

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO. 6939-s41J BY HELEN BAIR

FILED
APR 9 1976

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on August 23, 1976, by the Hearing Examiner, and the attached Decision dated July 7, 1976, and Memorandum Upholding the Validity of the Objections of the Montana Fish and Game Department Objections dated July 7, 1976, also entered in this matter by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, Helen Bair's Provisional Permit No. 6939-s41J is hereby granted allowing the appropriation of 3.8 cubic feet per second or 1,706 gallons per minute of water and not to exceed 150 acre-feet of water per annum from the Smith River, a tributary of the Missouri River, in Meagher County, to be diverted from the Smith River at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, Township 10 North, Range 5 East, M.P.M., and used for supplemental irrigation on 30 acres in Section 9 and 20 acres in Section 15, all in Township 10 North, Range 5 East, from April 1 to October 15, inclusive, of each year.
2. The Provisional Permit is granted subject to all prior water rights in the source of supply, and subject to any final determination of prior existing water rights in the source of supply as provided by Montana law.
3. In the event that the rights of the Montana Fish and Game Commission on the Smith River are quantified at a later time, the Provisional Permit shall be accordingly amended and modified to protect the prior rights of the Montana Fish and Game Commission.
4. The issuing of the Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of her Provisional Permit.

APR 11 1976

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 rights and protection.

Done this 30th day of September, 1976.

Orvin Ferris
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 APPLICATIONS)
FOR BENEFICIAL WATER USE PERMIT)
NOS. 6453-s41J BY WILLIAM P.)
LONEY AND 6939-s41J BY HELEN BAIR) PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-named applications was held on Thursday, May 13, 1976, in the courtroom of the Meagher County Courthouse at White Sulphur Springs, Montana, Gary L. Spaeth, Hearing Examiner, presiding.

The hearings of the above applications were consolidated as well as the Application for Beneficial Water Use Permit No. 1351-s41J by Nancy M. Berg. For purposes of this proposal, the above applications were combined and the application by Nancy M. Berg will be written separately.

Mr. William Loney, appeared and presented testimony on behalf of his application as well as the application of Helen Bair. Helen Bair was not present. Both Applicants were represented by John V. Potter, Jr. of White Sulphur Springs, Montana.

The Objector, Montana Department of Fish and Game, was represented by Counsel, W. F. Wright, and testimony and evidence was presented by Mr. Liter Spence and Al Wickerman.

Mr. T. J. Reynolds appeared on behalf of the Department

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of Natural Resources and Conservation.

MOTIONS

At the outset of the hearing the Applicants, through counsel, submitted a memorandum opposing Fish and Game Department's objections. The Applicants maintained that:

1. The objection of the Fish and Game Department was in excess of the authority granted it by the legislature in Section 89-801, R.C.M. 1947;
2. That the objection is based upon a claim in excess of the filed appropriation of the Fish and Game Department; and
3. That the objection is further based on a claim solely for recreational use when in fact the Fish and Game Commission has no existing right for such use.

Opportunity was given to the Fish and Game Department to submit briefs on the question and a ruling was made by the Hearing Examiner which is attached and included herein by reference.

The Montana Fish and Game Department raised the question as to whether the Hearing Office must accept an existing right in the amount stated on a properly filed appropriation, or whether that officer may request evidence upon the quantification of that right. Again the parties were given the opportunity to brief the question and the decision was written by the Hearing Examiner which is attached and included herein by reference.

As required by law the Hearing Examiner hereby makes the following Findings of Fact, Proposed Conclusions of Law, and Proposed Order to the Administrator of the Water Resources

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Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On July 17, 1974, the Applicant, Mr. William P. Loney, filed Application No. 6453-s41J with the Department of Natural Resources and Conservation seeking to appropriate 3.8 cubic feet per second or 1,706 gallons per minute of water and not to exceed 412 acre-feet per annum from the Smith River, a tributary of the Missouri River, in Meagher County, to be diverted from the Smith River at a point in the NE1/4 NE1/4 SW1/4 of Section 22, Township 10 North, Range 5 East, Montana Principal Meridian, and used for supplemental irrigation on 160 acres in Section 15 and 169 acres in Section 22, all in Township 10 North, Range 5 East, Montana Principal Meridian, and containing a total of 329 acres, more or less, from May 1 to September 20, inclusive, of each year.

2. On November 24, 1975, the Applicant, Helen Bair, filed Application No. 6939-s41J with the Department of Natural Resources and Conservation seeking to appropriate 3.8 cubic feet per second or 1,706 gallons per minute of water and not to exceed 150 acre-feet per annum from the Smith River, a tributary of the Missouri River, in Meagher County, to be diverted from the Smith River at a point in the NE1/4 NE1/4 SW1/4 of Section 22, Township 10 North, Range 5 East, Montana Principal Meridian, and used for supplemental irrigation on 30 acres in Section 9 and 20 acres in Section 15 all in Township 10 North, Range 5 East,

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Montana Principal Meridian, from April 1 to October 15, inclusive, of each year.

3. Mr. Loney has in the past years rented the Helen Bair property and also has subleased the section of state land from her. The state land and the Helen Bair property are both contiguous to the Loney property. The land in question has in the past been irrigated with a diversion from Thompson Creek which is also a tributary of the Smith River. The Thompson Creek water is a gravity flow diversion system and the lands in question are flood irrigated from the ditch.

4. Mr. Loney has already installed an electric pump with a 1700 gallon per minute or 3.8 cfs capability. The water is transported from the pump to the ditch in question by use of a 10 inch transit pipe buried three feet under ground.

5. The water from the Smith River will be used to supplement those of Thompson Creek. There will be years when there will be no water pumped from the Smith River under these applications. But in a particularly dry year there may be no water available from Thompson Creek and thus the Smith River will supply all the water to the lands in question. From the testimony at the hearing, it appears that the provisions for supplemental water are self-enforcing because it is cheaper to use water from a gravity flow system than through a pumping system.

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6. Thompson Creek is a small spring fed stream, is approximately 8 miles in length, and has several other users along the creek. At times Thompson Creek has plenty of water to supply the Applicants and at other times it may be completely dry.

7. Mr. Reynolds discussed the soil conditions on each of the properties. On the Bair property the soil is found to be a Fairfield-Clay loam with a total soil moisture-holding capacity of 8 inches at a 5 foot depth. Using alfalfa as a baseline crop, the total seasonal consumptive use would be 19.96 inches. During a normal year there is 5.14 inches of effective precipitation thus leaving a total irrigation requirement of 14.82 inches. Figuring a 70% field efficiency, the need would be 1.8 acre-feet per acre for a total of 90 acre-feet of water for a normal year. During a dry year where there is no effective precipitation, the total irrigation requirement would be 19.96 inches. Figuring a 70% efficiency, the total acre-feet per acre would be 2.4 with a total dry year requirement of 120 acre-feet per year.

8. Mr. Reynolds recommended that the total consumptive use for the Bair application be reduced downward to 120 acre-feet. This figure did not take into account the amount of ditch loss from the point of diversion to the fields to be irrigated. The ditch would traverse approximately 2 miles of somewhat sandy and coulee terrain, and thus there should be considerable ditch loss. Also the Bair property

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has received less water in the past from Thompson Creek than has the Loney property, thus there should be some difference in the amount of water applied for under these two applications per acre.

9. Mr. Reynolds concluded that the Loney property was also a Fairfield-Clay loam with a total soil moisture holding capacity of 8 inches at a 5 foot depth. Using alfalfa as the consumptive plant crop, the total seasonal consumptive use on the property would be 19.96 inches per acre of moisture. In a normal year subtracting the 5.14 total effective precipitation, the total irrigation requirement would be 14.82 inches. Using a field efficiency of 70%, the total acre-feet per acre would be 1.8 with a total need of 592 acre-feet of water for a normal year. During a dry year with a zero seasonal effective precipitation, the total irrigation plant use consumptive requirement would be 19.96 inches. Using a field efficiency of 70%, the total acre-feet per acre would be 2.4 with a total acre-feet requirement of 790 acre-feet of water for a dry year. The amount of supplemental water for the project as figured by the Soil Conservation Service would be 378 acre-feet of water per year. This figures in a 1.25 acre-feet of water per acre as a past use. Thus this leaves 34 acre-feet for loss. Again Mr. Reynolds raised the question as to whether this may be too much water for the land in question. Again the Department did not figure in ditch loss and since we do not have any figures on ditch loss this recommendation was denied at

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the hearing and is thus denied in this order.

10. The Applicants, through counsel, Mr. John Potter, introduced into evidence an exhibit which was denoted as Applicants Loney and Bair Exhibit "A". This was a map detailing the lay of the land with the ditches and acreages involved. Without objection this was accepted into the record.

11. The Montana Department of Fish and Game, through Liter Spence, introduced into the record Objector's exhibits 1, 2, and 3. Objector's Exhibit No. 1 is a copy of Chapter 8, Title 89 of the Revised Codes of Montana as enacted in 1969 and was accepted into the record without objection. Objector's Exhibit No. 2 is a filed appropriation in Book 8, Page 54 of the Water Rights of Meagher County, filed in December 1970. The pertinent parts of such exhibit are as follows:

"Under direction and authority set forth in Section 89-801, R.C.M. 1947, as amended, the Montana State Fish and Game Commission has appropriated, and by these presents does appropriate and claim 6,000 miners inches of water in said county and state (Meagher County, Montana) for the period from April 1 to August 31, of each and every year hereafter and 5,000 miners inches for the period from September 1 to March 31, for each and every year hereafter; the same being of the following described river or stream or portions thereof: Smith River from Meagher County - Cascade County line in Township 14 North, Range 3 East, Section 1 to the Fort Logan bridge in Township 11 North, Range 5 East, Section 31."

Objector's Exhibit No. 3 is a letter written by Gary J. Wicks, Director, Department of Natural Resources and Con-

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servation to Mr. Wesley R. Woodgerd, Director, State Fish and Game Department in response to a letter sent by Mr. Woodgerd to Mr. Wicks. The pertinent part of the letter is as follows:

"It is our determination that such appropriations validly perfected pursuant to the authorization of Section 89-801 prior to its repeal do constitute existing rights to the use of water as contemplated by both Article IX, Section III of the Constitution of Montana and the Water Use Act, Section 89-865 et seq., R.C.M. 1947."

12. The Department of Fish and Game submitted timely objections to the above applications. Fish and Game claims a right on the Smith River from the mouth of Hound Creek to the Cascade County line in the amount of 16,000 miners inches (400 cfs) from April 1 to August 31 and 6,000 miners inches (150 cfs) from September 1 to March 31 of each year. The Fish and Game water right which is most critical in reaching a decision in this case is the one from the Meagher-Cascade County line to the Fort Logan Bridge of 6,000 miners inches (150 cfs) from April 1 to August 31 and for 5,000 miners inches (125 cfs) from September 1 to March 31 of each year. Based on the above water rights, the Montana Fish and Game requested that the permits be modified so that water withdrawal will not be permitted after July 15 of each year.

13. The Montana Fish and Game Department did not submit any testimony in support of their water rights filings, but instead decided to rest upon the filings alone.

From the foregoing Proposed Findings of Fact, the

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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 in the Smith River.
2. There are at times unappropriated water in the source of supply available for appropriation by the Applicant for the purposes herein requested.
3. Pursuant to 89-886(1), R.C.M. 1947, valid water rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.
4. The Montana Fish and Game Commission has a valid prior water right to the waters of the Smith River for the purpose of maintaining flows necessary for the preservation of fish and wildlife habitat. There is insufficient evidence in the record at this time to quantify the Fish and Game Commission's water rights. From the filing, the water right of the Fish and Game Commission would not exceed 16,000 miners inches (400 cfs) from April 1 to August 31 and 6,000 miners inches (150 cfs) from September 1 to March 31 on the Smith River from the mouth of Hound Creek to the Cascade County line. Further it would not exceed 6,000 miners inches (150 cfs) from April 1 to August 31 and 5,000 miners inches (125 cfs) from September 1 to March 31 from the Meagher-Cascade County line to the Fort Logan Bridge.
5. The prior rights of the Montana Fish and Game

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Commission would be protected if these permits are conditioned to allow further amendments when the quantification of their water right has been accomplished.

6. The proposed means of diversion are adequate.

7. The issuing of provisional permits, in no way reduces the Applicants' liability for damages 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 their Provisional Permits.

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

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

10. The Applications for Beneficial Water Use Permit should be granted in accordance with the provision of Chapter 8, Title 89 of the Revised Codes of Montana.

11. Nothing decided herein has bearing upon the status of water rights claimed by the Applicants other than those herein applied for, nor does anything decided herein have bearing upon 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.

12. Based upon the Proposed Findings of Fact and Proposed Conclusion of Law, the Proposed Order is hereby made:

PROPOSED ORDER

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1. Subject to the conditions cited below, Mr. William P. Loney's Provisional Permit No. 6453-s41J is hereby granted allowing the appropriation of 3.8 cfs or 1,706 gallons per minute of water, not to exceed 412 acre-feet of water per annum from the Smith River, a tributary of the Missouri River, in Meagher County, to be diverted from the Smith River at a point in the NE1/4 NE1/4 SW1/4 of Section 22, Township 10 North, Range 5 East, Montana Principal Meridian, and used for supplemental irrigation on 160 acres in Section 15 and 169 acres in Section 22, all in Township 10 North, Range 5 East, Montana Principal Meridian, and containing a total of 329 acres, more or less, from May 1 to September 20, inclusive, of each year.

2. Subject to the conditions cited below, Helen Bair's Provisional Permit No. 6939-s41J is hereby granted allowing the appropriation of 3.8 cfs or 1,706 gallons per minute of water and not to exceed 150 acre-feet of water per annum from the Smith River, a tributary of the Smith River, in Meagher County, to be diverted from the Smith River at a point in the NE1/4 NE1/4 SW1/4 of Section 22, Township 10 North, Range 5 East, Montana Principal Meridian, and used for supplemental irrigation on 30 acres in Section 9 and 20 acres in Section 15, all in Township 10 North, Range 5 East, Montana Principal Meridian, from April 1 to October 15, inclusive, of each year.

3. Each Provisional Permit is granted subject to all

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prior water rights on the source of supply.

4. In the event that the rights of the Montana Fish and Game Commission on the Smith River are quantified at a later time, each Provisional Permit shall be accordingly amended and modified to protect the prior rights of the Montana Fish and Game Commission.

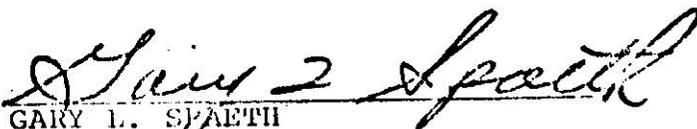
5. The issuing of the Provisional Permits by the Department in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permits.

6. These Provisional Permits are 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 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 23rd day of August, 1976.


GARY L. SPAETH
HEARING EXAMINER

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