

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT NO. 25534-c76H BY HARVEY GRIFF)
* * * * *

There being no objections or exceptions to the Proposal for Decision entered in this matter on June 18, 1981, said proposal, with the correction of clerical errors, is hereby made final and is expressly incorporated herein.

WHEREFORE, in accordance with the Proposal for Decision the following order is hereby issued.

ORDER

1. Subject to the terms and limitations below, Application for Change of Appropriation Water Right No. 25534-c76H by Harvey Griff is hereby granted. The new point of diversion shall be located in the SE1/4 SE1/4 NE1/4 of Section 27, Township 6 North, Range 21 West, all in Ravalli County. Nothing herein shall be construed to authorize Applicant to divert and/or withdraw more than ten (10) gallons per minute not to exceed 1.5 acre-feet per year.

This Authorization to Change is granted subject to the following terms, conditions and restrictions.

a. Applicant shall, at the discretion of the Department, conduct a "bucket and stopwatch" test of the pump at any given time and report the results thereof to the Department. The

CASE # 25534

Applicant shall also allow the Department on its own behalf to conduct reasonable tests of the pump's capacity at any reasonable times.

b. Applicant shall locate the pumping device in or about the garden area, and shall not locate the same on or about the banks of the source of supply. Nothing herein shall be construed as reducing Applicant's liability for damages caused by the exercise of this authorization to change, nor does the Department in issuing this authorization in any way acknowledge any liability for damage caused by the Applicant's exercise of this authorization, even if that damage is the inevitable and necessary consequence of diversions made pursuant to this authorization.

c. Applicant shall use reasonable diligence in completing the diversion works at the new point of diversion. The water right of permittee claimed herein is subject to modification pursuant to the adjudication provisions of MCA 85-2-211 (1979) et seq.

d. Applicant shall in all events submit to and act in accordance with any valid actions performed by a water commissioner that is or may be appointed on this source of supply.

e. Applicant shall diligently adhere to the terms and conditions of this order. Failure to observe said terms and conditions may result in revocation of this authorization.

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 1 day of July, 1981.

Gary Fitz

Gary Fitz, Administrator

Water Resources Division

Department of Natural Resources
and Conservation

32 S. Ewing, Helena, MT 59601

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
FILE NO. 25534-c76H BY HARVEY GRIFF)
* * * * *

Pursuant 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 in Hamilton, Montana, on March 30, 1981. The applicants appeared by Harvey and Doris Griff, and were represented by Counsel Douglas Schultz. Also testifying on behalf of the applicants was Don Thomas and Bob Armington, the latter a civil engineer with the Department of Natural Resources and Conservation. Appearing as objectors at the hearing were Frank and Sallie Brutto and Don Hill. Mr. Jeff Langton appeared as attorney for one Delmont Gould, who claims to be the successor in interest to objector Al N. Engbretson. Mr. Duane Hayward moved to intervene in the course of this proceeding and over objection was made a party hereto. The Department of Natural Resources and Conservation was represented at the hearing by Dave Pengelly, Area Office Field Supervisor of the Missoula Office.

PRELIMINARY MATTERS

Some of the evidence produced at the hearing on behalf of the Objectors was premised and based on a fear of similar applications in the future. The evidence indicates that the

lands in and about the parties' points of diversion are in the process of being subdivided. The Objectors hereto apparently allege that the present application should be denied based on a potential proliferation of similar claims in the future. This "opening the flood gates" argument is of no avail and the evidence relevant thereto is not material to this proceeding.

MCA-85-2-402(2) (1979) provides in relevant part that:

"(t)he Department shall approve a proposed change if it determines that the proposed change will not adversely affect the rights of other persons."

This mandatory directive cannot be ignored on the supposition that future changes might work deleterious effects. The Department must proceed on a case-by-case basis, and each individual application must be examined on its own merits. Those applications that threaten injury to other water users must be denied or modified to prevent the same.

EXHIBITS

The Applicants offered into evidence a single exhibit, to-wit: A statement of claim for existing water rights prepared pursuant to the adjudication procedures provided for in the Montana Water Use Act, and purporting to show the nature and extent of the Applicants' water right.

Applicants' exhibit was duly received into evidence without objection. Also made part of the record on behalf of the Applicants is a duly notarized affidavit by one Norman Sorenson, claiming that as a predecessor in interest to the Applicants, he

applied water from the Belle Lewis Ditch to irrigate the land now claimed by the Applicants herein.

The Objector Engbretson-Gould offered into evidence a single exhibit, to-wit: a copy of a Notice of Appropriation Water Right, purporting to show the nature and extent of a portion of their water right claims.

This exhibit was duly received into evidence without objection.

The Department of Natural Resources and Conservation offered into evidence four (4) exhibits, to-wit:

(1) A composite of a United States Geological Survey map upon which is depicted the various parties' places of use and places of diversion. The present point of diversion of the right claimed by the Applicants herein is depicted in red, and the proposed point of diversion of the Applicants herein is also depicted in red. The red shaded area purports to represent the place of use of the "Mary E. Belle" right. The green cross-hatched portion purports to depict the place of use of the "William B. Webb" right. The orange border to this section purports to outline the property owned by Objectors Brutto in this matter. The yellow portion of this map purports to designate the property owned and claimed by Objector Hill in this matter. The adhesive labels found on the map purport to detail the scope of the "Mary E. Belle" and "William B. Webb" rights.

(2) A copy of a map from the Water Resources Survey prepared by the State of Montana depicting the source of supply involved

CASE # ³ 25443

herein and the historical means of conveyance from that source utilized by the parties hereto.

(3) A copy of a digest or summary of the Canyon Creek adjudication apparently reflecting the contents of decretal portion thereof.

(4) A copy of a portion of the decree adjudicating the source of supply reflecting the "William B. Webb" and "Mary E. Belle" rights.

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

The Hearing Examiner, after reviewing the evidence herein, and now being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. An Application for Change of Appropriation Water Right was duly filed with the Department of Natural Resources and Conservation on December 3, 1979. The Application claims a right to the use of water derived from the "Mary E. Belle" right decreed in case No. 1503, with an appropriation date of June 1, 1889. The application alleges that this right has been historically exercised out of Canyon Creek by means of the Belle-Lewis ditch for the flood irrigation of pasture from April 15 to October 15 of each year. The application claims that a portion of said right was used in the amount of one (1) miners inch up to one and one-half (1.5) acre-feet per year for the irrigation of a

portion of the SE1/4 SE1/4 NE1/4 of Section 27, Township 6 North, Range 21 West. The historical point of diversion is alleged to be located in the SW1/4 SE1/4 SW1/4 of Section 21, Township 6 North, Range 21 West. The application now seeks to divert 10 gallons per minute not to exceed one and one-half (1.5) acre-feet per year from a location in the SE1/4 SE1/4 NE1/4 of Section 27, Township 6 North, Range 21 West. The present use of the water is claimed to be the irrigation of a lawn and garden by sprinkler irrigation methods.

2. Although the application alludes to a possible change from flood irrigation of pasture to sprinkler irrigation of a garden and lawn, these alterations apparently are not at issue in this proceeding. The sole focus of the evidence propounded at the hearing related to the proposed change in the point of diversion. The notice published in this matter also did not reference these alterations.

3. The application was duly published for three (3) successive weeks in the Missoulian, a newspaper of general circulation printed and published at Missoula, Montana. Said notice reflects the requested change in the point of diversion, and indicates the location of the proposed point of diversion.

