

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. 21949-s411 BY JUNE B. HENSLEY)
)

* * * * *

Our Order In Re Brown (1984), controls the disposition of the present matter insofar as the Objectors' Bureau of Reclamation and Montana Power Company are concerned. The Proposal for Decision is hereby incorporated herein.

WHEREFORE, based on these Findings of Facts and Conclusions of Law, the following Final Order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application No. 21949-s411 is hereby granted to June B. Hensley to appropriate 1100 gallons per minute up to 260 acre-feet per year for sprinkler irrigation of 108.1 acres more or less comprised of 23.1 acres in the SW1/4 of Section 19, Township 10 North, Range 2 East, and 75 acres in the NE1/4 and 10 acres in the SE1/4 of Section 25, Township 10 North, Range 1 East. The source of supply shall be White's Gulch, the waters thereof to be diverted at points in the SW1/4 NW1/4 SE1/4 of Section 19, Township 10 North, Range 2 East, and/or at a point in the NW1/4 NW1/4 SE1/4 of Section 19, Township 10 North, Range 2 East, all in Broadwater County. In no event shall waters be

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diverted for use prior to April 1 of any given year nor subsequent to October 15 of any year. The priority date for this permit shall be February 26, 1979, at 3:15 p.m.

This permit is subject to the following express conditions, limitations and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert or use water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes provided for herein. At all times when water is not reasonably required for said purposes, the Permittee shall cause and otherwise allow the waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit. Nor does the Department in issuing this permit acknowledge any liability for such damage, even if such damage is the necessary and unavoidable consequence of the exercise of this permit.

D. The Permittee shall proceed with reasonable diligence in the completion of the appropriation works and in actually

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applying the waters provided for herein to beneficial use.

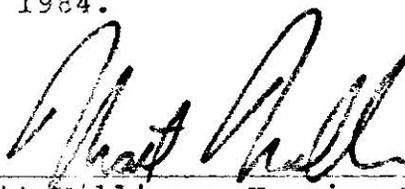
NOTICE

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 24th day of April, 1984.



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



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6704

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AFFIDAVIT OF SERVICE
FINAL 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 24, 1984, she deposited in the United States mail, 1 Certified mail, an order by the Department on the Application by June B. Hensley, Application No. 21949-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. June B. Hensley, Route 1, Box 92D, Townsend, MT 59644
2. Wayne Treers, Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
3. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
4. Montana Power Co., 40 East Broadway, Butte, MT 59701
5. Ron Waterman, Attorney, P.O. Box 1715, Helena, MT 59624 *sent delivery*
6. T.J. Reynolds, Helena Field Office (inter-departmental mail)
7. Gary Fritz, Administrator, Water Resources (hand deliver)
8. Montana Power company, Butte, MT

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

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

On this 24th 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.

Jan P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 21949

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. 21949-s411 BY JUNE B. HENSLEY)
)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Helena, Montana.

STATEMENT OF THE CASE

The present application seeks 1100 gallons per minute up to 741 acre-feet per year for the irrigation of 307.4 acres more or less. The Applicant appeared personally at the hearing in this matter. The pertinent portions of this application were duly and regularly published for three successive weeks in the Townsend Star, a newspaper of general circulation printed and published in Townsend, Montana.

An objection to the instant application was filed with the Department of Natural Resources and Conservation on behalf of the Montana Power Company. The objection alleges that the proposed appropriation is from White's Gulch, a tributary of the Missouri River in Broadwater County, and upstream from the Hauser, Holter, Black Eagle, Rainbow, Ryan, Cochrane and Marony dams and that

there is insufficient unappropriated water available for the proposed use without adversely affecting the downstream water rights of the Montana Power Company and other senior appropriators. This objector appeared at the hearing in this matter through Larry Gruel and by Counsel Jock Anderson of Gough, Shanahan, Johnson and Waterman.

An objection to the instant application was also filed with the Department of Natural Resources and Conservation on behalf of the Bureau of Reclamation of the United States of America. This objection claims generally that there is not unappropriated water available throughout the period of appropriation requested by the Applicant. The objection also alleges that any new irrigational development will adversely affect the prior rights of the Bureau of Reclamation's Canyon Ferry and Helena Valley Units. This objector appeared at the hearing by Wayne Treers and through Counsel Richard Aldrich.

The Department of Natural Resources and Conservation appeared at the hearing by T. J. Reynolds, Area Office Field Supervisor for the Department's Helena office.

PRELIMINARY MATTERS

The objections of the Bureau of Reclamation and the Montana Power Company are identical to a number of objections similarly filed against other applications for new water uses on the upper part of the Missouri River drainage. In In Re Brown, and continuing through subsequent proceedings involving these

objectors, the Hearings Examiner has concluded that the scope and extent of the water rights of said objectors did not warrant the denial of the respective applications, nor any particular modifications thereof.

