

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 6498-s40K BY ARCHIE DUNBAR)
FINDINGS OF FACT, CONCLUSIONS OF)
LAW, AND ORDER)
APR 7 1990

Pursuant to the Montana Water Use Act and Montana Administrative Procedure Act, after due notice a hearing on objections to the above-described application was held in Phillips County, Courtthouse, Malta, Montana, at approximately 1:15 p.m., on Wednesday, June 30, 1976, Daniel G. Diemert, Hearing Examiner, presiding.

Richard Dunbar appeared on behalf of his father, the Applicant. He was represented by Donald Cole, an attorney from Malta.

Objections were received by the Department from the Office of the Solicitor and the Bureau of Land Management of the U.S. Department of the Interior. The Office of the Solicitor was not represented at the hearing. Jack Jones and Don Ryan, area manager of the Phillips Resource Area, attended the hearing on behalf of the Bureau of Land Management.

Howard Reinhardt attended the hearing on behalf of the Department of Natural Resources and Conservation.

A Proposed Order (Proposal for Decision) dated August 24, 1976, was issued by the Hearing Examiner, Daniel G. Diemert.

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 September 9, 1976, the Department received a letter of Exception from Tom Gai, attorney for the Field Solicitor's Office of the U.S. Department of the Interior, Billings, Montana, opposing the Proposal for Decision entered on August 24, 1976, by the Hearing Examiner in the matter of Application No. 6498-s40K by Archie Dunbar to appropriate certain waters from Whitewater Lake for irrigation purposes. Copies of said letter of Exception were sent by Mr. Gai to the Bureau of Land Management district manager in Lewistown, the BLM area manager in the Phillips County Resource Area, Mike Whittington of the BLM, and Archie Dunbar, the Applicant, of Whitewater, Montana.

The letter of Exception states as follows:

"Exception is being filed on behalf of the BLM to your Proposal for

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Decision regarding Beneficial Water Use Permit No. 6498-s40K, by Archie Dunbar. We request a reopening of the hearing for the specific purpose of submitting minimum water-surface evaluations at which Whitewater Lake must be maintained through the summer months, in order to assure sufficient and suitable habitat for goose reproduction (ref: para. 5, Proposed Findings of Fact). A brief period of time will be required for fieldwork necessary to establish these evaluations. Your office will be notified immediately upon completion of field work. I appreciate your consideration in this matter."

The Hearing Examiner discussed with Mr. Gai by telephone the letter of Exception, and it was agreed that the Bureau of Land Management could submit its evaluations and if accepted by the Applicant, the BLM would withdraw its Exception and the Final Order could be issued accordingly, thereby eliminating any possible need for an oral argument hearing on the Exception and possible briefs.

The BLM did not submit its evaluations in October or November of 1976; however, during a hearing on another matter held in Helena during December 1976, Mr. Gai was approached on the matter of the Exception and evaluations to be submitted. Mr. Gai stated he would look into the matter and submit the evaluations as soon as they could be compiled.

The Department by letter of January 12, 1977, to Mr. Gai, and copies to Messrs. Archie B. and Richard Dunbar, Messrs. Floyd L. Blank, Jack Jones, and Don Ryan, and Mr. Donald Cole, requested that said evaluations be submitted to the Department by January 28, 1977, so that the Final Order could be completed.

On January 27, 1977, the Department received a letter and attached "Agreement," both dated January 26, 1977, from Charles S. Dahlen, area manager for the BLM at Malta, Montana. The "Agreement" dated January 26, 1977, was signed by Richard Dunbar and Charles S. Dahlen.

By letter of January 28, 1977, the Department informed Mr. Dahlen, with copies to Tom Gai, Richard Dunbar, and Donald Cole, that since an agreement had been reached by the parties in this matter, the need would no longer exist for the filing of briefs and reply briefs and an oral argument hearing on the BLM's exception of September 8, 1976, as filed by Tom Gai for the Field Solicitor in Billings. Mr. Dahlen was further advised that the Administrator of the Water Resources Division would proceed to prepare and issue a Final Order for Application No. 6498-s40K with the Agreement incorporated therein.

