

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION OF) FINAL ORDER
WATER RIGHT NO. W 138008 BY)
DELBERT KUNNEMAN)

* * * * *

An exception to the Proposal for Decision (hereafter "Proposal"), January 20, 1984, was filed by Objectors Manuel Castillo, Debra J. Castillo, Garry Cotant and Sharyl Cotant. The exception generally alleges that the Proposal erred in not considering adverse affect to the Objectors' property rights in evaluating the above-entitled application, and in failing to require the Applicant to protect the Objectors against flooding resulting from the changed use of his water right.

As to the first point, the Department of Natural Resources and Conservation (hereafter "Department" or "DNRC") hereby affirms its conclusion that a contested case hearing on a change/severance authorization pursuant to MCA § 85-2-402(6) is not the proper forum for complaints concerning property damage alleged to result from the improper exercise of the changed/severed water right. As stated in the Proposal, the current version of the applicable statute, MCA § 85-2-402(6) clarifys the prior law codified at MCA § 85-2-403(3) (1981). The current statute provides in pertinent parts, ..."The department shall approve the proposed change if it determines that the

proposed change will not adversely affect the water rights of other persons.... If the department determines that the proposed change might adversely affect the water rights of other persons, notice of the proposed change must be given in accordance with 85-2-307 hearings must be held in accordance with 85-2-309."

The Department's failure to consider the property damage to Objectors' land which allegedly will be caused by Applicant's exercise of the changed/severed water right, and to deny or to condition the authorization on the basis thereof, is not error. See, discussion pages 13-14, Proposal.

Several reported cases deal with damage claims resulting from flooding. Many involve flooding alleged to occur as a direct result of construction and/or operation of structures other than those appurtenant to an appropriative right. e.g., Heckaman v. Northern Pacific Ry. Co., 93 Mont. 363, 20 P.2d 258 (1933); Wibaux Realty Co. v. Northern Pac. Ry. Co. 101 Mont. 126, 54 P.2d 1175 (1936) (flooding resulting from construction of railroad embankment).

Flooding was sought to be enjoined, and damages therefrom obtained, in Butala v. Union Electric Co. et al., 70 Mont. 580, 226 P. 899 (1924). There, the flooding complained of resulted from the transport of water to the Beaverhead River, after it had been put to its appropriative use for power generation. No cause of action was found to exist in trespass, though a cause in negligence was alluded to exist.

In Fleming v. Lockwood, 36 Mont 384, 92 P. 962 (1907), the action sought damages and injunctive relief for flooding and

seepage from a ditch constructed and used by defendant. The court, again, simply held that the defendant was liable to the plaintiff for those injuries occasioned by defendant's negligence. No suggestion arises that the property right being exercised, an appropriative water right, was itself subject to diminution by reason of the allegations. Similarly, in Butler v. Paradise Valley Irrigation District, 117 Mont. 563, 160 P.2d 481 (1945), damages, not loss of the water right (which was appropriated by means of a canal), was in issue.

There are cases dealing with adverse affects other than diminution in quantity of water to a water right holder. In Missoula Public Service Co. v. Bitter Root Irrigation District, 80 Mont. 64, 257 P. 1038 (1927), the Irrigation District was enjoined from appropriating its irrigation water rights in a manner which polluted Missoula's public water supply. The case was decided on the basis of public nuisance law, however, and nowhere is there any intimation that the Irrigation District's appropriative rights were affected by the court action (other than that they could no longer be exercised in a manner constituting a public nuisance). In fact, the practice enjoined did not directly affect the manner by which the defendant exercised its appropriative rights.

The defendant owned and operated a canal to furnish irrigation and domestic water to the District. The canal crossed Skalkaho Creek, and was equipped so that the canal water could be turned into the Creek. The court prevented defendant from using Skalkaho Creek (source of Missoula's public water supply) as a

channel for waste water it temporarily could not use through its canal system because of breaks in the canal. "In case of a break in the canal below Skalkaho Creek it is the practice of the defendant to turn all of the water then flowing in the canal into Skalkaho Creek until the break is repaired...." The evidence sustains the finding that the water released into Skalkaho Creek by the defendant seriously deteriorates the water flowing into plaintiff's plant, amounts to a public nuisance and warrants the decree entered. Missoula Public Service., supra, at 66, 70.

Here, although a practice involving water usage was enjoined: a) the water rights of defendant were not affected, and b) the injury accrued to plaintiffs' prior water rights.

Hence, the applicant cannot lose his right to pursue, and, upon Departmental finding of no adverse affects to the water rights of others, to obtain, a change authorization, simply because of the possibility that the applicant will exercise the right in a manner giving rise to a cause of action on some theory unrelated to prior appropriation law, e.g.: nuisance, negligence, or trespass.

