

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
CHANGE OF APPROPRIATION WATER)
RIGHT NO. 9987-c41I BY HARRY F.)
FOSTER)

ORDER

This is to advise you that Application No. 9987-c41I by Harry F. Foster has been withdrawn by the Applicant by his letter of March 7, 1978.

Since the Application has been withdrawn the Application file is hereby terminated and no further action will be taken.

Done this 15th day of March, 1978.

Orin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

CASE # 9987

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

IN THE MATTER OF APPLICATION)
FOR CHANGE OF APPROPRIATION) PROPOSAL FOR DECISION
WATER RIGHT NO. 9987-c411)
BY HARRY F. FOSTER)

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 application was held in the courtroom of the Broadwater County Courthouse at Townsend, Montana on Monday, May 23, 1977, at approximately 1:30 p.m., Gary L. Spaeth, Hearing Examiner, presiding.

The Applicant, Harry F. Foster, was present and presented testimony on behalf of his application.

The following submitted timely objections to the above application: Mr. Ray and Mrs. Mary Alice Goodwin; Mr. Maurice L. Hunsaker and Mr. Shorland Hunsaker on behalf of Hunsaker Brothers Hunsaker Ranch; Mr. Robert L. Antonick; Mr. Frank McArthur; Mr. Robert L. Davis on behalf of the Broadwater-Missouri Water Users Association; Mr. and Mrs. Frank Flynn on behalf of Hidden Hollow Ranch; Mr. Martin Clark; Mr. Donald W. Shearer; and Mr. John A. Plymale. The following objectors appeared at the hearing and presented testimony on behalf of their objection and were represented by counsel, Ms. Louise R. Galt; Mrs. Mary Alice Goodwin on behalf of the objection of Mr. Ray and Mrs. Mary Alice Goodwin; Mr. Maurice L. Hunsaker and Mr. Shorland Hunsaker on behalf of Hunsaker Brothers, Hunsaker Ranch;

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Mrs. Robert L. Antonick on behalf of the objection of Mr. Robert L. Antonick; Mr. Frank McArthur; Mr. Robert L. Davis on behalf of the Broadwater-Missouri Water Users Association; Mr. Frank Flynn on behalf of the objection of Mr. and Mrs. Frank Flynn on behalf of Hidden Hollow Ranch; Mr. Martin Clark did not appear but was represented by Mr. John A. Plymale; Mr. Donald W. Shearer and Mr. John A. Plymale. There was no one present on behalf of the City of Townsend or was the city in any way represented at the hearing. The City of Townsend was not an objector of record.

On May 19, 1977 Ms. Louise R. Galt submitted objections to the hearing on behalf of herself and Mr. John W. Plymale. The basis for her objections are as follows:

1. That if the proposed change were approved that Ms. Galt's and Mr. Plymale's rights would be adversely affected since the moving of the point of diversion to a lower point on Deep Creek would require a greater quantity of water and to the extent of the excess required would adversely affect the property right, and interest of the objectors, both subsequent appropriators.

2. Ms. Galt was not given notice of the proposed change according to Section 89-881 as prescribed by Section 89-892 and 893, R.C.M. 1947. That the Department should have found on the basis of information recently available to it, that the change as proposed in the application would adversely affect the rights of Ms. Galt. Without such notice being given the Hearing Examiner would have no jurisdiction

over the subject matter of the hearing.

3. That the notice was not published in a newspaper in the area once a week for three consecutive weeks as prescribed by Section 89-881, R.C.M. 1947.

4. That the hearing set for May 23, 1977 was not being held within the sixty (60) days from the date set by the Department for the filing of objections as prescribed by Section 89883, R.C.M. 1947.

5. That the records indicate that the City of Townsend is the owner of the appropriation right and has not obtained prior approval from the Department to sever that right from the lands to which it is pertinent as required by Section 89893, R.C.M. 1947.

6. That the City of Townsend has not entered into any contract with the Broadwater Missouri Water Users Association and accordingly has no rights for the use of the Broadwater Missouri Water Users Canal.

7. That the Applicant, Mr. Harry Foster has no right in the Broadwater Missouri Water Users Association Canal which would entitle him to transfer this water right through the canal.

