

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. 53498-S41S BY RANDAL G.)
RIDGEWAY)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired, and submissions were timely submitted by Objectors Gerald Willis Clark and Joyce Clark, and J.C. Dye through their counsel William Berger; and by Sterling Sundheim of the Lewistown Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC").

After having given the matter full consideration, and being fully advised in the premises, the Department hereby, with the modifications specifically discussed below, accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of December 17, 1985 as its Final Order in the above-captioned matter and expressly incorporates the Proposal herein by reference.

Department Response to the Exceptions of Objectors Gerald Willis Clark and Joyce Clark and J.C. Dye:

Exception 1 - The Objectors excepted to Finding of Fact 30, and offered an alternative Finding. However, a review of the

CASE # 53498

record indicates that Finding of Fact No. 30, p. 12, in the Proposal is based upon substantial evidence. Therefore, Finding of Fact 30 is hereby deemed correct as originally stated in the Proposal.

Exception 2 - The word "call", used several times in Conclusion of Law No. 9, should be defined therein. Therefore, the second sentence of Conclusion of Law No. 9, at p. 16, is modified to read:

The possibility raised by Objector Clark, that the Applicant will not cooperate with a call (the word "call" as used herein means the giving of notice by a senior appropriator to a junior appropriator that the senior appropriator's water rights are not being fulfilled and that the junior appropriator must cease his use of water until the rights of the senior appropriator are completely fulfilled) by the Objector is not sufficient basis on which the Department can presume future bad faith on the part of the Applicant. See generally, McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972).

Exception 3 - The additional Finding of Fact suggested under this exception is irrelevant to a determination of whether Applicant has met his burden of proof; the suggested finding is hereby disregarded.

Department's Response to Comments of Sterling Sundheim:

Mr. Sundheim comments that the diversion period as applied for includes October 15 of each year but must exclude September 1 of each year, as September 1 is already included under Permit No. 7360-g41S, the extension of which this Permit represents. The Department agrees.

Therefore, Finding of Fact No. 5, last sentence thereof, at p. 6, is hereby modified to read:

Applicant seeks to appropriate 500 gpm up to 24.9 acre-feet per year, for use between September 1 and October 15, exclusive of September 1 and inclusive of October 15, of each year. This period of diversion may equivalently, but alternatively, be stated as follows: September 2 to October 15, inclusive, of each year.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law as modified and incorporated herein, the Department hereby makes the following:

ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 53498-s41S is hereby granted to Randal G. Ridgeway to appropriate 500 gpm up to 24.9 acre-feet per annum from Sage Creek for supplemental

sprinkler irrigation between September 2 and October 15, inclusive, of each year. The priority date for this appropriation shall be November 14, 1983 at 10:50 a.m.

The point of diversion for this appropriation is located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 15 North, Range 12 East, Judith Basin County, Montana. The means of diversion is a pump. The place of use is 11 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 13; 18 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13; and 141 acres in the SW $\frac{1}{4}$ of Section 13; for a total of 170 acres, all in Township 15 North, Range 12 East, Judith Basin County, Montana. The source of supply is Sage Creek.

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

A. The water rights governed by this Permit are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall in no event withdraw or cause to be withdrawn more water than the amount specified in the Permit. At all times when the water is not reasonably required for the specified purpose, the Permittee shall allow the waters to remain in the source of supply.

D. Permittee shall maintain a Parshall flume to be used as a water flow measuring device immediately below his point of diversion on Sage Creek. When Permittee is diverting water from Sage Creek he shall take readings at said Parshall flume, a minimum of once daily, of the flow of Sage Creek passing his point of diversion. Permittee shall not divert any water from Sage Creek if the flow thereof as measured at said Parshall flume is less than 300 gpm. Further, Permittee shall not divert any water from Sage Creek if such diversion would reduce the remaining flow as measured at said Parshall flume to less than 300 gpm. Permittee may, by operating the upstream artesian wells, supplement the supply of water to his point of diversion to allow for the minimum required flow past his point of diversion at times he is diverting water from Sage Creek.

