

EXHIBITS OFFERED/ADMITTED AT HEARING

Objector Mangen Ranch offered the following exhibits which were admitted at the hearing without objection:

Exhibit M-1 consists of an affidavit and resume of Paul Lemire, Tetra Tech, containing five pages.

Exhibit M-2 consists of a two page expert report entitled "Hydrology Review of Clarys Ranch Permits to Appropriate water on Alkali Creek" along with 11 pages of site maps and water right abstracts for both Clarys Ranch and Mangen Ranch.

Applicant Clarys Ranch offered the following exhibits which were admitted at the hearing without objection:

Exhibits C-1 thru 8 consists of 11 photographs of the vicinity of the Clarys ponds and the vicinity of Alkali Creek as it enters the Mangen Ranch.

PRELIMINARY MATTERS

The hearings for Provisional Permit Nos. 42J-30064354 and 42J-30065027 by Clarys Ranch were consolidated in the initial "Notice of Stock Water Permit Hearing and Appointment of Hearing Examiner" dated March 28, 2014. The Hearing Examiner notes that the two stock water facilities are in close proximity to one another, lie in the same small drainage area with the upper facility lying completely within the drainage area of the lower facility which ultimately discharges to the Mangen Ranch property. This matter is proceeding under the provisions of § 85-2-306(7), MCA, and this Hearing Examiner determines that the cases present substantially the same issues of fact or law, that a holding in one case would affect the rights of parties in another case, and that consolidation will not substantially prejudice any party. Consolidation of these two matters is proper and convenient. ARM 36.12.210.

ISSUE

The only issue in this matter is whether Clarys Ranch's two Provisional Stock Water Permits adversely affect the rights of other appropriators. Pursuant to § 85-2-306(6), MCA: A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

- (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

- (b) the appropriation is less than 30 acre-feet a year;
- (c) the appropriation is from a source other than a perennial flowing stream; and
- (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.

Additionally, § 85-2-306(7), MCA, provides:

(a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Subject to (7)(b) [not applicable in the instant case], upon receipt of a correct and complete application for a stock water provisional permit, the department shall *automatically* issue a provisional permit. *If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators. (emphasis provided).*

Mangen Ranch made a written request, dated March 3, 2014, requesting that the Department conduct a contested case hearing pursuant to § 85-2-306(7) so that Mangen Ranch may present evidence that it has been and will be adversely affected by the permits granted to Clarys Ranch at issue in this proceeding.

The statute does not provide how a hearing under § 85-2-306(7) is triggered, so the Department treated Mangen Ranch's request for a contested case hearing as an "objection" and followed the Department's procedures for contested cases found in ARM 36.12.201, *et. seq.*

BURDEN OF PROOF

Section 85-2-306(6) and (7), MCA, contains criteria for issuing a permit, methods of challenging an issued permit and the remedies that the Department is authorized to order upon a finding of adverse effect. Those criteria, methods and remedies are separate and distinct from the general criteria, methods of challenge and remedies found in § 85-2-302 and 311, MCA. In addition, § 85-2-311 places the burden of proof squarely on the applicant to fulfill the § 85-2-311 criteria. Section 85-2-302 specifically exempts Section 306 from its sphere. Under § 85-2-306(6) and (7), MCA, a permit is automatically issued if it meets the criteria. The Department may then revoke or modify the permit after a hearing. The Section does not

specifically designate which party bears the burden of proof at a hearing, but Section 306 does not directly require the applicant to affirmatively act beyond the filling of a permit application.

In *Gollaher v. Pribyl*, Montana Eighth Judicial District Court, Cascade County, Cause No. CDV-05-770, Order Re: Petition for Judicial Review, the Court found that § 85-2-306 is a stand-alone section and should not be analyzed in conjunction with Sections 302 and 311. Citing § 26-1-401 which states that “[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side” and § 26-1-402 which states [e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting” the Court affirmed the Departments decision that under § 85-2-306(6) and (7), the party asserting adverse effect bears the burden to proof to show adverse effect.

Having reviewed the Department’s files for Water Right Nos. 42J-30064354 and 42J-30065027, and the evidence submitted at hearing, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Clarys Ranch filed an Application for Provisional Permit for Completed Stockwater Pit or Reservoir on November 5, 2012. Designated as “Dam #2”, this application was for an impoundment located in the NWNWSW Sec. 29, T2S R51E, Powder River County, on Alkali Creek. The application was for 1.28 acre-feet (AF) and listed a completion date of September 25, 2012. (Application, File)
2. On December 12, 2012, the Billings Regional Office, DNRC, issued Permit to Appropriate Water No. 42J-30064354 to Clarys Ranch for “Dam #2” in the amount of 1.28 AF for stock use to be diverted by means of a dam for an on stream reservoir in the NWNWSW Sec. 29, T2S, R51E, Powder River County on Alkali Creek with a period of diversion of January 1 through December 31 with a priority date of November 5, 2012. This Permit was later reissued for corrections on February 14, 2014. (File)
3. Clarys Ranch filed an Application for Provisional Permit for Completed Stockwater Pit or Reservoir on December 13, 2012. Designated as “Dam #1”, this application was for an impoundment located in the SESESW Sec. 29, T2S R51E, Powder River County, on Alkali Creek. The application was for 1.6 acre-feet (AF) and listed a completion date of October 25, 2012. (Application, File)

