

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

\* \* \* \* \*

IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 23106-s76M BY JOHN R. AND )  
DEBRA ANN VASILCHEK )

\* \* \* \* \*

There being no exceptions or objections to the Proposal for Decision in this matter entered on June 5, 1981, the same is hereby made final and is expressly incorporated herein.

WHEREFORE, in accordance with the Proposal for Decision entered in this matter, the following Final Order is hereby issued.

FINAL ORDER

1. Subject to the terms and limitations described below, Application for Beneficial Water Use Permit No. 23106-s76M by John R. and Debra M. Vasilchek is hereby granted for ten (10) gallons per minute not to exceed one-half (.5) acre-foot of water annually for in-house domestic uses not requiring a potable supply of water. The application for water to be used for irrigation of a small garden area is denied. The water use recognized herein shall not be exercised from May 15 through September 30, inclusive, of any year. The point of diversion and place of use shall be located in the W1/2 of Government Lot 1, being in the NE1/4 NE1/4 of Section 3, Township 18 North, Range 27 West, all in Mineral County. Priority date for this permit shall be June 11, 1979, at 11:15 a.m.

This permit is hereby made expressly subject to the following terms and conditions:

**CASE # 23106<sup>1</sup>**

- (a) The right evidenced by this permit is subject to all prior and existing rights and any final determination of those rights made pursuant to Montana law. Nothing herein shall be construed to authorize or permit the permittee to divert or use water to the detriment to any degree of any senior appropriator.
- (b) Nothing herein shall be construed in any way 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 the liability for any damages caused by said exercise of this permit.
- (c) Permittee shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the above-described purposes. At all times when water is not reasonably required for these purposes, permittee shall cause and otherwise allow the waters to remain in the source of supply of Seven Mile Creek.
- (d) The permittee shall diligently adhere to the terms and conditions of this order. Failure to adhere to these terms and conditions may result in the revocation of this permit.

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.

DATED this 24 day of June, 1981.

Gary Fritz

Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT, 59601  
(406) 449-2872

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

\* \* \* \* \*

IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 23106-s76M BY JOHN R. AND )  
DEBRA ANN VASILCHEK )

\* \* \* \* \*

Pursant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, after notice required by law, a hearing in the above-entitled matter was held on March 20, 1981, in Superior, Montana. The Applicant appeared by Debra M. Vasilchek. Objectors Alfred J. and Patricia P. Germyn appeared by Alfred J. Germyn. The Department of Natural Resources and Conservation was represented by Dave Pengelly, Area Office Field Supervisor of the Missoula Office, and Jan Mack.

PRELIMINARY MATTERS

Several of the allegations contained in the objection filed in this matter raise threshold issues of materiality and relevance. Said objection, among other things, claims that there is a spring constituting a separate source of supply from that involved by the terms of the application from which water might be used by the applicant. Some of the evidence propounded at the hearing related to this matter. The Hearing Examiner concludes, as a matter of law, that such an allegation is immaterial to the present proceeding. There is no requirement that a prospective appropriator seek water from sources of supply that may be more

inconvenient to any objector. An applicant is entitled to an appropriation by the terms of his application so long as the requirements set forth in MCA 85-2-311 (1979), which is referenced elsewhere herein, are met.

The objection also claims that the application filed in this matter is likely to be the first of many such requests as there is alleged to be new subdivision developments upstream from the objector's diversion. The Hearing Examiner concludes that, even accepting the truth of such allegations, they are in no wise relevant to the instant proceedings. Each applicant for a water permit is required to run the same statutory gauntlet provided for the applicant herein. Moreover, as succeeding permits are approved, it is evident that the statutory requirement for unappropriated water will be more and more difficult to establish. The applicant herein cannot be prejudiced by subsequent acts of others. The inevitable consequence of objector's theory is that no water within the state of Montana may be appropriated, because at some point in time some future appropriators may seek more water than will be available from the source of supply.

#### EXHIBITS

The applicant offered into evidence two (2) exhibits, to-wit:  
A-1: A water right filing on behalf of the Big Blackfoot Milling Company.

A-2: A copy of a water right filing on behalf of Daniel Graham.