As to the second exception, by this authorization the Department in no way insulates the Applicant from any damage claims, or claims for injunctive relief, which the Objectors may bring in a court of competent jurisdiction. That is, any damage to Objectors' property resulting from Applicant's use of the Grannis Ditch may give rise to some cause of action in the Objectors. This need not, indeed cannot, be decided by the

Department herein. The authorization herein granted must, of course, by exercised in conformance with all other applicable statutory and common law requirements. The right to change the place of use for the water right in issue herein is acquired under all existing applicable laws, and those laws are a part of the right. see, Neel v. First Federal Savings of Great Falls, ___ Mont ___, 41 St. Rep. 18. Express conditioning of the authorization to this effect is redundant.

In summary, the applicant is required, independently of the change authorization, to avoid negligently exercising his changed water use to the injury of the Objectors herein. Failure of the Department to consider such possible property damage resulting from exercise of the changed water use, and its failure expressly to limit or condition the authorization on the basis thereof, is not error.

Wherefore, based upon the foregoing, including the record of proceedings, briefs and exceptions filed by the parties, and the Proposal for Decision of January 20, 1984, which is expressly incorporated herein by reference, the Department hereby makes the following:

ORDER

Subject to the terms, conditions and restrictions below, Application for Change of Appropriation Water Right No. W 138008 by Delbert Kunnemann is granted, to change the place of use of water, 240 inches of the Grannis' water right, priority date

June 1, 1880, from 123 acres in the E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 9 Township 1 South, Range 10 East (5 acres), E $\frac{1}{2}$ Section 9 Township 1 South, Range 10 East (92 acres), and W $\frac{1}{2}$ NE $\frac{1}{4}$ Section 16 Township 1 South Range 10 East (26 acres) all in Park County, Montana to 105 acres; 5 acres being in the E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 9 Township 1 South, Range 10 East; 74 acres being in the E $\frac{1}{2}$ Section 9 Township 1 South Range 10 East; and 26 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ Section 16 Township 1 South, Range 10 East, all in Park County, Montana, for flood irrigation between May 15 and October 15 of each year.

This authorization is subject to the following express terms, conditions, and restrictions:

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of these rights as provided by Montana law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages that may be so caused, even if such damage is the necessary and unavoidable consequence of the exercise of this permit.

C. This Authorization to Change is subject to any authority of court-appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled, including the waters granted in the Authorization to Change. The Appropriator

shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Authorization to Change.

D. The Appropriator shall install a suitable headgate or diversion structure at the point the water is diverted from the source of supply.

E. The Appropriator shall install an adequate flow measuring device, at a suitable place as near as practicable to the point where the water is diverted from the source of supply, in order to record the flow rate and volume of water diverted. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time and shall submit said records to the Department upon request.

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 13th day of April, 1984.

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

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

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AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Delbert B. Kunneman, Application No. W 138008, for a Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Mr. Ben Berg, Attorney, 211, N. Grand Avenue, P.O. Box 550, Bozeman, MT 59715
2. Ms. Bonnie Swandel, Attorney, 113 W. Callendar, P.O. Box 507, Livingston, MT 59047
3. Mr. Scott Compton, Bozeman Field Office (inter-department mail)
4. Ms. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

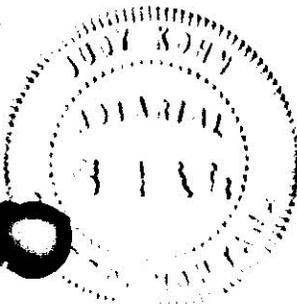
by Donna K. Elser

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

On this 24th 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 # 138008

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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 OF) PROPOSAL FOR DECISION
WATER RIGHT NO. W 138008)
BY DELBERT KUNNEMANN)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, after notice required by law, the above captioned matter came on for hearing in Bozeman, Montana, on September 29, 1983. The Applicant and the Objectors all appeared personally and, were there ably represented by counsel. The Applicant appeared by and through his counsel, Bonnie Swandal and Kathryn Orr, of Swandal, Douglass & Swandal. Objectors Manuel Castillo, Debra J. Castillo, Garry A. Cotant, and Sharyl Cotant appeared by and through their counsel, Ben Berg, of Berg, Coil, Stokes & Tollefson. Scott Compton, Area Office Supervisor of the Department of Natural Resources and Conservation (hereafter, "DNRC", or "Department") Bozeman Field Office, appeared as a Department Staff Expert.

