

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

FILMED

APR 5 1980

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 913-s41-I BY)
RICHARD W. KELLY)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on May 7, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

The Applicant's Beneficial Water Use Permit as sought by Application No. 913-s41-I is hereby denied.

Done this 28th day of June, 1976.

Ervin Ferris
Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

CASE # 913

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
913-s41-I BY RICHARD W. KELLY)

Pursuant to the Montana Water Use Act and to the Montana Administrative Act, after due notice, a hearing on objections to the above-described application was held in the first floor Conference Room of the Department of Natural Resources and Conservation building at 32 South Ewing, Helena, Montana on Monday, May 3, 1976 at approximately 10:00 a.m., Richard Gordon, Hearing Examiner, presiding.

Neither the Applicant, nor a representative of the Applicant appeared at the hearing.

Mr. James A. Rawlings, Mr. Brian J. Edwards, and Mr. Bert M. Madsen personally appeared on behalf of the Objector, United States Bureau of Reclamation (hereinafter referred to as "Bureau"). The Bureau was represented by counsel, Thomas Gai, Esq., United States Department of the Interior, Office of the Solicitor, Billings, Montana. The Bureau offered into evidence four exhibits: 1. a copy of a 1973 Helena Valley Irrigation District Lining and Drainage map, particularly showing drainage ditch D-3 in yellow, the Applicant's proposed pump site in red, and the

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acreage which the Applicant proposes to irrigate in green; 2. a copy of a letter dated March 15, 1963 from then United States Attorney General, Robert F. Kennedy, to then United States Secretary of the Interior, Stewart L. Udall, outlining the provisions of the final judgment in the condemnation proceeding, United States of America v. 185.54 acres of land, more or less, in the County of Lewis and Clark, State of Montana, Thomas H. Herrin et al., Civil No. 806 in the United States District Court of Montana, Helena Division, as entered March 6, 1963, and including an attached copy of a certified copy of the final judgment; 3. a copy of a United States Geological Survey map of the Helena Valley showing the location of certain physical features, including but not necessarily limited to, wells, springs, surface water, contour lines and water logged areas for April and August both of 1948; 4. a copy of the contract dated November 26, 1956 between the United States and the Helena Valley Irrigation District for water service and for the construction of a distribution system. Said exhibits were marked and entered as Bureau Exhibits Nos. 1 through 4 accordingly.

Mr. Allen Shumate and Mr. Jonathan Haywood personally appeared on behalf of the Objector, Helena Valley Irrigation District (hereinafter referred to as "District"). The District was represented by counsel, Carl Hatch, Esq., Helena, Montana.

Mr. T. J. Reynolds and Mr. Ken Clark appeared on behalf

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of the Department of Natural Resources and Conservation.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On March 15, 1974, the Applicant, Mr. Richard W. Kelly, filed Application No. 913-s41-I with the Department seeking to appropriate 1.809 cubic feet of water per second not to exceed 330 acre-feet of water per year for irrigation use from May 15 to September 15, inclusive, of each year. The Applicant sought to irrigate 110 acres, more or less, located in the NE1/4 and in the NW1/4, both of Section 9, Township 10 North, Range 3 West of the Montana Principal Meridian. The Application sought to appropriate the water from a drainage ditch in an unnamed slough (later identified as drainage ditch D-3), said diversion to occur at a point in the NE1/4 NE1/4 of Section 9, Township 10 North, Range 3 West of the Montana Principal Meridian.

2. On December 17, 1975, Mr. Brian J. Edwards filed an objection to the above-described application on behalf of Mr. Robert L. McPhail, Regional Director, United States Bureau of Reclamation. The objection alleged that the waters to

be diverted are irrigation return flows of water diverted from Missouri River by the Bureau for use on the Helena Valley Unit. The Objector claimed a prior right to said waters pursuant to the holding of the court in United States vs. Ide, 263 U.S. 497, 1506 (1924). The Objector requested that the permit be denied.

