

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. 39573-s43C BY BERKELEY R. DOWD)

Objection to the Proposal for Decision entered in this matter has been filed by the Objectors, Jack E. Shemer, C. Dan Stuart, Randy L. Miller, Juanita F. Miller, Doyle H. Whaley, Clara Whaley, Henry H. Koch and Henry R. Koch.

The Objectors make essentially three arguments: (1) The Hanks v. Sloss decree (1952) is not limited in application to the irrigation season; (2) evidence that the Applicant used the water during the summer months, which is in contravention of the Hanks decree, was improperly excluded; and (3) the Objectors provided substantial credible evidence as to their use of the water from March 1 through November 30 which was either ignored or not considered in the Proposal for Decision.

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FIRST CONTENTION

Addressing the first contention, the Hearings Examiner finds that the Objectors are attempting to extend their water rights by claiming Hanks allows them to use the water for purposes other than irrigation. After analyzing Hanks and reviewing the tapes and evidence in the record, the Examiner finds that Hanks grants seniority over Sloss and his successors only as to irrigation use.

The thrust of Hanks is that Hanks, by default judgment, was granted seniority over Sloss in use of the Canyon Creek for irrigation purposes. The Examiner notes that "Canyon Creek," "Prairie Creek," and "Sometimes Creek" are names for the same creek, herein designated as "Creek."

The argument in Hanks arose after Sloss partially demolished Hanks' means of diversion and so interfered with Hanks' use of the water for irrigating his land and crops. Sloss was permanently enjoined from interfering from Hanks' beneficial use of the water for irrigation purposes. Although the decree states that Hanks owns the right to use up to five cubic feet per second for "the irrigation of said lands and premises and other beneficial uses" [Hanks decree, pages 6-7], the entire decree centers on the right of Hanks to irrigate his crops without interference by Sloss.

A completed appropriation of water requires that the water actually be applied to a beneficial use. Bailey v. Tintinger, 45 Mont. 154 (1912).

Evidence in the record indicates that the Objectors are using the water primarily for irrigation purposes and only incidentally for other uses.

Objectors Whaley, Miller, Stuart, and Shemer filed written claims for irrigation water from the Creek from March 1 to September 30.

Objectors Shemer, Miller, and Stuart filed written objections to the Applicant's application. Shemer and Miller claimed they used Creek water to irrigate alfalfa and hay from May 15 to September 15 and to water two horses from May 1 to October 1. Neither objection states that the Objector uses the water for domestic or other use. Stuart claimed he used Creek water to irrigate alfalfa and hay from May 1 to September 15 and to water two horses from May 1 to October 1. His objection did not state he used the water for domestic or other use. The amount of water necessary to water so few horses does not justify finding that the Objectors used the Creek for stockwatering purposes.

Stuart testified that he used the Creek to raise alfalfa and that he would not use the water during the winter months. Stuart testified that he had tried to keep a couple of horses on his land but could not continue because the horses could not be watered and kept away from Stuart's foundation at the same time. Stuart testified he would keep horses on the land if he had more water, and that he intends to have some cattle on the land in the future.

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Stuart testified that he has put a foundation for a house on the land but that he would not need water for his domestic use until about 4-5 years from the hearing date. Stuart had not filed for domestic water.

Stuart testified that if he could clean out the ditches, more water would flow onto his land for his use. This means Stuart would be making the water conveyance system more efficient. Judging from Stuart's testimony, Examiner finds that the clamor for new efficiency masks an attempt to expand the use granted. This is contrary to the concepts of beneficial use and priority filing. See, Quigley v. McIntosh, 110 Mont. 495 (1940) and Stone, Selected Aspects of Montana Water Law (1978), specifically page 42.

Stuart said the Objector Miller's land is used for alfalfa and hay and that Miller told Stuart of his plans to live on the land in the future. Stuart also testified that Objector Shemer has hay and horses and a structure on that land. Neither Miller nor Shemer filed claims for domestic use of Creek water.

Objector Henry H. Koch testified that he has leased Miller's land for the last five years and that he would use Creek water, if available, in the middle of April or early May at the earliest. Koch stated that he had 12 cows and a bull on the Miller land which drank Creek water last year. Miller's objection to Applicant's application states that only two horses used Creek water.

