



exception to the Hearing Examiner's Proposal for Decision. The Department verbally granted Mr. Kaufman the requested extension on May 5, 1975, and on May 13, 1975, the Department confirmed the extension approval by letter to Mr. Kaufman. Mr. Kaufman by letter of May 5, 1975, confirmed the verbal extension approval and explained that since Mr. Reimer did not have an attorney at the initial hearing, it was necessary for him to take more time to evaluate the situation and file an exception, if deemed necessary, through his attorney, Mr. Kaufman, who was recently hired.

A written Exception (Objections to Proposed Findings of Fact, Conclusions of Law, and Objections to Proposed Order) dated May 19, 1975, to the Proposed Order as issued in the matter of Application No. 2105-s76LJ, was filed by Mr. Leonard E. Kaufman on behalf of Objector Bruce D. Reimer.

Mr. Kaufman, on behalf of his client Mr. Reimer, submitted a cover letter dated May 20, 1975, and attached Memorandum dated May 20, 1975, supporting the Exception previously filed and dated May 19, 1975.

By the Department's letter of June 10, 1975, Mr. Kaufman was informed that the Applicants were being sent a copy of the Exception and Memorandum, and he would be afforded the opportunity to file a reply memorandum or brief within fifteen (15) days after receipt of our notice.

The Applicants, Mr. and Mrs. Percy C. King, were sent copies of Mr. Kaufman's Exception and Memorandum along with the Department's letter of June 10, 1975. The Applicants were informed of their opportunity to file with the Department a reply memorandum or brief within fifteen days after receipt of the Department's letter.

On June 30, 1975, the Department received the Applicants' reply brief in the form of a letter dated June 29, 1975, and signed by Mr. Percy C. King. The Department by letter dated August 6, 1975, acknowledged receipt of Mr. King's reply brief. By letter dated August 6, 1975, the Department

informed Mr. Kaufman that he and his client, Mr. Reimer, would have the opportunity to make oral argument on their exception before the Water Resources Division Administrator. Mr. Kaufman was requested to reply within five days.

On August 13, 1975, the Department received a letter dated August 12, 1975, from Mr. Kaufman requesting an additional ten-day extension of time in which to decide whether to request an oral argument hearing before the Water Resources Division Administrator. By letter dated August 14, 1975, the Department granted Mr. Kaufman an extension of time to August 22, 1975, to reach a decision on said hearing.

On August 25, 1975, the Department received a letter from Mr. Kaufman dated August 22, 1975, in which he stated, in general, that another hearing would be extremely expensive for all parties and therefore the matter should be investigated further, since it appeared that a settlement could be reached. Mr. Kaufman brought out the point, as did Mr. King in his brief of June 29, 1975, and previous letter of April 23, 1975, that the substance of Mr. King's application was more of a change in place of appropriation rather than a new demand on Haskell Creek. Because of Mr. Kaufman's letter of August 22, 1975, and the confusion that existed, Mr. James Rehbein, field manager for the Water Rights Bureau of the Department in Kalispell, was called in to evaluate the situation and, specifically, to find out if in fact Mr. King does have a prior existing water right, which could be used by changing the place of use and point of diversion, thereby eliminating or reducing substantially the amount of water requested in Application No. 2105-s76LJ.

Mr. Kaufman by letter of September 23, 1975, asked the status of his request contained in his previous letter of August 22, 1975. The Department by letter of September 26, 1975, informed Mr. Kaufman, Mr. King, and

Mr. Reimer that Mr. Rehbein would make the necessary field investigation, and after his investigation was completed, the application would be processed as necessary.

Mr. Rehbein conducted his field investigation on September 30, 1975, and his findings are summarized below, as taken from Mr. Rehbein's letter of October 9, 1975, to Mr. King, with copies to Mr. Kaufman and Mr. Reimer:

"I believe it is quite obvious that at one time water did run through both east and west channels of Haskell Creek, and through the NW 1/4 SE 1/4 of Section 33, as you claim. However, this water has not run in the west channel for quite a number of years, which is indicated by the excessive erosion on the East Fork, or Main Haskell Creek as it is now known. It appears this excessive erosion starts at the county road bridge in the NW 1/4 NW 1/4 SW 1/4 of Section 27, and continues down through Section 33. It would appear that the reason for the erosion is the removal of the brush, trees, and beaver dams on the East Fork of Haskell Creek. My proposed solution to the situation would be that you fill out an Application for Change of Appropriation Water Right, which would be the full water right, to change the point of diversion and place of use of this water right. I planimetered the aerial photographs of the entire irrigated acreage in the NW 1/4 SW 1/4 of Section 33, and find the approximate acreage to be 25 acres, more or less. My planimeter reading was 23 acres; however, on small acreage plots it is quite hard to be really accurate. I also planimetered the acreage in the NE 1/4 NW 1/4 of Section 4, which you propose to irrigate. I find this acreage to be 25 acres. I am enclosing a reprint of an aerial photo, with the acreage shaded in so that you can get an accurate picture of the situation. The 25 irrigated acres you wish to change need not be the acreage in the

NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4. You may wish to put this water right on your properties in the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 33. This will be left entirely up to you; however, the water right as it appears now could only be applied to 25 acres, as it appears it is all the land that was ever irrigated by this water right. Your application was for water to irrigate 70 acres; 25 acres on the change would leave a balance of 45 acres of new land to be irrigated. Your present application could be modified to 45 acres; however, we would have to know where this new acreage would lie. You stated on your application that your point of diversion would be the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4. I assume then that your intentions would be to pump water from the road to the acreage in the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 33. Is this correct? Or do you anticipate a portable pump with two points of diversion, one in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4, the other point of diversion in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 33? We need the point of diversion clarified, as we must have the points of diversion accurate on the Authorization of Change and Application for Beneficial Water Use Permit."

The above-quoted portion of Mr. Rehbein's letter of October 9, 1975, was sent by the Department by letter of October 10, 1975, to Mr. Leonard L. Kaufman, with copies to the Applicants, Mr. James L. Murdock, Mr. Earl K. Good, and Mr. Bruce Reimer. Said letter requested Mr. Kaufman to reply within ten (10) days of receipt, if the proposed solution was agreeable with his clients.

A reply to the Department's letter of October 10, 1975, was not received within ten days from Mr. Kaufman; therefore, a reminder letter dated October 23, 1975, was sent by the Department requesting Mr. Kaufman to reply in writing to the letter of October 10 within five days after receipt.

By letter dated November 5, 1975, Mr. Kaufman responded to the Department's letters of October 10 and 23, 1975. The following is a quote of the major portion of Mr. Kaufman's reply:

"We have discussed the proposal as set forth by Mr. Rehbein, and at this time feel that those proposals as set out in Mr. Rehbein's letter of October 10, 1975, that is, the prior appropriation right of Mr. King would be applied to approximately 25 or less acres and the new appropriation right would be limited to not more than 45 acres, is about as reasonable a compromise on the situation that can be reached. I am merely advised that the new appropriation right alleged to be in the vicinity of a 45-acre right will in actuality be somewhat less, and on behalf of the Reimers and Murdocks, et al., would urge that whatever final order is granted be limited to that water necessary for the number of acres which Mr. King plans to irrigate."

Since an acceptable reasonable compromise on this matter had been reached, an oral argument hearing on the exception was not held before the Water Resources Division Administrator; therefore, the Administrator hereby makes the following Final Order, based on the Proposed Order of April 22, 1975, the objections, exception, memorandum, reply memorandum, Mr. Rehbein's field-investigation report, Mr. Kaufman's response, and all pertinent information filed by parties to this matter and made a permanent record of the application.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on April 22, 1975, by the Hearing Examiner, are hereby modified and adopted as the Final Findings of Fact, Conclusions of Law, and Order. The Proposed Order is hereby modified to coincide with the accepted compromise as follows:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 2105-s76LJ, to appropriate 0.5 cubic foot per second or 225 gallons per minute of water and not to exceed 100 acre-feet per annum from Haskell (Second) Creek, a tributary of the Whitefish River in Flathead County, Montana, to be diverted from Haskell (Second) Creek at a point in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4, Township 30 North, Range 21 West, M.P.M., and used for irrigation on 15 acres in the S $\frac{1}{2}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4, Township 30 North, Range 21 West, and 25 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 33, Township 31 North, Range 21 West, and containing a total of 40 acres, more or less, from May 1 to October 30, inclusive, of each year. The water will be diverted by means of a 10-horsepower pump and used in a sprinkler-irrigation system on said acreage.

2. The Provisional Permit is subject to any final determination of prior existing water rights as provided by Montana law.

3. The Provisional Permit is subject to all prior existing water rights in the source of supply, including those of the objectors downstream on Haskell (Second) Creek. In the event that any of the objectors or other existing water-right users have factual proof within a three-year period after the effective date of this Final Order showing that they are being adversely affected, they must inform the Department and the Permittee immediately in writing, by certified mail, of such alleged factual adverse effect, and upon receipt of said notice the Department will, if the Permittee refuses to cease using water in the manner in which he is adversely affecting prior water-right users, conduct a full field investigation of the alleged factual adverse effect, prepare a written report of the findings, and the Administrator of the Water Resources Division, after consideration of all the facts presented, will issue an appropriate order to all concerned

parties, including any modification of the permit and this Final Order, if necessary. The Order, as issued, shall be final in answering the alleged adverse effect and may further condition, modify, or in an extreme case, revoke Provisional Permit No. 2105-s76LJ.