4. The evidence supports a finding that the applicant herein is a successor in interest to a portion of the "Mary E. Belle" right decreed in the Canyon Creek adjudication of July 14, 1911, in case No. 1503. That judgment decreed a right to one Mary E. Belle for 120 miners inches of water for use in the NW1/4, and the W1/2 NE1/4, and the SE1/4 NE1/4, and the S1/2 NE1/4 NE1/4 in

Section 27, Township 6 North, Range 21 West. The waters were to be diverted by a structure known as the Belle-Lewis Ditch. The right is accorded a priority date of June 1, 1889. The applicant Griffs claim one (1) miners inch up to one and one-half (1.5) acre-feet annually out of this right. The evidence indicates that the above-described place of use is presently being subdivided, and pro rat interests in the "Mary E. Belle" right are being distributed to the various grantees. This development scheme assumes that the original 120 inch right was historically used on the total 300 acres, more or less, originally described as the place of use. Thus, the original decree provides a the mere two (2) miners inches for every five (5) acres of land.

The evidence shows that the applicants Griff claim ownership of slightly more than one (1) acre, of which approximately one-half (.5) acre is alleged to be the present place of use of the 1889 right. Thus, the applicants claim approximately one (1) miners inch for one-half (.5) acre of use as the historic measure of their rights. It is obvious that the "Mary E. Belle" right cannot be exercised to this extent upon the whole of the three hundred (300) acres originally described as the place of use. However, the Hearing Examiner finds that the issue of the possible future exercise of the "Mary E. Belle" right is not in issue in this matter. Don Thomas, who is the predecessor in interest to the applicants herein, indicated that the one (1) miners inch up to one and one-half (1.5) acre feet per year is indeed appurtenant to his land grant. Moreover, none of the

6

CASE # 25534

objectors to this matter propounded any evidence relating to this aspect of the division of the "Mary E. Belle" right.

It is also evident from the record, with an exception not relevant to the instant discussion, that all of the Objectors herein claim their rights to use of water through the aforesaid Canyon Creek adjudication. Objectors Brutto claim as successors in interest to the "William B. Webb" right. Objector Don Hill claims the use of water through the "C. S. Crane" right. The intervenor Objector Duane Hayward similarly claims the right to the use of water of Canyon Creek through the "Ann Harrington" right as defined in the Canyon Creek adjudication of 1911.

Therefore, as successors in interest to parties participating in that adjudication, these people are bound by the determinations therein. That is, for present purposes, all relevant parties are precluded from asserting that 120 miners inches of water was not beneficially applied for agricultural purposes on 300 acres, more or less. The evidence in the record also indicates that the water has been used in conformity with the terms of the "Mary E. Belle" right subsequent to the rendition of the decree.

The available evidence indicates that the Belle-Lewis ditch continues to divert water and at least portions thereof appear to be used for agricultural purposes. Moreover, both Don Thomas and Doris Griff indicated that the water had been historically used for pasture purposes and for the production of alfalfa hay and various grain crops. This testimony was apparently predicated on hearsay, however. The historical use of this water in accordance with the decree is also substantiated by the duly notarized

CASE # 255⁷34

affidavit of Norman Sorenson, who claims to be a predecessor in interest of both Don Thomas and Doris Griff. That affidavit recites and claims that since 1953, the affiant diverted water to irrigate the one-acre parcel that constitutes the present lot claimed by the Applicants, and used 1.5 miners inches from the 15th of April to the 15th of October of each year.

5. The evidence shows that the objector Engbretson-Gould claim their use of water both through the aforementioned decree and through and by the notice of appropriation reflected as objectors exhibit No. 1. It is not necessary for present purposes to determine the scope or character of these rights, nor the impact of the present claim for change of point of diversion on them, because during the course of this proceeding this objector acquiesced to the issuance of a permit in this matter so long as the pump at the proposed point of diversion is left in the garden area and not on the banks of Canyon Creek, and so long as not more than ten (10) gallons per minute nor one and one-half (1.5) acre feet per year is withdrawn from the source of supply.

6. The evidence shows that the applicant's proposed point of diversion is more than a mile downstream on the same source of supply from the present point of diversion. These are graphically depicted in Department's exhibit No. 1. Both the present point of diversion and the proposed point of diversion of the applicants are upstream from all the diversion points of the objectors herein.

