

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR  
CHANGE OF APPROPRIATION WATER RIGHT  
NO. 8627-C76H BY JAMES T. LACHAMBRE

**FILMED**  
APR 9 1990

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedures Act, after due notice, a hearing on objections to the above-named application was held on Tuesday, June 14, 1977 at the Sanders County Courthouse, Thompson Falls, Montana, Gary L. Spaeth, Hearing Examiner presiding.

The Applicant, Mr. James T. LaChambre appeared on behalf of the application and presented testimony. The Applicant was represented by Counsel, Mr. Eugene H. Mahoney, Thompson Falls, Montana.

Timely objections were submitted by Mr. Glenn McFarland of the McFarland Ranch, Clark Fork, Idaho, Mr. Archie P. Sherar of Pacifica, California, Mr. and Mrs. Edward L. Bernier, Mrs. Treasure M. Todd, Ms. Katherine Woodward, Ms. Millie Rowe, Mr. John C. Tange, and Harriet Garth. Those present at the hearing and who presented testimony on behalf of their objection were Mr. Glenn McFarland, Mr. Archie P. Sherar, Mr. and Mrs. Edward L. Bernier, who presented testimony on behalf of their objection, and the objection of Mrs. Treasure M. Todd, Ms. Katherine Woodward, Mrs. Millie Rowe. Mr. John C. Tange and Mrs. Harriet Garth were present and represented by Counsel, Mr. Robert S. Keller of Kalispell, Montana. Mr. Forrest Tevebaugh and Gary Diaziger were present and presented testimony on behalf of the Department.

A Proposed Order (Proposal for Decision) dated November 1, 1977 was issued by the Hearing Examiner Gary L. Spaeth.

The Proposed Order as issued on November 1, 1977 provided that it would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, and that any written

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exceptions to the Proposed Order, if any, shall be 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 November 9, 1977 the Department received a letter from Eugene H. Mahoney, attorney for the Applicant concerning the Hearing Examiner's Proposal for Decision in this matter and stated he did not desire to file written exceptions to the proposed decision. Mr. Mahoney went on to explain in his letter a problem existing with the distribution of decreed spring waters. This problem was investigated by the Department's Water Rights Field Office Manager in Kalispell and a report on that problem was prepared as dated December 15, 1977.

The Department received on November 10, 1977 a letter of Exception from Mr. and Mrs. Edward L. Bernier filed in opposition to the Hearing Examiner's Proposal for Decision of November 1, 1977. In the Bernier letter it was stated that they were also speaking for Mrs. Katherine Woodward, Mrs. Treasure M. Todd, and Mrs. Millie Rowe.

On November 18, 1977 the Department received a letter of Exception dated November 15, 1977 from Mr. Glenn McFarland, also filed in opposition to the Hearing Examiner's Proposal for Decision of November 1, 1977.

By letters of November 25, 1977 both Exceptors, Mr. and Mrs. Edward L. Bernier and Mr. Glenn McFarland, were advised by the Department of their opportunity to file a Brief supporting their written Exceptions to the Proposal for Decision within fifteen (15) days after receipt of the Department's letter. They were also informed, that if so requested by either party to this matter: Applicant and/or Objectors, a hearing in Helena before the Water Resources Division Administrator could be held at a later date for the purpose of presenting oral argument in support of the briefs filed or just the exceptions, if that be the case. They were requested to inform the Department if they wished to make oral argument before the Water Resources Division Administrator.

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On December 1, 1977 the Department received a Brief in letter form from Mr. and Mrs. Edward L. Bernier (also on behalf of Katherine Woodward, Treasure M. Todd, and Millie Rowe) in support of the previously filed letter of Exception. The Department by letter of December 9, 1977 to Mr. and Mrs. Bernier acknowledged receipt of their written Brief and informed them that the Administrator had reviewed their Exception and Brief, and advised them that the scheduling of an oral argument hearing before the Administrator is not automatic, therefore, since an oral argument hearing had not been specifically requested by any party to this matter, the Department would proceed to send the Exceptions and Briefs presently received to the Applicant and his attorney and they would be afforded the opportunity to file a Reply Brief in answer to the filed exceptions and briefs.

On December 1, 1977 the Department received a letter dated November 30, 1977 from Mr. Glenn McFarland in reply to the Department's letter of November 25, 1977 which stated in part that he would not be filing a legal brief and did not desire to make oral argument in support of his exception unless such arguments are made by the Applicant. He did request to be notified and be present if oral argument was requested by the Applicant. The Department by letter of December 9, 1977 to Mr. McFarland acknowledged receipt of his letter and informed him that oral argument had not been requested, however, if it was he would be notified. He was also informed that the Applicant and his attorney would be afforded the opportunity to file a Reply Brief in response to the filed exceptions and brief opposing the Hearing Examiner's Proposal for Decision.

The Department by letter of December 9, 1977 to Eugene H. Mahoney, attorney for the Applicant, advised him of their opportunity to file a Reply Brief in response to the objectors exceptions and brief within fifteen (15) days after receipt of the Department's letter.

On December 12, 1977 the Department received Mr. Mahoney's Reply Brief in response to the Objector's exceptions and brief. In the Reply Brief it stated that

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they did not desire to appear at an oral argument hearing in Helena before the Water Resources Division Administrator and would be willing to submit the matter on the record already made. The Department by letter of January 5, 1978 to Mr. Mahoney, acknowledged receipt of his Reply Brief and advised him a copy would be sent to the Exceptors. He was also advised that since an oral argument hearing had not been specifically requested by any party to this matter, the application file would be forwarded to the Administrator of the Water Resources Division for preparation and issuance of a Final Order taking into full consideration the exceptions, brief and reply brief filed in this matter and made a part of the application record.

On January 16, 1978 the Department received a letter dated January 11, 1978 from Mrs. Edward L. Bernier, requesting an oral argument hearing. By letter of April 10, 1978 the Department responded to the Bernier's letter and rejected the "untimely" request, because of reasons stated in said letter.

Since none of the parties in this matter specifically requested an oral argument hearing, and the "untimely" Bernier request was rejected, on the exceptions, brief, and reply brief before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Hearing Examiner's Proposal For Decision of November 1, 1977, the objections, exceptions, brief, reply brief, and all other information of record in the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on November 1, 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 mainly for clarification, and new Item 5 has been added.

#### FINAL ORDER

1. Subject to the conditions cited below the Applicant's Application to Change Appropriation Water Right No. 8627-07611 by James T. LaChambre is hereby granted, allowing for the addition of an additional diversion from the Applicant's

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existing 2-inch pipeline, at a point in the S $\frac{1}{2}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, Township 27 North, Range 34 West, by dividing an existing 1 $\frac{1}{2}$ -inch pipe which now serves the Applicant, into two 3/4-inch pipes, and change the place of use and use to one plot of land in the S $\frac{1}{2}$  SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, and to another plot of land in the N $\frac{1}{2}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, both in Township 27 North, Range 34 West, for domestic purposes. Three acre-feet of water per annum previously used by the Applicant for stockwatering at a point in the S $\frac{1}{2}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 31 will now be used for domestic purposes on two separate plots of land as noted above at the flow rate of 10 gallons per minute, not to exceed 1 $\frac{1}{2}$  acre-feet per annum for each separate plot of land.

This is a change of a part of the water right adjudicated and still possessed by the Applicant included in Decree Case No. 4790, Glenn McFarland, et al., vs. James T. LaChambre, et al., Defendants, dated November 14, 1971 (LaChambre and Price,  $\frac{1}{2}$  of the waters of a certain spring arising in the SW $\frac{1}{4}$  of Section 31, Township 27 North, Range 34 West, M.P.M.) as required in Judgement Book 8, Page T39, Records of Sanders County, Montana. Of the above water, 0.12 cubic feet per second or 60 gallons per minute, up to 9 acre-feet per annum, have been diverted from said spring at a point in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 31, Township 27 North, Range 34 West, M.P.M. Of the 9 acre-feet per annum, 6 acre-feet per annum have been used for domestic purposes and 3 acre-feet per annum have been used for stockwatering purposes, both from January 1st to December 31st, inclusive, of each year. The Applicant will retain for his own domestic purposes 40 gallons per minute, up to 6 acre-feet per annum.

2. This change of appropriation, relative to an additional diversion from the existing pipeline, place of use, and the use itself, is granted with the understanding that if said decree is modified, taking into account the interests of the Applicant, Mr. and Mrs. LaChambre, that this authorization to change shall be modified accordingly. The issuance of this authorization to change in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of

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this change of appropriation, nor does the Department in issuing this authorization to change, in any way acknowledge liability for damage caused by the Applicant's exercise of this authorization to change.

3. This authorization to change is subject to any final determination of prior existing water rights in the source of supply, including the one in question in the source of supply, as provided by Montana law.

4. This authorization to change shall be revoked upon the violation of any of its terms by the Applicant or his successor.

5. This authorization to change grants only an additional diversion from the existing pipeline, a new place of use on two separate plots of land and a new use from stockwatering to domestic, and does not grant the Applicant the right to take any new or additional water for which an existing water right does not now exist.

#### 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 20<sup>th</sup> 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

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IN THE MATTER OF APPLICATION )  
FOR CHANGE OF APPROPRIATION ) PROPOSAL FOR DECISION  
WATER RIGHT NO. 8627-c76N )  
JAMES T. LaCHAMBRE )  
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The Applicant, Mr. James T. LaChambre appeared on behalf of the application and presented testimony. The Applicant was represented by Counsel, Mr. Eugene H. Mahoney, Thompson Falls, Montana.

Timely objections were submitted by Mr. Glenn McFarland of the McFarland Ranch, Clark Fork, Idaho, Mr. Archie P. Sherar, 1259 Lerida Way, Pacifica, California, Mr. & Mrs. Edward L. Bernier, Mrs. Treasure M. Todd, Ms. Katherine Woodward, Ms. Millie Rowe, Mr. John C. Tange, and Harriet Garth. Those present at the hearing and who presented testimony on behalf of their objection were Mr. Glenn McFarland, Mr. Archie P. Sherar, Mr. & Mrs. Edward L. Bernier, who presented testimony on behalf of their objection and the objection of Mrs. Treasure M. Todd, Ms. Katherine Woodward, Mrs. Millie Rowe, Mr. John C. Tange and Mrs. Harriet Garth were present and represented by Counsel, Mr. Robert S.

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Keller of Kalispell, Montana. Mr. Forrest Tevebaugh and Gary Dieziger were present and presented testimony on behalf of the Department.

The spring in question is covered under Decree Cause No. 4790-21 Fourth Judicial District of the State of Montana, in and for the County of Sanders. The action was brought by Glenn McFarland and Mary McFarland, et al., who were predecessors in interest to the Objector, Mr. Archie P. Sherar vs. the Applicant here, James T. LaChambre and Evelyn A. LaChambre, et al. Administrative notice was taken of the decree. This decree was a result of a stipulation between the parties and which was submitted subsequent to the hearing by Mr. Keller. Examination of the decree showed that no priority of date was given but rather that the waters of the spring shall be divided into two equal parts, by appropriate device, at the present site of the collecting tank. That one-half of the waters would be available for the use of the Applicant and Mr. Price or their assignees and that the other half of the waters would be available for use by the Plaintiffs, Mr. & Mrs. McFarland and three members of the Foster family. The system would be constructed so that any surplus waters not being used by the Defendants LaChambre and Price or their assigns, from their half of the system, shall automatically be conveyed to the Plaintiff's system. The Defendants, Mr. & Mrs. Edward L. Bernier, Mrs. Treasure M. Todd, Ms. Katherine Woodward and Ms. Millie Rowe, were not made parties to this

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decree.

The spring water flows into a collecting tank from which there are two, two-inch lines. One of the two-inch lines goes to the property which was acquired for Mr. and Mrs. LaChambre by Mr. & Mrs. Bethel, who are the immediate predecessors in interest of John Tange and Harriet Garth. The other two-inch line goes to the property owned by the Applicant, Mr. LaChambre. Both two-inch lines are gravity fed. This application would not affect the two-inch line going to the property presently owned by the Objectors, Mr. John Tange and Harriet Garth. With that understanding, Mr. Robert S. Keller withdrew the objection of John Tange and Harriet Garth.

The Applicant, Mr. LaChambre, would like to, in the future, sell two tracts of land, one 34 acres in size and the other 20 acres in size. The Applicant would like to extend water to these two tracts. At present the two-inch line that goes to the LaChambre property is divided into a 1 1/2 inch line which serves directly the Applicant, Mr. LaChambre, and a 3/4 inch line is transferred to property that was sold subsequent to this decree by Mr. LaChambre to Mr. Robert Anderson. The Applicant would like to divide the 1 1/2 inch line that serves him further into two 3/4 inch lines and extend them on to the acreages in question.

There was some confusion at the hearing as to the number of springs on Mr. LaChambre's property. From legal descriptions presented by Mr. and Mrs. Bernier and from the

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descriptions presented in the application there seemed to be some difference. From an examination of the documents and the application, it appears that the only difference was as to the specificity of the descriptions. There is only one spring in question.

Mr. McFarland was concerned that this would be an additional appropriation because there would be less water flowing down from the springs onto the property covered in his sales contract to Mr. Archie Sherar. Mr. Sherar, who acquired the property from Mr. McFarland subsequent to the stipulated settlement, was also concerned about the possible effects that the change would have on his water. Mr. Sherar is to receive any surplus water from the system, and an increase in usage of the water by the Applicant would affect him.

From testimony received at the hearing from Mr. Forrest Tevebaugh, as a result of his field investigation, but also from the testimony of the Applicant, this change would not result in an increase in the water flowing through the two-inch line.

Mr. and Mrs. Bernier testified on behalf of themselves and Mr. Treasure M. Todd, Ms. Katherine Woodward, Ms. Millie Rowe, that they were not a party to the original decree and do plan on reopening that decree. They pointed out that the spring feeds into Mile Creek or Brewer Creek and that they are at the lower end of this creek and use the water for gardening and domestic purposes. That they have three filed water rights which were submitted and received into evidence

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under the objection of Mr. Mahoney. The three water right filings were identified and marked as Objectors' Bernier Exhibits C, D, & E. Bernier Exhibit C is a Notice of Appropriation by George E. Brewer for 432 miners inches of water of Brewer Creek for agricultural purposes filed on March 13, 1903. Bernier Exhibit D is a Notice of Appropriation by Florence M. Boaze for 80 miners inches of water of an unnamed stream for irrigation and household purposes filed on December 28, 1912. Bernier Exhibit E is a Notice of Appropriation by Charles R. Walkley and Charles C. Walkley of Heron for 150 miners inches of water of Mile Creek for irrigation purposes and was filed September 14, 1905.

The Bernier's maintain that the use of the water by the Applicant would decrease the water flowing in Mile Creek which would ultimately effect their rights downstream. From the testimony of Mr. and Mrs. Bernier, it appears that there are a couple of beaver dams and one small reservoir constructed by the Applicant here between the spring and their place of diversion upon Mile Creek. It further appears that even if more water were to flow from the spring in Mile Creek, that with the reservoirs and beaver dams that it would be unable to reach the Objectors Mr. and Mrs. Bernier.

It seems that Mr. and Mrs. Bernier and the Objectors which they represented do have an apparent water right in Mile Creek. That such water right may or may not be prior to the water right covered in the Decree Cause No. 4790-21 discussed above. Yet, under that decree the Applicant, by this proposed change, would not be increasing his water

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and thus would have a valid right to use the water in the manner which he proposes. Thus this administrative body would in no way interfere with that particular decree except to allow the proposed change contemplated by the Applicant here. Other exhibits introduced at the hearing and admitted were Bernier Exhibits No. A & B which were maps showing the layout of Mile Creek in the area in question, and Sherar Exhibit No. 1 which was a photograph of the tank located at the spring from which the two two-inch pipes run from.

