STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMITS 6268-s42KJ AND 6269-s42KJ BY WALLACE A. NEWMAN AND 8247-s42KJ AND 8248-s42KJ BY WILSON A. NEWMAN

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FILED
APR 3 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on August 11, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order; except that on page 4 of the Proposed Findings of Fact, Item 11, lines 1 and 15, the name of Mr. Nelson is corrected to read Mr. Olson.

FINAL ORDER

1. Subject to the conditions cited below, the following Provisional Permits are hereby granted to Wallace A. Newman (6268-s42KJ and 6269-s42KJ) and to Wilson A. Newman (8247-s42KJ and 8248-s42KJ):

(a) Permit No. 6268-s42KJ to appropriate 80 acre-feet of water per annum, to be diverted from two unnamed tributaries of McGinnis Creek, in Rosebud County, Montana, at points in the NE¼ NW¼ NE¼ of Section 13, Township 12 North, Range 34 East, M.P.M., and the NW¼ NW¼ NW¼ of Section 18, Township 12 North, Range 35 East, M.P.M., and used for new irrigation by water spreading on a total of 30 acres, more or less, in said Section 18, from January 1 to December 31, inclusive, of each year.

(b) Permit No. 6269-s42KJ to appropriate 3,000 gallons of water per minute, not to exceed 245 acre-feet of water per annum, to be diverted from McGinnis Creek, in Rosebud County, Montana, at a point in the SW¼ NW¼ NE¼ of Section 18, Township 12 North, Range 35 East, M.P.M., and used for supplemental irrigation by water spreading on a total of 245 acres, more or less, in said Section 18, from March 15 to September 15, inclusive, of each year.

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(c) Permit No. 8247-s42KJ to appropriate 40 acre-feet of water per annum, to be diverted from an unnamed tributary of McGinnis Creek, in Rosebud County, Montana, at a point in the NW¼ SE¼ of Section 30, Township 12 North, Range 35 East, M.P.M., and used on a total of 40 acres, more or less, in Section 32, Township 12 North, Range 35 East, M.P.M., for new irrigation by water spreading from January 1 to December 31, inclusive, of each year.

(d) Permit No. 8248-s42KJ to appropriate 80 acre-feet of water per annum, to be diverted from an unnamed tributary of McGinnis Creek, in Rosebud County, Montana, at a point in the NW¼ NE¼ of Section 5, Township 11 North, Range 35 East, M.P.M., and used on 70 acres in Section 4 and 10 acres in Section 5, all in Township 11 North, Range 35 East, M.P.M., and containing a total of 80 acres, more or less, for new irrigation by water spreading from January 1 to December 31, inclusive, of each year.

2. The maximum rate of diversion for each permit cited above shall be less than 15 cubic feet of water per second.

3. The above-cited permits are granted subject to all prior water rights in the source of supply.

4. At the discretion of the Department of Natural Resources and Conservation, the Applicants shall install and maintain measuring devices and a record of all quantities of water diverted, as well as the periods of diversion. Such records, when required, shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

5. Each diversion for the above-cited permits shall have installed a satisfactory means of diverting or bypassing all water required to satisfy all prior downstream water rights from the source of supply.

6. Prior to construction, plans and specifications for the diversion facilities for each permit cited above shall be submitted, at Applicant's expense, to the the Department for approval. Applicants shall meet all design and construction requirements recommended by the Department.

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7. 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 Permits, nor does the Department in issuing the Provisional Permits, in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permits.

8. These Provisional Permits are granted subject to any final determination of prior existing water in the source of supply as provided for by Montana law.

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 6th day of October, 1977.

Orrin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMITS NO. 6268-s42KJ, 6269-s42KJ, BY WALLACE A. NEWMAN, AND 8247-s42KJ, AND 8248-s42KJ BY WILSON A. NEWMAN	)))))	PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held June 22, 1977 at Forsyth, Montana, for the purpose of hearing objections to the above-named applications, William F. Throm, Hearing Examiner, presiding.

Mr. Wilson A. Newman, one of the Applicants, appeared at the hearing on his own behalf and on behalf of his son, Wallace A. Newman, and presented testimony on all applications. Applicants were not represented by counsel.