E. The Permittee shall maintain accurate written records of the flow of Sage Creek during the period of diversion by recording the measurements made pursuant to paragraph "D" above, by recording the amount of water being diverted as measured by a water flow measurement device installed on the pump at the point of diversion, and further by noting whether or not he is

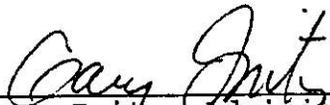
supplementing the flow of water to his point of diversion by use of the upstream artesian wells. The Permittee shall make the records available to the Department on request. Permittee shall submit copies of said records to the Department by November 30 each year.

F. The Permit is to be used in conjunction with Permit Nos. 53496-g41S and 53497-g41S for a combined appropriation not to exceed 36.8 acre-feet per annum.

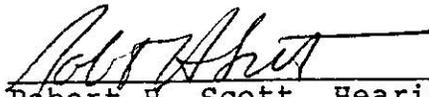
NOTICE

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

DONE this 3rd day of March, 1986.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6625

AFFIDAVIT OF SERVICE
MAILING

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 4th, 1986, she deposited in the United States mail, postage prepaid, a Final Order, an order by the Department on the Application by Randal G. Ridgeway, Application No. 53498-s41S, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Randal G. Ridgeway, Rt. 3, Stanford, MT 59479
2. Gerald Willis Clark & Joyce M. Clark, Rt. 3, Stanford, MT 59479
3. John R. Christensen, Attorney, P.O. Box 556, Stanford, MT 59479
4. William Berger, Attorney, P.O. Box 506, Lewistown, MT 59457
5. J.C. Dye, Rt. 3, Stanford, MT 59479
6. Sam Rodriguez, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
7. Gary Fritz, Administrator, Water Resources Division (hand deliver)
8. Robert Scott, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Kay Elser

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

On this 4th day of March, 1986, 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.

Udely Lohu
Notary Public for the State of Montana
Residing at Helena Montana
My Commission expires 3-1-88

CASE # 53498

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. 53498-s41S BY RANDAL G. RIDGEWAY)

* * * * *

Pursuant to Montana Water Use Act, Title 85, Chapter 2, MCA (1985), and the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA (1985), a hearing in the above-entitled matter was held on September 12, 1985, in Stanford, Montana.

Appearances

Applicant Randal G. Ridgeway appeared by and through his counsel, John R. Christensen.

Objectors Gerald Willis Clark and Joyce Clark (hereafter, "Objector Clark" or "Clarks") appeared by and through their counsel, William Berger.

Objector J.C. Dye appeared by and through his counsel, William Berger.

Lois Hajenga appeared as an untimely objector under Administrative Rules of Montana § 36.12.219, by and through William Berger.

Sam Rodriguez and Sterling Sundheim appeared as Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") staff expert witnesses.

Jeff Hajenga appeared as a witness for untimely Objector Lois Hajenga.

CASE # 53498

Exhibits

The Applicant offered the following Exhibits into the record:

Applicant's Exhibit No. 1 - A handwritten list of measurements taken during the summer of 1985 at the Parshall flume located below Applicant's pump site.

Applicant's Exhibit No. 2 - Photocopies (4 pages) of daily pump records for Applicant's diversion pump, May through August of 1985.

The Applicant's Exhibits were received into the record without objection.

Objector Clark offered the following Exhibits into the record:

Objector's Exhibit A - Photocopies (3) of calendars for May, June and July, 1985, kept by Clarks and containing notations of depth measurements of Sage Creek taken by Objector Clark at a culvert 15 feet above Clarks' point of diversion for yard irrigation and stock water.

Objector's Exhibit B - A photograph taken by Joyce Clark on July 26, 1985 purporting to show a culvert 15 feet above Objector Clark's point of diversion for yard irrigation and stock water.

Objector's Exhibit C - Photographs (5) taken July 26, 1985 by Joyce Clark, purporting to show Sage Creek near Clarks' point of diversion for yard irrigation or stock water.

Objector's Exhibit D - 1984 Calendar kept by Objector Clark containing notations of Sage Creek levels during the summer of 1984.

Objector's Exhibit E - Copies (5) of letters written by Objector Clark to the DNRC and 1 copy of a letter from DNRC to Clarks.

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

The Department offered the contents of the Department file which includes the Memorandum dated October 16, 1984, written by Sterling Sundheim re: Field Report on Application No. 53498-s41S by Randal G. Ridgeway, into the record.

The contents of the Department file including said Memorandum were admitted into the record without objection.

