

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. )  
8865-s40J BY EARL F. KORMAN )

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER  
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The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 7, 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. 8865-s40J is hereby granted allowing the appropriation of no more than 5.12 cubic feet of water per second or 2,300 gallons of water per minute, not to exceed 264 acre-feet of water per annum from the Milk River, in Valley County, Montana; to be diverted from the Milk River by means of a pump located at points in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  and in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$ , both in Section 29; in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 28 and the SW $\frac{1}{4}$  SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 27, all in Township 32 North, Range 35 East of Montana Principal Meridian. Said appropriation is to be used for new irrigation on 29 acres in Section 27, on 56 acres in Section 28, and on 30 acres in Section 29, all located in Township 32 North, Range 35 East of the Montana Principal Meridian; and containing a total of 115 acres more or less. Said appropriation is to be used and diverted from May 1 to September 15, inclusive, of each year.

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

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

**CASE # 8865**

4. Specifically, the waters appropriated pursuant to this Provisional Permit may only be diverted when all other terms and conditions of the Provisional Permit are satisfied during extreme high spring runoff or when the Bureau of Reclamation is spilling at Vandalia Diversion Dam. During all other periods the Applicant shall allow the flow to pass the points of diversion so as to satisfy prior existing water rights.

5. The Applicant shall contact the Bureau of Reclamation at Malta at the start of each irrigation season to determine the current water supply conditions and the availability of water for use pursuant to the Provisional Permit.

6. The Applicant shall contact the Glasgow and Malta Irrigation Districts at the start of each irrigation season to determine the current water supply conditions and the availability of water for use pursuant to the Provisional Permit.

7. The conditions contained herein relating to Vandalia Diversion Dam may be modified by the Department upon receipt of further evidence or determinations by the Department pertaining to the water rights of the United States Government in the Milk River Basin.

8. The Applicant shall install and maintain adequate measuring devices so as to enable the Applicant to keep a record of all quantities of water diverted from the source of supply as well as of the periods of such diversion. Such records shall be presented to the Department for inspection upon demand by the Department.

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

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.

**CASE # 8865**

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 6<sup>th</sup> day of December, 1977.

*Arvin Ferris*

Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE # 8865**

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATIONS	)	
FOR BENEFICIAL WATER USE	)	
PERMIT NO. 8865-s40J BY	)	
EARL F. KORMAN AND NO.	)	PROPOSAL FOR DECISION
8874-s40J BY RALPH	)	
KORMAN	)	

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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 Applications, each for a new water right, was held in the Courtroom of the Valley County Courthouse, Glasgow, Montana, on Tuesday, May 3, 1977. The hearing commenced at approximately 10:00 a.m., Richard Gordon, Legal Counsel for the Department and appointed Hearing Examiner herein presiding.

The Applicant, Mr. Ralph Korman, appeared personally in support of his application. The Applicant, Mr. Earl Korman, did not appear personally but was represented by his son, Mr. Terry Korman. Both Applicants were represented by counsel, Peter O. Maltese, Esq., of Glasgow, Montana. The Applicants offered into evidence two exhibits, to wit:

1. A Soil Conservation Service aerial photograph depicting the point of diversion and place of use with respect to Application No. 8874-s40J;
2. A Soil Conservation Service aerial photograph depicting the point of diversion and place of use with respect to Application No. 8865-s40J.

Said exhibits were admitted as Applicants' Exhibit Nos. 1 and 2 respectively.

The Objector, Bureau of Reclamation appeared through its attorney, Ed Bartlett, Esq. of Billings, Montana. Also appearing on behalf of the Bureau of Reclamation was Mr. Gordon Aycock. The Objector Bureau of Reclamation offered into evidence four exhibits, to wit:

**CASE # 8865**

1. A graph depicting month-by-month active storage in acre-feet and spills in cubic feet per second with respect to Fresno Reservoir, said graph covering the period January, 1966 through September, 1975;

2. A chart depicting the Milk River flow in cubic feet per second at the Glasgow Diversion from October, 1972 through September, 1973;

3. A graph depicting estimated average monthly irrigation season shortages in acre-feet experienced by the Glasgow Irrigation District at the Vandalia Diversion Dam, as computed from the DNRC Milk River study computer printouts;

4. A graph depicting the estimated monthly irrigation season shortages in acre-feet experienced by the Glasgow Irrigation District in 1973 at the Vandalia Diversion Dam, as computed from DNRC Milk River study computer printouts.

Said exhibits were admitted as Objector Bureau of Reclamation Exhibits No. 1 through 4 respectively.

The Objector, Malta Irrigation District appeared through Mr. Ted Ereaux and Mr. Fred Mavencamp.

The Objector, Glasgow Irrigation District appeared through Ms. Faye Seel, Mr. Mark Etchart, and Mr. Bert Steiner.

No representatives appeared from the Fort Belknap, Paradise Valley, Alfalfa, Valley, Zurich, Harlem or Dodson Irrigation Districts.

Mr. Forrest Tevebaugh personally appeared on behalf of the Department of Natural Resources and Conservation.

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 10, 1976 the Department received Application for Beneficial Water Use Permit No. 8865-s40J by Earl F. Korman seeking to appropriate 5.12 cubic feet

of water per second or 2,300 gallons of water per minute and not to exceed 264 acre feet of water per annum from the Milk River, in Valley County, Montana; to be diverted from the Milk River by means of a pump located at points in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  and in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , both in Section 29; in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 28; and in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27, all in Township 32 North, Range 35 East of the Montana Principal Meridian. Said appropriation would be used for new irrigation on 29 acres in Section 27, on 56 acres in Section 28, and on 30 acres in Section 29, all in Township 32 North, Range 35 East, of Montana Principal Meridian, and containing a total of 115 acres, more or less. Said appropriation would be diverted and used from May 1 to September 15, inclusive, of each year.

2. On September 22, 1976 the Department received an objection to the above-described application from the Glasgow Irrigation District alleging insufficient natural flow in the Milk River to satisfy existing uses.

3. On September 22, 1976 the Department received an objection to the above-described application from the Malta Irrigation District alleging insufficient natural flow in the Milk River to satisfy existing uses.

4. On October 14, 1976 the Department received an objection to the above-described application from the United States of America, Bureau of Reclamation alleging filed and use rights dating from 1911 to water from the Milk River sufficient to irrigate 100,000 acres, to satisfy municipal uses, and to satisfy low flow augmentation rights from Fresno Reservoir. The Objector alleged that except for brief periods of high flows in years of above average runoff, all water in the Milk River is appropriated natural flow, storage released from Fresno and Nelson Reservoirs, or imports into the Milk River from the St. Mary River Basin, all of which must remain in the Milk River for diversion at Vandalia Dam, a feature of the Milk River project, the uses of which are outlined above.

The Objector further alleged that it is not possible to divert an irrigational water supply from the Milk River at the point of diversion without adversely affecting the existing water rights of the Milk River Project.

case 8865

5. On October 28, 1976, the Department received a combined objection to the above application from the Fort Belknap, Paradise Valley, Alfalfa Valley, Zurich, Harlem, Dodson, Malta and Glasgow Irrigation Districts alleging a prior filed and use right to the waters of the Milk River sufficient to irrigate approximately 100,000 acres of irrigated land within the boundaries of said irrigation districts, and further alleging that there is no unappropriated water in the natural flow of the Milk River, and that all water in the Milk River in excess of the natural flow is a result of storage facilities and must be contracted for through the Bureau of Reclamation.

6. On June 28, 1976 the Department received Application for Beneficial Water Use Permit No. 8874-s40J by Ralph Korman seeking to appropriate 5.34 cubic feet of water per second or 2,400 gallons of water per minute and not to exceed 198 acre feet of water per annum from the Milk River in Phillips County, Montana; to be diverted from the Milk River by means of a pump located at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 16, Township 32 North, Range 33 East of the Montana Principal Meridian. Said appropriation would be used for new irrigation on a total of 86 acres, more or less, in Section 9, Township 32 North, Range 33 East of Montana Principal Meridian. Said appropriation would be diverted and used from May 1 to September 15, inclusive of each year.

7. On September 22, 1976 the Department received an objection to the above-described application from the Glasgow Irrigation District alleging insufficient natural flow in the Milk River to satisfy existing uses.

8. On September 22, 1976 the Department received an objection to the above-described application from the Malta Irrigation District alleging insufficient natural flow in the Milk River to satisfy existing uses.

**CASE # 8865**

9. On September 23, 1976 the Department received an objection to the above-described application from the United States of America, Bureau of Reclamation alleging filed and use rights dating from 1911 to water from the Milk River sufficient to irrigate 100,000 acres, to satisfy municipal uses, and to satisfy low flow augmentation rights from Fresno Reservoir. The Objector alleged that except for brief periods of high flows in years of above average runoff, all water in the Milk River is appropriated natural flow, storage released from Fresno and Nelson Reservoirs, or imports into the Milk River from the St. Mary River Basin, all of which must remain in the Milk River for diversion at Vandalia Dam, a feature of the Milk River project the uses of which are outlined above. The Objector further alleged that it is not possible to divert an irrigational water supply from the Milk River at the point of diversion without adversely affecting the existing water rights of the Milk River Project.

10. For purposes herein, based upon testimony given at the hearing, it is found that the amounts of water requested to be appropriated annually amount to a maximum of approximately 3 acre feet of water per irrigated acre and thus are not excessive; and that the issue of prior appropriation aside, sufficient water physically flows past the Applicants' points of diversion to satisfy the requested appropriation in most years.

11. For purposes herein, based upon testimony given at the hearing, it is found that there is unappropriated water in the source of supply only at such times when there is water flowing in the source of supply in excess of all prior water rights in the source of supply, and further when the withdrawal of water by the Applicants will not adversely affect any such prior existing water rights in the source of supply.

12. For purposes herein, based upon testimony given at the hearing, it is found that if any Provisional Permits granted herein are conditioned to allow the appropriation of water only at such times when there is unappropriated water available in the source of supply, the rights of prior appropriators will not be adversely affected.