Therefore, it is the Hearing Examiner's evaluation that the Hanks decree (as shown by subsequent use of Creek water by the Objectors) is restricted in its effect to irrigation use during the irrigation season.

Considering the growing season for alfalfa and hay in that climatic area and the bulk of the witnesses testimony, the Examiner finds that the irrigation season, on the average, runs from May 1 to September 30, subject to the availability of the Creek water.

SECOND CONTENTION

The Objectors' second contention is that the Examiner improperly excluded from the Proposal evidence relating to the Applicant's use of Creek water during the summer.

During the hearing, Objectors gave testimony that Applicant used the water during the summer. The Examiner allowed the Objectors to testify as fully as they wished, but the Examiner cautioned the Objectors, reminding them that evidence of use not during the time period requested in the Applicant's application (September 1 to May 31) would not be considered. Such information is beyond the application and therefore beyond the scope of this administrative hearing.

The Examiner did consider the substantial and credible evidence regarding Objectors' use of Creek water for irrigation from May 1 to May 31 and from September 1 to September 30. This decision reflects that consideration.

THIRD CONTENTION

The third contention which the Objectors set forth is that the Objectors showed substantial credible evidence of their use of Creek water from March 1 to November 30. However, the Examiner finds that the evidence presented on the Objectors' use from March 1 to April 30 and from October 1 to November 30 is not substantial and credible. For example, Objector Henry R. Koch testified that the latest he had seen water flow was in November; the water went past his property and onto Objector Stuart's property. Stuart, however, had testified an hour earlier that he had not seen water flow on his property in November.

Henry H. Koch testified that the earliest he had ever seen water flow was in February. Henry R. Koch testified that the earliest he had ever seen water flow was in March. Henry H. Koch and Henry R. Koch are father and son, live together, and have leased the Miller land for the last five years. Stuart testified that in the two years he has irrigated his land he did not know when water first flowed through the Creek onto his land.

The evidence presented supports the finding that this intermittent stream (the Creek) generally is used by the Objectors from May 1 to September 30. The Examiner did not find credible evidence which the Examiner considered extraordinary or exceptional.

In addition to these responses to Objectors' objections, the Examiner cautions the Applicant from exceeding the boundaries of this application. The Applicant is granted certain rights to Creek water for

stockwatering purposes only during the non-irrigation season. Any other use or time of use of Creek water exceeds the Applicant's permit. For example, this means that if Mr. Schanck wishes to use some Creek water for his house, he should have a claim or provisional permit.

At all times the availability of water in the source limits the effect of this decree. The Proposal for Decision previously entered in this matter is expressly incorporated herein.

WHEREFORE, based on these findings and conclusions, the following Final Order is hereby issued:

APPLICATION NO. 39573-s43C

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 39573-s43C is hereby granted to Berkeley R. Dowd, to appropriate 10 gallons per minute up to 1.5 acre-feet per year for stock watering purposes. The point for diversion of this water is in the SE 1/4 SW 1/4 SW 1/4 of Section 5, Township 5 South, Range 16 East, Stillwater County, Montana, by means of an infiltration gallery in Sometimes Creek to a culvert springbox, to stock tanks by means of a buried pipe line. The place of use of this water is in the NW 1/4 SE 1/4 SW 1/4, and NW1/4 SW1/4 of Section 5, Township 5 South, Range 16 East, in Stillwater County, Montana. The source of supply of the waters for this permit is Sometimes Creek, and the

waters are to be diverted for use from October 1 to April 30, inclusive, of each year. The priority date for this permit shall be November 19, 1981, at 10:07 a.m.

This permit is subject to the following express conditions, limitations, and restrictions:

1. 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.

2. Nothing herein shall be construed to affect or reduce the Permittee's 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.

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

4. The Permittee 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 Permittee shall further pay his proportionate

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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.

5. The Permittee shall install an adequate water flow measuring device at a suitable place as near as practicable to the point where the water is diverted from the source of supply in order to record the flow rate and volume of water diverted. The Permittee shall keep a written record of the flow rate and volume of all waters diverted including the period of time and shall submit said records to the Department on request.

6. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for stock watering on the above-described lands. At all times when water is not reasonably required for use in this fashion, Permittee shall cause the waters to be left in the Sometimes Creek.

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 30th day of March, 1983.

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

Karlen J. Moe
Karlen J. Moe, Hearings Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

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AFFIDAVIT OF SERVICE
FINAL ORDER

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 30, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Berkeley R. Dowd, Application No. 39573-s43C, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Berkeley Dowd, Rt. 2, Box 54, Fishtail, MT 59028
2. Jack Shener, 270 Ocean Rd., Los Angeles, CA 90048
3. C. Dan Stuart, 1725 Yellowstone Avenue, Billings, MT 59102
4. Randy Miller, Box 10, Boonescamp, Kentucky 41204
5. Bill Nather, 200 Securities Building, Billings, MT 59103
6. Joel E. Guthals, Wright, Tolliver, Guthals, Prater & Leroy, P.O. Box 1977, Billings, MT 59103
7. Karlen J. Hoo, Hearing Examiner, Montana Law Review, Univ. of Mt. Law School, Missoula, Mt. 59812
8. Keith Kerbel, Billings Field Office (inter-dept. mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

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

On this 29th day of March, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

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

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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. 39573-s43C BY BERKELEY R. DOWD)

Pursuant to the Montana Water Use Act and to the contested cases provision of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Billings, Montana, on August 24, 1982.

STATEMENT OF THE CASE

Application No. 39,573-s43C requests the right to divert 10 gallons per minute up to 1.5 acre-feet per year for stock watering purposes at a point in the SE 1/4 SW 1/4 SW 1/4 of Section 5, Township 5 South, Range 16 East, Stillwater County, Montana. The source of supply is Sometimes Creek, a tributary of Prairie Creek (also known as Canyon Creek) located in Stillwater County, and the waters are to be diverted for use from September 1 to May 31, inclusive, of each year.

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Pertinent portions of this application were duly published for three successive weeks in the Billings Gazette, a newspaper of general circulation printed and published in Billings, Montana, and in the Stillwater County Citizen, a newspaper of general circulation printed and published in Columbus, Montana.

On April 29, 1982, written objections to the granting of this application were filed with the Department by Jack E. Shemer, C. Dan Stuart, Randy L. Miller, and Juanita F. Miller, who alledged generally that the application was contrary to a prior water rights decree, Hanks v. Sloss (thirteenth judicial district court, 1952). Other objectors were Doyle H. Whaley, Clara Whaley, Henry H. Cook, and Henry R. Cook, all of whom previously joined in the complaint against Mr. Dowd's diversion filed in district court.

Appearing to testify on behalf of the Applicant were Berkeley Dowd, Miles Keogh and Wilbur Schanck, all of whom were represented by William Mather, an attorney of Moulton, Bellingham, Longo and Mather, Billings, Montana. Mr. Mather was also present throughout the hearing. Ed Von Seggern of the Soil Conservation Service also spoke on the Applicant's behalf.

Appearing to testify on behalf of the Objectors were C. Dan Stuart, Henry H. Cook, and Henry R. Cook. All Objectors listed herein were represented by Joel Guthals, an attorney of Wright, Tolliver, Guthals, Prater & Leroy, Billings, Montana. Mr. Guthals was present throughout the hearing.

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Appearing as the Hearings Examiner was Karlen J. Moe from the Department in place of Matt Williams, the initially-appointed hearings examiner, who could not preside over the proceedings due to a scheduling conflict. There were no objections to Ms. Moe's appearance. Appearing on the behalf of the Department was Keith Kerbel, Billings Area Office Supervisor.

PRELIMINARY MATTERS

Much of the Objectors' evidence presented at the hearing focused on allegations that Mr. Dowd has used water from Prairie Creek during the summer months contrary to the 1952 decree Hanks v. Sloss, Objector's Exhibit 0-1.

According to the Hanks decree, the Hanks' successors have priority to Prairie Creek waters over the Sloss' successors for seasonal irrigation purposes for 5 cfs of water. Counsel for the Applicant and Objectors stipulated at the hearing that the Applicant is Sloss' successor and the Objectors are Hanks' successors.

The Hanks decree is relevant to this hearing so far as it establishes the Objectors' priority over the Applicant during the irrigation season. The decree did not specify the beginning and ending dates of the irrigation season. The Hanks decree is the subject matter of pending litigation between the Applicant and the Objectors in district court.

