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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. 25445-s410 BY RAY HABEL, INC.)

There being no objections or comments to the proposal for decision entered in this matter, the same is hereby made final and the contents of said proposal for decision are hereby incorporated herein and made a part hereof for all purposes.

WHEREFORE, it is ordered that subject to the terms and limitations below, the Application for Beneficial Water Use Permit No. 25445-s410 be granted for 600 gallons per minute not to exceed 211 acre-feet per year from the Teton River for new irrigation.. In no event shall the Applicant divert water pursuant to this permit prior to May 1 nor subsequent to September 15 of any year.

The point of diversion shall be located in the SE1/4 SW1/4 SW1/4 of Section 12, Township 25 North, Range 1 East, in Teton County. The place of use shall be 115 acres more or less in the NE1/4 of Section 13, Township 25 North, Range 1 East. The priority date of this permit shall be at 11:39 a.m., on November 28, 1979.

This provisional permit is granted subject to the following restrictions, limitations and conditions:

- (a) This permit is subject to all prior and existing rights in the source of supply and to any final determination of rights made pursuant to the Montana Water Use Act. Nothing herein shall be construed to authorize Permittee to withdraw water to the detriment to any degree of any senior appropriator.

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(b) The Permittee, at the discretion of the Department, shall install adequate metering devices such that the flow rate and volume of water withdrawn might be recorded. At the discretion of the Department, the Permittee shall further keep a written record of the flow rate and volume of all waters withdrawn and shall submit such records to the Department on request.

(c) In no event shall the Permittee divert or otherwise withdraw any water from the source of supply unless and until the flow at the Kerr Bridge gaging station exceeds 50 cubic feet per second. Nothing herein shall be construed to limit or otherwise affect Permittee's rights against junior appropriators or those using the water of the source of supply unlawfully. For the purposes of information only, Frank Schuler, Inc., located approximately six miles upstream from Applicant, is a junior permittee.

When and if the Kerr Bridge gaging station becomes unavailable as a water measurement point, the Permittee shall immediately notify the Department. Upon receipt of said notice, the Department shall conduct a hearing for the purposes of promulgating alternate conditions for this permit. Any of the parties hereto may at any time request the Department to hold a hearing on the following issues, to-wit: (1) Whether the Kerr Bridge is accurately measuring the flow rate of 50 cubic feet per second; (2) Whether a quantity of water greater than 50 cubic feet per second is required to protect and fulfill valid senior downstream demand. The Permittee may not increase its supply of water beyond the terms of

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order without conforming with the permitting process.

(d) 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 provisional permit, nor does the Department in issuing this provisional permit in any way acknowledge liability for damages caused by the exercise of this permit.

(e) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for irrigation of the above-described lands. At all times when water is not reasonably required for the above-described purposes, Permittee shall cause the waters to be left in the Teton River.

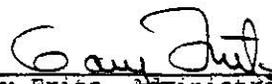
(f) Permittee shall complete his diversion works and actually apply water to the beneficial use described herein by July 1 of 1983, insofar as he is able to by the terms of this order.

(g) Permittee shall diligently adhere to the terms and conditions of this order. Failure to observe the terms and conditions of this order may result in revocation of this permit. MCA 85-2-314 (1979).

NOTICE

The Hearing Examiner'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 10 day of June, 1981.



Gary Fritz, Administrator
Water Resources Division

CASE # 254415

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

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 25445-s410 BY RAY HABEL, INC.)

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after notice required by law, the hearing in the above-entitled matter was held in Great Falls, Montana, on February 9, 1981. The Applicant, Ray Habel, Inc., appeared by Ray Habel. Bill Reichelt appeared on behalf of the Objector, Teton Water Users Association. Neither Charles nor Janet Danreuther, who filed an Objection herein, appeared to present any evidence or testimony at the hearing. The Department of Natural Resources and Conservation was represented by Bob Larson and Dave Pengelly.

EXHIBITS

The Applicant offered into evidence one (1) exhibit, to-wit:

Applicant's Exhibit:

(A-1) A map prepared by Triangle Irrigation Company, Inc. purporting to show the place of use, depicted by the circular shaded area, in relation to the proposed pump site.

Applicant's exhibit was duly received into evidence.

