

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
2632-s41F BY STEPHEN F. MCDONNELL

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ORDER

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice a hearing was held at Three Forks, Montana, on October 8, 1975 for the purpose of hearing objections to the above-named application.

A Proposed Order (Proposal for Decision) on the above application hearing was issued by the Hearing Examiner, Allen Chronister, on November 13, 1975.

A Final Order was issued in this matter on September 14, 1976 by the Administrator of the Water Resources Division, granting a Provisional Permit to the Applicant, with specific conditions.

As provided in paragraph 7 of the Final Order of September 14, 1976, the Administrator hereby makes the following Introductory Facts, Findings of Fact and Conclusions of Law, and Order.

INTRODUCTORY FACTS

1. On August 2, 1978 the Department received a letter dated July 29, 1978 from Mrs. Yolanda Blakely and Mr. Claude Watson with two color pictures enclosed. Said letter states: "We have been seriously shorted our rightful water by McDonnell's continuous usage of Rea Creek water during June, July, 1978 and during May, June, July, August, 1977. We have not been able to irrigate our crops this summer as we have been accustomed to since McDonnells started using the water without sharing it with us. McDonnell refuses to quite pumping to his fields. We would like to have a hearing as soon as possible to bring forth too numerous evidence to mail."

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2. A second letter dated August 22, 1978 as received on August 24, 1978 by the Department from Howard Blakely, alleged that he had, "photos and several witnesses to the shortage of water during May 1977 and June, July, 1978 showing a shortage of water in Rea Creek during this time due to McDonnell's continuous usage and refusal to turn his pump off."

3. On August 24, 1978 the Department received a letter dated August 23, 1978 from Ms. Audrey Henry which stated in part; "I am writing this letter to request that the provisional permit issued to Stephen F. McDonnell issued by the Department in accordance with the decision of the administrator dated September 14, 1976, not become final as of September 14, 1978, for the following reasons:" Ms. Henry stated four specific reasons against finalizing the Provisional Permit.

She states further, "I feel that if the Provisional Permit issued to Stephen F. McDonnell becomes final without the required measuring device in the Burrell Ditch, and without him having acquired a legal right to the appropriated waters in the Burrell Ditch, or a legal right in the ditch, that any objections in the future to interference with my water rights would serve very little purpose. I think every one is aware of the problems involved at this time and that if a further order was made requiring the necessary measuring devices, the distribution of the water could be recognizing the prior rights. I would appreciate your department investigating my complaints and continuing this matter for further investigation after proper measuring devices have been installed."

4. Paragraph 7 of the Final Order of September 14, 1976, provides as follows:

"7. In the event that any of the objectors or other existing water right users have factual proof within a two-year period after the effective date of this order showing that they are being adversely affected as a result of the Permittee's appropriation during the period granted, to the

point that they cannot reasonably exercise their prior water rights under any changed conditions, they must inform the Department and the Permittee in writing setting forth the factual proof by certified mail immediately of such alleged factual adverse effect, and upon receipt of said notice the Department will 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 facts presented will issue an appropriate order to all concerned parties, including any modification of the permit, 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. 2632-s41F."

5. On August 10, 1978, Gregory VanVoast, Water Rights Analyst for the Department's Water Rights Bureau, conducted a field investigation as requested by the aforesaid complaints. A report dated August 21, 1978 was prepared by Mr. VanVoast and is part of the Application file.

Mr. VanVoast's report summary states as follows:

"From what I saw, and from the information I received from both Mr. Reider Kelstrup and Mr. Stephen McDonnell, it is apparent that there is sufficient water in Rea Creek to satisfy Blakelys and other existing water users. There is also sufficient water in the stream to satisfy the Weber water users should they have any water rights out of Rea Creek. This is questionable as no one from Weber Ranch was available to consult, nor was there any mention of their water rights in McDonnell's file. It is further apparent

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that the Blakely-Weber complaint is false and accompanying pictures are a complete fabrication."

6. On August 24, 1978 in response to the Audrey Henry Complaint, Mr. VanVoast and Lyle MacDonald of the Water Rights Bureau, and Mr. Larry Brown, Mr. Homer Peterson and Mr. Ken Crest of the Technical Services Bureau conducted a second field investigation and met with Mr. and Mrs. Blakely, Mr. and Mrs. Henry, James Phillips (an irrigator employed by the Henrys) and Mr. Claude (Rick) Watson of the Weber Ranch. A report dated September 12, 1978 was prepared by Mr. VanVoast and is part of the Application file.

