

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. 29427 BY PAUL C. HAYNES)
)

* * * * *

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

WHEREFORE, Application for Beneficial Water Use Permit No. 29427-s76N by Paul C. Haynes is hereby denied and dismissed in its entirety.

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 26th day of July, 1982.

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

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

AFFIDAVIT OF SERVICE

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 July 29, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Paul C. Haynes, Application No. 29427, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Paul C. Haynes, Box 1386; Thompson Falls, MT 59873
2. Ben G. Cox, Box 246, Thompson Falls, MT 59873
3. Britton Ranch, Box 246, Thompson Falls, MT 59873
4. Robert L. Fletcher, Baxter & Fletcher, Box 9, Thompson Falls, MT 59873
5. Dave Pengelly, Hearings Examiner (inter-department mail)
6. Chuck Brasen, Kalispell Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STATE OF MONTANA)

by Beverly J. Jones

) ss.

County of Lewis & Clark)

On this 29th day of July, 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 my official seal, the day and year in this certificate first above written.

Ann P. Gilman
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

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The pertinent portions of this application were duly published for three successive weeks in the Sanders County Ledger, a newspaper of general circulation printed and published in Thompson Falls, Montana.

On December 1, 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation by the Britton Ranch. This objection states that there are more recorded water appropriations on Mosquito Creek than there is water available in a normal year.

On December 3, 1980, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation on behalf of Ben G. Cox. The objection and subsequent correspondence through the Objector's counsel, Mr. Robert L. Fletcher, indicate that the Objector claims a year-round flow of 2.5 cubic feet per second (cfs) as necessary to adequately protect his existing rights.

EXHIBITS

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

- A-1: A hand-drawn map depicting the source of supply, the Applicant's proposed point of diversion and place of use, the location of the diversion to the Britton Ranch below the Applicant, and the location of Mr. Cox's fish ponds.

This exhibit was received into the record with no objections.

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The Britton Ranch offered the following exhibits for the record to-wit:

- O-1: Photograph of the Britton Ranch diversion point on Mosquito Creek taken in December.
- O-2: A photocopy of an SCS map of the Britton Ranch property showing the point of diversion from Mosquito Creek and the ditches and fields served through this source of water.
- O-3: An abstract of the Britton Ranch's claimed water right from Mosquito Creek.

The exhibits of the Objector Britton Ranch were received into the record with no objections.

The following exhibits were offered into the record on behalf of Mr. Ben Cox, to-wit:

- O-4: Acknowledgment of claim number 76N-W-100475-00 along with a copy of the original claim.
- O-5: Acknowledgment of claim number 76N-W-100477-00 along with a copy of the original claim.
- O-6: Acknowledgment of claim number 76N-W-100476-00 along with a copy of the original claim.
- O-7: Photocopies of portions of the revised codes of Montana, particularly Section 69-5003 as it was in effect from 1967 to 1973 and the same statute as revised in 1973 and in effect until 1975 and a copy of Section 76-4-121, MCA, 1979.

The exhibits of Objector Ben Cox were received into the record with no objections.

No exhibits were introduced on behalf of the Department.

Based on the information contained in the Department's file in this matter and the information presented at the hearing, the hearing examiner hereby makes the following Findings of Fact, Conclusions of Law, and Order:

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FINDINGS OF FACT

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

2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

3. The Applicant's intended use of the water for domestic and stockwater purposes is a beneficial use.

4. The Applicant intends to divert the waters claimed herein by means of a pump and to transport the water by means of a system of pipelines. Very little water would be lost in the conveyance of this water. This system is adequate for the Applicant's intended purposes, and no water would be wasted by such a diversion.

5. The source of supply for the Applicant's intended diversion is Mosquito Creek, a tributary of the Clark Fork River.

6. The Applicant intends to divert said water from the NW1/4 NW1/4 NW1/4 of Section 23, Township 22 North, Range 30 West, Sanders County, Montana, and to use the water on lands located within the same legal description.

7. Given the nature of the Applicant's intended use of water, the Applicant needs to have water available throughout the entire year for his intended usage.

