

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

FILMED

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IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. ) FINDINGS OF FACT,  
1260-s76L BY RAYMOND M. HUGHES ) CONCLUSIONS OF LAW & ORDER  
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Pursuant to the Montana Water Use Act and the Administrative Procedure Act, after due notice a hearing on objections to the above-named application was held on September 23, 1974, at 7 p.m., at Hot Springs, Montana. Objectors appearing at the hearing were Ronald L. and Jolene M. Jacobson, represented by Counsel Leonard L. Kaufman. The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation filed objections but did not present oral testimony at the hearing. The Applicant, Raymond Hughes, appeared and was represented by Counsel F. L. Ingraham. Evidence was introduced by both objectors and the Applicant. A taped record of the proceedings was made.

A Proposed Order (Proposal for Decision) dated November 13, 1974, was issued by the Hearing Examiner, Donald D. MacIntyre.

The Proposed Order as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral

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argument before the Administrator.

On November 21, 1974, the Department received from Counsel for the Objector Jacobsons, several documents titled, "Objections to Statement of Opinion and Notice and Proposal for Decision," and "Memorandum," both dated November 20, 1974. These two documents, hereinafter referred together as Exceptions, were filed in opposition to the Proposal for Decision.

No other parties to this matter took exception to the Proposal for Decision.

By letter of January 16, 1975, the Department acknowledged receipt of the Exceptions and informed Counsel for the Objectors of his opportunity to file a brief supporting the Exceptions within 20 days upon receipt of the letter. He was further advised that he might request a hearing in Helena before the Water Resources Division Administrator for the purpose of presenting oral argument in support of the Exceptions and briefs. He was requested to indicate, if he filed a brief, whether he wished to make such an oral argument.

By letter of January 16, 1975, the Department informed the Applicant and his counsel of the Exception and Memorandum and enclosed copies of each. The Applicant and his counsel were also informed that the objector had been afforded the opportunity to file a Brief in support of the Exceptions, and further, that a copy of any such Brief would be sent to the applicant who would then have an opportunity to file a Reply Brief.

On January 22, 1975, the Department received a second Memorandum from counsel for the Objectors, supporting the Exceptions.

By letter of January 29, 1975, the Department acknowledged receipt of this Memorandum. Counsel for the Objector was informed that the Applicant would be sent a copy and would be afforded the opportunity to reply in writing in the form of a Reply Memorandum or Brief.

On January 29, 1975, the Department sent such copy to the Applicant's counsel and advised him that he had the opportunity to file a Reply Memorandum within 20 days of receipt of the Memorandum.

The Applicant's counsel did not reply to the Department's mailing of January 29, 1975. The Department sent a follow-up letter on March 21, 1975.

By letter of April 15, 1975, counsel for the Applicant responded to the Department's previous letters stating that the Applicant would respectfully refrain from further briefing the issues involved.

The letter further asserted: "Additionally, as was developed in the hearing, the water which Mr. Hughes proposes to appropriate from the Little Bitterroot River in effect is not, repeat is not, an appropriation but is only a matter of conveying water from his own private wells over into the channel of the Little Bitterroot River, using the bed and channel of that river to convey the water further downstream to his land where he would then use it."

By letter of July 25, 1975, the Department responded: "The original application submitted by Mr. Hughes specifically states that the source of the water supply is the Little Bitterroot River and there is no mention of the wells as noted in your quoted paragraph above. We would be interested in receiving further explanation or information concerning the wells."

The Department did not receive any reply further explaining the Applicant's well allegation.

Furthermore, a complete review of the original hearing tape did not substantiate the Applicant's well allegation.

Counsel for the Applicant stated at the hearing (counter reading 60 to 70, on Tandberg at 1-7/8 speed), "The Application of the Applicant is strictly for the use of 1.5 cfs of water out of the Little Bitterroot River; it is taken by means of a diversion point located in Section 18--and I believe it's 28--anyway, in Township 23 (North), Range 22 West, if I recall it properly. I haven't seen any exact application on it." (Emphasis added.)

