

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 43117-s41P BY MORRIS O. OR)
ELIZABE H D. MANCORONAL

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. One timely exception was received from the Applicant. For the reasons stated below, and after having given the objection full consideration, the Department of Natural Resources and Conservation (hereafter the "Department" or "DNRC") hereby accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in her Proposal for Decision and incorporates them herein by reference.

1. Additional Factual Arguments and Exhibits

Much of Mr. Mancoronal's objection reiterates allegations made at the hearing. Some of the objection sets forth additional facts in support of the Application. Because the record closed at the end of the hearing, these additional facts cannot be considered by the Hearing Examiner. See, In the Matter of the Beneficial Water Use Application No. 31711-g410 by Miller Colony, Final Order, June, 1984.

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Mr. Mancoronal also submitted various "exhibits". As with the additional factual arguments, the exhibits cannot now be considered without violating the other parties' right to cross-examine witnesses in a contested case proceeding. Hert v. J.J. Newberry, 178 Mont. 355, 584 P.2d. 656; rehearing denied, 179 Mont. 160, 587 P.2d. 11, (1978).

2. Finding Evidence Inconclusive Regarding Alleged Wrongful Advice from DNRC Personnel

Mr. Mancoronal took exception to the lack of a finding that the evidence on the record showed that Mr. Rodriguez improperly advised Mr. Mancoronal that he did not need a permit for which he later applied. The Department affirms this finding. (See Finding of Fact No. 15). The Department regrets any misinformation Mr. Mancoronal may have received from any Department personnel. Nevertheless, the evidence on the record consisted of uncorroborated statements by Mr. Mancoronal as opposed to contradictory, uncorroborated statements by Mr. Rodriguez. Mr. Rodriguez did offer various exhibits to demonstrate his correct understanding of the law at the time in question, and showing that Mr. Mancoronal had represented his prior right to include the 32 acres now in issue. Thus, it was entirely possible that Mr. Rodriguez advised Mr. Mancoronal of no need for a permit, but with the misunderstanding that the 32 acres was already appurtenant to his existing right. (See Finding of Fact No. 16). Because of the finding that the record did not demonstrate by substantial credible evidence that no

unappropriated water was available for the permit, the issue of whether Mr. Mancoronal could receive a priority date earlier than his permit filing date was unnecessary to resolve.

3. Exhibits

The Hearing Examiner did not "complain", but merely reported that no exhibits were offered by Mr. Mancoronal. The Hearing Examiner did review the tapes of the hearing, and notes therefrom that Mr. Mancoronal was urged by the Hearing Examiner to present some sort of case. She repeatedly asked for general project descriptions as well as evidence on all statutory criteria, explaining that the Applicant had the burden to show by substantial credible evidence that all statutory criteria were met. In response to the question of the existence of unappropriated water, the Applicant replied that there was none. Having hoisted himself on his own petard, the Applicant may not now complain because of his failure to meet the mandatory burden of proof. Whether the Department has jurisdiction to look beyond the SB76 Statements of Claim and examine actual water use, need not be addressed, because concrete evidence as to actual water uses was simply not presented at the hearing. The mere statements by Applicant that many of the water users were not, in fact, using the water for which they filed statements of claim are insufficient evidence to overcome the prima facie presumption created by the filings. MCA § 85-2-227.

4. Subsequent Applications

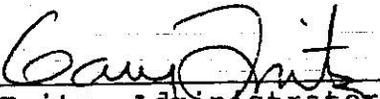
The Department notes that the Permit must be denied herein simply because of the Applicant's failure to meet its statutory burden of proof. Hence, the door is always open to the Applicant to submit another application, this time armed with some evidence of water availability. Or, the Applicant could seek a Change Authorization to move water for which he has an irrigation right from the land to which it is presently appurtenant, to the 32 acres in issue herein.

WHEREFORE, based upon the files, records, and proceedings herein, the Department hereby makes the following:

ORDER

That Application Number 43117-s41P by Morris O. or Elizabeth D. Mancoronal is denied and dismissed in its entirety without prejudice.

DONE this 14 day of June, 1984.



