

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. 27522-s76M BY STANLEY AND)
NINA CADWELL)

* * * * *

Objection to the Proposal for Decision in this matter entered on January 18, 1982, has been entered by John Callen. However, the Department concludes herein that these objections are without merit.

Objector Callen asserts that the Department of Natural Resources and Conservation is precluded from issuing a new water use permit if any possibility of interference with prior rights should be indicated in the record. This position is inconsistent with the legislative intent imposed by the Montana Water Use Act. Fundamentally, this Act reaffirms and recodifies the talisman of the prior appropriation system to the effect that he who is "first in time is the first in right." MCA 85-2-401(1) (1981), MCA 85-2-406(1) (1981). He who first diverts and uses water for a beneficial use is entitled to the maintenance of that use as against all subsequent appropriators, notwithstanding the terms of any permit issued by this Department. Permittees may have a priority date no earlier than the date of application for a water use permit with the Department. MCA 85-2-401(2) (1981).

If the mere possibility of interference with prior rights was the determinative factor in assessing "adverse affect of prior appropriators," there would plainly be no reason to assign any priority at all to any permit. An appropriator's priority only becomes important when there is an insufficient physical supply to fill all the claims on that source. If the mere chance of interference with prior rights was the pivotal issue, the junior status of any permittee would be irrelevant as it would have been error to issue a permit at all.

Moreover, this Objector's theory necessarily argues that the availability of unappropriated water and the question of adverse affect be determined with reference to the driest years on record. This approach would inevitably result in the defacto closure of every river system in Montana, and this would in turn inevitably mandate and encourage the waste of vast quantities of this state's water resources.

It is true that new water uses may impose some sort of regulatory burden on existing water users should such new comers overstep the bounds of their claim in the source of supply. However, this is a necessary incident of the development of this state's water resources.

"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, 59 Mont. 373, 379, 222 P. 451 (1922).

Equally, one cannot escrow vast portions of this state's water resources merely to conveniently exercise present rights.

On this record, Applicant's proposed water use cannot be said to adversely affect prior appropriators. Indeed, there appears to be no surface water connection between the Applicant's source of supply and the source of supply of the Objector's to this matter. Whether or not seepage patterns from the source of supply will be changed to the detriment of these appropriators must remain entirely speculative absent data from the actual use. It simply cannot be determined at this juncture whether Applicant's capture of the waters claimed herein will deprive these objectors of seepage waters at their historic time and place of need.

Nor can this application be denied based on Objector's assertion that it's contract vendee's water use is more beneficial than that proposed by the Applicant. Beneficial use means simply a "use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses." There are no preferences among the water uses of this state's water resources. The Department of Natural Resources and Conservation simply has no authority to inquire as to whether one particular water use is intrinsically more valuable than

another. It is enough that Applicant's proposed water use finds itself within the legislative confines of a beneficial use.

WHEREFORE, subject to the restrictions, conditions and limitations described below, Application for Beneficial Water Use Permit No. 27522-s76M is hereby granted to Stanley and Nina Cadwell to appropriate 50 gallons per minute up to five (5) acre-feet of water per year for new irrigation from May 1 to September 1, inclusive, of each year, and to use out of this aforesaid amount in the alternative 2.25 acre-feet of water for stock-watering purposes continuously throughout the year. The place of use shall be located in the NE1/4 of Section 25, Township 19 North, Range 30 West, all in Mineral County, and the lands to be irrigated shall be confined to two (2) acres more or less. The source of supply shall be intermittent flow from the point of diversion located in the NE1/4 NE1/4 NE1/4 of Section 25, Township 19 North, Range 30 West, all in Mineral County. The priority date of this permit shall be June 6, 1980, at 1:26 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 any final determination of these rights as reflected by Montana Law. Nothing herein shall be construed to authorize the Permittees to interfere with the natural flows of the source of supply to the detriment of any senior appropriator.

B. The Permittees shall in no event cause to be diverted from the source of supply more waters than are reasonably required for the purposes provided for herein. Whenever waters are not reasonably required for the purposes provided for herein, the Permittees shall cause and otherwise allow such waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittees' 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 damages, even if damage is a necessary and unavoidable consequence of the exercise of this permit.

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

E. The Permittees shall diligently adhere to the terms and conditions of this order.

F. In constructing their diversion works, the Permittee shall not excavate, dig, or otherwise dredge so as to expose any new ground surface.

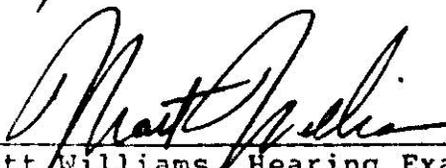
NOTICE

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 28th day of January, 1982.