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 June 9, 1976, the Applicant, Mr. James T. LaChambre, applied to the Department of Natural Resources and Conservation and submitted an Application for Change of Appropriation Water Right No. 8627-c76N. The Applicant seeks to change the use and place of use and to add an additional point of diversion to the following water right: Decree Case No. 4790, Glenn McFarland, et al., vs. James T. LaChambre, et al., Defendants, dated November 14, 1971 (LaChambre and Price 1/2 of the waters of that certain spring rising in the SW1/4 of Section 31, Township 27 North, Range 34 West, M.P.M.) as recorded in Judgement Book 8, Page 189, Records of Sanders County, Montana.

The proposed change is to add an additional point of

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diversion S1/2 NE1/4 SE1/4 of Section 31, Township 27 North, Range 34 West, M.P.M., and to change the place of use to the S1/2 SE1/4 SE1/4 and the N1/2 NE1/4 SE1/4, both in said Section 31. The 3 acre-feet previously used for stockwatering is to be used for domestic purposes.

2. The Objectors all seem to have an apparent interest of some sort in water rights in the Mile Creek drainage. Some of those rights are spelled out in the above-named decree while others are covered by prior use and filed appropriations. Some of the interests involved by the Objectors include holding contracts and leases on property served by the spring or by Mile Creek.

3. Pursuant to Section 89-892(1), R.C.M. 1947, an appropriator of the said spring found in the SW1/4 of Section 31, Township 27 North, Range 34 West, M.P.M., may not be transferred to another location or the use changed without the approval of the Department.

4. This change in location and use of appropriation will not adversely affect the rights of other persons located in the said drainage.

From the foregoing Proposed Findings of Fact, the Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-892(1), R.C.M. 1947, an authorization from the Department is required to change the place of use and type of use of the waters of the

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said spring.

2. Filed and adjudicated prior water rights of prior appropriators of the water in the said drainage, must, by statute, be protected.

3. The Objectors presenting evidence at the hearing appear to have valid adjudicated or filed rights in the spring or the drainage of Mile Creek.

4. The Application for Change of Appropriation Water Right should be granted according to the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

5. Nothing decided herein has bearing upon the status of water rights claimed by the Applicants, including the one sought to be changed, nor does anything decided herein have bearing upon the claimed rights of any other parties, except in relation to the right in question, 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. The Applicants request to change the appropriation water right is hereby granted allowing for the addition of an additional point of diversion in the S 1/2 NE1/4 SE1/4 of Section 31, Township 27 North, Range 34 West, M.P.M., and to change the place of use to the S1/2 SE1/4 SE1/4 and the N1/2 NE1/4 SE1/4, both in said Section 31. The three acre-feet per annum previously used for stockwatering is to be used for domestic purposes. This is a change of that part of the

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water right adjudicated and still possessed by the Applicant included in Decree Case No. 4790, Glenn McFarland, et al., vs. James T. LaChambre, et al., Defendants, dated November 14, 1971 (LaChambre and Price, 1/2 of the waters of that certain spring rising in the SW1/4 of Section 31, Township 27 North, Range 34 West, M.P.M.) as required in Judgment Book 8, Page 189, Records of Sanders County, Montana.

Of the above water, 0.13 cfs or 60 gallons per minute up to 9 acre-feet per annum have been diverted from said springs at a point in the NE1/4 NE1/4 SE1/4 SW1/4 of Section 31, Township 27 North, Range 34 West, M.P.M. Of the 9 acre-feet per annum, 6 acre-feet per annum have been used for domestic purposes and three acre-feet per annum have been used for stockwatering purposes, both from January 1st to December 31, inclusive, of each year. The place of use had been in the S1/2 NE1/4 SE1/4 of said Section 31.

2. This change of appropriation and use shall be granted with the understanding that if the said decree is modified, taking into account the interests of the Objectors, Mr. and Mrs. LaChambre, that this authorization to change shall be modified accordingly. From the issuing of this authorization to change appropriation water right and use in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of this change of appropriation, nor does the Department in issuing this authorization to change, in any way acknowledge liability for damage caused by the Applicant's exercise of this authorization to change.

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3. This authorization to change is subject to any final determination of prior existing water rights including, the one in question, in the source of supply as provided by Montana law.

4. This authorization to change shall be revoked upon the violation of any of its terms by the Applicant.

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.

DATED this 1st day of November, 1977.

  
GARY L. SPETH  
HEARING EXAMINER

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