

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
9757-s76K BY ROBERT J. SHOTLIFF)
AND ALFRED J. HAUGH)

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on February 15, 1978, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order, except that the Proposed Order is hereby modified by adding items 4, 5 and 6.

FINAL ORDER

1. Subject to the conditions cited below, the Application for Beneficial Water Use Permit No. 9757-s76K by Robert J. Shotliff and Alfred J. Haugh is hereby granted to appropriate 0.5 cubic foot per second or 224.5 gallons per minute of water, not to exceed 12.5 acre-feet per annum from Alder Creek, a tributary of the Swan River, in Lake County, Montana to be diverted from Alder Creek by means of a ditch at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, Township 22 North, Range 17 West, M.P.M. and used for new irrigation on a total of 5.0 acres, more or less, in said Section 28 from April 1 to October 15, inclusive, of each year.

2. The permit is provisional and is subject to all prior existing water rights in the source of supply, including, but not limited to prior decreed rights, if any, and not necessarily limited to all existing water rights in the source of supply of those objecting herein, and is further subject to any final determination of prior existing water rights, as provided by Montana Law.

3. The permit is further subject to the following additional conditions:

- a. The proper installation and maintenance of two satisfactory measuring devices, one in Alder Creek, immediately above the

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confluence of Alder Creek and Meadow Creek and the second at the Permittees' point of diversion from Alder Creek.

- b. Satisfactory water measurements shall be maintained during Permittees' periods of diversion to show the rate of flow of Alder Creek and the periods, rate of flow and volume of water diverted from Alder Creek. Such records shall be made available to the Department upon request.
- c. The Permittees shall divert at a rate of flow not to exceed 0.5 cubic feet per second or the measured rate of flow of Alder Creek at its confluence with Meadow Creek, whichever is less.
- d. The Permittees shall cooperate with prior water rights holders to allow reasonable access to the measuring devices for verification of flow measurements.
- e. The Permittees shall submit plans and specifications for this project, including the measuring devices, to the Department for review and approval prior to the start of construction.

4. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

5. The issuing of a Provisional Permit by the Department in no way reduces the Permittees' liability for damage caused by the Permittees' 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.

6. The above conditions to the granting of this Provisional Permit shall hold in effect for any predecessor in interest to the Permittees herein named.

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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 15th day of March, 1978.

Orvin Ferris

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)
PERMIT NO. 9757-s76K) PROPOSAL FOR DECISION
BY ROBERT J. SHOTLIFF AND)
ALFRED J. HAUGH)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on October 27, 1977, at Swan River Forest Youth Camp, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit, William F. Throm, Hearing Examiner presiding.

The Applicants, Robert J. Shotliff and Alfred J. Haugh, appeared at the hearing and presented testimony in support of the application. The applicants were not represented by legal counsel. No exhibits were introduced supporting the application.

One Objector, Mr. Alfred C. Wise, attended the hearing and presented testimony or statements. The Objector was not represented by legal counsel. The Objector introduced no exhibits supporting his objection.

Montana Department of Natural Resources and Conservation personnel and witnesses present and testifying on behalf of the Department were Jim Rehbein, Kalispell Field Office Manager and Stan Jones, Hearing Assistant. The Department was not represented by legal counsel. Two exhibits were introduced by the Department to wit: Exhibit No. 1, a copy of an aerial photo of the proposed project area, and Exhibit No. 2, consisting of three sheets: sheet 1, U.S. Geological Survey stream flow records for the Swan River near Condon, October 1972 to current year; sheet 2, U.S. Geological Survey stream flow records for the Swan River near Condon October 1972 to September 1973; and sheet 3, computation by Stan Jones, extrapolation of U.S. Geological Survey

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stream flow records for Pony Creek and Alder Creek drainages. The Department Exhibits were marked accordingly and received into the record without objections.

PROPOSED FINDINGS OF FACT

1. On October 6, 1976, the Department received an Application for Beneficial Water Use Permit No. 9757-s76K by Robert J. Shotliff and Alfred J. Haugh to appropriate 0.5 cubic foot per second or 224.5 gallons per minute of water, not to exceed 25 acre-feet per annum from Alder Creek, a tributary of the Swan River, in Lake County, Montana, to be diverted from Alder Creek by means of a ditch at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, Township 22 North, Range 17 West, M.P.M., and used for new irrigation on a total of 10 acres, more or less, in said Section 28 from April 1 to October 15, inclusive, of each year.

2. On January 27 and February 3 and 10, 1977, the Department caused to be duly published in the Flathead Courier, Polson, Montana, Notice of the above Application for Beneficial Water Use Permit No. 9757-s76K.

3. On March 4, 1977, the Department received an objection to the above application from Alfred C. and Reva Wise and from Dan Frye. On March 10, 1977, an objection was received by the Department from Bruce W. Woodard.

4. Robert J. Shotliff testified that it is the intent of he and Alfred J. Haugh to improve their land for possible retirement homes and to develop irrigated pasture for a cow or a few head of livestock. He testified that they have been improving the land and through correspondence with the Department of Natural Resources and Conservation determined that there were no water rights filings on Alder Creek. However, he did testify that Mr. Wise does divert water from Pony Creek and stores it in a pond on Alder Creek from where it is diverted by a gravity ditch to Mr. Wise's land for irrigation purposes. Mr. Shotliff testified that he believes there are unappropriated

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waters available and that Mr. Wise would not be adversely affected by the proposed development. Mr. Shotliff stated that there are old beaver dams below Mr. Wise's dam which impound water and cause swampy conditions to the Shotliff and Haugh land which they propose to remove, thus drying up their land and making it reclaimable for irrigated pasture, which would consist of approximately 5 acres at the most, all to be irrigated by a gravity ditch taking out approximately at Mr. Wise's diversion, but from the opposite side of Alder Creek. Mr. Haugh, in his testimony, confirmed the testimony offered by Mr. Shotliff. Mr. Shotliff also testified that they have offered to improve Mr. Wise's dam, which is on their property, and if done, he feels there would be a better supply of water for all concerned.

5. Mr. Alfred C. Wise testified that he has a filed water right for 80 miners inches from Pony Creek which he diverts by a gravity ditch through Meadow Creek to Alder Creek where he stores Pony Creek water in a small reservoir and then diverts by gravity ditch to his land for irrigation of 3 to 5 acres. He testified that Alder Creek does not supply a sufficient volume of water during the irrigation season for irrigation purposes which is the reason that he has gone to Pony Creek for his source of supply.

6. Jim Rehbein testified that from his observations and field inspection of the proposal that he does not feel that Alder Creek contributes a useable volume of flow for irrigation purposes during the irrigation season.

7. Stan Jones presented his calculations extrapolated from U.S. Geological Survey Swan River stream flow measurements to the Alder Creek Drainage which he testified were unreliable because of differences which may exist in watershed characteristics, nevertheless, which may give some indication of stream flows in Alder Creek based on the two year period of record available, which is: 6.8 cfs in June; 2.4 cfs in July; 1.6 cfs in August and 0.8 cfs in September. He also testified that, based upon extrapolations from the

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same period of record, the April through September total stream flow for Alder Creek would have been 40 acre-feet in 1973 and 86 acre-feet in 1974.

8. The beneficial use to which the Applicants will apply this water is not to exceed 5.0 acres of irrigated hay or pasture. This is one half the acreage stated on the Application. The rate of diversion requested was 0.5 cubic feet per second which, although very ample, is not excessive for gravity irrigation. The total volume requested was 25 acre-feet per annum which is excessive for irrigation of 5.0 acres of hay or pasture. A volume not to exceed 12.5 acre-feet per annum would be ample for the beneficial use as stated in the Applicant's testimony.

9. A review of the Department Exhibit No. 2 of extrapolations of the Swan River stream flow to apply to the Alder Creek Watershed revealed an error in factoring. Corrected computations would show the following yield for the Alder Creek watershed for the period April through September:

<u>USGS Swan River Yield</u>		<u>Alder Creek Areas</u>		<u>Alder Creek Yield</u>
1973-831 ac. ft./sq. mi.	X	3.5 sq. mi.	=	<u>2909</u> ac. ft. not 40 ac. ft.
1974-1782 ac. ft./sq. mi.	X	3.5 sq. mi.	=	<u>6237</u> ac. ft. not 86 ac. ft.

Stream flow extrapolations applied to Alder Creek for the 1973 low water year would have been:

	<u>USGS Swan River (CFSM)</u>		<u>Area Alder Creek (3.5 mi²)</u>		<u>Alder Creek Stream Flow (cfs)</u>		
June	4.80	X	3.5	=	16.8 cfs	not	6.8 cfs
July	2.14	X	3.5	=	7.5 cfs	not	2.4 cfs
Aug.	0.77	X	3.5	=	2.7 cfs	not	1.6 cfs
Sep.	0.52	X	3.5	=	1.8 cfs	not	0.8 cfs

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a Beneficial Water Use Permit is required by the Applicants to appropriate water from the proposed source of supply.

