

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT G(P)011185-43D BY SAM H.)
MCDOWELL)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 12, 1997, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Authorization to Change G(P)011185-43D is granted to Sam H. McDowell to add a point of diversion to Beneficial Water Use Permit P011185-43D. The additional point of diversion will be the existing diversion which diverts water from Bluewater Creek into the Orchard Ditch at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 6 South, Range 24 East, in Carbon County, Montana. The appropriator will then take the water from Orchard Ditch at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, Township 6 South, Range 24 East, to irrigate 14 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of said Section 7.

A. The issuance of this authorization by the Department in

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no way grants the appropriator any ditch rights.

B. The issuance of this authorization by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this authorization. Nor does the Department in issuing this authorization in any way acknowledge liability for damage caused by the appropriator's exercise of this change.

C. The appropriator shall use a Department approved water use estimation technique to allow the flow rate and volume of water diverted to be recorded. The appropriator shall keep written monthly records of the flow rate and volume of all water used including the period of time, and shall submit the records by November 30 of each year and upon request at other times of the year. Failure to submit reports may be cause for revocation or modification of a permit or change. The records must be sent to the water resources regional office listed below. Contact the regional office for the current address.

Billings: Phone: 406-657-2105 Fax: 406-245-2064

D. This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute water. The appropriator shall pay his/her share of the fees, compensation, and expenses incurred in the distribution of the waters. The fees shall be set by district court.

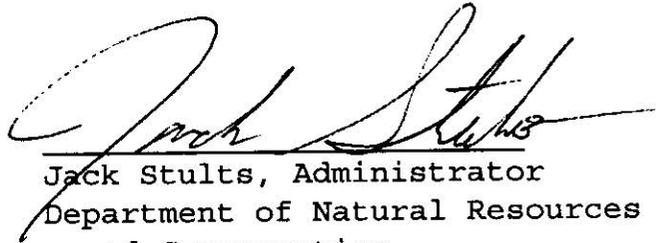
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as

part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 15th day of January, 1998.



Jack Stults, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 23rd day of January, 1998, as follows:

Sam H. McDowell
P.O. Box 481
Bridger, MT 59014

Hope K. Hanson
P.O. Box 237
Fromberg, MT 59029

Dick Josephson
P.O. Box 1047
Big Timber, MT 59011

William H. Rettig
Patricia A. Rettig
RT 1 Box 1217
Bridger, MT 59014

Janice Rehberg
P.O. Box 2529
Billings, MT 59103

Gary Hart
P.O. Box 28
Fromberg, MT 59029

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
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P.O. Box 201601
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Nancy Andersen, Chief
Water Rights Bureau
Department of Natural
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Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 121
Billings, MT 59102
(via electronic mail)


Mandi Shulund
Hearings Assistant

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

* * * * *

| | | |
|---------------------------|---|----------|
| IN THE MATTER OF THE |) | |
| APPLICATION FOR CHANGE OF |) | PROPOSAL |
| APPROPRIATION WATER RIGHT |) | FOR |
| G(P)011185-43D BY SAM H. |) | DECISION |
| MCDOWELL |) | |

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 1, 1997, in Billings, Montana, to determine whether an authorization to change a water right should be granted to Sam H. McDowell (Applicant) for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1995).

APPEARANCES

Sam H. McDowell (Applicant) appeared at the hearing in person and by and through counsel, Janice Rehberg.

Hope Hanson (Objector Hanson), William and Patricia Rettig (Objectors Rettig), and Gary Hart (Objector Hart) all appeared at the hearing in person and by and through counsel, Richard Josephson.

Helen Weatherford, Secretary of the Orchard Ditch Company, Barney Chambers, local farmer/rancher; Leslie Carlson, local farmer/rancher; Jim Nichol, local farmer/rancher; Lillian Dietz,

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local land owner; and Herman Carlson, local farmer/rancher appeared at the hearing and were called to testify by Applicant.

Keith Kerbel, Manager of the Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing and was called to testify by Applicant.

EXHIBITS

Applicant offered eight exhibits for the record. All were accepted without objection.

Applicant's Exhibit 1 is a copy of pages 113 and 114 of the Minutes of Meeting of the Orchard Ditch Company. The pertinent portion of this exhibit is indicated by a blue line on the left of four lines on page 113 which state, "Sam McDowell asked about sprinkling on 15 A he has. It was agreed by all present that this was permissible [sic] providing no more acres were added or Sam were to use more water than he was entitled to."