The applicant offered the above-mentioned filings as bearing on the issue of unappropriated water. However, these exhibits rather tend to show that waters in the source of supply are already appropriated by persons other than the applicant. Indeed, the objector herein claims to be the successor in interest to the rights evidenced by these filings. All those said exhibits were received into evidence without objection, and under the circumstance of this matter, they have no probative matter and they have been disregarded.

A-3: A composite of two (2) photographs taken by Jan Mack on November 12, 1980, of the garden area of the applicant. The place of view is referenced on the back of the photograph. All of applicant's exhibits were duly received into evidence.

The department offered into evidence fifteen (15) exhibits,  
to-wit:

D-1: A copy of a United States Geological Survey map upon which has been depicted in red the drainage area served by Seven Mile Creek. The applicant's property together with the proposed point of diversion is referenced in orange. The objector's property is depicted in green, and the objector's point of diversion is referenced thereto.

D-2: A copy of a water right tabulation from a water resources survey conducted by the State of Montana

allegedly representing the character and extent of objector's water right.

D-3 through D-12, inclusive: Photographs taken by Jan Mack on November 12, 1980, showing objector's diversion system. Place of view and point of view are referenced on the back of each photograph.

D-13: A composite of five (5) photographs taken by Jan Mack on November 12, 1980, showing a portion of objector's place of use. Point of view and place of view are referenced on the back of the photographs.

D-14 and D-15: Photographs taken by Jan Mack on November 12, 1980, representing Seven Mile Creek on or about objector's property.

All of Department's exhibits were duly received into evidence without objection.

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

#### FINDINGS OF FACT

1. On June 11, 1979, at 11:15 a.m., an Application for Beneficial Water Use Permit was duly filed with the Department of Natural Resources and Conservation (hereinafter designated as Department). The application seeks ten gallons per minute up to 1.0 acre-foot per year for domestic purposes for continuous use

throughout the year. The proposed point of diversion and the proposed place of use are represented as being identical, to-wit: in the W1/2 of Government Lot 1, being in the NE1/4 NE1/4 of Section 3, Township 18 North, Range 27 West, all in Mineral County. The source of supply is claimed to be Seven Mile Creek, which is tributary to the Clark Fork River. The pertinent portions of the application were duly published three (3) successive weeks in the Mineral Independant, a newspaper of general circulation, printed and published at Superior, Montana.

2. A timely objection to the application was filed by Alfred J. Germyn and Patricia P. Germyn.

3. The Department has jurisdiction over the subject matter involved herein, and has jurisdiction over the parties hereto.

4. The evidence supports a finding that the applicant intends to use the water applied for herein for the purposes of domestic use. More specifically, the applicant intends to use the water for washing and cleaning and any other domestic uses not requiring a potable water supply. The evidence also indicates that applicant intends to irrigate a roughly 50x70 foot garden with the water claimed herein. The use of the water in this fashion would materially benefit the applicant, and the Hearing Examiner expressly finds that the proposed use is a beneficial one. To date, applicant has apparently secured water for the aforesaid purposes by carrying the same in buckets from Seven Mile Creek, apparently with the consent of the objector, Alfred Germyn.

5. The evidence supports a finding that the proposed means of diversion are adequate. The applicant intends to pump the water from Seven Mile Creek through a system of pipes connected to the place of use. The distance the water needs to be conveyed is modest, as applicant's property is located adjacent to the source of supply. Nothing in the record indicates a pumping lift that would be unfeasible. The proposed means of diversion are customary for the intended uses, and will not result in any waste of water.

6. The evidence supports a finding that the applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource. The applicant has demonstrated a feasible means of conveying the water and a definite need for the same.

7. The evidence supports the finding that at times there are unappropriated waters available in the source of supply. The applicant indicated in her testimony that high flows as a result of spring runoff occur in Seven Mile Creek during the month of May in a typical year. Thereafter, by the middle of June, in a typical year, Seven Mile Creek reaches a base flow or a rate of flow that is relatively constant for the remainder of the year. The objector, Alfred Germyn, who has lived adjacent to the source of supply for some 25 years, confirmed this description, although he also indicated that runoff may occur in some years as early as April. The evidence shows that the applicant intends to use this water from the source of supply year-round for in-house domestic

use, but intends to limit the irrigation of the above-described garden to the summer months.

Objector Mr. Germyn testified extensively to the scope and character of his water rights. Although he claims to be the successor in interest of the first four rights for agricultural purposes listed and described in Department's Exhibit No. 2, it is not necessary for the purpose of this order to determine the precise priority or the precise extent in terms of quantity of Mr. Germyn's use. It is clear from the testimony that Mr. Germyn owns and is exercising at least a use right that was perfected prior to the 1973 effective date of the Montana Water Use Act, and that pursuant to the exercise of this right, the entire flow of Seven Mile Creek is diverted for agricultural purposes. Mr. Germyn uses a hand-line sprinkler irrigation system, and diverts the waters from the source of supply through the same by a system of open ditches and pipe lines through which water is conducted by gravity flow. The objector applies water for the beneficial purposes of production of hay and pasture virtually continuously throughout the irrigation season. Objector's irrigation season runs generally from "sometime in May" through September. Climatic conditions allow the objector to begin irrigating earlier and to cease his irrigation later in some years. However, during the early part of the irrigation season, when the source of supply is carrying its spring run-off, some of the waters in Seven Mile Creek are not diverted and put to use by the objector, so that these excess waters continue to flow down to the Clark Fork River. The objector also uses the water from this

source of supply for stock watering purposes. The objector presently has some 30 head of livestock, and indicated that historically he has pastured up to 100 head.

The foregoing demonstrates that the applicant herein has failed to show that there are unappropriated waters available at any time between May 15 through September 30, inclusive. Throughout this period, the objector inevitably and continuously diverts and puts to use the entire flow of the source of supply. Indeed, the objector has testified to a presently inadequate supply of water. He presently loses production of alfalfa hay on a lower 50 acres of his property due to insufficient water in an average year. Throughout this above-described period, any diversions would necessarily and inevitably adversely affect a prior appropriator.

8. The Hearing Examiner expressly finds that the objector Germyn's means of diversion are reasonable and adequate. Some of applicant's evidence purported to show that the objector's diversion system resulted in the waste of the water resource. However, this evidence is insufficient to show the same. Exhibits 3 through 11, inclusive, depict the objector's diversion system. It is composed of segments of open ditches and pipelines. Although some of the photographs exhibit the ditches in a state of disrepair, these pictures were taken in November after the irrigating season. The objector testified that throughout the actual irrigation season, he regularly performed routine maintenance such that the actual conditions of the ditches during the time of use are not accurately portrayed by

the exhibits reflected in the record. Although the evidence also indicates that various leaks occur in the objector's pipeline conveyance system, this does not of itself indicate a waste of water resources. Unlined ditches are a common means of diversion in this state, and great quantities of water may be lost by seepage through them. In this light, the Hearing Examiner notes the testimony that objector's ditches were constructed in relatively impermeable clay-type material. Objector's diversion works are customary for the uses the water is put to, and it cannot be said on this record that they will result in the waste of water.

9. The evidence supports a finding that the applicant in fact does not intend to appropriate one acre-foot of water per year. This volumetric limitation was apparently predicated on a misplaced and unfounded belief that the statutes or department regulations provided for the same. In light of the disposition to be made of this application, the Hearing Examiner finds that such quantity of water would be unreasonable for the time of use and type of use contemplated by this order. Figuring a maximum of 250 gallons per day per person in a typical four-person household, and presuming a continuous use not including the irrigation season, one-half (.5) an acre-foot is the probable maximum use of water that could be made by the applicant herein for in-house domestic uses not requiring a potable water supply. Nothing in the record suggests that the flow rate of ten (10) gallons per minute is unreasonable. The Hearing Examiner can

officially note that such capacities are common for pumps supplying water for domestic needs.

10. The evidence supports a finding that applicant's use will not interfere unreasonably with other planned developments for which a permit has been issued or for which water has been reserved. There is no indication in the record that there exist any such outstanding permits or reservations which may be impacted by applicant's use.