The Hearings Examiner took administrative notice of the Temporary Preliminary Decree for the Judith River Basin Drainage Area dated April 23, 1984, and signed by W.W. Lessley, Chief Water Judge.

STATEMENT OF THE CASE

On November 14, 1983, Randal G. Ridgeway filed Application for Beneficial Water Use Permit No. 53498-s41S with the Lewistown Water Rights Bureau Field Office, DNRC. By this Application, Mr. Ridgeway seeks to appropriate 500 gallons per minute (hereafter, "gpm") up to 24.9 acre-feet per annum for supplemental sprinkler irrigation between September 1 and October 15 of each year. The diversion point is to be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 15 North, Range 12 East, Judith Basin County, Montana; the places of use to be 11 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 13; 18 acres in

the S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13, and 141 acres in the SW $\frac{1}{4}$ of Section 13; all in Township 15 North, Range 12 East, Judith Basin County, Montana for a total of 170 acres. The water source for the Application is Sage Creek.

Applicant presently operates a sprinkler irrigation system on the above-described lands under provisional permits issued with periods of use from April 1 to September 1 with waters obtained from different sources, manifolded together and pumped into the system by a pump located at the system site.

The primary sources are 1) an artesian well near the center-point of the system and 2) Sage Creek from which Applicant pumps water. Applicant augments the flow of Sage Creek at times by channeling into it the flow from 3) an artesian well slightly upstream from the Sage Creek point of diversion and 4) an artesian well, located about one mile above the Sage Creek point of diversion, near Flat Creek (which joins Sage Creek about $\frac{1}{2}$ mile above the pump site).

Applicant presently possesses permits to divert ground water from September 1 to October 15 of each year, by means of the three above-described artesian wells for use on the land served by his sprinkler irrigation system. As the combined flow of these wells does not provide sufficient water to operate his sprinkler system, Applicant seeks to extend the time period of his appropriation from Sage Creek by this Application, that he may use Sage Creek together with the artesian well near the center of his irrigation system as primary sources of water

during this period. He would divert water from the two artesian wells upstream only to augment the supply of water in Sage Creek when the natural flow of the creek is low.

All Objectors allege that not enough unappropriated water exists in Sage Creek during the period of proposed use to supply the Applicant in the amount requested, regardless of augmentation by means of the upstream artesian wells, and that their respective prior appropriations would be adversely affected by Applicant's proposed use.

PROPOSED FINDINGS OF FACT

1. The Application in this matter was regularly filed with the DNRC on November 14, 1983 at 10:50 a.m.

2. The DNRC has jurisdiction over the parties and over the subject matter herein.

3. The pertinent portions of the Application were published in the Judith Basin Press, a newspaper of general circulation in the area of the source, once a week for two consecutive weeks on February 9 and 16, 1984.

4. The Applicant has a present bona fide intent to appropriate water for irrigation of alfalfa crops, between September 1 and October 15 of each year.

5. The source of supply for the Application is Sage Creek, a tributary of the Judith River. By means of a pump on Sage Creek, located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 15 North, Range 12 East, Judith Basin County, Montana, Applicant would pump water

for use on 11 acres in the $W\frac{1}{2}W\frac{1}{2}SE\frac{1}{4}$ of Section 13; 18 acres in the $S\frac{1}{2}S\frac{1}{2}NW\frac{1}{4}$ of Section 13; and 141 acres in the $SW\frac{1}{4}$ of Section 13, all in Township 15 North, Range 12 East, Judith Basin County, Montana, for a total of 170 acres.

This Application seeks to appropriate 500 gpm up to 24.9 acre-feet per year, for use between September 1 and October 15 of each year.

6. Applicant presently operates a sprinkler irrigation system, the same system designated as the method of use under this Application, during the period from April 1 to September 1 of each year, by diverting water from two primary sources and two secondary sources. The waters from these sources are manifolded together and forced through the system by a pump located near the system pivot point. (Testimony of Randal Ridgeway.)

