

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 7504-g41H BY YOLANDA BLAKELY

FILMED

APR 9 1980

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application for a new water right was held in the first floor community room of the Gallatin County Courthouse, Bozeman, Montana on Monday, December 20, 1976 beginning at approximately 10:00 a.m., Richard Gordon, Legal Counsel for the Department and appointed Hearing Examiner herein presiding.

The Applicant, Ms. Yolanda Blakely, personally appeared and presented evidence and testimony in support of the application. Mr. Howard Blakely also appeared on behalf of the Applicant.

The Objectors, John W. and Edna M. Gillespie appeared and presented evidence and testimony in support of their objection. The Objectors were represented by Counsel, J. Robert Planalp, Esq., Bozeman, Montana.

EXHIBITS

The Applicant offered into evidence two exhibits, to wit:

1. A copy of the second page of the Objector's Form 611, filed in this matter, entitled Objection to Application;
2. A copy of a letter dated September 9, 1976 from Objector Edna M. Gillespie to the Department.

Said exhibits were entered and numbered respectively as Applicant's Exhibits Nos. 1 and 2.

The Objectors offered into evidence three exhibits to wit:

1. A copy (made by the Clerk of Court) of every document of record appearing

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in the records of the District Court of the 18th Judicial District of the State of Montana, in and for the County of Gallatin with respect to Cause No. 22536, John W. Gillespie and Edna M. Gillespie, Plaintiffs v. Howard Blakely and Yolanda Blakely, Defendants;

2. A certified copy of a Notice of Completion of Groundwater Appropriation Without Well by John W. Gillespie and Edna M. Gillespie filed March 3, 1967 in the Gallatin County records;

3. A letter of Mr. John W. and Ms. Edna M. Gillespie dated August 12, 1976 from the Department.

Said exhibits were entered and numbered respectively as Objector's Exhibits Nos. 1 through 3.

A Proposed Order (Proposal For Decision) dated March 16, 1977 was issued by the Hearing Examiner, Richard Gordon.

The Proposed Order Notice as issued on March 16, 1977 provided that the Proposal for Decision would not be final until accepted by the Administrator of the Water Resources Division, Department of Natural Resources and Conservation. Written exceptions to the Proposal, if any, shall be filed with 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 April 7, 1977 the Department received an Exception dated April 6, 1977 from John W. and Edna M. Gillespie, in opposition to the Proposed Order as entered on March 16, 1977 by the Hearing Examiner in the matter of Application No. 7504-s41H by Yolanda Blakely.

The Department by letter of April 15, 1977 to J. Robert Planalp, acknowledged receipt of his Exceptions and informed him of the opportunity to file a brief to support the Exceptions to the Proposal for Decision within fifteen days after receipt of the Department's letter. He was also requested to indicate if he wished to present oral argument on the Exceptions before the Water Resources Division Administrator.

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On April 29, 1977 the Department received a letter from Mr. Planalp which stated: "This is to notify you that Mr. and Mrs. Gillespie do not wish to present a written argument, but do request an oral argument on their request for clarifications of the Proposed Findings of Fact and Conclusions of Law."

By letter of May 10, 1977 to Mr. Planalp, the Department acknowledged receipt of his April 28, letter and informed him that the Applicant would be given the opportunity to file a written reply or reply brief in answer to the Exceptions before proceeding onto the oral argument hearing.

Also by letter of May 10, 1977/^{to} the Applicant, Yolanda Blakely, the Department advised of her opportunity to file a written reply or reply brief within fifteen days after receipt of the Department's letter. The Applicant was further advised that Mr. Planalp in his letter of April 28, requested an oral argument hearing on his Exceptions to the Proposal for Decision, and therefore said requested hearing would be scheduled and held sometime after the Department receives the reply or reply brief.

The Department received the Applicant's Reply Brief as dated May 13, 1977 in response to the Exceptions filed by Mr. Planalp in opposition to the Hearing Examiners Proposal for Decision of March 16, 1977.

The Department by letter of May 23, 1977 to the Applicant, with copies to Mr. Planalp and Mr. and Mrs. Gillespie, acknowledged receipt of her Reply Brief and advised that the application file would be routed to the Water Resources Division Administrator for scheduling of the requested oral argument hearing.

On September 12, 1977 the Administrator issued a Notice of Oral Argument Hearing on Exceptions to the Proposal for Decision in the matter of Application For Beneficial Water Use Permit No. 7504-s41H by Yolanda Blakely. The Notice stated that on Wednesday, October 5, 1977, at 10:00 a.m., an oral argument hearing would be held before the Administrator of the Water Resources Division in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana, for the purpose of hearing oral arguments in

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support of the exception and brief. Parties herein were requested to notify the Administrator in writing before the hearing if they did not wish to attend, which in such case the exception and brief would stand as filed.

The oral argument hearing before the Administrator was held in Helena, Montana on October 5, 1977 in the Conference Room of the Department of Natural Resources and Conservation Building, for the purpose of hearing oral arguments by the Applicant and Exceptors.

The Applicant, Yolanda Blakely was present and presented testimony on behalf of her application. She was not represented by legal counsel.

The Exceptors, Mr. and Mrs. Gillespie, were present and presented testimony, and were represented by their attorney J. Robert Planalp. Mr. Richard (Fritz) Gillespie was also present.

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

The Administrator of the Department's Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of March 16, 1977, the application, objections, exceptions, brief, the testimony of the oral argument hearing held on October 5, 1977, both hearing tape recordings, 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 March 16, 1977, 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. Subject to the conditions cited below, the Permittee's Provisional Permit No. 7504-g41H is hereby granted allowing for the appropriation of one cubic foot of water per second or 450 gallons of water per minute, not to exceed 12.5 acre-feet of water per annum from a ground-water pit approximately 100' x 150' x 12' feet deep,

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with a holding capacity of approximately 1.65 acre-feet, as supplied by ground-water seepage and percolation and by springs in Gallatin County, Montana to be diverted by means of a pump from said pit at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, Township 2 North, Range 2 East, M.P.M., and used for sprinkler irrigation on a total of 5 acres, more or less, in the SE $\frac{1}{4}$ of Section 21, from April 1 to November 1, inclusive, of each year.

2. The ground-water pit shall be located on the Permittee's property in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, Township 2 North, Range 2 East, at a site approximately half-way between Rae Creek and the unnamed stream. No excavations, ditches, etc. shall be allowed from Rae Creek or the unnamed stream into the groundwater pit.

3. The Provisional Permit is granted subject to all prior water rights in the source of supply, including but not necessarily limited to such rights of those herein claiming existing water rights in the source of supply. The Provisional Permit is also subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

4. The Permittee may only appropriate water at such times when to so appropriate would not adversely affect any valid prior existing water rights in the source of supply.

5. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898 R.C.M. 1947.

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

7. The Permittee shall prior to any excavation of the ground-water pit submit the following to the Department within 180 days after receipt of the Provisional

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Permit, or within any extension of time authorized by the Department:

- A. Detailed map of the Permittee's property drawn to scale, showing the proposed location of the groundwater pit between Rae Creek and the unnamed stream, and including approximate measurements where applicable.
- B. The map shall also include the location of the 5 acres to be irrigated from the groundwater pit, including any additional information that would assist in approving the site for the pit.

8. Within 60 days after receipt of Item 7 above, the Department will modify, approve, or deny the site location of the groundwater pit.

9. The above conditions to the granting of this Provisional Permit shall hold in full effect for any successor in interest to the Permittee herein named.

RECOMMENDATION

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

Done this 7th day of June, 1978.



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

IN THE MATTER OF THE APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
7504-s41H BY YOLANDA BLAKELY

)
) PROPOSAL FOR DECISION
)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application for a new water right was held in the first floor community room of the Gallatin County Courthouse, Bozeman, Montana on Monday, December 20, 1976 beginning at approximately 10:00 a.m., Richard Gordon, Legal Counsel for the Department and appointed Hearing Examiner herein presiding.

The Applicant, Ms. Yolanda Blakely, personally appeared and presented evidence and testimony in support of the application. Mr. Howard Blakely also appeared on behalf of the Applicant.

The Objectors, John W. and Edna M. Gillespie appeared and presented evidence and testimony in support of their objection. The Objectors were represented by Counsel, J. Robert Planalp; Esq., Bozeman, Montana.

Mr. T. J. Reynolds attended the hearing on behalf of the Department.

