

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 23-0268

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MONTANA TROUT UNLIMITED, TROUT UNLIMITED, MONTANA  
ENVIRONMENTAL INFORMATION CENTER, EARTHWORKS, and  
AMERICAN RIVERS

Petitioners and Appellants,

v.

MONTANA DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION and TINTINA MONTANA, INC.,

Respondents and Appellees.

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On Appeal from the Montana Fourteenth Judicial District Court,  
Meagher County, Honorable Michael B. Hayworth Presiding  
Cause No. DV-2022-09

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**RESPONDENT/APPELLEE MONTANA DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION'S  
ANSWER BRIEF APPENDIX**

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## Appendix 1

### Final Order

*In the Matter of the Application for  
Beneficial Water Use Permit No. 24591-g41H  
by Kenyon-Noble Ready Mix Co.  
dated July 1, 1981*



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. 24591-g41H BY KENYON-NOBLE	)	
READY MIX CO.	)	

\* \* \* \* \*

There being no objections or exceptions to the Proposal for Decision entered in this matter on June 3, 1981, said proposal with the correction of certain clerical errors, is hereby made final and is expressly incorporated herein. In addition to those conditions and limitations contained therein, an additional subsection (5) is expressly adopted as part of this final order. Also made a part hereof is an additional "Reasons of Hearing Examiner" memorandum.

WHEREFORE, the following Final Order in this matter is hereby issued.

FINAL ORDER

1. Subject to the terms and restrictions listed below, an Interim Permit is hereby granted to the Applicant Kenyon-Noble Ready Mix Co. for 700 gallons per minute up to 237 acre-feet annually for gravel washing purposes from January 1 through December 31, inclusive, of each year. The point of diversion and place of use shall be located in the NE1/4 SW1/4 SW1/4 of Section 23, Township 1 South, Range 4 East, all in Gallatin County. The priority date for this interim permit shall be at 9:00 a.m., on April 7, 1981. As an incident to its diversions for gravel

washing purposes, applicant herein shall be accorded the right to collect the return waters therefrom in a settling pond of a three and one-half (3.5) acre-foot capacity, more or less, as part of its system for returning waters to the source of supply.

This interim permit is granted subject to the following restrictions, limitations, and conditions.

- (a) This permit is subject to all prior and existing rights in the source of supply.
- (b) Nothing herein shall be construed in any way to affect or reduce the permittee's liability for damages which may be caused by the exercise of this interim permit, nor does the Department in issuing this interim permit in any way acknowledge liability for any damages caused by the exercise of this permit.
- (c) The permittee shall in no event cause to be diverted from the source of supply pursuant to this interim permit more water than is reasonably required for gravel washing purposes. At all times when water is not reasonably required for the above-described purposes, permittee has no authority by virtue of this interim permit to alter or modify the direction or character of flow of the source of supply.
- (d) Permittee shall remit to the Department upon request the cost attendant to the filing of an application for beneficial water use permit or the cost attendant to the noticing of applicant's amended application, whichever is less.

- (e) The permittee shall not expand its gravel mining operations in a southerly direction. The present distance from the adjoining roadway of approximately 175 feet shall be the southern most limit.
- (f) The permittee shall diligently adhere to the terms and conditions of this order. Failure to adhere to the terms and conditions herein may result in the revocation of this interim permit.
- (g) The issuance of this interim permit in no way assures or entitles the applicant herein to any other permit, and approval of the application to be republished in this matter is subject to the procedures and criteria set out in the Montana Water Use Act. Nothing herein shall be construed as according the applicant any vested right to an appropriation.
- (h) The Department shall cause the application previously filed in this matter to be republished in accordance with the amendments noted herein. Said amendments shall expressly include a proposed time of use of January 1 through December 31, inclusive of each year. Said notice shall also disclose that applicant intends to return the waters not used for gravel washing to the groundwater resource through the use of a three and one-half (3.5) acre-foot capacity,

more or less, settling pond. The Department shall republish in accordance with this order without undue delay.

