

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

\* \* \* \* \*

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 Hairs 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.

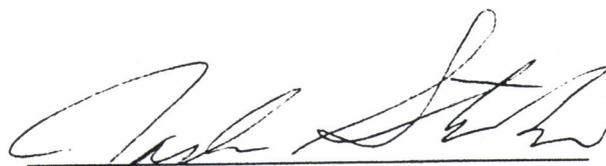
Therefore, based on its assumptions and what has been stated above, the DNRC finds and concludes that operation of the Applicant's water pump-back system does not require a beneficial use permit. The DNRC is without jurisdiction to issue or require the Applicant to obtain, a beneficial water

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.



Jack Stults, Administrator  
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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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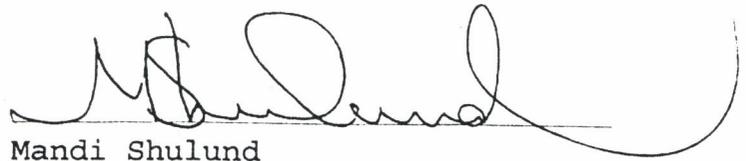
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