

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. 32798-S76G BY HARPOLE FAMILY )  
CORPORATION )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of July 28, 1987, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

That portion of Beneficial Water Use Permit No. 32798-s76G by Harpole Family Corporation granting authorization to appropriate 5.00 gpm up to 2.40 acre-feet per annum for fire protection is stricken from the Permit.

**CASE # 32798**

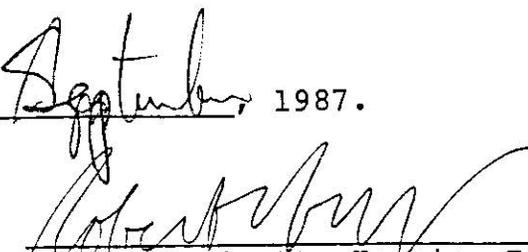
The Permit is hereby modified to authorize only the appropriation of .09 acre-feet per annum from Warm Springs Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 24, Township 10 North, Range 08 West, Powell County, Montana, between January 1 and December 31, inclusive, each year for stock water use in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 24, Township 10 North, Range 08 West, Powell County, Montana; the authorized capacity of the storage facility, an on-stream pit, is 540 gallons. The priority date remains April 27, 1981.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

Done this 5<sup>th</sup> day of September, 1987.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6605

  
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Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6625

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AFFIDAVIT OF SERVICE  
MAILING

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

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, (DNRC) being duly sworn on oath, deposes and says that on September 28, 1987, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER by the Department on the Application for Beneficial Water Use Permit No. 32798-s76G, by Harpole Family Corporation, addressed to each of the following persons or agencies:

Harpole Family Corporation  
Tom Harpole  
Box 304  
Avon, MT 59713

T.J. Reynolds  
Field Manager  
DNRC, Water Rights Bureau  
1520 E. 6th Ave.  
Helena, MT 59620-2301  
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Susan Howard

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

On this 28th day of September, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, 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.

Gregg S. G. Voost  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission Expires October 17, 1989

**CASE # 32798**

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 32798-s76G BY HARPOLE FAMILY )  
CORPORATION )

\* \* \* \* \*

Pursuant to the Montana Water Use Act, Montana Code Annotated (hereafter, "MCA") Title 85, Chapter 2 (1985), and the contested case provisions of the Montana Administrative Procedure Act, MCA Title 2, Chapter 4, Part 6 (1985), a show-cause hearing in the above-entitled matter was held on November 25, 1986 in Helena, Montana.

Appearances

Tom Harpole appeared representing the Harpole Family Corporation.

The Department of Natural Resources and Conservation (hereafter, "the department" or "DNRC") was represented by legal counsel, James Madden.

Jim Beck, Agricultural Specialist with the Helena Water Rights Bureau Field Office of the DNRC, appeared as a witness for the department.

Statement of the Case

On October 8, 1982, the Harpole Family Corporation was granted Provisional Permit to Appropriate Water No. 32798-s76G,

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which authorized the appropriation of 5 gallons per minute (gpm) up to 2.49 acre-feet per annum from Warm Springs Creek between January 1 and December 31, inclusive, each year for use as follows: 5.00 gpm up to 2.40 acre-feet for fire protection; and, up to .09 acre-feet for stock water. Such water was to be impounded by pit with an on-stream capacity of 0.06 acre-feet. On December 1, 1983, Permittee filed a Notice of Completion stating that the water development authorized had been completed and that water had been put to beneficial use on or before October 1, 1983, as required under the terms of the Permit.

The department brings action against Permittee for modification of this Permit. The department seeks to delete fire protection therefrom so that said Permit authorizes stock water use only, alleging that only the portion of the Permit for stock water was perfected, and that the portion for fire protection was not perfected as Permittee had failed to put any water to use by putting out a fire. The department also seeks to reduce the permitted storage capacity to reflect actual development and use (for stock only).

Permittee responds by disputing the legitimacy of the requirement that the water right must be perfected by actually putting out a fire as unreasonable and not required by the law. Permittee further responds by stating that the plan for which the permit was tailored, i.e., for storing by means of a pit, sufficient water to provide fire protection, could not be carried out due to geologic complications unforeseeable at the time of Permit issuance.

