

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 7522-s76LJ BY
JOHN AND VIOLA LA BONTY

FILED
APR 1 1980

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 20, 1976, 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, the Permittee's Provisional Permit No. 7522-s76LJ is hereby granted allowing for the appropriation of 0.27 cubic foot of water per second, equivalent to 125 gallons per minute of water, not to exceed 35 acre-feet per annum of water for irrigation and 0.5 acre-foot per annum of water for stock watering, constituting a total of 35.5 acre-feet per annum of water, from Ashley Creek, a tributary of the Flathead River, in Flathead County, Montana, to be diverted from Ashley Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 28 North, Range 21 West, M.P.M., and used for new irrigation on a total of 14 acres, more or less, in said Section 18 from April 1 to October 1, inclusive, of each year, and for stock watering from January 1 to December 31, 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 claimed by the Objectors in this matter.

3. 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 his 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 his Provisional Permit.

4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by

ADSE #7522

Recommendation

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

Done this 17th day of November, 1976.

Orvin Harris

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

CASE # 7522

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. 7522-s76LJ BY JOHN AND VIOLA)
LaBONTY)

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the Kalispell City Hall, City Council Chambers at Kalispell, Montana, on Wednesday, September 15, 1976 at approximately 9:30 a.m., Daniel G. Diemert, Hearing Examiner, presiding.

Mr. and Mrs. LaBonty appeared at the hearing and presented testimony in support of their application. Objections to the application were received by the Department from George M. Begg and Malcolm S. McLelland and from George L. and JoAnn M. Reksten. None of the Objectors appeared at the hearing.

Mr. Jim Rehbein attended the hearing on behalf of the Department of Natural Resources and Conservation.

PROCEDURAL MATTERS

The hearing was begun at 9:45 a.m. in expectation of the arrival of the Objectors, however after a fifteen minute delay none arrived. The Hearing Examiner went on the record and admitted Department's Exhibit No. 1, a notarized statement entitled, Affidavit of Service in which Ronald J. Guse, an

CASE # 7522

employee of the Montana Department of Natural Resources and Conservation, stated that he deposited in the United States mail, "Certified mail, return receipt requested", a notice of the hearing addressed to the Applicants, the Objectors of record and Mr. James H. Rehbein, Water Rights Bureau Field Office, Department of Natural Resources and Conservation.

The Hearing Examiner then read the objections received into the record and also admitted a notarized letter from John E. and Linda M. Cusick, apparent landowners in the area, who stated that they had no objection to the above-entitled application.

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. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Ashley Creek, a tributary of the Flathead River.
2. On February 17, 1976, the Department received an Application for Beneficial Water User Permit No. 7522-s76LJ from John and Viola LaBonty who sought to appropriate 0.27 cubic feet of water per second, equivalent to 125 gallons of water per minute, not to exceed 35 acre-feet of water per year irrigation and 0.5 acre-feet of water per year for

CASE # 7522

stockwatering, constituting a total of 35.5 acre-feet of water per annum, from Ashley Creek, a tributary of the Flathead River, in Flathead County, Montana, to be diverted from Ashley Creek at a point in the NW1/4 SE1/4 SW1/4 of Section 18, Township 28 North, Range 21 West, Montana Principal Meridian, and used for new irrigation on a total of 14 acres, more or less, in said Section 18 from April 1 to October 1, inclusive of each year, and for stockwatering from January 1 to December 31, inclusive, of each year.

3. The Department received two objections to the application. An objection received on June 14, 1976 and signed by George M. Begg and Malcolm S. McLelland alleged that there is "insufficient water for irrigation during summer months. At times poor for watering livestock with low water and resulting algae and other growth." The other objection, dated June 16, 1976, was signed by George L. and JoAnn M. Reksten and alleged that "in the months of July and August we have not had a high enough water level in Ashley Creek to irrigate our yard and garden. If the amount the LaBonty's need is added to the present use of this water, we will be totally without water this summer and all ensuing summers."

4. Based upon the testimony of the Applicant, who has lived on Ashley Creek for nineteen years, there are unappropriated waters in the source of supply.

5. If a permit is conditioned so that it cannot be exercised adverse to existing water rights in the source of

CASE # 7522

supply, the rights of prior appropriators will not be adversely affected.

6. It appears that the proposed means of diversion or construction are adequate.

7. The use of water to irrigate and water livestock are beneficial uses.

8. 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.

9. The Applicant has not asked for an appropriation of fifteen cubic feet of water per second or more. It therefore is not necessary to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 7522-s76LJ should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

2. Pursuant to Section 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

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

4. The issuing of a Provisional Permit in no way reduces the Applicants' liability for damage caused by the

CASE # 7522

appropriation, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

5. 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 Applicants' Provisional Permit No. 7522-s76LJ is hereby granted allowing for the appropriation of 0.27 cubic feet of water per second, equivalent to 125 gallons of water per minute, not to exceed 35 acre-feet of water per annum for irrigation and 0.5 acre-feet of water per annum for stockwatering constituting a total of 35.5 acre-feet of water per annum, from Ashley Creek, a tributary of the Flathead River, in Flathead County, Montana, to be diverted from Ashley Creek at a point in the NW1/4 SE1/4 SW1/4 of Section 18, Township 28 North, Range 21 West of the Montana Principal Meridian and used for new irrigation on a total of 14 acres, more or less, in said

CASE # 7522

Section 18 from April 1 to October 1, inclusive, of each year, and for stockwatering from January 1 to December 31, 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 claimed by the Objectors in this matter.

3. 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 their Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

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

CASE # 7522

DATED this 20th day of October, 1976.

Daniel G. Diemert
DANIEL G. DIEMERT
HEARING EXAMINER

CASE # 7522