

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 28744-g40A BY ALAN D. EVANS) FINAL ORDER

* * * * *

The time period for filing exceptions or objections to the Proposal for Decision, March 14, 1984, has expired. No exceptions or other arguments have been filed. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Proposal for Decision, its Findings of Fact and Conclusions of Law, as its Final Order, and expressly incorporates said Proposal for Decision herein.

WHEREFORE, the following Final Order in the above-entitled matter is hereby entered.

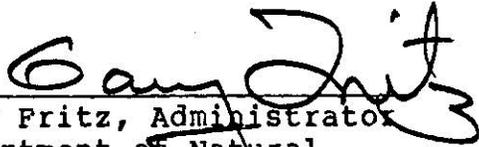
Application for Beneficial Water Use Permit No. 28744-g40A by Alan D. Evans is hereby denied without prejudice.

CASE # 28744

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 3rd day of May, 1984.



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



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

CASE # 28744

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 4, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Alan D. Evans, , Application No. 28744-g40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Alan D. Evans, Box 642, Roundup, MT 59072
2. John & Marjorie Runestad, Goulding Creek Rt., Roundup, MT 59072
3. Paul, Fern, & Ruth Mayo, Box 5128, Klein St. Rt., Roundup, MT 59072
4. Sam Rodriguez, Water Rights Bureau Field Office, Lewistown (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 4th day of May, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Beth Lambson
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 6 Oct 1985

CASE # 28744

The Mayos are prior appropriators downstream from the proposed project. Their water rights' source is Half-Breed Creek, from which they claim a right to 200 miners inches for stock and irrigation uses. They allege that the groundwater source for Mr. Evans's well is hydrologically connected to the underground springs which are a substantial source of water for Half-Breed Creek. Because the usual flow of Half-Breed Creek is insufficient to satisfy even existing rights thereon, any further reduction would adversely affect their water rights as well as all others downstream on the Creek.

John and Marjorie Runestad timely filed an objection on the basis that Mr. Evans' own prior testimony (at a hearing in Roundup, March, 1980) indicated there were no unappropriated waters in the source of supply and, therefore, his permit should be denied. By subsequent letter, Mrs. Runestad admitted knowing of no adverse affect to their water rights which would result from Mr. Evan's project, but stated their objection was to help others in the area whose employment prevented their participation in the hearings. The Runestads did not attend the hearing either personally or by representative.

The pertinent portions of the application were duly published in the Roundup Record-Tribune, a newspaper of general circulation in the area of the source once a week for three consecutive weeks.

EXHIBITS

The Applicant offered the following exhibits for admission into the record:

1. A copy of a Soil Conservation Service map showing the entirety of Section 7, Township 7 North, Range 26 East, Musselshell County, Montana. The Applicant depicted in red the approximate acreage to be irrigated, as well as the proposed well site.
2. A hand-written statement of November 1, 1983, by Merle E. Hunt. The statement relates his having been in the well-drilling business for 15 years, his experience in drilling a similar well, his acquaintance with the groundwater geology in the area of Half-Breed Creek, his belief that the groundwater is sufficient for Mr. Evans' proposed irrigation, and his admonition not to confuse groundwater with surface water.

Applicant's Exhibit 1 was received into the record. Exhibit No. 2 was not received into the record because of the parties' inability to cross-examine the document, i.e.: cross-examine the author thereof. While the Exhibit is not a part of the record, the Hearing Examiner notes that testimonial evidence was received into the record on all matters addressed by Mr. Hunt's statement, so the effect on the record, of the exclusion of Mr. Hunt's statement, is minimal.

On the other hand, the right of parties to cross-examine all documents and testimonial evidence received into the record, is

a constitutional right. Hert v. J.J. Newberry, 178 Mont. 355, 584 P.2d 656 (1978), 179 Mont. 160, 587 P.2d 11 (1978) (Pet. for reh. den.).¹ Ergo, it cannot be disregarded.

The Objectors offered no exhibits into the record.

The Department offered into the record the following exhibits:

1. Geohydrologist report of September 28, 1982, written by Paul Lemire for Application No. 28744.
2. A Departmental study of January, 1982, entitled Water Availability Analysis on the Musselshell River Below Ryegate, Montana, by Sterling Sundheim.

Both of the Department's Exhibits were received into the record.