Statement of the Case

The Applicant, pursuant to Montana Supreme Court directive, has applied to the Department for a change authorization authorizing him to change his place of use of his pre-1973 water right. The Objectors herein admit they have no water rights upon

which to object. Rather than alleging adverse affect to a water right, they allege adverse affect to their property rights. In sum, they allege that the proposed change will necessarily result in an increased volume of water in the Grannis ditch as it crosses their property, and that flooding will thereby adversely affect their property. Further, they allege that the Applicant can irrigate the lands he seeks to irrigate by means of another ditch, the McNiven ditch, and that Applicant need not make the change applied for herein.

A. Preliminary Matters

This matter has engendered significant litigation and has received unusually extensive judicial consideration, the last, and final, judicial determination having been the opinion issued by the Montana Supreme Court on March 3, 1982, (opinion on rehearing), in Manuel Castillo, Debra Castillo, Garry Cotant, Sharyl Cotant v Delbert B. Kunnemann, 39 St.Rep. 460, (1982). (hereafter, Kunnemann). It is this decision which provides the framework for the Hearing Examiner's Proposal for Decision (hereafter, "Proposal") herein.

I. Exhibits

The Applicant offered into evidence the following exhibits:

1. Applicant's Exhibit A - a copy of a completed Department form #606, Application for Change of Appropriation Water Right, showing Applicant as Delbert B. and Bernice M. Kunnemann, stamped received, Montana DNRC Bozeman Field Office, April 30, 1982;

2. Applicant's Exhibit B - a completed "SB76" claim form, or statement of claim for existing water rights, irrigation, for the Water Courts of the State of Montana, showing owner of water right as Delbert B. and Bernice M. Kunnemann,

3. Applicant's Exhibit C - two maps, consisting of aerial photographs, depicting past and present use of water by Applicants. The Grannis ditch was sketched in green by Mr. Kunnemann. The maps are copies of maps submitted with Applicant's application for change, and denominated therein as Exhibit "B", past use, Exhibit B, present use. Castillos' and Cotants' land is depicted in red.

During the hearing, the Objectors availed themselves of this exhibit graphically to depict; a) the McNiven ditch, drawn in blue, and b) point at which the Grannis ditch is alleged to be filled (written in ball point pen).

4. Applicant's Exhibit D - a copy of the opinion of the Montana Supreme Court in Castillo, et al., v. Kunnemann, No. 80-465, 39 St. Rep. 460, (March 3, 1982). (For the convenience of the parties, references to the language of this opinion will be based on the page numbers of this exhibit.)

5. Applicant's Exhibit E - a certified copy of a warranty deed, dated November 8, 1979, showing Jake and Myrle M. Franks, grantors, Garry A. and Sharyl Cotant, grantees.

6. Applicant's Exhibit F - a copy of a contract for deed, dated March 4, 1977, showing Jake and Myrle M. Franks sellers, and Manuel Castillo, Jr. and Deborah J. Castillo as purchasers.

7. Applicant's Exhibit G - a copy (black and white) of p.20, of Water Resources Survey, Part 2, published by the Montana State Engineer Office, December, 1951. The page is a map showing irrigated areas in colors designating sources of supply, Park County, Montana (colors appear as shading). All of Applicant's exhibits were received into evidence. The Applicant also moved for admission of the contents of the Department file on this application. The contents of the file were duly received into evidence.

The Objector offered into evidence the following exhibits:

1. Objector's Exhibit 1 - a certified copy of a page from the decree issued upon adjudication of water rights out of the Shields River, showing Thirza Grannis, Defendant, as owner of a water right of 240 inches, 6 cubic feet per second, with a priority date of June 1, 1880.

2. Objector's Exhibits 2-15 - photographs of:

2-3, 6 - Castillo property; 6/30/83; 8:15 a.m.

4, 5 - Cotant Property, 6/30/83, 8:15 a.m.

7-15 - Castillo property.

All of the Objector's exhibits were received into evidence at the hearing.

The Applicant and Objector each timely filed post-hearing briefs, the Applicant also filed a rebuttal brief. All briefs are received into the record, and have been well considered in reaching the proposal herein.

II. Evidentiary Rulings

Pursuant to MCA § 2-4-612(2) the Hearing Examiner hereby responds to the objections to evidentiary offers made by the parties at the hearing.

1. The Applicant and Objector each requested the Hearing Examiner to take judicial notice of the Supreme Court decision in Kunemann, supra. The Hearing Examiner stated that she would so notice the decision. This was error, and is hereby overruled.