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



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

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

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 18, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by Morris O. Mancoronal, Application No. 43117-s41P, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Morris O. Mancoronal, Jr., RR 1 Box 32, Conrad, MT 59425
2. Robert & Leona Elings, RT 1, Box 48, Conrad, MT 59425
3. Clyde Schultz, Rt 3, Box 456, Conrad, MT 59425
4. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
5. Robert Larson, Havre Field Office (inter-departmental mail)
6. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Key Elser

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

On this 18th day of June, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

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

CASE # 43117

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 43117-S41P BY MORRIS MANCORONAL)

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, Part 3, MCA 1983, and the contested case provisions of the Administrative Procedures Act, Title 2, Chapter 4, Part 600, MCA 1983, the above-captioned matter came on for hearing on December 12, 1983, in Conrad, Montana.

The Applicants, Morris O. and Elizabeth D. Mancoronai appeared, pro se.

The Objectors, Robert & Leona Elings appeared, pro se.

Objector Clyde Schultz timely filed an objection but failed to appear at the hearing. Bob Larson, Area Office Supervisor, Havre Water Rights Bureau for the Department of Natural Resources and Conservation (hereafter, "DNRC" or Department") appeared as staff expert witness. Silvio Rodriguez, Area Office Supervisor, Lewistown Water Rights Bureau, DNRC, also appeared.

STATEMENT OF THE CASE

The Applicant seeks to appropriate 292 gallons per minute (hereafter, "gpm") up to 120 acre-feet per year for irrigation of 32 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 23, Township 28 North, Range 1

West, Pondera County, Montana. The period of use to be April 15 through October 20, of each year. The source of supply is surface water flowing in Pondera Coulee; the point of diversion to be NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 23, Township 28 North, Range 1 West, Pondera county, Montana. The pertinent facts of the application were published once a week for three successive weeks in the Independent Observer, Conrad, Montana, a newspaper of general circulation in the area of the source.

Mr. & Mrs. Elings filed an objection with the DNRC alleging and complaining generally that there is no unappropriated water available in the source of supply, and also that the issuance of the permit applied for herein would work adverse affect to their water rights on Pondera Coulee.

Mr. Schultz complained generally that there is insufficient water in Pondera Coulee for the present existing rights, and that therefore the permit should not be issued.

EXHIBITS

The Applicant did not offer any exhibits into the record.

The Objector offered the following exhibits into the record.

Objector 1-12 - Objections to an Application for Beneficial Water Use Permit by Robert and Leona Elings filed by:

- 1) State of Montana, Department of State Lands
- 2) Pondera Coulee and Tributaries Water Users Ass'n.
- 3) J.A. Broadhurst
- 4) Harold A. Philipps
- 5) Charles J. Yeager, Jr.
- 6) Hollandsworth Ranch

- 7) Fred and Helen Arnold
- 8) Kenneth Broadhurst
- 9) Pugsley Ranches, Inc., Robert L. Pugsley, Sr.,
Robert L. Pugsley, Jr.
- 10) Adrian & Jane VanDyke
- 11) Donald Cheek
- 12) Marvin Cheek

The foregoing objections were offered into the record to establish the general consensus of water users of Pondera Coulee that no unappropriated water exists therein. The objections were filed in 1976.

All of the Objector's Exhibits were received into the record without objection.

The Department offered the following exhibits into the record:

- 1) Dept. Exhibit 1 - a copy of a handwritten synopsis by Silvio Rodriguez of Senate Bill 444, which became the 1973 Water Use Act. The pertinent portion is Section 16 on Page 4. The summary was written in late 1973 or early 1974.
Dept. Exhibit 2 - a copy of a narrative summary of the Montana Water Use Act, written by Mr. Rodriguez for inclusion in a water rights survey book which was to have been published for Fergus County. The pertinent portion is ¶ 3, beginning at the bottom of page 2.

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Dept. Exhibit 3 - a copy of a test formulated by Mr. Rodriguez in late 1974, for use in training DNRC water rights personnel. The pertinent section is Question H. on page 4.

Dept. Exhibit 4 - a copy of a letter dated November 20, 1975 from Mr. Rodriguez to Mrs. Donald Luraski. The pertinent portion is the third paragraph.

Dept. Exhibit 5 - a copy of a "USGS" map showing, inter alia, Sections 22 and 23 and depicting the point of diversion and place of use proposed in the application at issue. Also an overlay prepared by Sam Rodriguez showing the legal descriptions of the areas in question.

Dept. Exhibit 6 - a copy of the objection filed by Morris O. Jr., & Elizabeth D. Mancoronal to Application No. 7164-s41P by Robert and Leona Elings. The relevant portion is the answer to part 3c, top of page 2.