The only real discussion found on the tape concerning wells occurred at counter reading 638 to 642. During cross-examination, Counsel for the Applicant asked the Objector Mr. Jacobson: "Do you know of any water that has been inserted by wells; for instance, the Hughes' wells that are artesian that might run back into the creek and inserted as sources of water?" Mr. Jacobson replied, "No."

It is clear from the evidence and testimony on record that the Applicant has applied to appropriate waters of the Little Bitterroot River, and not from private wells of the Applicant.

By letter of May 7, 1975, the Department acknowledged receipt of the letter of April 15, 1975 and stated that counsel for Objectors would be sent a copy and would be given an opportunity to request oral argument before the Water Resources Division Administrator. The Applicant's counsel was requested to notify the Department if he wished to attend such a hearing, if held.

By letter dated May 16, 1975, the Applicant's counsel notified the Department that, "I and my client wish to

attend any hearing that might be requested by Mr. Kaufman and his clients in the above-subject matter."

On May 7, 1975, the Department sent the Applicant's letter of April 15, 1975 to counsel for the Objectors, and further advised him of his opportunity to request oral argument. He was requested to so notify the Department within five (5) days of receipt.

By letter of June 19, 1975 the counsel for Objectors stated that he did not intend to submit further briefs or request further hearings in the matter. The letter stated, "We would reiterate that our primary objection to the granting of the water rights as set forth in your proposed order is that indefinite times are utilized. That is, you utilized the words 'peak irrigation season,' 'mid-June,' etc. It is requested that your final order specifically delineate dates as beginning and termination dates for the utilization of those water rights. It is my understanding that any such order granted will deny the utilization of any water rights under the four above appropriations from about June 15 until approximately September 7."

By letter of June 25, 1975, the Department informed counsel for the Objectors, "It appears from your letter that you may be agreeable to April 15 to June 15, and September 7 to October 15, inclusive, of each year. Assuming this is correct, we will proceed to contact the Applicants to see if they are agreeable to these specific dates. If our assumption is incorrect, please notify us as soon as possible."

By letter of June 30, 1975, counsel for the Objectors replied, "My primary objection to the proposed orders granting any water rights to the above individuals was on the

grounds that there is not sufficient water in the Little Bitterroot Creek for the existing appropriations at any time of the year, yet alone these new appropriations which are being granted by your department. You are correct, however, in my secondary objection in that the dates must be specific when these water rights are to be allowed. My clients do not wish to proceed further in an appellate procedure. Thus, it would appear that if the Department is going to issue more water rights on this grossly overappropriated stream, the date limitation you set forth are the best we can hope for."

The Department by letter of July 25, 1975, to counsel for both parties, states, "In the Department's letter dated June 25, 1975, to Mr. Kaufman, we set forth the dates of April 15 to June 15 and September 7 to October 15, inclusive, of each year, as the specific dates for allowing the appropriation of water under a permit. It appears Mr. Kaufman has agreed (see Mr. Kaufman's letter dated June 30, 1975) to the specific dates set forth above. Please notify this Department in writing within seven days if you agree to the specific appropriation dates as set forth above. If you and your client agree with these dates, a Final Order can be issued to include these dates, and, of course, the other conditions stated in the Proposed Order as entered on November 13, 1974, by the Hearing Examiner."

The Department did not receive a reply from the Applicant concerning the specific appropriation dates.

In part, in response to counsel for the Objectors' letters of June 6, September 3, and October 14, 1974, the testimony at the hearing and subsequent exceptions and

memoranda; and in part as a direct remedy to other water right problem areas in the state, the Department prepared and submitted to the 1975 Legislative Session a bill for a Departmental Administrative Adjudication System. This bill was not passed by the legislature. Attempts to realign priorities in order to concentrate some of the Department personnel from the Yellowstone River basin adjudication to the Little Bitterroot River and many other water right problem areas was not able to be accomplished. Therefore, the hope of resolving disputes on the Little Bitterroot River through adjudication was halted at least for the present time.