Objector offered into evidence a single exhibit, to-wit:

(O-1) A list of all application numbers for new water use permits on the Teton River made since July, 1973. Objector's exhibit was duly received into evidence.

The Department in its own behalf offered a single exhibit, to-wit:

(D-1) A copy of a field report prepared by Bob Larson with reference to the incident application.

The Department's exhibit was duly received into evidence.

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

PROPOSED FINDINGS OF FACT

1. An Application was duly filed with the Department of Natural Resources and Conservation (hereinafter referred to as the Department) by Ray Habel, acting on behalf of Ray Habel, Inc., on November 28, 1979, at 11:39 a.m. The Application seeks 600 gallons per minute up to 211 acre-feet per year for new irrigation from May 1 to September 15, inclusive, of each year. The source of the water supply is to be the Teton River, and the point of diversion is to be located in the SE1/4 SW1/4 SW1/4 of Section 12, Township 25 North, Range 1 East, in Teton County. The water is to be diverted by means of a pump in said Teton River and thence conveyed to the place of use, which is located in the NE1/4 of Section 13, Township 25 North, Range 1 East and which is comprised of 115 acres more or less.

2. Timely objections were filed to this Application by William E. Reichalt, on behalf of Teton Water Users Association, and by Charles and Janet Danreuther.

3. The Department has jurisdiction over the subject matter involved herein and has jurisdiction over the parties hereto, whether they have appeared or not.

4. The evidence supports the finding that the Applicant intends to use the water applied for herein for the purposes of new irrigation of small grain crops. The Hearing Examiner believes the testimony of the Applicant to the effect that the lands described as the place of use are not now suitable for the production of small grain crops, and that the application of water thereto will materially increase the productivity of said lands. Mr. Habel has demonstrated himself to be experienced in the cultivation of grain.

5. The evidence further supports the finding that the land described as the place of use are susceptible to irrigation. Bob Larson, Area Office Supervisor for the Department's Havre office, testified that the Irrigation Guide for Montana reflects that the soil type in this general area is suited to the small grain sprinkler irrigation system proposed by the Applicant. The Irrigation Guide is a technical report prepared by the Soil Conservation Service that reflects the physical characteristics of soils in Montana.

6. The Applicant testified and the Hearing Examiner finds that for Applicant's present intended purposes of small grain production, irrigation through the end of June will generally be

sufficient. The relatively high moisture retention capacity of the soils in this area substantiate^s the claim that even a limited use of water will materially increase the productivity of the place of use.

7. The evidence supports the finding that 600 gallons per minute, not to exceed 211 acre-feet per year is a reasonable quantity of water for the intended use. Bob Larson testified that in light of the probable soil type in the area, the prevailing climate, and the requirements of the proposed crops, the amount requested is conservatively reasonable.

8. The evidence supports the finding that the Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan. The Applicant has investigated various sprinkler irrigation systems in anticipation of this Application and has indicated that he presently owns the agricultural machinery required for the production of small grain crops.

9. The evidence supports a finding that the proposed means of diversion are adequate. The Applicant proposes to pump from a sump, which in turn will be fed by a pipe system connecting to the Teton River. Power for the pump is available at a modest distance from the proposed place of diversion. The water will be applied to beneficial use by means of a center pivot sprinkler system. According to Mr. Larson, who is experienced in irrigating practices in this area, the proposed diversion works are customary for the proposed purposes in this general area and are feasible for Applicant's plans.

10. The evidence supports a finding that there are unappropriated waters in the source of supply that at times exceed Applicant's requested amount. However, the evidence also conclusively indicates that there will be times in most years in which the amount requested will not be available for diversion due to existing demand on the stream system. Bob Larson submitted evidence of historic records of flow based on United States Geological Survey records from the Kerr Bridge Gaging Station, which is apparently located on or about Applicant's property. These records indicate a maximum recorded discharge of 71,300 cubic feet per second on July 9, 1964, and a minimum recorded discharge of 4.3 cubic feet per second on August 3 and 4, 1977. The average discharge is 175 cubic feet per second and 119,500 acre-feet per year. These calculations are based on records from 1954 to approximately 1978. Testimony at the hearing indicates that the Teton River generally flows in excess of 1,000 cubic feet per second during the spring run-off, thereafter tapering off throughout the months of June, July and August, such that it is common that less than 100 cubic feet per second flow in the source of supply during the months of August and September. Testimony also indicates that subsequent to the irrigation season there are substantial accretions to the Teton River flow. The former is descriptive of a normal year. In dry years, the flow at the Kerr Bridge Gaging Station may be as low as 50 cubic feet per second in early June. Indeed, in some years, the flow of the Teton River practically never exceeds 50 cubic feet per second. The Applicant, who has lived on the Teton

River for most of his life and who daily records readings from the USGS Gage Station, substantiated the above-stated general flow patterns of the Teton River.

The Objector's evidence demonstrated that its members had been unable to divert sufficient quantities of water from the Teton River at various times in the past to fulfill their needs. The Hearing Examiner has inspected Objector's exhibit and officially noticed that some permits for the appropriation of water have been issued for diversions upstream of the Kerr Bridge Gaging Station. However, it still appears that there will be unappropriated water at some times in most years even if said permits are exercised to their full capacity. Indeed, none of the evidence produced at the hearing suggests that there is no unappropriated water available from the Teton River.

Testimony of Bob Larson reflects that downstream demand will require approximately 50 cubic feet per second to be left in the Teton River. Since the USGS stream flow records indicate that there will be times in most years when the Teton River will be below 50 cubic feet per second, the Hearing Examiner finds that there is not inevitably and constantly unappropriated water available in the amount the Applicant requests. The 50 cubic feet per second figure was apparently based on studies reflected in the Water Resources Survey of Teton County, Montana, and Mr. Larson's personal knowledge. The Hearing Examiner finds that the Applicant has failed to prove that there is unappropriated water in excess of 50 cubic feet per second flow, but finds in the

evidence produced that it is more likely than not that any flow above 50 cubic feet per second is unappropriated.

11. The evidence supports the finding that prior and existing rights in and to the water of the Teton River will not be adversely affected so long as 50 cubic feet per second are made available for downstream users. The Objector, while not having sufficient knowledge to testify as to the quantity of water required for the use of the members of the Teton Water Users Association, did indicate that water from the Teton River was used for various irrigation, stock watering, and domestic purposes by said members. For the limited purposes of this hearing, the Hearing Examiner recognizes a use right belonging to the Objector and notes the evidence demonstrating that the Objector in past times has been unable to divert sufficient water to meet their needs. The Hearing Examiner therefore finds that the Permit applied for herein must be conditioned so as not to adversely affect prior rights in the source of supply.

12. The evidence supports a finding that this permit can be properly conditioned so as to protect prior and existing rights and to help assure that only unappropriated waters are being diverted by requiring that no diversions be made from the Teton River unless and until at least 50 cubic feet per second of water is left in the Teton River at the Kerr Bridge Gaging Station. Objector's depletions occurred in the middle and late summer months.

13. The evidence supports a finding that the proposed place of use is as recited in the application, to-wit: 115 acres more

or less in the NE1/4 of Section 13, Township 25 North, Range 1 East. The Hearing Examiner also finds that the proposed point of diversion is as recited in the Application, to-wit: SE1/4 SW1/4 SW1/4 Section 12, Township 23 North, Range 1 East in Teton County.

14. The evidence supports the finding that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued.

15. Applicant's testimony indicates that at all times the proposed use will involve less than 15 cubic feet of water per second and less than 10,000 acre-feet per year.

16. Applicant's testimony supports the finding that in no event does the Applicant intend to use the water prior to May 1 of any year nor subsequent to September 15 of any year.

CONCLUSIONS OF LAW

1. The Hearings 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

CASE #

- (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 Hearings Examiner finds and concludes that the Applicant does not intend to appropriate more than 15 cubic feet per second or more than 10,000 acre feet per year. Therefore, it is not incumbent upon the Applicant to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected. However, Applicant has the burden of demonstrating the existence of the remaining aforesaid conditions by a preponderance of the evidence. See generally, Woodward v. Perkins, 116 Mont. 46, 137 P.2d 1016 (1944); compare, MCA 85-2-311(6) (1979) with MCA 85-2-311(2) (1979).

3. The Hearing Examiner finds and concludes that the Department has the authority and power to issue a permit subject

CASE # 25445

to terms, conditions, and limitations necessary to assure the existence of the aforesaid statutory criteria. MCA 85-2-312, 1-3-227 (1979). In all events, a permit must be issued "subject to existing rights and any final determination of those rights" made pursuant to the Montana Water Use Act. MCA 85-2-313 (1979).