Although the department seeks revocation of the fire protection portion of the Permit claiming that water has not been put to such use within the time allowed, it also admits that a reasonable appropriator would not be able, under ordinary circumstances, to timely put water to this use.

#### Exhibits

The department submitted the department file in this matter for inclusion in the record. The file was admitted with no objection to its contents by Permittee, who had the opportunity to inspect it.

The Permittee submitted no exhibit for inclusion in the record in this matter.

#### PROPOSED FINDINGS OF FACT

1. Beneficial Water Use Permit No. 32798-s76G was issued to Harpole Family Corporation (hereafter, "Harpole") on October 8, 1982 with a priority date of April 27, 1981 at 2:20 p.m. The Permit granted Harpole the right to appropriate 5.00 gallons per minute up to 2.49 acre-feet per annum from Warm Springs Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 24, Township 10 North, Range 08 West, Powell County, Montana, between January 1 and December 31, inclusive, each year for use as follows: 5.00 gpm up to 2.40 acre-feet per annum for year-round fire protection use and up to .09 acre-feet for year-round stock water use; both uses to occur in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 24, Township 10 North, Range 08 West,

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Powell County, Montana. The means of diversion authorized was a pit with on-stream capacity of 0.06 acre-feet. (Department file: Permit.)

2. Under the terms of the Permit, the diversion and distribution works for the appropriation were to be completed, and the water put to beneficial use, on or before October 1, 1983, or within any authorized extension of time. The Notice of Completion of Water Development, Form 617, was to be filed on or before December 1, 1983. (Department file: Permit.)

3. No request for extension of time for completion was made by Permittee and a timely Notice of Completion was executed and filed with the department on December 1, 1983. The Notice stated water development had been fully developed as specified within the terms of Permit No. 32798-76G and timely put to beneficial use on or before October 1, 1983. (Department file.)

4. On July 11, 1984, Jim Beck inspected the situs of the appropriation to verify the accuracy of the Notice of Completion. (Testimony of Jim Beck.)

5. As of July 11, 1984 Permittee had constructed a pit at the location described in the Permit with a 540 gallon capacity, rather than with a .06 acre-feet (19,551 gallons) capacity as specified in the Permit. (Testimony of Jim Beck.)

6. Permittee could not construct a .06 acre-feet pit at the point of diversion due to its location in swampy ground, which prevented use of heavy equipment and also allowed for use of only one charge of ditching powder due to immediate filling of the blast hole with water. Thus, only a small pit could be excavated. (Testimony of Tom Harpole.)

7. Permittee has impounded water in the 540 gallon pit and stock have used such water. (Testimony of Jim Beck.) However, the impounded water has never been used to put out a fire. (Testimony of Jim Beck, Tom Harpole.)

8. Permittee did not, as of July 11, 1984, have in place and ready for operation any pumping or other facility adequate to provide sufficient lift and water delivery to put out a fire at his home or out-buildings. (Testimony of Jim Beck.)

9. No pump was in place because the 60 gpm 8 horsepower non-submersible pump which Permittee had tried was insufficient to provide 42 feet of lift from the pit to the roof of the house; and because a submersible pump, which could provide such lift, would drain the pit in less than 10 minutes, thereby creating the risk of pump burnout. (Testimony of Tom Harpole.)

10. Permittee believes that the diversion and impoundment facility as authorized by his Permit could never be practical for fire protection use. Rather, Permittee believes that a dam and reservoir are necessary. (Permittee had initially applied for diversion and impoundment by dam and reservoir. However, pursuant to stipulation between Permittee and then-Objector Soren Beck, the Application was modified so that impoundment would be by pit.) (Testimony of Tom Harpole.)

11. MCA §85-2-314 states, in relevant part, "If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not

being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit."

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The department has continuing jurisdiction over the subject matter herein, and over the parties hereto, whether present at the hearing or not. See MCA §85-2-312 et seq.
2. The department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner.
3. The department contends that Permittee, within the time specified in the Permit, neither completed the diversion and distribution works which were to be used to appropriate water for fire protection purposes nor applied water to the beneficial use of putting out an actual fire. Therefore, pursuant to its authority under §85-2-314 (1985), the department seeks to modify Permit No. 32798-s76G to delete those portions pertaining to, and authorizing, appropriation of water for fire protection use.