7. The primary sources are: 1) an artesian well, located near the center point of the irrigation system, operated under Permit No. 2909-g41S, and hereafter referred to as "the primary artesian well"; and 2) Sage Creek from which water is diverted by pump under Permit No. 7360-s41S. When the flow of Sage Creek is low, Applicant supplements the supply of water at the pump site by channeling into the creek the flow from two secondary sources, to wit: 1) an artesian well, located a short distance upstream from the Sage Creek point of diversion, operated under Permit No. 2920-g41S, and hereafter referred to as the "P.O.D. artesian well"; and 2) an artesian well known as the "Miller well", which well is located near Flat Creek, a tributary of Sage Creek. The

Miller well is approximately one-mile upstream from the Sage Creek point of diversion, and is operated under Permit No. 14256-g41S in the name of Michael John Ridgeway. (Testimony of Randal Ridgeway, Department Records.)

8. Applicant has received additional permits which extend the period of use of the primary artesian well (by Permit No. 53496-g41S) and the period of use of the P.O.D. well (by Permit No. 53497-g41S) to include the period September 1 to October 15 of each year. The period of diversion authorized for the Miller well is March 1 to December 1 of each year. (Department records.)

9. The irrigation requirement for alfalfa crops in the period September 1 to October 15 of each year, utilizing an estimated 70% efficient sprinkler irrigation system in Applicant's Climatic Area, Irrigation Climatic Area III (S.C.S Irrigation Guide for Montana, 1974), is .216 acre-feet per acre. (S.C.S. Irrigation Guide for Montana, 1974 at p. 3-9.) Applicant's irrigation requirement for 170 acres between September 1 and October 15 is approximately 36.8 acre-feet per year. (See Department Records, Permit Nos. 53496-g41S, 53497-g41S.)

10. Applicant presently is authorized under Permit Nos. 53496-g41S and 53497-g41S to divert from the artesian wells a combined appropriation not to exceed 36.8 acre-feet per annum during the period from September 1 to October 15 of each year.

11. By this Application, Applicant seeks to extend the period of use for the primary source, Sage Creek, to include the period September 1 to October 15 of each year because the three sources already so extended cannot of themselves supply sufficient water flow to operate Applicant's irrigation system. (Testimony of Randal Ridgeway.)

12. Applicant's sprinkler system requires total manifold flows of between 650 gpm and 715 gpm to operate. The primary artesian well flows at approximately 250 gpm. In order to operate the irrigation system, Applicant requires a minimum 400 gpm from the Sage Creek pump. (Testimony of Randal Ridgeway.)

13. Applicant's Sage Creek pump presently produces a flow-rate of 400 gpm, which is less than the amount Applicant seeks by this Application to divert from Sage Creek. (Testimony of Randal Ridgeway.) Whether Applicant intends to increase his pumping capacity to 500 gpm cannot be determined from the record.

14. Water exists in Sage Creek, unaugmented by Applicant's secondary sources, for all parts of the year. Sage Creek is spring-fed and the natural flow is relatively constant throughout the year. However, the flow can be sporadically low due to upstream diversions. (Testimony of Randal Ridgeway, J.C. Dye.)

15. As a condition of Permit No. 7360-s41S, authorizing Applicant to divert from April 1 to September 1 of each year 500 gpm up to 270 acre-feet per year from Sage Creek, Applicant was to maintain during the periods of withdrawal, flow records for Sage Creek and records of the amount being diverted from Sage Creek. (Department Records.)

CASE # 53498

16. Applicant has operated the irrigation system each year since 1977 but has submitted flow records only for the year 1985. Although Applicant alleges he took measurements in 1977, no evidence of this was presented for the record by the Applicant. The records for 1985 presented by Applicant and admitted as Applicant's Exhibit 1 were compiled from measurements taken by Applicant at the Parshall flume, installed in June 1985, located below Applicant's Sage Creek point of diversion. (Testimony of Randal Ridgeway.)

17. During July of 1985, Applicant augmented the Sage Creek flow by use of the Miller and P.O.D. wells whenever he diverted water from Sage Creek because the flow of Sage Creek was abnormally low during that month. (Testimony of Randal Ridgeway.) The flow of Sage Creek prior to diversion, as augmented by the Miller and P.O.D. wells, varied between a high of 812 gpm on July 2, 1985 and a low of 475.7 gpm on July 28, 1985. (Applicant's Exhibit 1.)

