed by Larry Akey, Executive Assistant. The letter is addressed to Dr. Leslie Chalmers and states that Mr. Akey has discussed the Applicant's proposed irrigation dam with Kelly Blake at the Department of State Lands and that Mr. Blake will, at the Applicant's request, "provide a statement that the Board of Land Commissioners generally provides easements on state lands for projects such as the one you

propose. I hope this will be enough to show . . . that you have the ability to acquire the needed easements, at least across State lands" The letter states that the Board of Land Commissioners most likely will not grant the actual easement unless the Applicant can show that it can obtain easements on adjacent private sections. (Letter dated February 28, 1983.)

Applicant's Exhibit 2B is a May 15, 1981 letter from the Montana Department of State lands to Danny L. Weist, referencing State Lease No. 2130. The letter authorizes the entry of Leslie Chalmers onto the State land for the purpose of a survey. The letter states that the action does not include the authority to construct the proposed reservoir; that the Applicant will be required to submit an application to the Land Board for an easement, and that compensation must be made for any "leasehold damages suffered as a result of Mr. Chalmer's action." (May 15, 1981 letter, signed by Wilbur Erbe, Administrator of the Land Administration Division.)

Applicant's Exhibits 1 through 7 are filmcards containing microfiche reproductions of contour maps of Muddy Creek. These were introduced to show that the Applicant's proposed impoundment would stay within the creek channel of Muddy Creek except for approximately 12 acres of State land and 4-5 acres of Depner property which might be flooded.

Applicant's Exhibits 1A, 2B, and 1 through 7 were accepted into the record without objection.

The Objectors offered seven exhibits for admission into the record.

Objectors' Exhibit A is a photocopy of records pertaining to State Land Lease No. 2130; specifically, a "control card" from the records of the Montana Department of State Lands which shows the lessees of the S½ of Section 36, Township 26 North, Range 4 West, Teton County, Montana, since 1916.

Objectors' Exhibit B is a certified photocopy of United States of America Patent Number 1098299, issued to the State of Montana on August 6, 1938 "as evidence of the title which was granted and vested in the State of Montana to the above-described land on November 8, 1889, for the support of common schools" Included in the enumerated lands is Section 36, Township 26 North, Range 4 West in Teton County, Montana. (Patent, page 10.)

Objectors' Exhibit C is a series of seven photographs taken from the Applicant's proposed dam site, looking west over low plain, the Brady Canal, and the Brady Canal diversion structure. (Photos taken June 4, 1985.)

Objectors' Exhibit D is a series of four photographs taken at a point east of the old impoundment, showing remnants of the old impoundment (proposed dam site) and of a ditch from the impoundment. Muddy Creek and the Brady Canal both run through the breach in the impoundment. (Photos taken June 4, 1985.)

Objectors' Exhibit E consists of two photographs taken east of the old impoundment, looking across a bench. The photos show faint outlines of a ditch which apparently used to run across the bench. (Photos taken June 4, 1985.)

Objectors' Exhibit F consists of two photos taken from near the old dam site showing remnants of the main ditch which apparently ran from the old impoundment. The only physical feature which remains is a slight swale. (Photos taken June 4, 1985.)

Objectors' Exhibit G consists of two photographs taken at the old impoundment. One photo looks north across the breach, showing Muddy Creek, Brady Canal, and remnants of borrow area for the impoundment. Photo 2 shows remnant of ditch which runs east from the old impoundment site. (Photos taken June 4, 1985.)

Objectors' Exhibits A through G were accepted into the record without objection.

The Department did not offer any exhibits for admission into the record.

PRELIMINARY MATTERS

Objector Department of State Lands filed a Motion in Limine, dated June 6, 1985, moving the Hearing Examiner for an order excluding the use of the Applicant's "Notice of Water Right" as evidence in this matter. The Notice had been submitted by the Applicant as documentation for the claimed use right (SB76 Claim) which the Applicant proposes to change through the present Application. The Motion in Limine was not received in time for the Hearing Examiner to rule on it prior to the June 12 hearing. Therefore, State Lands moved to exclude the notice at the contested case hearing.