This Applicant is similarly situated to those prior applicants, and such former determinations are entitled to deference for present purposes. See generally, MCA 2-4-612 (1981). The principles of *stare decisis* and collateral estoppel dictate such deference, even if the present record and those of past administrative hearings differ in some minor detail. See generally, Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940) (Decrees admissible as evidence of water rights as against persons not parties to or in privity of interest with parties to original judicial proceeding); see also, Brennan v. Jones, 101 Mont 550, 55 P.2d 697 (1936); Gessel v. Jones, 149 Mont. 418, 427 P.2d 295 (1967). Moreover, even if the present record is not precisely congruent with those of former proceedings, the findings and conclusions therein were predicated largely on admissions of the respective objectors, and there being no prejudice to the Applicant in this regard, such admissions have reliability for present purposes. See MRE 801. For these reasons, the Hearing Examiner will not make detailed findings or conclusions regarding the issues of unappropriated water and adverse effect to prior appropriators. Reference may be had to prior matters for a full delineation for the reasons for the findings made herein.

The Hearings Examiner, after considering the evidence herein, and now being fully advised in the premises, does hereby make the following findings of fact, conclusions of law, and proposed order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and by the appearance of the parties, has jurisdiction over the persons involved.

2. The Applicant does not intend to irrigate the total of the 307.4 acres claimed herein, but rather has a bona fide intent to appropriate water only for the irrigation of 108.1 acres comprised of 23.1 acres in the SW1/4 of Section 19, Township 10 North, Range 2 East, and 75 acres in the NE1/4 and 10 acres in the SE1/4 of Section 25, Township 10 North, Range 1 East.

3. The use of water for Applicant's purposes would be of material benefit to herself, as the lands comprising the place of use will not grow the intended crops or will not yield the same yields of such crops without the use of irrigation waters.

4. The use of 741 acre-feet per year for the purposes the Applicant intends is an unreasonable and wasteful quantity of water. Two hundred and sixty (260) acre-feet per year is the most water the Applicant can use without waste for her intended purposes.

5. The Applicant intends to divert the waters claimed herein out of White's Gulch by means of ditches. The water will thence be conveyed to the ultimate place of use by a system of pipelines and sprinkler systems.

6. The use of 1100 gallons per minute is a reasonable estimate of the quantity of water required for Applicant's purposes, as there may be instances in which that quantity of water will be required to push other waters down the ditch for application on the ultimate place of use.

7. There are no permits or water reservations that the Applicant's use will affect.

8. White's Gulch is a tributary of the Missouri River, but a surface flow interconnection only exists at times of extreme high-flow.

9. There are unappropriated waters available for Applicant's use in the amounts provided for herein throughout the period during which the Applicant seeks the use of the water in at least some years.

10. The Applicant's proposed diversions and use pursuant thereto will not adversely affect the rights of any prior appropriator.

CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein, and by the appearance of the parties, has jurisdiction over the persons involved. See generally MCA 85-2-301 et. seq.

2. The Department of Natural Resources and Conservation must issue a new water use permit if the following conditions or criteria exist:

- (1) there are unappropriated waters in the source of supply:
 - (a) at times when the water can be put to the use proposed by the applicant;
 - (b) in the amount the applicant seeks to appropriate;
- and
- (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (2) the rights of a prior appropriator will not be adversely affected;
- (3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (4) the proposed use of water is a beneficial use;
- (5) 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) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;
- (7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through 5).

The present application antedates the effective date of the foregoing statute. That is, the present language of MCA 85-2-311 differs in some respects from the statutory provision in force at the time this application was filed. Juxtaposing these versions of the statute, however, makes clear that the new language merely makes explicit what was formerly implicit. No material change was made in the substantive standards governing an application for a new water use permit.

Moreover, while the statute did indeed lessen the burden of proof of an applicant for a permit of the type contemplated herein, the objectors can claim no prejudice in this regard. Objectors to proceedings for new water use permits have no vested interest in the expeditious processing of an application therefore, as the status quo is merely maintained. See MCA 85-2-310(1). ("Time for processing of application may be extended upon "agreement of the applicant.") The objectors herein can claim no vested interest in the fortuity of the timing of the above-noted legislative change. See also MCA 1-2-110 (1981).

3. The Applicant bears the burden of proof in this matter. Substantial credible evidence means such evidence that a reasonable mind will accept as supporting a particular conclusion. See In Re Monforton, Dept. Order, 5/82.

4. The use of 741 acre-feet per year for the purposes intended by the Applicant is an unreasonable quantity of water, and the use of said amount would result in the waste of the water resource. See generally MCA 85-2-102(13). The Hearings Examiner concludes that 260 acre-feet of water per year is the greatest quantity of water the Applicant can use for the purposes described herein. See generally Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905); Allen v. Petrik, 69 Mont. 373, 222 P.451 (1924).

