

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
8734-s76M BY HELEN L. ANDERSON

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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 21, 1977, 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 Applicant's Provisional Permit No. 8734-s76M by Helena L. Anderson is hereby granted as amended allowing for the appropriation of 0.6 cubic feet per second or 270 gallons per minute of water, not to exceed 55.2 acre-feet per annum for irrigation and 1 acre-foot per annum for stockwatering, constituting a total of 56.2 acre-feet per annum from the East Fork of Twin Creek, a tributary of Twin Creek, in Mineral County, Montana, to be diverted from the East Fork of Twin Creek by means of a pump at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19, Township 19 North, Range 29 West, M.P.M. and used for new irrigation on a total of 45 acres, more or less in said Section 19 from May 1 to June 15, 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. In other words when there is insufficient water in the stream to meet the adjudicated rights then the Applicant shall cease diverting.

While this permit is only from May 1 to June 15, inclusive of each year, there may be periods even during this time that the adjudicated rights of the Objectors can not be met. During such times the Applicant will cease his diversions. It shall be the responsibility of the Objectors to so inform the Applicant, that they are unable to obtain sufficient water at their headgates

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to satisfy their adjudicated rights. It shall be the responsibility of each of the parties to cooperate with each other and not to abuse his water rights at the expense of the other, since these conditions must be essentially selfpolicing.

3. Such prior water rights shall include, but are not limited to those of the Objectors which are found in the decree.

4. In order to effectuate the provisions of this Order, the Applicant shall install an adequate metering device upon his pumping facility.

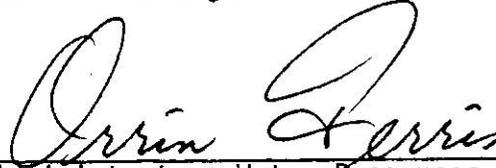
5. The issuing of the Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of their Provisional Permit, nor does the Department, in issuing the Provisional Permit, in any way acknowledge liability for damage caused by the Applicant's exercise of this Provisional Permit.

6. The Provisional Permit is subject to any final determination of prior existing water rights in the source of supply as provided by Montana law and shall be something or other accordingly. This Provisional Permit shall be revoked upon failure to comply with the terms of this permit.

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 log of records of water used for their own proof of their water rights and protection.

Done this 6th day of December, 1977.



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 APPLICATION)
FOR BENEFICIAL WATER USE) PROPOSAL FOR DECISION
PERMIT NO. 8734-s76M BY)
HELEN L. ANDERSON)

Pursuant to the Montana Water Use Act and Administrative Procedure Act, after due notice, a hearing on objections to the above-named application was held on Tuesday, June 14, 1977 at 2:00 p.m. in the courtroom of the Mineral County Courthouse, at Superior, Montana, Gary L. Spaeth, Hearing Examiner, presiding.

The Applicant, Mrs. Helen L. Anderson, was present as was her husband, Thomas A. Anderson, and they presented testimony on behalf of their application.

There were three objections filed to the application, Mr. John L. Callen, Sr., Mr. Wilbur W. Lorenz, and Mr. Charles J. Antos, on behalf of Mountain Home Nurseries. Mr. and Mrs. Antos were present and were represented by Mr. Vernon Hoven of the law firm of Tipp & Hoven of Missoula. Mrs. Wilbur Lorenz was present on behalf of the objection of her husband, Mr. Wilbur Lorenz, and Mr. John L. Callen appeared and presented testimony on behalf of his objection.

Mr. Forrest Tevebaugh of the Department of Natural Resources and Conservation appeared and presented testimony as to the results of his field investigation.

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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 May 28, 1976, the Applicant, Mrs. Helen L. Anderson, applied to the Department of Natural Resources and Conservation for Beneficial Use Permit No. 8734-s76M seeking to appropriate 0.6 cfs or 270 gallons of water per minute and not to exceed 58 acre-feet per annum for irrigation and 1 acre-foot per annum for stockwatering, constituting a total of 59 acre-feet per annum from the East Fork of Twin Creek, a tributary of Twin Creek, in Mineral County, Montana, to be diverted from the East Fork of Twin Creek by means of a pump at a point in the NW1/4 NW1/4 NE1/4 of Section 19, Township 19 North, Range 29 West, M.P.M., and used for new irrigation on a total of 45 acres, more or less, in said Section 19, from May 1 to October 1, inclusive, of each year, and for stockwatering from January 1 to December 31, inclusive, of each year.

2. Timely objections to the above application were filed by Mr. John L. Callen, Sr., of Post Falls, Idaho, Mr. Wilbur W. Lorenz of DeBorgia, Montana, and Mr. Charles J. Antos of the Mountain Home Nurseries, also of DeBorgia, Montana.

3. Twin Creek, including both the East Fork and the West Fork, are decreed streams, having been decreed under

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Case No. 1018 in Mineral County. Mendel and Helen S. Bennett were given the first appropriative rights on the West Fork of Twin Creek with a priority date of December 17, 1889 for 78 miners inches and also a priority date of 1901 for the East Fork of Twin Creek for 28 miners inches. Mr. John Callen was successor in interest to the Bennetts, and he established the Mountain Home Nursery on the tracts of land described in the above decree. Mr. John Callen then sold the property to Mr. Antos who is also an Objector here and who would also be the successor in interest to the first water rights on Twin Creek. There were a total of three other decrees found in said case, with A. J. and Viola E. Cotton having priority dates of May 1912 for 80 miners inches in the West Fork of Twin Creek and for 60 miners inches in the East Fork of Twin Creek. The Objector, Mr. Wilbur Lorenz, is the successor in interest to such decreed right and thus would appear to be the second water right in the Twin Creek drainage. At present they are using water for a garden and for two Buffalo. Over the last few years there has been no water used for irrigation under this particular decree. Once a title question is resolved, Mrs. Lorenz stated that they would like to begin irrigating again. The other two decree holders have a May 24, 1914 priority date for 60 miners inches on the West Fork of Twin Creek and the other decree holder would have a May 21, 1917 priority date from the East Fork of Twin Creek. Thus it would appear that if this permit is granted that the Applicant would have the third water right found along the East Fork

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of Twin Creek.