3. Those persons actually appearing and participating in the hearing in this matter, together with their successors in interest, are hereby bound and precluded from attacking or questioning any of the findings of fact or conclusions of law herein, together with the order based thereon, for the purposes of the permit process. Specifically those persons so bound are:

- (1) Don Barney
- (2) Richard and Ramona Brastrup
- (3) Robert and Lorraine Decker
- (4) Norman Dykstra
- (5) Gilbert and Carole Fandrich
- (6) George and Jean Francis
- (7) Michael and Hellevi Kerbs
- (8) Ivan Ludwig
- (9) Don Westra

4. The permittee shall cause and otherwise allow the return flow from the gravel-washing operation to recharge the groundwater source of supply.

5. Permittee shall cause to be filed with the Department on a form authorized by the Department an application for beneficial water use permit that describes Applicant's present intentions as reflected in this Order. Such application shall be filed within thirty days of this Order.

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.

DATED this 1 day of July, 1981.



Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59601  
(406) 449-2872

AFFIDAVIT OF SERVICE  
~~NOTARY PUBLIC EXAMINER~~

*Reason of Hearing Examiner and Final Order*

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

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on July 14, 1981, he deposited in the United States mail, "certified mail", an Order of Hearing Examiner by the Department on the application by Kenyon Noble Ready Mix, Application No. 24591-g41H for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Kenyon Noble Ready Mix Co., P. O. Box 1387 Bozeman, MT 59715
2. Donald Barney, Box 933, Belgrade, MT 59714
3. Carl F. and Lois E. Beckman, Box 44, Belgrade, MT 59714
4. Mrs. Peter Bos, Rt. 1, Box 60B, Manhattan, MT 59741
5. Richard A. and Ramona L. Brastrup, Rt. 2, Box 437, Belgrade, MT 59714
6. Orville Crask, Rt. 2, Box 429, Belgrade, MT 59714
7. Robert and Lorraine Decker, 2670 Thorpe Rc., Bozeman, MT 59715
8. Norman Dykstra, 340 Valley Center E., Bozeman, MT 59715
9. Gilbert & Carole Fandrich, Box 457A, Rt. 2, Jack Rabbit Ln., Bozeman
10. George E. and Jean C. Frances; Box 572, Belgrade, MT 59714
11. Paul G. & Sandra K. Gorsuch, Rt. 2, Box 430B, Belgrade, MT 59714
12. Wayne and Nancy Guy, Box 1082, Belgrade, MT 59714
13. Louise Kennedy, 2507 Jack Rabbit Lane, Bozeman, MT 59715
14. Michael & Hillevi Kerbs, Rt. 2, Box 438, Belgrade, MT 59714
15. Breta Kravik, Box 521, Havre, MT 59501
16. Ivan G. Ludwig, Box 987, 3051 Thorpe Rc., Belgrade, MT 59714
17. Michael E. Zimmerman, Mt. Pwr. Co., 40 E. Broadway, Butte, 59701
18. Michael R. Rassley, 57 Hulbert Rd. e., Bozeman, MT 59715
19. Don Westra, 754 Valley Center West, Bozeman, MT 59715
20. Scott Compton, Bozeman Water Rights Field Office (regular mail)
21. T. J. Reynolds, Helena Water Rights Field Office (hand deliver)
22. Matt Williams, Hearing Examiner, DNRC, Helena (hand deliver)
23. Bob Green, Finneau Subdivision, Belgrade, MT 59714
24. Kirwin & Barrett, 1609 W. Babcock, Bozeman, MT 59715

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STATE OF MONTANA                     )  
  ) ss. by *Beverly J. Jones*  
County of Lewis & Clark )

On this 14th day of July, 1981, before me, a Notary Public in and for said State, personally appeared Beverly Jones, known to me to be the Hearing Recorder, of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

*John P. Gibson*  
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	
NO. 24591-g41H BY KENYON-NOBLE	)	REASONS OF
READY MIX CO.	)	HEARINGS EXAMINER

\* \* \* \* \*

The Hearings Examiner hereby offers the following as additional reasons for the conclusion reached in the instant matter that dewatering schemes, or those dealings with water that are solely motivated by drainage concerns, are not appropriations and consequently not subject to Department jurisdiction insofar as the permitting process is concerned.

