

1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF BEAVERHEAD

3 * * * * *

4 Cause No. 9163

5 JACK HIRSCHY LIVESTOCK, INC.,)
6 FRED WALCHLY, G. JON ROUSH and)
7 KATHERINE M. ROUSH, and DEVERE)
8 BARKER,)

9 Petitioners,)

10 -vs-)

11 JOHN P. SCHONENBERGER and the)
12 DEPARTMENT OF NATURAL RESOURCES,)
13 STATE OF MONTANA,)

AMENDED ORDER

14 Respondents.)
15 _____)

16 This cause came on regularly for hearing the 14th day
17 of May, 1979. The Court heard oral arguments and received
18 written briefs supporting the parties' respective positions.
19 After consideration of the arguments, both oral and written,
20 and good cause appearing therefor,

21 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the
22 decision of the respondent Department of Natural Resources,
23 State of Montana (hereinafter "DNR"), granting the respondent
24 John P. Schonenberger's (hereinafter "Schonenberger") applica-
25 tion No. 10046-s41D to appropriate water from Yank Swamp, a
26 tributary of Swamp Creek, be reversed, and that Schonenberger's
27 application be denied. The reasons for the Court's decision
28 are as follows:

- 29 1. DNR's finding of unappropriated waters in Yank Swamp,
30 a tributary of Swamp Creek, was clearly erroneous in view of
31 reliable, probative, and substantial evidence on the whole
32 record. The uncontested evidence proves that 2660 miners
inches of water have been decreed from Swamp Creek and its
tributary Yank Swamp; that although 1977 was a "dry" year,
the flow of Swamp Creek in 1977 did not exceed a ten day

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1 average of 785 miners inches; that water shortages compelled
2 appointment of a water commissioner to divide the available
3 water in 17 of the 24 irrigation seasons since 1954; and that
4 there are insufficient waters flowing in Swamp Creek to satisfy
5 existing rights. No evidence was presented by any party suggest-
6 ing any amount of water in excess of the 2660 perviously decreed
7 miners inches ever flows in Swamp Creek. Furthermore, on July
8 25, 1978, DNR admitted there was insufficient evidence to grant
9 Schonenberger's application, and no new or additional evidence
10 was gathered by DNR after July 25, 1978, and before December 1,
11 1978, the date of its decision.

12 2. DNR's decision was in violation of statutory pro-
13 visions and in excess of its statutory authority. Although
14 DNR has statutory authority to require modification of a diver-
15 sion's plans and specifications as a condition to issuance of
16 a permit (see Sec. 85-2-312, MCA), DNR has absolutely no authority
17 to issue any permit without prior review of the adequacy of the
18 means of diversion. By issuance of a permit without any proof
19 of the adequacy of the means of diversion, DNR violated the
20 statutory condition precedent to the issuance of a permit: namely
21 a showing that "the proposed means of diversion or construction
22 are adequate." Sec. 85-2-311(3), MCA.

23 3. DNR followed an unlawful procedure during the course
24 of its decision to grant Schonenberger's application. When DNR
25 approved the application without first requiring any evidence
26 of the adequacy of the means of diversion or its construction,
27 the petitioners herein were effectively denied their rights of
28 cross-examination and rebuttal on these issues.

29 4. Schonenberger failed to prove by a preponderance
30 of the evidence that the evidence satisfied the criteria of
31 Section 89-885, R.C.M. 1947.

32 5. All of the foregoing reasons contributed to the

1 prejudice of the petitioners' substantial rights including the
2 substantial rights to receive their decreed water rights, of
3 assurance of the adequacy of the means and construction of the
4 diversion, and to cross-examine and rebut on the issue of the
5 adequacy of the means of diversion. Additionally, DNR's
6 decision further prejudiced petitioners' substantial rights
7 by imposing upon them additional water commissioner costs.

8 DATED this _____ day of November, 1979.

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10 _____
11 JUDGE
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CASE #

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
10,046-s41D BY JOHN P. SCHONENBERGER)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held on July 6, 1977 at Dillon, Montana, for the purpose of hearing objections to the above-named application, William F. Throm, Hearing Examiner, presiding.

The Applicant, Mr. John P. Schonenberger, appeared at the hearing and presented testimony on his behalf. He was not represented by legal counsel nor did he present any exhibits in support of the above application.

Objectors to Application No. 10,046-s41D who appeared at the hearing were Mr. and Mrs. Emory H. Rouse, Mr. Robert McDowell, Mr. Tony Schoonen, Mr. S.J. Seidensticker, Mr. and Mrs. John Eliel, Mr. and Mrs. G. Jon Roush, Mr. Doug McDowell, Mr. Dick Hirschy, Mr. Fred Walchly and Mr. Jack Hirschy.