Dept. Exhibit 7 - a document labeled figure 1, listing the place of use claimed by Mr. Mancoronal on Dept. Exhibit 6.

Dept. Exhibit 8 - Computer printouts, called "all purpose abstracts", showing all water rights information in the DNRC computer for the Pondera Coulee downstream from Applicant. Claimed uses for irrigation, stockwater, and domestic uses are compiled each according to use.

Dept. Exhibit 9 - A copy of a USGS computer printout depicting the records of Gauging Station No. 06101560 on Pondera Coulee at the mouth where it enters the Marias River.

Departmental Exhibits Numbers 1-4 are offered for the purpose of showing Mr. Rodriguez's correct understanding of the law requiring all appropriators, after 1973, to receive a permit from DNRC authorizing use of water prior to construction of diversion works and actual appropriation of water. Departmental Exhibits 5-7 are offered for the purpose of showing how a possible misunderstanding could have arisen in 1975 between Mr. Rodriguez and Mr. Mancoronal as to the places of use for which his 1893 decreed water right is appurtenant.

All of the Department's exhibits were received into the record without objection.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.
2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water source.
3. The Applicant's proposed use is irrigation: a beneficial use.

4. The Applicant's proposed diversion works are reasonable: the works consist of electric pumps and a wheel-line sprinkler.

5. The amount Applicant seeks to appropriate is a maximum but a reasonable one, being approximately 3.15 acre-feet per acre. (For example, the water courts are using 3.3 acre-feet per acre as a general guide for maximum beneficial use for spinkler irrigation systems in Climatic Area III, the area of the proposed beneficial water use.)

6. Since 1975 Mr. Mancoronal has been sprinkler irrigating, and appropriating the water for the use which he now seeks a permit.

7. The Applicant, apparently through a misunderstanding in 1975 with Mr. Rodriguez, believed he did not need to seek a permit before irrigating the 32 acres in question herein.

8. The Applicant was informed by unnamed Department personnel in the Havre Water Rights Bureau Office that he needed a permit to authorize his appropriation for use on the 32 acres in question. In 1981, Mr. Mancoronal was filing his Statement of Claim of Existing Water Right (SB76 Claim), a DNRC personnel assisting him therewith discovered that his 1893 and 1909 decreed and use right claims did not include, as appurtenant places of use, the 32 acres in issue herein. At this discovery, Mr. Mancoronal was informed of the need to file a permit application, which he did shortly thereafter.

9. Mr. Mancoronal, in 1976, filed an objection to a new beneficial water use permit application of Mr. & Mrs. Elings. On the objection he included among his places of use appurtenant to

his 1893 and 1909 rights, S $\frac{1}{2}$ NE $\frac{1}{4}$ Section 23, Township 28 North, Range 1 West, Pondera County the land for which he now seeks a permit..

10. On this objection, Mr. Mancoronal included the 32 acres in issue herein as appurtenant to his pre-1973 water rights. (Dept. Exhibit 6)

11. In 1981, in filing his SB76 claims, Mr. Mancoronal represented to DNRC personnel in the Havre Water Rights Bureau Office that this 32 acres was not, in fact, appurtenant to his 1893 and 1909 rights.

12. At the hearing, Mr. Mancoronal admitted that the 32 acres in issue were not originally, or at any time prior to 1973, appurtenant to his 1893 and 1909 water rights.

13. In 1975, Mr. Rodriguez was employed at the DNRC Helena office and was responsible for statewide processing of Applications for Change of Appropriation Water Right.

14. Mr. Rodriguez, in 1975, and now, has a correct understanding of the law regarding the requirement for all appropriators of water after July 1, 1973, to comply with the Water Use Act permit requirements.

15. The evidence is inconclusive whether in 1975 Mr. Rodriguez ever, in fact, represented to Mr. Mancoronal that he need not apply for a beneficial water use permit from the DNRC prior to commencing irrigation of the 32 acres at issue herein. Because the testimony is conflicting, no finding of fact as to whether such conversation ever took place as alleged by Mr. Mancoronal is possible on the record herein.

16. Assuming arguendo that such conversation did occur as alleged by Mr. Mancoronal, Mr. Rodriguez's statements would have been the product of his understanding, stemming from Mr. Mancoronal's representation, that the 32 acres now in issue were appurtenant to his 1893 and 1909 rights on Pondera Coulee.

17. Mr. & Mrs. Elings are owners of filed water rights for irrigation on Pondera Coulee, dating from December 10, 1900.

18. Mr. & Mrs. Elings's point of diversion from Pondera Coulee is approximately 10 river miles upstream from Mr. Mancoronal.