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The facts of record sustain the department's contention that Permittee neither completed the diversion and distribution works as specified in the Permit nor applied water to fire protection use by actually putting out a fire within the time specified. (Findings of Fact 5, 6, 7.) Permittee does not deny these facts; however, it contends that the requirement that a fire be put out by a certain date in order to perfect a water right for fire protection use is illogical and fundamentally in error.

The department admits that the requirement that the water be applied to the use contemplated in the permit by the date specified therein requires that Permittee, or fate, timely create the very exigency against which the appropriation is intended to protect. However, it nevertheless maintains that a fire must occur by the date specified in the Permit, and water be used to put out the fire, or revocation of the the fire protection portion of the Permit must lie.

4. The Water Use Act (hereafter, "the Act") established a system by which a prospective appropriator must apply for, and can receive, a permit, i.e., a license, which authorizes the permittee to proceed with the appropriation. MCA §85-2-311. The Act also provides that after actual application of water to the proposed beneficial use within the time allowed (which may be verified by the department), a certificate of water right shall issue. MCA §85-2-315. The certificate is evidence of a water right which has been perfected, that is, which vested in the Permittee upon the actual application of water to a beneficial use. See Doney, Montana Water Law Handbook §3.2.2.6 (1981).

The Act itself does not limit the period between permit issuance and perfection of the appropriation; however, it does grant the department authority to impose time limits on the Permittee's development of his appropriation. MCA §85-2-312(2) provides "[t]he department may limit the time for commencement of the appropriation works, completion of construction and actual application of the water to the proposed beneficial use."

(Emphasis supplied.)

The use of the the word "may" indicates that the department is not required by statute to impose time limits for the perfection of any appropriation; rather, it shows that imposition of time limits is discretionary. However, it must be emphasized that this grant of discretion does not include the right to make an arbitrary or capricious decision. See generally State ex. rel. State Board of Equalization v. Kovich, 142 Mont. 201, 383 P.2d 818 (1963); Yick Wo v. Hopkins, 118 U.S. 356, 366-367 (1885); MCA §2-4-704(2)(f). There must be a factual basis for imposing a particular time limitation. McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035 (1939).

Although the Water Use Act lists certain facts which must be considered in fixing time limits,<sup>1</sup> it does not expressly provide a standard, or general rule of action, to guide the department in

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<sup>1</sup>MCA §85-2-312(2) directs that, in fixing time limits, "the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use." However, these variables are just some of those which can be expected to affect the time in which an appropriation can be made and water put to use. As the statute does not expressly exclude consideration of other facts

weighing these facts. However, the legislature (so that it may not be said to have delegated to the executive exclusively legislative powers, and to assure that the departmental decision is not controlled by caprice) must fix such standards. State v. Stark, 100 Mont. 365, 370-374, 52 P.2d 890 (1935). These standards are the usual standards implied by law, where no different standards are expressed by the Act. Stark, supra., p. 374. Standards governing appropriation time constraints are implicit in the law of prior appropriation, which is the substrate of the Water Use Act. See MCA §1-1-108 (1985).

5. The standard governing what time constraints may be imposed on actual application of water originates in the common law of water appropriation, and is reflected in present statutory law. In Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949) the Court recapitulated the common law of water appropriation:

"All that is necessary to make a valid appropriation is that there be an actual diversion of the water from the natural channel or other source of supply, with an intent to apply it to some beneficial use, followed by an actual application of the water either to the use designated or to some other within a reasonable time, and any lawful means toward obtaining that end may be used." 2 KINNEY ON IRRIGATION WATER RIGHTS, 2d. ed., Sec. 825; see also, Sec. 723.

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and, because it is not reasonable to conclude that the Department is limited to consideration of only the listed variables if there are other variables which are relevant to its decision, any fact which could reasonably be expected to affect the speed of making the appropriation and putting water to use will be considered.

The rule expressed here, relevant to this inquiry, is that the actual application of water must be made within a reasonable time after actual diversion. (Such principle is reflected in the portion of MCA §85-2-312(2) addressing projects designed for gradual development.) Accordingly, the department must consider the facts in the case before it which are relevant to final application of the water and, based on these facts, estimate the amount of time after diversion within which it is reasonable to expect application be made.