4. The Hearing Examiner finds and concludes that the applicant corporation is a person entitled to appropriate water. MCA 85-2-302, 85-2-102(10) (1979).

5. The Hearing Examiner finds and concludes that use of the water is a beneficial use. The use of water for the production of grains is agriculture within the meaning of MCA 85-2-102(2) (1979). The uncontradicted evidence shows that the use of waters applied for herein will materially increase the productivity of the lands described as the place of use, and that the production of grains is not possible without the use of irrigation water. The evidence also supports a finding that 600 gallons per minute not to exceed 211 acre-feet annually is a reasonable estimate of the quantity of water required to fulfill the aforesaid purposes.

6. The Hearing Examiner finds and concludes that the Applicant has exhibited a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in water resources.

7. The Hearing Examiner finds and concludes that the proposed means of diversion are adequate. The uncontradicted evidence indicates that the proposed diversion works are customary for the intended purposes in this general area, and will not result in a waste of water. Indeed, the Hearing

Examiner can note the notorious fact that sprinkler irrigation is among the most efficient means of applying water to agricultural purposes.

8. The Hearing Examiner finds and concludes that there are at times unappropriated waters in the Teton River that may be diverted without any adverse affect to prior rights. Said unappropriated waters exist when the Applicant can apply them to the use proposed in the application, and in the amounts that the Applicant seeks to appropriate. The Applicant has failed to show, however, that the amount requested will be available continuously throughout the entire period of use requested in the application. Indeed, the evidence shows that there will be many years in which there will be no unappropriated waters in the source of supply during the months of July and August, and the evidence further shows that in some years there will be practically no unappropriated waters in the source of supply throughout the year. Throughout those periods in which no unappropriated water exists, a diversion would inevitably and necessarily adversely affect the right of a prior appropriator. Therefore, any permit issued must be conditioned to protect the rights of said other appropriators. MCA 85-2-312 (1979).

9. The Hearing Examiner finds and concludes that Applicant has failed to show that less than 50 cubic feet per second of time is required by down stream demand. If the permit is issued subject to the condition that no less than 50 cubic feet per second of time be allowed to flow past the Kerr Bridge gaging station located on or about Applicant's property, no adverse

affect will occur upon the rights of a prior appropriator within the meaning of MCA 85-2-311(2) (1979). It is true that there is no evidence of the character of the Teton River between said gaging station and said diversion points of downstream appropriators. That is, there is nothing to indicate whether the Teton River gains water from ground water or other sources, or loses water to groundwater resources. However, the Applicant is not required to conduct an adjudication of the rights in the particular drainage basin, nor is it required to produce a complete and exhaustive hydrological and geological survey of said basin in discharging its burden of proof.

10. The Hearing Examiner finds and concludes that the Applicant intends to divert the requested amount of water from a point in the SE1/4 SW1/4 SW1/4 of Section 12, Township 25 North, Range 1 East, in Teton County, and apply the water to beneficial use on 115 acres more or less in the NE1/4 of Section 13, Township 25 North, Range 1 East.

11. The Hearing Examiner finds and concludes that in no event does the Applicant intend nor is the Applicant entitled to divert more than 600 gallons per minute not to exceed 211 acre-feet per year.

12. The Hearing Examiner finds and concludes that the Applicant does not intend nor is the Applicant entitled to divert any water prior to May 1 of any year or subsequent to September 15 of any year.

13. The Hearing Examiner finds and concludes that the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued.

14. The Hearing Examiner finds and concludes that it is necessary that the Department retain jurisdiction over the operation of the above-described proposed condition. None of the parties hereto, including the Department, have any jurisdiction or authority over the Kerr Bridge gaging station. Therefore, for the purposes evinced by the statutory criteria detailed above, the Department of Natural Resources and Conservation expressly retains jurisdiction over the following matters, to-wit:

- (a) Whether the USGS gaging station located at the Kerr Bridge is accurately measuring a flow of 50 cubic feet per second;
- (b) Whether a quantity of water greater than 50 cubic feet per second is required to protect and fulfill valid senior downstream demand. The Applicant may not increase its supply of water beyond the terms of this order without conforming with the permitting process. MCA 85-2-301, 85-2-302 (1979).