3. Neither the Applicant nor a representative of the Applicant appeared at the hearing. Consequently no evidence or testimony was offered in support of the application and furthermore no evidence or testimony was offered to rebut testimony of the Objector. The Department's files show that the Applicant was duly notified of the date, time and place of the hearing. Prior to commencement of the hearing, an effort was made to locate the Applicant in order to determine whether the Applicant planned to attend. The start of the hearing was delayed approximately 30 minutes in the event that the Applicant was merely late. The Applicant did not appear at all during the hearing, and has not to date communicated in any manner or form with the Hearing Examiner.

4. At the hearing, Mr. Clark testified on behalf of the Department of Natural Resources and Conservation that pursuant to Mr. Clark's personal understanding the Applicant intends to pump water directly from the Helena Valley Irrigation District drain ditch D-3 for the sprinkler irrigation of approximately 110 acres. Mr. Clark testified that a small source of water resembling a spring flows into drainage ditch

ditch D-3 directly across the ditch from the Applicant's proposed point of diversion. Mr. Clark could not say with certainty whether the source of water is a natural spring. Mr. Clark testified that there are no measuring devices on the spring, and consequently there is no way to estimate the amount of water in drain ditch D-3 which is attributable to the spring. Mr. Clark testified that there is a small continuous flow on a year-round basis from the spring, but that the flow is heavier during the irrigation season than at other times of the year. Mr. Clark testified that the presence of the spring could possibly be attributed to groundwater drainage, irrigation runoff, drainage from the Prickley Pear Creek, or drainage from Helena City Sewer system. Mr. Clark testified that the amount of water flowing into drainage ditch D-3 from said spring is "quite small" even at its maximum stages, and constitutes considerably less than the amount sought for appropriation from drain ditch D-3 by the Applicant herein. Mr. Clark testified that he is not aware of the precise sprinkler or pumping method to be employed, the crop to be cultivated, the particular soil requirements or the quantity or flow of water in drainage ditch D-3.

5. Representatives of the Bureau testified that the Helena Valley Unit of which drainage ditch D-3 is a part, was constructed by the Bureau. Representatives of the Bureau testified that the Helena Valley Unit consists of approximately 52.8 miles of similar drainage ditches. Representatives of the Bureau testified that the Applicant's land sought to be irrigated herein

is not within the boundaries of the Helena Irrigation District served by the Helena Valley Unit because although Mr. Kelly had the opportunity to join the project when it was first formed in the early 1950's, Mr. Kelly chose at that time not to so join. Representatives of the Bureau testified that when the Bureau approached Mr. Kelly with regard to obtaining a right of way across Mr. Kelly's land for the purpose of constructing drain ditch D-3, Mr. Kelly would not agree to grant such a right of way, and would not accept the Bureau's fair market value offer of \$1,200 for the land necessary for the construction of drainage ditch D-3. Consequently, a condemnation suit was necessitated, the details of which are outlined in Bureau Exhibit No. 2. Bureau Exhibit No. 2 shows that a jury awarded Mr. Kelly a sum of \$34,877.51 in principal and interest for the aquisition of the right of way across the 9.42 acres of Mr. Kelly's land needed for the construction of drainage ditch D-3 and lateral E-36. Representatives of the Bureau testified that in addition to the sum spent on property aquisition for drainage ditch D-3, the Bureau spent approximately \$100,000 for construction of the drainage ditch D-3 facilities, approximately \$7,200 of which was specifically spent on construction of the portion of the drainage ditch passing through the Kelly property. Bureau representatives testified that the Applicant has not approached the Bureau for permission to pump from drainage ditch D-3 nor for permission to cross over or upon Bureau property to do same. The representatives of the Bureau testified that Bureau Exhibit No. 3, as above described, shows no natural spring existing along drainage ditch D-3 anywhere in the vicinity of the Applicant's