7. The evidence supports a finding that the change of point of diversion as reflected in the application filed in this matter

will not work injury to other appropriators. The evidence indicates that the applicants are successors in interest to one (1) miners inch of the 120 miners inches originally decreed to one Mary E. Belle. That miners inch translates by statutory fiat into 11.25 gallons per minute. Although the Belle-Lewis ditch which diverted the "Mary E. Belle" right is lengthy and undoubtedly lost water through seepage and percolation, none of the objectors evidence attempted to quantify any amount that might have historically recharged Canyon Creek. In any event, the applicant now claims the right to use only ten (10) gallons per minute, and this lesser amount would tend to offset any such recharge or any carriage losses in the source of supply that historically occurred between the present point of diversion and the applicant's proposed point of diversion.

8. The evidence propounded by the objectors herein related almost exclusively to their present inability to obtain water pursuant to their asserted rights. All of these objectors, save Engbretson and Gould claim priority dates prior to or identical with the priority date of that right owned by the applicant herein. To the extent that objector Brutto's allegations are true and accurate and they are accepted as true and accurate for the present purposes, their 1887 right out of the Iddings Ditch remains prior to any right of the applicant, such that they continue even in the face of this order to enjoy the right to demand the complete curtailment of the applicant's right in order to meet the full measure of their water claims, vis a vis this Iddings Ditch right.

In any event, these asserted inabilityes to divert the measure of their claimed rights is not predicated or relevant to the requested change of the point of diversion herein. This asserted frustration of the extent of their water rights was extant before the change, and nothing in the evidence suggests that it will be increased by the granting of this application in accordance with the terms thereof.

The objectors also alleged generally that the effect of the change will result in an unadministratable water right. That is, they claim, and the evidence indicates, that their diversion points are the only ones on the source of supply equipped with suitable headgates, and thus the prior point of diversion of the applicant's herein cannot meaningfully be regulated to reflect the transfer proposed in this matter such that one (1) miners inch of water less is diverted at the present point of diversion. The Hearing Examiner accepts this allegation as true for present purposes, but finds that this is not injury within the meaning of the change statute. The Hearing Examiner also finds that the water diverted to the applicant's proposed point of diversion can be measured in a fashion making it capable of regulation. The simple "bucket and stopwatch" method is sufficient to show the output of the proposed diversion works at any given time.

9. The evidence shows that the applicant intends to divert the water from Canyon Creek at the proposed point of diversion by means of a pump located in his garden area. Applicant's lands border and are adjacent to the source of supply. The evidence indicates that said pump is driven by a one and one-half (1.5)

horse power mechanism. Although such a capacity is capable of driving greater amounts of water than ten (10) gallons per minute in some circumstances, the evidence herein indicates that as a result of the placement of the pump and the friction factors in the pipeline, the present capacity of the pump as situated is roughly ten (10) gallons per minute. Applicant Harvey Griff testified that utilizing the "bucket and stopwatch" method, the pump was tested and produced approximately ten (10) gallons per minute. In any event, nothing herein shall be construed to grant, recognize, or affirm any right upon the part of the applicants to more than ten (10) per minute or more than 1.5 acre-feet per year.

10. The evidence supports a finding that the proposed point of diversion is as asserted in the application, to-wit: in the SE1/4 SE1/4 NE1/4 of Section 27, Township 6 North, Range 21 West, all in Ravalli County.

11. The evidence supports a finding that the Department has jurisdiction over the subject matter herein and jurisdiction over the parties hereto.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto. MCA 85-2-402(1) (1979) provides that "(a)n appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the

Department." Subsection 2 thereof directs the Department to "approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons".