Supreme Court opinions are not "judicially cognizable facts", nor are they, "generally recognized technical or scientific facts within the agency's specialized knowledge". MCA § 2-4-612(6) (1983) (emphasis added). The quoted statute defines those facts of which the Hearing Examiner may take notice, thereby establishing those facts as true without necessity of evidentiary presentation thereon. That such a Montana Supreme Court opinion was duly issued, and is reported as cited may be a fact, however, the relevancy and import of such a fact depends upon the interpretation of that opinion and its bearing on the case at hand. The decision itself is not evidence, it is rather the law upon which the Hearing Examiner relies, or by which she is bound. Hence, while the Hearing Examiner is well aware of the decision, and is bound by the law enunciated therein, she does not take official notice of it, as one would take notice of, for example, what day of the week it is, or that water is composed of hydrogen and oxygen. Official notice is a rule

of evidence, and is inapplicable to the law bearing on the case. Hence, official notice, the administrative counterpart of judicial notice, is inapplicable to Kunnemann, supra.

2. Objectors objected to Applicant's evidence of historic use of Grannis water on lands other than those specified in the decree on the grounds that such evidence, "...amounted to a collateral attack upon the Shields River Decree and that a new or different water right cannot be initiated on a decreed stream by use alone, but only by a supplemental decree amending the prior adjudication" Objectors' brief, p.3. The objection is overruled. The proposition that new water rights cannot arise on an adjudicated stream absent a supplemental adjudication is inapplicable here. This factual situation is clearly governed by a separate and distinct rule of law, ie: that prior to 1973, the owner of a water right in Montana was free to change place of use, point of diversion, or method of use, so long as it did not work injury to other appropriators, and, further that the burden of proof to show adverse affect was on those objecting to the change. State ex rel Crowley v. Dist. Ct., 108 Mont. 89 , McIntosh v. Graveley, 159 Mont. 72 (1972), Lokowich v. City of Helena, 46 Mont. 575 (1913). Ergo, although decreed appurtenant to sections 9 and 17, the Grannis right was legally changed, and, as of 1973, was then appurtenant to the lands as shown by the evidence, including the SB76 claim, Section 16, and Section 9.

The cases cited in Objector's brief are not on point. The finality of a decreed water right is not being argued here. Nor are any of the findings of the decree being collaterally attacked. Certainly the Grannis water right was final at the time it was decreed - it was then a full, vested property right, one of whose attributes was that it could be changed so long as others failed to come forward and show that they were thereby adversely affected. The decreed right is not challenged, nor its nature attacked. Mr. Kunnemann merely exercised one of the rights which make up the bundle of rights called a vested water right, and changed the place of the right's use.

The vested Grannis water right, as are all water rights in Montana, is a usufructuary right of many attributes. The right is composed of a specified amount of water. It is limited by an uppermost flow, a specified method of use, place of use, and period of use. Except to the extent that a change in use may result in an enlargement of the historically consumed volume of water¹, prior to 1973 any of these characteristics of the right may have been changed by the owner, with the only limitation that if other water right

¹ The increased use resulting from a change should properly be the subject of a new appropriative proceeding. Since 1973, and since Kunnemann supra, all water right owners now must seek prior authorization from the Department for any changes in use. The issues previously determined by the District Court are now administratively determined by the Department. Kunnemann, Applicant's Exh.D, p.11.

owners show adverse affect, the change may have been disallowed, or modified by a District Court to prevent the injury.

The Objectors, in their post-hearing brief, erroneously characterize any Departmental recognition of the appurtenancy of Mr. Kunnemann's right to Sections 9, and 16 as "...attempting by its order to modify a court decree....", Objectors brief at p.6.

While this straw dog argument is compelling, its compulsive effect wanes when its falsity is exposed.² The Department is not modifying the decree, it merely is recognizing that the Applicant exercised his right to change his place of use subsequent to the Decree. The right as evidenced by the SB76 claim is used on Section 16, not Section 17, and the Department is bound to afford that claim prima facie evidentiary effect. The Objectors did not attempt to rebut the claim, and show that the water was not used as shown on the claim. Hence, it has been established that the Applicant's right is now, and has been since approximately 1927³, appurtenant to Section 16.

Therefore, the Department is not, and need not, approve a

² The compelling part is, of course, the warning that the Department would obviously be far outside of its jurisdiction if it were to modify a court decree. Were the Department, in fact, attempting to modify a court decree, we agree that such action would be improper.

³ Testimony of Applicant, and of Roy Edwards.

change in place of use from Section 17 to Section 16, because that change occurred long prior to the 1973 Water Use Act.

Furthermore, as more fully discussed elsewhere herein, the Supreme Court's findings in Kunnemann are binding upon this Hearing Examiner, and, therein the Court declared the Grannis right appurtenant to the lands owned now by Objectors Brennan v Jones, 101 Mont. 550, 563 (1936). It should be noted that the Court made those findings, at least as to Cotants' property, after reviewing evidence of historic use. The Objectors' objection to the evidence regarding historic use is affirmed as overruled.