Others present at the hearing were Mr. Robert Knight, Attorney at Law, representing his clients G. Jon and Katherine M. Roush, Sam R. McDowell, and The Nature Conservancy; Mr. Leonard A. Schulz and John Warren, Attorneys at Law, representing clients Adele P. and Emory H. Rouse, the Dick Hirschy Cattle Company and Fred Walchly. Mr. Tom Daniel, Trout Unlimited; Mr. Ray Weaver, Water Commissioner for Moose and Swamp Creeks; and Mr. Ted Hazelbaker, Licensed Abstractor. Four exhibits were introduced into evidence in support of the objections: Exhibit A, entitled "Water Rights on Moose or Swamp Creeks in the Big Hole Basin, Beaverhead County," was identified as the listing from the 1909 Court Decree showing original and recent water right ownerships. Exhibit B is a map of the west half of Beaverhead National Forest. Exhibit C is a Forest Service map, Class C, of Moose and Swamp Creek

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drainages showing Applicant's and Objectors' points of diversion on Moose and Swamp Creeks. Exhibit D is a list of names supplied by Mr. Ray Weaver giving the names of commissioners and years when Moose and Swamp Creeks were served by water commissioners. These exhibits were received into evidence without objection and were marked Objectors' Exhibits "A", "B", "C" and "D", respectively.

Mr. T.J. Reynolds attended the hearing to represent the Department. No exhibits were introduced into evidence on behalf of the Department.

A Proposed Order (Proposal for Decision) dated October 17, 1977, was issued by the Hearing Examiner William F. Throm.

The Proposed Order Notice as issued on October 17, 1977, provided that the Proposed Order would 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, must have been mailed to the Department within ten (10) days of service upon the parties herein. 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 October 31, 1977 the Department received an Exception dated October 27, 1977 as filed by Mr. John Warren on behalf of his clients Jack Hirschy Livestock, Inc., Dick Hirschy Cattle, Inc., Emory H. Rouse and Adele Rouse, and Fred Walchly, in opposition to the Proposal for Decision of October 17, 1977.

On October 31, 1977 the Department received an Exception dated October 27, 1977 as filed by Mr. Robert M. Knight on behalf of his clients Sam McDowell Cattle Co. and Mr. and Mrs. G. Jon Roush, in opposition to the Proposal for Decision.

The Department also received letters of Exception on October 31, 1977 to the Proposal for Decision from Mr. Moose Rouse and Mr. Emory H. Rouse, both dated October 28, 1977.

The Department by letters of November 1, 1977 to Mr. Warren and Mr. Knight, acknowledged receipt of their Exceptions and advised each of their opportunity to file a Brief supporting their Exceptions to the Proposal for Decision within

fifteen (15) days after receipt of the Department's letter.

By letter of November 1, 1977 to Messrs. Emory and Moose Rouse, the Department acknowledged receipt of their letters of Exception and advised them that their two letters would be attached to the Exception filed on their behalf by Mr. Warren as dated October 27, 1977. All further correspondence would be directed to Mr. Warren unless they specifically requested otherwise.

Also by letter dated November 1, 1977 to the Applicant, Mr. Schonenberger, the Department informed him that the Department had received four Exceptions to the Proposal for Decision in the matter of his application. A copy of each Exception was enclosed with said Department letter to Mr. Schonenberger. Mr. Schonenberger was also advised that Mr. Warren and Mr. Knight, representing six objectors, had been informed of their opportunity to file a Brief, supporting their exceptions and that they had also been informed of their right to request an oral argument hearing to argue their exceptions and briefs before the Water Resources Division Administrator, if they deemed it necessary. If Briefs were filed, copies would be sent to Mr. Schonenberger and he would likewise be afforded equal time to prepare and file a Reply Brief.

On November 14, 1977 the Department received a letter from Mr. Warren requesting 20 days in addition to the 15 days allowed by administrative rule in which to file a brief supporting the exceptions to the proposed decision filed in this matter on behalf of his clients, Jack Hirschy Livestock, Inc. and Fred Walchly. Mr. Warren advised that Dick Hirschy Cattle, Inc. and Emory H. Rouse and Mrs. Adele Rouse do not wish to participate any further in opposition to Mr. Schonenberger's application. The Department by letter of November 17, 1977 to Mr. Warren acknowledged receipt of his letter of November 10, 1977 and granted to him an extension of time to December 9, 1977 in which to file his Brief.

On November 17, 1977 the Department received Mr. Knight's "Brief in Support of Exceptions to Proposal for Decision", dated November 16, 1977 and filed on behalf of his clients, Sam McDowell Cattle Co., and Mr. and Mrs. G. Jon Roush. By letter of

November 25, 1977 to Mr. Knight, the Department acknowledged receipt of his Brief, and advised him that the Department would wait for Mr. Warren's Brief to be filed, which is due on or before December 9, 1977, before informing the Applicant of his opportunity to file a Reply Brief to the Exceptions and Briefs filed in opposition to the Proposed Order.

