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

* * * * *

IN THE MATTER OF BENEFICIAL WATER)
USE PERMIT NO. 783-g41G ISSUED TO) ORDER
KENNETH D. AND RON SEARS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on November 5, 1987 in Whitehall, Montana.

Permittees William and Bernadette Connor appeared at the hearing in person, and by and through counsel Perry Moore.

Lyle Ward, Soil Conservation Service technician, appeared at the hearing as a witness for the Permittees.

Senator Sam Hoffman, rancher, appeared at the hearing as a witness for the Permittees.

The Department of Natural Resources and Conservation (hereafter, the "Department") was represented at the hearing by Department legal counsel James Madden.

James Beck, agricultural specialist with the Helena Water Rights Bureau Field Office, appeared as the Department staff witness.

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EXHIBITS

Counsel for the Permittees stipulated that the Department file, which had been reviewed by counsel for the Permittees, be accepted into the record in its entirety. No objection was made to any part of the file. Therefore, the motion was granted, and the file in this matter is included in the record in its entirety.

The Department offered one exhibit for inclusion in the record in this matter:

Department Exhibit 1 consists of a graph showing the pump system curve for the Permittees' sprinkler system at three different pump sizes, and a second page chart showing system discharge, sprinkler pressure, system friction losses, and total system head.

Department Exhibit 1 was accepted for the record without objection.

The Permittees offered two exhibits for inclusion in the record in this matter:

Permittees' Exhibit 1 consists of a photocopy of a Department computer printout, listing water right data for water right number "41G P000783-0", and showing Bernadette K. and William S. Connor as the current owners of the permit water right originally granted to Kenneth D. and Ron Sears.

Permittees' Exhibit 2 consists of a calculation of flow requirements for the Permittees' sprinkler irrigation system, made by Soil Conservation Service technician Lyle Ward. (The November 4, 1987 date specified in the first sentence of the document was verbally corrected to November 2, 1987 at the hearing by Lyle Ward.)

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Permittees' Exhibits 1 and 2 were accepted for the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA §85-2-314 states:

Revocation or modification of permits. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

2. On August 8, 1974, Provisional Permit to Appropriate Water No. 783-g41G was granted to Kenneth D. and Ron Sears, with a priority date of October 23, 1973. The Permit granted the Permittees the right to divert 580 gallons per minute ("gpm") up to 252 acre-feet of water per year for irrigation of 63 acres of land located in the NE¼ of Section 2, Township 1 North, Range 4 West, Jefferson County, Montana. The water to be appropriated is specified as groundwater, to be diverted by means of a groundwater pit. The specified period of use is April 15 to October 15, inclusive, of each year.

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Under the terms of Permit No. 783-g41G, the Permittees were required to have completed the permitted diversion and distribution works, and applied water to beneficial use as specified in the Permit, on or before November 1, 1974 or within any authorized extension of time. The Permittees further were required to file the Notice of Completion of Water Development for their project on or before January 1, 1975.

3. The Department received a Notice of Completion, signed by Kenneth Sears on July 5, 1975 and by Ron Sears on July 12, 1975, attesting that the diversion and distribution works were completed and water had been put to beneficial use on or before November 1, 1974. No Request for Extension of Time was filed or granted in this matter. (Department file.)

4. A site visit was made to the Sears project on April 1, 1976, and a memorandum made to the file on April 6, 1976, by Ken Clark of the Helena Water Rights Bureau Field Office. The memorandum states, in its entirety:

On Thursday April 1, 1976, this application was field investigated. There was a pump installed and the field had been previously irrigated. Since at this time no irrigation is being done, it could not be determined how much water is pumped. It appears the project is complete and complies to the Provisional Permit.

5. The project was re-verified on May 10, 1985, as part of a basin-wide verification of all Provisional Permits for which Notices of Completion have been filed. The Department was concerned that the few early (pre-1980) verifications which had been made were inaccurate, superficial, and not properly documented. (Testimony of James Beck.)