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



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

AFFIDAVIT OF SERVICE

FINAL ORDER

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 February 5, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Stanley & Nina Cadwell, Application No. 27522, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

- 19456 1. Stanley & Nina Cadwell, Box 23, Deborgia, MT 59830
- 2455 2. Donna Davis, Box 51, Deborgia, MT 59830
- 2454 3. Charles J. Antos, Box 26, Deborgia, MT 59830
- 2453 4. John L. and Fern L. Callen, SR., 625 Dawn Drive, Grangeville, ID 83530
- 2452 5. M. Shaun Donovan, Attorney at Law, Box 668, Superior, MT 59872
- 6. Dave Pengelly, Missoula Field Office (regular department mail)
- 7. Matt Williams, Hearing Examiner, DNRC, Helena, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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

by Beverly J. Jones

On this 5th day of February, 1982, 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 by official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

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

* * * * *

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE) PROPOSAL FOR DECISION
PERMIT NO. 27522-s76M BY)
STANLEY AND NINA L. CADWELL)

* * * * *

Pursuant to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Superior, Montana. The Applicants appeared through Stanley Cadwell. Objector Charles Antos appeared personally. Objector Donna Davis also appeared personally at the hearing. The Department of Natural Resources and Conservation was represented at the hearing by David Pengelly, Area Office Supervisor for the Department's Missoula field office.

PRELIMINARY MATTERS

The application in this matter seeks 50 gallons per minute up to five acre-feet per year for new irrigation of two acres, more or less, that are claimed to be located in the NE1/4 of Section 25, Township 19 North, Range 30 West, from May 1 to October 15, inclusive, of each year. The application also seeks 50 gallons per minute up to 2.25 acre-feet of water per year for stockwatering purposes continuously throughout each year. The source of supply is claimed to be intermittent seasonal flow, and it is recited as being tributary to Twin Creek, said waters to be diverted at a point in the NE1/4NE1/4NE1/4 of Section 25,

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Township 19 North, Range 30 West, all in Mineral County.

Pertinent portions of this application were published for three successive weeks in the Mineral Independent, a newspaper of general circulation printed and published in Superior, Montana.

On April 14, 1981, an objection to the aforesaid application was filed with the Department of Natural Resources and Conservation by Donna L. Davis. At the hearing in this matter, said Objector withdrew objection to the granting of this application so long as the Applicant herein does not construct his diversion works in such a manner that new ground will be exposed through digging or dredging operations.

On April 13, 1981, an objection to the granting of the instant application was filed with the Department by Charles Antos. This objection sets forth and claims generally an existing right to the use of water, and claims further that the Applicant's proposed use would adversely affect such water use.

Objection to the granting of the instant application was also filed by John and Fern Callen. Said Objectors are apparently the contract vendors of the land and water rights claimed by Objector Antos herein. This objection makes similar allegations. Although this particular Objector did not appear personally at the hearing in this matter, he submitted the substance of his argument by letter December 4, 1981, (Objector's Exhibit No. 3), and no person objected to this being made part of the record in this matter.

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EXHIBITS

The Applicant offered into the record the following exhibit, to-wit:

A copy of a map detailing Applicants' land, together with a description of the proposed diversion means and the point of diversion, with the source of supply being depicted in red.

The Applicants' exhibit was received into the record without objection.

The Objector Antos offered two exhibits into the record, to-wit:

O-1: A copy of a decree from which this Objector claims his rights to the use of water.

O-2: A letter prepared and executed by this Objector setting forth the basis of his objection in this matter.

Both of Objector Antos' exhibits were received into the record without objection.

The Department offered into the record four exhibits, to-wit:

D-1-3: Photographs of the source of supply taken by Dave Pengelly on January 29, 1981.

D-4: A copy of the U.S.G.S. map depicting Applicants' proposed source of supply, with Twin Creek being depicted in blue.

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

The Hearing 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.

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FINDINGS OF FACT

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

2. The application in this matter was regularly and duly filed with the Department of Natural Resources and Conservation on June 6, 1980, at 1:26 p.m.

3. The Applicants' proposed use of water is a beneficial one. The use of 50 gallons per minute up to five acre-feet of water for irrigation purposes from May 1 to October 15, inclusive, of each year, of two acres located in the NE1/4 of Section 25, Township 19 North, Range 30 West, all in Mineral County, is a reasonable estimate of the quantity of water required for the proposed use, especially in light of the Applicants' intended flood irrigation. The use of such a quantity of water for the proposed purpose will not result in the waste of the water resource.

4. The Applicants' proposed use of up to 50 gallons per minute up to 2.25 acre-feet of water per year for stockwatering purposes continuing throughout the year is also a beneficial use, and said amount of water is reasonable and customary for Applicants' proposed purpose.

