

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
NO. 7484-s40N BY DEWEY JOHNSON

FILMED FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER  
APR 2 1990

A hearing on objections to the above-entitled Application was held on November 4, 1976 at Glasgow, Montana. The Applicant, Mr. Johnson, was present and represented himself. Mr. Ed Bartlett from the Field Solicitor's Office, U. S. Department of the Interior, represented the United States, and Mr. Mark Etchart appeared for the Glasgow Irrigation District.

A Proposed Order (Proposal for Decision) dated November 24, 1976 was issued by the Hearing Examiner, Allen B. Chronister.

The Proposed Order Notice as issued on November 24, 1976 provided that the Order would 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, must have been mailed to the Department within ten (10) days of service upon the parties herein, and upon receipt of any written exceptions, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On December 13, 1976 the Department received an Exception to the Proposal for Decision dated December 10, from the Glasgow Irrigation District. Also on December 13, 1976 the Department received an Exception to the Proposal for Decision dated December 10, from the U. S. Bureau of Reclamation.

By letters of December 22, 1976 to the Glasgow Irrigation District and the U. S. Bureau of Reclamation, the Department acknowledged receipt of their Exceptions and informed them of their opportunity to file a Brief supporting their exceptions by January 17, 1977. They were also informed of their right to request an oral

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argument hearing before the Water Resources Division Administrator to argue their exceptions and any briefs filed. Copies of the Department's letter were also sent to the Applicant.

On December 30, 1976, the Department received a letter from the U. S. Bureau of Reclamation in reply to the Department's letter of December 22, which states in part: "...we feel our written exception is self-explanatory and we will not be filing a supporting Brief. We would like to reserve the right to request an oral argument hearing in support of our exception by the applicant (Dewey Johnson)."

On January 10, 1977 the Department received a letter from the Glasgow Irrigation district in reply to the Department's letter of December 22, which states in part: "We feel that our exceptions are valid and we would like to reserve the right to request an oral argument hearing in support of our exceptions." Certain general questions asked by the Glasgow Irrigation District in their Exception of December 10, 1976 and referred to in their letter of January 7, 1977 were answered by the Department's letter of January 12.

The Department by letter of January 12, 1977 to the Applicant informed him of the opportunity to file a Reply or Reply Brief to the two exceptions filed by the Glasgow Irrigation District and the U. S. Bureau of Reclamation within fifteen days after receipt of the Department's letter.

On May 20, 1977 the Department sent a second letter to the Applicant, since he did not respond to the Department's first letter of January 12, and informed him that the Department had not received a written Reply Brief nor a request for oral argument, and therefore, if a Reply Brief was not received within ten (10) days after receipt of the Department's letter, the Department would assume the Applicant had waived his right to file a Reply Brief and would proceed to send a letter to the Exceptors asking them how they wished to proceed with their filed Exceptions. If the Exceptors requested an oral argument hearing, a hearing would be scheduled for that purpose. If they did not request a hearing the application would be forwarded to the Administrator of the Water Resources Division for

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preparation and issuance of a Final Order.

The Department did not receive a written reply to its letters of January 12 and May 20, therefore, by letter of August 18 from the Department, the Applicant was informed that since he did not file a Reply Brief in response to the Objector's Exceptions, the Department would proceed to contact the two Exceptors to see if they wished to request an oral argument hearing on their exceptions.

By letters of August 18, to the two Exceptors the Department informed them it appeared the Applicant had waived his right to file a Reply Brief and requested them to review their position in this matter and decide their course of action by either requesting an oral argument hearing to argue their exceptions or decline to request said hearing, thereby enabling the Administrator to prepare and issue a Final Order. Both Exceptors were requested to reply within seven days.

On August 26, the Department received a letter from the U. S. Bureau of Reclamation, which stated in part, "we feel our written exception is sufficient and we do not feel it is necessary to request an oral hearing." The Department by letter of August 29 acknowledged receipt of the Bureau's letter.

On September 14, 1977 the Department received a letter from the Glasgow Irrigation District, which presented certain facts which were requested to be considered in the making of a final decision on the application.

By letter of September 28, 1977 to the Glasgow Irrigation District, the Department made reference to their letter of September 12, and informed them since they had not requested an oral argument hearing to argue their Exception before the Water Resources Division Administrator, that the application file would be forwarded to the Administrator for preparation and issuance of the Final Order. Copies of this letter were also sent to the Applicant and the U. S. Bureau of Reclamation.

Since none of the parties in this matter specifically requested an oral argument hearing on the exceptions before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposal for Decision of November 24, 1976, the objections, exceptions and all pertinent information of record in the application file. **ADSE # 7484**

The Proposed Findings of Fact, Conclusions of Law, and Order, as entered on November 24, 1976 by the Hearing Examiner are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that on Page 2, Item 4, line 6 of the Proposed Findings of Fact is modified to read, "point of diversion is Milk River water backed up by Vandalia Dam;" except that on Page 3, Item 4, lines 1 and 2 of the Proposed Findings of Fact is modified to read, "Further, most of the water which is in the Milk at that time is water imported from the St. Mary River basin and released water from Fresno and Nelson reservoirs;" and except that the Proposed Order is hereby modified as follows.

FINAL ORDER

1. Subject to the conditions cited below, the Permittee's Provisional Permit No. 7484-s40N is hereby granted allowing for the appropriation of 5.56 cubic feet of water per second, or 2,500 gallons of water per minute, not to exceed 390 acre-feet of water from Rock Creek, a tributary of the Milk River, in Valley County, Montana to be diverted from Rock Creek by means of a pump at a point in the S $\frac{1}{2}$  SW $\frac{1}{4}$  of Section 21, Township 31 North, Range 36 East, M.P.M. and used for new flood irrigation on 80 acres in the SE $\frac{1}{4}$  of Section 20, and on 50 acres in the NE $\frac{1}{4}$  of Section 29, all in Township 31 North, Range 36 East, M.P.M., and containing a total of 130 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior existing water rights in the source of supply, including but not necessarily limited to all valid prior existing rights in the source of supply of those objecting herein.

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

4. The Permittee may appropriate water only at such times when said appropriation will not adversely affect prior existing water rights in the source of supply.

5. The Permittee shall install and maintain an adequate measuring device and keep a record of all quantities of water diverted and the periods of diversion and

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shall supply said records to the Department upon request.

6. The waters appropriated pursuant to this Provisional Permit may be diverted only during extreme, high, spring runoff through June 15, or when the Bureau of Reclamation is spilling at Vandalia Diversion Dam. During all other periods the Permittee shall allow the flow to pass his diversion to satisfy prior existing water rights.

7. The Permittee shall contact the Bureau of Reclamation at Malta, Montana at the start of each irrigation season to determine the current water supply conditions and the availability of water for his use.

8. The Permittee shall contact the Glasgow Irrigation District at Malta, Montana at the start of each irrigation season to determine the current water supply conditions and the availability of water for his use.

9. The conditions above relating to Vandalia Diversion Dam may be modified by the Department upon receipt of further evidence or determinations by the Department pertaining to the water rights of the United States Government in the source of supply and in storage reservoirs on the Milk River.

10. The above conditions to the granting of this Provisional Permit shall hold for any predecessor in interest to the Permittee herein named.

11. 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.

#### RECOMMENDATION

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation

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where practical and keep a log of records of water used for proof of their water rights.

Done this 3<sup>rd</sup> day of January, 1978.

*Orin Ferris*

Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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BEFORE THE DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. ) PROPOSAL FOR DECISION  
7484-s40N BY DEWEY JOHNSON )  
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A hearing on objections to the above-entitled Application was held on November 4, 1976 at Glasgow, Montana. The Applicant, Mr. Johnson, was present and represented himself. Mr. Ed Bartlett from the Field Solicitor's Office, U.S. Department of the Interior, represented the United States, and Mr. Mark Etchart appeared for the Glasgow Irrigation District. Based upon the record herein, the following Proposed Findings of Fact are made as required by the Montana Administrative Procedure and Water Use Act:

PROPOSED FINDINGS OF FACT

1. The Applicant, Mr. Johnson, desires to appropriate 390 acre-feet of water per year by pumping at the rate of 2500 gallons per minute from Rock Creek, a tributary to the Milk River in Valley County, Montana. Mr. Johnson intends to place 130 acres of new land under flood irrigation to supplement his existing irrigation from the same point of diversion.

2. The proposed point of diversion on Rock Creek is located less than two miles from its confluence with the

Milk River. Mr. Johnson wants water primarily in June and July, during which time he intends to make one application of water to the ground.

3. Rock Creek is an intermittent stream which has a natural flow only during periods of spring snowmelt. The Milk River is an international stream arising in Montana, flowing into Canada and then back into Montana where it discharges into the Missouri River near Nashua, Montana. The Milk is controlled for irrigation use by a series of dams constructed by the United States Bureau of Reclamation. The primary regulating device is Fresno Reservoir, upstream from Havre, Montana. Irrigation season water releases from Fresno are further regulated by Nelson Reservoir near Malta and by the Vandalia diversion structure near Hinsdale. The water supply picture on the Milk is further complicated by the fact that about 156,000 acre-feet of water per year are imported from the St. Mary's River to satisfy the water demands in the Milk Valley.

4. The Vandalia diversion structure is located on the Milk a few miles downstream from the mouth of Rock Creek, and thereby controls the water which is present at the Applicant's proposed point of diversion. That is, during the irrigation season the water present at Mr. Johnson's point of diversion is Milk River water backed up at Vandalia.

Further, most of the water which is in the Milk at the that time is water released from Fresno and Nelson reservoirs.

5. The United States claims to have appropriated the flows of both Rock Creek and the Milk River through its various dams and diversions thereon. The United States has also concluded that there is an overall shortage of water in the Milk when compared to irrigation needs, and that this shortage amounts to 3000 acre-feet per annum in the Glasgow Irrigation District.

At the same time, however, the Glasgow District experiences an actual shortage of water in only about one year in ten, and there has been water at Mr. Johnson's point of diversion during 19 of the last 20 years. Mr. Johnson cooperated in the past when asked to cease pumping by the District.

#### PROPOSED CONCLUSIONS OF LAW

1. The United States has appropriated the available flow of Rock Creek and the Milk River at Vandalia except for periods of very high runoff in the early spring.

2. The water present at the Applicant's point of diversion during the irrigation season is water previously appropriated by the United States.

3. The United States does not, however, in most years need all the water it has appropriated at Vandalia, and therefore that water is subject to use by others until needed by the United States. See Section 89-805, R.C.M. 1947, and Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 100-102 (1927).

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4. The Applicant can appropriate water as proposed in most years without interfering with the previous rights of the United States if the appropriate conditions are attached to the permit.

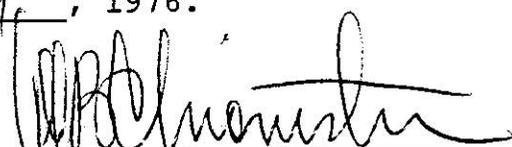
PROPOSED ORDER

It is proposed that the permit be granted as applied for to give the Applicant one application of water to his crop. The permit should be subject to the following conditions:

1. The Applicant must notify the Glasgow Irrigation District by telephone call to the office or to any officer thereof at least three (3) days prior to the time he intends to start pumping each year. Notice may also be given by other means reasonably calculated to give the District three days prior notice of Applicant's intentions.

2. The Applicant shall cease pumping upon notification by the District that it is using the entire flow of the Milk River at Vandalia. The District shall so notify the Applicant when the Applicant's pumping would create or contribute to an actual shortage of water as compared to the needs of the District. Notification shall be by telephone or by other means reasonably calculated to give the Applicant prompt notice of the District's needs.

DATED: November 24, 1976.

  
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ALLEN B. CHRONISTER  
HEARING EXAMINER

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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 mailed to 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.