19. Mr. Mancoronal's water use under any permit which might be issued herein would be utilized in connection with his 1893 and 1909 rights. (Testimony of Mr. Mancoronal). Because the wheel-line he intends to use to irrigate his 32 acres also covers his 8 acres appurtenant to his prior rights, part of the 40 acre tract would be irrigated with the senior water right but the 32 acres would only be entitled to the priority date of the permit.

20. The Havre Water Rights Bureau Field Office has not received any complaints from water users in Pondera Coulee regarding Mr. Mancoronal's use on the 32 acres in question.

21. The lack of complaint (see ¶ 20 above) is as likely the result of a belief of water rights holders in that area that Mr. Mancoronal's use on the 32 acres was included as of right, in his 1893 and 1909 rights, as it is likely the result of an adequate water supply for the users of Pondera Coulee.

22. According to the information gleaned from the Department's computer records, the claimed water rights, filed on

SB76 claims, on Pondera Coulee, downstream from Mr. Mancoronal to the mouth of the Marias River are as follows: 326.25 cubic feet per second ("cfs") for irrigation; 33.5 cfs for stockwater; and 4.91 cfs for domestic uses. (Testimony of Bob Larson)

23. According to testimony of Bob Larson, based on the USGS gauging station records, in only 2 years out of 8 does the Pondera Coulee exceed in flow the amount of water claimed for appropriations thereupon.

24. The gauging station records, while the best evidence available as to the water availability in Pondera Coulee, are of little relevance to the matter herein because of the long distance between the Applicant's proposed point of diversion and place of use and the gauging station. (Testimony of Bob Larson.)

Wherefore, based upon the foregoing Findings of Fact, the Hearing Examiner hereby makes the following Proposed:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they have appeared or not. Title 85, Chapter 2, Part 3, MCA (1983).

2. MCA § 85-2-311(1) sets forth the exclusive criteria by which the present application for permit must be tested.

3. The Applicant must prove by substantial credible evidence that the statutory criteria are met.

4. 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.

5. Objector Clyde Schultz failed to appear at the hearing, and is in default pursuant to Administrative Rule of Montana § 1.3.214(1).

6. The Applicant's proposed use would be of material benefit to the Applicant, and the use is a beneficial one. Sayre v. Johnson, 33 Mont. 15, 88 P. 389 (1905).

7. The diversion of 292 gpm up to 120 acre-feet per year will not result in a waste of the water resource. See generally, Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

8. The Applicant's proposed means of diversion, construction and operation of its appropriation works are adequate for the intended purposes.

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

10. The Applicant failed to prove by substantial credible evidence that there is unappropriated waters in the source of supply: at times when the water can be put to the use proposed by the Applicant: in the amount the Applicant seeks to appropriate: and throughout the period during which the Applicant seeks to appropriate, the amount requested is available. MCA § 85-2-311(1)(a).

11. The Applicant failed to prove by substantial credible evidence that the prior appropriative rights of the objectors Mr. & Mrs. Elings will not be adversely affected by permit issuance. MCA 85-2-311(1)(b). The permit issuance would sanction the uses the applicant has been appropriating for since 1975, but would for all practical purposes result in an expansion of the Applicant's 1893 and 1909 rights. In Applicant's exercise of those historic rights in conjunction with any right permitted herein, downstream senior water right owners may require Mr. Elings to stop appropriating, or "call" Mr. Elings. Because the use under the permit would be exercised with the Applicant's historic rights, there is no practical means by which enforcement of the permit can reasonably be assured.

Wherefore, based on these Findings of Fact and Conclusions of Law, it is hereby recommended to the Department that the following Order issue:

PROPOSED ORDER

The Application Number 43117-s41P by Morris O. or Elizabeth D. Mancoronal be denied and dismissed in its entirety.

DONE this 18th day of April, 1984.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

This proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this proposal. Such exceptions must be filed (received) with the Hearing Examiner at 32 South Ewing, Helena, Montana 59620 within 20 days after service of this Proposal by first class mail, MCA § 2-4-623. No final decision shall be made until after the expiration of the period for filing exceptions, and the due consideration of those exceptions. All exceptions shall specifically set forth the precise portions of the proposed decision to which exception is taken, the reasons for the exception and authorities upon which the exception relies.