4. On May 2, 2013, the Billings Regional Office, DNRC, issued Permit to Appropriate Water No. 42J-30065027 to Clarys Ranch for “Dam #1” in the amount of 1.6 AF for stock use to be diverted by means of a dam for an on stream reservoir in the SESESW Sec. 29, T2S, R51E, Powder River County on Alkali Creek with a period of diversion of January 1 through December 31 with a priority date of December 13, 2012. (File)
5. Verification reports conducted by the Department on February 19, 2014, show that the actual capacities of the impoundments is 0.68 AF for “Dam #1” and 2.29 AF for “Dam #2”. The total volume that can be stored in “Dam #1” and “Dam #2 combined is 2.97 AF. (Verification Abstracts, File(s))
6. Both “Dam #1” and “Dam #2” are earthen structures with constructed earthen spillways. Neither dam has outlet works that would allow the impoundment to be drained. (Hearing Examiner observation site visit, Exhibit M-2)
7. Mangen Ranch holds three water rights under the Powder River Final Decree, 42J-104 01, 42J-104 02, and 42J-104 03. 42J-104 01 is for irrigation by water spreading in the amount of 6.5 AF from Alkali Creek on 4.3 acres in the N2NENE Sec. 32, T2S, R51E Powder River County. The period of diversion is January 1 to December 31 with a priority date of October 1, 1912. 42J-104 02 is for irrigation by water spreading in the amount of 161.6 AF from Alkali Creek on 107.7 acres in the W2SW Sec. 28, NW Sec. 28, and SESE Sec. 29, T2S, R51E Powder River County. The period of diversion is January 1 to December 31 with a priority date of December 31, 1940. 42J-104 03 is for irrigation by water spreading in the amount of 131.6 AF from Alkali Creek on 87.7 acres in the SENW Sec. 28, S2NE Sec. 28, and SESE Sec. 29, T2S, R51E Powder River County. The period of diversion is January 1 to December 31 with a priority date of December 31, 1946. (Department File, Abstracts of Mangen Ranch Alkali Creek Water Rights)
8. The Mangen Ranch water spreading operation takes all available runoff from Alkali Creek on a year around basis and spreads it using a system of berms on their irrigated fields below the mouth of Alkali Creek above and along Mizpah Creek. (Exhibit M-2, Hearing Examiner observation site visit)
9. Water stored behind “Dam #1” and “Dam #2” would otherwise flow down Alkali Creek and at least some portion would reach the Mangen Ranch irrigated fields. The evidence shows in March 2014 the Clarys Ranch Ponds were impounding water and some water was still

reaching the Mangen fields. Mangen Ranch's water rights from Alkali Creek are year round water rights and in combination total 299.7 AF per year. But for "Dam #1" and "Dam #2, the water impounded therein would otherwise reach the Mangen Ranch. (Hearing Examiner observation site visit, Exhibits C-1, C-2)

10. The drainage area upstream of "Dam #1" (the lower dam) is approximately 292 acres and includes the drainage area of "Dam #2. It would take a *runoff* event of 0.12 inches to produce the approximate 2.97 AF needed to reach the storage capacity of the two impoundments. A *runoff* event is the amount of water produced from a *precipitation event* minus the water that infiltrates into the soil and assuming there is no evaporation or other losses. It is not known what magnitude of precipitation event would produce a 0.12 inch runoff event, but using the conservative estimate that 50% of the precipitation is realized as runoff (see FOF 12), it would take a precipitation event of 0.24 inches to produce the 0.12 inches of runoff needed to fill the ponds. The probability of a precipitation event of only 0.15 inches in this area is less than 20 percent. The probability of a 0.24 inch precipitation event is even less. (Testimony of Lemire, Exhibit M-2, FOF 12)

11. When infiltration and evaporation are taken into account, for most precipitation events, the impoundments will hold all precipitation runoff, and precipitation events will not provide sufficient water to exceed the combined impoundment capacity to allow water to reach the Mangen Ranch at times and in the amount that Mangen Ranch is entitled to. (Exhibit M-2, FOF 10)

12. Average annual precipitation in the vicinity of Alkali Creek is approximately 13.91 inches per year. Using an extremely conservative estimate that 50% of the precipitation is realized as runoff (the actual efficiency is probably far less), the drainage area above "Dam #1" would produce 169.25 AF of water (13.91 inches/12 inches per AF * 292 acres = 169.25), far less than the combined water rights to which Mangen Ranch is entitled. (Department knowledge, Hearing Examiner calculation)

13. Mangen Ranch's full water rights from Alkali Creek have been fulfilled only once or twice since the 1970's. (Testimony of John Mangen)

14. Clarys Ranch established through testimony that their dams hold back water from Alkali Creek that otherwise would flow downstream to the Mangen Ranch irrigated fields. (Hearing Audio Tk. #04)

CONCLUSIONS OF LAW

15. Pursuant to § 85-2-306 (7), MCA, the Department is required to automatically issue a provisional permit for stockwater pit upon receipt of a correct and complete application in compliance with §85-2-306(6), MCA. However, if the Department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators. Mont. Code Ann. § 85-2-306(7).