Once diversion is completed and the water made ready for application, the elapsed time between diversion and actual application will depend on the time that the need arises, and whether the appropriator reacts to that need by applying water. In most cases the appropriator will not be able to cause the need to arise; e.g., in the case of irrigation, he must await dry soil conditions. However, he may be said to have applied the water within a reasonable time, if he diligently applies the diverted water upon occurrence of the condition precedent, i.e., when the need does arise.

Accordingly, in cases where the appropriator can cause the need, or in any case where the department can estimate the time of occurrence of the need on a rational basis, the determination of the amount of time which should elapse between diversion and application can be factually based, and the department may impose time limits. However, if the

contemplated need is such that a reasoned estimate of the time of its occurrence is not possible, no factually based determination of time between diversion and application can be made, and the department may not impose time limits, for any attempt to do so would be utterly arbitrary.

In the case of fire protection, no reasonable man would, or should be expected to, (illegally) cause the need to put out a fire, i.e., commit arson. The occurrence of the need thus remains outside the control of the appropriator. Further, there can be no reasoned estimate of when an unplanned fire might occur.

Therefore, held, that because an estimate of time within which it is reasonable to expect that water will have been used to put out an unplanned fire cannot be factually based, and because imposition of any time limit is thus necessarily arbitrary, the department's imposition of such limit upon this Permittee is per se invalid. The time limit for application of water to beneficial use imposed in this Permit is thus void ab initio, and accordingly, non-compliance therewith cannot be the basis for revocation of the fire protection portion of this Permit.

6. The standard governing time constraints for completion of the appropriation works is that of reasonable diligence, a concept developed by the courts to govern whether "relation back" would be invoked in determining the priority date of an appropriation.

The "doctrine of relation back" is the common law doctrine which, under certain conditions, allows the priority date of an appropriation to relate back to the date of initiation of that appropriation, despite the fact that considerable time may have passed between initiation and the perfection of the water right. Its purpose is "to protect bona fide appropriators during the time they are building ditches and other preparatory works; and at the same time to give no comfort to those, who, not bona fide, try to monopolize water for speculative purposes." 1 WEIL, WATER RIGHTS IN THE WESTERN STATES (3rd. ed.) §394, p. 425 (1911).

Historically, in cases where relation back was claimed, the decision as to whether the claimant-appropriator had the bona fide intent on the date of initiation to make the full claimed appropriation was rendered after the fact, based on evidence of his reasonable diligence in proceeding from initiation of the appropriation works to their completion.<sup>2</sup> The appropriator could claim a priority date as of the date of initiation only as to that portion of the appropriation

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<sup>2</sup> As the applicability of the doctrine of relation back rests squarely on the nature of the appropriator's intent at the time of initiation, evidence of this intent is necessary in any case where relation back has been claimed. The appropriators diligence is evidence of his intent.

Under the doctrine as it developed in Montana, if the appropriation was initiated before 1885, bona fide intent was shown and the priority date would relate back to the date that construction of the appropriation works was commenced, if the works were completed with reasonable

which could have been made by means of the appropriation works that were completed with reasonable diligence following initiation.

The concept of "relation back" has been incorporated in the Water Use Act. MCA §85-2-401(2). However, under the Act, relation back (to the date of application) is automatically "invoked" if the terms of the Permit are met. This being the case, in order that the purpose of "the doctrine of relation back" be retained, it is incumbent on the department to determine time limits for completion of the appropriation works utilizing the standard of reasonable diligence, applied prospectively. Accordingly, the time limit set for completion should be an estimate of the time it would require an appropriator, proceeding with reasonable diligence, to complete the appropriation works.

Reasonable diligence requires an effort proportional to the magnitude of the obstacles, and thus an appropriator may be said to have proceeded to complete the appropriation with

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diligence. Woolman v. Garringer, 1 Mont. 535 (1871). If the appropriation was initiated after 1885, the date of enactment of statutes held to have been intended to regulate the doctrine of relation back, Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897), bona fide intent could be shown only by showing compliance with the statutes. The priority date would relate back to the date of posting of notice of intent to appropriate only if the provisions of RCM§89-810, 811, 812, (1947), which include the requirement that the appropriator must complete construction of the appropriation works with "reasonable diligence," were met. If an appropriation was initiated after 1885, but the appropriator did not comply with the terms of RCM §89-810, 811, 812 (1947), a valid water right could still be acquired; however, the priority date was the date water had actually been put to beneficial use, i.e., there was no "relation back" to commencement of the appropriation. Clausen, supra at p. 14.