8. That the City of Townsend and not the Applicant is the owner of the water right with respect to which the point of diversion is sought to be changed and not the Applicant, Harry F. Foster. That the Applicant has no standing with which to make this application, since he is not the "appropriator" within the Section 89-892, R.C.M. 1947.

The objections to the hearing as submitted by Louise R.

Galt and John A. Plymale were noticed on May 19, 1977 and were heard prior to the commencement of the hearing, on May 23 1977. The other objectors present at the hearing joined in pertinent part to the objections that were raised by Ms. Galt and Mr. Plymale. Ms. Galt argued on behalf of the objections and Mr. Foster, while not represented by an attorney, made a statement in opposition to the objections. The objections as submitted by the objectors are hereby denied and the reasons are included in the attached memorandum which is included herein by reference.

Mr. Harry Foster testified on behalf of his application and presented some background information as to why he submitted this application. From Mr. Foster's testimony it appears that he was a successful bidder when the City of Townsend put their water right up for bid. Mr. Foster gave the City of Townsend \$5,000 plus a 165 acre-foot paid up Broadwater-Missouri Water Users Association canal water contract.

The water right in question is for a 110 miners inches and is the first adjudicated water right on Deep Creek. Deep Creek is an adjudicated stream as found in Deep Creek Decree, Job Thompson, et al, Plaintiffs, v. William Harvey, et al., Defendants, dated May 2, 1891. The water right in question is a portion of the following water right Job Thompson and S. V. Cooper, one-half interest each in 240 miners inches priority date April 1, 1866. The decree in question is recorded in Judgment Book 2, page 322, records

of Broadwater County, Montana.

From the testimony of Mr. Plymate it appears that this water right was used approximately 2 1/2 miles south of Townsend on the Job Thompson place which is now the present Kickbush property. It was later separated and sold with a 120 miners inches going to Mr. Williams and Mr. Hollas Holloway and 70 to 75 inches was moved up Deep Creek to the Mr. Degano place and 50 inches to the Haun place. This was all done sometime in the 1920's. The 120 inche water right was purchased by the City of Townsend in the early 1940's. It was purchased from the then mayor of the City of Townsend. A pipe or a series of three pipes was placed in Deep Creek from the present point of diversion to the City of Townsend. The capacity for the line was a maximum of sixty (60) miners inches but very seldom reached that peak because of roots, breaks, etc. The average capacity of the pipes was probably closer to 40 miners inches. The heaviest use was found during the summer with the least use being during the winter.

Finally the City of Townsend stopped using the water and decided to place it up for lease. Mr. Ed Hoyer was the first to lease the water at \$150.00 per year. The next year the price was raised and the Mitchells then used the water and diverted it from the present point of diversion in Sections 36 and used it on the Mitchell place and the Zubrick ranch after it was bought by the Mitchells. The Mitchells then sold their place to Mr. Frank McArthur, who then leased and used the water right in question. At some point in time

the water right was decreased from 120 miners inches to 110 miners inches but there was no evidence at the hearing as to when this occurred or why this occurred. Mr. McArthur used the water for a few years until the City of Townsend decided to sell the water right. The City of Townsend put the water right up for bid and Mr. McArthur submitted a bid which was rejected.

The City of Townsend again called for bids and Mr. Foster submitted the bids described above and was the successful bidder. On December 16, 1975 the City of Townsend accepted the above-described bid by Mr. Harry Foster for the purchase of the water right.

The proposed change is as follows: 2.75 cubic feet per second or 1,237.5 gallons per minute of water (110) miners inches and not to exceed 720 acre-feet per annum, to be diverted from Deep Creek at a point in the SE1/4 SE1/4 SW1/4 of Section 3, Township 6 North, Range 2 East, Montana Principal Meridian, to be used for irrigation on a total of 300 acres, more or less, in the SE1/4 and the S1/2 SW1/4 of Section 33, Township 7 North, Range 2 East, M.P.M. and the N1/2 NW1/4 of Section 4, Township 6 North, Range 2 East, M.P.M., and used for irrigation from May 1 to September 30, inclusive, of each year. Prior to December 16, 1975 Mr. Mitchell and Mr. McArthur diverted 3 cubic feet per second or 1,347 gallons per minute (110 miners inches) from Deep Creek, a tributary of the Missouri River, at a point in the

NE1/4 NE1/4 SE1/4 of Section 36, Township 7 North, Range 2 East, M.P.M. and used for irrigation by Mitchell and McArthur on 140 to 520 acres, more or less from May 1 to September 30, inclusive, or each year.

This water is to be used in conjunction with an existing water right which from Mr. Foster's testimony is upward to 200 miners inches from Deep Creek and it also appears from his testimony that he has a contract with the Broadwater-Missouri Water Users Association Canal for delivery of water.

The Application seeks to change the point of diversion from Section 36 and move it approximately 3 1/2 miles downstream in Deep Creek to a point in Section 3 where it would be diverted into the Broadwater-Missouri Water Users Association Canal and transported approximately 2 1/2 to 3 miles to two points of diversion of Mr. Foster's found in Section 33 and 34, Township 7 North, Range 2 East, M.P.M. Mr. Foster submitted a map further detailing the present points of diversion and present uses and also listed the proposed points of diversion and proposed place of use of the water right. This was identified as Applicant's Illustrative Exhibit No. 1 and was accepted without objection.

Mr. Foster further explained that this proposed change would actually assist subsequent appropriators on Deep Creek by allowing this water to be used in a water exchange on Deep Creek by the Broadwater-Missouri Water Users Association Canal. The Browadwater-Missouri Canal intersects Deep Creek

at a point in Section 3, Township 6 North, Range 2 East, M.P.M. There are several decree holders found on Deep Creek downstream from where the Broadwater-Missouri Canal crosses Deep Creek. The topography of the area does not allow canal water to be transported to all water users along Deep Creek. Because of this the problem has been solved by diverting the natural flow of Deep Creek for use on land above the intersection of Deep Creek with the Broadwater-Missouri Canal. Then the water so taken from the creek above the point of intersection with the Broadwater-Missouri Canal is then replaced in the stream at the point of intersection for downstream water users. This system has been in use since the canal was completed in 1939. This exchange is specifically allowed under Section 89-806, R.C.M. 1947. It provides the only practical method by which those individuals with inferior water rights, whose land is located above the canal, can obtain the water needed for irrigation. This water is obtained without prejudice to the superior rights located downstream since the water from the canal is available for prior appropriators. From further testimony at the hearing it appears that approximately 2900 to 3000 miners inches are exchanged along Deep Creek. This allows lands upstream from the intersection of the Broadwater-Missouri Canal with Deep Creek to be irrigated within essence Broadwater-Missouri Canal Water even though they are diverting directly from Deep Creek.

Mr. John Plymale testified at the hearing that he was in the past a water commissioner along Deep Creek and was

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thus familiar with the water usages and diversions exchange system used along Deep Creek and was also at one time the councilman for the City of Townsend. He testified that Deep Creek is somewhat of a flash creek with there being short periods of high flow and generally during the irrigation season low flows are to be found. That Deep Creek is over adjudicated and also over appropriated. In addition to the adjudicated rights along Deep Creek there are approximately 36,000 miners inches that have been appropriated. These appropriated rights and some of the adjudicated rights are only valid during periods of extreme flow. That when Deep Creek gets down to approximately 1200 miners inches there is very little water available for exchange because of providing water for the early prior water rights on Deep Creek that are found above the intersection of the Broadwater-Missouri Canal with Deep Creek. Mr. Plymale further testified that he was concerned about the adverse effect that the transferring of such rights would have on present users along the stream. He was concerned about the precedent that could possibly be set by such. Mr. Plymale has apparent prior appropriative rights for 300 miners inches. Mr. Plymale indicated that water there has been some study of ditch losses in the area and one such study indicated that there was a 30% loss in the Broadwater-Missouri Canal from its intersection with Deep Creek to its intersection with Highway No. 6. This canal reach is approximately the same length as the reach

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from the present point of diversion to the proposed point of diversion on Deep Creek. While the Canal and Deep Creek cannot be exactly compared because of the different nature, the Canal does pass over two faults and is an alluvial valley and thus the loss should be approximately the same.

Mr. Flynn testified on behalf of Hidden Hollow that he has an appropriation right which is in essence a flood right from Deep Creek. He uses the same ditch as Mr. Foster and also has a 250 acre-foot contract with the Broadwater-Missouri Water Users Association Canal which is delivered under an exchange system. He is concerned about less water being available for exchange if this transfer is granted. Also since he uses the ditch that the water right was transported in prior to this application, there would be greater ditch loss having to be borne by the present water users along that ditch.

Mr. Donald Shearer has a 110 miners inch decreed right on Deep Creek. Mr. Shearer is a new owner along Deep Creek having purchased his place from the Hunsakers. While he did have some problems getting water in his ditch, if this water were used for an exchange, then he would have very little objection to it being transferred.

Mrs. Goodwin testified on behalf of the objection of her and her husband and pointed out that her diversion is in Section 2 which is below the present point of diversion of this water right in Section 36. She has the same concerns that the other objectors that if this transfer is made there would be less water available to subsequent appropriators.

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Mrs. Antonick and her husband divert above Section 36 and are concerned about the loss of this water under an exchange program.

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 October 26, 1976, the Applicant, Mr. Harry Foster, applied to the Department of Natural Resources and Conservation and submitted an Application of Change of Appropriation Water Right No. 9987-c41-I by Harry F. Foster. The Applicant seeks to change a portion of the following water right: Deep Creek Decree, Job Thompson, et al., Plaintiffs, vs. William Harvey, et al., Defendants, dated May 2, 1891 (Job Thompson and S. V. Cooper 1/2 interest each in 240 miners inches, priority date April 1, 1866), as recorded in Judgment Book 2, page 322, of Records of Broadwater County, Montana.

Prior to December 16, 1975, this water right was used along Deep Creek on numerous places and subsequently 3 cubic feet per second or 1,347 gallons per minute (120 miners inches) of the above water right had been diverted from Deep Creek, a tributary of the Missouri River at points in the NW1/4 NW1/4 SW1/4 of Section 31, Township 7 North, Range 3 East, M.P.M., and in the NE1/4 NE1/4 SE1/4 of Section 36, Township 7, North, Range 2 East, M.P.M., and used for municipal

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purposes by the City of Townsend and for irrigation by Frank McArthur on 140 to 520 acres, more or less, from May 1 to September 30, inclusive, of each year. On December 16, 1975, the City of Townsend accepted a bid by Harry F. Foster for the purchase of the above water.

The proposed change is as follows: 2.75 cubic feet per second or 1,237.5 gallons per minute of water (110 miners inches) not to exceed 720 acre-feet per annum, to be diverted from Deep Creek at a point in the SE1/4 SE1/4 SW1/4 of Section 3, Township 6 North, Range 2 East, Montana Principal Meridian, to be used for irrigation on a total of 300 acres, more or less, in the SE1/4 and the S1/2 SW1/4 of Section 33, Township 7 North, Range 2 East, M.P.M., and the N1/2 NW1/4 of Section 4, Township 6 North, Range 2 East, M.P.M., from May 1 to September 30, inclusive, of each year.

2. The Department of Natural Resources and Conservation received timely objection from Mr. Ray and Mrs. Mary Alice Goodwin, Hunsaker Brothers-Hunsaker Ranch, Mr. Maurice L. Hunsaker, Mr. Shorland Hunsaker, Mr. Robert L. Antonick, Mr. Frank McArthur, Mr. Robert L. Davis, as President of the Broadwater-Missouri Water Users Association, Mr. and Mrs. Frank Flynn, on behalf of Hidden Hollow Ranch, Mr. Martin Clark, Mr. Donald W. Shearer and Mr. John A. Plymale.

3. The objectors have prior existing rights to the waters of Deep Creek for irrigation. All of the objectors property is located in the general vicinity of this application along Deep Creek both upstream and downstream from the

proposed point of diversion.

4. The Applicant has not obtained formal authority or permission from the Broadwater Missouri Water Users Association for transferring this water through their canal at a point in Section 3, Township 6 North, Range 2 East to his two points of diversion from the Canal of the Broadwater-Missouri Water Users Association located in Section 33, Township 7 North, Range 2 East. The transfer by the City of Townsend is contingent upon such authority being granted.

5. Pursuant to Section 89-892(1) and Section 89-893(3), an appropriator along Deep Creek may not sever all or any part of an appropriation from the land to which it is pertinent and transfer it to another location without the approval of the Department.

6. If this change in appropriation is granted without modification, it will adversely affect the rights of other persons located along Deep Creek.

