

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER)
RIGHT NO. 34551-c76H BY STANLEY M.)
AND MYRA L. BARTOS) FINAL ORDER

* * * * *

The time period for filing exceptions and objections to the Proposal for Decision of July 17, 1984, has expired. No submissions have been received. Therefore, having considered the matter and being fully advised in the premises, the Department of Natural Resources and Conservation hereby incorporates the Proposal for Decision of July 17, 1984 herein by reference, and, with the corrections below, adopts same as the Final Order herein.

The following typographical errors in the Proposal for Decision are hereby corrected:

A. P. 4, Proposal, Finding of Fact Number 14 should read as follows:

"The parties and the water commissioners have historically treated the north channel as a natural channel for decades."

B. P. 5, paragraph (a) of the Order should read:

"Provided that the diversion works to be constructed shall be designed and constructed in a good and sufficient manner and with the assistance and aid of SCS or DNRC personnel."

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C. P. 5, paragraph (c) of the Order should read:

"The Applicant is specifically directed pursuant to this paragraph to curtail use of the water rights changed herein to provide the aforesaid quantity of water at the specified turnout whenever the source of supply is insufficient to fill the priorities now owned by the Baldwin Land and Cattle Company or those claiming thereunder."

WHEREFORE, based upon the foregoing, the Department hereby issues the following:

FINAL ORDER

Application for Change of Appropriation Water Right No. 34551-c76H is hereby granted to Stanley and Myra Bartos to change the following existing water rights.

Current Use

SOURCE OF SUPPLY: MCCALLA CREEK

POD: SWNE SECTION 1, TOWNSHIP 8 NORTH, RANGE 21 WEST, RAVALLI COUNTY

AMOUNT: 2 CFS UP TO 657.5 ACRE-FEET WITH PRIORITIES OF APRIL 1, 1865 AND MAY 1, 1883

PURPOSE OF USE: 2 CFS UP TO .5 ACRE-FEET FOR STOCK AND 2 CFS UP TO 657 ACRE-FEET FOR IRRIGATION

TIME OF USE: APRIL 1 - OCTOBER 31

PLACE OF USE: NWNW SECTION 6, TOWNSHIP 8 NORTH, RANGE 20 WEST AND NENE SECTION 1, TOWNSHIP 8 NORTH, RANGE 21 WEST, ALL IN RAVALLI COUNTY, COMPRISING 80 ACRES MORE OR LESS

Stanley M. and Myra L. Bartos are authorized to change the point of diversion of the above-described rights in the following particular.

Changed Use

POD: SWNENW SECTION 1, TOWNSHIP 8 NORTH, RANGE 21 WEST, ALL IN RAVALLI COUNTY

- (a) Provided that the diversion works to be constructed shall be designed and constructed in a good and sufficient manner and with the assistance and aid of SCS or DNRC personnel;
- (b) Provided further that water be provided through such point of diversion and associated ditch in sufficient quantities to fulfill all water rights held as of this date by the Baldwin Land and Cattle Company, or Carl and Cheryl Baldwin, or those thereafter claiming through them so long as said rights are otherwise in priority. Said waters shall be measured at a certain turnout in said ditch in the SWNE Section 1, Township 8 North, Range 21 West, in Ravalli County;
- (c) Provided further that in the event the obligation specified in paragraph (b) is unfulfilled in whole or in part, the Applicants shall to the extent of such default cause sufficient waters to bypass the point of diversion provided for herein such that said quantity is made available at the referenced turnout through a point of diversion located in the SWNE Section 1, Township 8 North, Range 21 West, in Ravalli County.

The Applicant is specifically directed pursuant to this paragraph to curtail use of the water rights changed herein to provide the aforesaid quantity of water at the specified turnout whenever the source of supply is insufficient to fill the priorities now owned by the Baldwin Land and Cattle Company or those claiming thereunder.

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 15th day of January, 1985.

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

AFFIDAVIT OF SERVICE
MAILING

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 September 10, 1985, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Stanley M. and Myra L. Bartos, Application No. 34551-c76H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Stanley and Myra Bartos, Rt. 2, Box 149, Stevensville, MT 59870
2. Karl Boehm, Milodragovich, Dale & Dye, P.O. Drawer R, Missoula, MT 59806
3. Baldwin Land and Cattle Corp., Rt. 2, Box 150, Stevensville, MT 59870
4. Jeff Langton, Attorney at Law, 220 South 3rd, Hamilton, MT 59840
5. Mike McLane, Water Rights Bureau Field Office, Missoula (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources Division (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

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

On this 10 day of September, 1985, 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.

James P. [Signature]
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 34551

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT 34551-c76H BY STANLEY M.)
AND MYRA L. BARTOS)

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Stevensville, Montana.

STATEMENT OF THE CASE

The present application seeks to change the point of diversion for existing water rights. The Applicant appeared through counsel Karl Boehm.

An objection to this application was filed with the DNRC by the Baldwin Land and Cattle Corp. and Carl and Cheryl Baldwin. These Objectors appeared at the hearing and were represented by counsel Jeffrey Langton.

The pertinent portions of this Application were duly and regularly published for three successive weeks in the Ravalli Republic, a newspaper of general circulation printed and published in Hamilton, Montana.

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FINDINGS OF FACT

1. The source of supply for all parties herein is McCalla Creek.

2. The Applicant has the most senior rights relative to the Objector, although one priority date is owned by both parties. Typically, the flows of McCalla Creek are such that there is insufficient water to provide for any late season irrigation by the Objectors.

3. The present point of diversion is located on a northern channel of McCalla Creek. The proposed point of diversion is upstream at the confluence of this channel and the middle channel of McCalla Creek.

4. The Applicant and the Objectors share the same diversion point. The waters of McCalla Creek are distributed to the parties via the same ditch.

5. Diversions of the full decreed share at the present point of diversion is difficult at times. Rocks are commonly placed upstream at the site of the proposed point of diversion to endure more water to enter the northern channel. The ditch at the present point of diversion has to be dug down at times to divert the full decreed amount.

6. The physical attributes of the site of the proposed point of diversion will make it difficult to install and maintain a diversion structure that will withstand spring snow-melt runoff and its associated debris.

7. It cannot be determined whether the proposed point of diversion and the ditch proposed to be associated with it will function more efficiently than the old diversion system. That is to say, it is impossible to determine on this record whether the proposed system will lose less water per unit than the present system.

8. The Applicant uses the 1st and 8th rights out of those rights decreed in Dawning v. Johnson.

9. The gradient of the drainage is to the south, meaning that the southern channels of McCalla Creek are more likely to receive the waters from the upstream drainage than the northern channels are.

10. To divert the full measure of his right from the existing point of diversion, the Applicant must, and has historically, dig his ditch down and constructed a "wing-dam" of rocks from time to time.

11. The purpose of the application for change is to provide a point of diversion that would make it easier for the Applicant to divert the quantity of water he has historically used. It will not result in an increase in the water historically available.

12. The distance between the present point of diversion and the proposed point of diversion is approximately 1/4 of a mile.

13. If the "north channel" of McCalla Creek was ever a ditch, it has lost its identity as such and now is indistinguishable from the Creek itself.

14. The parties and the water commissioners have historically treated the south channel as a natural channel for decades.

CONCLUSIONS OF LAW

1. The DNRC has jurisdiction over the subject matter herein, and over the parties hereto. MCA 85-2-402 et seq.

2. The Applicant is the holder of decreed rights, which are prima facie evidence of the existence of its same. See Galiger v. McNulty, 80 Mont. 339, 200 P. 401 (1927).

3. The Objectors are the holders of decreed rights and use rights, none of which rights are wholly senior to the Applicants.

4. The Objectors have vested rights to maintenance of the stream conditions attendant to their water uses.

5. The change in point of diversion sought by the Applicants will result in adverse effect to the vested rights to maintenance of the stream conditions held by the Objectors unless the same is properly conditioned. The conditions made part of the change herein protect against any such adverse effect.