18. Flow data available on Sage Creek for the months of September and October consists of the following: U.S.G.S. flow records for the years 1920, 1921 and 1922 taken at Sage Creek $\frac{1}{4}$ mile south of Windham, Montana. These flow records indicate that the flow of Sage Creek during those years in September and October varied from 673 gpm to 1,140 gpm. (Memorandum of Sterling Sundheim.) One reading taken by Applicant on September 9, 1985 indicated an unaugmented flow-rate of 780.9 gpm. (Applicant's Exhibit 1.) Objector Dye believes the average flow during the year is approximately 1,000 gpm. (Testimony of J.C. Dye.)

19. The Hearing Examiner, upon an independent review of the record, finds that the average flow of Sage Creek unaugmented by Applicant's wells in September and October of most years is between 800 and 1,000 gpm.

20. Applicant intends to use the flow of Sage Creek, unaugmented by the Miller Well and the P.O.D. well, when possible. He would use the wells to augment Sage Creek water only when the creek flow is low. (Testimony of Randal Ridgeway.)

21. Water from the Miller well is channeled into Sage Creek by means of a pipeline, running from the well, which discharges into Flat Creek, a tributary to Sage Creek. The distance from the point of discharge to the pump site is about one mile. (Testimony of Randal Ridgeway.)

22. The Miller well and the P.O.D. well have a combined flow-rate of 265 gpm. (Miller well, 240 gpm; P.O.D. well, 25 gpm.) (Testimony of Randal Ridgeway.) However, the portion of flow from the Miller well and the P.O.D. well ultimately reaching the Sage Creek pump site is unknown due to lack of data on seepage and evaporation. (Testimony of Sterling Sundheim.)

23. The amount of Sage Creek water, as compared with Miller and P.O.D. well water, actually being diverted by the Sage Creek pump (at times when the Miller and P.O.D. wells are being used to augment the water supply) is not known. On the face of the record, there is no practical means by which to make a determination of proportional flow.

CASE # 53498

24. Objector Clark has been decreed under the temporary preliminary decree for the Judith Basin Drainage Area, a water right of 341 gpm up to 64.8 acre-feet per year for irrigation of 20 acres. The period of irrigation use is May 1 to October 31 with a priority date of June 1, 1891. Additionally, 2 acres of lawn and garden are irrigated by Objector Clark. (Claimed by Objection to Temporary Preliminary Decree.) Objector Clark has been decreed under the temporary preliminary decree a stockwater right in Sage Creek of 30 gallons per day per animal unit. (Department Records.)

25. Between May and August of each year since the year Applicant began operating his sprinkler irrigation system, Sage Creek has run so low at Objector Clark's point of diversion that Clarks could not irrigate any of their claimed acreage. At times Sage Creek has run so low that Objector Clark could not obtain enough water for stock. Clarks recall Sage Creek running so low only once prior to the installation of Applicant's irrigation system; in 1959 when the U.S. installed missile silos upstream. (Testimony of Willis Clark & Joyce Clark.)

26. Clarks have attempted to call Applicant's use of Sage Creek at times of low flow, but the majority of such calls have been unsuccessful because of poor communication between the Clarks and the Department. (Testimony of Joyce Clark, Sam Rodriguez.) One call in 1977 was made directly to Applicant, but was unsuccessful due to flaring tempers.

27. The level of Sage Creek affects the level of Objector Clark's domestic water well, which is in close proximity to Sage Creek. If Sage Creek is low, the well is low. (Testimony of Willis Clark.) In past summers when Sage Creek was low, the well has been so low as to seriously impair Clark's domestic water use e.g. Clarks had to re-use bath water. (Testimony of Joyce Clark.)

28. During the summer of 1985, Objector Clark was not able to exercise domestic and stockwater rights at times approximately corresponding to flows through Applicant's Parshall flume measuring less than 300 gpm. (Applicant's Exhibit-1, Objector's Exhibit A, Testimony of Joyce Clark.)

29. Objector Dye, under the temporary preliminary decree above-named, was decreed a right of 2,805 gpm up to 480 acre-feet per year, for irrigation of 240 acres between May 1 and October 4 of each year. The priority date listed therefor is June 1, 1891. (Department Records.)

30. Objector Dye has historically utilized the above water right only in the months of May and June of each year for flood irrigation. Because of the means of diversion, Mr. Dye can only flood irrigate during periods of high water. Mr. Dye's irrigation water right is not presently affected by the Applicant's diversion. (Testimony of J.C. Dye.)

