

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 14295-g41F BY YOLANDA BLAKELY)

* * * * *

The time period for filing exceptions to the Proposal For Decision of July 15, 1985 (hereafter, "Proposal") has expired. Timely exceptions were received from Yolanda Blakely and Richard Gillespie. Scott Compton, Field Manager for DNRC submitted comments. (A copy of Mr. Compton's comments is attached hereto as Exhibit A.) Having given the submitted exceptions, comments, and motions full consideration, the Department of Natural Resources and Conservation (hereafter, "Department") accepts and adopts, incorporating herein by reference, the Proposal for Decision as its Final Order, with the exception of the modifications below.

RESPONSE TO THE APPLICANT

On July 29, 1985, Yolanda Blakely submitted a document entitled "Appeal to Equal Usage of Blakely Creek And Exceptions" (hereafter, "Appeal"), which document is substantially a motion for rehearing of Application for Beneficial Water Use Permit Nos. 7504-g41H and 14295-g41F.

Under Administrative Rules of Montana (ARM) § 36.12.231, a rehearing proceeding is expressly prohibited except as required under § 2-4-703, § 2-4-621, and § 2-4-622 MCA (1983). As no

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judicial review is pending on either Permit Application, and receipt of additional evidence has not been ordered by the Court, § 2-4-703 MCA (1983) does not apply. Further, as the person who conducted the hearing is available to the Department and because the Findings of Fact are based on substantial competent evidence and because the proceedings on which the Findings are based comply with essential requirements of law, no new hearing is permitted under the provisions §§ 2-4-621 and 2-4-622 MCA (1983).

Therefore, Applicant's motion for new hearings on above stated Permit Applications is denied.

As to the filing of exceptions via Ms. Blakely's "Appeal"; it must be noted that no statement made in said "Appeal" specifically sets forth a portion of the Proposal For Decision to which an exception, if any, is taken. Rather, the statements made in the "Appeal" amount to vague assertions regarding title to the water in Blakely Creek, and fail wholly to address any specific portion of the Proposal For Decision. The statements are indeed largely irrelevant to the substance of the Proposal.

The Department therefore accords the denominated exceptions little attention. ARM § 36.12.229.

RESPONSE TO RICHARD E. GILLESPIE

Findings of Fact Nos. 13 and 16 in the Proposal For Decision are based upon the record herein, including all evidence received and duly considered. The record sustains the Findings of Fact.

Objector Gillespie's reason for making the exception to wit: to preserve the right to be served with whatever the Applicant might file when properly making a new Application to the Department, is adequately served by the provisions of § 85-2-307 et seq., MCA (1983) which provide for notice, objection and hearing prior to action on an application.

RESPONSE TO SCOTT COMPTON

§ 85-2-302 MCA (1983) requires that an application be made on a form prescribed by the Department. What is essentially a defective new Application has been made by the Applicant herein, in that the new Application was initiated by oral amendment at the hearing and was not made on the prescribed form.

Any Permit issued subsequently by the Department resulting from the new Application will have a priority date of February 13, 1985, if the proper application form is completed and filed with the Department within 45 days of service of this Final Order, 45 days being the time the Department hereby allows pursuant to above-said statute.

WHEREFORE, based upon the foregoing and on the record herein, the Department hereby issues the following:

ORDER

Application for Beneficial Water Use Permit No. 14295-g41F by Yolanda Blakely, is hereby denied.

Applicant has the right to, within 45 days of the date of service of this Final Order, file a new application on the proper form with the Department for a Beneficial Water Use Permit. to appropriate water pursuant to the description offered at the hearing, i.e.: directly from a pit in the NW $\frac{1}{4}$, NW $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 21, Township 2 North, Range 2 East, Gallatin County Montana, by pump. If Applicant fails to file a new application within the stated time, she will lose the priority date of February 13, 1985 for such permit if ultimately issued.