EXHIBITS

The Applicant offered into evidence two exhibits, to wit:

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1. A copy of the second page of the Objector's Form 611, filed in this matter, entitled Objection to Application;

2. A copy of a letter dated September 9, 1976 from Objector Edna M. Gillespie to the Department.

Said exhibits were entered and numbered respectively as Applicant's Exhibits Nos. 1 and 2.

The Objectors offered into evidence three exhibits to wit:

1. A copy (made by the Clerk of Court) of every document of record appearing in the records of the District Court of the 18th Judicial District of the State of Montana, in and for the County of Gallatin with respect to Cause No. 22536, John W. Gillespie and Edna M. Gillespie, Plaintiffs v. Howard Blakely and Yolanda Blakely, Defendants;

2. A certified copy of a Notice of Completion of Groundwater Appropriation Without Well by John W. Gillespie and Edna M. Gillespie filed March 3, 1967 in the Gallatin County records;

3. A letter of Mr. John W. and Ms. Edna M. Gillespie dated August 12, 1976 from the Department.

Said exhibits were entered and numbered respectively as Objector's Exhibits Nos. 1 through 3.

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

PROPOSED FINDINGS OF FACT

1. On February 17, 1976 the Department received Application for Beneficial Water Use Permit No. 7504-s41H by Yolanda Blakely seeking to appropriate 2.67 cubic feet of water per second or

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1200 gallons of water per minute and not to exceed 15 acre-feet of water per annum from springs, tributaries of the Gallatin River, in Gallatin County, Montana, to be diverted from said springs in the NW1/4 NW1/4 SE1/4 of Section 21, Township 2 North, Range 2 East of the Montana Principal Meridian, and used for supplemental irrigation on a total of 5 acres, more or less, in said Section 21, from April 1 to November 1, inclusive, of each year.

2. On June 16, 1976 the Department received an objection to the above-described application from John W. and Edna M. Gillespie alleging a prior stockwater and irrigation filed right dating from December 8, 1939 for 75 miners inches of water from springs which are tributaries of the Gallatin River diverted at a point in the NW1/4 NE1/4 of Section 21, Township 2 North, Range 2 East of the Montana Principal Meridian. The Objector alleged that said prior water rights would be adversely affected by the granting of the permit herein.

3. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant is in possession of a tract of real property in Gallatin County, Montana immediately south of Objector's property and described as the SE1/4 of Section 21, Township 2 North, Range 2 East of the Montana Principal Meridian.

4. For purposes herein, based upon testimony given at the hearing, it is found that the Objectors are in possession

of a tract of real property in Gallatin County, Montana, immediately north of Applicant's property and described as the NE1/4 of Section 21, Township 2 North, Range 3 East of the Montana Principal Meridian.

5. For purposes herein, based upon testimony given at the hearing, it is found that the source of supply consists of certain springs arising on the Applicant's property and flowing in a creek bed augmented by additional springs along the way. The creek flows onto the Objectors' property.

6. For purposes herein, based upon testimony given at the hearing, it is found that the Objectors appear to possess valid prior rights to water flowing from springs on the Applicant's property, used at least for the irrigation of the gardens, a lawn, domestic uses, and the stockwatering of approximately 40 head of stock, such right dating from at least December 8, 1939, in an amount equal to the maximum amount of water actually beneficially used by the Objectors, not to exceed 75 miners inches.

7. For purposes herein, based upon testimony given at the hearing, it is found that at the present time there is no unappropriated water flowing from the springs into the creek in question. However, for purposes herein based upon testimony and evidence given at the hearing, it is found that there may at times be unappropriated water available in the source of supply.

8. For purposes herein, based upon testimony and evidence given at the hearing, it is found that the Applicant specifically

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proposes to construct a settling pond at the edge of the existing creek, approximately 800 feet along the creek below the property line between the Applicant and the Objectors, without damming the creek, in an effort to increase the amount of groundwater flowing from the springs into the creek.

9. For purposes herein, based upon testimony given at the hearing, it is found that if and only if the above-described plan is successful in increasing the flow of water from the springs into the creek, there may be at times, when at least the above-described water right of the Objectors' is satisfied, unappropriated water available in the source of supply.

10. For purposes herein based upon testimony given at the hearing, it is found that if any Provisional Permit granted herein is conditioned to allow the appropriation of water only at such times when there is unappropriated water available to be appropriated from the source of supply, and further if the plans of the Applicant involve absolutely no lessening of, obstruction of, or impediment to the present flow of the creek to the Objectors, the rights of prior appropriators will not be adversely affected.