The foregoing discussion detailed in the body of the Proposal for Decision amply attests to the common law emphasis on an actual use for the water as a prerequisite for an appropriation. The only provision of the Montana Water Use Act that arguably alters such a construction is MCA 85-2-505 (1979):

"(1) No groundwater may be wasted. The department shall require all wells producing waters which contaminate other waters to be plugged or capped. It shall also require all flowing wells to be so capped or equipped with valves that the flow of water can be stopped when the water is not being put to beneficial use. Likewise, both flowing and nonflowing wells shall be so constructed and maintained as to prevent the waste, contamination, or pollution of groundwater through leaky casings, pipes, fittings, valves, or pumps either above or below the land surface, provided, however, in the following cases the withdrawal or use of groundwater shall not be construed as waste under this part:

. . . . .

(c) the disposal of groundwater without further

beneficial use that must be withdrawn for the sole purpose of improving or preserving the utility of land by draining the same or that must be removed from a mine to permit mining operations or to preserve the mine in good condition.

However, a sensitive analysis of this provision yields a conclusion that the legislature intended merely to salvage such drainage practices from the otherwise statutory proscription against waste. It does not transform such practices into beneficial uses so as to bootstrap them into the permitting process.

The above-cited provision was originally enacted as part of a comprehensive chapter detailing a regulatory scheme for controlling groundwater diversions. See RCM (1947) 89-2911 et. seq. Such diversions raise issues such as reasonable pumping lifts that surface water diversions do not entail and it is apparent from the structure of this chapter that the legislature recognized that such differences call for special regulatory responses.

This statutory scheme survived substantially intact as part of the Montana Water Use Act of 1973. See MCA 85-2-501 (1979), et. seq. However, this juxtaposition of these provisions with the statutory scheme detailing the permit process cannot be read as modifying the apparent legislative intent of providing additional regulatory control for situations in which groundwater is being mined. See generally, MCA 1-11-103(4). ("No implication or presumption of legislative construction is to be drawn from the classification or arrangement of the Montana Code Annotated.") Thus, the exclusion of the disposal of groundwater incidental to mining operations from the definition of "waste" merely bespeaks a legislative judgment that such practices should not inevitably



and necessarily be curtailed in order to protect water users diverting from some sort of critical groundwater area. Indeed, the mere fact that the legislature expressly excepted such activities indicates that they are not normally to be regarded as having any inherent protections by virtue of the law of water rights.

Nor does the presence of the verbiage "without further beneficial use" in the statutory language work a transformation of such practices into appropriations. Rather than referring to or modifying any disposals of groundwaters, that language merely serves to highlight a legislative intention that waters withdrawn and subsequently used for beneficial purposes should be treated as traditional appropriations in terms of ascertaining waste in light of the scope and character of the subsequent beneficial use. Subsequent uses of waters withdrawn are thus not inevitably protected against waste characterizations.

Moreover, the mere absence of waste does not inevitably indicate a beneficial use. Waters flowing over an individual's property may incidentally benefit that person by contributing to that property's value. In such a situation, it is also apparent that such waters cannot be said to suffer waste by any actions of such persons. It is nonetheless fundamental that such waters cannot be said to be beneficially used by those so situated. Riparian rights are no part of the law of this state, and the fundamental focus of the appropriative system is upon a bona fide use for the claimed resource. See generally, Meetler v. Ames Realty Co., 6 Mont. 152, 201 P.702 (1921). Thus, the exception

of drainage practices incident to mining operations from the statutory ban against waste does not by its terms transform such practices into appropriations governed by the permitting process.

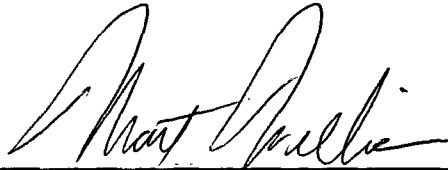
The permit system merely details a procedural mechanism whereby certain threshold determinations may be made for various appropriations. It is still incumbent upon water users to protect and defend their own property interests. See MCA 85-2-406 (1979). Thus, the mere fact that the legislature has not delegated authority to the Department to assess drainage practices does not work substantial prejudice to any potentially affected persons. Rather, it leaves them where they have historically and traditionally been.

## II

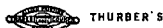
The body of the proposal for decision in this matter aptly describes the reasons for according the Applicant a priority date tracking with the date of the hearing in this matter. Although MCA 85-2-401 (1979) provides that priority of appropriation dates from the filing of an application, the Applicant's declarations on the public record in this matter sufficiently indicate an appropriative intent for the purposes of this section. However, this oral application is defective within the meaning of MCA 85-2-302 (1979). Applications for beneficial water use permits must be on forms provided by the Department. Prospective appropriators are entitled to rely on these filings as indicating potential conditions on the source of supply. Therefore, in order

to preserve its priority date, Applicant must refile with the Department within thirty (30) days of this order in accordance with MCA 85-2-302.

DATED this 1<sup>st</sup> day of July, 1981.

A handwritten signature in cursive script, appearing to read "Matt Williams", written over a horizontal line.

Matt Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation



STATE OF MONTANA  
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
**PERMIT TO APPROPRIATE WATER**

THIS IS TO CERTIFY, that a **Interim** Permit to appropriate water is hereby granted to **Kenyon-Noble Ready Mix Company** of **Bozeman**, State of **Montana**, pursuant to Application No. **24591-g41H**, with a priority date from **April 7, 1981 at 9:00 a.m.**, upon finding that the criteria of Section 89-885, R.C.M. 1947, have been met.

The source and point of diversion of this appropriation shall be **Groundwater by means of a pit at a point in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 23, Township 1 South, Range 4 East, M.P.M., Gallatin County, Montana.**

The water appropriated pursuant to this Permit shall be used for **gravel washing purposes.**

The diversion and distribution works for this appropriation shall be completed, and water shall be applied to beneficial use as specified above, on or before **N/A**, or within any authorized extension of time. The Notice of Completion of **Water Development**, Form No. **N/A**, shall be filed on or before **N/A**.

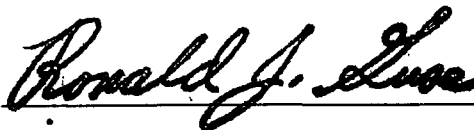
This Permit is SUBJECT TO ALL PRIOR WATER RIGHTS, and the following limitations, terms, conditions, and restrictions:

**Final Order, marked Exhibit "A", attached hereto and made a part hereof.**

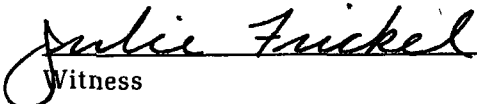
- 1.) This Interim Permit is issued on a temporary basis and shall expire upon issuance of a Provisional Permit.

NOTICE: Failure to comply with all terms and conditions herein may result in the loss of the right to appropriate water granted by this Permit.