8. There are surplus or unappropriated waters in Mosquito Creek at the flow rate the Applicant seeks to appropriate the water at some times in most years.

9. The base flow of Mosquito Creek is in the range of 350 to 500 gallons per minute (gpm).

10. The Britton Ranch diverts water downstream from the Applicant's intended point of diversion at a rate of approximately 2 cubic feet per second (cfs) and uses this water year-round for stock water, irrigation, and fish production purposes.

11. In most years the Britton Ranch has curtailed their diversion of water in order to provide water for other downstream users.

12. Ben Cox claims a diversion of 2.5 cubic feet per second as being necessary to maintain his fish ponds located downstream from the Applicant's proposed point of diversion.

13. The Department's records show that as of December 16, 1981, there was 328 gpm diverted from Mosquito Creek excluding the claimed diversions of the Britton Ranch and Ben Cox. The total claimed diversions from Mosquito Creek, therefore, are at least 2,348 gallons per minute, excluding any other possible claimed rights not brought into evidence at this hearing.

14. There are no unappropriated waters in the amount the Applicant seeks to appropriate during certain periods of the year, namely the base flow periods from mid-summer to the end of September.

15. The Britton Ranch has filed statements of claims for their claimed water rights, thereby establishing prima facie evidence of these rights.

16. Ben Cox has filed statements of claims regarding his water rights, therefore establishing prima facie evidence of his claimed rights.

17. There are no permits evident in the record which may be potentially affected by the Applicant's proposed diversions. Equally, there are no water reservations listed in the record.

CONCLUSIONS OF LAW

1. MCA 85-2-311, 1979, directs the Department of Natural Resources and Conservation to issue a water use permit if the following conditions or criteria exist:

- (1) there are unappropriated waters in the source of supply:
 - (a) at times when the water can be put to the use proposed by the applicant;
 - (b) in the amount the applicant seeks to appropriate; and
 - (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (2) the rights of a prior appropriator will not be adversely affected;
- (3) the proposed means of diversion or construction are adequate;
- (4) the proposed use of water is a beneficial use;
- (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;
- (6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

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

3. The Applicant's intended use of water for domestic and stockwatering purposes is a beneficial use.

4. The Applicant's proposed means of diversion and construction are adequate.

5. The application as limited herein will not unreasonably affect developments for which a permit has been issued, nor will it affect any water reservation.

6. The application does not exceed 10,000 acre-feet or 15 cubic feet per second.

7. There exists unappropriated water in the source of supply in the amount the Applicant seeks to appropriate, but such waters are not available throughout the period during which the Applicant seeks to appropriate said waters.

8. The Applicant cannot reasonably exercise this water right unless water is available throughout the entire period during which water is sought pursuant to this permit.

WHEREFORE, based on these Finding of Facts and Conclusions of Law, the following proposed order is hereby issued. Application for Beneficial Water Use Permit No. 29427-s76N by Paul C. Haynes is hereby denied.

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NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before _____, 1982.

DONE this 23rd day of June, 1982.

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

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AFFIDAVIT OF SERVICE
PROPOSAL FOR DECISION

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

Cheryl Wallace, 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 June 24, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Paul C. Haynes, Application No. 29427, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Paul C. Haynes, Box 1386, Thompson Falls, MT 59873
2. Ben G. Cox, Box 246, Thompson Falls, MT 59873
3. Britton Ranch, Box 246, Thompson Falls, MT 59873
4. Robert L. Fletcher, Baxter & Fletcher, Box 9, Thompson Falls, MT 59873
5. Dave Pengelly, Hearings Examiner (inter-dept. mail)
6. Chuck Brasen, Kalispell Field Office
7. Gary Fritz, DNRC, 32 S. Ewing, Helena, MT

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Cheryl Wallace

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

On this 24 day of June, 1982 before me, a Notary Public in and for said State, personally appeared Cheryl Wallace, known to me to be the Typist, 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 Kolow
Notary Public for the State of Montana

Residing at Montana City

My Commission Expires 3/1/85

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