On December 9, 1977 the Department received Mr. Warren's "Brief Supporting Objectors Jack Hirschy Livestock, Inc., and Walchly's Exceptions to Proposed Order", dated December 8, 1977. The Department by letter of December 14, 1977 to Mr. Warren acknowledged receipt of his Brief and advised that the Department would proceed to inform the Applicant of his opportunity to file a Reply Brief in response to his filed Exception and Brief.

The Department by letter of December 14, 1977 to Mr. Schonenberger advised him of his opportunity to file a Reply Brief in response to the filed Exceptions and Briefs within fifteen (15) days after receipt of the Department's letter. He was further advised that since an oral argument hearing before the Water Resources Division Administrator had been requested by Mr. Knight and Mr. Warren to orally argue their exceptions and briefs, that the next step would be for the Administrator to schedule said requested hearing.

On December 22, 1977 the Department received the Applicant's Reply Brief, dated December 19, 1977 filed in response to the Exceptions and Briefs filed by Mr. Knight and Mr. Warren on behalf of their respective clients. By letter of January 5, 1978 to Mr. Schonenberger, the Department acknowledged receipt of his Reply Brief and advised him that the application would be forwarded to the Administrator of the Water Resources Division for scheduling of the requested oral argument hearing and that all parties to this matter would be notified by Certified mail of the time, place and date of the requested oral argument hearing.

On June 20, 1978 the Administrator of the Water Resources Division issued a Notice of Oral Argument Hearing on Exceptions to Proposal for Decision in the matter of Application for Beneficial Water Use Permit No. 10,046-s41D by John P. Schonenberger.

The Notice stated, that on Tuesday, July 25, 1978 at 1:30 p.m. an oral argument hearing would be held before the Administrator of the Water Resources Division in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana for the purpose of hearing oral arguments on the filed exceptions and briefs. Parties herein were requested to notify the Administrator in writing before the hearing if they did not wish to attend, which in such case the exceptions and briefs would stand as filed.

On June 26, 1978 the Department received a letter from Mr. Tony Schoonen, which stated he did not wish to speak at said hearing. On June 27, 1978 the Department received a letter from Mr. S.J. Seidensticker, which stated he did not wish to make oral argument and waived this right. Also on June 27, 1978 the Department received a letter from Mr. D. Roscoe Nickerson on behalf of the Skyline Sportsmen's Association stating that they would not be making oral argument.

On July 3, 1978 the Department received a letter from Mr. Robert Knight, advising that he now represents Mr. Devere Barker who purchased the former Sam McDowell Cattle Co. home ranch property, and that he will attend the oral argument hearing on the application on behalf of Mr. Barker and the Roushs.

On July 21, 1978 the Department received a letter from Mr. Dick Hirschy, which stated he wished to waive the right to make oral argument.

The oral argument hearing was held before the Administrator in Helena, Montana on July 25, 1978 at 1:30 p.m. in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing for the purpose of hearing oral arguments by the Applicant and Exceptors.

The Applicant, Mr. John Schonenberger was present and presented testimony on his own behalf. He was not represented by legal counsel.

Mr. John Warren was present and presented testimony on behalf of his clients, Jack Hirschy Livestock, Inc., and Mr. Fred Walchly.

Mr. Robert Knight was present and presented testimony on behalf of his clients, Mr. and Mrs. G. Jon Roush, and Mr. Devere Barker the new owner of the former

Sam McDowell Cattle Co. home ranch property.

The hearing was also attended by several Department personnel directly involved with this matter.

The Administrator of the Department's Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of October 17, 1977, the application, objections, exceptions, briefs, reply briefs, the testimony and evidence from the original hearing held in Dillon, Montana on July 6, 1977 and the testimony of the oral argument hearing held in Helena on July 25, 1978 and all pertinent information, exhibits, and documents filed by parties to this matter, and made a permanent record of the Application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 17, 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 modified as follows:

FINAL ORDER

1. Subject to the conditions, modifications and limitations imposed below, the Applicant John P. Schonenberger is hereby granted a Temporary Permit allowing for the appropriation of 4 cubic feet per second or 1,795 gallons of water per minute, not to exceed 114 acre-feet per annum from Yank Swamp, a tributary of Swamp Creek in Beaverhead County, Montana, by means of a ditch at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, Township 3 South, Range 17 West, M.P.M., and used for new irrigation on a total of 100 acres, more or less, in said Section 27, from June 1 to July 15, inclusive, of each year.

2. The Temporary Permit is granted for a period of three years from the date of this order, to enable the Applicant and Objectors to document any adverse affects, after which time the documented data will be evaluated by the Department of Natural Resources and Conservation and a Provisional Permit will be either modified, granted, or denied, as based on the available evidence.

3. The Applicant shall install and maintain an adequate measuring device to enable the Applicant to keep a record of all quantities of water diverted and used, as well as, the periods of such diversion and use. A permanent log record shall be kept showing the above data for a period of at least three years. Such records shall be presented by the Applicant to the Department of Natural Resources and Conservation at the end of each irrigation season or upon demand by the Department.

4. The Applicant shall submit plans and specifications for the measuring device and the diversion facilities to the Department for approval prior to the start of construction of this project.

5. It shall be the responsibility of the Objectors to notify the Applicant or Swamp Cr. herein when, in fact, there is insufficient water in Yank Swamp/during the period of appropriation granted the Applicant herein, to satisfy both the claimed prior water rights of the Objectors and the water use granted by this Temporary Permit. It shall be the responsibility of the Applicant to cease diverting water immediately pursuant to this Temporary Permit when there is insufficient water in Yank Swamp or Swamp Cr. to satisfy all claimed prior water right users, and the water use granted by this Temporary Permit. It shall be the responsibility of each of the parties herein not to abuse his water rights at the expense of the other.

Any notice served upon the Applicant by any Objector shall also be filed with the Administrator of the Water Resources Division, Department of Natural Resources and Conservation, Helena, Montana, or his successor. Service of such notice by mail shall be deemed complete when the same is enclosed in an envelope, duly sealed, and deposited in the United States mail, properly addressed with postage fully prepaid thereon.

6. The issuance of this Temporary Permit does not entitle the Applicant to a Provisional Permit and the Applicant may not obtain any vested right to an appropriation obtained under this Temporary Permit by virtue of the construction of diversion works, measuring devices, purchase of equipment to apply water, planting of crops, or other action where the Provisional Permit is denied or is modified from the terms of this Temporary Permit.

7. The issuance of a Temporary Permit by the Department in no way reduces or alters the Applicant's liability for damage caused by the Applicant's exercise of his Temporary Permit, nor does the Department in issuing a Temporary Permit in any way acknowledge liability for damage caused by the Applicant's exercise of his Temporary Permit.

8. The granting of a Temporary Permit in no way grants the Applicant any right to violate real property rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising his Temporary Permit.

9. The Temporary Permit is granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights in the source of supply as provided for by Montana law.

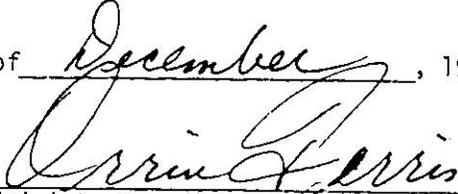
10. The Temporary Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

11. The above conditions to the granting of this Temporary Permit shall hold in full effect for any successor in interest to the Applicant herein named.

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 15th day of December, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE #

R. Gordon

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JUN 22 1979

MONT. DEPT. OF NATURAL RESOURCES & CONSERVATION

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF BEAVERHEAD

FILED

JACK HIRSCHY LIVESTOCK, INC.,
FRED WALCHLY, G. JON ROUSH and
KATHERINE W. ROUSH, and DEVERE
BARKER,

Petitioners,

vs.

JOHN P. SCHONENBERGER and the
DEPARTMENT OF NATURAL RESOURCES,
STATE OF MONTANA,

Respondents.

JUN 20 1979

MARGARET SHAW Clerk

Dr. A. P. Kaula Deputy

No. 9163

ORDER

This cause came on regularly for hearing the 14th day of May, 1979. The Court heard oral argument and received written briefs supporting the parties' respective positions. After consideration of the arguments, both oral and written, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the decision of the respondent Department of Natural Resources, State of Montana (hereinafter "DNR"), granting the respondent John P. Schonenberger's (hereinafter "Schonenberger") application No. 10046-s41D to appropriate water from Yank Swamp, a tributary of Swamp Creek, be reversed, and that Schonenberger's application be denied. The reasons for the Court's decision are as follows:

1. DNR's finding of unappropriated waters in Yank Swamp, a tributary of Swamp Creek, was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record. The uncontested evidence proves that 2660 miners inches of water have been decreed from Swamp Creek and its tributary Yank Swamp; that, although 1977 was a "dry" year,

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the flow of Swamp Creek in 1977 did not exceed a ten day average of 785 miners inches; that water shortages compelled appointment of a water commissioner to divide the available water in 17 of the 24 irrigation seasons since 1954; and that there are insufficient waters flowing in Swamp Creek to satisfy existing rights. No evidence was presented by any party suggesting any amount of water in excess of the 2660 previously decreed miners inches ever flows in Swamp Creek. Furthermore, on July 25, 1978, DNR admitted there was insufficient evidence to grant Schonenberger's application, and no new or additional evidence was gathered by DNR after July 25, 1978, and before December 1, 1978, the date of its decision.