Any of the parties hereto may at any time request a hearing on either of the above-described issues. The petitioning party shall bear the burden of proof as to the matters asserted. The Department on its own motion shall order a hearing if and when measurements at the Kerr Bridge gaging station shall be no longer available. In the latter case, Applicant must bear the burden of proof as to appropriate alternate conditions.

15. The Hearing Examiner finds and concludes that the priority date is the date of filing of the instant application, to-wit: 11:39 a.m. on November 28, 1979. MCA 85-2-401(2) (1979).

16. The Hearing Examiner finds and concludes that the Department has jurisdiction over the subject matter herein and over the parties hereto, whether or not they have appeared. MCA 85-2-301 (1979).

PROPOSED ORDER

Based upon the above findings of fact and conclusions of law, the Hearing Examiner hereby makes the following proposed order:

1. Subject to the terms and limitations below, the Application for Beneficial Water Use Permit No. 25445-s410 is granted, for 600 gallons per minute not to exceed 211 acre-feet per year from the Teton River for new irrigation. In no event shall the Applicant divert water pursuant to this permit prior to May 1 nor subsequent to September 15 of any year.

The point of diversion shall be located in the SE1/4 SW1/4 SW1/4 of Section 12, Township 25 North, Range 1 East, in Teton County. The place of use shall be 115 acres more or less in the NE1/4 of Section 13, Township 25 North, Range 1 East. The priority date of this permit shall be at 11:39 a.m., on November 28, 1979.

This provisional permit is granted subject to the following restrictions, limitations, and conditions:

- (a) This permit is subject to all prior and existing rights in the source of supply and to any final determination of rights made pursuant to the Montana Water Use Act. Nothing herein shall be construed to authorize Permittee to withdraw water to the detriment to any degree of any senior appropriator.
- (b) The Permittee, at the discretion of the Department, shall install adequate metering devices such that the flow rate and volume of water withdrawn might be recorded. At the discretion of the Department, the Permittee shall further keep a written record of the flow rate and volume of all waters withdrawn and shall submit such records to the Department on request.
- (c) In no event shall the Permittee divert or otherwise withdraw any water from the source of supply unless and until the flow at the Kerr Bridge gaging station exceeds 50 cubic feet per second. Nothing herein shall be construed to limit or otherwise affect Permittee's rights against junior appropriators or those using the water of the source of supply unlawfully. For the purposes of information only, Frank Schuler, Inc., located approximately six miles upstream from Applicant, is a junior permittee.

When and if the Kerr Bridge gaging station becomes unavailable as a water measurement point, the Permittee

shall immediately notify the Department. Upon receipt of said notice, the Department shall conduct a hearing for the purposes of promulgating alternate conditions for this permit. Any of the parties hereto may at any time request the Department to hold a hearing on the following issues, to-wit: (1) Whether the Kerr Bridge is accurately measuring the flow rate of 50 cubic feet per second; (2) Whether a quantity of water greater than 50 cubic feet per second is required to protect and fulfill valid senior downstream demand. The Permittee may not increase its supply of water beyond the terms of this order without conforming with the permitting process.

- (d) 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 provisional permit, nor does the Department in issuing this provisional permit in any way acknowledge liability for damages caused by the exercise of this permit.
- (e) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for irrigation of the above-described lands. At all times when water is not reasonably required for the above-described purposes, Permittee shall cause the waters to be left in the Teton River.
- (f) Permittee shall complete his diversion works and actually apply water to the beneficial use described herein by

July 1 of 1983, in so far as he is able to by the terms of this order.

(g) Permittee shall diligently adhere to the terms and conditions of this order. Failure to observe the terms of conditions of this order may result in revocation of this permit. MCA 85-2-314 (1979).

NOTICE

The parties hereto may file written objection or exceptions to the findings and order contained herein within ten (10) days of receipt. Said exceptions or objections shall be addressed to this Hearing Examiner, and they shall be deemed timely filed if postmarked no later than the 10th day following receipt of this Order. For purposes of computing this time period, the day of receipt shall be excluded, but the last day shall be included.

DATED this 5th day of May, 1981.


Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation.

CASE # 25445