Mr. VanVoast's report summary states as follows:

"I feel we should address ourselves only to the question as to whether Mr. McDonnell has complied with the terms and conditions of the permit. Larry Brown has been given Mr. McDonnell's measuring device data for consideration. If the measurement method is deemed adequate, the file should be closed. Should the method not be adequate, he should be advised that an adequate device must be installed prior to the 1979 irrigation season. If so, he should further be advised by the Department as to what is acceptable as an adequate measuring device. Possibly, he should also be required to submit measurements to the Department at regular intervals. It is apparent that the Blakely objections were filed in bad faith and do not deserve further consideration."

Based on the above Introductory Facts, following Findings of Fact and Conclusions of Law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Under the provisions of paragraph 7 of the Final Order of September 14, 1976, the Department must conduct a full field investigation of the alleged factual adverse effect, prepare a written report of the field investigation and provide it

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to the Administrator, and the Administrator must prepare and issue an Order answering the alleged adverse effect.

2. The Department caused to be conducted two field investigations in the Rea Creek area on August 10 and August 24, 1978, as required by Paragraph No. 7 of the Final Order and written field investigation reports of the findings were submitted to the Administrator.

3. The field investigation reports state that no evidence of adverse water use by Mr. McDonnell could be found and that it is apparent that there is sufficient water in Rea Creek to satisfy existing water right users.

4. Applicants Exhibit No. 1 shows that he does have through purchase a legal right to convey 1,300 gallons per minute of water through the Burrell Ditch.

5. It is the finding of the field investigations and discussions with Mr. McDonnell and the Bozeman A.S.C.S. that Mr. McDonnell does have a measuring device, which is an existing concrete culvert under a road which is three feet by four feet wide, by 24 feet long. The Department Hydrologist states in his report that, "if the culvert has been properly surveyed for slope and a staff gage or calibrated rule is utilized to measure water levels then the facility may produce valid cross sectional measurements."

6. The Department must determine if the measuring device being used is adequate or suitable to be in compliance with the conditions of the Final Order and Provisional Permit in order that accurate measurements can be taken and recorded to show what is being diverted through the Burrell Ditch, as well as, to protect prior existing water rights.

7. The Permittee's Provisional Permit is subject to all prior water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

8. Pursuant to the Final Order of September 14, 1976 the Administrator of the Water Resources Division, after consideration of all facts presented, will issue an appropriate order to all concerned parties, including any modification of the permit and Final Order, if necessary.

9. Pursuant to the Final Order of September 14, 1976, this 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. 2632-s41F.

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

ORDER

1. The Final Order of September 14, 1976, with the conditions contained therein to the granting of the Provisional Permit to the Permittee, stands as issued, except said permit is further conditioned as follows:

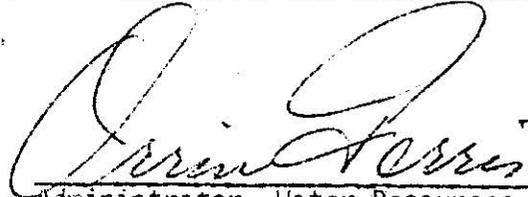
- A. The Permittee shall submit plans and specifications for a suitable measuring device that must be installed and maintained to measure the flow of water from the Burrell Ditch into Rae Creek, (an existing structure or facility could possibly be utilized) to the Department for approval prior to the beginning of the 1979 irrigation season. Said suitable measuring device shall be in an operating order prior to the appropriation of water for the 1979 irrigation season.
- B. The Permittee shall maintain any approved measuring device to reasonably control its accuracy, and keep a periodic measured log record of the flow of water passing through the measuring device noted in condition "A" above.
- C. At the Permittee's diversion pump site an adequate measuring device or flow meter shall be installed and maintained to enable the Permittee to keep a record of all quantities of water

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diverted and used, as well as, the periods of such diversion and use. A permanent log record shall be kept showing the above data. Such records shall be presented by the Permittee to the Department upon demand by the Department.