It is not germane to this particular aspect of the issue of beneficial use that the Applicant will not divert a greater flow rate than provided by decree with respect to other lands under the Applicant's control. An appropriator may not extend the time or extent of use without initiating a new water right, which new right is in turn subject to the permitting process. See generally Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940). Moreover, although the Applicant does not intend to divert any additional quantities of water from the ultimate source of supply, a flow rate of 1100 gallons per minute will be recognized by the permit to be issued in this matter. There may be instances where Applicant desires to irrigate the places of use described herein without also irrigating lands described by the decree evidencing other water rights. In such situations, the Applicant is entitled to divert 1100 gallons per minute to meet the purpose claimed herein. The Applicant is entitled to the greatest quantity of water she can beneficially use. See Sayre v. Johnson, supra.

4. The use of 1100 gallons per minute up to 260 acre-feet per year for the purposes of the irrigation of pasture and hay is a beneficial use. See generally MCA 85-2-102(2) (1981). The Applicant's proposed means of diversion are reasonable and customary for her intended purposes, and said means will not result in the waste of the water resource. See generally State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

5. The Applicant's diversion and use of water will not unreasonably interfere with other planned developments for which a permit has been issued or for which water has been reserved.

6. There are unappropriated waters in the amounts the Applicant seeks to appropriate during the period during which she seeks to use the water in at least some years.

7. The Applicant's diversions and uses pursuant thereto will not adversely affect the rights of any prior appropriator. Such uses will not inevitably or necessarily capture waters otherwise required for downstream demand, nor will Applicant's right to be unadministratible in times of scarcity when her junior status will force curtailment in deference to senior requirements.

The Hearngs Examiner notes that the Applicant also implicitly argues that no adverse affect will occur by virtue of the sporadic nature of a surface water tributary connection with the Missouri River. Findings and conclusions on this matter are unnecessary in light of the disposition of this matter. However, the Hearings Examiner cannot determine on the face of this record whether or not the failure of surface waters to reach the Missouri River at any given time is merely a product of other uses which are themselves junior to the Objectors herein. It will not do to license further injury on the predicate of the continuing harm. Nor is it necessary to further determine whether even in light of this lack of surface water connection, the ground water resource would be depleted to the Objectors' injury.

WHEREFORE, based on these findings of fact and conclusions of law, the following proposed order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application No. 21949-s41I is hereby granted to June B. Hensley to appropriate 1100 gallons per minute up to 260 acre-feet per year for sprinkler irrigation of 108.1 acres more or less comprised of 23.1 acres in the SW1/4 of Section 19, Township 10 North, Range 2 East, and 75 acres in the NE1/4 and 10 acres in the SE1/4 of Section 25, Township 10 North, Range 1 East. The source of supply shall be White's Gulch, the waters thereof to be diverted at points in the SW1/4 NW1/4 SE1/4 of Section 19, Township 10 North, Range 2 East, and/or at a point in the NW1/4 NW1/4 SE1/4 of Section 19, Township 10 North, Range 2 East, all in Broadwater County. In no event shall waters be diverted for use prior to April 1 of any given year nor subsequent to October 15 of any year. The priority date for this permit shall be February 26, 1979, at 3:15 p.m.

This permit is subject to the following express conditions, limitations and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the Permittee to divert or use water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes provided for herein. At all times when water is not reasonably required for said purposes, the Permittee shall cause and otherwise allow the waters to remain in the source of supply.

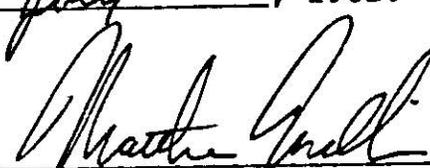
C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for such damage, even if such damage is the necessary and unavoidable consequence of the exercise of this permit.

D. The Permittee shall proceed with reasonable diligence in the completion of the appropriation works and in actually applying the waters provided for herein to beneficial use.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before August 10, 1982.

DONE this 30th day of July, 1982.


Matthew Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE

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

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on August 2, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by June B. Hensley, Application No. 21949-s411, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. June B. Hensley, Route 1, Box 92D, Townsend, MT 59644
2. USDI-Bureau of Reclamation, Wayne Treers, Box 2553, Billings, MT 59103
3. Montana Power Company, 40 East Broadway, Butte, MT 59701
4. Ron Waterman, Attorney, Box 1715, Helena, MT 59624
5. T. J. Reynolds, Helena Area Office Supervisor, (inter-department mail)
6. Matt Williams, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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

by Beverly J. Jones

On this 2nd day of August, 19 82, before me, a Notary Public in and for said State, personally appeared Beverly J. Jones, known to me to be the Hearing 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 Lohr
Notary Public for the State of Montana

Residing at Montana City, Montana

My Commission Expires 3/1/85

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