Applicant's Exhibit 2 is a blue sheet of paper upon which a map has been drawn showing the point of diversion from Bluewater Creek into the Orchard Ditch (labeled "A"); the approximate route of the ditch; the end of the Orchard Ditch (labeled "D"); the three-way split (labeled "H"); the ditch which routes water to Lewallen, Musegades, and Objectors Rettig; the ditch which services Klein, Objector Hart, and Objector Hanson (labeled "E"); the Deitz ditch (labeled "F"); and the waste water ditch (labeled "G"). There are four pump sites (labeled "Nichol/Lewallen"); the

siphon (labeled "C"); and Lewallen's point of diversion (labeled "B").

Applicant's Exhibit 3 is a hand-drawn map on a sheet of yellow paper. This map shows the approximate locations of various ditches and pipes below the three-way split at the end of the Orchard Ditch. The detailed portion is "H" on Applicant's Exhibit 2, the ditch shared by Rettigs, Lewallen, and Musegades. This drawing shows Musegades' pump sites indicated by an "M", Lewallen's pump sites indicated by an "L", and Rettig's diversion is designated by an "R".

Applicant's Exhibit 4 is a one-page letter with three attachments from Bob Lewallen to Sam McDowell as president of the Orchard Ditch Company. This letter speaks of Mr. Lewallen's effort to establish a water loss profile for the Orchard Ditch. It describes work that needs to be completed. The intent in gathering this information is to provide a basis for equitable distribution of water on the Orchard Ditch system. The first attachment is a graph indicating a loss profile at $500 \pm$ miner's inches and at $800 \pm$ miner's inches from the siphon to the division box. The second attachment is a loss profile of the Musegades, Rettig, and Lewallen lateral ditch at $135 \pm$ miner's inches and at a rate of $188 \pm$ miner's inches from the division box to the Rettigs' gate. The third attachment is a table used to determine discharge from a rectangular weir with end contractions.

Applicant's Exhibit 5 is a photograph taken by Applicant in August of 1996, of an irrigation pipe losing water at the pipe joint.

Applicant's Exhibit 6 is a close-up view of the irrigation pipe joint losing water. The photograph was also taken by Applicant in August of 1996.

Applicant's Exhibit 7 is a photograph taken by Applicant in August of 1996. This photograph shows water standing on one of the two approaches to the Klein field which is farmed by Applicant. Applicant testified the water was coming from Objector Hanson's leaking irrigation pipes.

Applicant's Exhibit 8 is a photograph taken by Applicant in August of 1996. This photograph shows water standing on the other of the two approaches to the Klein field.

Objectors offered nine exhibits for the record. All were accepted without objection except Objectors' Exhibit F. Applicant did not object to the exhibit, but objected to the list being called water rights when they have not been adjudicated and are merely claims of water rights. With that expressed, all Objectors exhibits were accepted into the record.

Objectors' Exhibit A consists of four pages. The first is a copy of the cover of the *Water Resources Survey, Carbon County, Montana, Part 1, History of Land and Water Use on Irrigated Areas.* This was published by the State Engineer and State Water Conservation Board in May, 1946. The second page is a copy of

the title page of the aforementioned publication. The third page is a copy of page 55 of the publication which describes Orchard Ditch Company location, the location of the point of diversion, the history, and other items of interest. The fourth page is a copy of page 13 which is a summary of irrigation companies and ditches, the sources of water, the acres irrigated, potential irrigable acres, and the total acreage that could be irrigated, including the present and potential acreage.

Objectors' Exhibit B consists of two pages which are copies pages 60 and 61 of the *Water Resources Survey, Carbon County, Montana (Resurvey)* published by the State Water Conservation Board in June, 1966. The pertinent portion is entitled "Orchard Ditch Company" and describes the history, location of the point of diversion, locations of the places of use, statistics, and other items of interest.

Objectors' Exhibit C consists of seven pages. The first five pages are Applicant's handwritten response to objections to his application for permit 11185-43D received by the Department on May 10, 1977. The last two pages are a typed version of the first five pages (typed by Josephson & Fredricks).

Objectors' Exhibit D consists of six pages. The first two pages are a letter to O.J. Musegades from Don Riddle who was an employee of the Department's Billings office at that time. The following pages are identical letters addressed to Lillian B. Dietz and James A. Englert.

Objectors' Exhibit E consists of four pages and is a copy of Petition for Determination of Ditch Rights and Appointment of Water Commissioner signed by James Englert and Frank Vanderloos on March 12, 1984, and filed on April 2, 1984, in the District Court of the Thirteenth Judicial District of Montana.

Objectors' Exhibit F is a one-page list taken from the Department's Temporary Preliminary Decree Index - Listing by Source name by Priority date. Report date is June 22, 1995.

Objectors' Exhibit G is a copy of a two-page letter to attorney, Joseph E. Mudd from Gerald Westesen dated July 25, 1984. The letter constitutes a report for the water measurements taken by Professor Westesen on July 21, 1984, at the request of Mr. Mudd.

Objectors' Exhibit H consists of two pages. The first page is a copy of page 23 in the Minutes of Meetings book for the Orchard Ditch Company which is the minutes of meetings held on April 1912. The second page is a copy of page 22 of that book dated May 31, 1911.

Objectors' Exhibit I is a copy of a two-page letter to Jesse E. Boley and Sam McDowell from Thomas E. Towe dated June 3, 1996, concerning the ownership of .54 shares.

Objectors' Exhibit J consists of four pages and is a copy of the two-page water use complaint filed by William and Patricia Rettig, dated August 13, 1996; Keith Kerbel's one-page written

correspondence to Sam McDowell, dated August 22, 1996; and Keith Kerbel's note regarding the complaint.

HISTORY

An application for beneficial water use permit in the name of and signed by Sam McDowell was received by the Department on January 17, 1977, at 3:00 p.m. Mr. McDowell sought to divert 337.5 gallons per minute of Bluewater Creek at points in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, all in Township 6 South, Range 24 East. The proposed places of use were to be 9 acres in the SW $\frac{1}{4}$ of Section 5, 8 acres in the SE $\frac{1}{4}$ of Section 6, 2 acres in the NE $\frac{1}{4}$ and 14 acres in the NW $\frac{1}{4}$ of Section 7. The application was duly noticed and five objections were received. Three of those objecting diverted their water from the Orchard Ditch, one withdrew his objection, and one objector diverted water from Bluewater Creek more than three miles downstream from the last proposed point of diversion. The Department determined the three Orchard Ditch users would not be adversely affected because the proposed points of diversion were downstream from the Orchard Ditch point of diversion. The Department determined there was sufficient water in Bluewater Creek for all the users and Mr. McDowell. Beneficial Water Use Permit P011185-43D was issued to Sam McDowell on October 11, 1977. On March 11, 1981, during the annual meeting of the Orchard Ditch Company, Sam McDowell asked about sprinkling on 15.00 of the permitted acres

from the Orchard Ditch. It was agreed by all present it was permissible providing there was no increase in acreage or the amount of water used. Without the benefit of an authorization to change a water right from the Department, Mr. McDowell began irrigating that acreage from the Orchard Ditch and continued to do so until a complaint was filed with the Billings Water Resources Regional Office by William and Patricia Rettig on August 13, 1996. Mr. McDowell then filed the instant application.

The Orchard Ditch Company was first organized on April 10, 1910. Orchard Ditch Company has no water rights. Water is taken from Bluewater Creek by the individuals who own the water rights and placed in Orchard Ditch. Individuals purchase stock in the company for the right to put their water in the ditch. One share of stock is the right to put 50 miner's inches in the ditch.

PRELIMINARY MATTERS

At the beginning of Mr. Josephson's presentation of the objectors' case, he moved the application be dismissed as it failed to carry the burden of proof that is required under the statute. The motion is denied. Applicant had met his initial burden by submitting a correct and complete application. The information provided by Applicant to address the criteria for issuance of an authorization to change was reviewed by the Department which determined that with respect to the information provided the criteria were met. Notice of the application was

then published. When an application receives objections, the applicant must then provide additional evidence to prove the criteria are met with respect to the information submitted by the objectors. In this case, Applicant was unable to convince the objectors the criteria had been met, hence, the hearing to determine whether the criteria for issuing an authorization to change are met.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right G(P)011185-43D in the name of and signed by Sam McDowell was received in the Department's Billings Water Resources Regional Office on September 11, 1996, at 10:28 a.m. (Department file.)

2. Pertinent portions of the application were published in the *Carbon County News*, a newspaper of general circulation in the area of the source on March 12, 1997. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed change. Three objections to the proposed change were received by the Department. Applicant was notified of the objections by a letter from the Department dated April 14, 1997. (Department file.)

3. Applicant seeks to add a point of diversion to Beneficial Water Use Permit P011185-43D. The additional point of diversion would be the existing diversion which diverts water from Bluewater Creek into the Orchard Ditch at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 6 South, Range 24 East, in Carbon County, Montana. Applicant would then take the water from Orchard Ditch at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, Township 6 South, Range 24 East, approximately one hundred yards below the siphon, to irrigate 14 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of said Section 7. (Department file and testimony of Applicant.)

4. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant has been using the diversion works, a 25 horsepower electric pump, and delivery system, aluminum pipe to impact sprinklers, for 15 years. The 14 acres are irrigated approximately seven days each month, as needed. (Department file, Applicant's Exhibit 1, and testimony of Applicant and Helen Weatherford.)

5. Applicant has proven by a preponderance of evidence the proposed use of water is beneficial. Irrigation is a beneficial use as set forth in Mont. Code Ann. § 85-2-102(2)(a) (1995).

6. Applicant has proven by a preponderance of evidence the proposed use would not adversely affect the water rights of other appropriators or other planned uses or developments for which a permit has been issued or for which water has been reserved.

Applicant had been using the ditch for 15 years without objection from down ditch users. There are no diversions between the present point of diversion and the proposed new point of diversion. No additional water would be appropriated from Bluewater Creek as a result of the proposed change. (Department file.)

There is a weir in the waste water ditch at the end of Orchard Ditch. The weir was placed in this ditch as a means to raise the water level so it could flow into Objectors Rettig's headgate. When there is excess water at the three way split at the end of Orchard Ditch, the waste water goes into this ditch, flows over the weir, and on toward Skunk Creek. Mr. Barney Chambers, lessee of the Lewallen property, visits this site at least four times a week. He has never been at the site when the water was not flowing over the weir. On one occasion, Mr. Jim Nichol, upon receiving a complaint from Mr. William Rettig that Objectors Rettig were not getting sufficient water, drove to the waste water ditch and found water was flowing over the weir. This would indicate a problem within the system or method of operation of the ditch rather than a shortage of water. It appears there are some problems with the allocation of water, however, this would be overcome when Mr. Lewallen completes the loss profile work and a method for a more equitable distribution of the water in Orchard Ditch is established. However, the allocation problem can only be settled by the Orchard Ditch

Company. The Department has no jurisdiction in matters pertaining to ditch rights. (Applicant's Exhibit 2 and 4 and testimony of Applicant, Barney Chambers, Jim Nichol, Patricia Rettig, and Gary Hart.)

7. Applicant has proved by a preponderance of evidence he has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicant owns the property where the water would be put to beneficial use. (Department file.)

8. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-402 (1995).

2. Applicant has met all the criteria for issuance of an Authorization to Change. See Findings of Fact 3 through 8. Mont. Code Ann. § 85-2-402 (1995).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Authorization to Change G(P)011185-43D is granted to Sam McDowell to add a point of diversion to Beneficial Water Use Permit P011185-43D. The additional point of diversion will be the existing diversion which diverts water from Bluewater Creek into the Orchard Ditch at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 6 South, Range 24 East, in Carbon County, Montana. The appropriator will then take the water from Orchard Ditch at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, Township 6 South, Range 24 East, to irrigate 14 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of said Section 7.

A. The issuance of this authorization by the Department in no way grants the appropriator any ditch rights.

B. The issuance of this authorization by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this authorization. Nor does the Department in issuing this authorization in any way acknowledge liability for damage caused by the appropriator's exercise of this change.

C. The appropriator shall use a Department approved water use estimation technique to allow the flow rate and volume of water diverted to be recorded. The appropriator shall keep

written monthly records of the flow rate and volume of all water used including the period of time, and shall submit the records by November 30 of each year and upon request at other times of the year. Failure to submit reports may be cause for revocation or modification of a permit or change. The records must be sent to the water resources regional office listed below. Contact the regional office for proper mailing address.

Billings Water Resources Regional Office
Phone: 406-657-2105
Fax: 406-245-2064

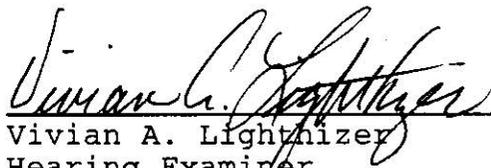
D. This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute water. The appropriator shall pay his/her share of the fees, compensation, and expenses incurred in the distribution of the waters. The fees shall be set by District Court.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague

assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 12th day of November, 1997.


Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 12th day of ~~October~~ ^{NOVEMBER}, 1997, as follows:

Sam H. McDowell
P.O. Box 481
Bridger, MT 59014

Dick Josephson
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Big Timber, MT 59011

Hope E. Hanson
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Diane McDuffie
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