2. The Objectors have apparent prior existing water rights from the source of supply which by law must be protected, however, the quantification

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and final determination of the validity of such rights must await the adjudication process mandated by Section 89-870 et seq., of the Montana Water Use Act and any permits issued must be subject to that final determination.

3. There are unappropriated waters in the source of supply, however, such waters are not necessarily available at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and the amount requested is not necessarily available throughout the period during which the Applicants seek to appropriate and the permit must be conditioned to protect prior water rights appropriators from adverse affects during periods of low flow, and the permit, in no way, assures the Applicants the water granted will be available.

4. The rights of prior appropriators will not be adversely affected if the permit is conditioned so as to protect those rights.

5. The proposed means of diversion or construction will be adequate if built in accordance with plans and specifications approved by the Department.

6. The proposed use of water is a beneficial use; however, the volume requested is excessive for the acreage to be irrigated and should be reduced proportionately.

7. 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.

8. The Application for Beneficial Water Use Permit No. 9757-s76K by Robert J. Shotliff and Alfred J. Haugh may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. Subject to the conditions cited below, the Application for Beneficial Water Use Permit No. 9757-s76K by Robert J. Shotliff and Alfred J. Haugh is

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hereby granted to appropriate 0.5 cubic foot per second or 224.5 gallons per minute of water, not to exceed 12.5 acre-feet per annum from Alder Creek, a tributary of the Swan River, in Lake County, Montana to be diverted from Alder Creek by means of a ditch at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, Township 22 North, Range 17 West, M.P.M., and used for new irrigation on a total of 5.0 acres, more or less, in said Section 28 from April 1 to October 15, inclusive, of each year.

2. The permit is provisional and is subject to all prior existing water rights in the source of supply, including, but not limited to prior decreed rights, if any, and not necessarily limited to all existing water rights in the source of supply of those objecting herein, and is further subject to any final determination of prior existing water rights, as provided by Montana Law.

3. The permit is further subject to the following additional conditions:

- a. The proper installation and maintenance of two satisfactory measuring devices, one in Alder Creek, immediately above the confluence of Alder Creek and Meadow Creek and the second at the Permittees' point of diversion from Alder Creek.
- b. Satisfactory water measurements shall be maintained during Permittees' periods of diversion to show the rate of flow of Alder Creek and the periods, rate of flow and volume of water diverted from Alder Creek. Such records shall be made available to the Department upon request.
- c. The Permittees shall divert at a rate of flow not to exceed 0.5 cubic feet per second or the measured

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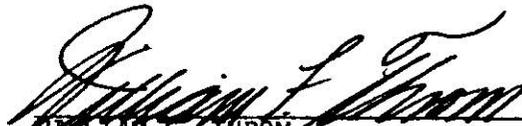
rate of flow of Alder Creek at its confluence with Meadow Creek, whichever is less.

- d. The Permittees shall cooperate with prior water rights holders to allow reasonable access to the measuring devices for verification of flow measurements.
- e. The Permittees shall submit plans and specifications for this project, including the measuring devices, to the Department for review and approval prior to the start of construction.

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 after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions will be granted. 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 15th day of February, 1978.


WILLIAM F. THROM
HEARING EXAMINER

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AFFIDAVIT OF SERVICE
(Proposed Order)

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Ronald J. Guse, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on February 16, 1978, he deposited in the United States mail, "certified mail, return receipt requested," a copy of the Proposed Order by the Department Hearing Examiner on the application by Robert Shotliff and Alfred Haugh, Application No. 9757-s76K, for a permit to appropriate water, addressed to each of the following persons or agencies:

Certified No's. 50668 - 50672

1. Mr. Robert J. Shotliff; 2526 Gilbert Avenue; Missoula, MT 59801
2. Mr. Alfred J. Haugh; 2808 Queen Street; Missoula, MT 59801
3. Mr. Don Frye; Swan Lake, MT 59911
4. Mr. and Mrs. Bruce W. Woodard; 1337 South 4th West; Missoula, MT 59801
5. Mr. Alfred C. and Mrs. Reva Wise; Swan Lake, MT 59911
6. Mr. James H. Rehbein; WaterRights Bureau Field Office; Department of Natural Resources and Conservation; P.O. Box 224; Kalispell, MT 59901 (Regular Mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Ronald J. Guse

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

On this 16th day of February, 1978, before me, a Notary Public in and for said State, personally appeared Ronald J. Guse, known to me to be the Assistant Chief, Water Rights Bureau, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

T. J. Reynolds
Notary Public for the State of Montana

Residing at NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My commission expires My Commission Expires July 16, 1980

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