MEMORANDUM

On the record of this case, the Application herein must be denied. The Applicant failed to sustain his statutorily mandated burden of proof to show, by substantial credible evidence, that the water rights of a prior appropriator will not be adversely affected and that there are unappropriated waters in the source of supply; at times when the water can be put to the use proposed by the Applicant; in the amount the applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available. M.C.A. § 85-2-311 (1) (1983).

Adverse Affect to a Prior Appropriator

This is a classic situation wherein an upstream appropriator can be adversely affected by a new appropriation downstream. The Elings's rights are junior to those of the Applicant. Downstream from the Applicant, however, are rights which are senior to the Elings. See e.g., Dept. Exhibit 8, water right number 41P W181936-00, current owner, Oliver R. Offerdal. Mr. Offerdal's right to irrigation water, 224 acre-feet per year from June 1 to December 31 of each year, has a claimed priority date of June 6, 1980. See also, Mr. Offerdal's right with claimed priority date of June 29, 1898. These are senior to the Objector's most senior right of December 10, 1900.¹

The senior, Mr. Offerdal, has the right, therefore, to call any upstream junior, when the supply is insufficient to supply his rights, and when that call would result in water reaching his point of diversion. MCA § 85-2-401(1) (1983), Anaconda National Bank v. Johnson, et al., 75 Mont. 401, 244 P. 141, (1926).

Because of the usual lack of unappropriated water in Pondera Coulee throughout the irrigation season, should the permit be issued, Mr. Offerdal would more frequently need to "call the river" possibly forcing the Objector to shut-off his appropriation. Mr. Offerdal is downstream from the Objector as well as Applicant, and any new appropriation by the Applicant would necessarily

¹ See also, Dept. exhibit 8, water right number 41P W159368-00, priority date claimed, June 29, 1898, current owner, Virginia and Charles Bliss.

result in less water in the Coulee for downstream users. Mr. Offerdal, being senior to Mr. & Mrs. could call their right or call the Applicant's permit right, since both are junior to his rights. Mr. Elings's rights are greater in volume than the permit sought herein, so would be the logical right to call. The Objector, being upstream from the Applicant, would have no right to call the Applicant, forcing him to stop appropriating under his 1981 permit, however, because such a call would be futile, i.e.: would not result in any increased water flowing to Mr. and Mrs. Elings' point of diversion. The right to call a junior appropriator is limited to those times and situations where increased supply will result to the senior's headgate. Beaverhead Canal Co. v. Dillon Elec. Light and Power Co., 34 Mont. 135, 85 P. 880 (1906); Raymond v. Wimsette, 12 Mont. 551, 31 P. 537 (1892). See generally, Thrasher v. Mannix, 95 Mont. 273 (1933), (where a change in point of use could not be enjoined where such injunction would not result in greater flow of water to plaintiffs point of diversion.)

Such a result is clearly adverse affect to the Objectors and where foreseen, precludes the issuance of the permit.

The fact that the downstream seniors could choose to "call" either the Applicant or the Objector does not vitiate the injury. In light of the relatively long distances involved, (the Objector is 10 miles upstream from Applicant), the seniors downstream may, indeed, need to call both the Applicant and the Objector in order for enough water to reach their points of diversion for them to be

able to use it. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939). In any case, the Applicant's appropriation would greatly increase the risk of insufficient water reaching the point at which the Objectors' appropriate, and therefore would constitute adverse affect to the Objectors.

Another fatal obstacle to this permit's issuance is that, for all practical purposes, use under the permit would be merged with the Applicant's 1893 right, having the unavoidable result of merging the two, and thus advancing the 1981 permit right to the seniority of the 1893 right. At times of high flow, no one in the coulee could shutdown the Applicant's 1981 appropriation unless the full amount of the permit right, 120 acre-feet, had been used. The Applicant could thus rotate use of his two rights, using his 1981 right only at times of high flow, and saving his 1893 right for later in the irrigation season. The result of this use would be an expansion of the historical right.

Because the period of diversion would be substantially the same for his 1981 right, he could not be forced to use either right before the other. In other words, he would, if granted the permit, have the right to use it during the full period of appropriation, so long as seniors were then being satisfied Boyd v. Hoffine 44 Mont. 306, 120 Pac. 228 (1911). (There, the two rights were on different streams and it was held that the owner thereof couldn't be forced to use the one prior to the other. The same reasoning should apply where both rights are on the same source). At the time of year when water is scarce, he would then declare the water he is appropriating his 1893 right, and immunize

himself from all calls. Thus, because of the admitted scarcity of water in the Coulee, this diminished flow would result in adverse affect both to the Objectors and to the downstream users. Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921); Meine v. Ferris, 126 Mont. 210, 247 P.2d 195 (1952); State ex rel. Crowley, 108 Mont. 89, 88 P.2d 23 (1939), In the Matter of Application for Beneficial Water Use Permit No. 19084-s41I by The City of Helena.