2. DNR's decision was in violation of statutory provisions and in excess of its statutory authority. Although DNR has statutory authority to require modification of a diversion's plans and specifications as a condition to issuance of a permit (See Sec. 85-2-312, MCA), DNR has absolutely no authority to issue any permit without prior review of the adequacy of the means of diversion. By issuance of a permit without any proof of the adequacy of the means of diversion, DNR violated the statutory condition precedent to the issuance of a permit: namely a showing that "the proposed means of diversion or construction are adequate." Sec. 85-2-311(3), MCA.

3. DNR followed an unlawful procedure during the course of its decision to grant Schonenberger's application. When DNR approved the application without first requiring any evidence of the adequacy of the means of diversion or its construction, the petitioners herein were effectively denied their rights of cross-examination and rebuttal on these issues.

4. Schonenberger failed to prove by a preponderance of the evidence that the evidence satisfied the criteria of Section 89-885, R.C.M. 1947.

5. The use of water to irrigate Schonenberger's private pasture for wild elk and moose is not a beneficial use.

6. All of the foregoing reasons contributed to the prejudice of the petitioners' substantial rights including the substantial rights to receive their decreed water rights, of assurance of the adequacy of the means and construction of the diversion, and to cross-examine and rebut on the issue of the adequacy of the means of diversion. Additionally, DNR's decision further prejudiced petitioners' substantial rights by imposing upon them additional water commissioner costs.

Dated this 15th day of June, 1979.


PRESIDING JUDGE

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF BEAVERHEAD

* * * * *

Cause No. 9163

JACK HIRSCHY LIVESTOCK, INC.,)
FRED WALCHLY, G. JON ROUSH and)
KATHERINE M. ROUSH, and DEVERE)
BARKER,)

Petitioners,)

-vs-

JOHN P. SCHONENBERGER and the)
DEPARTMENT OF NATURAL RESOURCES,)
STATE OF MONTANA,)

Respondents.)

FILED

NOV 15 1979

Margaret Shus Clerk
J Deputy

JUDGMENT

Upon the filing of the Stipulation of the parties hereto,
by and through their respective counsel of record, and in accor-
dance therewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judg-
ment is hereby entered in favor of the petitioners, JACK HIRSCHY
LIVESTOCK, INC., FRED WALCHLY, G. JON ROUSH and KATHERINE M.
ROUSH, and DEVERE BARKER, and against the respondents, JOHN
P. SCHONENBERGER and the DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION, STATE OF MONTANA, jointly and severally, in the
amount of Four Thousand Four Hundred Thirty-seven and 40/100
Dollars (\$4,437.40), with interest thereon at the rate provided
by law from the date hereof until paid.

JUDGMENT RENDERED the 13th day of November, 1979.

Jack D. Shouston
JUDGE

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MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA, IN AND FOR THE COUNTY OF BEAVERHEAD

3 * * * * *

4 Cause No. 9163

5 JACK HIRSCHY LIVESTOCK, INC.,)
6 FRED WALCHLY, G. JON ROUSH and)
7 KATHERINE M. ROUSH, and DEVERE)
8 BARKER,)

Petitioners,)

9 -vs-)

10 JOHN P. SCHONENBERGER and the)
11 DEPARTMENT OF NATURAL RESOURCES,)
12 STATE OF MONTANA,)

Respondents.)

STIPULATION

13 COME NOW the parties, by and through their respective
14 counsel of record, and stipulate and agree as follows:

15 1. The parties hereto acknowledge that they have this
16 date executed a Stipulation for Entry of Judgment. The parties
17 agree that in the event a petition is filed by either or both
18 of the respondents in accordance with paragraph 3 of the Stipu-
19 lation for Entry of Judgment, and in the further event the
20 Court rules that the respondents are jointly and severally
21 liable for petitioners' attorneys' fees, or alternatively,
22 if the Court rules that the respondent, the Department of Natural
23 Resources and Conservation, State of Montana, is obligated
24 to pay more than the sum of Two Thousand Three Hundred Dollars
25 (\$2,300.00) as and for petitioners' attorneys' fees, that then
26 and in that event, the respondent, the Department of Natural
27 Resources and Conservation, State of Montana, agrees to immed-
28 ately pay to the petitioners the sum of Two Thousand Three
29 Hundred Dollars (\$2,300.00). The parties agree that the peti-
30 tioners may, with respect to the balance of the attorneys'
31 fees, take all necessary steps, including execution, to collect
32 the balance of the attorneys' fees from the respondent, John

CASE #

1 P. Schonenberger, or alternatively, that the petitioners may
2 await the commencement of the next fiscal year of the respon-
3 dent, the Department of Natural Resources and Conservation,
4 State of Montana, -at which time petitioners will be promptly
5 paid the balance of their attorneys' fees, together with accrued
6 interest.