The basis for the motion to exclude is that the Notice of Water Right was not filed in a timely fashion. According to the notice, 29 days elapsed between the initial appropriation of water and the time of filing. Under the appropriation statutes in effect at the time, an appropriator was required to file notice of the appropriation within 20 days after the date of appropriation. (See Mont. Laws 1885, p. 130, Section 1886, Civ. C. 1895.)

At the hearing in this matter, the Applicant attempted to prove "good cause" for the delay in filing by reading into the record the United States Weather Service data for the days in question, which indicates generally that blizzard conditions and severe weather prevailed during this period, making a 26-mile trip to the county seat an extreme hardship.

State Lands objected to the weather records as being without foundation and not relevant, and countered the Applicant's explanation of the late filing with case law which indicates that the Montana Supreme Court has strictly interpreted filing requirements.

The Hearing Examiner hereby overrules State Lands' objection to the inclusion of the information. Although State Lands apparently is correct in its argument that filing requirements have been strictly interpreted in court, all parties to the hearing agreed to the admission of all evidence which possesses probative value, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct

of their serious affairs. The Applicant's Notice of Water Right falls within this category, since an average person undoubtedly would rely upon such a Notice as showing that a water use had been initiated by the holder of the Notice. As such, the Notice provides a certain amount of credence on the issue of whether or not the claimed water right was ever used, and supplements testimony and physical evidence which indicates that diversion structures were put in place and were used for at least a short length of time.

However, the Notice is not admissible to establish the amount or priority date of the claimed use right, see Holmstrom Land Co. v. Newlan Creek Water Dist., 185 Mont. 409 (1979), since the Notice is given prima facie status only if the notice has been recorded in compliance with statutory provisions. Therefore, the Objectors are not harmed by the inclusion of the Notice in the record, since it has been admitted only for the limited purpose of showing that an initial water use occurred--a fact obtained through other evidence in the record, as well--and not for the purpose of showing the continued existence of the claimed water right or the parameters of such a right.

The additional preliminary matter to be addressed is the receipt of ex parte communications from Objectors in this matter. The Department of State Lands received communications from Darlene Denzer and Elizabeth Hawley, and forwarded them to the Hearings Examiner. These letters constitute a type of ex parte communication, although not directed to the Hearing

Examiner, since the Hearing Examiner inadvertently received them. Therefore, to comply with Administrative Rule of Montana 32.12.230, the Hearing Examiner hereby notes these communications for the record, and advises the parties that they will not be considered:

The letter from Darlene Denzer applies solely to Application for Beneficial Water User Permit No. 51353-s410 and therefore will be addressed therein.

Elizabeth Hawley wrote to Lyle Manley on June 24, 1985, reviewing the sale of William Chalmer's property, and the description of appurtenant water rights. Mrs. Hawley also stated that her concern about saline seep would be solved if the Applicant forebore from using water if it caused saline problems.

These letters are placed on the record by this notice, and they will not be considered in the decision. No prejudice can accrue to any party because of the Hearing Examiner's receipt of these letters, since the content is not prejudicial in any way, and since the content had already been covered at the hearing in this matter.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Application for Change of Appropriation Water Right in this matter was duly filed with the Department of Natural Resources and Conservation on March 10, 1982, at 4:20 p.m.

3. The pertinent portions of the Application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on August 11 and 18, 1983.

4. The Applicant in this matter is Crumpled Horn, a Montana corporation.

5. David Chalmers, representing the Applicant, testified that they would like to build a diversion dam across Muddy Creek at the site of a dam which was constructed by his grandfather in 1898-1899 and subsequently breached by a spring flood. The diversion structure would be fairly low, backing water up to a two to three foot depth so that it could be pumped. Mr. Chalmers testified that it would be nice to build the diversion structure large enough to capture spring runoff, however, since Muddy Creek "is an intermittent stream." The diversion structure would be built to Soil Conservation Service standards.

Mr. Chalmers stated that he feels the waters raised by the proposed impoundment would stay within the confines of the creek channel except for approximately 12 acres of State land and four or five acres of Depner property. (See Applicant's Exhibits 1 through 7.) He testified that, if the impounded waters backed up over the Brady Irrigation Company diversion structure, the Applicant would be willing to install a new diversion for Brady at the time the Applicant's diversion went in.