Dated July, 14, 1981

  
\_\_\_\_\_  
WATER RESOURCES DIVISION

Administrative Officer

  
\_\_\_\_\_  
Witness

Recorded in State Record of Water Rights Permits, Volume

, Page

## Appendix 2

Opinion on Threshold Issue of Beneficial Use  
*In the Matter of the Applications for Beneficial  
Water Use Permits 41T-104524, 41T-104526,  
41T-104527 by CR Kendall Corporation*  
dated February 8, 1999

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

STATE NATURAL RESOURCES  
ENTRY NO. 9  
DATE 2-22-13  
BILL NO. SB 347

\* \* \* \* \*

IN THE MATTER OF THE	)	
APPLICATIONS FOR BENEFICIAL	)	OPINION ON
WATER USE PERMITS	)	THRESHOLD
41T-104524	)	ISSUE OF
41T-104526	)	BENEFICIAL
41T-104527	)	USE
BY CR KENDALL CORPORATION	)	

\* \* \* \* \*

The Parties to this administrative contested case are Applicant CR Kendall Corporation represented by attorney Holly Franz; Objector Van Haur's represented by attorney Roger Frickel; and Objector Shammels, Ruckmans, Harrels, and Simmons represented by attorney David Pengally. The Hearing Examiner is Vivian Lighthizer.

Applicant CR Kendall Corporation has applied to the Montana Department of Natural Resources and Conservation (DNRC) for the above numbered beneficial water use permits to operate a pump-back water treatment system at their mine. The pump-back system captures shallow groundwater that is contaminated from trickling down through the mine tailings. The contaminated water is pumped back into the mine's water containment system and is disposed of through evaporation

and irrigation. CR Kendall claims they operate the system to comply with Department of Environmental Quality (DEQ) water quality requirements. Downstream water users object that operating the pump-back system adversely affects their senior water rights by depleting the water source. The DNRC received and processed nine objections to the Applications thereby triggering this contested case process. Mont. Code Ann. § 85-2-309 (1997).

At the request of CR Kendall, the DNRC conducted a prehearing conference in Lewistown on September 28, 1998. CR Kendall also requested a DNRC determination as to whether diverting water through the pump-back system for treatment of contaminated water requires a beneficial water use permit.

At the prehearing conference, the Parties and DNRC staff, including the Water Resources Division Administrator, Jack Stults, discussed the beneficial use issue. The Hearing Examiner requested briefs, and the Parties agreed to submit briefs by October 8, 1998, and reply briefs by November 12, 1998. The Parties were to restrict their briefs to legal arguments and avoid conclusory statements on

issues of fact. Because of the statewide importance of this issue and because the issue concerns agency function, rather than disputed facts, the Water Resources Division Administrator, instead of the Hearing Examiner, considered and is rendering this opinion.

There was some complaint in the briefs about conclusory statements of fact in opposing briefs. This disagreement is at least partially due to the uncommon procedure in this case whereby the DNRC is determining an issue that may go to the merits of the Applications before holding the evidentiary hearing. The DNRC instructed the parties to avoid conclusory statements of issues of fact but a certain amount of assumption about the facts is necessary in order to frame the issues. Perhaps arriving at agreed to facts would have been a better way to proceed.

As the matter stands, however, the DNRC will state the factual assumptions it used in arriving at this decision. To the extent that these assumptions diverge from fact, this decision will not control and additional process may be necessary.

For this opinion, the DNRC is assuming that Applicant



operates the pump-back system for disposing of contaminated water. The DNRC is also assuming that the "water treatment" referred to in the Applications is disposal of the water so as not to contaminate other waters downstream of the mine. For now, the DNRC is assuming Applicant's irrigation is a by-product of water disposal rather than a required activity for vegetative reclamation.

This case is unusual. Applicant CR Kendall is arguing that the water they are applying to use is not beneficially used. If Applicant is correct, the DNRC must deny the Applications. The Objectors, on the other-hand, argue that Applicant's treatment or disposal of contaminated water requires a beneficial use permit. In effect, Objectors are conceding one of the essential elements, beneficial use, for issuance of the Permits to which they are objecting. The DNRC believes this reversal of roles by the Parties results because disposal of contaminated water is not a use of water in which a property interest is necessary to achieve a legal objective (hereinafter termed a non-use of water). Consequently, such a non-use of water is not entitled to water rights protection under the prior appropriation

doctrine embodied in the Montana Water Use Act of 1973 and does not fall within the jurisdiction of the DNRC permitting process.