7 2. The parties further agree that in the event the
8 Court determines that the respondent, the Department of Natural
9 Resources and Conservation, State of Montana, is responsible
10 for payment of a portion of the attorneys' fees set forth in
11 the Stipulation for Entry of Judgment, less than or equal
12 to the sum of Two Thousand Three Hundred Dollars (\$2,300.00),
13 that then and in that event, the respondent, the Department
14 of Natural Resources and Conservation, State of Montana, agrees
15 that it will immediately pay that portion of the petitioners'
16 attorneys' fees which the Department of Natural Resources and
17 Conservation, State of Montana, is found to be responsible
18 to pay, and that the petitioners may then take whatever steps
19 may be necessary, including execution, to collect the balance
20 due to petitioners from the respondent, John P. Schonenberger.

21 DATED this 5th day of November, 1979.

22 THOMAS A. DOOLING
23 32 North Washington Street
24 Dillon, Montana 59725

SCHULZ, DAVIS & WARREN
P.O. Box 28
Dillon, Montana 59725

24 Thomas A. Dooling
25 ATTORNEY FOR JOHN P.
26 SCHONENBERGER

Robert M. Knight
25 ATTORNEYS FOR PETITIONERS,
26 JACK HIRSCHY LIVESTOCK, INC.,
27 and FRED WALCHLY

27 DONALD D. McINTYRE
28 32 South Ewing
29 Helena, Montana 59601

ROBERT M. KNIGHT
P.O. Box 8957
Missoula, Montana 59807

29 Donald D. McIntyre
30 ATTORNEY FOR DEPARTMENT OF
31 NATURAL RESOURCES AND
32 CONSERVATION

Robert M. Knight
ATTORNEY FOR PETITIONERS,
G. JON ROUSH and KATHERINE M.
ROUSH, and DEVERE BARKER

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PER-) PROPOSAL FOR DECISION
MIT NO. 10,046-s41D BY JOHN P.)
SCHONENBERGER)

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held July 6, 1977 at Dillon, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit, William F. Throm, Hearing Examiner, presiding.

The Applicant, Mr. John P. Schonenberger, appeared at the hearing and presented testimony on his behalf. He was not represented by legal counsel nor did he present any exhibits in support of the above application.

Objectors to Application No. 10,046-s41D who appeared at the hearing were Mr. and Mrs. Emory H. Rouse, Mr. Robert McDowell, Mr. Tony Schoonen, Mr. S. J. Seidensticker, Mr. and Mrs. John Eliel, Mr. and Mrs. Jon G. Roush, Mr. Doug McDowell, Mr. Dick Hirschy, Mr. Fred Walchly, and Mr. Jack Hirschy.

Others present at the hearing were Mr. Robert Knight, Attorney at Law, representing clients Jon G. and Katherine M. Roush, Sam R. McDowell, and The Nature Conservancy; Mr. Leonard A. Schulz and John Warren, Attorneys at Law, representing clients Adele P. and Emory H. Rouse, the Dick Hirschy Cattle Company, and Fred Walchly. Mr. Tom Daniel, Trout Unlimited; Mr. Ray Weaver,

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Water Commissioner for Moose and Swamp Creeks; and Mr. Ted Hazelbaker, Licensed Abstractor. Four exhibits were introduced into evidence in support of the objections: Exhibit A, entitled "Water Rights on Moose or Swamp Creeks in the BigHole Basin, Beaverhead County," was identified as the listing from the 1909 Court Decree showing original and recent water right ownerships. Exhibit B is a map of the west half of Beaverhead National Forest. Exhibit C is a Forest Service Map, Class C, of Moose and Swamp Creek drainages showing Applicant's and Objectors' points of diversions on Moose and Swamp Creeks. Exhibit D is a list of names supplied by Mr. Ray Weaver giving the names of commissioners and years when Moose and Swamp Creeks were served by water commissioners. These exhibits were received into evidence without objection and were marked Objectors' Exhibits "A", "B", "C" and "D", respectively.

Mr. T.J. Reynolds attended the hearing to represent the Department. No exhibits on behalf of the Department were introduced into evidence.

PROPOSED FINDINGS OF FACT

1. On November 3, 1976, the Applicant, John P. Schonenberger, submitted to the Department of Natural Resources and Conservation Application for Beneficial Water Use Permit No. 10,046-s41D to appropriate 4 cubic feet per second or 1,796 gallons per minute of water and not to exceed 300 acre-feet per annum from Yank Swamp, a tributary of Swamp Creek, in Beaverhead County, Montana, to be diverted from Yank Swamp by means of a ditch at a point in the SW1/4 SW1/4 of Section 27, Township 3 South, Range 17 West, M.P.M., and used for new irrigation on a total of 100

acres, more or less, in said Section 27, from June 1 to October 1, inclusive, of each year.

2. On February 16 and 23 and on March 2, 1977 the Department caused to be duly published in the Dillon Daily Tribune Examiner, Dillon, Montana, notice of above Application No. 10,046-s41D.

3. The Department received timely objections to Application No. 10,046-s41D as follows:

March 22, 1977 from Spokane Ranch by Robert McDowell

March 23, 1977 from Dick Hirschy Cattle Co. by Dick Hirschy

March 23, 1977 from Fred Walchly

March 23, 1977 from Jack Hirschy Livestock, Inc., by Jack Hirschy

March 28, 1977 from Emory H. Rouse and Adele P. Rouse

March 29, 1977 from John Eliel and Frances Eliel

April 1, 1977 from The Nature Conservancy by Spencer B. Beebe

April 5, 1977 from Skyline Sportsmen's Association, Inc.,

by D. Roscoe Nickerson, Secretary

April 5, 1977 from Sam R. McDowell Cattle Co. by Sam R. McDowell

April 5, 1977 from G. Jon and Katherine M. Roush

April 6, 1977 from Tony Schoonen

April 6, 1977 from Seidensticker Ranch, Inc., by S. J. Seidensticker

4. Mr. Schonenberger testified that he proposes to divert water from Yank Swamp by means of a gravity ditch with a control structure; that he has consulted with the Soil Conservation Service concerning his plans and would build in accordance with their plans and specifications; that he proposes to irrigate approximately 100 acres of new land by clearing it of sagebrush and reseeding to white dutch clover and creeping meadow foxtail to be used solely

for improved wildlife habitat, principally for elk; that a large percentage of the water appropriated would return to the source and that this diversion would in no way adversely affect the rights of prior appropriators.

5. All objectors except The Nature Conservancy, The Skyline Sportsmen's Association, Trout Unlimited and Mr. Tony Schoonen claimed decreed water rights from the source of supply. They further testified that the source of supply is already over-appropriated and does not adequately supply existing rights. The objectors also questioned the benefits to wildlife by destroying native habitat and reseeding to introduced species.

6. The Nature Conservancy, Skyline Sportsmen's Association, Trout Unlimited and Tony Schoonen did not show or claim existing water rights from the source of supply. Their objections were based upon adversely affecting water quality and quantity for fish, wildlife, and recreational purposes through further stream-flow depletions.

7. Mr. Ray Weaver, Water Commissioner for Moose and Swamp Creeks, testified that he has been Water Commissioner since May 4, 1977; that he is familiar with the source of supply and that most years there is not enough water to satisfy decreed rights; that the Moose and Swamp Creek decreed rights total 9,115 miner's inches, of which 2,660 miner's inches are decreed from Swamp Creek. Mr. Weaver testified that this year the average June flow of Swamp Creek was 625 inches and is presently flowing about 80 miner's inches, whereas the normal flow for this time of the year is about 150 miner's inches.

8. Mr. Jack Hirschy testified that he has approximately 8,000 acres of irrigable land that could be irrigated from Moose and Swamp Creeks that he irrigates about 500 acres of hay and gives a partial irrigation to the remainder as pasture on a rotating basis as water is available but there is not enough water to cover it all. Mr. Hirschy estimated that the normal flow of Swamp Creek is about 150 miners' inches at this time of year (the first part of July).

9. Mr. Fred Walchly testified that he was the owner of the Swanson Ranch, which he is selling, on which he irrigated about 1,000 acres of hay from Swamp Creek and that he put up between 1,300 and 1,350 tons per year. He estimated the average flow of Swamp Creek to be between 100 and 150 miners' inches.

10. Mr. Doug McDowell testified that he irrigates between 800 and 850 acres of pasture, and waters 900 cows all from Swamp and Moose Creeks. He further testified that most years there is enough water from May to the middle of July; and that water generally becomes short around the middle of July.

11. Mr. John Eliel testified that he irrigates 700 acres of hay and 400 acres of pasture from Moose and Swamp Creeks. He stated that he generally is able to get enough water to satisfy his decreed rights during the months of May, June and July, but that about one-fourth to one-third of the time his early rights are not satisfied and seldom if ever are satisfied during August. He further testified that a water commissioner must be hired from one-half to two-thirds of the time, usually starting in June but sometimes in May. Mr. Eliel testified that he has 4th and 5th decreed rights on this source of supply.