13. For purposes herein, based upon testimony given at the hearing, it is found that there is only unappropriated water available in the source of supply during extreme high spring runoff or at such times when the Bureau of Reclamation is spilling water at Vandalia Diversion Dam.

14. For purposes herein, based upon testimony given at the hearing it is found that the proposed means of diversion are adequate.

15. For purposes herein, based upon testimony given at the hearing, it is found that the proposed uses of water constitute beneficial uses.

16. For purposes herein, based upon testimony given at the hearing it is found that the proposed uses will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

17. For purposes herein, based upon testimony given at the hearing, it is found that the Applicants do not purpose to appropriate in excess of 15 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 R.C.M. 1947 Beneficial Water Use Provisional Permits are required to appropriate the waters sought to be appropriated by the Applicants herein.

**CASE # 8865**

2. If granted, the Provisional Permits 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 specifically based upon any conditions and limitations appearing therein, it is concluded that the criteria for the issuance of Provisional Permits as delineated at 89-885 R.C.M. 1947 have been met.

4. Pursuant to 89-886(1) R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of Beneficial Water Use Provisional Permits. It is concluded that the rights of prior appropriators will be protected if the Provisional Permits are conditioned so as to protect those rights.

5. It is concluded that the issuing of Provisional Permits in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permits.

6. It is concluded that nothing decided herein has bearing on the status of water rights claimed by the Applicants other than those herein newly 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 Applicant's Provisional Permit No. 8865-s40J is hereby granted allowing the appropriation of no more than 5.12 cubic feet of water per second or 2,300 gallons of water per minute, not to exceed 264 acre-feet of water per annum from the Milk River, in Valley County, Montana; to be diverted from the Milk River by means of a pump located at points in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  and in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , both in Section 29; in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 28 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27, all in Township 32 North, Range 35 East of Montana

**CASE # 8845**

Principal Meridian. Said appropriation is to be used for new irrigation on 29 acres in Section 27, on 56 acres in Section 28, and on 30 acres in Section 29, all located in Township 32 North, Range 35 East of the Montana Principal Meridian; and containing a total of 115 acres more or less. Said appropriation is to be used and diverted from May 1 to September 15 inclusive, of each year.

2. Subject to the conditions cited below, the Applicant's Provisional Permit 8874-s40J is hereby granted allowing the appropriation of no more than 5.34 cubic feet of water per second or 2,400 gallons of water per minute, and not to exceed 198 acre-feet of water per annum from the Milk River, in Phillips County, Montana; to be diverted from the Milk River by means of a pump located at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 16, Township 32 North, Range 33 East, of the Montana Principal Meridian. Said appropriation is to be used for new irrigation on a total of 86 acres, more or less, located in Section 9, Township 32 North, Range 33 East of the Montana Principal Meridian. Said appropriation is to be diverted and used from May 1 to September 15, inclusive of each year.

3. The Provisional Permits are granted subject to all valid prior existing water rights in the source of supply, including but not necessarily limited to all valid prior existing rights in the source of supply of those objecting herein.

4. The Applicants may only appropriate water at such times when such to appropriate will not adversely affect any prior existing right in the source of supply.

5. Specifically, the waters appropriated pursuant to these Provisional Permits may only be diverted when all other terms and conditions of the Provisional Permit are satisfied during extreme high spring runoff or when the Bureau of Reclamation is spilling at Vandalia Diversion Dam. During all other periods the Applicants shall allow the flow to pass the points of diversion so as to satisfy prior existing water rights.

**CASE # 8845**

6. The Applicants shall contact the Bureau of Reclamation at Malta at the start of each irrigation season to determine the current water supply conditions and the availability of water for use pursuant to the Provisional Permit.

7. The Applicants shall contact the Glasgow and Malta Irrigation Districts at the start of each irrigation season to determine the current water supply conditions and the availability of water for use pursuant to the Provisional Permit.

8. The conditions contained herein relating to Vandalia Diversion Dam may be modified by the Department upon receipt of further evidence or determinations by the Department pertaining to the water rights of the United States Government in the Milk River Basin.

9. The Applicants shall install and maintain adequate measuring devices so as to enable the Applicants to keep a record of all quantities of water diverted from the source of supply as well as of the periods of such diversion. Such records shall be presented to the Department for inspection upon demand by the Department.

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

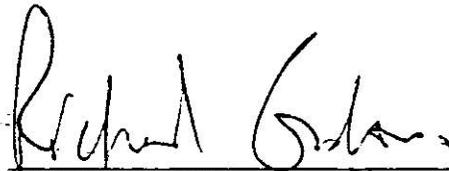
11. The Provisional Permits are granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

**CASE #** 8865

NOTICE

This is a Proposal for Decision and will 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, should be filed with the Department within ten (10) days of service herein. Upon receipt of any written exceptions, opportunity will be provided to the exceptor and to all adversely affected parties to file briefs and make oral arguments before the Administrator of the Water Resources Division.

DATED this 7<sup>th</sup> day of October, 1977.



RICHARD GORDON  
HEARING EXAMINER

**CASE #** 8865