31. Objector Dye uses Sage Creek for stock water. He has never run short of water for stock. (Testimony of J.C. Dye.)

CASE # 53498

32. Applicant admits the existence of stockwater rights in all Objectors. Although he contests the existence of their irrigation rights, he has filed no objections to the Temporary Preliminary Decree for the Judith Basin Drainage Area.

(Testimony of Randal Ridgeway.)

33. In October of any given year, there are more cattle watering from Sage Creek than during the months of June, July and August. It cannot be determined from the record whether there are more cattle watering from Sage Creek in September of any given year than in the months of June, July and August.

34. Clarks run 95 head of cattle which water at Sage Creek in September and October. (Testimony of Willis Clark.)

35. Sage Creek has run dry at untimely-Objector Hajenga's property, 2½ miles downstream from Objector Dye's property, in 1984 and 1985. No shortage has been observed between 1977 and 1984. (Testimony of Jeff Hajenga.)

36. 1984 and 1985 were unusually dry years. (Testimony of Randal Ridgeway, Willis Clark, J.C. Dye, Jeff Hajenga.)

Based upon the foregoing Proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto. Title 85, Chapter 2, Part 3, MCA (1985).

CASE # 53498

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

3. MCA § 85-2-311 directs the Department to issue a permit if the Applicant proves by substantial credible evidence that the following criteria are met:

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

4. The proposed use, irrigation, is a beneficial use.

MCA § 85-2-102(2); Sayre v. Johnson, 33 Mont. 15, 81 p. 389 (1905).

CASE # 53498

5. The Applicant has a present bona fide intent to appropriate water. See generally, Bailey v. Tintinger, 45 Mont. 159, 22 p. 575 (1912).

6. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction and operation of the appropriation works are adequate.

7. There are no permits or water reservations apparent from the face of the record which the Application could conceivably affect.

8. There is substantial credible evidence on the record that there is unappropriated water in the amount Applicant seeks to appropriate in the source of supply, at times when the water can be put to the use proposed by the Applicant. Although Department records as to filed water rights on Sage Creek yield no conclusive evidence of water availability, a comparison of testimony presented regarding filed water use rights on Sage Creek in Applicant's immediate locale (Findings of Fact 24, 29) and when these rights are exercised (Finding of Fact 30) with flow data available on Sage Creek (Findings of Fact 18, 19), show that there is unappropriated water in Sage Creek during September and October of most years in the amount Applicant seeks to appropriate.

Although water measurement data on Sage Creek in conjunction with testimony on flow rates indicate that the full amount of the requested appropriation is not available during low flow periods (Finding of Fact 18, 25, 35), all that need be shown is that there is sufficient water in at least some years for the

CASE # 53498

Applicant's appropriation, and that the Applicant's appropriation is, in fact, administrable. In the Matter of the Beneficial Water Use Application No. 43117-s41P by Morris Mancoronal, Final Order, June 14, 1984.

Additionally, the Applicant can make beneficial use of lesser amounts of unappropriated water available, as Applicant is able to supplement the supply of water to his pump by augmenting the flow of Sage Creek with the flow from the Miller and P.O.D. wells. (Findings of Fact 7, 8.)

9. The water rights of prior appropriators will not be adversely affected by the granting of a Beneficial Water Use Permit if it is conditioned so as to protect those rights.

The possibility raised by Objector Clark, that the Applicant will not cooperate with a "call" by the the Objectors, is not a sufficient basis on which the Department can presume future bad faith on the part of the Applicant. See generally, McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972).

As senior appropriators, the Objectors are entitled to "call" a junior appropriator, whenever they lack sufficient water to fulfill their appropriation rights. Although evidence presented at the hearing indicates that past attempts to call Sage Creek by Objector Clark have been unsuccessful, this has been caused in the main by poor communication between Clarks, the Department and the Applicant, rather than by the bad faith of the Applicant. (Finding of Fact 26.)

CASE # 53498

However, as a matter relating to the practical administration of Sage Creek, the Hearing Examiner recognizes that there exists a threshold flow level in Sage Creek, as measured at Applicant's Parshall flume, of approximately 300 gpm, below which Clarks will receive insufficient water from Sage Creek to fulfill even their prior appropriations for stock water and well water for domestic uses. (Finding of Fact 28.) Above this threshold level, the shortages for these appropriations cease.