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

Application for change of Appropriation Water Right No. 34551-c76H is hereby granted to Stanley and Myra Bartos to change the following existing water rights.

CASE # 34551

Current Use

Source of Supply: McCalla Creek
POD: SWNE Section 1, T8N, R. 21 West, Ravalli County
Amount: 2 cfs up to 657.5 acre feet with priorities of April 1, 1865 and May 1, 1883
Purpose of Use: 2 cfs up to .5 acre feet for stock and 2 cfs up to 657 acre feet for irrigation
Time of Use: April 1 - October 31
Place of Use: NWNW Section 6, T8N, R20W and NENE Section 1, T8N, R21W, all in Ravalli County, comprising 80 acres more or less

Stanley M. and Myra L. Bartos are authorized to change the point of diversion of the above-described rights in the following particular.

Changed Use

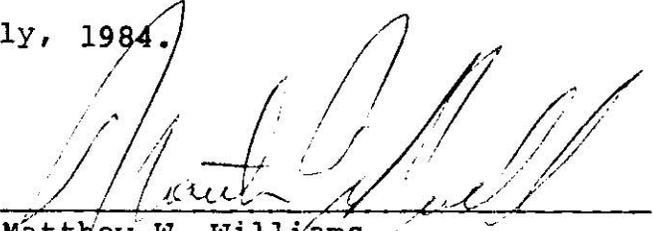
- POD: SWNE Section 1, T8N, R21W, all in Ravalli County
- (a) Provided that the diversion works to be constructed shall be designed and constructed in a good and sufficient manner and with the assistance and aid of SCS or DNRC personnel;
 - (b) Provided further that water be provided through such point of diversion and associated ditch in sufficient quantities to fulfill all water rights held as of this date by the Baldwin Land and Cattle Company, or Carl and Cheryl Baldwin, or those thereafter claiming through them so long as said rights are otherwise in priority. Said waters shall be measured at a certain turnout in said ditch in the SWNE Section 1 T8N, R21W, in Ravalli County;
 - (c) Provided further that in the event the obligation specified in paragraph (b) is unfulfilled in whole or in part, the Applicants shall to the extent of such default cause sufficient waters to bypass the point of diversion provided for herein such that said quantity is made available at the referenced turnout through a point of diversion located in the SWNE Section 1, T8N, R21W, in Ravalli County.

The Applicant is specifically directed pursuant to this paragraph to curtail use of the water rights changed herein to provide the aforesaid quantity of water at the specified turnout whenever the source of supply is sufficient to fill the priorities now owned by the Baldwin Land and Cattle Company or those claiming thereunder.

NOTICE

Objections or exceptions to this Proposal for Decision must be filed with Gary Fritz, Administrator, Water Resources Division, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59620, no later than 20 days from service hereof. Said objections must include a demand for oral argument, or the same is waived.

DATED this 17th day of July, 1984.



Matthew W. Williams
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620

CASE # 34551

AFFIDAVIT OF SERVICE

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

Dorothy Millsop, Legal Secretary of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July~~20~~, 1984, she deposited in the United States mail, a PROPOSAL FOR DECISION by the Department on the Application by STANLEY M. AND MYRA L. BARTOS, Application No. 34551-c76H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Stanley and Myra Bartos, Rt. 2, Box 149, Stevensville, Montana 59870
2. Karl Boehm, Milodragovich, Dale & Dye, P.O. Drawer R, Missoula, Montana 59806
3. Baldwin Land and Cattle Corp., Rt. 2, Box 150, Stevensville, Montana 59870
4. Jeff Langton, Attorney at Law, 220 South 3rd, Hamilton, Montana 59840
5. Dave Pengelly, Missoula Area Office Supervisor, Missoula, Montana (regular department mail)
6. Matt Williams, Hearing Examiner, DNRC, Helena, Montana (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Dorothy Millsop

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

On this 20th day of July, 1984, before me, a Notary Public in and for said state, personally appeared Dorothy Millsop, known to me to be the Legal Secretary 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.

Donald M. McIntyre
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12/15/84

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