3. Objectors "objected" to Applicant's counsel's question of whether Mr. Castillo had a right in or to use the Grannis ditch, then proceeded to argue the substance of the issue. Clearly, an objection was not made, but rather the Objectors instead actually disagreed with Applicant's opinion that the Objector, Mr. Castillo, owned no ditch rights.

An objection is based on some rule(s) of evidence, and is intended to delete the issue from consideration by the Hearing Examiner. By arguing the substance of the issue, Objectors' counsel clearly "entered the fray" over the issue, instead of intending the deletion of it from the hearing therefore, no ruling on the so-called objection is warranted.

As to the issue, I find its resolution unnecessary. The Supreme Court opinion expressly finds that neither

Objector received any ditch rights through conveyances from Mr. Franks. Whether they may have some rights relative to the ditch otherwise by operation of law, for example, is not before the Hearing Examiner.

III. Scope of Hearing

Lengthy argument at the hearing centered on the proper scope of the hearing and relevance of the Applicant's evidence showing past use verses relevance of the appurtenance as established in the decree, Objector's Exhibit 1. Objectors argued that no rights to irrigate Section 16 could have arisen because, inter alia, constitutional protection of prior rights somehow cemented the appurtenancy shown in the decree.

The Hearing Examiner rules against the Objector's argument. It is not true that the decreed appurtenancy could not lawfully be changed prior to 1973. Applicant's established by substantial credible evidence that the Grannis rights are appurtenant to, inter alia, lands in Section 16, by virtue of historic use having been shown there, going back at least to 1927*. The fact that the right was a decreed right, rather than a use right, does not affect the general

* Whether this Hearing Examiner need ever look at these facts is unclear, as the Supreme Court itself expressly found the rights in issue to be appurtenant to Castillos' and Cotants' land. Castillos' land is in Section 9, Cotants' land is in Section 16.

rule that, unless other water right owners show detriment as a result of the change, a water right owner may change place of use or diversion.

Decreed rights were in issue in McIntosh v. Graveley, 159 Mont. 72(1972). Therein, the Court noted:

Quigley (Quigley v. McIntosh 110 Mont 495) stands for the proposition that a water user who has been decreed the right to use a specific amount of water on given lands cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decree, (sic) to the injury of subsequent appropriators. However, this principle is not germane to the instant case, as no injury to subsequent appropriators in the drainage of origin is possible where permanent diversion of the waters into another watershed was decreed in the original appropriation, at 80, 81.

The Supreme Court in Kunneman did not specifically address the issue of the difference in the decree and historic use, as shown by the SB76 claim.

The decree was quoted, showing the appurtenancy to the S1/2 of Section 9 and Section 17, (see p. 7 Applicant's Exhibit D). Castillo property was described as being in the S1/2 of Section 9, to which the decree establishes as appurtenant to the Grannis' rights. Regarding appurtenancy to Cotants' property, the court noted that, "No decree was admitted which declared such rights appurtenant to the Cotant property." (p.7). The court then reviewed the evidence of; a) historic use there, b) aerial photos showing proximity of the two properties, and c) placement of Grannis' ditch, to

find that the Cotant property was irrigated along with the Castillo property, and that therefore, the right was appurtenant to both tracts. This Hearing Examiner is not prepared to contradict the findings of the Supreme Court, nor to hold that their methodology to determine appurtenancy is incorrect.

In a nutshell then, the Hearing Examiner is bound by the findings in Kunnemann that the Grannis rights in question were appurtenant to Castillos' & Cotants' lands, neither of which is in Section 17. Brennan v. Jones supra. In Kunneman, one finds, "it is clear that both by decree and beneficial use, the Grannis' water and ditch rights were appurtenant to Castillos' land." p.7. And, after reviewing the history of Kunnemann's use, the court said that, "We find the Grannis' rights to be appurtenant to both tracts." p.7.

Argument was also had on whether the property damage claims of persons, not owners of prior or junior water rights, are within the scope of adverse affect, and therefore properly before the Hearing Examiner as possible bases of a denial or conditioning the Applicant's severance authorization⁵. Because the Supreme Court has held that the applicable statutory provision, 85-2-403(3) did not change the law, but merely gave the Department the duty or power to review the same issues which previously would be before a

⁵ Applicant objected to the evidence of flooding as beyond the scope of the hearing or Departmental jurisdiction.