4. From testimony received at the hearing, primarily from Mr. Callen, who has been a long-time resident of the area, until his recent retirement from the Mountain Home Nursery business, both the East Fork and West Fork of Twin Creek are mountain streams that experience generally high runoff during the spring. Such runoff would be in excess of any appropriations along the stream. Mr. Callen also felt that during such high periods of runoff that if anyone could utilize such water they should ^{be} allowed to do so. Also from Mr. Callen's testimony, it appears that the West Fork of Twin Creek is by far the larger of the two forks of Twin Creek and thus explains the larger decrees being found upon such stream.

5. The Objector, Mr. Callen, explained the use of the waters of the East and West Fork of Twin Creek at the Mountain Home Nursery. It appears over the last several years that the Nursery has grown from a small nursery operation of several hundred thousand trees to a substantial operation involving well over a million trees each year. Mr. Callen further explained that during certain times of the summer, particularly on hot windy days, the seedlings at the nursery need water almost immediately or they will perish. That the waters of Twin Creek are vitally important to the maintenance of the nursery stock at the nursery. This was further verified by Mr. Antos during cross-examination by Mr. Hoven.

7. Mr. Callen indicated that in many years there is insufficient water in Twin Creek to even satisfy the first

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appropriation of the Mountain Home Nursery in total. Yet, there seems to be enough water to generally manage during such periods even though the other appropriators many times are without water after the first to the 15th of July.

8. Mr. Hoven, on behalf of the Objector, Mr. Antos, urged that the application be denied because there are no appropriated waters during the period applied for from May 1 to October 1, inclusive, of each year. The Applicant to help settle and solve any of the concerns of the Objectors, amended this application to only apply during the high water periods which are generally from May 1 to June 15, inclusive, of each year. There will be times when water will not always be available during this period of the year to meet this application. By so granting this permit it should not be interpreted that the Applicant does not have to honor the prior adjudicated rights found along Twin Creek when there is insufficient water to satisfy this application. Based upon the above Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the East Fork of Twin Creek in Mineral County.
2. There are times when there exists unappropriated waters in the source of supply available for appropriation by the Applicant for the purposes of irrigating and stockwater purposes.
3. Pursuant to 89-886(1), R.C.M. 1947, valid rights

of prior appropriators must be protected in the issuance of

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a beneficial water use permit.

4. The proposed means of diversion is adequate for the purpose of the water, but nothing herein will be construed of a finding of adequacy under the Streambed Preservation Act.

5. The proposed use of water constitutes a beneficial use.

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

7. The Objectors and other persons appear to have valid prior adjudicated water rights along the East and West Fork of Twin Creek and these existing water rights shall not be adversely affected through the exercise of this Provisional Permit.

8. The Application for Beneficial Water Use Permit shall be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

9. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant nor the Objectors other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any party except in relation to those rights herein applied for to the extent necessary to reach a conclusion

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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 sited below, the Applicant's Provisional Permit No. 8734-s76M by Helen L. Anderson is hereby granted as amended allowing for the appropriation of 0.6 cubic feet per second or 270 gallons per minute of water, not to exceed 55.2 acre-feet per annum for irrigation and 1 acre-foot per annum for stockwatering, constituting a total of 56.2 acre-feet per annum from the East Fork of Twin Creek, a tributary of Twin Creek, in Mineral County, Montana, to be diverted from the East Fork of Twin Creek by means of a pump at a point in the NW1/4 NW1/4 NE1/4 of Section 19, Township 19 North, Range 29 West, M.P.M. and used for new irrigation on a total of 45 acres, more or less in said Section 19 from May 1 to June 15, inclusive, of each year, and for stockwatering from January 1 to December 31, inclusive, of each year.

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shall be the responsibility of the Objectors to so inform the Applicant, that they are unable to obtain sufficient water at their headgates to satisfy their adjudicated rights. It shall be the responsibility of each of the parties to cooperate with each other and not to abuse his water rights at the expense of the other, since these conditions must be essentially self-policing.

3. Such prior water rights shall include, but are not limited to those of the Objectors which are found in the decree.

4. In order to effectuate the provisions of this Proposed Order, the Applicant shall install an adequate metering device upon his pumping facility.

5. The issuing of the 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 the Provisional Permit, in any way acknowledge liability for damage caused by the Applicant's exercise of this Provisional Permit.

6. The Provisional Permit is subject to any final determination of prior existing water rights in the source of supply as provided by Montana law and shall be something or other accordingly. This Provisional Permit shall be revoked upon failure to comply with the terms of this permit.

NOTICE

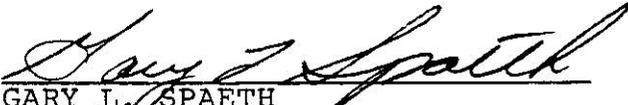
This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation.

Written exceptions to the Proposed Order, if any, shall be

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mailed to the Department within ten (10) days of service upon the parties named herein. Upon receipt of any written exceptions opportunity will be provided to make oral arguments before the Administrator of the Water Resources Division.

DATED this 21st day of October, 1977.


GARY L. SPAETH
HEARING EXAMINER

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