There is sufficient information and evidence presented in the record to make a decision at this time allowing the provisional use of the water until adjudication is completed subject to the specific conditions imposed below.

Since none of the parties in this matter specifically requested an oral argument on the objections, exceptions, and memoranda before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposed Order of November 13, 1974, the objections, exceptions, memoranda, and all other pertinent information of record. The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on November 13, 1974, by the Hearing Examiner are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified to read as follows:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 1260-s76L to appropriate, subject to the conditions imposed below, from the

Little Bitterroot River, a tributary of the Flathead River, 2.228 cubic feet of water per second, not to exceed 447 acre-feet of water per annum, in Lake County, Montana, to be diverted by pumping from the Little Bitterroot River at two points in the SE1/4 NW1/4 of Section 20 and the E1/2 NE1/4 of Section 18, all in Township 22 North, Range 23 West, M.P.M., and to be used for irrigation on 120 acres in the NW1/4 of Section 20, 40 acres in the NE1/4 of Section 19, and 70 acres in the NE1/4 and 40 acres in the NW1/4 of Section 18, all in Township 22 North, Range 23, West, M.P.M., and containing a total of 270 acres, more or less, from April 15 to June 15 and from September 7 to October 15, inclusive, of each year.

2. The Provisional Permit is granted by law subject to all prior existing water rights in the source of supply, including any prior Indian (Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation) reserved water rights in the source of supply; and subject to any final determination of such prior existing water rights as provided by Montana law.

3. No appropriations of water under this Provisional Permit are allowed except at such times, for such purposes and in such manner as is expressly authorized herein.

4. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

5. The Permit by law must be provisional. Section 89-880(4), R.C.M. 1947, provides, "A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination."

6. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with 89-898, R.C.M. 1947.

7. At the discretion of the Department, the Permittee shall, with adequate notice given, install and maintain an adequate measuring device (or devices) so as to enable the Permittee to keep a record of all quantities of water actually diverted from the Little Bitterroot River and as well to enable the Permittee to keep a record of the periods of diversion. Such records shall be presented to the Department by the Permittee upon demand by the Department.

8. It shall be the responsibility of the Permittee to immediately cease diverting water pursuant to this Provisional Permit when there is insufficient water in the Little Bitterroot River to satisfy the prior rights of the Objector(s).

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical and keep a log of records of water used for proof of their water rights.

Done this 14<sup>th</sup> day of March, 1977.

Orvin 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 # 1260

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF THE APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
No. 1260-s76L, RAYMOND M. HUGHES

PROPOSAL FOR DECISION

Pursuant to the requirements of the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, a hearing was held on September 23, 1974, at 7:00 p.m. at Hot Springs, Montana, for the purpose of hearing objections to the above-named application.

Objectors appearing at the hearing were Ronald L. and Jolene M. Jacobson, represented by counsel Leonard L. Kaufman. The Confederated Salish and Kootenai Tribes of the Flathead Reservation filed objections but did not present oral testimony at the hearing.

The applicant, Raymond Hughes, appeared and was represented by Counsel F.L. Ingraham.

Evidence was introduced by both the objectors and the applicant. The law and evidence having been fully considered the following proposed Findings of Fact, Conclusions of Law and Order are hereby made and entered.