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James Beck, agricultural specialist with the Helena Water Rights Bureau Field Office, listed several discrepancies between the Permit issued in this matter and the project as he found it to be operating at the time of the 1985 field verification investigation, on the permit verification form which was submitted to the current Permittees for review.

Mr. Beck verified that the present Permittees are William S. and Bernadette K. Connor, instead of Kenneth D. and Ron Sears; that the source of water is a groundwater well rather than groundwater from a pit; that the diversion means is a pump rather than a pit; that the point of diversion is located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2 rather than the N $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, Township 1 North, Range 4 West; and that the place of use is more precisely described as the W $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2 (rather than the previous legal of the NE $\frac{1}{4}$), Township 1 North, Range 4 West. These findings by Mr. Beck were not disputed by the Permittees, and were stipulated to as being accurate at the November 5, 1987 hearing in this matter.

Mr. Beck verified the flow rate of the irrigation system at 400 gpm rather than 580 gpm and the volume at 230 acre-feet per year rather than 252 acre-feet per year. These figures were arrived at based on information from Permittee William Connor, and on the field investigation which Mr. Beck conducted, that the system included a 20-horsepower pump, a 6-inch diameter mainline, a single wheel line (5" diameter, with 33 sprinklers), and a handline with 19 sprinklers. Since the pump make and model were unknown, Mr. Beck assumed that the pump is well-matched to the system and operates at

76 percent efficiency. (Testimony of James Beck; May 15, 1985 Field Verification Report by James Beck.) Based on these assumptions, on the minimum static lift, and other factors such as sprinkler nozzle size, Mr. Beck calculated that the system utilizes a flow rate of approximately 400 gpm. Based on this flow rate and on the 130-day use period reported by Mr. Connor, Mr. Beck calculated that the volume diverted is 230 acre-feet per year. (See Department file, May 15, 1985 Verification Report.) Mr. Beck accordingly recommended that the Permit in this matter be modified to show a 400 gpm flow rate and a volume of 230 acre-feet per year. (See Permit Verification Data Sheet; May 15, 1985 Verification Report.)

Permittee William Connor disagreed with these findings on flow rate and volume, stating, "I am at present using an extra hand line with 12 sprinklers making a total of 60 sprinkler heads. I run these all at once. Also, Ron Sears believes they have used that many in the past. Also I intend to replace the 20 H.P. pump with a 25 or 30 H.P. one when possible." (Permit Verification Data Sheet, signed by Mr. Connor on June 10, 1985.) Mr. Connor requested a hearing on these items of disagreement.

6. On the basis of evidence presented at the hearing which was not available to Mr. Beck at the time of the field verification, the record indicates that the full flow rate and volume were perfected by the original Permittees Ron and Kenneth Sears.

Testimony by current Permittee William Connor indicates that the submersible pump currently being utilized is a 25 h.p. pump rather than the 20 h.p. pump which he believed, and informed Mr. Beck, was

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in place. Mr. Connor also testified that his predecessors in interest had used different pumps and different irrigation system configurations over the years, perhaps at some time using a 30 horsepower pump and at least as many sprinkler heads as Mr. Connor currently uses. (See Permit Verification Data Sheet, and June 12, 1985 letter from Mr. Connor to James Beck.)

As Department Exhibit 1 illustrates, flow rate discharge from the Permittees' sprinkler system would not exceed 500 gpm even with a 30 horsepower pump, assuming that no more than the specified 62 sprinklers were utilized. However, Mr. Connor further testified that the former Permittees had used a centrifugal pump to flood-irrigate the place of use. Mr. Connor testified that he himself had flood-irrigated the place of use at one time, and that the flood irrigation utilized a flow rate and volume at least as great as the Permit rates.¹

Based upon the Foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

¹Soil Conservation Service technician Lyle Ward estimated that it would require a flow rate of 675 gpm to convert the present system to flood irrigation. See Permittees' Exhibit 2. Sam Hoffman testified that he had consulted three irrigation system dealers and had been told that the Permittees' system under "free flow" conditions would pump anywhere from 650 gpm to double the 425 gpm flow rate obtained in the sprinkler system, assuming the 25 h.p. pump now in place.