The Administrator of the Water Resources Division hereby makes the following Final Order, based on the Proposed Order (Proposal for Decision)

issued by the Hearing Examiner on August 24, 1976, the objections, letter of exception, the signed "Agreement" of January 26, 1977, and all pertinent information filed by all 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 of Application No. 6498-s40K by Archie Dunbar, as entered on August 24, 1976, 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 coincide with the "Agreement" of January 26, 1977, as follows:

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 6498-s40K is hereby granted allowing the appropriation of 2.22 cubic feet per second of water or 1,000 gallons per minute and not to exceed 250 acre-feet of water per annum from Whitewater Lake, a tributary of the East Fork Whitewater Creek, in Phillips County, Montana, to be released from said lake at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, and impounded in a 250-acre-foot existing reservoir located at a point on said creek in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, all in Township 35 North, Range 31 East, M.P.M., pumped from said existing reservoir and used for supplemental irrigation on 25 acres in the SE $\frac{1}{4}$ of Section 13, Township 35 North, Range 31 East, 80 acres in the SW $\frac{1}{4}$ of Section 18, and 30 acres in the NW $\frac{1}{4}$ of Section 19, both in Township 35 North, Range 32 East, containing a total of 135 acres, more or less, from April 15 to August 30, inclusive, of each year.

2. This Provisional Permit is granted subject to all prior water rights in the source of supply, including, but not limited to, those of the Bureau of Land Management of the U.S. Department of the Interior and the prior Indian (Assiniboine and Sioux Indians of the Fort Peck Reservation) reserved water rights.

3. In the completion of the proposed water-release structure from Whitewater Lake, the Applicant shall assume all the costs necessary in installing the water-release device (8-inch pipe) and any costs not contemplated by the Bureau of Land Management which would be necessary to protect the purposes of goose production and wildlife habitat.

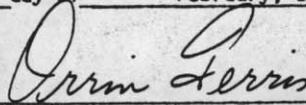
4. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise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

6. The "Agreement" of January 26, 1977, as agreed upon and signed by Richard Dunbar and Charles S. Dahlen is hereby attached to this Final Order and made a part of hereof.

Recommendation

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

Done this 28th day of February, 1977.



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 OF THE
STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 6498-s40K, BY ARCHIE DUNBAR) -----

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the Phillips County Courthouse, Malta, Montana, at approximately 1:15 p.m. on Wednesday, June 30, 1976, Daniel G. Diemert, Hearing Examiner, presiding.

Richard Dunbar appeared on behalf of his father, the Applicant. He was represented by Mr. Donald Cole, an attorney from Malta.

Objections were received by the Department from the Office of the Solicitor and the Bureau of Land Management of the United States Department of Interior. The Office of the Solicitor was not represented at the hearing. Jack Jones and Don Ryan, area manager of the Phillips Resource Area, attended the hearing on behalf of the Bureau of Land Management.

Mr. Howard Reinhardt attended the hearing on behalf of the Department of Natural Resources and Conservation.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions

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of Law, and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation:

PROPOSED FINDINGS OF FACT

1. On September 22, 1975, the Department received an Application for Beneficial Water Use Permit No. 6498-s40K from Mr. Archie Dunbar who sought to appropriate 1,000 gallons of water per minute not to exceed 250 acre-feet per annum for supplemental irrigation on a total of 135 acres located in Sections 18 and 19 in Township 35 North, Range 32 East and Section 13 in Township 35 North, Range 31 East of the M.P.M. in Phillips County, Montana from April 15 to August 30, inclusive, of each year. The application requested a point of diversion in the SE1/4 SE1/4 of Section 2, Township 35 North, Range 31 East from Whitewater Lake into East Fork of Whitewater Creek and stored in a reservoir in the NE1/4 NW1/4 of Section 24, Township 35 North, Range 31 East. The diversion from the lake is to be accomplished through an 8 inch pipe. The place of use is now irrigated early in the spring with runoff water by means of ditches that now exist and the proposed diversion will facilitate irrigation of this land later on in the summer.

2. The Department received objections from the Bureau of Land Management of the United States Department of Interior on April 1, 1976 and from the Office of the Solicitor on March 23, 1976. The Office of the Solicitor did not attend the hearing but in its objection requested that the Department

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include a provision subordinating any Provisional Permit to all prior Indian reserved water rights in the source of supply and such provision was agreed to by Department personnel.