Having fully considered all of the testimonial and documentary evidence accepted into the record herein, the Hearing Examiner hereby makes the following proposed:

FINDINGS OF FACT

1. The Department has jurisdiction over the parties and of the subject matter herein.
2. The Application was duly filed with the Department on August 18, 1980, at 2:19 p.m.

¹ The case is reported in 178 Mont. 355 as Hert v. J.J. Newberry, while reported in 179 Mont. 160, as Hart v. J.J. Newberry. The Hearing Examiner has no other explanation for this frustration in research, rather than that it was a typographical error.

3. The Applicant has a present bona fide intent to appropriate water and is not attempting to speculate in the water resource.

4. The use of the water as proposed is a beneficial use, being of material benefit to the Applicant. By irrigating the area proposed, a greater yield of alfalfa and hay would be obtained than is possible by dry farming.

5. Applicant's proposed means of diversion, and his proposed construction and operation of his appropriative works are reasonable and customary for the intended use. Use of the proposed system will not result in wasting the water resource.

6. There are no planned uses or developments for which a permit has been issued or for which water has been reserved with which the appropriation would unreasonably interfere.

7. There are no unappropriated waters, at least at some times, available in the source of supply. The source of supply is groundwater which is more likely than not hydrologically connected with the surface waters of Half-Breed Creek.

8. The Mayos have prior water rights to 200 miners inches up to 3620 acre-feet per year, the source being Half-Breed Creek. On the objection, Mr. Mayo claims a use-right for 200 inches from Half-Breed Creek with a priority date of 1949. The Departmental records (of which the Hearing Examiner takes official notice) reflect a Notice of Appropriation of Water Rights claiming rights to "... the possession, use and control of any and all the natural flow of and all flood waters draining and

flowing in and to that certain stream known as "Half-Breed Creek"...". This Notice, attached to the Mayo's SB76 Claim, evidences a priority date of 15 June 1966, and historic use since 1949. The Hearing Examiner has no authority to determine the exact priority date of the Mayo's rights. Their rights incidentally appear to include a Provisional Permit to appropriate water from an unnamed tributary of Half-Breed Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 7 North, Range 25 East, M.P.M., Musselshell County, Montana.²

9. The surface waters of Half-Breed Creek are already over appropriated, i.e.: there are rights (of record) to the use of more water than normally exists in Half-Breed Creek.

10. The source of supply for Applicant's well is the quantenary alluvium along Half-Breed Creek. This alluvium is made-up of unconsolidated sands, gravels and clays. Groundwater from the aquifer probably discharges to the Creek. One marked instance of such discharge is the Majerus Spring, approximately 2000 feet upstream from Applicant's point of diversion. See Figure 3, Mr. Lemire's report, Department's Exhibit 1. Although the alluvium, at some points along the stream, is confined by a clay layer at the top, this clay layer is not uniform, and, at least at the Majerus Spring, and most likely at various other springs, is insufficient to separate the alluvium from the stream.

² As shown in Departmental microfilm records of statewide Statements of Claims of Existing Water Rights (hereafter, SB76 Claims).

11. The Majerus Spring is an important source of supply for Half-Breed Creek.

12. The draw-down effect from Applicant's pumping would be approximately 7-8 feet at the Majerus Spring. (See, Dept. Exhibit No. 1).

The Hearing Examiner, after fully considering all of the evidence in the record herein, and based upon the foregoing Proposed Findings of Fact, hereby makes the following Proposed:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and the subject matter of this hearing.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. Objectors Mr. & Mrs. Runestad, having failed to appear at the hearing, are in default pursuant to Administrative Rule of Montana § 1.3.214(1).

4. The Department is statutorily mandated to issue a permit if the Applicant proves by substantial credible evidence that the following criteria are met.

- (a) There are unappropriated waters in the source of supply
- (i) at times when the water can be put to the use proposed by the applicant:
- (ii) in the amount the applicant seeks to appropriate, and
- (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;

- (c) the proposed means of diversion, construction and operation of the appropriation works are adequate;
- (d) 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.

5. There is groundwater available, as indicated by excessive subirrigation on the Applicant's property.

6. The proposed use of water for irrigation is a beneficial use.

7. The proposed means of diversion, construction and operation of the appropriator works are adequate.

8. The proposed use will probably interfere with the prior appropriative rights of the Mayos, as well as all those others holding downstream appropriative rights to use of waters in Half-Breed Creek.