11. The evidence supports a finding that applicant has shown that it is more likely than not that unappropriated waters exist except in the irrigating season. Said unappropriated waters exist in the amount the applicant seeks to appropriate, and at times that water can be put to the use proposed by the applicant. Nothing in the record suggests any other use or user of the water of Seven Mile Creek, other than that made by the objector herein. The evidence indicates that the objector is irrigating sometime in the month of May in a typical year. At that time, the source of supply is characteristicly experiencing its heaviest flows due to snow-melt run-off and not all of the water in the source of supply is actually diverted and put to use by the objector. However, the Hearing Examiner finds that applicant has failed to show that there will be any waters available for use after May 15 of any year. Similarly, the applicant has failed to show that any unappropriated waters exist prior to September 30 of any year. The objector herein indicated that he consistently and continuously irrigates until such time. Moreover, this late-summer irrigation utilizes the entire flow of the source of

supply. At all other times, the applicant has discharged her burden of proof as to unappropriated waters.

12. Applicant indicated that the use of the water claimed herein for the irrigation of a small garden will be confined to the summertime. It is clear from the foregoing that the applicant has not demonstrated that unappropriated waters exist for this period.

13. The evidence supports a finding that the application in this matter was filed with the Department of Natural Resources on June 11, 1979, at 11:15 a.m.

14. The evidence supports a finding that the proposed place of use and proposed place of diversion are identical, and are as recited in the application, to-wit: W1/2 of Government Lot No. 1, being in the NE1/4 NE1/4 of Section 3, Township 18 North, Range 27 West, all in Mineral County.

#### CONCLUSIONS OF LAW

1. The Hearing Examiner finds and concludes that the Department of Natural Resources and Conservation must issue the permit requested herein if:

"(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 or construction 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 or 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." MCA 85-2-311 (1979)

2. The Hearing Examiner finds that the proposed use of water for in-house domestic purposes not requiring a potable water supply is a beneficial one. Such a use of water as is contemplated herein is a domestic one within the meaning of MCA 85-2-102(2) (1979). The Hearing Examiner also concludes that 10 gallons per minute not to exceed one-half (.5) an acre-foot per year is a reasonable quantity of water for the purposes and times of use permitted herein. The full one (1) acre-foot requested by the applicant is an unreasonable quantity of water in light of the disposition of this application. See generally Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). The Hearing

Examiner concludes that the proposed means of diversion are adequate for the intended purposes. The evidence indicates that the diversion works proposed herein are customary for the intended purposes, and little water will be lost in conveyance.

3. The Hearing Examiner concludes that it is more likely than not that there are generally unappropriated waters in the amounts provided for in this order and at times when the applicant can use them for in-house domestic purposes from October 1 through May 14, inclusive, of each year. The Hearing Examiner also concludes that the applicant has failed to demonstrate that there are unappropriated waters available at such times that applicant intends to use water for the irrigation of a small garden. Diversions for in-house domestic uses not requiring a potable water supply during the above-described time periods will not adversely affect a prior appropriator within the meaning of MCA 85-2-311(2) (1979). However, nothing herein shall be construed to authorize the applicant to divert or use any water to the detriment of objector Germyn. The bare bones of Montana's appropriation system remains "first in time is the first in right." MCA 85-2-401 (1979). Therefore, if climatic conditions allow the objector herein to begin irrigating earlier than May 15 or to continue irrigating after September 30, the applicant must cease diverting or using the water provided for by this order to the extent necessary to provide the objector with the full measure of his water needs. The Department has no authority to take one man's property and award it to another, regardless of the demonstrated need therefore. Nothing herein,

however, prevents or otherwise inhibits the applicant from purchasing or otherwise contracting for water out of existing water rights.

Throughout the period of May 15 to September 30, inclusive, the applicant has failed to show that diversions therein will not adversely affect the rights of a prior appropriator. Therefore, this permit must be conditioned so as to protect the rights of such prior appropriators. MCA 85-2-310(2) (1979); See, Donich v. Johnson, 77 Mont. 229, 250 P.963 (1926).

Objector's assertion that applicant herein is entitled to no water based on his limited use of the source of supply is without merit. The actual need and use of the water defines the scope and character of the appropriative claim. See, Cook v. Hudson, 110 Mont. 263, 103 F.2d 137 (1940), Quigley v. McIntosh, 88 Mont. 103, 290 P.266 (1930). Thus an appropriator may use only that quantity of water that is reasonably required for the purposes of this appropriation. A corresponding duty devolves on every such appropriator to cause any unneeded or surplus waters to remain available to other water users. MCA 85-2-412 (1979). This is in accord with the fundamental policies and purposes of the Montana Water Use Act.

"It is the policy of this state and the purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic systems." MCA 85-2-101(3) (1979).

The foregoing tracts with the judicial treatment of the subject:

One should not be permitted to play the dog in the manger with water he does not or cannot use for beneficial purposes when other lands are crying for water. It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated. Allen v. Petrick, 69-Mont. 373, 379, 222 P.451 (1922).

Thus,

another may appropriate without regard to the consent of the prior appropriator. Subject to the rule of priority, later comers may make appropriations, each in succession being required to respect the appropriation of all who came before him. Later appropriations may be made of the surplus over what has been appropriated by prior appropriators, or of any use that does not materially interfere with prior appropriators, . . ."  
"Custer v. Missoula Public Service Company, 91 Mont. 136, 143-145, 6 P.2d 132 (1931).

4. The Hearing Examiner concludes that the application as limited in this order will not interfere unreasonably with other planned developments for which a permit has been issued or for which water has been reserved.

5. The Hearing Examiner concludes that the priority date of this permit is June 11, 1979, at 11:15 a.m. This is the date and time the application was regularly filed with the Department of Natural Resources and Conservation. See, MCA 85-2-401(2) (1979).

6. The Hearing Examiner concludes that the proposed place of use and the proposed point of diversion are located in the same general area and are as recited in the application filed in this matter, to-wit: W1/2 of Government Lot 1, being in the NE1/4

NE1/4 of Section 3, Township 18 North, Range 27 West, all in Mineral County.

7. The Hearing Examiner concludes that the applicant has demonstrated a fixed and definite plan to appropriate water, and is not attempting to speculate in the water resource. See generally, Toohey v. Campbell, 24 Mont. 13, 60 P.396 (1900).

Based on these proposed findings of fact and conclusions of law, the Hearing Examiner hereby makes the following proposed order.

#### PROPOSED ORDER

1. Subject to the terms and limitations described below, Application for Beneficial Water Use Permit No. 23106-s76M by John R. and Debra M. Vasilchek is hereby granted for ten (10) gallons per minute not to exceed one-half (.5) acre-foot of water annually for in-house domestic uses not requiring a potable supply of water. The application of water to be used for the irrigation of a small garden area is denied. The water use recognized herein shall not be exercised from May 15 through September 30, inclusive, of any year. The point of diversion and place of use shall be located in the W1/2 of Government Lot 1, being in the NE1/4 NE1/4 of Section 3, Township 18 North, Range 27 West, all in Mineral County. Priority date for this permit shall be June 11, 1979, at 11:15 a.m.

This permit is hereby made expressly subject to the following terms and conditions:

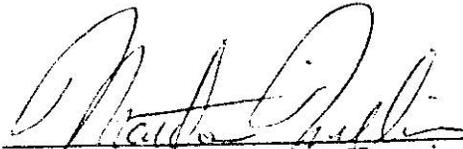
- (a) The right evidenced by this permit is subject to all prior and existing rights and any final determination of those rights made pursuant to Montana law. Nothing herein shall be construed to authorize or permit the permittee to divert or use water to the detriment to any degree of any senior appropriator.
- (b) Nothing herein shall be construed in any way 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 the liability for any damages caused by said exercise of this permit.
- (c) Permittee shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the above-described purposes. At all times when water is not reasonably required for these purposes, permittee shall cause and otherwise allow the waters to remain in the source of supply of Seven Mile Creek.
- (d) The permittee shall diligently adhere to the terms and conditions of this order. Failure to adhere to these terms and conditions may result in the revocation of this permit.

NOTICE

The parties hereto may file written objection or exceptions

to the findings and order contained herein. Said exceptions or objections shall be addressed to this Hearing Examiner, and they shall be deemed timely if filed with and received by the Department no later than June 22, 1981.

DATED this 5<sup>th</sup> day of June, 1981.



Matthew Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59601  
(406) 449-3962