District Court (Applicant's Exhibit D, p.11), the prior law must be the basis for the answer. Upon reviewing prior law, the Hearing Examiner finds that injuries to the vested water rights of prior or subsequent appropriators are the only types of injuries which can be raised to defeat an appropriation change*. The Hearing Examiner has found no Montana cases holding otherwise.

In Miles v. Butte Electric and Power Company, 32 Mont. 56, (1904), the Court, addressing an attempted injunction against use of water held, "Until a claimant is himself in a position to use the water, the right to the water, or water right, does not exist in such sense that the mere diversion and use of the water by another, is a ground of action to uncover the water, or for damages for the diversion." at 69 (emphasis added).

The cases reviewed for discussion of adverse affect regarding changes, all involved affects on other appropriators, see e.g., State ex. rel Crowley v. District Court, 108 Mont. 89 (1939), Quigley v. McIntosh, 110 Mont. 495 (1940), Thompson v. Harvey, 164 Mont. 133 (1974), McIntosh v. Graveley, supra. Hence, the discussion of adverse affect with respect to preventing a new appropriation in Butte, supra, is the clearest discussion of the issue.

* The standard of review for a severance is the same as that for a change. The sole distinction between the two is that a severance is a change where the appurtenant land changes ownership. Severance and change are, therefore, used interchangeably throughout this Proposal.

Although flooding may be a judicially cognizable injury in a court of competent jurisdiction, this is not the proper action or forum within which to press such claims. Nor is the denial or modification of a severance authorization the proper remedy for such injury.

Past decisions of the Department, are consistent with this result. In the matter of the Application for Beneficial Water Use Permit No. 1-s41H, and Application for Change of Appropriation Water Right No. 98-c41H, Marvin M. and Helen Morgan, the Department conditioned the application to prevent the Applicant from interfering or adversely affecting other rights and interests in the ditch. This case is not on point, however, because there the objectors were water right owners with interests in the ditch. Here, the objectors have neither rights in the Grannis water, nor rights to use the Grannis ditch.

Based upon all of the proceedings and the record established herein; the Hearing Examiner makes the following:

Proposed Findings of Fact

1. On March 3, 1982, the Montana Supreme Court decided, on rehearing, Manuel Castillo, Jr., and Deborah J. Castillo and Garry A. Cotant, Sharyl Cotant v. Kunnemann, ___ Mont. ___. 39 St. Rep. 460(1982). Therein, the Court held inter alia; a)"....Kunnemann effectively reserved his Grannis water right and the related Grannis ditch right." (p. 9, Applicant's

Exhibit D), b) the water right remained appurtenant to land conveyed by Kunnemann to Franks, c) Kunnemann must apply to the Department of Natural Resources to sever from the land conveyed, the water right which Kunnemann owns. Applicant's Exhibit D, p.12.

2. On April 30, 1982, the Applicant filed an Application for Change of Appropriation Water Right No. W 138008. The application was filed pursuant to the Supreme Court directive, and sought authorization to change, or to sever, his use of water from the land to which it had become appurtenant, ie: land that now belongs to Castillos and Cotants, and use it on land consisting of 26 acres in Section 16 and already under his irrigation. He proposes to change use of water from Castillos and Cotants property, to his own lands lying in Section 16, Township 1 South, Range 10 East. Castillos land lies in the south half of Section 9, Cotants property lies in the NE $\frac{1}{4}$ of Section 16. On the application a notation was made to "see Bonnie Swandal's letter to Donald McIntyre, attorney, by letter of April 27, 1982, indicating that the intent of the application is to comply with the directive of the Supreme Court opinion. The application was signed by Delbert and Bernice Kunnemann.

Attached to the application was an "SB76" Statement of Claim for irrigation use indicating ownership of the Grannis right 240 inches decreed on June 1, 1880. The claim indicates use as described in the testimony, ie: on land owned by Kunnemann in Sections 9 and 16. The Hearing Examiner, pursuant to MCA §

2-4-612(6) (1983) takes official notice that the claim was duly filed with the Department on November 10, 1981. (indicated by Departmental records).

3. A brief description, and map, of the relative positions of the Grannis ditch, property owned by the Applicant, and property owned by each Objector is found in Kunnemann, at p. 25, and attached hereto for reference as exhibit "A".

4. The Notice of Application (hereafter "Notice") was published in the Livingston Enterprise, a newspaper of general circulation in the area of the source, on September 9, 16th, and 22nd, 1982. The Notice stated that objections to the application were to be received on or before October 27, 1982.