Unappropriated Waters in the Source of Supply

At the hearing, the Applicant admitted that there are no unappropriated waters in the source of supply. (Testimony, Mr. Mancoronal). However, he alleged that, in fact, there existed water in the source of supply because the downstream users were not using their full entitlements. Two common situations could account for Applicant's contention that unappropriated water exists in the stream despite filed SB 76 rights indicating otherwise. One would be where the filed rights greatly exaggerate the amount of water actually applied to beneficial use. The second would be where the claimants of existing rights do not, in fact, regularly appropriate as indicated by their filed claims.

If the claims for existing rights evidenced wasteful uses, there might be some justification for the Hearing Examiner to look beyond the "SB76" claims in determining whether unappropriated waters exist. The Hearing Examiner reviewed the evidence of claims on Pondera Coulee submitted herein as Dept. Exhibit 8, and found that, by and large, no unusual or unjustifiable amounts were

claimed as beneficially used for the specific purposes listed therein. For example, an irrigation claim for 200 acre-feet per year to be used for irrigation purposes on 20 acres of land, planted in small grains, would raise a question as to the validity of the right in the amount claimed for the purpose listed. Beneficial use is the base, measure and limit of the right. Holstrom Land Co., Inc. v. Meagher County Newland Creek Water District, ___ Mont. ___, 36 St. Rep. 1403, 595 P.2d 360, Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Worden v. Alexander, 108 Mont. 208, 90 P.2d. 160 (1939). If the beneficial use for the water is to irrigate small grains on 20 acres, the amount of water which can beneficially be used for that purpose is the limit of the right therefore. Worden, supra. If the claims for existing water rights in Pondera Coulee were of such a type, there would be an argument for looking beyond the prima facie effect of those claims, not for the purpose of limiting those claims², but for the sole purpose of determining the existence of unappropriated waters. The claims as shown in Dept. Exhibit 8, however, were not so suspect, and therefore lend no support to the Applicant's theory that claimed use is greater than actual use.

As to whether or not the claimants of water rights in Pondera Coulee are actually exercising their claimed rights, the Hearing

² Determination of existing rights is exclusively within the province of the water courts. Title 85 Chapter 2 Part 2 MCA. There is simply no probative evidence in this record of the volume of typical flows in Pondera Coulee in the vicinity of the Applicant's proposed places of diversion and use, as well as in the vicinities of the nearest appropriators.

Examiner finds the resolution of the issue impossible on the record established herein. Further, such resolution, even if determined in favor of the Applicant, would not remove the impediment of adverse affect to Mr. & Mrs. Elings's rights. See

Proposed Conclusion of Law No. 11. Even if there are, in fact, unappropriated waters in the source of supply, the Objectors herein would still suffer adverse affect from the permit issuance, thus precluding same. MCA § 85-2-311(1)(b). This is because of the Objectors' greater risk of subjection to call, caused by the reduction in flow to those rights which are downstream from the Applicant and senior to the Objectors. See, discussion above.

APPLICANT'S PRIORITY DATE:

As to the Applicant's claim that he is entitled to a priority date of sometime in 1974 rather than a priority date of filing, as stated in the Findings of Fact above, the Hearing Examiner is not convinced of the Applicant's argument. Misunderstanding the law is not listed as an exception to the rule that priority of the right is the date of filing. M.C.A. § 85-2-401(2) (1983). Even assuming that the Hearing Examiner were so convinced, the matter need not be reached herein, as the permit must be denied for the reasons stated above, i.e.: the permit issuance would work adverse affect to the Objectors.

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 18, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Morris O. Mancoronal, Application No. 43117-s41P, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Morris O. Mancoronal, Jr., RR 1 Box 32, Conrad, MT 59425
2. Robert & Leona Elings, RT 1, Box 48, Conrad, MT 59425
3. Clyde Schultz, Rt 3, Box 456, Conrad, MT 59425
4. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
5. Robert Larson, Havre Field Office (inter-departmental mail)
6. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 18th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

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



CASE # 43117