- D. This Order shall be final in answering the alleged adverse effect, and the above conditions, including the Final Order and Provisional Permit conditions shall hold in full effect for any successor in interest of the Permittee herein named.

Done this 15th day of December, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINDINGS OF FACT, CONCLUSIONS OF
2632-s41F BY STEPHEN F. McDONNELL) LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedure Act, after due notice a hearing was held on October 8, 1975, at Three Forks, Montana, for the purpose of hearing objections to the above-named application.

The Applicant, Stephen F. McDonnell, was represented by John Scully, Esq., of Bozeman. H. A. Bolinger, Esq., of Bozeman, represented the Objectors Yolanda Blakely, Theodore Shannon, Merton C. Mysse, and Audrey K. Mysse.

A Proposed Order (Proposal for Decision) on the above hearing was issued by the Hearing Examiner, Allen Chronister, on November 13, 1975.

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 argument before the Administrator.

On November 28, 1975, the Department received an Exception (Objections to Proposed Findings of Fact and Conclusions of Law) dated November 25, 1975, filed by H. A. Bolinger on behalf of his clients and the objectors, Yolanda Blakely, Theodore Shannon, Merton C. Mysse, and Audrey K. Mysse, in opposition to the Hearing Examiner's Proposed Order of November 13, 1975, in the matter of Application No. 2632-s41F by Stephen F. McDonnell.

On January 15, 1976, the Department received Mr. Bolinger's Brief supporting his Exception filed on behalf of his clients in opposition to the Proposed Order.

On January 28, 1976, the Department received a letter from Mr. Bolinger requesting an oral argument hearing before the Water Resources Division Administrator to support their objections, exception, and brief.

On February 4, 1976, the Department received a Reply Brief (Brief in Opposition to Objections filed by Yolanda Blakely, et al.) dated February 4, 1976, as filed by John P. Scully on behalf of his client, the Applicant, Stephen F. McDonnell.

The Department by its letter of February 5, 1976, to Mr. Bolinger, with copies to Mr. Scully and Mr. McDonnell, stated that since oral argument

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had been requested, this matter would be forwarded to the Administrator of the Water Resources Division for scheduling of a hearing, and further, that all parties would be notified by certified mail when the hearing date, time, and place have been selected.

The Administrator of the Water Resources Division issued on March 2, 1976, a Notice of Hearing on Exceptions in the Matter of Application for Beneficial Water Use Permit No. 2632-s41F by Stephen F. McDonnell, stating that on Wednesday, March 31, 1976, at 10 a.m., a hearing would be held before the Administrator in Room 211 or the Conference Room as the situation may require, of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing was to hear oral arguments in support of the written briefs. If certain parties did not wish to make oral argument, they were requested to so advise in writing before the hearing of their wish to waive this right. In such case, the briefs would stand as filed. This Notice of Hearing on Exceptions was mailed by certified mail to all parties in this matter, including the original objectors and their attorneys.

The oral argument hearing was held in Helena, Montana, on March 31, 1976, in the Department Conference Room for the purpose of hearing oral arguments in support of the objections, exception, and briefs.

Stephen McDonnell and his attorney, Mr. Scully, appeared at the hearing and presented testimony in support of the Application and Reply Brief as filed.

Objector Blakely appeared at the hearing and was represented by Mr. Bolinger, and presented testimony in support of their objections, exception, and brief as filed.

The hearing was also attended by three Department personnel, other than the Water Resources Division Administrator.

The Administrator of the Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposed Order of November 13, 1975, the objections, exceptions, briefs, the testimony of the oral argument hearing held on March 31, 1976, and all pertinent information and documents filed by parties to this matter, and made a permanent record of the Application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on November 13, 1975, 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.

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 2632-s41F. to appropriate when available and not needed to satisfy prior water rights downstream in the Madison River 2.89 cubic feet per second of water or 1,300 gallons per minute, not to exceed 630 acre-feet per annum, from the Madison River, a tributary of the Missouri River, in Gallatin County, Montana, to be diverted from the Madison River at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, Township 1 South, Range 2 East, M.P.M., dropped into the Madison Dike and Drain Ditch, then into the Burrell Ditch, thence dropped into Rae Creek, and rediverted by means of a pump from the East Branch of Rae Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 2 North, Range 2 East, M.P.M., and used for sprinkler irrigation on 110 acres in Section 3, Township 1 North, Range 2 East, and 100 acres in Section 34, Township 2 North, Range 2 East, M.P.M., containing a total of 210 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit does not grant the Permittee the right to any natural drainage waters from Rae Creek, only those waters applied for and granted to be appropriated from the Madison River. Rae Creek for purposes of this permit can only be used by the Permittee as a carrier of the appropriated Madison River water.