6. Mr. Chalmers testified that water would be diverted out of the impoundment by means of a pump, carried to the place of use through a 12-inch pipeline, and utilized in center pivot sprinkler systems. The pipeline and electrical lines would be approximately $\frac{1}{4}$ mile in length, and would be located underground.

The water would be used to irrigate forage and small grain crops. The period of appropriation would be April 15 through October 15 of each year. Mr. Chalmers testified that the frequency of irrigation would be determined by tensiometric evaluation.

7. Mr. Chalmers further testified that proper irrigation practices can prevent saline seep. Citing the research of experts in the area of saline seep, he testified that he believes salinity problems can be controlled or even forestalled by using proper irrigation techniques. He stated that research indicates continuous cropping and growing deep-rooted crops help control salinity, as does irrigating in such a manner that water does not penetrate below the root zone. Mr. Chalmers stated that studies indicate that center pivot irrigation is well-suited to controlling saline seep problems. (Citing Ron McMullan, Lethbridge, Canada, soil and water specialist for Canadian government; Dr. John D. Rhodes, U.S. Soil Salinity Lab; Dr. Ann Stradley, University of Montana Ph.D. dissertation "Hydrology and Sub-Surface Geology of the Missouri and Madison Group, and Potential Water Use for Agriculture and Industry, Northwestern Montana Plains.")

8. David Chalmers testified that the old diversion structure and impoundment could have been capable of flood-irrigating approximately 3,300 acres, based on estimates by Marvin Cross of the Havre Water Rights Field Office, but that there is no evidence of approximately how many acres actually were irrigated. About 100 acres of the land which Crumpled Horn proposes to irrigate under the current project were part of this claimed historic use, while the other lands which may have been irrigated now are owned by other individuals. (Testimony of David Chalmers.)

9. Mr. Chalmers testified that the dam was built by William Chalmers in 1898, and filed on in January of 1899. Mr. Chalmers testified that the water right apparently was still being used in 1908, since a successor in interest who had purchased the Chalmers ranch had filed on an additional "80 cubic feet" in that year. However, the dam structure appears to have washed out in the spring of 1899 or 1900. (See September 21, 1983 Memorandum to File No. G40605-410 by Marvin Cross. "According to Mr. Leslie Chalmers of Crumpled Horn Corp., a dam and ditches were built pursuant to this filed appropriation and land was irrigated for one season before the dam washed out.")

10. The proposed point of diversion is on State land. (Testimony of David Chalmers, Montana Department of State Lands, Danny Weist.) The Applicant received a letter from State Lands granting permission for the Applicant and the Soil Conservation Service to enter on the State lands for the purposes of a survey

(Applicant's Exhibit 2B) : The letter states that it does not authorize construction of the proposed reservoir and that the Applicant must apply to the State Land Board for an easement across the State lands.

David Chalmers testified that it was his understanding that such easements usually are granted. A letter to his father from the Montana Secretary of State's office states that Kelly Blake at the Department of State Lands "will, at your written request, provide a statement that the Board of Land Commissioners generally provides easements on State lands for projects such as the one you propose." (Applicant's Exhibit 1A.)

In addition, Mr. Chalmers testified, it is his understanding that an 1866 Act of Congress made it legal to trespass to use water: William Chalmers went in on public domain and appropriated water for the original dam and impoundment. Mr. Chalmers stated that prior to the "new Constitution" (referring to the State Constitution adopted and ratified in 1972), Crumpled Horn "went in on State land" and appropriated and developed 600 gpm.

11. David Chalmers stated that the Applicant's proposed project should not be forestalled by the need for stockwater downstream since the water often would not make it down to the lower users anyway, and since Objector Weist can water his cattle from a well or allow them to drink from the Applicant's impoundment. Citing the Montana case of Mettler v. Ames Realty

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Co. (61 Mont. 152, 201 P. 702 (1921)), Mr. Chalmers stated that under the circumstances, it would be waste to turn the water into the creek for stockwater.

12. Counsel Lyle Manley, for the Department of State Lands, stated that his Department's position is that it became owner of the land where the point of diversion is located in November, 1889, when a Federal patent was issued to the State of Montana which included the land in question. The patent set aside this and other lands for inclusion in the School Trust.

Mr. Manley stated that the Applicant's underlying water right appears to have been abandoned, since the dam was destroyed in the spring of 1899 and has never been replaced. He stated that, if the dam was replaced as proposed, part of the State land would be inundated, thereby decreasing the income which it produces for the School Trust.