4. The Permittee under his Provisional Permit may not appropriate more than 225 gallons per minute of water and not to exceed 100 acre-feet per annum from Haskell (Second) Creek for irrigation of said 40 acres, from May 1 to October 30, inclusive, of each year. The Permittee shall schedule his periods of pumping so as not to interfere with prior water-right users downstream, and shall cease pumping when it is apparent that he is adversely affecting said downstream prior water-right users on Haskell (Second) Creek.

5. The Provisional Permit is granted subject to the permanent installation and maintenance of an adequate measuring device or flowmeter capable of accurately measuring the amount of water pumped from Haskell (Second) Creek, and the keeping of an accurate log of records of all periods and quantities of water pumped from said creek. The Permittee shall supply said records to the Department upon request.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular situation, and keep records of water used for their own proof and protection of their water rights.

Done this 30<sup>th</sup> day of April, 1975.

  
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Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
NO. 2105-s76LJ, PERCY C. AND  
GLADYS M. KING

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PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing was held on January 29, 1975, at Whitefish, Montana for the purpose of hearing objections to the above-named application. The Applicant, Percy C. King, appeared at the hearing and presented testimony. He was not represented by counsel. James A. Murdock, Orville K. Good, and Bruce D. Reimer all filed timely objections to the application. All were present at the hearing and presented testimony. None were represented by counsel.

PROPOSED FINDINGS OF FACT

1. On April 24, 1974, the Applicant submitted an Application for Beneficial Water Use Permit to the Department seeking to appropriate 0.5 cubic feet per second or 225 gallons per minute of water, and not to exceed 175 acre-feet per annum from Haskell (Second) Creek, a tributary of the Whitefish River in Flathead County, Montana. The water is to be diverted from Haskell (Second Creek) at a point in the NE $\frac{1}{2}$  NE $\frac{1}{2}$  NW $\frac{1}{2}$  of Section 4, T. 30 N., R. 21 W., M.P.M. and used for irrigation on 30 acres in NE $\frac{1}{2}$  of Section 4, T. 30 N., R. 21 W.; and 40 acres in SE $\frac{1}{2}$  of Section 33, T. 31 N., R. 21 W., and containing a total of 70 acres more or less from May 1 to October 30, inclusive of each year. On November 12, 1974, James A. Murdock filed a timely objection to the application. On November 26, 1974, Orville K. Good filed a timely objection to the application. On November 26, 1974, Bruce D. Reimer filed a timely objection to the application. All of the objections were on the

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grounds that there were no unappropriated waters in the source of supply, and that granting the application would cause adverse effects to the prior existing water rights.

2. The Applicant testified that he had no intention of pumping the creek dry. The Applicant testified that he thinks that 175 acre-feet per annum of water is perhaps too large a quantity. The Applicant testified that he understands the water must be allowed to go on down the creek for domestic uses. The Applicant testified that he has never heard of any irrigation down stream from his proposed point of diversion.

3. Objector Mr. Murdock, testified that last summer when the season was very dry, a four inch pump would have dried up the creek. He testified that he uses the water for stockwater.

4. Objector Mr. Reimer, testified that there are times when there is a lots of water in the creek, and that there are times when there is no water in Haskell Creek. Mr. Reimer testified that he has a filed appropriation in the records of the courthouse for 8 miners inches diverted by means of a three foot ditch with a priority date of April 7, 1926. He testified that in the past, he used this water to irrigate, but does not do so presently because he uses the water for stockwater and domestic purposes.

5. Objector Mr. Good, testified that he uses the water for stockwater and garden purposes.

6. Testimony by all parties at the hearing indicated that there are five or six families down stream from Mr. King's proposed point of diversion.

PROPOSED CONCLUSIONS OF LAW

1. There are unappropriated water in Haskell Creek.
2. To protect the prior existing water rights of downstream users it will

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be necessary to condition the permit so that sufficient water flows on down to the domestic uses for at least six families.

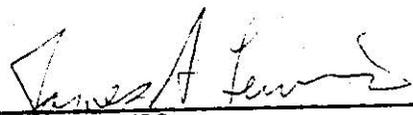
PROPOSED ORDER

That the Applicant's permit be granted subject to:

1. All prior existing water rights.
2. The permit be limited so that at least 60 gallons per minute continues on down the stream during any period of diversion.

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 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 22<sup>nd</sup> day of April, 1975.

  
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JAMES A. LEWIS  
HEARING EXAMINER

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