Although it is the law that "priority of appropriation does not include the right to prevent change by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level . . .", the statute qualifies this rule by continuing, ". . . if the prior appropriator can reasonably exercise his water right under the changed conditions."

§ 85-2-401 MCA (1985) (emphasis added). What is "reasonable" must be determined on a case-by-case basis.

The evidence shows that Objector Clark's supply of water for minimum daily domestic and stock needs, is dependent on the level of Sage Creek. Below a certain level corresponding to approximately 300 gpm as measured at Applicant's Parshall flume, Clarks' ability to supply these needs is severely curtailed.

(Finding of Fact 27, 28.) It is clearly unreasonable for the Clarks to have to call Sage Creek when they wish to take a bath, wash dishes, or water stock. Thus, under § 85-2-401 MCA (1985), senior appropriator, Objector Clark has a right to prevent an appropriation having such effect.

However, "the Department may issue a permit subject to terms, conditions, restrictions and limitations it considers necessary to satisfy the criteria listed in 85-2-311 . . ." § 85-2-312(1) MCA (1985). Montana Power Company v. Carey, 41 St. Rep._____, 685 P.2d 336 (1984). To satisfy the requirement of 85-2-311(b), that the water rights of prior appropriators not be adversely affected i.e. that Objector Clark may reasonably exercise his water right, imposition of conditions and restrictions, which ensure such a prior appropriator the reasonable exercise of his water rights, is necessary.

The practical administration of Sage Creek can be accomplished by imposition of a condition requiring a minimum flow by Applicant's point of diversion. Applicant's Parshall flume will serve as the necessary measuring device required for effective administration of the water rights on Sage Creek so that Objectors will not be adversely affected by this appropriation. Seniors will be able to reasonably exercise their water rights if Applicant is required to guarantee a flow of at least 300 gpm, as measured at said Parshall flume, going past his point of diversion. If he cannot, through some combination of diversion rate and/or augmentation of Sage Creek water, provide for a minimum flow-by of 300 gpm, he will be prohibited from diverting Sage Creek water.

Applicant will not be required to operate his artesian wells except as it may be necessary to provide the minimum flow-by at his point of diversion at times when he is diverting water from Sage Creek.

CASF # 53498

Applicant's permitted appropriation will of course be subject to the rights of any prior appropriator. He will not operate his diversion after receiving notice that a senior's right is not completely supplied. The minimum flow-by requirement is in no way to be interpreted as limiting the rights of a senior appropriator. Senior appropriators may call the Applicant at any time that their appropriations are not being covered.

10. Applicant's stated intent is to use up to 500 gpm of water from Sage Creek during the period September 1 to October 15 of each year. (Application, Department file.) However, the right of an appropriator is limited to the capacity of the appropriation facility, even though the appropriator might need more. Holmstrom Land Company v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Wheat v. Cameron, 64 Mont. 494, 210 p. 761 (1922).

Applicant's present facilities will provide a diversion rate of 400 gpm. (Finding of Fact 13.) The record will not allow a conclusion as to whether Applicant has altered his intent as stated in the Application to an intent to appropriate only 400 gpm.

As no evidence contradicting Applicant's intent to appropriate 500 gpm has been adduced, the Hearing Examiner must assume his intent remains as alleged in the Application.

However, it must be stated here that a Permit gives the Permittee only an inchoate right, a right which must be perfected according to the terms of the Permit. If upon verification the Permittee is found to have a capacity to divert only 400 gpm, he or his successor will receive a certificate for only this amount.

11. Beneficial use is the base, limit and measure of the appropriative right, Toohy v. Campbell, 29 Mont. 13, 60 p. 396 (1900); Featherman v. Hennessey, 43 Mont. 310, 15 p. 983 (1911). Therefore the right cannot be greater than the amount needed to serve the use. Worden v. Alexander, 108 Mont 208, 90 p. 20 160 (1939). The amount of water which can be beneficially used at the designated place of use between September 1 and October 15 is 36.8 acre-feet per year. (Finding of Fact 9.) Therefore the right issued hereunder shall be in conjunction with Permit Nos. 53496-g41S and 53497-g41S for a combined appropriation not to exceed 36.8 acre-feet per year providing always that no more than 24.9 acre-feet per year is withdrawn from the unaugmented flow of Sage Creek during the period of use herein authorized.