The geohydrology report, supported by Paul Lemire's testimony at the hearing, indicates the drawdown effect of the Applicant's proposal on the Majerus Spring will be 7.8 feet. Because the Spring is a significant source of supply for Half-Breed Creek, such interference with the Spring will necessarily adversely affect the Mayos right to use water from the Creek. This is so because prior appropriators are protected from any reduction in amount of water they can beneficially use through their historic reasonable means of diversion. The Objectors herein probably could not reasonably exercise their water rights under the changed conditions of a reduced flow in Half-Breed Creek. See State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d. 23 (1939). In the Matter of the Application for Beneficial Water

Use Permit No. 39786-g76H by Western Water Company, Proposal for Decision, March 8, 1983, Final Order, March 24, 1983.

9. Because of the hydrologic connection between the groundwater source from which Applicant seeks to appropriate, and the surface waters in Half-Breed Creek, the subsurface waters at issue herein are not "groundwater" within the meaning of the Water Use Act. Groundwater is there defined as "...any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water." MCA § 85-2-102(8), 85-2-501(3). See, In the Matter of the Application for Beneficial Water Use Permit No. 14,965-g41E and Application for Change of Appropriation Water Right No. 19,230-c41E by Thomas H. Boone, Trustee. Final Decision, May 21, 1981.

10. Because of the uncertainty regarding the effect of Applicant's pumping on the surface water in Half-Breed Creek, the Applicant failed to meet his burden of proof, i.e. he failed to prove by substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 28744-g40A by Alan D. Evans be denied without prejudice.

DONE this 14th day of March, 1984.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

This proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this proposal. Such exceptions must be filed (received) with the Hearing Examiner at 32 South Ewing, Helena, Montana 59620 within 20 days after service of this Proposal by first class mail, MCA § 2-4-623. No final decision shall be made until after the expiration of the period for filing exceptions, and the due consideration of those exceptions. All exceptions shall specifically set forth the precise portions of the proposed decision to which exception is taken, the reasons for the exception and authorities upon which the exception relies.

MEMORANDUM

The Hearing Examiner is mandated to deny the permit on the record of this case. The statute clearly and unequivocally places the burden of proof by substantial credible evidence on the Applicant MCA § 85-2-311(1) (1983). The facts adduced at the

nearing are admittedly inconclusive. There seems to be subsurface water in the vicinity of the Applicant's proposed well: there was no proof, however, that the pumping at Applicant's site will not adversely affect, by drawdown of approximately 8 feet, at least one source of supply for Half-Breed Creek, the Majerus Spring. On the contrary, the evidence in the record, that an 8 foot drawdown would occur, was uncontradicted. Such depletion of Half-Breed Creek would be adverse affect to the water rights of the Objectors, among others, and the Department may not allow such injury to occur MCA § 85-2-311(1)(b) (1983) State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

It is noted that the Applicant is free further to study the groundwater - surface water connection in issue, and present another application modified to prevent adverse affect to the stream. Such an application would, of course, be subject to the same statutory requirements of proof as was this application. If further studies reveal the connection to be more tenuous than presently appears, substantially the same application could be presented, especially if it included proposed monitoring of stream flow. If the Applicant could install stream gauges immediately above and below his well, taking baseline data to establish the norm for readings there, then those readings would, in all likelihood, measure if in fact well pumping were depleting stream flows. This would remedy the problem of measuring the effect of Applicant's pumping on the flow of Half-Breed Creek. In the absence of such monitoring, the water users would be faced with an unsurmountable task of tracing the cause of lowered stream flows to Applicant's pumping.

"It is recognized that deciphering the movement and extent of groundwater is often a difficult and expensive task. The burden of proof is on the Applicant, however. The attenuated connection between diversion by a groundwater appropriator and the effects thereof must be accounted for. Inattention to this issue threatens long-term deprivation to the senior." Western Water Company, Proposal for Decision, p 15.

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 20th, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Alan D. Evans, , Application No. 28744-g40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Alan D. Evans, Box 642, Roundup, MT 59072
2. John & Marjorie Runestad, Goulding Creek Rt., Roundup, MT 59072
3. Paul, Fern, & Ruth Mayo, Box 5128, Klein St. Rt., Roundup, MT 59072
4. Sam Rodriguez, Water Rights Bureau Field Office, Lewistown (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 20th day of March, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy John

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85



CA # 28744