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proposed point of diversion prior to construction of the Helena Valley Unit facilities. Representatives of the Bureau testified that they believe that the "spring" is in actuality not a natural spring, but rather constitutes recharge from irrigation and seepage from the Helena Valley Sewer outflow and from Prickley Pear Creek. The representatives of the Bureau testified that the amount of flow attributable to such a source would in any event constitute only a small fraction of the amount of water sought to be appropriated by the Applicant herein. The representatives of the Bureau testified that on January 1, 1975 pursuant to contract dated November 26, 1956 the Bureau turned the operation of the Helena Valley Unit over to the Helena Irrigation District. Representatives of the Bureau testified that users of water from the Helena Valley Unit are annually assessed approximately six dollars per acre for the water supplied to them through the unit. Representatives of the Bureau testified that it would amount to unjust enrichment to allow the Applicant to refuse to participate in the project during its construction; to contest the construction of water-conveying facilities through his property; to accept a sizeable cash payment for the condemnation of land necessary for such water-carrying facilities; and then to allow the Applicant herein to freely appropriate project waters which would not be available to to the Applicant without the construction of the very same project facilities which the Applicant tried to obstruct, which district members are presently paying for, and which District members have a prior right to use. Representatives of the Bureau testified that the Bureau has a planned future use for the flow of drainage ditch D-3 whereby

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water from that drain will be intercepted and pumped back into the unit's lateral system for use by project members. Representatives of the Bureau testified that an alternate (or additional) plan is being contemplated which would entail the downstream pumping of water from the Prickley Pear Creek (into which drainage ditch D-3 empties) into lateral 14.8-2.6 located in Section 34, Township 11 North, Range 3 West of the Montana Principal Meridian for irrigation use by project members. Representatives of the Bureau testified that such plans are proceeding to fruition as land within the project is developed, and as the needs of the Unit thus increase. Representatives of the Bureau testified that peak demand has reached a critical stage and that implementation of the plan to reuse the project waters flowing through drainage ditch D-3 is thus becoming more and more necessary. Representatives of the Bureau testified that such reuse of existing project runoff in project drainage ditches has been anticipated and planned since the outset of the project. Representatives of the Bureau testified that implementation of either of the two above-described plans would require only the installation of a pump at the site selected for reintroduction of the water into the lateral systems. Representatives of the Bureau testified that the water presently flowing in drainage ditch D-3 consists largely of precipitation runoff and ground water recharge from

irrigation systems in the Helena Valley. Representatives of the Bureau testified that the only present use made of water flowing in drainage ditch D-3 is for stockwatering purposes by several project users. Representatives of the Bureau testified that the project is approaching the developed acreage sought to be developed through the project as originally planned. Representatives of the Bureau testified that water in drainage ditch D-3 will be used to meet both present project obligations based upon such continuing original development and as well for supplemental uses currently planned by the irrigation district. Representatives of the Bureau testified that the Applicant does own 80 acres which do qualify for supplemental project water as supplemental project land. Agreements regarding this land are presently being negotiated. Additionally, representatives of the Bureau testified that it is possible that project water might be able to be supplied to the Applicant by the Helena Valley Irrigation District through drainage ditch D-3 for the Applicant's use as sought herein on a water service contract basis.

6. Representatives of the Helena Valley Irrigation District testified that they work "hand in hand" with the Bureau on fully developing the Helena Valley Unit and that they fully support the Bureau's testimony herein, particularly with regard to the unjust enrichment allegation should the Applicant be allowed to appropriate project water from the project ditch without joining the project.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

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PROPOSED CONCLUSIONS OF LAW

1. The appropriation sought by the Applicant pursuant to Application No. 913-s41-I may only legally be effectuated through the issuance of a Beneficial Water Use Permit to be issued by the Department of Natural Resources and Conservation.

2. Such a permit may only be granted if the pertinent criteria detailed at 89-885 R.C.M. are met.

3. 89-885(1), R.C.M. 1947 requires that there be unappropriated water in the source of supply for any permit to be issued.

4. Pursuant to the holding of the Court in United States v. Ide, 263 U.S. 497, 1506 (1924), the Objector herein has a prior right to the use of project return flows such as those carried by the project drainage ditch D-3.

5. Consequently there are no unappropriated waters in the source of supply.

6. And thus, regardless of the status of all other issues presented herein, the Beneficial Water Use Permit must be denied.

7. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. The Applicant's Beneficial Water Use Permit as sought by Application No. 913-s41-I is hereby denied.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

Dated this 7th day of May, 1976.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER