

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
NO. 1265-s76L AND 1266-s76L BY  
KEMP RANCH PARTNERSHIP

)}  
)} FINDINGS OF FACT, CONCLUSIONS OF  
)} LAW, AND ORDER

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 the City Hall in Hot Springs, Montana, for the purpose of hearing objections to the above-named Application No. 1266-s76L.

Objectors appearing at the hearing were Dwight E. Preston, Arvid Kopp, J.B. Wilkerson, and George A. Godfrey (represented by Counsel Keith W. McCurdy), and Ronald and Jolene 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 appeared by David R. Kemp, and was not represented by counsel at the hearing.

Evidence was introduced by both the Objectors and Applicant.

A Proposed Order (Proposal for Decision) dated November 13, 1974, was issued by the hearing examiner, Donald D. MacIntyre, in the matter of Application No. 1266-s76L.

The Proposed Order for Application No. 1266-s76L as issued provided in general 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 shall 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 argument before the administrator.

Kemp Ranch Partnership duly filed two applications for beneficial water use permit (No. 1265-s76L and 1266-s76L). Objections were duly and timely filed relative to only Application No. 1266-s76L. The Department determined that because the source of water is the same and that since the points of diversion and places of use are in close proximity to each other, an application could not be denied, granted, or modified without a study of the other. Therefore, the Department, after the hearing on Application No. 1266-s76L, issued a Statement of Opinion and Notice on November 13, 1974, proposing that a provisional permit be granted to the Applicant with five specific conditions. The Department's Notice notified the Applicant that pursuant to the provisions of Section 89-884, R.C.M. 1947,

**CASE # 1265**

he may obtain a hearing by filing a request therefor, within thirty (30) days after the date of mailing of said notice. If no request for hearing was made, the application (1265-s76L) would be modified in the manner specified in said Statement of Opinion, adopting therewith the findings of fact and conclusions of law made and entered in the matter of Application No. 1266-s76L, with the exception that for Findings No. 1 substitute the following new finding:

"On January 2, 1974, Kemp Ranch Partnership, Hot Springs, Montana, filed with the Department of Natural Resources and Conservation Application No. 1265-s76L to appropriate 10 cfs of water and not to exceed 480 acre-feet per annum from the Little Bitterroot River, a tributary of the Flathead River in Lake County, Montana. The water is to be diverted from the Little Bitterroot River at a point in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 20, Township 22 North, Range 23 W., M.P.M., and used for irrigation on 220 acres and supplemental water on 100 acres in said Section 20, and containing a total of 320 acres, more or less, from April 1 to October 1, inclusive, of each year."

The Applicant did not file for a hearing within 30 days pursuant to Section 89-884, R.C.M. 1947.

On November 21, 1974, the Department received from counsel for Objectors Jacobson 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 relative to Application No. 1266-s76L and the Statement of Opinion and Notice relative to Application No. 1265-s76L.

No other parties to this matter took exception to the Proposal for Decision or the Statement of Opinion and Notice.

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 of the exception and memorandum and enclosed copies of each. The Applicant was also informed that the objectors and their counsel had been afforded the opportunity to file a brief in support of the exceptions, and further, that

**CASE # 1265** - 2 -

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 their exceptions as dated January 21.

By letter of January 29, 1975, the Department acknowledged receipt of this memorandum. Counsel for the Objectors 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 said copy to the Applicant and advised him that he had the opportunity to file a Reply Memorandum or Brief within 20 days of receipt of the memorandum.

The Applicant by letter of February 14, 1975, requested an extension of time in order to file a reply memorandum or brief to the exceptions, since his attorney was out of the state and would not return until late March. By letter of February 21, 1975, the Department granted the Applicant an extension of time to file said document to April 18, 1975.

By letter of April 15, 1975, Eugene H. Mahoney, counsel for the Applicant, filed his Reply Memorandum to Exceptions to Applications 1265-s76L and 1266-s76L. The Department by letter of May 8, 1975, acknowledged counsel for the Applicant's letter of April 15, and informed him that the Applicant and his counsel would be contacted concerning their right to an oral argument hearing on their Exceptions. The Department also by letter of May 8 to counsel for the Applicant informed him of his opportunity to request an oral argument hearing.