NOTICE

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

DONE this 19th day of September, 1985.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER
NO. 14295-g41F BY YOLANDA BLAKELY)

* * * * *

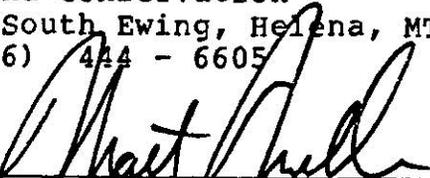
The objections filed by the Objectors hereto are in substance the same as those previously passed upon in numerous prior dispositions. Our decisions therein control the present matter. The Bureau also requests that we incorporate the evidentiary matter in In re Brown into the present record. In effect, this incorporation has already been achieved. We rely on In re Brown et al. for our disposition herein. Error in the seminal case taints the instant one.

WHEREFORE, the objections filed on behalf of the Montana Power Company and the Bureau of Reclamation are hereby stricken.

DONE this 24 day of April, 1984.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing
Helena, MT 59620

AFFIDAVIT OF SERVICE
ORDER

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 25, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by YOLANDA BLAKELY, Application No. 14295-g41F, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Yolanda Blakely, Royal Star Route, Othello, WA 99344
2. Edna Gillespie, Route 1, Box 10, Three Forks, MT 59752
3. Eileen Beebe, Box 68, Three Forks, MT 59752
4. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
5. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
6. Montana Power Co., 40 East Broadway, Butte, MT 59701
7. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 (hand deliver)
8. Scott Compton, Bozeman Field Office, (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources (hand deliver)

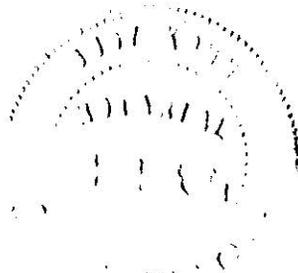
DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

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

On this 25 day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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



Judy John
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 14295-g41F BY YOLANDA BLAKELY)

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA, and the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA, the Department of Natural Resources and Conservation (hereafter, the "Department") held a hearing in the above-entitled matter on February 13, 1985.

I. STATEMENT OF THE CASE

A. Parties

The Applicant, Yolanda Blakely, was represented by Howard Blakely.

Richard Gillespie has succeeded to the interest of Edna Gillespie, his mother, and represented himself.

Eileen Beebe timely filed an objection but did not appear personally or by representative.

Montana Power Company (hereafter, "MPC") and the United States Department of Interior, Bureau of Reclamation (hereafter, the "Bureau") timely filed objections hereto, but by Order of April 24, 1984, their objections were stricken as invalid. Therefore, neither of these parties appeared at the hearing.

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B. Case

The Application originally sought to appropriate developed spring water by pumping from Rea Creek, into which the spring water had been channeled. At the hearing, Mr. Blakely amended the Application to appropriate water from a pit located between "Blakely Creek" and Rea Creek. The water would be used for new irrigation on 50 acres and supplemental irrigation on 30 acres. Objector Gillespie is an appropriator immediately downstream from the Applicant on Blakely Creek.

C. Findings of Fact

1. The Blakelys originally filed an Application for Beneficial Water Use Permit on July 27, 1977.
2. On January 6, 1978, Joe Carroll, Analyst for the Water Rights Bureau, returned the Application because it was neither correct nor complete.
3. On November 4, 1981, Scott Compton, Area Office Supervisor for the Bozeman office, returned the Application for termination because no interest in the Application had been shown since 1978, and because the filing fee had not been paid.
4. On December 16, 1981, the Blakelys corrected the Application and paid the filing fee.
5. On February 13, 1985, the Department held a hearing on the objections to the Application.
6. The Department has jurisdiction over the subject matter herein and the parties hereto, whether or not they appeared.

7. The pertinent facts of the Application were published on February 24, March 3, and March 10, 1982, in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source.

8. The Applicant amended the Application at the hearing, and now intends to pump water directly from a pit in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, Township 2 North, Range 2 East, Gallatin County, Montana. This constitutes a change in the proposed point of diversion as the original Application sought to divert directly from Rea Creek. The pit is approximately halfway between Rea Creek and "Blakely Creek" which are approximately 300-400 feet apart.

9. There is no surface connection between the pit and either Rea or "Blakely" Creek.

10. The source has also changed since the original Application involved "developed springs" and the amended Application would appropriate only seepage and percolating waters. Certainly all these waters are tributary to each other, but for public notice and permit term purposes, the sources are considered distinct.

11. The waters in the pit, supplied by seepage and percolation, are unappropriated save for an existing permit right of the Blakelys.

12. There is no evidence on the record from which to determine the amount of water the pit will produce.

13. The only objector who appeared at the hearing indicated he had no objection to the amended Application.

14. The proposed use, irrigation, will be of material benefit to the Applicant.

15. Montana Power Company and the Bureau filed objections hereto, on the grounds that any and all further consumptive uses upstream from Canyon Ferry would adversely affect MPC's hydroelectric generation water rights in the Missouri River and the Bureau's rights in Canyon Ferry.

16. Richard Gillespie appeared and objected to the appropriation as applied for. Mr. Gillespie stated he would withdraw an objection if Mr. Blakely agreed to pump only from a pit, and refrain from pumping from Blakely Creek. Mr. Blakely agreed to this condition.

Wherefore, based on the foregoing, and the record on file herein, the Hearing Examiner hereby makes the following:

D. Conclusions of Law

1. The Department has jurisdiction over the subject matter herein and the parties hereto, regardless of whether or not they appeared at the hearing. See, Title 85, Chapter 2, Part 3, MCA (1983).

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of rule or law have been fulfilled, and, therefore, the matter was properly before the Hearing Examiner. § 85-2-309 MCA (1983).

3. The Applicant having amended the source and point of diversion, and having amended the Application to request appropriation from a pit, rather than the Rea Creek, has essentially presented the Department with a new Application. Any permit ultimately issued hereunder will have a priority date of February 13, 1985, the date of the hearing in this matter. In the Matter of the Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon Noble Ready Mix Co., Final Order, July 1, 1981.

4. The pertinent facts of the new Application must be published in a newspaper of general circulation in the area of the source to satisfy procedural due process notice requirements as codified in § 85-2-307, MCA (1983).

5. The Department must issue the permit if:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

6. The Applicant herein has so substantially altered his plans, that there is insufficient evidence on record to grant the Permit therefore. There is no evidence at all as to how much water could be appropriated from the pit. Although Mr. Blakely said there was sufficient water there, such unsupported statement is insufficient evidence upon which to base a Provisional Permit. Further, the evidence regarding the adequacy of the means of diversion and appropriation consisted solely of Mr. Blakely's vague assertions that he would sprinkle or flood. The area of use is separated from the point of diversion by a road, but no evidence was presented regarding the means of water conveyance or distribution. The Hearing Examiner was unable to conduct an on-site visit (because of weather) and the field personnel have had no opportunity to field investigate and report to the Department on the instant project.

7. The Applicant's description of the development of springs did not track with the Application. The Application states that the source is, "newly developed springs channeled into Rea Creek and out to 80 acres." At the hearing, however, Mr. Blakely asserted he would, in fact, divert from Blakely Creek not Rea Creek. Hence, his developed water to Rea Creek could not be credited as his source, since the two creeks do not converge. Although the Application file aerial photographs indicate the existence of a headgate whereby it may be possible to turn water from Rea Creek into Blakely Creek, Mr. Blakely never indicated

any plan by which his "developed" water could be measured to allow for commensurate diversion from either creek. In sum, the Applicant's description of his project was so vague as to be unidentifiable. The Applicant then completely changed his evidence into a description of an agreement to pump from a pit, unconnected to either stream or any drainage ditch or spring, and without any specificity regarding the appropriative works other than to indicate agreement to pump from a pit instead of Blakely Creek.

8. The Applicant must return to the Bozeman Field Office and complete an application form sufficiently precise for the appropriation as described at the hearing (one involving diversion from the pit only), that the Application can be published, if necessary, and further Departmental action had thereon. § 85-2-307, 85-2-310 MCA (1983).

9. By so agreeing to a change in the proposed Application, the Applicant has essentially agreed to terminate the Application No. 14295-g41F.

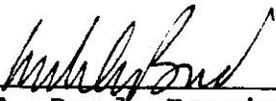
10. The Applicant lacks a bona fide intent to appropriate water pursuant to the appropriation described in the instant Application.

Wherefore, based on the Preceding and the files herein, the Hearing Examiner hereby issues the following:

PROPOSED ORDER

That Application No. 14295-g41F by Yolanda Blakely be hereby denied.

DONE this 15th day of July, 1985.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

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