2. The change of one (1) miners inch historically diverted in the SW1/4 SE1/4 SW1/4 of Section 21 Township 6 North, Range 21 West, all in Ravalli County to a diversion of ten (10) gallons per minute up to 1.5 acre feet annually from a point in the SE1/4 SE1/4 NE1/4 of Section 27, Township 6 North, Range 21 West, all in Ravalli County, will not work injury to other persons. The bulk of the evidence propounded by the objectors at the hearing did not relate to any injury predicated on the proposed change. Instead, it reflects that prevailing conditions on the source of supply are working interferences with the scope of the objectors' claimed water rights. The only evidence pertinent to any increased injuries that may be occasioned by the change of the point of diversion herein is that relating to the inability of the original or present point of diversion to accurately measure a flow of 119 miners inches, instead of the originally decreed 120 miners inches. This is not injury within the meaning of the statute.

In Tucker v. Missoula Light and Railroad Company, 77 Mont. 91, 250 P.11 (1926), Defendant argued that Plaintiff could not complain of his use of the water because the Plaintiff therein had failed to install a headgate capable of measuring the extent of his water claim. In dictum, the court found and concluded that such a failure did not affect the scope or extent of the Plaintiff's water right, and further indicated that any such

requirements for such measuring devices are merely intended to aid in the regulation of the water rights, and do not otherwise affect their validity. Although the evidence indicates that the waters of Canyon Creek remain in practical effect as unadjudicated waters due to the absence of any headgates or other suitable measuring devices except for those of the objectors herein, this alone cannot prejudice the applicant's right to change the point of diversion herein absent any showing of injury. Objectors' remedy for this concern is to petition the appropriate district court for an order requiring the installation of such measuring devices. MCA 85-2-406(2) (1979) provides that:

"(when) a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter, any party of the controversy may petition for relief. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the issuance of a final decree."

3. The proposed point of diversion is as recited in the application in this matter, to-wit: in the SE1/4 SE1/4 NE1/4 of Section 27, Township 6 North, Range 21 West, all in Ravalli County.

4. Nothing in the order to be issued in this matter shall be construed as determining the character or extent of applicant's alleged water rights for the purposes of the adjudication proceedings being conducted pursuant to MCA 85-2-211 (1979) at et seq., nor shall anything in this order be construed as a recognition or resolution of any matter other than that involved

with the change of the point of diversion as requested herein and any attendant injuries thereto.

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

PROPOSED ORDER

1. Subject to the terms and limitations below, Application for Change of Appropriation Water Right No. 25534-c76H by Harvey Griff is hereby granted. The new point of diversion shall be located in the SE1/4 SE1/4 NE1/4 of Section 27, Township 6 North, Range 21 West, all in Ravalli County. Nothing herein shall be construed to authorize Permittee to divert and/or withdraw more than ten (10) gallons per minute not to exceed 1.5 acre-feet per year.

This Permit is granted subject to the following terms, conditions and restrictions.

a. Permittee shall, at the discretion of the Department, conduct a "bucket and stopwatch" test of the pump at any given time and report the results thereof to the Department. The Permittee shall also allow the Department on its own behalf to conduct reasonable tests of the pump's capacity at any reasonable times.

b. Permittee shall locate the pumping device in or about the garden area, and shall not locate the same on or about the banks of the source of supply. Nothing herein shall be construed as reducing Permittee's liability for damages caused by the exercise

of this permit, nor does the Department in issuing the Permit in any way acknowledge any liability for damage caused by the Permittee's exercise of this Permit, even if that damage is the inevitable and necessary consequence of diversions made pursuant to this permit.

c. Permittee shall use reasonable diligence in completing the diversion works at the new point of diversion. The water right of permittee claimed herein is subject to modification pursuant to the adjudication provisions of MCA 85-2-211 (1979) et seq.

d. Permittee shall in all events submit to and act in accordance with any valid actions performed by a water commissioner that is or may be appointed on this source of supply.

e. Permittee shall diligently adhere to the terms and conditions of this order. Failure to observe said terms and conditions may result in revocation of this permit.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end on June 26, 1981. Comments or exceptions must be filed with and received by the Department by June 26, 1981.