Ms. Louis R. Galt and Mr. Ben Olson filed timely objections to Application No's 6268-s42KJ and 6269-s42KJ by Wallace Newman. Mr. Ben G. Olson filed a timely objection to Application No's 8247-s42KJ and 8248-s42KJ by Wilson Newman. Ms. Galt did not appear at the hearing.

Mr. Olson did appear at the hearing and was represented by legal counsel, Mr. Garry P. Bunke, Attorney-at Law, Forsyth, Montana, who was also present.

Mr. Bunke offered into evidence, on behalf of Ben G. Olson, four Notices of Appropriation of Water Right, totaling 8.5 cubic feet per second of water from Big Porcupine Creek, a tributary of the Yellowstone River in Rosebud County and marked as Objector's Exhibits A, B, C, and D, respectively. These exhibits were received into evidence without objections.

Mr. Don Riddle, Water Rights Bureau Field Office Manager, Billings, Montana, appeared as Department of Natural Resources and Conservation representative and offered into evidence 9 photographs of project area marked as Department's Exhibit A-1 through A-9; and a U.S. Bureau of Land Management Map of the Big Porcupine

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Creek Watershed (also known as the Great Porcupine Creek), and the proposed project area and points of diversion, and marked as Department's Exhibit B. These exhibits were received into evidence without objections.

PROPOSED FINDINGS OF FACT

1. On August 22, 1975, Wallace A. Newman submitted to the Department:

(a) Application No. 6269-s42KJ to appropriate 3000 gallons of water per minute not to exceed 245 acre-feet of water per annum to be diverted from McGinnis Creek in Rosebud County, Montana, at a point in the SW¼NW¼NE¼ of Section 18, Township 12 North, Range 35 East, M.P.M., and used for supplemental irrigation by water-spreading on a total of 245 acres in said Section 18, from March 15 to September 15, inclusive, of each year.

(b) Application No. 6268-s42KJ to appropriate 80 acre-feet of water per annum, to be diverted from two unnamed tributaries of McGinnis Creek in Rosebud County, Montana, at points in the NE¼NW¼NE¼ of Section 13, Township 12 North, Range 34 East, M.P.M., and the NW¼NW¼NW¼ of Section 18, Township 12 North, Range 35 East, M.P.M., and used for new irrigation by water spreading on a total of 80 acres in Section 18, Township 12 North, Range 35 East, M.P.M., from January 1 to December 31, inclusive, of each year.

2. On April 8, 1976, Wilson A. Newman submitted to the Department:

(a) Application No. 8247-s42KJ to appropriate 40 acre-feet of water per annum to be diverted from an unnamed tributary of McGinnis Creek in Rosebud County, Montana, at a point in the NW¼SE¼ of Section 30, Township 12 North, Range 35 East, M.P.M., and used for new irrigation on a total of 40 acres in Section 32, T. 12 N. R. 35 E., M.P.M., by water spreading from January 1 to December 31, inclusive, of each year.

(b) Application No. 8248-s42KJ to appropriate 80 acre-feet of water per annum to be diverted from an unnamed tributary of McGinnis Creek in Rosebud County, Montana, at a point in the NW¼NE¼ of Section 5, Township 11 North, Range 35 East, M.P.M., and used on 70 acres in Section 4, and 10 acres in Section 5, all in

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T. 11 N., R. 35 E., M.P.M., and containing a total of 80 acres for new irrigation by water spreading from January 1 to December 31, inclusive, of each year.

3. On May 6, 13 and 20, 1976, the Department caused to be published in the Forsyth Independent, notice of above Applications No. 6268-s42KJ and 6269-s42KJ by Wallace Newman.

4. On June 24, 1976, Louise R. Galt filed a timely objection to Application No. 6268-s42KJ alleging that McGinnis Creek is an intermittent stream and that granting of the permit would jeopardize her stockwatering facilities.

5. On June 23, 1976, Ben G. Olson, filed timely objections to Applications 6268-s42KJ and 6269-s42KJ by Wallace Newman claiming a prior right on Big Porcupine Creek, of which McGinnis Creek is a tributary, and alleging said rights would be impaired should these permits be granted.