13. Mr. Manley stated that the State lands in question are not part of the public domain, and are subject to separate laws and rules. Therefore, since neither the Applicant nor its predecessors had been lessees of the State land or had been granted right-of-way, any access which was made to construct and utilize the old dam (present point of diversion) had been done by trespass.

Mr. Manley further stated that Crumpled Horn does not currently have any easement to install the proposed dam, pipeline, or other portions of the proposed project. He said that State lands does not necessarily require a water use permit

as a pre-requisite for issuance of an easement across the lands, but that the "best interests of the School Trust" must be a deciding factor.

14. Kelly Blake, Lands Division Administrator for State Lands testified that easements across State lands must be purchased, based on fair market value. He stated that surface disturbances, such as might be created by burying pipelines and electrical lines, must be reclaimed to ensure that primary vegetation is restored.

In response to questions from the Applicant, Mr. Blake stated that he could not say that the land near the old diversion structure was highly productive land. He stated that he didn't know how much land would be lost if the proposed impoundment was constructed, and that he didn't know what the land is worth, since it hasn't been appraised. He added that the State has not sold land since the 1960's.

15. Objector Danny Weist testified that he leased the State land in question (Lease 2130) in February, 1982, and is the current lessee. He has lived in the area of Muddy Creek all of his life, and testified that he and his family have always watered stock out of the creek. He stated that he waters the stock from a well during the winter when the creek freezes.

Mr. Weist stated that he is concerned that there will not be any water running beyond the impoundment if the proposed amount is diverted, since there is "barely enough" stockwater now. In reference to a question from the Applicant concerning the ability

of the stock to drink at the impoundment, Mr. Weist stated that if the cattle would all have to drink from the impoundment, instead of being spread along the creek, there would be serious overgrazing of the area around the impoundment site. He testified that he would also lose good grazing land upstream from the impoundment, since it would be flooded.

16. Danny Weist also testified that the old impoundment structure has never been used to impound water, nor have the old ditches ever been used to convey water.

17. Danny Weist voiced an additional concern that the proposed irrigation possibly may create a saline seep problem from seepage or runoff, and that the proposed place of use is adjacent to his leased land. He stated that he has not experienced a saline problem on his own fields.

18. Ernest Weist testified that he was the previous lessee of Lease 2130, and has farmed the area since the 1930's. He stated that he has used Muddy Creek for watering pasture and for stockwatering.

Mr. Weist testified that he could not remember the dam ever impounding water, or ditches ever being used. He stated that he thinks the proposed impoundment structure could not handle a flood, since eight to ten times he has seen floods one-quarter of a mile across which would take out the impoundment.

19. Objector Ross Depner of Depner Farms, Inc., testified that they are objecting to the proposed project because they feel they would lose some land to flooding and possibly to saline seep.

Mr. Depner testified that they are located about $\frac{1}{4}$ of a mile upstream from the proposed impoundment structure, and have some "very productive farmground" which would be flooded. Mr. Depner also testified that their land is lower in elevation than Crumpled Horn's proposed place of use, so that it is possible irrigation by the Applicant will cause saline to emerge on the Depner property, since water in combination with any rainfall will force water into the soil profile and "it has to come out somewhere with the salt."

20. Objector Elizabeth Hawley testified that she is concerned with saline seep. She stated that she thinks the experts quoted by the Applicant don't know about the area's "gumbo" soils, which do not handle excess water. She is concerned that there is a possibility of runoff from the Applicant's proposed sprinkler system onto the Hawley property.

Mrs. Hawley testified that she doesn't mind the Applicant irrigating if it's not in excess, but that she worries that the water can't be controlled well enough to prevent saline seep.

21. Objector Ronald Otness also objected to the proposed project on the basis of saline seep. He stated that he has forty years of experience irrigating in the area, and that he has just spent a lot of money cleaning up a saline problem.

Mr. Otness testified that "perfect irrigation" - putting on just enough water to be used completely - can control saline seep, but that it never happens that way. He said there is always runoff where there is irrigation because rainfall and other factors cannot be controlled by the irrigator.