5. On October 27, 1982, the Department received an objection to the application from Manuel Castillo, Jr. and Deborah J. Castillo. No ownership of water rights is therein indicated. An attached Exhibit A, was incorporated as the statement of basis of objection, (item 3 on the Departmental objection form #611), the Exhibit "A" reads as follows:

1. The water right proposed to be transferred was never decreed to Section 16;
2. The water right is being diverted from irrigated to unirrigated lands;
3. Applicants do not have any ditch right to Section 16;
4. There is no past use of water on the acres of Section 16;
5. Transfer will adversely affect the ditch across Objectors' property;
6. Transfer would exceed ditch capacity causing flooding to Objectors' land;

2-4-612(6) (1983) takes official notice that the claim was duly filed with the Department on November 10, 1981. (indicated by Departmental records).

3. A brief description, and map, of the relative positions of the Grannis ditch, property owned by the Applicant, and property owned by each Objector is found in Kunemann, at p. 25, and attached hereto for reference as exhibit "A".

4. The Notice of Application (hereafter "Notice") was published in the Livingston Enterprise, a newspaper of general circulation in the area of the source, on September 9, 16th, and 22nd, 1982. The Notice stated that objections to the application were to be received on or before October 27, 1982.

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1. The water right proposed to be transferred was never decreed to Section 16;
2. The water right is being diverted from irrigated to unirrigated lands;
3. Applicants do not have any ditch right to Section 16;
4. There is no past use of water on the acres of Section 16;
5. Transfer will adversely affect the ditch across Objector's property;
6. Transfer would exceed ditch capacity causing flooding to Objectors' land;

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7. Transfer exceeds amount of water needed by Applicants. The objection was signed by the Castillos, and indicated it had been prepared by Berg, Coil, Stokes & Tollefsen.

6. On October 27, 1982, the Department received an objection to the Application from Garry A. and Sharyl Cotant. The objection was filled out in the same manner as was that of the Castillos, incorporating an identical Exhibit A as the basis for objection. The objection also had been prepared by Mr. Berg's law firm.

7. The Applicant proposes to sever, or change, his use of water from land to which the Supreme Court in Kunnemann expressly found it was appurtenant.

The Castillos' parcel is 20 acres, the Cotants own a 9.114 tract of land. The change then results in moving the water from these 29.114 acres, to 26 acres in Section 16, all of which are owned by Applicant. The total actual acres Applicant will irrigate will be 105 acres, as opposed to his past irrigation of 126 acres. The period of use will remain the same, May 15 to October 15.

8. Diversion will be by means of headgate. Use of water is for irrigation by means of flooding.

9. The Applicant's proposed use is a beneficial one.

10. The Applicant proposes to use a reasonable amount of water to effectuate his use.

11. The Applicant has a bona fide present intent to use the water as applied for.

12. There are no planned uses or developments for which a permit has been issued or water reservations which the proposed change/sever will affect.

13. The Department of Natural Resources and Conservation has jurisdiction over the parties and the subject matter of this hearing.

14. The proposed change will not adversely affect the water rights of other persons.

15. The Objectors alleged ownership of no water rights which might be adversely affected by the proposed change. Objectors affirmatively state that they own no water rights on the basis of which to object herein.

16. Objectors based their objections on the alleged damage to their land from seepage or flooding they allege to occur on their lands as a result of Applicant's use of the Grannis ditch.

Based upon the discussion of preliminary issues, and the foregoing findings of fact, the Hearing Examiner hereby makes the following:

Conclusions of Law

1. The Montana Department of Natural Resources and Conservation has jurisdiction over the parties and the subject matter herein, MCA § 85-2-402(6) (formerly 85-2-403(3)), Kunnemann, supra.

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

3. The Department is statutorily mandated to authorize the severance/change herein in issue if it determines that the water rights of others will not be adversely affected thereby. Without obtaining prior approval from the Department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, or make the appropriation right appurtenant to other lands. The Department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons, MCA § 85-2-403(3) (emphasis added).

4. The controlling statute in effect at the time Kunemann was decided was MCA § 85-2-403(3). This statutory provision was recodified and included as a subsection of the statute entitled, change in appropriation rights, MCA § 85-2-402, as subsection (6). This more accurately reflects that the nature of a severance proceeding, and that the statutory criteria for change authorizations is the same as those for a severance authorization. Further, the provision was slightly amended to clarify the law. The current version states in pertinent part that, "The Department shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons. This did not substantively change the law, but merely clarifies prior case law in point.

The prior version of the statute did not change the prior case law. "The law has not been changed. The Department has simply been given a review to determine the same issue that could previously have been determined only by a District Court."