The Hearing Examiner notes that the September 1 to October 15 portion of Permit No. 14256-g41S, which Permit is issued to Michael Ridgeway but is appurtenant to the acreage herein, should be conjoined with Permit Nos. 53496-g41S, 53497-g41S and 53498-g41S, with the restriction that the maximum permissible volume of the combined appropriation may not exceed 36.8 acre-feet per year. However, the Hearing Examiner lacks jurisdiction to impose such a condition unless the matter is properly brought before him.

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

PROPOSED ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 53498-g41S is hereby granted to Randal G. Ridgeway to appropriate 500 gpm up to 24.9 acre-feet per annum from Sage Creek for supplemental sprinkler irrigation between September 1 and October 15 of each year. The priority date for this appropriation shall be November 14, 1983 at 10:50 a.m.

The point of diversion for this appropriation is located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 15 North, Range 12 East, Judith Basin County, Montana. The means of diversion is a pump. The place of use is 11 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 13; 18 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13; and 141 acres in the SW $\frac{1}{4}$ of Section 13; all in Township 15 North, Range 12 East, Judith Basin County, Montana for a total of 170 acres. The source of supply is Sage Creek.

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

A. The water rights governed by this Permit are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

CASE # 53498

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall in no event withdraw or cause to be withdrawn more water than the amount specified in the Permit. At all times when the water is not reasonably required for the specified purpose, the Permittee shall allow the waters to remain in the source of supply.

D. Permittee shall maintain a Parshall flume to be used as a water flow measuring device immediately below his point of diversion on Sage Creek. When Permittee is diverting water from Sage Creek he shall take readings at said Parshall flume, a minimum of once daily, of the flow of Sage Creek passing his point of diversion. Permittee shall not divert any water from Sage Creek if the flow thereof as measured at said Parshall flume is less than 300 gpm. Further, Permittee shall not divert any water from Sage Creek if such diversion would reduce the remaining flow as measured at said Parshall flume to less than 300 gpm. Permittee may, by operating the upstream artesian wells, supplement the supply of water to his point of diversion to allow for the minimum required flow past his point of diversion at times he is diverting water from Sage Creek.

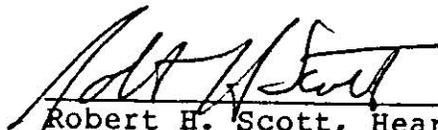
E. The Permittee shall maintain accurate written records of the flow of Sage Creek during the period of diversion by recording the measurements made pursuant to paragraph "D" above, by recording the amount of water being diverted as measured by a

CASE # 53498

water flow measurement device installed on the pump at the point of diversion, and further by noting whether or not he is supplementing the flow of water to his point of diversion by use of the upstream artesian wells. The Permittee shall make the records available to the Department on request. Permittee shall submit copies of said records to the Department by November 30 each year.

F. The Permit is to be used in conjunction with Permit Nos. 53496-g41S and 53497-g41S for a combined appropriation not to exceed 36.8 acre-feet per annum.

DONE this 17 day of December, 1985.



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th, Helena, MT 59620
(406) 444 - 6625

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 East 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.

CASE # 53478

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 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.

CASE # 53498

AFFIDAVIT OF SERVICE
MAILING
PROPOSAL FOR DECISION

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 December 18, 1985, she deposited in the United States mail, first class, postage prepaid, an order by the Department on the Application for Beneficial Water Use Permit by Randal Ridgeway, Application No. 53498-s41S, addressed to each of the following persons or agencies:

1. Randal G. Ridgeway, Rt. 3, Stanford, MT 59479
2. Gerald Willis & Joyce M. Clark, Rt. 3, Stanford, MT 59479
3. John R. Christensen, Attorney, P.O. Box 556, Stanford, MT 59479
4. William Berger, Attorney, P.O. Box 506, Lewistown, MT 59457
5. J.C. Dye, Rt 3, Stanford, MT 59479
6. Sam Rodriguez, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
7. Gary Fritz, Administrator, Water Resources Division (hand-deliver)
8. Bob Scott, Hearings Examiner, (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

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

On this 18th day of December, 1985, 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.

Jim P. Gilman
Notary Public for the State of Montana
Residing at HELENA Montana
My Commission expires 1-21-1987

CASE # 53498