CONCLUSIONS OF LAW

1. The Department has continuing jurisdiction over the subject matter herein, and over the Permittees. See MCA §85-2-312 et seq.

2. The Department had reasonable basis for requiring the Permittees to show cause why the Permit should not be modified.

The April 6, 1976 memorandum does not contain any specific data which supports its conclusion that the project "appears" to comply with the Provisional Permit; in fact, as the memorandum itself notes, no determination could be made on how much water the system pumped. (See Finding of Fact 4.) Additionally, Mr. Beck's much more thorough field verification indicated that the irrigation system in place did not utilize nearly as much flow or volume as was granted by the Permit. As indicated by the Field Verification Data Sheet and Mr. Beck's May 15, 1985 Verification Report, however, Mr. Beck had no knowledge of the original Permittees' flood irrigation nor of the many irrigation system changes which apparently have taken place over the intervening years (Finding of Fact 6), nor did the information which the current Permittee supplied prior to the hearing in this matter suffice to apprise the Department of these facts. (See Mr. Connor's written responses to Verification.) Therefore, the matter was properly before the Hearing Examiner.

3. The statutory language of MCA §85-2-314 indicates that the Department's decision on modification of a Permit is discretionary; that is, if the Permittee shows sufficient cause why a Permit should not be revoked, the Department is not required to revoke the Permit even though a recommendation to do so has been made.

4. The Permittees in this matter have shown sufficient cause Permit flow rate and volume in this matter should not be lied.

Uncontradicted testimony by Permittee William Connor indicates that the full flow rate and volume granted in this Permit were effected by former Permittees Kenneth and Ron Sears. (See Finding Fact 6.) Nothing in the Department's records or field verification data indicates that the Permit was not perfected as indicated by Mr. Connor.

Mr. Beck's field verification findings are well-documented and more accurate than those made at the time of the 1976 (as evidenced by the refinement of legal locations, for example) and, in the absence of evidence that the irrigation system had been changed in the interim between the date of completion and the date of his field investigation, would be entitled to more weight than would the more perfunctory field report made in 1976. However, in light of testimony concerning perfection of the water right through flood irrigation and the testimony that the sprinkler irrigation system had been altered several times since the original verification, the irrigation system upon which Mr. Beck's report is based is not indicative of the past water use which occurred. The 1976 memorandum written by Ken Clark which suggests that the Permit was perfected as granted is not as thorough as Mr. Beck's report but is entitled to as great a weight because it was prepared much closer

in time to the date of completion.² This memorandum and Mr. Connor's testimony indicate that the Permit was perfected by the original Permittees. Therefore, there is no basis for modification of the Permit, even though the irrigation system presently in place is not utilizing the full flow rate and volume at this time.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

ORDER

Beneficial Water Use Permit No. 783-g41G, issued to Kenneth and Ron Sears and now held by William and Bernadette Connor, is hereby modified as follows:

The source of water and means of diversion shall be modified to accurately reflect that groundwater is being diverted by means of a pump from a groundwater well; the point of diversion shall be modified to read the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 1 North, Range 4 West, Jefferson County, Montana; and the place of use shall be modified to the more accurate legal land description of the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, Township 1 North, Range 4 West, Jefferson County, Montana. The flow rate shall remain at 580 gpm and the volume of

²Since the 1976 memorandum does not specify what type of irrigation had taken place, the memorandum may refer to the surface pump and flood irrigation system testified to by Mr. Connor.

water diverted at 252 acre-feet per year. All Permit specifications not addressed in this Order shall remain as specified in the original Permit issued in this matter.

NOTICE

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

DONE this 10th day of November, 1987.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
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and Conservation
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CERTIFICATE OF SERVICE

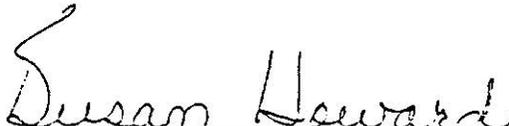
This is to certify that a true and correct copy of the foregoing documents was served by mail upon all parties of record at their address or addresses this 10th day of November, 1987, as follows:

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