3. The Provisional Permit as granted is subject to all prior water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

4. The Permittee must not alter the headgate or ditch of the Madison River Dike Ditch.

5. The Permittee must secure, if he has not already done so, adequate legal rights to the use of the Burrell Ditch and other routes of necessary water conveyance.

6. The Permittee can only divert water from the Madison River Dike Ditch into the Burrell Ditch when there is sufficient water in the Madison River Dike Ditch to satisfy prior rights. A suitable measuring device must be installed and maintained to measure the flow of water from the Burrell Ditch into Rae Creek, and further, that the Permittee never pump from Rae Creek more water than which flows in from the Burrell Ditch without adversely affecting the prior water rights and ditch rights to the Burrell Ditch and the prior water rights to Rae Creek.

7. In the event that any of the objectors or other existing water-right users have factual proof within a two-year period after the effective date of

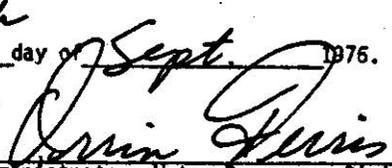
this order showing that they are being adversely affected as a result of the Permittee's appropriation during the period granted, to the point that they cannot reasonably exercise their prior water rights under any changed conditions, they must inform the Department and the Permittee in writing setting forth the factual proof by certified mail immediately of such alleged factual adverse effect, and upon receipt of said notice the Department will 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 facts presented will issue an appropriate order to all concerned parties, including any modification of the permit, 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. 2632-s41F.

8. The issuance 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.

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 or proof of their water rights.

Done this 14th day of Sept. 1976.


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

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BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 2632-s41F BY STEPHEN F.)
McDONNELL)

Pursuant to the Montana Water Use and Administrative Procedure Acts a hearing upon this application and objections to it was held at Three Forks, Montana, on October 8, 1975. The Applicant was represented by John Scully, Esq., of Bozeman. H.A. Bollinger, Esq., of Bozeman represented the Objectors Yolanda Blakely, Theodore Shannon, Merton C. Mysse and Audrey K. Mysse.

MEMORANDUM

The project represented by this application has been installed and was in operation during the 1974 and 1975 irrigation seasons. According to the Applicant's testimony, he planned the system in the fall of 1972 in cooperation with the Soil Conservation Service, and it was not until sometime in 1973 that he learned of the necessity for securing a permit to appropriate water. Nevertheless, water was appropriated through the system for irrigation during the 1974 and 1975 seasons.

The Applicant's project is basically an appropriation of

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water from the Madison River through a system of ditches and a natural watercourse. The diversion begins with the existing Madison Dike and Drain Ditch which diverts water from the east side of the Madison River in the SW 1/4 SW 1/4 SW 1/4, S. 8, T. 1 S., R. 2 E. in Gallatin County. This Dike Ditch was constructed in the late 1940's by the U.S. Army Corps of Engineers. The Dike Ditch headgate is generally completely opened in the spring and closed in the fall, and catches whatever water flows into it from the Madison River in the meantime. Thus the level of water in the River determines the amount of water flowing in the Dike Ditch. In most years there is apparently more river water flowing through the Dike Ditch than is appropriated from the river through that ditch.

The Dike Ditch flows north parallel to the river, and in S. 9, T. 1 N., R. 2 E. the Burrell Ditch taps water from the Dike Ditch and runs in a north-easterly direction until it empties into Rea Creek in Section 4. The Burrell Ditch was evidently unused for a number of years, but was cleaned and enlarged to its original capacity of 1600 miners inches about one year ago.

Rea Creek flows generally north, and in Section 33, T. 2 N., R. 3 E. The Applicant's pump station diverts water from the creek to sprinkler irrigate about 210 acres on a bench east of the creek in Sections 3, T. 1 N., R. 2 E. and 34, T. 2 N., R. 2 E.