6. On July 1, 8 and 15, 1976 the Department caused to be duly published in the Forsyth Independent, notice of above Applications Nos. 8247-s42KJ and 8248-s42KJ by Wilson Newman.

7. On August 18, 1976, Ben G. Olson filed timely objections to Application No's 8247-s42KJ and 8248-s42KJ claiming a prior appropriated water right on Big Porcupine Creek of which McGinnis Creek is a tributary and further alleging said rights would be impaired, degraded and diminished should these permits be granted.

8. Objector Ben G. Olson has an apparent water use right for 8.5 cubic feet per second from Big Porcupine Creek a tributary of the Yellowstone River in Rosebud County. (Reference Objector's Exhibits A, B, C, and D).

9. McGinnis Creek is a tributary of Big Porcupine Creek also know as Great Porcupine Creek. (Reference Department Exhibit B).

10. Mr. Wilson Newman testified that Application 6268-s42KJ is for a new system with a total of 80 acres, of which 20 acres would be served with supplemental water as necessary by a pump; that Application 6269-s42KJ would be pump irrigation from an

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existing site to serve an existing system consisting of 245 acres with supplemental irrigation water; that Application No. 8247-s42KJ would be served by direct diversion from McGinnis Creek with very little impoundment and would serve about 30 acres by water spreading, and would also provide erosion control benefits; and that Application No. 8248-s42KJ would serve about 70 acres by a direct diversion out of an existing dam. Mr. Wilson Newman further testified that he believes there is sufficient water to satisfy all rights. He testified that the irrigation by water spreading would be to improve his range and native hay production and that the system was designed by the Soil Conservation Service, and that the pump would be of 3000 gallon per minute capacity, powered by a 100 hp tractor.

11. Mr. Nelson, the Objector, testified that his point of diversion is about 18 miles below the Applicants proposed point of diversion; that he now owns or controls all land and appurtenant water rights filed in the name of Inga N. Olson for a total of 4 cubic feet per second from Big Porcupine Creek and in the name of Thomas Gilbert for 2 cubic feet per second from Big Porcupine Creek and in his own name for 2½ cubic feet per second from Big Porcupine Creek, all in Rosebud County, consisting of a total of 8.5 cubic feet per second. He further testified that McGinnis Creek is a tributary of Big Porcupine Creek and that Big Porcupine Creek is a dry stream and provided insufficient water for his needs in 1925, 1926, 1930, 1931, 1960, 1961 and from June 1976 to May 1977 or about 6 or 7 times in the past 40 years. He also testified that there was plenty of water in McGinnis Creek to satisfy all needs about 8 years out of 10. He further testified that he irrigates approximately 180 acres according to SCS figures provided to him and he waters an average of 500-600 head of livestock and has used this water continuously from the time of appropriation whenever it is available. Mr. Nelson testified that at times the only water available to him is from McGinnis Creek when Big Porcupine and other tributaries are dry.

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12. Mr. Don Riddle, Department representative testified that the drainage area of Big Porcupine Creek and its tributaries lying upstream of the Olson Ranch including McGinnis Creek consists of 480 square miles or 307,200 acres; that the drainage area of McGinnis Creek and its tributaries upstream of the Applicants proposed irrigation project is 113.5 square miles or 72,640 acres; that the drainage area of McGinnis Creek above Applicants point of diversion is less than one fourth of the Big Porcupine Creek drainage above Objectors point of diversion; that Objectors place of use is approximately 18 miles downstream from Applicants proposed point of diversion; that the proposed use is a beneficial use and that the proposed means of diversion has been designed by the Soil Conservation Service and is adequate.

13. There are at times, during the period of proposed diversion, unappropriated waters in the source of supply.

PROPOSED CONCLUSIONS OF LAW

1. The Objectors to these Applications have apparent prior appropriations to the waters of Big Porcupine Creek and its tributaries including McGinnis Creek.

2. Under the provisions of Section 89-880 R.C.M. 1947, a permit is required to appropriate water from the proposed source of supply, McGinnis Creek and unnamed tributaries to McGinnis Creek.

3. There are unappropriated waters in the source of supply.

4. 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. The rights of prior appropriators will be protected if the permits are conditioned to protect those rights.

5. The Objectors presenting evidence and testimony at the hearing appear to have valid prior existing water rights from the source of supply for such portions of the year and in such amounts as such prior rights have been actually beneficially used.