The DNRC is the regulator of water rights, not the regulator of water disposal. The 1972 Montana Constitution recognized and confirmed existing rights for the use of water and directed the legislature to establish a statutory procedure for the administration, control, and regulation of water rights. 1972 Mont. Const., Art. IX, § 3. The Montana Water Use Act, codified at Title 85, Chapter 2, Mont. Code Ann., was the legislative response to the Constitution's directive. The Water Use Act designated the DNRC as the administrator of the Act. In carrying out its mandate to regulate water rights, the DNRC issues permits for the appropriation of water for beneficial uses according to the statutory procedure and criteria in the Act.

Prior to the Water Use Act, an appropriator in Montana could obtain a water right in a variety of ways but an essential element of a water right has always been application of the water to beneficial use. *See generally Shammel v. Vogl*, 144 Mont. 354, 396 P. 2d 103 (1964); *See*

also *Mettler v. Ames Realty Co.*, 61 Mont. 152 169, 201 P. 702, 707 (1981). With enactment of the Water Use Act in 1973, a beneficial water use permit became the means by which a new water user may obtain a property interest in water for beneficial use, i.e. a water right. Mont. Code Ann. § 85-2-315. A beneficial use permit gives the water user a priority date and legal standing to protect their water supply from depletion according to Montana's first in time, first in right priority system. Mont. Code Ann. § 85-2-401. A water right provides a water user with security that water will be available to supply a proposed water project's need.

Not all diversions of water involve a water use or require the security of a water right. For example, a farmer who has a swamp on his land may dig a ditch and drain the swamp water from his land to a natural stream. Although the farmer is diverting the water, the farmer does not need a water right because the farmer is not putting the water to a beneficial use or attempting to secure a property interest in the swamp water. See *West Side Ditch Co. v. Bennett et al.*, 106 Mont. 422, 78 P.2d 78 (1938). As another example,

a gravel mining company excavating its gravel pit cannot, and is not required to, obtain a water right to pump the water out of the pit solely for dewatering the pit area. Application No. 24591-G41H by Kenyon Noble Ready Mix Co. (1981) (DNRC Beneficial Use Permit Contested Case). As a final example, the Department of Transportation may physically move the bed and banks of a stream for the construction of a highway. Again, although water is being diverted from its course, the DNRC's jurisdiction is not invoked because the Department of Transportation is neither putting the water to beneficial use nor attempting to secure a property interest in the water. See *State Department of Highways v. Feenan*, 231 Mont. 255, 752 P.2d 182 (1988).

Here Applicant does not need security against upstream water users depleting the water source. In fact, a depleted water source would mean less water to dispose and therefore less cost for the Applicant. Moreover, the recent priority date for these Applications would not protect Applicant in a water rights dispute with the downstream Objectors because the Objectors' priority dates are earlier. Applicants simply have no use for the water nor need for a water right.



Objectors point out that Mont. Code Ann. § 85-2-302 requires that a person may not appropriate water except by applying for and receiving a permit from the DNRC. Under Mont. Code Ann. § 85-2-102(1) "appropriate" means to divert, impound or withdraw a quantity of water. Objectors argue that since Applicant is diverting water a permit must be obtained. This interpretation ignores the history of water rights law in Montana and the theme and thrust of the Water Use Act, i.e., water rights protect water use. Diversions for non-use are not, and never have, qualified for water rights under Montana law.

The Water Use Act concerns water rights and obtaining water rights protection in Montana has always required and always been limited by beneficial use. *See generally Matter of Dearborn Drainage Area*, 234 Mont. 331, 766 P.2d 228 (1988) and *McDonald v. State*, 220 Mont. 519, 722 P.2d 598 (1986). The Act states, "A person may only appropriate water for a beneficial use." Mont. Code Ann. § 85-2-101(1). The DNRC "may cease action upon an application and return it to the applicant when it finds ... that the application does not show a bona fide attempt to appropriate water for a

beneficial use." Mont. Code Ann. § 85-2-310(3). The DNRC in no case may "issue a permit for more water than ... can be beneficially use ...." Mont. Code Ann. § 85-2-312(1). The Water Use Act has not changed the time-tested marriage of water rights to water use.

It is true that the Applications list mining and irrigation as their uses and that mining and irrigation are among the types of uses listed as beneficial in Mont. Code Ann. § 85-2-102(2)(a). The essential issue here, however, is not whether Applicant's diversion is beneficial or related to mining. Obviously, the pump-back system is related to mining activities and must benefit Applicant in some way. Otherwise, Applicant would not operate the system. The issue rather is whether Applicant's diversion is a use of water in the first place. Disposal of water would not seem to be a use of water.

The DNRC has formally considered the issue of whether water disposal is water use. *See In the Matter of the Petition for Declaratory Judgement the City of Deer Lodge. No. 97514-76G.* The City of Deer Lodge petitioned the agency for a declaration as to whether a beneficial use permit or

change of use authorization was needed before implementing a plan to apply sewage effluent to land. The plan was a means to avoid the water quality problems associated with discharging the effluent into the Clark Fork River. The effluent was to be applied to land outside of the municipality and some type of crop was likely to be grown. The intent of the plan, however, was to get rid of the sewage water without discharging it into the river. This agency held, "Since the City of Deer Lodge plans to land apply its sewage effluent as part of its treatment of municipal water, and does not intend to irrigate with it, the DNRC does not consider it a new beneficial use in a new place of use for which a change authorization is required." *See Deer Lodge at page 11.* Trimmed to its essence the *Deer Lodge* holding is simply that water disposal is not water usage.

Therefore, based on its assumptions and what has been stated above, the DNRC finds and concludes that operation of the Applicant's water pump-back system does not require a beneficial use permit. The DNRC is without jurisdiction to issue or require the Applicant to obtain, a beneficial water

use permit for their non-use of water. The DNRC therefore intends to cease action on these Applications under Mont. Code Ann. 85-2-310(3) because the Applications do not show a bona fide intent to appropriate water for a beneficial use. Applicants may amend the applications if they desire a water right for their irrigation or other remedial activities that require water.

Objector Shammels have requested as an alternative to a determination that Applicant's diversions require a permit that the DNRC determine that the diversions are waste and enjoin the Applicant from further diversions. Although Applicant's non-use does not require a beneficial use permit, their diversions may be adversely affecting Objectors' water rights and DNRC has an obligation to consider the problem. However, whether Applicant's non-use is "waste" is a question that is not properly considered as part of the permit application process, and the DNRC is not inclined to consider these diversions waste merely because the diversions do not involve a use of water. Moreover, the DNRC does not have the authority to enjoin the diversions. The DNRC, like the Objectors, may go to court in an effort



to obtain an injunction. Mont. Code Ann. 85-2-114.

Objectors would be in a much better position than Department to establish the irreparable damages element required by the courts for an injunction. See Mont. Code Ann. §27-19-201.

Dated this 3<sup>rd</sup> day of February, 1999.



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#### CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Opinion on Threshold Issue of Beneficial Use was served on all parties listed below on this 8<sup>th</sup> day of February, 1999.

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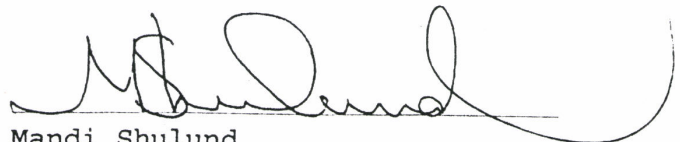
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