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The Applicant thus transports Madison River water to his point of diversion and pumps out of Rae Creek at the rate of 1300 gallons per minute, up to 630 acre-feet per year.

As noted above, the Dike Ditch was constructed by the Corps of Engineers, which evidently still generally oversees its management. The right to convey water through the Dike Ditch, or more correctly to use unappropriated river waters already flowing in the ditch, depends solely upon water supply and not upon ownership of rights in the ditch. The daily management of the Dike Ditch is supervised by three local commissioners who are concerned with the operating condition of the ditch, but not with the actual water use from the ditch. Thus the Applicant can appropriate river water flowing in the Dike Ditch without entering any formal agreements as long as his use does not entail enlargement of the Dike Ditch or the headgate on the river, or pushing more river water down the ditch. Mr. Darlington, one of the commissioners, feels that more water currently flows down the Dike Ditch than is necessary to satisfy existing rights appropriated through the ditch. This, of course, may not be true in extremely dry years when little river water flows into the Dike Ditch. (The river is not the only source of water for the ditch, however, and up to one-half its flow comes from seepage and inflows from other streams.)

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The Burrell Ditch, which takes water out of the Dike Ditch, is under private ownership. It was evidently constructed in the early part of this century by six or seven owners, each of whom owned an equal proportional share of the ditch. The Burrell Ditch lay unused for a number of years until there was recently interest in using the ditch among some of the successors to the property of the original owners. The ditch was cleaned and enlarged to its original capacity, and each of the successor property owners was assessed a proportional share of the cost. The Mysse, Objectors in this proceeding, have refused to pay their assessment until there is some formal agreement reached as to the present ownership and rights in the Burrell Ditch.

The Applicant approached the successor owners of the Burrell Ditch with his desire to obtain the right to run water through it. Evidently negotiations to purchase the Mysse share of the ditch fell through, and the Applicant secured an agreement from the remaining owners to purchase "a ditch right in the Burrell Ditch" to convey 1300 gallons per minute or 112 miners inches. The total cost to the Applicant was \$1425.65, which he has paid.

At/hearing the Applicant offered into evidence a letter to himself from those owners agreeing to sell him a ditch right in the Burrell Ditch. This was objected to because of improper foundation, and because it was incompetent to convey real pro-

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property interest in a ditch. The objection will be overruled. Both the Applicant and Dr. Rea, Secretary of the Burrell Ditch Company, testified that it contained the agreement between the Applicant and the agreeing owners. Whether it is competent to accomplish the purported transfer is irrelevant.

Essentially, what is involved here is a dispute over the ownership rights in the Burrell Ditch. The Applicant and all the owners except the Mysse's claim that the Applicant has acquired a right in the ditch. The Mysse's have not consented to this and claim the Applicant has no such right. While this dispute might be crucial to the success of the Applicant's project, it is not a dispute which the Department can resolve. The Department has no jurisdiction or power to determine the relative real property rights of various parties.

It was evident from the hearing that there was sufficient capacity in the Burrell Ditch to carry the Applicant's water. The Mysse's never contended that the Applicant's project would interfere with any uses they have planned for the Burrell Ditch. Thus, if the Applicant either has, or can obtain, the right to use the Burrell Ditch, everyone connected with it has either consented or will not be harmed. The responsibility, therefore, is upon the Applicant to insure himself that he has sufficient legal basis to use the Burrell Ditch. If anyone believes that he does not, the court is the appropriate forum for raising that question.

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The following persons appeared as Objectors at the hearing:

1. Mr. Gordon Darlington is one of the commissioners of the Madison River Dike and Drainage District, and is thus responsible for management of the Dike Ditch. The commissioners, upon recommendation of the Corps of Engineers, feel that the permit should be modified so that the period of water use be from May 15 until October 1, so that the existing headgate not be modified, and so that no actions be taken to increase the flow down the Dike Ditch. The Applicant agreed at hearing to comply with these conditions.

2. Audrey Mysse appeared for herself and Merton Mysse. The Mysses own one place of 479 acres irrigated from the Dike Ditch at a point below the Burrell Ditch, and another place irrigated from Rae Creek at a point below the Applicant's point of diversion on that stream. The Mysses also claim a one-third interest in the Burrell Ditch and object to the Applicant's claim of any right to run water through that ditch.