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This hearing is designed to hear objections regarding the Applicant's use of water from September 1 to May 31. Objections as to use from June 1 to August 31 were admitted but not considered by the Examiner. Counsel for the Applicant made a continuing objection to all testimony and evidence regarding summer use of Prairie Creek waters because the evidence was irrelevant, immaterial, and not germane to the hearing.

The Examiner notes that Objectors introduced substantial and credible evidence regarding the Applicant's use of Prairie Creek water for irrigation from May 1 to May 31 and September 1 to September 30. This evidence was taken into the Examiner's consideration on this application.

EXHIBITS

Objections to the exhibits, if any, are noted and made part of this record. Persons reviewing this record should note the Applicant's continuing objection to matters regarding summer (June 1 to August 30) use of Prairie Creek waters by the Applicant.

The Applicant offered into evidence the following two exhibits:

A-1: A schematic drawing of the water collector in detail located on
Sometimes Creek.

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A-2: A diagram by the Soil Conservation Service of a standard spring design and collector similar to the infiltration gallery used in Sometimes Creek.

All the Applicant's exhibits were received into evidence without objection.

The Objectors offered into evidence the following three exhibits:

O-1: A copy of the Hanks v. Sloss decree dated March 4, 1952, from the thirteenth judicial district court in Stillwater County, Montana. The Applicant objected to this decree as being immaterial to this hearing.

O-2: A rough drawing showing the relative locations of the Objectors and Applicant's farms, ditch, and diversion on Prairie (Canyon) Creek.

O-3: Twenty-four (24) photographs taken by Mr. Stuart in July of 1981 of the Prairie Creek and Sometimes Creek diversions, the Objectors' "headgate", flow of the creeks, and stock tanks. The Applicant objected to these photographs as being immaterial to this hearing.

All the Objectors' exhibits were received into evidence, and all objections were noted.

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The Department offered into evidence the following four exhibits:

- D-1: Statements of Claims for existing water rights for irrigation purposes filed by Doyle and Clara Whaley on July 23, 1981, for use from March 1 to September 30, with a claimed priority date of April 8, 1896; by Jack E. Shemer filed on September 24, 1981 for use from March 1 to September 30, with a claimed priority date of March 4, 1952; by C. Dan Stuart filed on July 13, 1981 for use from March 1 to September 30, with a claimed priority date of April 8, 1896; and by Randy and Juanita Miller filed on July 10, 1981 for use from March 1 to September 30, with a claimed priority date from April 8, 1896.
- D-2: A copy of an aerial photograph of Prairie Creek, indicating Applicant's point of diversion and use, Objectors' ditch, and stock tanks.
- D-3: Plat survey of Buffalo Jump Ranch Lower Portion, detailing the dimensions of the subdivision and ownership in Stillwater County. The affixed page indicates ownership of various subdivided portions of the survey.
- D-4: A memorandum to the file dated July 23, 1982, from Keith Kerbel regarding his field report, with attachments.

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All the Department's exhibits were received into evidence without objections.

The Hearings Examiner, after reviewing the evidence herein, and now being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Proposed Order.

FINDINGS OF FACT

1. On November 19, 1981, at 10:07 a.m., an Application for Beneficial Water Use Permit was duly filed with the Department. The application seeks ten gallons per minute up to 1.5 acre-feet per year for stock watering purposes from September 1 to May 31, inclusive, every year. The proposed point of diversion is the SE 1/4 SW 1/4 SW 1/4 of Section 5, Township 5 South, Range 16 East, in Stillwater County, Montana. The proposed point of use is the NW1/4 SE1/4 SW1/4 and NW1/4 SW1/4 of Section 5, Township 5 South, Range 16 East, in Stillwater County, Montana. The source of supply is Sometimes Creek, a tributary to Prairie Creek and the Stillwater River. The pertinent portions of the application were published for three (3) successive weeks in the Billings Gazette, a newspaper of general circulation printed and published in Billings, Montana, and in the Stillwater County Citizen, a newspaper of general circulation printed and published in Columbus, Montana.

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2. Timely objections were filed by Jack E. Shemer, C. Dan Stuart, Randy L. Miller, and Juanita F. Miller. Other objectors who joined in the petition against Mr. Dowd which was filed in district court and who are considered objectors of equal standing are Doyle H. Whaley, Clara Whaley, Henry H. Cook and Henry R. Cook.

3. The Applicant's intent to use such waters for stock watering purposes is bona fide and is not an attempt to speculate in the water resource. The use of 10 gallons per minute up to 1.5 acre-feet per year during the off season is a customary and reasonable amount of water for stock watering purposes, and such quantity will not result in waste of the water resource.

4. Sometimes Creek is an intermittent stream which usually dries up every fall (September or late August) before it passes through the Applicant's land. The Applicant's diversion is placed higher up on the creek at a spot where the creek flows year round.

5. All waters from Prairie Creek are diverted into the Objector's ditch by a "headgate" composed of boulders, rocks, and dirt located downstream from the Applicant's collector.

6. The Applicant intends to draw the amount requested from Sometimes Creek by means of an infiltration gallery for use in four stock tanks. Applicant's purpose is to provide sufficient water for approximately 50 horses

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and cattle at times when he is unable to water his stock directly from the Objectors' ditch which flows through the Applicant's land. Water is diverted by means of the gallery to a culvert spring box, then to a buried 1 1/4 inch pipe to the four stock tanks. The gallery is located about three feet below the level of the streambed and is surrounded by a natural pocket of bentonite, an impervious type of clay.

7. The Applicant's proposed means of diversion, its construction, and its operation are customary for collecting stock water. The gallery is placed just below the streambed to collect subsurface flows, and gravity feeds the water to the stock tanks. Evidence was introduced that the installation was fairly routine and that the installers (the Applicant, Miles Keogh, the Applicant's son, and his nephew) did not go back to re-do the installation. Mr. Keogh also testified that if a little water did leak out of the collector (infiltration gallery), the amount would not be noticeable to any one using the water for irrigating fields.

8. Any leaks from the collector should return to the Sometimes Creek channel as a hydrologically connected subsurface flow.

9. The flows diverted by the Applicant are subsurface flows, not groundwater, despite confusion generated by some of the testimony.

10. The SCS determined on July 29, 1981 that the collector was correctly installed.

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11. The collector and diversion point is located on property owned by Wilbur Schanck, who gave the Applicant permission to install the diversion works and pipe the water across Mr. Schanck's land. Some of the water collected by the Applicant's gallery is used by Mr. Schanck for occasional domestic use. Since his purchase of the property in 1950, Mr. Schanck has obtained water from the Sometimes Creek for domestic purposes by hauling buckets of water directly from the creek or by pipeline. A valve controls the flow of water to Mr. Schanck's property. Mr. Schanck had not applied for a permit from Sometimes Creek because he felt it would not do him any good except make the water more convenient to him.

12. The evidence supports a finding that there are unappropriated waters in the source of supply at the times when the Applicant proposes to use them (September 1 through May 31) except during the months of May (May 1 through May 31) and September (September 1 through September 30). Substantial credible evidence exists in the record to find that the Objectors would and do use Prairie Creek waters from May 1 through August 31 during the irrigation season for irrigation purposes. The Objectors' primary crop needing irrigation is alfalfa, which has a growing season generally from May 1 to September 30 for that climatic area.

13. Though there was evidence given as to the earliest and latest dates that water has been seen to flow through the ditch, little evidence was introduced as to the average beginning and cessation of flows through the ditches.

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14. The evidence supports a finding that there are unappropriated waters in the source of supply from October 1 through April 30.

15. The evidence supports a finding that the rights of prior appropriators will not be adversely affected by the Applicant's diversion from October 1 through April 30 in the amount requested.

16. The evidence supports a finding that the proposed use of the water is a beneficial use. Stock watering is a use specifically classified as beneficial in the statutes, and the Applicant will benefit from the use.

17. Applicant does not contest the prior right of the Objectors to use the water during the irrigation season for irrigation purposes.

18. There are no permits or water reservations with which the Applicant's proposed use will unreasonably interfere.

19. The Applicant has lived on his land for over eleven (11) years; Wilbur Schanck has owned his land for thirty-two (32) years; Henry H. Cook and Henry R. Cook have worked their lands for five (5) years; C. Dan Stuart has owned his land for five (5) years and worked it for two (2) years.