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Mr. Otness stated that he doesn't object to Crumpled Horn irrigating if it's properly managed, but that he is concerned over who will have to pay for cleanup if the proposed irrigation causes saline seep.

22. Gumbo, Inc., did not appear at the hearing in this matter.

23. Gordon Schlepp, Secretary of the Brady Irrigation Company, testified that Brady Irrigation objects to the point of diversion, place of use, and proposed irrigation period of the Applicant's proposed project.

In reference to the proposed diversion structure, Mr. Schlepp testified that probably there is not enough water available year-round to maintain storage of two or three feet of water (since a small-capacity reservoir could not take advantage of runoff), while a higher diversion structure would back water up over Brady's diversion structure, which is located about 600 feet west of the proposed dam site. Mr. Schlepp testified that if the Applicant was granted a permit, it would have to provide a new diversion for Brady Irrigation; an expense that was estimated to be about \$56,000 seven years ago.

Mr. Schlepp stated that, aside from the question of diversion structure, there are questions about water availability in Muddy Creek. He testified that Muddy Creek has been decreed as a delivery canal from Bynum Reservoir to Brady's point of diversion between May 15 and September 1 of each year.

24. Bob Larson, Field Manager of the Havre Water Rights Bureau Field Office, clarified Brady Irrigation Company's use of Muddy Creek. Mr. Larson stated that Brady Irrigation has shares in the Teton Cooperative Reservoir Project (priority of July, 1902), as well as having a decreed right to 400 cfs out of Muddy Creek with a priority of 1909. The District Court decree allows Brady Irrigation Company to use Muddy Creek as a conveyance for its Teton Co-op shares, from the reservoir down to Brady's point of diversion in Section 36, Township 26 North, Range 4 West, Teton County, Montana.

25. In response to questions from Ron Roman of State Lands, Mr. Larson stated that changing from flood irrigation to sprinkler irrigation does have the effect of changing return flow patterns, but that the effect should not be adverse to other appropriators if the same or less acreage is irrigated as was irrigated before, since the amount initially diverted will be smaller.

Mr. Larson testified that it was not possible to determine how much acreage historically had been irrigated from the old impoundment, since the only remaining evidence is a short stretch of ditch near the impoundment site. Contour maps indicate that irrigation of the proposed point of use might have been possible from the impoundment site; however, cultivation has destroyed any irrigation system which may have existed, apart from the short stretch of ditch, now in disrepair. Mr. Larson testified that it was not possible to determine whether water ever was actually used on the proposed place of use.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. Objector Gumbo, Inc., having failed to appear at the hearing in this matter, is in default, pursuant to Administrative Rule of Montana 36.12.208.

4. MCA § 85-2-402 (1983) states that the Department shall approve a proposed change if it determines that the proposed change will not adversely affect the rights of other persons.

5. The record in this matter indicates that the proposed irrigation itself more likely than not will not adversely affect the rights of other persons. Testimony indicates that the Applicant is a knowledgeable irrigator, willing to take whatever steps are necessary to prevent saline seep problems and any other problems which may interfere with the rights of the other parties. Crumpled Horn has indicated its intent to employ such measures as tensiometers and continuous cropping to forestall saline seep problems, for example.

6. There is some evidence to indicate that the Applicant's proposed means of diversion could interfere with the rights of others. The proposed impoundment most likely would back water over the diversion structure of the Brady Irrigation Company, and possibly might affect the ability of Danny Weist to water his stock. (See Findings of Fact 15, 23.)

7. There is evidence which indicates that the proposed project would inundate lands belonging to Objectors Depner Farms and Department of State Lands. (See Finding of Fact 5.) This fact in itself would not necessarily mean that the Applicant's proposed project must be rejected, since the reservoir is a "public use" and the Applicant likely would be able to acquire the lands by payment of just compensation. See Constitution of Montana, Article IX, § 3 (2); MCA § 85-2-414. Whether or not the proposed project meets the "greatest public good - least private injury" statutory requirements (MCA § 70-30-110) is a question which the decision in this matter makes unnecessary to reach. Likewise, it is unnecessary to reach the question of access through State lands.