7. From the evidence presented at the hearing, it appears that there will be a loss of water as a result of this decreed water right being transferred from a point in Section 36, Township 7 North, Range 2 East to a point approximately 3 1/2 miles downstream on Deep Creek to a point in Section 3, Township 6 North, Range 2 East. That this loss of water will be approximately 30% of the total flow of the Decree.

8. That if this Decree is subject to an exchange and is actually exchanged to a point on Deep Creek upstream from the present point of diversion found in Section 36, Township 7 North, Range 2 East then there will be no subsequent loss and thus there will be no adverse affect on prior appropriators.

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In fact if this water right is subject to an exchange that will beneficially affect water users along Deep Creek because this water right at its present point of diversion at Section 36, Township 7 North, Range 2 East is not subject to an exchange.

9. The history of this water right is that it has been moved to different and numerous locations along Deep Creek throughout its existence. That at one time this water right was diverted downstream from the present proposed point of diversion found in Section 3, Township 6 North, Range 2 East. But that this was sometime ago, probably well over 50 years ago.

10. A field check of the proposed site was made by the Hearing Examiner subsequent to the hearing on May 23, 1977.

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

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Sections 89.892(1) and 89-893(3), R.C.M. 1947, an authorization from the Department is required to sell and change the location of the point of diversion and place of use from Deep Creek.

2. If this authorization is conditioned it will not adversely affect any prior appropriators.

3. Filed and adjudicated prior water rights of prior appropriators of water from Deep Creek, must, by statute, be protected even if they are subsequent to the adjudicated right in question.

4. The Objectors presenting evidence at the hearing appear to have valid adjudicated and filed rights along Deep

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Creek.

6. 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.

7. Nothing herein has bearing upon the status of water rights claimed by the Applicant including the one sought to be changed, or does anything herein have bearing upon the status of 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 ons of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below the Applicants request to change appropriation water right is hereby granted allowing for the change of 2.75 cubic feet per second or 1,237.5 gallons per minute of water (110 miners inches), not to exceed 720 acre-feet per annum to be diverted from Deep Creek at a point in the SE1/4 SE1/4 SW1/4 of Section 3, Township 6 North, Range 2 East, M.P.M., and to be used for irrigation on a total of 300 acres, more or less, in the SE1/4 and the S1/2 SW1/4 of Section 33, Township 7 North, Range 2 East, M.P.M., and the N1/2 NW1/4 of Section 4, Township 6 North, Range 2 East, M.P.M., from May 1 to September 30, inclusive, of each year. This grants a change of the portion of the following water right: Deep Creek Decree Job Thompson, et al., Plaintiffs vs. William Harvey,

et al., Defendants, dated May 2, 1891 (Job Thompson and S. V. Cooper 1/2 interest each in 240 miners inches, priority date April 1, 1866), as recorded in Judgment Book 2, page 322, records of Broadwater County, Montana.

2. This change of appropriation shall be granted in total (110 miners inches) with the provision that this water be allowed to be exchanged with water from the Broadwater-Missouri Water Users Association Canal as provided in Section 89-806, R.C.M. 1947.

3. In the event that this water is not used in any exchange program, then it will be reduced by 30% which is the amount of depletion which would result from the water being transferred from the present point of diversion found in Section 36, Township 7 North, Range 2 East to the proposed point of diversion found in Section 3, Township 6 North, Range 2 East, which is approximately 3 1/2 miles downstream from the present point of diversion. This would mean that when this water is not being exchanged that the Applicant is only allowed to divert 1.925 cubic feet per second or 866.25 gallons per minute (77 miners inches and not to exceed 504 acre-feet per minute).

4. The issuing of this Authorization to Change Appropriation Water Right in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of this change in 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.

5. This authorization to change is subject to any

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final determination of prior existing water rights including the one in question in the source of supply as provided by Montana law.

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

7. This authorization to change is granted subject to obtaining permission from the Broadwater-Missouri Canal Water Users Association to transport this water through their facilities. The granting of this authorization in no way requires the Broadwater-Missouri Canal Water Users Association to grant the Applicant any type of easement or permission to transport this water right through their facilities.

NOTICE

This is 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 12 day of October, 1977.


GARY L. SPÆTH
HEARING EXAMINER

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