5. The Applicants have a bona fide intent to appropriate water, and they are not attempting to speculate in the water resource.

6. The Applicants do not intend to divert waters for the aforesaid uses continuously throughout the period of use. The source of supply flows intermittently, and then only during the spring and early summer. It is apparent that the Applicants do not intend to divert waters for the uses claimed herein prior to March 1 of any given year nor subsequent to July 1 of any given year.

7. The Applicants' proposed means of diversion are inadequate for their intended purposes, as they will prove to be incapable of implementing Applicants' proposed water use. Applicants' diversion dam will be relatively small so as to avoid encroachments of the captured water on adjoining lands, and as a result approximately three "fillings" will be required to accommodate the full measure of Applicants' proposed use. These "refillings" cannot be performed throughout the term of Applicants' proposed uses.

Otherwise, Applicants' means of diversion are customary for their intended purposes, and will not result in the waste of the water resource. Applicants' will construct their diversion dam across the coulee that is their source of supply, and the same will be located in the NE1/4NE1/4NE1/4 of Section 25, Township 19 North, Range 30 West, all in Mineral County.

8. There are no water permits or water reservations apparent from the face of the record which the present application can affect.

9. The source of supply claimed by the Applicants herein is not tributary to Twin Creek in the sense that there is any

surface flow connection. The waters in the source of supply involved herein have historically disappeared from surface flow downstream from the Applicants' land.

10. The Objector Antos uses the waters of East and West Twin Creeks for the irrigation of coniferous trees and hay and grain crops. The irrigation of the trees in this Objector's nursery is an exacting business, and modest deprivations of water may work substantial harm. This Objector is a successor in interest to Mondell and Helen Bennett, who were decreed 28 inches of water in a previous judicial action not involving these Applicants.

11. There are unappropriated waters available for the Applicants' use in the amounts they seek to appropriate. The evidence herein fairly suggests that the Applicants' proposed source of supply is not tributary to Objector Antos' source of supply. There is also unappropriated water throughout the March 1 through July 1 period during which Applicants seek to divert the quantities of waters claimed herein.

12. The Applicants' proposed appropriation will not adversely affect prior appropriators. The use of the waters claimed herein cannot be said on this record to interfere with any Objector's historic water use.

CONCLUSIONS OF LAW

1. Pursuant to the Montana Water Use Act, the Department has jurisdiction over the subject matter herein, and by the appearance of the parties hereto, has jurisdiction over the persons involved herein.

2. The Department of Natural Resources and Conservation must issue a new water use permit if the following conditions or criteria exist. See MCA 85-2-311 (1981).

(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).

While this statutory language reflects changes made by the 1981 Legislature, this provision was expressly made applicable to pending proceedings. At any rate, no prejudice accrues to these

Applicants therefrom, as it is apparent that the language changes merely make explicit what was formerly implicit.

3. Applicants seek less than 10,000 acre-feet a year, and therefore must establish by substantial credible evidence that the statutory criteria exist.

4. The Applicants' proposed use of water is a beneficial one, as it will be of material benefit to them. Irrigation and stockwatering find themselves within the confines of the legislative description of a beneficial use. See generally MCA 85-2-102(2) (1981). Moreover, the amount of water claimed would be reasonable and customary for the Applicants' intended purposes, and such use would not result in the waste of the water resource. See generally Worden v. Alexander, 108 Mont. 208, 90 P.2d 169 (1939), Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

5. The priority date for the permit to be issued in this matter shall be June 6, 1980, at 1:26 p.m. This is the date and time at which the application in this matter was duly and regularly filed with the Department of Natural Resources and Conservation. See MCA 85-2-401(2) (1981).

6. The Applicants have a bona fide intent to appropriate water, and they are not attempting to speculate in the water resource. See generally Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900). However, while the Applicants intend to use the waters claimed herein for irrigation from May 1 to October 15, inclusive, of each year and further claim the right to use the water for stockwatering continuously throughout the year, the Applicants intend to divert waters for these purposes only from

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March 1 to July 1 of any given year, as this is the period during which the source of supply passes water.

7. The Applicants' proposed manner of diverting the waters claimed herein is customary for their 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).

However, Applicants' means of diversion are inadequate in that they will fail to accommodate the Applicants' proposed uses throughout the term of said uses. Applicants' diversion dam is without sufficient capacity to hold waters necessary for late season use. Nor will additional waters for such uses be available after July 1 of any given year. Thus, if Applicants are to have a late season irrigation, it will be necessary to have the diversion dam entirely full for such use, around July 1, thereby precluding the possibility of water for stockwatering purposes. Even if in this case, it is doubtful that any waters devoted to such irrigation purposes will remain after September 1, in view of the seepage and evaporative losses that will necessarily accrue to such waters. Therefore, it is apparent that Applicants will have a supply of only five (5) acre-feet available for their proposed purposes, with half of that volume being available only in the alternative for stockwater or irrigation.