Kunnemann, Applicants exh. D., p. 11. The prior case law establishes that only other water right users could object to another's change in use, and, further, that the valid objection must be based on injury to that water right. See discussion, supra. Injury to the water right could have been qualitative or quantitative, but, to prevent or limit another's proposed change in use, it must have been adverse affect preventing the reasonable use of the right. State ex. rel. Crowley, supra.

Hence, even before the clarifying amendment of 1983, the proper interpretation of § 85-2-403(3) MCA was that the adversely affected rights of Objectors must be water rights. It is a moot point, therefore, whether the applicable statute is MCA § 85-2-403(3) (as cited by the court in Kunnemann), or the presently effective version, MCA § 85-2-402(6).

5. The Objectors do not have a valid objection to the proposed change.

6. The proposed change will not adversely affect the water rights of other persons.

7. The Objectors admitted that they owned no water rights. The Objectors have failed therefore, to meet their burden of proof to prevent or limit Applicants' change. Thrasher v Mannix & Wilson, 95 Mont. 273, 26 P2d 370, Lokowich v City of Helena, 46

Mont. 575, 129 P1063; Hansen v Larsen, 44 Mont, 350, 120 P229, Thompson v Harvey, 164 Mont. 133, 519 P2d 963. Kunnemann, supra.

Wherefore, based on the foregoing evidentiary rulings, determination of scope of the hearing, proposed findings of fact, and the proposed conclusions of law, and all of the evidence in the record herein, the Hearing Examiner makes the following:

Proposed Order

Subject to the terms, conditions and restrictions below, Application for Change of Appropriation Water Right No. W 138008 by Delbert Kunnemann be granted, to change the place of use of water, 240 inches of the Grannis' water right, priority date June 1, 1880, from 123 acres in the E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 9 Township 1 South, Range 10 East (5 acres), E $\frac{1}{2}$ Section 9 Township 1 South, Range 10 East (92 acres), and W $\frac{1}{2}$ NE $\frac{1}{4}$ Section 16 Township 1 South Range 10 East (26 acres) all in Park County, Montana to 105 acres; 5 acres being in the E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 9 Township 1 South, Range 10 East; 74 acres being in the E $\frac{1}{2}$ Section 9 Township 1 South Range 10 East; and 26 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ Section 16 Township 1 South, Range 10 East, all in Park County, Montana, for flood irrigation between May 15 and October 15 of each year.

This authorization is subject to the following express terms, conditions, and restrictions:

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of these rights as provided by Montana law. Nothing herein shall be construed to

authorize diversions by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages that may be so caused, even if such damage is the necessary and unavoidable consequence of the exercise of this permit.

C. This Authorization to Change is subject to any authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled, including the waters granted in the Authorization to Change. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Authorization to Change.

D. The Appropriator shall install a suitable headgate or diversion structure at the point the water is diverted from the source of supply.

E. The Appropriator shall install an adequate flow measuring device, at a suitable place as near as practicable to the point where the water is diverted from the source of supply, in order to record the flow rate and volume of water diverted. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted including the period of time and shall submit said records to the Department upon request.

NOTICE

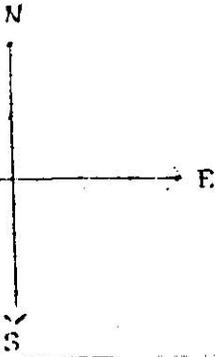
This proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this proposal.

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. All parties are urged carefully to review the terms of the proposed permit, especially checking the legal land descriptions, for correctness. 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 is relies.

DONE this 20 day of January, 1984.



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



Shields River

McNiven Ditch

Grannis Ditch

Kunnemann
Property

Kunnemann
Property

Water blocked

Franks
Subdivision

Castillo
Property

20 acres

Sec. 8

Sec. 9

Sec. 17

Sec. 16

Cotant
Property
9.114 acres

Kunnemann
Property

Case # 138008 Exhibit A

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 January 20, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Delbert B. Kunneman, Application No. W 138008, for a Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Mr. Ben Berg, Attorney, 211, N. Grand Avenue, P.O. Box 550, Bozeman, MT 59715
2. Ms. Bonnie Swandal, Attorney, 113 W. Callendar, P.O. Box 507, Livingston, MT 59047
3. Mr. Scott Compton, Bozeman Field Office (inter-department mail)
4. Ms. Sarah A. Bond, Hearing Examiner (hand deliver)

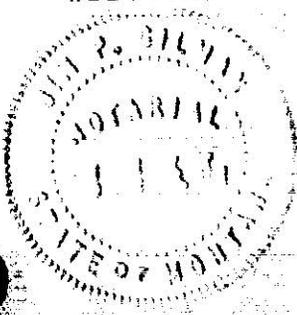
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 20th day of January, 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.



Frank Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1984

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