By letter of June 19, 1975, counsel for the Applicant informed the Department that, "This is to advise that I, on behalf of the Jacobsons, do not intend to further brief our opposition to the granting of the water appropriations above designated nor do we intend to ask for or wish a hearing on the legality of same before your Commission at Helena."

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 Applicant to see if he is 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 limitations you set forth are the best we can hope for."

The Department by letter of July 25, 1975, to counsel for the Applicant, 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 (7) 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 by letter of July 25, 1975, to counsel for the Objectors, stated, "If the Applicant and his attorney agree to the condition of indicating 'specific dates' as set forth in our letter to Mr. Mahoney, would you and your clients object to accepting the proposed amendments as set forth in Mr. Mahoney's reply memorandum of April 5, 1975? The proposed amendments do not appear to cause any problem, since they merely clarify the existing water rights of Anna Kemp, one of the partners in Kemp Ranch Partnership."

No written reply was received by the Department from the Objectors' counsel in response to the Department's above-noted letter of July 25.

By letter of August 1, 1975, counsel for the Applicant responded to the Department's letter of July 25, stating, "We are agreeable to the issuance of a permit in regard to each application setting forth the dates April 15 to June 15 and September 7 to October 15, inclusive. This, however, is agreed provided that the proposed amendments as set forth by me in the reply memorandum dated April 5, 1975, is incorporated into the final order."

In part, in response to counsel for the Objectors' letters of June 6, September 3, and October 14, 1974, the testimony at the hearing on Application No. 1266-s76L 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

**CASE # 1265**

Administrative Adjudication System. This will 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 hearing 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 and Statement of Opinion and Notice, both of November 13, 1974, the objections, exceptions, memoranda, and all other pertinent information of record in both application files.

The Proposed Findings of Fact, Conclusions of Law, and Order, and the Statement of Opinion and Notice in this matter, as entered on November 13, 1974, by the Hearing Examiner and Administrator, respectfully, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Findings of Fact, Item 4, second sentence, is amended to read: "It is apparent that several water users, including Applicant Kemp Ranch Partnership, some of the objectors, members of the above-named tribes, and other unnamed parties, have apparent filed or use rights for irrigation and stock-watering purposes." (Amended portion is underlined.) Except further, 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. 1266-s76L to appropriate, subject to the conditions imposed below, from the Little Bitterroot River, a tributary of the Flathead River, in Lake County, Montana, 10 cubic feet of water per second, not to exceed 480 acre-feet per annum, to be diverted by pumping from the Little Bitterroot River at a point in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 29, Township 22 North, Range 23 West, M.P.M., and used for new irrigation on 295 acres in Section 28, and for supplemental irrigation water on 80 acres in Section 29 and 25 acres in Section 28, all in Township 22 North, Range 23 West, M.P.M., and containing a total of 400 acres, more or less, from April 15 to June 15 and from September 7 to October 15, inclusive, of each year.

2. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 1265-s76L to appropriate, subject to the conditions imposed below, from the Little Bitterroot River, a tributary of the Flathead River, in Lake County, Montana, 10 cubic feet of water per second, not to exceed 480 acre-feet

per annum, to be diverted by pumping from the Little Bitterroot River at a point in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 20, Township 22 North, Range 23 West, M.P.M., and used for new irrigation on 220 acres and supplemental irrigation water on 100 acres in said Section 20, Township 22 North, Range 23 West, M.P.M., and containing a total of 320 acres, more or less, from April 15 to June 15, and from September 7 to October 15, inclusive, of each year.

3. The above conditionally granted Provisional Permits are in addition to any water right or rights now held by Anna Kemp, one of the members of the Kemp Ranch Partnership.

4. The Provisional Permits are 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, including those of Anna Kemp, a member of Applicant, Kemp Ranch Partnership.

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

6. The issuing of these Provisional Permits by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permits nor does the Department in issuing the Provisional Permits in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permits.

7. The Permits 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."

8. The Provisional Permits are granted subject to the right of the Department to revoke the permits in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with 89-898, R.C.M. 1947.

9. 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.

10. It shall be the responsibility of the Permittee to immediately cease diverting water pursuant to these Provisional Permits when there is insufficient water in the Little Bitterroot River to satisfy the prior rights of the Objectors.

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 7<sup>th</sup> day of July, 1977.