reasonable diligence so long as he makes an effort commensurate with the obstacles. Unlike actual application, the appropriator's exercise of reasonable diligence in completing the appropriation will never be predicated on the occurrence of a condition precedent; it is to be expected regardless of events. See, In the Matter of Application for Beneficial Water Use Permits Nos. 55834-s76LJ and 56386-s76LJ by Zon G. and Martha M. Lloyd, Proposal for Decision, January 22, 1987, pp. 12-16 (Final Order April 13, 1987). Thus, as the appropriator's proceeding to complete the appropriation works is always in his control, and because the magnitude of the obstacles may always be estimated on a rational basis, a determination of the amount of time which should elapse between the initiation of an appropriation and its completion is not a priori arbitrary. Therefore, held, that the imposition of a time limit for completion of appropriation works for fire protection is not per se invalid.

7. As Permittee did not raise the issue of whether the department had given him long enough to complete the appropriation works, and as he did not apply for an extension of time but filed a Notice of Completion, the time limitations imposed for completion must be presumed to be reasonable.

The department has shown that Permittee did not complete the contemplated .06 acre-foot storage pond in the time allotted. However, he did construct a smaller pond (540 gallons.). Nevertheless, the department does not propose modification of the Permit simply to decrease the storage capacity for fire protection; rather, it proposes complete deletion of the fire protection use from the Permit.

The facts show that, although Permittee had timely impounded a small amount of water under the Permit, it had not timely made ready the equipment which would enable it to effectively convey the impounded water to a fire. As the impounded water is useless for fire protection in the absence of readily operational equipment and as Permittee stated for the record that a pond of that size was not suitable for fire protection purposes (Finding of Fact 10), it is apparent that Permittee lacks the bona fide intent to utilize the small impoundment for fire protection.

Lack of bona fide intent is fatal to establishment of a water right. Clausen, supra. Therefore, held, that Permittee's failure to install, by the time stated in the Permit for completion of the appropriation works, equipment on site which would enable him to effectively put diverted water to use in putting out a fire constitutes failure to timely perfect any appropriation for fire protection, and that accordingly revocation of the fire protection portion of Permit No.32798-76G must lie. MCA §85-2-314 (1985).

However, Permittee diligently constructed appropriation works for, and diverted, stock water. Thus, although the evidence shows that Permittee is not diverting with the bona fide intent to put the diverted water to fire protection use, it does show that it continues to have the bona fide intent to use, and actually has used, the small pond for stock water. Therefore, that portion of the Permit for stock water remains in effect. (Findings of Fact 1, 7.)

8. The department further seeks to modify the capacity of the storage pit, which is presently stated at .06 acre-feet to reflect the actual development as verified.

The pit actually constructed has a 540 gallon capacity and has been used for stock water only. (Finding of Fact 7.) Therefore, the Permit will be modified to reflect the reduced capacity of the storage pit and that the only use authorized is stock water. MCA §85-2-314.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

That portion of Beneficial Water Use Permit No. 32798-s76G by Harpole Family Corporation granting authorization to appropriate 5.00 gpm up to 2.40 acre-feet per annum for fire protection is stricken from the Permit.

The Permit is hereby modified as follows: Permittee is authorized to appropriate .09 acre-feet per annum from Warm Springs Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 24, Township 10 North, Range 08 West, Powell County, Montana, between January 1 and December 31, inclusive, each year for stock water use in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 24, Township 10 North, Range 08 West, Powell County, Montana. The capacity of the storage facility, an on-stream pit, is 540 gallons. The priority date is April 27, 1981.

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NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

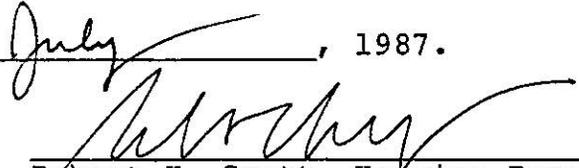
Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 28 day of July, 1987.

  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6625

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MEMORANDUM

I. One question that remains unanswered, yet which is of particular relevance to the appropriator who has received a permit to appropriate and store water for fire protection, is at what juncture is he entitled to "call" for water, as against junior appropriators, to fill his storage facility? Although MCA §85-2-401(2) provides that "[p]riority of appropriation made under this chapter dates from the filing of an application for a permit with the department", there is no express provision in the Water use Act which specifies when that priority date may first be exercised.

The general rule is that the holder of a valid senior water right (a prior appropriator) may "call" junior appropriators only if he requires the resulting water for beneficial use. However, a Permittee is not necessarily a prior appropriator; a Permit is merely a license to appropriate. Thus the question becomes, at what point does a Permittee become a prior appropriator for purposes of being able to call water? (i.e., when does he acquire a valid water right?)

The answer to this question is generally understood to be when he puts the water to the authorized beneficial use. However, if the nature of the proposed appropriation is such that he must store the water prior to the use, and circumstances require that he call junior appropriators in order to obtain the initial storage, he is caught in the paradoxical situation that he can't use the water until he obtains it, but he can't obtain the water until he uses it. There is, however, a strain of water

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law in Montana which recognizes the establishment of a valid water right in the appropriation prior to the water being put to a beneficial use. See Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

The seemingly aberrant decision in Bailey was justified on several bases. First, the court recognized that the existence of state statutes authorizing ownership of water rights by a water company, and public policy encouraging such enterprises, necessitated the decision. Second, the court concluded that compliance with the terms of the statutory water right filing system established in 1885 (which terms did not specify that the water be put to beneficial use) either provided a complete mode of acquiring a valid water right, or none at all. Third, the court found that the theory that a water right vests upon the diversion of water, before its application to beneficial use, was not alien to water law, but that this venerable theory had developed as a logical consequence of the law of prior appropriation being a branch of the law of possessory rights upon the public domain. "The method of making an appropriation was deduced from the requisite of obtaining possession of the stream. Actual use was not a prerequisite to the creation of the right and to invoking the doctrine of relation; actual diversion was enough, if with bona fide intent." Bailey supra, p. 173.

Realizing it was impossible to harmonize the two strains of law, i.e., the "Colorado theory" requiring actual beneficial use to establish a valid water right, and what I shall call the "theory of possessory right", the court in this case adopted the

latter, holding that at least for a public service corporation, "its appropriation is complete when it has fully complied with the statute and has its distribution system completed and is ready and willing to deliver water to users upon demand, and offers to do so." Bailey, supra, pp. 177-178.

If the "theory of possessory right" were applied to the scenario outlined above, the paradox could be resolved; i.e., Permittee could call for water upon completion of the works. However, whether the "theory of possessory right" can in such case be applied is uncertain, as it was but one of several bases the court considered in deciding Bailey. I would suggest, however, that the court's principal impetus for applying the doctrine was the perceived impossibility of maintaining independent ownership of water rights in the water companies, while simultaneously universally applying the "Colorado theory". The instant case being another incident of impossibility; i.e., it is impossible under the "Colorado theory" to call for water never before beneficially used, perhaps public policy considerations justify recognition of another limited exception to the Colorado doctrine.

Until a court of competent jurisdiction decides the matter, the Permittee, who is doubtless legitimately authorized to appropriate water upon compliance with MCA §85-2-307,310 and upon proof of the criteria listed in MCA §85-2-311, will retain an inchoate right to appropriate water for fire protection if he obeys the (legitimate) terms of the permit. His attempt to

"call" a junior appropriator, and the junior's response, will set the stage for the Court's decision as to when an appropriation right vests.

II. An alternative to applying for and receiving a permit to store water for fire protection under MCA Title 85, Chapter 2, Part 3 may exist under MCA §85-2-113(3) (1985), which provides that "[t]he board [of natural resources and conservation] shall adopt rules providing for and governing temporary emergency appropriations, without prior application for a permit, necessary to protect lives or property." This provision instructs the board to implement the principle that all water rights are subject to the right of the public to protect lives and property in case of emergency. The right to make a temporary appropriation clearly supersedes the rights of all other appropriators on the source; however, the right is limited.

The terms used to define this appropriation, i.e., "temporary emergency", obviously limit its scope. However, the legislature did not define or expand further on these terms. The statute simply directs that the board adopt rules providing for and governing temporary emergency appropriations necessary to protect lives and property.