Mrs. Mysse testified that they had experienced years of short water supply in both of their sources of water. Particularly, she testified that there was a noticeable lowering of Rae Creek in 1974 while the Applicant was pumping water.

3. Howard Blakely represented the objection filed in the name of Yolanda Blakely and Theodore Shannon. He is currently farming the Shannon place, which is being purchased

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by his wife Yolanda. Last season, his first year farming the place, he irrigated 30 acres of corn from the east Branch of Rae Creek under a claimed appropriation of 100 miners inches.

Mr. Blakely testified that his corn crops require a precise application as to time and amount of water. In the summer of 1975 he testified that there was a shortage of water in the creek where the Applicant was pumping and a surplus when he was not.

PROPOSED FINDINGS OF FACT

1. The Applicant's project involves the appropriation of water from the Madison River, into the Madison Dike Ditch, then through the Burrell Ditch into Rae Creek to the point of diversion. The Applicant's 200 horsepower pump on Rae Creek has the capacity to pump 1300 gallons per minute, and the Applicant desires to appropriate up to 630 acre-feet of water per year to sprinkler irrigate approximately 210 acres. This system was in use during the irrigation seasons of 1974 and 1975.

2. There is a fixed quantity of water which flows from the Madison River into the Dike Ditch each irrigation season, beginning with the opening of the headgates in the spring. They are opened and the flow through the Dike Ditch is not regulated in any way during the summer. In most years more water flows from the river into the Dike Ditch than is necessary to satisfy the rights of those persons appropriating water through the Ditch. The Dike Ditch is essentially a public ditch, constructed

by the Corps of Engineers and maintained by three local commissioners.

3. The Burrell Ditch, transporting water from the Dike Ditch to Rae Creek, is a private ditch which was constructed in the early part of this century. It was unused for many years until about 1974 when it was cleaned and rehabilitated to its original carrying capacity of 1600 miners inches. This work was paid for by the Applicant and most of the successors to the original owners of the ditch, except for the Myssees. The Applicant claims to have purchased the right to carry 112 miners inches (or 1300 gallons per minute) through the Burrell Ditch. The Myssees dispute this claim.

4. The Burrell Ditch has sufficient capacity to transport the Applicant's appropriation.

5. Rae Creek is a relatively small natural stream into which river water is dumped from the Burrell Ditch. The highest flow in the creek occurs in the fall. The Applicant measured the flow in the creek just at its forks in October, 1975, and found it to be 3350 miners inches. The Burrell Ditch was contributing 628 miners inches.

6. The Mysse's claim the prior right to 250 miners inches of irrigation water from the Dike Ditch and the natural flow of Rae Creek.

7. The Elakely's claim the prior right to 100 miners inches of irrigation water from the natural flow of Rae Creek.

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PROPOSED CONCLUSIONS OF LAW

1. There are unappropriated waters in the Madison River.
2. There are unappropriated waters from the Madison River flowing into the Madison Dike Ditch which are, in most years, surplus to the needs of those persons appropriating water from the ditch.
3. There are persons appropriating water from the Dike Ditch and Rae Creek with prior existing rights.
4. The Objectors' prior rights can be adequately protected by properly conditioning the Applicant's permit.

PROPOSED ORDER

The application of Stephen McDonnell should be granted as filed subject to the following conditions:

1. That the Applicant not alter the headgate or ditch of the Madison River Dike Ditch.
2. That the Applicant secure, if he has not already done so, adequate legal rights to the use of the Burrell Ditch.
3. That a suitable device be installed to measure the flow of water from the Burrell Ditch into Rae Creek, and that the Applicant never pumped from Rae Creek more water than flows in from the Burrell Ditch.
4. That the Applicant divert water from the Dike Ditch into the Burrell Ditch only when there will be sufficient waters left in the Dike Ditch to satisfy prior rights.

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NOTICE

This is a Proposed Order and will become final when accepted by the Administrator, Department of Natural Resources and Conservation Water Division. Written exceptions to this Proposed Order shall be filed with the Department within ten (10) days of receipt of same. Upon receipt of any written exceptions by the Department, opportunity will be provided to file briefs and to make oral arguments before the Administrator, Water Resources Division.

DATED this 13th day of November, 1975.


ALLEN B. CHRONISTER
HEARING EXAMINER

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