PROPOSED FINDINGS OF FACT

1. On December 31, 1973, the applicant submitted an application for beneficial water use permit to the Department seeking to appropriate 2.228 cubic feet per second of water and not to exceed 1,080 acre-feet per annum in Lake County, Montana. The water is to be diverted from the Little Bitterroot River, a tributary of the Flathead River, at two points in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Sec. 20 and

the E $\frac{1}{2}$  NW $\frac{1}{4}$  of Sec. 18, all in T. 22 N., R. 23 W., M.P.M., and used for irrigation on 120 acres in the NW $\frac{1}{4}$  of Sec. 20, 40 acres in the NE $\frac{1}{4}$  of Sec. 19, 70 acres in the NE $\frac{1}{4}$  and 40 acres in the NW $\frac{1}{4}$  of Sec. 18, all in T. 22 N., R. 23 W., M.P.M., and containing a total of 270 acres, more or less, from April 15 to October 15, inclusive, each year.

2. The proposed place of use and diversion of the waters applied for are within the exterior boundaries of the Flathead Indian Reservation.

3. Objector Jacobson has on file two Notices of Appropriation for 2.50 cubic feet per second of water of Little Bitterroot River (a total of 5.0 cubic feet per second). The notices do not indicate the place of use for said water; however, it appears that Mr. Jacobson has beneficially put to use by means of sprinkle irrigation, since 1969, approximately 2.20 cubic feet per second.

4. Objector Jacobson has at all times been able to irrigate his lands throughout the irrigation season with his present water rights.

5. Several water users, including the objectors, members of the above-named tribes, and other unnamed parties, have apparent filed or use rights for irrigation and stockwater purposes for use during the period April 15 to October 15, inclusive, of each year. The evidence is insufficient to establish with any certainty the exact quantity of water entitled to under these apparent rights. However, the evidence shows that water has been appropriated in previous years from April to September of each year for irrigation purposes and it is, therefore, reasonable to find that there are apparent prior irrigation and stockwater rights below Applicant's proposed point of diversion.

6. Expert Engineering testimony introduced shows that at a certain point, approximately 30 feet above him, Jacobson's pump house, on or about the 19th day of September 1974, the streamflow of the Little Bitterroot River was approximately 10.85 ft<sup>3</sup>/sec (+10.%). Expert opinion based on estimated water

Levels indicated that at peak irrigation the waterflow for the 1974 irrigation season was approximately 3.00 ft<sup>3</sup>/sec (+ 25%).

7. Testimony indicates that during most years there is a sufficient amount of water throughout most of the irrigation season to irrigate lands below the objector Jacobson. The water being withdrawn from the Little Bitterroot River below the objectors is being withdrawn at the approximate rate of 1.50 cubic feet per second.

8. The peak irrigation season in the area of the source generally runs from mid June until September of each year.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit to appropriate water from the Little Bitterroot River for a beneficial use is required.

2. The proposed use of the water is a beneficial use; the proposed means of diversion appear to be adequate; and, it does not appear that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

3. It appears that any further appropriation of water from the Little Bitterroot River at certain times during the peak irrigation season will adversely affect prior appropriators.

4. It further appears that prior to mid-June of each year and subsequent to the first week in September of each year that there are unappropriated waters in the source of supply at Applicant's proposed point of diversion.

5. The application for beneficial water use permit may be granted in a modified form in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

The Applicant is granted a provisional permit to appropriate water from the Little Bitterroot River at the proposed point of diversion in quantities not exceeding 2.228 cubic feet per second, subject, however, to the following conditions:

- (1) The provisional permit is subject to existing rights and final determination of rights under the Montana Water Use Act.
- (2) the water appropriated under the provisional permit may be used only for irrigation purposes; and,
- (3) the water may be diverted during the following periods only:
  - (a) from April 15 until mid-June, inclusive, of each year; and,
  - (b) from the first of September until October 15, inclusive, of each year.

NOTICE: This is a proposed Order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation. Pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2)-P6190, written exceptions to this Proposed Order shall be filed with the Administrator within ten (10) days of service of this Proposed Order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

DATED this 13<sup>th</sup> day of November, 1974.

*Donald D. MacIntyre*  
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 Donald D. MacIntyre  
 Hearings Officer

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