11. For purposes herein, based upon testimony given at the hearing, it is found that it appears the proposed means of construction and diversion are adequate, provided that all Soil Conservation Service specifications and requirements are met, and further, provided that any construction and diversion involves

absolutely no lessening of, obstruction of, or impediment to the present flow of the creek to the Objectors.

12. For purposes herein, based upon testimony given at the hearing, it is found that the proposed use of water constitutes a beneficial use.

13. For purposes herein, based upon testimony and evidence given at the hearing, it is found that 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.

14. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant does not propose to appropriate in excess of fifteen cubic feet of water per second.

Based upon the above proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to 89-880 and 89-889, R.C.M. 1947, a Beneficial Water Use Permit is required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, the Application for Beneficial Water Use Permit No. 7504-s41H must be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

3. Based upon the above Proposed Findings of Fact and any conditions and limitations appearing therein, it is concluded that the criteria for issuance of a Provisional Permit delineated at 89-885, R.C.M. 1947 have been met.

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4. Specifically, it is concluded that although there is no unappropriated water presently flowing in the creek leading from certain springs in question, there may be unappropriated water within the source of supply not presently flowing into said creek. It is concluded that the Applicant may not appropriate water pursuant to any Provisional Permit granted herein, nor may the Applicant impede, obstruct or interfere with the flow of said creek in any manner, unless the Applicant is successful in increasing the flow of water into the creek, and available to the Objectors, to such an extent that the prior rights of the Objectors are first fully satisfied. In such an event and only in such event, may the Applicant appropriate water pursuant to any Provisional Permit granted herein, and in no event shall any appropriation made by the Applicant pursuant to any Provisional Permit granted herein operate so as to reduce the amount of water available for appropriation by the Objectors to an amount less than they are fully entitled pursuant to their prior rights in the source of supply.

5. 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. It is concluded that the rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

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6. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of her Provisional Permit.

7. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything 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.

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 is hereby granted allowing the appropriation of 2.67 cubic feet of water per second or 1,200 gallons of water per minute and not to exceed fifteen acre-feet of water per annum from springs, tributaries of the Gallatin River, in Gallatin County, Montana, to be diverted from said springs at a point in the NW1/4 NW1/4 SE1/4 of Section 21, Township 2 North, Range 2 East of the Montana Principal Meridian and used for supplemental irrigation on a total of five acres, more or less, in said Section 21, from April 1 to November 1, inclusive, of each year.

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

3. The Applicant may only appropriate water at such times when to so appropriate would not adversely affect any valid prior existing water right in the source of supply.

4. Specifically, the Applicant may not appropriate water pursuant to this Provisional Permit, nor may the Applicant impound, obstruct, impede, or interfere in any way with the flow of said creek, unless the Applicant is successful in increasing the flow of water into the creek and available to the Objectors to such an extent that the prior rights of the Objectors are fully satisfied. In such an event and in only such an event, may the Applicant appropriate water pursuant to the Provisional Permit. And in no event shall any appropriation made by the Applicant pursuant to this Provisional Permit operate so as to reduce the amount of water available for appropriation by the Objectors to an amount less than the Objectors are fully entitled to pursuant to their valid prior existing rights in the source of supply.

5. The design and construction of any engineering structure shall be in accordance with all applicable Soil Conservation Service specifications.

6. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of her Provisional Permit.

7. The Applicant shall, prior to attempting to increase the flow of water into the creek, install and maintain adequate measuring devices to be approved by the Department so as to enable the Applicant to keep an ongoing record of all quantities of water from the source of supply reaching the property of the Objectors, of water diverted from the source of supply by the Applicant and of the periods of diversion by the Applicant. Such records shall be presented to the Department for inspection upon demand by the Department.

8. The granting of a Provisional Permit in no way grants the Applicant any right to violate the rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising her Provisional Permit.

9. The Provisional Permit is granted subject to all prior rights in the source of supply.

10. The 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 Proposal for Decision and will not be final until accepted by the Administrator of the Water Resources

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Division, Department of Natural Resources and Conservation.
Written exceptions to the Proposal, 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 16th day of March, 1977.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER