

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 1769-s42L BY)
VERNARD SCHELL)

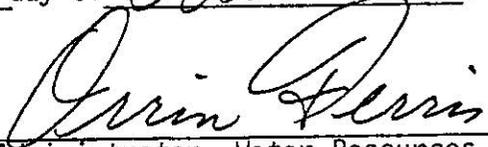
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on May 12, 1975, by the Hearing Examiner, and as amended by the Notice of Proposal for Decision Amendment dated August 6, 1975, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

The Applicant's permit is denied.

Done this 10th day of October, 1975.



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 # 1769

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

FILMED

APR 5 1990

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 1769-s42L by VERNARD SCHELL)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing was held on February 6, 1975 at Baker, Montana for the purpose of hearing objections to the above-named application.

The Applicant, Mr. Vernard Schell, appeared and presented testimony. He was represented by counsel, Mr. Denzil R. Young, Esq. of Baker, Montana.

The Objector Bickle Inc., was represented by Mr. William Bickle, Vice President. They were not represented by counsel.

Pursuant to a subpoena issued by the Hearing Examiner at the request of counsel for the Applicant, the District Soil Conservation Service Officer, Mr. Warren M. Lee, testified at the hearing.

The Applicant offered into evidence a map and two computation sheets compiled by Mr. Lee of the S.C.S. These were received into evidence without objection and marked as Applicant's Exhibits numbers 1, 2, and 3.

The following proposed findings of fact and conclusions of law are made upon the testimony and evidence introduced by the Applicant and the Objector.

PROPOSED FINDINGS OF FACT

1. On March 8, 1974 the Applicant submitted an Application for Beneficial Water Use Permit to the Department seeking to appropriate 72.4 acre-feet of water per annum in Fallon County, Montana. The water is to be diverted from an unnamed tributary of Sandstone Creek at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, T. 8 N.,

CASE # 1769

R. 56 E., M.P.M. and used for water spreading on a total of 24 acres, more or less, in said Section 10 from January 1 to June 1, inclusive, of each year.

2. On June 27, 1974 Bickle Inc. filed a timely objection to the application on the grounds of no unappropriated water in the proposed source and adverse effect on Bickle's prior existing right.

3. The Applicant testified that he intends to plant 25 acres of hayland. He said he felt that in a normal year there was enough water for both his proposed project and that of the Objector. He said he did not want to take water away from his neighbor. He said he has owned one piece of the land to be developed since 1941 and the other piece since 1967. He said the location of the proposed point of diversion was the SE $\frac{1}{2}$ NE $\frac{1}{2}$ SE $\frac{1}{2}$ Section 10, T. 8 N., R. 56 E., as stated in the application. He said that on frequent years there was not enough water for anyone. He said he figured that the dikes would only use snow runoff and probably would not appropriate much rainwater.

He felt the rains usually come after the hay is full grown. He said it would not be feasible for him to close his gates and let water on down to fill up Bickle's dikes, because he is high up in the drainage and has to catch the water before it leaves. Mr. Schell testified that he is not at all familiar with Mr. Bickle's hayland and diversion works.

4. The Objector, Mr. Bickle testified that if the dikes are built they will stop rainwater from running on down to his diversion. As a general rule, Mr. Bickle said his diversion doesn't use much rainwater, but he is usually so short of water that they take all they can get. He said much of the drainage area is gravel and doesn't produce much runoff. He said that a large part of the runoff comes from the upper reaches of the drainage area.

He testified that the spillways of his diversion works show very little erosion damage. He feels that this indicates that very little water flows on past his diversion works without being appropriated. He said that the entire drainage area will produce only 70 acre-feet, 80 per cent of the time. He said that he doesn't think the drainage areas has ever produced enough water for both his system and the system proposed by the Applicant. He said he irrigates 42 acres from this unnamed coulee. He said the system was built in 1958. Mr. Bickle said this is his best areas for hay production.

5. Mr. Warren Lee, District Conservationist for the Soil Conservation Service testified that:

a. The S.C.S. design criteria will not allow the S.C.S. to cost share a project unless the S.C.S. is reasonably assured that the area will be flooded eight years out of ten.

b. The culvert below Mr. Schell's property is a 30' long 36" x 22" arch pipe which will flow 30 cfs with a 3 ft. head.

c. 90.4 acre-feet of water is required to fill Mr. Bickle's dikes.

d. 71 acre-feet will be available from the drainage area 8 years out of 10.

e. There is not enough water for both projects.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880 R.C.M. 1947, an Application for Beneficial Water Use Permit is required to appropriate water from said unnamed coulee.

2. There is no unappropriated water in said unnamed coulee.

3. The criteria for issuance of a permit set forth in Section 89-885 R.C.M. 1947 have not been met.

Based on the above proposed findings of fact and conclusions of law, the following order is proposed.

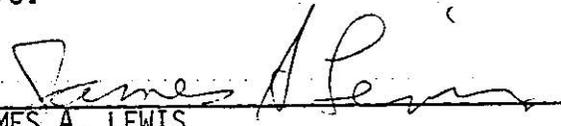
CASE # 1769

PROPOSED ORDER

The Applicant's permit be denied.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator, Water Resources Division, 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 may be filed with the Administrator within ten (10) days of the 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 12th day of May, 1975.



JAMES A. LEWIS
HEARING EXAMINER