16. Mangen Ranch is the party asserting a claim for relief in this matter and, therefore, bears the initial burden of production and persuasion. Gollaher Ranch Co. v. Pribyl, CDV-05-770, Montana Eighth Judicial District Court, *Order RE: Petition for Judicial Review and Request for Receipt of Additional Evidence* Pgs. 6 - 10 (March 7, 2007); Montana Environmental Info. C'tr v. Montana Department of Environmental Quality, 2005 MT 96, 112 P.3d 964(In procedurally similar contested case proceeding conducted by DEQ, the Supreme Court concluded that the “party asserting a claim for relief bears the burden of producing evidence in support of that claim.”) Once Mangen presents sufficient evidence, Clarys Ranch bears the burden of proving that there is no adverse effect. In Matter Of Provisional Stockwater Permit Nos. 41QJ 30006070 and 41QJ 30006071 Issued To Pribyl, *Final Order*, at Pgs. 3-6 (June 8, 2005)

17. The Supreme Court has explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holder from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co. v. Carey, 211 Mont. 91, 685 P.2d 336 (1984). An adverse effect occurs where a junior water user’s use or proposed use interferes with a senior water user’s ability to reasonably exercise his water right. A junior use that reduces or limits a senior’s ability to the use of water to which he would otherwise be entitled and able to put to use constitutes adverse effect. Iron v Hyde, 110 Mont. 570, 105 P.2d 666, 673-674. A new appropriation on a source that would result in “constant call” by a senior constitutes adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler* (DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No.*

80175-s76H by Tintzmen (DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992) (applicant must show that at least in some year no legitimate call will be made); *In the Matter of Application for Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC 2006).

18. Mangen Ranch holds water rights which are senior in priority to the water rights held by Clarys Ranch at issue in this proceeding. (FOF 1 – 4, 7)

19. Storage of water which, at least in part, would otherwise reach the Mangen Ranch place of use represents a deprivation of water to which Mangen Ranch is legally entitled. Deprivation of water to which Mangen Ranch is legally entitled represents an encroachment by a junior water user and adversely affects Mangen Ranch's senior water rights. (FOF 6 – 12, COL 1)

20. The fact that only a maximum of 2.97 AF can be stored behind "Dam #1" and "Dam #2" (not including infiltration, seepage and evaporation) does not equate to no adverse effect. The Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. (FOF 6, 9, COL 16)

21. Pursuant to § 85-2-306(7), MCA, this Hearing Examiner could order Clarys Ranch to modify "Dam #1" and "Dam #2" by installing drainage devices to allow the impoundments to be completely drained at times that Mangen Ranch calls for water (§ 85-2-306(7)(a)). However, such a solution is impractical as Mangen Ranch's Water Right Nos. 42J-104 01, 42J-104 02 and 42J-104 03 have a period of diversion from January 1 to December 31 and Mangen Ranch could be forced to place constant calls for water from Clarys Ranch. Constant call is an adverse effect. (FOF 11, 12, COL 16, 18)

CONCLUSION/ORDER

For the foregoing reasons, this Hearing Examiner concludes that Clarys Ranch's Permits to Appropriate Water Nos. 42J-30064354 and 42J-30065027 adversely affect Mangen Ranch's Water Right Nos. 42J-104 01, 42J-104 02, and 42J-104 03, and are therefore **REVOKED**. Absent Permits to Appropriate Water Nos. 42J-30064354 and 42J-30065027 Clarys Ranch is not legally authorized to impound water behind "Dam #1" or "Dam #2" as described in this Order. Accordingly, within 90 days of this Order, Clarys Ranch must provide documentation,

either in the form of photographic evidence or by affidavit, that “Dam #1” and “Dam #2” are not impounding water. Said documentation should be sent to the DNRC, BILLINGS REGIONAL OFFICE, AIRPORT BUSINESS PARK, 1371 RIMTOP DR., BILLINGS, MT, 59105-1978.

It is so **ORDERED**.

NOTICE

This *Final Order* is the Department’s final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 29th day of August 2014.

/Original signed by David A Vogler/

David A. Vogler, Hearing Examiner
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 29th day of August 2014 by first class United States mail.

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