In response to this mandate, the board has adopted Administrative Rule of Montana (ARM) 36.12.105 (1984).<sup>1</sup>

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<sup>1</sup>ARM 36.12.105 reads in toto: (1) A temporary emergency appropriation may be made without prior approval from the department, but the use must cease immediately when the water is no longer required to meet the emergency. (2) A temporary emergency appropriation does not include the use of water for the ordinary operation and maintenance of any trade or business. (3) The appropriator shall within 10 days of the day he begins a

The rule authorizes the use of water during an emergency without prior department approval; stating, however, that the use must cease upon cessation of the emergency; it restricts use of the water appropriated thereunder to emergencies; it requires subsequent reporting of the use. Thus, the statute and rule set forth certain parameters of this public right: it is not subject to call; the flow and volume are the amounts reasonably needed to defeat the emergency; the period of use is during the emergency. However, neither statute nor rule specifically address the question of whether water can be diverted prior to, and in preparation for, use during an emergency.

Whether the principle that use of water for public safety supersedes the use-established water rights of prior appropriators is inherent in the doctrine of prior appropriation, or is simply a rudimentary (and presumably constitutional) preference system created by legislative fiat, its existence is recognized in MCA §85-2-113(3). The price is a certain degree of diminution of the water rights of prior appropriators, but there is a limit to this diminution has been expressed by the legislature only in the phrase "temporary emergency appropriation."

That phrase can be interpreted either as meaning an appropriation made for a temporary emergency; or as meaning a temporary appropriation made during an emergency. The first

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temporary emergency appropriation file with the department, notification on Form 614 of the use to which the water was put, the dates of use, the amount of water used, and such other information as the department may require.

interpretation allows anticipatory storage, the second disallows it (as storage necessarily involves a permanent appropriation). The board arguably has adopted the second interpretation by Administrative Rule 36.12.101(6) defining "temporary emergency appropriation" as the temporary beneficial use of water; however, such interpretation, of central importance in determining the extent of the public right and conversely the limit to the diminution of the water rights of prior appropriators, is subject to change by the board. The legislative intent remains elusive.

If it is ultimately determined that the legislature intended to allow advance storage, the board must adopt rules providing therefor, see §85-2-113(3), which it has not done.

Simultaneously, the board should adopt rules regulating the storage of water for potential emergency use, for if it does not, great adverse effect could befall prior appropriators; e.g., small streams could be dried up by persons storing water allegedly in preparation for "large" emergencies. Accordingly, if it ultimately provides for anticipatory storage, the board, in adopting regulatory policy, should inter alia consider: (1) that the impoundment should be no more than the amount reasonably necessary to combat the anticipated emergency; (2) that the impoundment should be made with utmost regard for minimizing infringement on the rights of other appropriators; e.g., the impoundment should be made during a period of a high supply to demand ratio on the source; (3) that impoundment in anticipation of certain emergencies may be unreasonable vis-a-vis prior appropriations on the source; e.g., fighting a range or forest

fire would require impoundment of far more water than a residence and/or outbuilding fire; and (4) that the person impounding should be doing so only for the allowed fire protection use and should be able to demonstrate his ability to effectively use the impounded water for fire protection.

CAVEAT

Until the board announces its interpretation of MCA §85-2-113(3), i.e., whether said statute allows advance impoundment, and adopts rules providing for and governing advance storage, any person appropriating and storing water in advance of an emergency without a permit does so at risk of incurring both civil liability and criminal penalty. See MCA §85-2-122.

AFFIDAVIT OF SERVICE  
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, (DNRC) being duly sworn on oath, deposes and says that on July 21, 1987, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision by the Department on the Application for Beneficial Water Use Permit No. 32798-s76G, by Harpole Family Corporation, addressed to each of the following persons or agencies:

Harpole Family Corporation  
Tom Harpole  
Box 304  
Avon, MT 59713

T.J. Reynolds  
Field Manager  
DNRC, Water Rights Bureau  
1520 E. 6th Ave.  
Helena, MT 59620-2301  
(inter-departmental mail)

Gary Fritz  
Administrator  
DNRC, Water Resources Division  
1520 E. 6th Ave.  
Helena, MT 509620-2301  
(hand-issue)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 25<sup>th</sup> day of July, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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.

Jim P. Gilman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1990

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