8. A water right is a usufructuary right, that is, it is based on the actual use of water rather than upon a showing of "paper rights". Numerous Montana cases embody the concept that a water right is defined by the actual use of the water, rather than by the amount claimed by, or even decreed to, a water right

holder. See 79 Ranch Inc. v. Pitsch, 40 St. Rep. 981, 666 P.2d 215 (1983); Cook v. Hudson, 110 Mont. 263 103 P.2d 137 (1940); Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914); Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898).

9. In the present matter, the Objectors have raised the issue of abandonment with regard to the claimed water right for which the Applicant has requested a change authorization.

The record indicates that the earthen dam which was the means of diversion for the Applicant's claimed water right in this matter has not existed for approximately 85 years. (See Finding of Fact 9.) It is possible that the claimed water right was used for a few years after the dam was destroyed (see Finding of Fact 9), although of necessity the water must have been diverted directly out of the stream. However, there is no showing that the water was used after 1908.

Testimony by the Objectors indicates that the Applicant's ditches have not been used since the 1930's, at the latest, (Finding of Fact 18), and photographs show that only traces remain of ditches leading from the old impoundment site. (See Objectors' Exhibits C through G.)

10. SB76 Claims (Statements of Claim for Existing Water Rights) which have been properly filed as required by the adjudication process constitute prima facie evidence on the matters asserted therein, with regard to the historic use for

which the claim has been filed. MCA § 85-2-227. However, such prima facie evidence can be contradicted and overcome by other evidence. MCA § 26-1-102(6). See Marshall v. Minischmidt, 148 Mont. 263, 419 P.2d 186 (1966); Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935). It is then necessary for the holder of the SB76 Claim to introduce further evidence concerning the existence of the right.

In the present matter, the Applicant did not provide any further evidence that the claimed water right for which application to change has been made has been used any time within the last 70 to 80 years.

11. Where an appropriator ceases use of his water right, with intent to abandon it, the right ceases to exist. Nonuse for an extended period of time is strong evidence of intent to abandon. See Pitsch v. 79 Ranch, supra, and Smith v. Hope Mining Co., 18 Mont. 526 (1903), wherein the Court found that allowing ditches and flumes to fall into disrepair and become filled up shows intent to abandon.

12. While the Department has no authority to make final determinations on the issues of abandonment or the scope of existing rights, it must have evidence establishing the existence of a claimed right before it can authorize a change of that right. (See Memorandum.) Otherwise, a water right which has never existed or has been long abandoned could serve as the basis of a new operation, while retaining an old priority date.

There is insufficient evidence in the record in this matter to allow a determination that the water right sought to be

changed still exists in whole or in part. There also is insufficient evidence that a water right exists as it was claimed in the adjudication process. (Testimony of Applicant, Objectors, Bob Larson.) Therefore, the Applicant has failed to sustain its burden of proof on the issue of the existence of the underlying water right, and the Department cannot authorize a change. See In the Matter of the Application for Beneficial Water Use Permit No. 51282-s410 and Application for Change of Appropriation Water Right No. G139972-410 by Ben Lund Farms, Inc., Proposal for Decision, November 8, 1984 (Final Order July 22, 1984).

13. The Department has no authority to prevent the Applicant from utilizing its claimed right as described in its SB76 Claim. That authority resides in the Water Courts. However, the Department cannot authorize the Applicant to exercise this right by means of the project described in the change application.

The Applicant is entitled to petition the appropriate district court for a determination of the existence of the claimed water right, pursuant to MCA § 85-2-406(2) (1985), and then reapply for a change authorization based on the court determination. No loss of priority will result from such action, since any changed use which may be authorized will retain the priority date assigned to the original, claimed right.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

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PROPOSED ORDER

Application for Change of Appropriation Water Right No. G40605-410 by Crumpled Horn hereby is denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Division Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled

for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

DONE this 2nd day of April, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

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MEMORANDUM

The Department cannot issue a Change Authorization where an Applicant fails to show an existing right. It is fundamental to Montana Water Law, as well as a matter of common sense, that one cannot change a water right that does not exist. See Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911), Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974). The Department must, as a subject matter jurisdictional issue, require a preliminary showing that the claimed existing right, if disputed, exists.

Final determinations concerning water rights which vested prior to 1973 are solely within the province of the water court adjudication system, as set forth in MCA Title 85, Part 2, Chapter 2. Administrative decisions do not carry the weight of finality on determinations of ownership, nor does an appropriator obtain any rights through a change approval that are not contingent upon a verification of the underlying right in the adjudication process. See Meadow Lakes, infra, In the Matter of the Application for Change of Appropriation Water Right No. G05081 and G05083 by Neil W. Moldenhauer, Final Order, March 24, 1984.