3. The Whitewater Dam (Chris Abelman Dam) was constructed by the Federal Government for wildlife habitat and Canadian geese production. The reservoir is a series of three ponds located in Sections 2 and 11 of Township 35 North, Range 31 East and Sections 25, 26, 35, and 36 in Township 36 North, Range 31 East. The three ponds are separated by a series of dikes with pond No. 1 the largest and northern most being the main area of goose production. Pond No. 3, the southern most, fills first, then water flows into pond No. 2 through dike No. 4 and from pond No. 2 over dike No. 1 into pond No. 1. There was a headgate installed at the dam originally but has become inoperative and would not be adequate for purposes of the proposed diversion. The north unit (pond No. 1) covers about 680 acres and has a maximum capacity of 1,904 acre-feet. The south unit (ponds No. 2 and 3) cover about 240 acres and have a maximum capacity of 1,152 acre-feet. Because of the shallowness of the reservoir, BLM estimates that they have an evaporation loss of about 2,080 acre-feet per year for the entire reservoir. When the reservoir is lowered 3 feet the surface area is reduced by about 50%. When both units are filled water could be appropriated out of the south unit without affecting the depth of the north unit.

4. Mr. Richard Dunbar, on behalf of his father,

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testified that the installation of the 8 inch pipe could be completed without any alteration of the dam itself. They intend to release water through this 8 inch pipe into the East Fork of Whitewater Creek and recapture it in a reservoir owned by the United States Government in Section 24 of Township 35 North, Range 31 East. The water will be pumped from that existing reservoir on to the lands to be irrigated. He does not feel that BLM would be adversely affected because there is usually more water in Whitewater Reservoir than they have applied for or need and secondly, that a diversion of 250 acre-feet would only lower the water level of the southern unit approximately 1 foot.

5. Because of the high rate of evaporation in Whitewater Lake a diversion of 250 acre-feet during the time that the Applicant wishes to use it would not necessarily mean a loss of 250 acre-feet to the Bureau of Land Management. Through past experience the personnel in charge of the Whitewater Lake project know at what level the lake must be maintained through the summer months in order to assure sufficient retention water for goose production the following spring (early April - mid May). From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Whitewater Lake.

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2. There are at times unappropriated waters in the source of supply available for appropriation by the Applicant for the purpose requested herein. Those times at which there is water available are determined by the level of water in Whitewater Lake which will assure sufficient retention for goose production for the following spring.

3. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.

4. The rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

5. All prior Indian (Assiniboine and Sioux Indians of the Fort Peck Reservation) reserved water rights in the source of supply must be protected.

6. The proposed means of diversion and storage are adequate, provided that the diversion from the reservoir in Section 24 will not adversely affect the fish in that reservoir.

7. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the appropriation, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

9. The proposed use of water constitutes a beneficial use.

10. The proposed use will not interfere unreasonably

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with other planned uses or developments for which a permit has been issued or for which water has been reserved.

11. The Application for Beneficial Water Use Permit No. 6498-s40K should be granted in accordance with provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

12. Nothing decided herein has bearing on the status of water rights claimed by the Applicants other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

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

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 6498-s40K is hereby granted allowing the appropriation of 2.22 cubic feet of water per second or 1,000 gallons of water per minute not to exceed 250 acre-feet of water per annum from Whitewater Lake, a tributary of the the East Fork Whitewater Creek, in Phillips County, Montana, to be released from said lake at a point in the SE1/4 SE1/4 of Section 2, and impounded in a 250 acre-foot existing reservoir located at a point on said creek in the NE1/4 NW1/4 of Section 24, all in Township 35 North, Range 31 East M.P.M., pumped from said existing reservoir and used for supplemental irrigation on 25 acres in the SE1/4 of

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Section 13, Township 35 North, Range 31 East, 80 acres in the SW1/4 of Section 18 and 30 acres in the NW1/4 of Section 19 both in Township 35 North, Range 32 East, containing a total of 135 acres, more or less, from April 15 to August 30, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply, including but not limited to those of the Bureau of Land Management of the United States Department of Interior and the prior Indian (Assiniboine and Sioux Indians of the Fort Peck Reservation) reserved water rights.

3. In the completion of the proposed water release structure from Whitewater Lake the Applicant shall assume all the costs necessary in installing the water release device (8 inch pipe) and any costs not contemplated by the Bureau of Land Management which would be necessary to protect the purposes of goose production and wildlife habitat.

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

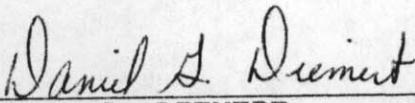
5. This Provisional Permit is granted subject to any final determination of prior existing water rights in the

source of supply as provided for by Montana law.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 24th day of August, 1976.



DANIEL G. DIEMERT
HEARING EXAMINER

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