8. There are unappropriated waters in the amounts the Applicants seek, and throughout the March 1 to July 1 period during which the Applicants seek the right to divert the waters.

However, there are not unappropriated waters available for the Applicants' use throughout the entire time of use claimed for irrigation purposes, because in fact there will be no waters available at all.

9. The Applicants' proposed appropriation will not adversely affect the rights of prior appropriators. Since the record herein fairly establishes that there is no surface flow interconnection between the Applicants' proposed source of supply and that of the remaining Objectors herein, it cannot be said that the Applicants' proposed use will have any affect on said Objectors. Even assuming that the source of supply involved herein recharges Twin Creeks by groundwater percolation, it must remain speculative absent data from the Applicants' actual water use whether the capture of the waters intended by the Applicants would ever deprive the Objector herein of water during his time of need in light of the inherently slow rate of groundwater movement. Indeed, in this light, the Applicants' diversion dam and flood irrigation may ultimately benefit this Objector if indeed there is groundwater recharge. Said uses proposed by the Applicants in such a scenario might actually increase available water supply downstream by seepage in late summer months.

Of course, these Applicants, like any other applicant for a new water use permit, proceed at their own peril. The fundamental rule remains he who is "first in time, is first in right." The first to apply water to a beneficial use is entitled to the maintenance of that use as against all subsequent appropriators. See MCA 85-2-401(1) (1981), MCA 85-2-406(1)

(1981). Nothing herein can be construed as authorizing these Applicants to interfere with the natural flows of the source of supply to the detriment of any senior appropriator. Therefore, should it subsequently appear that the Applicants herein are treading on prior rights, they must immediately curtail their water use such that existing rights perceived are accorded their full historical measure.

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

Subject to the restrictions, conditions, and limitations described below, Application for Beneficial Use Permit No. 27522-s76M is hereby granted to Stanley and Nina Cadwell to appropriate 50 gallons per minute up to five (5) acre-feet of water per year for new irrigation from May 1 to September 1, inclusive, of each year and to use out of this aforesaid amount in the alternative 2.25 acre-feet of water for stockwatering purposes continuously throughout the year. The place of use shall be located in the NE1/4 of Section 25, Township 19 North, Range 30 West, all in Mineral County, and the lands to be irrigated shall be confined to two (2) acres more or less. The source of supply shall be intermittent seasonal flow from a point of diversion located in the NE1/4NE1/4NE1/4 of Section 25, Township 19 North, Range 30 West, all in Mineral County. The priority date for this permit shall be June 6, 1980, at 1:26 p.m.

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

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of these rights as reflected by Montana Law. Nothing herein shall be construed to authorize the Permittees to interfere with the natural flows of the source of supply to the detriment of any senior appropriator.

B. The Permittees shall in no event cause to be diverted from the source of supply more waters than are reasonably required for the purposes provided for herein. Whenever waters are not reasonably required for the purposes provided for herein, the Permittees shall cause and otherwise allow such waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittees' 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 damages, even if damage is a necessary and unavoidable consequence of the exercise of this permit.

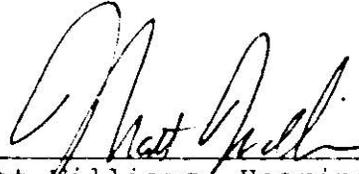
D. The Permittees shall proceed with reasonable diligence in the completion of their appropriation works and in actually applying the waters provided for herein to beneficial use.

E. The Permittees shall diligently adhere to the terms and conditions of this order.

F. In constructing their diversion works, the Permittee shall not excavate, dig, or otherwise dredge so as to expose any new ground surface.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. Exceptions and objections to this Proposal for Decision must be filed with and received by the Department of Natural Resources and Conservation on or before January 27, 1982.



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

DONE this 18th day of January, 1982.

AFFIDAVIT OF SERVICE
Proposal for Decision

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 January 18, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Stanley & Nina Cadwell, Application No. 27522, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Stanley & Nina Cadwell, Box 23, Deborgia, MT 59830
2. Donna Davis, Box 51, Deborgia 59830
3. Charles J. Antos, Box 26, Deborgia, MT 59830
4. John L. and Fern L. Callen, Sr., 625 Dawn Drive, Grangeville, ID 83530
5. M. Shaun Donovan, Attorney at Law, Box 668, Superior, MT 59872

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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

By Beverly J. Jones

On this 18th day of January, 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.

Jim K. Gibson
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84