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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;

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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 subsection (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 or more and 15 cubic feet per second or more, and therefore need only prove by substantial credible evidence the criteria listed in subsection (1) through (5) above.

4. The Examiner finds that the Department has the authority and power to issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to assure the existence of the above statutory criteria. (MCA 85-2-312, 1-3-227 (1981)). In all events, a permit must be issued "subject to existing rights and any final determination of those rights" made pursuant to the Montana Water Use Act. (MCA 85-2-313 (1981)).

5. The Applicant's proposed use of water for stock watering purposes will be of material benefit to himself; such use is enumerated in MCA 85-2-102(2) (1981) as one class of beneficial use ("Beneficial use," unless otherwise provided, means the use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural

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(including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.).

6. The Examiner concludes that the use of ten (10) gallons per minute up to 1.5 acre-feet per year is a reasonable estimate of the quantity of water required for Applicant's stock watering purposes. See generally, Worden v. Alexander, 108 Mont. 208, 90 P.2nd 160 (1939).

7. The Applicant's proposed means of diversion are reasonable and adequate for the intended purposes, and such means will not result in the waste of the water resource. See State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2nd 23 (1939).

8. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource. See Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

9. A completed appropriation requires that the Applicant actually applies the water to a beneficial use. See generally, Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912). The Applicant 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 Applicant completes the proposed appropriation, but only after the source has had a general determination (adjudication) of the existing rights in the source pursuant to 85-2-211, et. seq. MCA (1979).

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

PROPOSED ORDER

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 39573-s43C is hereby granted to Berkeley R. Dowd to appropriate 10 gallons per minute up to 1.5 acre-feet per year for stock watering purposes. The point for diversion of this water is in the SE 1/4 SW 1/4 SW 1/4 of Section 5, Township 5 South, Range 16 East, Stillwater County, Montana, by means of an infiltration gallery in Sometimes Creek to a culvert springbox, to stock tanks by means of a buried pipe line. The place of use of this water is in the NW 1/4 SE 1/4 SW 1/4, and NW 1/4 SW 1/4 of Section 5, Township 5 South, Range 16 East, in Stillwater County, Montana. The source of supply of the waters for this permit is Sometimes Creek, and the waters are to be diverted for use from October 1 to April 30, inclusive, of each year. The priority date for this permit shall be November 19, 1981, at 10:07 a.m.

This permit is subject to the following express conditions, limitations, and restrictions:

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1. 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.

2. Nothing herein shall be construed to affect or reduce the Permittee's 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.

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

4. The Permittee 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 Permittee shall further pay his 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.

5. The Permittee shall install an adequate water flow measuring device at a suitable place as near as practicable to the point where the water is diverted from the source of supply in order to record the flow rate and volume

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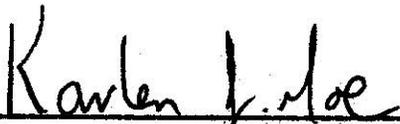
of water diverted. The Permittee shall keep a written record of the flow rate and volume of all waters diverted including the period of time and shall submit said records to the Department on request.

6. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for stock watering on the above-described lands. At all times when water is not reasonably required for use in this fashion, Permittee shall cause the waters to be left in Sometimes Creek.

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 JAN. 7, 1985

DONE this 11th day of November, 1982.



Karlen J. Moe, Hearing Examiner
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 449-3712

CASE # 39573

AFFIDAVIT OF SERVICE
Proposal for Decision

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 December 16, 1982, she deposited in the United States mail, certified mail, return receipt requested mail, an order by the Department on the Application by Berkeley Dowd, Application No. 39573, for a Permit to Appropriate water, addressed to each of the following persons or agencies:

1. Berkeley Dowd, Rt. 2, Box 54, Fishtail, MT 59028
2. Jack Shemer, 270 Ocean Rd., Los Angeles, CA 90049
3. C. Dan Stuart, 1725 Yellowstone Avenue, Billings, MT 59102
4. Randy Miller, Box 10, Boonescamp, Kentucky 41204
5. Bill Mather, 200 Securities Building, Billings, MT 59103
6. Joel E. Guthals, Wright, Tolliver, Guthals, prater & Leroy, P. O. Box 1977, Billings, MT 59103

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Beverly J. Jones

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

On this 16th day of December, 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 Lala
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 39573