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6. The proposed means of diversion is adequate.

7. The proposed use of water is a beneficial use.

8. 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 received.

9. An Applicant for an appropriation of fifteen (15) cubic feet per second or more must prove by clear and convincing evidence that the rights of prior appropriators will not be adversely affected. Since Application No's 6268-s42KJ, 8247-s42KJ, and 8248-s42KJ did not specify a maximum cubic foot per second figure and none was requested by the Department, the Hearing Examiner, based upon this hearing record, is precluded from granting the Applicants an appropriation rate equal to or in excess of 15 cubic feet of water per second for any appropriation granted herein. The applicants are not, however, precluded from seeking an increased appropriation rate equal to or in excess of 15 cubic feet of water per second for the amount of appropriated water granted herein at some future date.

10. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, have been met.

11. The Applications for Beneficial Water Use Permits may be granted in accordance with the provisions of chapter 8 of Title 89 of the Laws of the State 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 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.

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PROPOSED ORDER

1. Subject to the conditions cited below the following Provisional Permits are hereby granted to Wallace A. Newman (6268-s42KJ and 6269-s42KJ) and Wilson A. Newman (8247-s42KJ and 8248-s42KJ):

a. Permit No. 6268-s42KJ to appropriate 80 acre-feet of water per annum, to be diverted from two unnamed tributaries of McGinnis Creek, in Rosebud County, Montana, at points in the NE¼NW¼NE¼ of Section 13, Township 12 North, Range 34 East, M.P.M., and the NW¼NW¼NW¼ of Section 18, Township 12 North, Range 35 East, M.P.M., and used for new irrigation by water spreading on a total of 80 acres, more or less, in said Section 18 from January 1 to December 31, inclusive, of each year.

b. Permit No. 6269-s42KJ to appropriate 3,000 gallons of water per minute, not to exceed 245 acre-feet of water per annum to be diverted from McGinnis Creek, in Rosebud County, Montana, at a point in the SW¼NW¼NE¼ of Section 18, Township 12 North, Range 35 East, M.P.M., and used for supplemental irrigation by water spreading on a total of 245 acres, more or less, in said Section 18 from March 15 to September 15, inclusive, of each year.

c. Permit No. 8247-s42KJ to appropriate 40 acre-feet of water per annum, to be diverted from an unnamed tributary of McGinnis Creek, in Rosebud County, Montana, at a point in the NW¼SE¼ of Section 30, Township 12 North, Range 35 East, M.P.M., and used on a total of 40 acres, more or less, in Section 32, Township 12 North, Range 35 East, M.P.M., for new irrigation by water spreading from January 1 to December 31, inclusive, of each year.

d. Permit No. 8248-s42KJ to appropriate 80 acre-feet of water per annum to be diverted from an unnamed tributary of McGinnis Creek, in Rosebud County, Montana, at a point in the NW¼NE¼ of Section 5, Township 11 North, Range 35 East,

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M.P.M., and used on 70 acres in Section 4 and 10 acres in Section 5, all in Township 11 North, Range 35 East, M.P.M. and containing a total of 80 acres, more or less, for new irrigation by water spreading from January 1 to December 31, inclusive, of each year.

2. The maximum rate of diversion for each permit cited above shall be less than 15 cubic feet of water per second.

3. The above cited permits are granted subject to all prior water rights in the source of supply.

4. At the discretion of the Department of Natural Resources and Conservation, the Applicants shall install and maintain measuring devices and a record of all quantities of water diverted as well as the periods of diversion. Such records, when required, shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

5. Each diversion for the above cited permits shall have installed a satisfactory means of diverting or by-passing all water required to satisfy all prior downstream water rights from the source of supply.

6. Prior to construction plans and specifications for diversion facilities for each permit cited above shall be submitted, at Applicant's expense, to the Department for approval. Applicants shall meet all design and construction requirements recommended by the Department.

7. 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 Permits, nor does the Department in issuing the Provisional Permits, in any way acknowledge liability for damage caused by the Applicant's exercise of their Provisional Permits.

8. 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.

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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 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 11th day of August, 1977.

WILLIAM F. THROM
HEARING EXAMINER

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