  
\_\_\_\_\_  
Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE # 1265**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

FILMED

APR 5 1990

IN THE MATTER OF THE APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
No. 1266-s76L, KEMP RANCH PARTNER-  
SHIP

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 the City Hall in Hot Springs, Montana, for the purpose of hearing objections to the above-named application.

Objectors appearing at the hearing were Dwight E. Preston, Arvid Kopp, J.B. Wilkerson, and George A. Godfrey (represented by Counsel Keith W. McCurdy), and Ronald and Jolene Jacobsen (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 appeared by David R. Kemp, and was not represented by Counsel at the hearing.

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

PROPOSED FINDINGS OF FACT

1. On January 2, 1974, the applicant submitted an application for beneficial water use permit to the Department seeking to appropriate 10 cubic feet per second of water and not to exceed 480 acre-feet per annum from the Little Bitterroot River, a tributary of the Flathead River, in Lake County, Montana. The water is to be diverted from the Little Bitterroot River at a point in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Sec. 29, T. 22 N., R. 23 W., M.P.M., used for irrigation on 295 acres in Sec. 28 and supplemental water on 80 acres in Sec. 29 and 25 acres in Sec. 28 T. 22 N., R. 23 W., M.P.M., and containing a total of 400 acres, more or

**CASE # 1266**

less, from April 1 to October 1, inclusive, of each year.

2. The lands upon which the water sought to be appropriated are to be used are presently under lease from the applicant partnership.

3. The proposed point of diversion and proposed place of use are within the exterior boundaries of the Flathead Indian Reservation.

4. Testimony indicates that there are prior appropriators of the waters of the Little Bitterroot River. It is apparent that several water users, including some of the objectors, members of the above-named tribes, and other unnamed parties, have apparent filed or use rights for irrigation and stockwater purposes. The evidence presented is insufficient to establish with any certainty the exact quantity of water entitled to under these apparent rights. It is, however, evident that the water has been appropriated in years previous for irrigation purposes and it is, therefore, reasonable to find that there are prior irrigation and stockwater rights on the source of supply.

5. Expert engineering testimony indicates that at a certain point, approximately 30 feet above Mr. Jacobson's pump house, on or about the 19th day of September, 1974, the stream flow of the source was approximately  $10.85 \text{ ft}^3/\text{sec}$  (+10%). Expert opinion, based on estimated water levels, indicated that at peak irrigation the water flow for the 1974 irrigation season was approximately  $3.00 \text{ ft}^3/\text{sec}$  (+25%).

6. The evidence presented indicates that the applicant has wells which presently do or could contribute to the flow of the Little Bitterroot River.

7. Evidence presented indicates that throughout most of the irrigation season there is a sufficient flow of water to irrigate the lands of prior appropriators below the applicant's proposed point of diversion.

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. Pursuant to the provisions of the Montana Water Use Act, a permit to appropriate water from a source (the Little Bitterroot River) for a beneficial use is required.

2. The proposed use of 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 a permit has been issued or for which water has been reserved.

3. There does not appear to be sufficient flow in the source of supply during the peak irrigation season to allow a withdrawal of the amount of water applied for without adversely affecting prior appropriators.

4. Water appropriated under an existing right may be turned into the natural channel of a stream without becoming a part of the natural flow of that stream and be withdrawn at a point downstream for a beneficial use provided the appropriator obtains the approval of the Department of Natural Resources and Conservation prior to taking such action.

5. It does, however, appear that prior to mid-June of each year and subsequent to the first week in September of each year, there are some unappropriated waters in the source of supply at Applicant's proposed point of diversion.

6. The application 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 10 cubic feet per second, subject, however, to the following conditions:

- (1) no water may be appropriated from the source during the peak irrigation season;
- (2) the water appropriated under this provisional permit may be used only for irrigation purposes;
- (3) water may be appropriated only during the following period of time:
  - (a) April 1 until the beginning of the peak irrigation season (usually mid-June), and
  - (b) commencing at the end of the peak irrigation season (usually first week in September) until mid October inclusive of each year;
- (4) no water may be appropriated from the source at any time, including that period of time immediately above described, when the appropriation of such water would adversely affect prior appropriators; and,
- (5) this provisional permit is subject to existing rights and final determination of rights under the provisions of the Montana Water Use Act.

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  
Donald D. MacIntyre, Hearings Officer

**CASE #** 1266