12. Mr. Jon Roush testified that he owns property abutting Section 27, Applicant's place of use and point of diversion, and between Moose Creek and Swamp Creek. He stated that he pastures 250 to 500 head of cattle on this property and uses Swamp Creek water for livestock watering when Moose Creek water is no longer available.

13. Mr. Emory Rouse testified that he has ranched for 30 years at Wisdom, that he irrigates 700 acres from Moose Creek when there is sufficient water and reduces that to 300 acres during water-short years; and that water is in short supply in Swamp Creek about 75% to 80% of the time. Mr. Rouse stated that every year a water commissioner has been hired it has been because it was a water-short year. (Reference Exhibit II.)

14. Mr. S. J. Seidensticker testified that he irrigates about 1,700 acres on the lower end of the Big Hole River; that the lower end of the Big Hole River is completely dewatered about 3 years out of 5 by the 1st to the 15th of August.

15. Moose and Swamp Creeks are decreed streams and during years of short supply a water commissioner is appointed to apportion water to users according to the extent and priority of their lawful rights.

PROPOSED CONCLUSIONS OF LAW

1. All objectors to Application for Beneficial Water Use Permit No. 10,046-s41D except The Nature Conservancy, Skyline Sportsmen's Association, Trout Unlimited and Tony Schooner have apparent prior decreed water rights to Swamp Creek, the proposed source of supply.

2. The Nature Conservancy, Skyline Sportsmen's Association,

Trout Unlimited and Tony Schoonen were objectors without claimed or apparent prior existing water rights from the source of supply are therefore concluded to be without standing in this matter. Objections submitted in writing or orally at the hearing by the same are invalid and are not to be considered by the Hearing Examiner in reaching a decision.

3. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the proposed source of supply.

4. There are unappropriated waters in the proposed source of supply; however, unappropriated waters are not available throughout the period during which the Applicant seeks to appropriate them and in the amount requested. The evidence indicated that unappropriated waters are available some years during June and up to the 15th of July. It is concluded that the permit should be granted up to the amount requested for the period of June 1 to July 15 only.

5. Swamp Creek is a decreed stream. Historically, a water commissioner is appointed by the District Court to distribute water during water-short periods on the basis of priority of water rights in the source of supply. In accordance with Section 89-1001(1), R.C.M. 1947, a water commissioner appointed by the Judge of the District Court having jurisdiction "shall have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates and permits issued under the Montana Water

Use Act." Therefore the granting of this permit will not adversely affect prior water rights on Swamp Creek if the permit is conditioned to protect those rights and if the water commissioner exercises diligence in distributing the water in accordance with such conditions.

6. The proposed means of diversion will be adequate if plans and specifications for the same are approved by the Department prior to construction of the diversion works.

7. (a) It is concluded that the objectors' arguments that irrigation of pasture for wildlife, principally for elk, is not a beneficial use of water are without basis of law, in that Section 89-867(2), R.C.M. 1947, defines beneficial uses as a use of water for the benefit of the appropriator, including, but not limited to, fish and wildlife and irrigation.

(b) It is concluded that the objectors' arguments that destruction of native vegetation and reseeding to a pasture mixture would not be beneficial to elk; that the pasture is not needed by elk; and that there is a greater need for irrigation of hay and pasture for livestock production, are not within the purview of Montana Water Law for the Hearing Examiner to consider any more than he should give weight to an argument that a proposal on the part of a rancher to reseed native pasture to tame pasture of alfalfa would not be beneficial to his livestock; or that growing of a surplus commodity was not needed.

(c) It is concluded that the proposed use by the Applicant meets the requirements of Section 89-885(4) that the proposed use of water is a beneficial use.

8. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been

issued or for which water has been reserved.

9. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, have been met.

10. The Application for Beneficial Water Use Permit No. 10,046-s41D 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. The Application by John P. Schonenberger for Beneficial Water Use Permit No. 10,046-s41D is granted to appropriate 4 cubic feet per second or 1,796 gallons of water per minute not to exceed 300 acre-feet per annum from Yank Swamp, a tributary of Swamp Creek in Beaverhead County, Montana, by means of a ditch at a point in the SW1/4 SW1/4 of Section 27, Township 3 South, Range 17 West, M.P.M., and used for new irrigation on a total of 100 acres, more or less, in said Section 27, from June 1 to July 15, inclusive, of each year.

2. The above permit is provisional and is granted subject to all prior water rights in the source of supply and any final determination of prior existing water rights in the source of supply provided for by Montana law.

3. The Permittee shall install and maintain a satisfactory measuring device at the point of diversion and shall submit plans and specifications for the measuring device and the diversion facilities to the Department for approval prior to the start of construction of this project.

4. The Permittee shall keep records of the rate and volume of water diverted and shall submit such records to the Department upon request of the Department.

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 17th day of October, 1977.


WILLIAM F. THROM
HEARING EXAMINER