However, the Department must make preliminary administrative findings on water rights in order to perform its mandated function of authorizing or denying applications for change of water rights. See In the Matter of the Application for Change of Appropriation Water Right Nos. G05081 and G05083 by Neil W. Moldenhauer, Final Order, March 20, 1984; In the Matter of the

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Application for Beneficial Water Use Permits Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates and In the Matter of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates, Final Order, October 6, 1981; Whitmore V. Murray City, 107 Utah 445, 154 P.2d 748 (1944); United States v. District Court of Fourth Judicial District, 121 Utah 18, 242 P.2d 774 (1952).

One of the determinations that the Department must make in change proceedings is the existence of the right for which the application for change has been made.

Although the governing factor in change proceedings perforce of the statutory language is the absence of adverse affect (sic) to the rights of other persons, the entire provision implicitly assumes that the petitioner for such a change is a water right holder. The section speaks to the change of a water right. It is well-settled that such a right is a usufructuary interest only, and accords the appropriator no privileges by way of ownership of the corpus of the water. Thus, a water right accords an appropriator only a right to use a certain quantity of water for some specified purpose. A petitioner for a change must therefore adduce proof of such characteristics of a water right in order to demonstrate as a threshold matter some legally cognizable interest in the proceedings. (Citations omitted.) Meadow Lakes, supra, Proposal for Decision, August 25, 1981, at 56.

The Applicant must make a threshold showing of the existence of the water use right that it wishes to change. See In the Matter of the Application for Beneficial Water Use Permit No. 20736-s41H by the City of Bozeman and In the Matter of the Application to Sever and Sell Appropriation Water Right No. 20737-s41H, Proposal for Decision, June 4, 1984 (Final Order January 9, 1985); In the Matter of the Application for Change of Appropriation Water Right No. V157350-76H by Neil and Virginia Miller, Proposal for Decision, April 4, 1985 (Final Order July 15, 1985); In the Matter of the Application for Change of Appropriation Water Rights No. G120401-41H and G120403-41H by Estate of Lena Ryen, Proposal for Decision, March 13, 1985.

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AFFIDAVIT OF SERVICE
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 2, 1986, she deposited in the United States mail, first class mail, a Proposal for Decision, an order by the Department on Change of Appropriation Water Right No. G40605-410 by Crumpled Horn, addressed to each of the following persons or agencies:

1. Crumpled Horn, Rt. 2, Choteau, MT 59422
2. State of Montana, Dept. of State Lands, c/o Ron Roman, Capitol Station, Helena, MT 59620
3. Teton Water Users Assoc., Box 222, Carter, MT 59420
4. Brady Irrigation Co., c/o Gordon Schlepp, Box 207, Brady, MT 59416
5. Allen L. & Terri L. Denzer, Box 936, Conrad, MT 59425
6. Elizabeth M. Hawley, Choteau, MT 59422
7. Robert L. Woodahl, Attorney, P.O. Box 162, Choteau, MT 59422
8. Ronald W. & Lyle E. Otness, P.O. Box 726, Choteau, MT 59422
9. Danreuther Ranches, Charles & Janet Danreuther, Loma, MT 59460
10. Danny L. Weist, Rt. 2, Box 176, Choteau, MT 59422
11. Lyman R. & Darlene A. Denzer, Box 937, Choteau, MT 59422
12. Depner Farms, Inc., c/o Ross Depner, Box 135, Rt. 2, Choteau, MT 59422
13. Gumbo, Inc., c/o Roger J. Weist, Rt. 2, Box 175, Choteau, MT 59422
14. Lyle Manley, Attorney, Montana Board of Commissioners, Capital Station, Helena, MT 59620
15. Bob Larson, Water Rights Bureau Field Manager, Havre, MT (inter-departmental mail)
16. Peggy A. Elting, Hearing Examiner, (hand-deliver)
17. Gary Fritz, Administrator, Water Resources Division, (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

CASE # 40605

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

On this 2nd day of APRIL, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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.

John P. Gilman

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

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