

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. 38719-s43Q BY DUANE AND)
VICKI L. BENDER)

* * * * *

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.

FINAL ORDER

WHEREFORE, subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 38719-s43Q is granted to Duane & Vicki L. Bender to appropriate 40.0 gallons per minute up to 10.0 acre-feet per year for sprinkler irrigation of 5 acres more or less from April 1 to October 31 inclusive of each year and 40.0 gallons per minute up to 0.10 acre-feet per year for stock watering purposes from January 1 to December 31, inclusive of each year. Place of use of this water is in the SE1/4 SE1/4 SW1/4 of Section 21, Township 1 South, Range 26 East

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in Yellowstone County. The source of supply of the waters for which this permit is issued shall be Blue Creek; the waters to be diverted at a point in the SE1/4 SE1/4 SW1/4 of Section 21, Township 1 South, Range 26 East in Yellowstone County. The priority date for this permit shall be September 14, 1981 at 2:15 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 determinations of these rights as provided by Montana law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. 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 damages that may be so caused, even if such damage is the necessary and unavoidable consequence of the exercise of this permit.

C. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages to a downstream prior appropriator's rights occasioned by Permittees' alteration of the stream channel of Blue Creek,

D. The Permittees shall at all times be subject to the authority and jurisdiction of any water commissioner duly

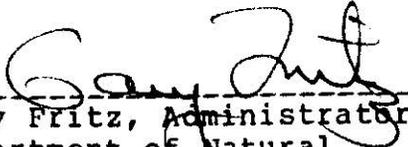
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appointed to distribute the waters of the source of supply. The Permittees shall further pay their proportionate share of the cost of such water commissioner, in the same manner and to the same extent as any other water user subject to the authority of such water commissioner.

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 ____ day of _____, 1982.



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

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AFFIDAVIT OF SERVICE
Final Order

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

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says That on November 19, 1982, she deposited in the United States mail, certified mail, return receipt requested mail, an order by the Department on the Application by Duane & Vicki Bender, Application No. 38719, for a Permit to Appropriate water, addressed to each of the following persons or agencies:

1. Duane & Vicki Bender, P. O. Box 31553, Billings, MT 59107
2. Maxine Oliver, 121 Monroe Street, Billings, MT 59101
3. Lloyd & Marilyn Hartman, 4146 Arden Avenue, Billings, MT 59101
4. G. Edward & Richard Oliver, 411 Hillview Lane, Billings, MT 59101
5. Kieth Kerbel, Billings Area Office Supervisor (inter-department mail)
6. Bill Dockins, hearing Examiner, DNRC, Helena (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Beverly J. Jones

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

On this 19th day of November, 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.

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

CERTIFIED NUMBERS 38078 - 53081

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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. 38719-s43Q BY DUANE AND)
VICKI L. BENDER)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Billings, Montana, on August 24, 1981.

STATEMENT OF THE CASE

This application seeks 40 gallons per minute up to 10.0 acre-feet per year for irrigation of lawn and garden on 5 acres of land more or less and 40 gallons per minute up to 0.10 acre-feet per year for stock watering purposes. The source of supply is to be Blue Creek, a tributary of the Yellowstone River.

Pursuant to MCA 85-2-307 (1981), notice of this application was published for three consecutive weeks in the Billings Gazette, a newspaper of general circulation in the area of the source. The Department of Natural Resources and Conservation also served notice of this application by first-class mail to permit holders interested or affected by this appropriation.

A timely objection to this application was filed with the Department of Natural Resources and Conservation by Lloyd W. and Marilyn R. Hartman. These Objectors did not personally appear

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nor were they otherwise represented at the hearing in this matter.

A timely objection to this application was filed with the Department of Natural Resources and Conservation by Maxine E. Oliver. This Objector appeared personally at the hearing in this matter.

A timely objection to this application was filed with the Department of Natural Resources and Conservation by G. Edward Oliver, Jr. and Richard L. Oliver. G. Edward Oliver, Jr. appeared personally at the hearing in this matter.

The Department of Natural Resources and Conservation was represented at the hearing by Keith Kerbel, Area Office Supervisor for the Department's Billings office.

PRELIMINARY MATTERS

Certain allegations made by the Objectors raise threshold questions of materiality and relevance. Objectors claim that a spring upon the Applicants' property, if developed, could satisfy all or part of the Applicants' water requirements. The Hearing Examiner concludes as a matter of law that this claim is immaterial to the present proceeding. The law does not require the Applicants to develop a water source, at their expense, just because the Applicants' use of water from this source is more convenient to Objectors. Applicants are entitled to an appropriation by the terms of a permit so long as the requirements set forth in MCA 85-2-311 (1981) are met.

Furthermore, the spring on the Applicants' land may be hydrologically connected to Blue Creek, and it is possible that any appropriation from this stream would constitute an appropriation from Blue Creek.

The Objectors also allege that diversions installed by an upstream subdivision have decreased the quantity of water in Blue Creek to the point that there is insufficient water to satisfy the Applicants' claim. The questionable legality of these subdivision diversions and streambed alterations have constituted part of the evidence offered in the instant hearing. The Hearings Examiner concludes that this evidence is irrelevant to these proceedings. Each prospective user of water on Blue Creek must obtain a permit to appropriate water for his use. The acts of others, who may be obtaining water without meeting statutory requirements, cannot prejudice the Applicants in the instant proceeding.

EXHIBITS

The Applicants offered two exhibits into the record:

(A-1) A group of documents including a general description of Applicants' proposed diversion and use, a copy of a notice of appropriation by one John M. Conway, dated April 8, 1911, a copy of a floodplain permit issued to applicant Duane R. Bender, date March 10, 1982;

(A-2) A copy of a Certificate of Survey No. 646 3rd amended tract B-3 amended, located in the S1/2SW1/4 Section 21, T1S, R26E, P.M.M, Yellowstone County, Montana, upon which a general description of Applicants' property and irrigation system has been hand-drawn by the Applicants.

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

The Objectors did not offer any exhibits into the record.

The Department offered one exhibit into the record:

(D-1) A summary of claims filed with the Department's Billings Area Office to date on behalf of water users on Blue Creek.

The Hearings Examiner, after considering the submitted evidence, and now being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law and Proposed Order.

FINDINGS-OF-FACT

1. Application for Beneficial Water Use Permit No. 38719-s43Q was filed with the Department of Natural Resources and Conservation on September 14, 1981, at 2:15 p.m.
2. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and they are not attempting to speculate in the water resource.
3. The Applicants intend initially to use the appropriated water to irrigate an existing lawn and garden on approximately two acres of land. The Applicants have present plans to irrigate the remainder of their five acres of land which they intend to plant with trees, bushes, fairway grass, and alfalfa.
4. The Applicants intend to use appropriated water to water stock.
5. The use of the water claimed by the Applicants would be of material benefit to themselves.

6. The quantity of water claimed is reasonable for Applicants' proposed uses, and the uses will not result in the waste of the water resource.

7. The Applicants intend to divert water from Blue Creek by means of a pump and pipeline and to irrigate via above- and underground sprinkler systems.

8. The Applicants' proposed means of diversion are customary and adequate for their intended purposes and will not result in a waste of the water resource.

9. There are no permits or water reservations that Applicants' proposed use will unreasonably interfere with.

10. There are surplus waters available for the Applicants' use throughout the period during which they request to use the waters and in the amounts claimed herein. The evidence indicates that Blue Creek's flow fluctuates dramatically in response to climatic conditions. At certain times throughout the Applicants' requested period of use, there is sufficient water to satisfy the Applicants' proposed use without interfering with the rights of prior appropriators.

11. Objectors Maxine E. Oliver, G. Edward Oliver, Jr. and Richard L. Oliver divert water from Blue Creek at a point upstream from Applicants' proposed point of diversion.

12. Objectors Lloyd W. and Marilyn R. Hartman divert water from Blue Creek at a point downstream from Applicants' proposed point of diversion.

CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and has jurisdiction over the persons that are parties to this matter whether they have appeared or not. See MCA 85-2-301 et seq. (1981)

2. The Hearing Examiner finds and concludes that the Department of Natural Resources and Conservation must issue the permit requested herein if:

"(1) There are unappropriated waters in the source of supply:

(a) at times when the water can be put to 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)." MCA 85-2-311 (1981).

3. The Applicant is not seeking an appropriation in excess of 10,000 acre-feet per year and therefore need only prove by substantial credible evidence the criteria listed in (2) above.

4. There is substantial credible evidence that unappropriated waters exist in the source of supply, Blue Creek, at times when the water can be put to the use proposed by the Applicants, in the amount and throughout the period the Applicants seek to appropriate, in at least some years. The evidence indicates that the flow of Blue Creek is erratic, but at times interspersed throughout the appropriation period there is more than sufficient water to satisfy the claims of both the Applicant and all prior appropriators. Thus, there will be some years in which the amount of water requested by the Applicants will be available for a beneficial use. The Applicants are entitled to appropriate this surplus water in the amount requested and to use this water in the order of their priority.

5. The Applicants' use of the requested water will not adversely affect the rights of prior appropriators. It should be noted that Objectors Oliver are in a position to protect their own water use. These Objectors divert water at a point on Blue Creek upstream from Applicants' proposed diversion. Thus the Applicants are not even in a position to disturb these Objector's prior use of water.

Objectors Hartman, however, divert water at a point downstream from the Applicants' proposed diversion. These Objectors did not attend the hearing and the record is insufficient to show adverse effects upon these Objectors' prior appropriation or to refute Applicants' prima facie assertions that Applicants' use will not adversely affect Objectors Hartmans' rights. The record, though sparse, indicates that Objectors Hartman are primarily concerned with streambed alterations that have been undertaken by the Applicants. Applicants allege that these activities are related to the development of a spring on the Applicant's property pursuant to a floodplain permit. See Applicants' Exhibit A-1. The determination of whether the alleged streambed alterations made by the Applicants interfere with Objectors Hartmans' water rights is separate and distinct from the determination of whether Applicants' use of the water requested will adversely affect Objectors Hartmans' rights. This hearing results only in the conclusion that the Applicants' use of the water requested will not adversely affect the rights of Objectors. Whether or not the Applicants have complied with provisions of their floodplain

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permit or have interfered with the Hartmans' water rights by altering the streambed is not decided here and is not pertinent to a proceeding to decide whether to issue a water permit. See MCA 85-2-311 (1981).

6. The Applicants' proposed means of diversion, construction, and operation of the appropriation works are adequate. The proposed means of diversion are reasonable and customary for their intended purposes and will not result in the waste of the water resource. See State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

7. The use of the water claimed for stock watering and for the irrigation of a lawn and garden is a beneficial use, see MCA 85-2-102(2) (1981), and the amounts of water claimed for intended purposes are reasonable estimates of the quantity of water required for such purposes. See generally Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905); Wardoh v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

8. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and they are not attempting to speculate in the water resource. See Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900). Even though the Applicants presently irrigate approximately two acres of land and the requested water is in excess of the amount required to do so, they have present plans to use all of the requested water to irrigate the remainder of their five acre tract. A permit merely licenses the Applicants to begin their appropriation. A completed appropriation requires that the Applicants actually

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apply the water to a beneficial use. See generally Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912). The Applicants must proceed diligently to put the water requested to beneficial use. A Certificate of Water Right will be issued pursuant to MCA 85-2-315 (1981) only when the Applicants complete their proposed appropriation.

9. The evidence supports a conclusion that the Applicants' use will not interfere unreasonable with other planned developments for which a permit has been issued or for which water has been reserved. There is no indication in the record that there exist any such outstanding permits or reservations which may be impacted by the Applicants' use.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following PROPOSED ORDER is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 38719-s43Q is granted to Duane & Vicki L. Bender to appropriate 40.0 gallons per minute up to 10.0 acre-feet per year for sprinkler irrigation of 5 acres more or less from April 1 to October 31 inclusive of each year and 40.0 gallons per minute up to 0.10 acre-feet per year for stock watering purposes from January 1 to December 31, inclusive of each year. Place of use of this water is in the SE1/4 SE1/4 SW1/4 of Section 21, Township 1 South, Range 26 East in Yellowstone County. The source of supply of the waters for which this permit is issued shall be Blue Creek; the waters to be diverted at a point in the SE1/4 SE1/4

SW1/4 of Section 21, Township 1 South, Range 26 East in Yellowstone County. The priority date for this permit shall be September 14, 1981 at 2:15 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 determinations of these rights as provided by Montana law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. 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 damages that may be so caused, even if such damage is the necessary and unavoidable consequence of the exercise of this permit.

C. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages to a downstream prior appropriator's rights occasioned by Permittees' alteration of the stream channel of Blue Creek,

D. The Permittees shall at all times be subject to the authority and jurisdiction of any water commissioner duly appointed to distribute the waters of the source of supply. The Permittees shall further pay their proportionate share of the cost of such water commissioner, in the same manner and to the same extent as any other water user subject to the authority of such water commissioner.

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NOTICE

This Proposal for Decision is offered for the review and comment of all parties or record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before October 22, 1982

DONE this 27th day of September, 1982.

William S. Dockins

William S. Dockins, Hearings Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449-3712

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