

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. 42133-c43D BY DAVID ZIER)
)

* * * * *

Exceptions to the Proposal for Decision in this matter have been entered by the Consolidated Ditch Company; the Rocky Fork Decreed Users, Incorporated; and the Rock Creek Water Users Association.

These exceptions generally allege that the Applicant's claimed right was abandoned by the previous owner; that the water has already been appropriated by the State of Montana; and finally that there is no way to police this diversion.

The validity of the claimed right is not an issue in this matter. As stated in Proposed Conclusion of Law No. 2, the Statement of Claim filed by the Applicant is prima facie evidence of the water right in this matter. The validity of this right will be determined by the Water Courts Division of Montana under the statewide adjudication of existing rights. If this right is found to be invalid during this process, then this Change Authorization will also become invalid. A disclaimer regarding this has been added to this Final Order after Part 1, 7.

The fact that the State of Montana may have a prior claim to this water is not an issue in this matter. This application seeks only a change in a point of diversion. Therefore the issue

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to be decided is whether this change in diversion point will adversely affect an existing use. The granting of this change does not authorize the Applicant to divert water at times when prior rights in the source have not been satisfied. Rather, this change authorizes the Applicant to divert his claimed water at a new diversion point at such times when there is sufficient water in the source to satisfy all rights with earlier priority dates.

Finally, Montana Water Law has provided a mechanism for users to regulate water appropriations. This mechanism is to petition the District Court to appoint a water commissioner. Condition E of the Proposed Order gives the commissioner, if appointed, authority over this diversion. Also, Conditions A, B, and C require the Applicant to measure waters diverted pursuant to this change. Therefore, if there is a question regarding the amounts of water diverted or the time period when water is diverted, the Applicant can be required to produce said records.

Therefore, the Proposal for Decision in this matter as entered on March 10, 1983, is hereby adopted in its entirety as Final.

FINAL ORDER

1. Application for Change of Appropriation Water Right No. 42133-c43D by David Zier is hereby granted to divert 1,122 gallons per minute up to 450 acre-feet per annum from May 1 through October 15, inclusive, of each year from Willow Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, Township 5 South, Range 20 East, Carbon County, to be used on 160 acres in the SE $\frac{1}{4}$ of

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Section 22, E½ of Section 27 and the W½ of Section 26, all in Township 5 South, Range 20 East, M.P.M., Carbon County, for irrigation purposes. This change authorization is granted subject to the following express conditions:

- A. The Applicant shall measure the waters diverted from the Taylor Ditch into the unnamed draw stated in the Application. At no time shall the Applicant divert in excess of 200 miners inches (2,244 gallons per minute) down said unnamed draw.
- B. Although the maximum allowable diversion from Willow Creek pursuant to this authorization is 1,122 gallons per minute, at no time shall the amount diverted from Willow Creek exceed one half or 50% of that amount diverted into said unnamed draw from the Taylor Ditch. For example, if the Applicant is diverting 1,000 gallons per minute into said unnamed draw, then the Applicant's diversion from Willow Creek shall not exceed 500 gallons per minute.
- C. The Applicant shall keep written records of the flow rates and period of time waters are diverted into said unnamed draw and concurrent records of the waters diverted from this new diversion on Willow Creek. Said records shall be made available to the Department upon request.
- D. At no time shall the combined appropriation pursuant to this authorization and Provisional Permit No. 16327-s43D exceed 472 acre-feet per annum.

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E. This Authorization to Change is subject to the authority of court-appointed water commissioners, if and when appointed, to measure and distribute to the parties using waters in the source of supply the water to which they are entitled, including the waters granted in this Authorization to Change. The holder of this Authorization to Change shall pay his proportionate share of the fees and compensation and expenses as fixed by the District Court, incurred in the distribution of the waters granted in this Authorization to Change.

NOTICE: The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to MCA 85-2-201, et. seq.

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 14th day of April, 1983.

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

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

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AFFIDAVIT OF SERVICE
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 April 15, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by David Zier, Application No. 42133-c43D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. David Zier, Box 117, Roberts, MT 59070
2. Rock Creek Water Users Assoc., Box 246, Red Lodge, MT 59068
3. Consolidated Ditch Co., c/o Beth Prinkki, Box 127, Roberts, MT 59070
4. Rocky Fork Decreed Water Users, Inc., Rt. 2, Box 3260, Red Lodge, MT 59068
5. Walter Ukhola, Rt. 1, Roberts, MT 59070
6. Julius Pilati, Box 600, Red Lodge, MT 59068
7. Pat Billingsley, Joliet, MT 59041
8. John Teini, Roberts, MT 59070
9. Keith Kerbel, Billings Field Office (inter-department mail)
10. Dave Pengelly, Hearing Examiner (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

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

On this 14th day of April, 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.

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

Suey Kohn

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

CASE # 42133

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

* * * * *

IN THE MATTER OF APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT NO. 42133-C43D BY DAVID ZIER)
)

* * * * *

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 Red Lodge, Montana, on January 18, 1983. The Applicant, Mr. David Zier, appeared personally at the hearing. Mr. Pat Billingsley appeared on behalf of the Rock Creek Water Users Association. Messrs. Fred Cole, John Teini, and Everett Zumbum appeared on behalf of Rocky Fork Decreed Water Users, Inc., and Mr. Bob Kero appeared on behalf of the Consolidated Ditch Corporation. The Department of Natural Resources and Conservation was represented by Mr. Keith Kerbel of the Billings Water Rights Field Office.

STATEMENT OF THE CASE

On October 19, 1981, an Application for Change of Appropriation Water Right was filed with the Department of Natural Resources and Conservation by David Zier. This Application seeks to change the point of diversion of a water right claimed under filing No. W-036391-43D. The Applicant claims a past use of 2,244 gallons per minute up to 900 acre-feet

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of waste water diverted at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, Township 6 South, Range 20 East, M.P.M., Carbon County. The claimed period of appropriation of said water is January 1 to December 31, inclusive, of each year. A claimed past use of this water is 2,244 gallons per minute up to 900 acre-feet per annum from May 1 through October 15, for irrigation of 160 acres located in the SE $\frac{1}{4}$ of Section 22, the E $\frac{1}{2}$ of Section 27, and the W $\frac{1}{2}$ of Section 26, all in Township 5 South, Range 20 East, M.P.M., Carbon County. The claimed means of diversion is by the Taylor Ditch. The Applicant proposes to divert these waste waters into an unnamed draw from the Taylor Ditch and to run the water through said draw to Willow Creek and thence down Willow Creek. The Applicant seeks to divert these waters from Willow Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 22, Township 5 South, Range 20 East, M.P.M., Carbon County.

The pertinent portions of this Application were duly published for three successive weeks in the Carbon County News, a newspaper of general circulation, printed and published in Red Lodge, Montana.

Five objections to the granting of this Application were filed with the Department of Natural Resources and Conservation as follows:

1. Consolidated Ditch Company on May 19, 1982.
2. Rocky Fork Decreed Users, Inc. on May 25, 1982
3. Rock Creek Water Users Association on May 26, 1982
4. Walter Ukkola on June 29, 1982
5. Julius L. Pilati on June 29, 1982

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EXHIBITS

No exhibits were introduced on behalf of the Applicant at the hearing.

The Objector Rock Creek Water users Association introduced the following exhibits, to-wit:

O-1: A Notice of Appropriation of waters from Red Lodge Creek filed by the State Water Conservation Board of the State of Montana with a priority date of May 10, 1934.

O-2: A Notice of Appropriation filed by the State Water Conservation Board of the State of Montana for the waters of West Fork of Rock Creek and tributaries filed on July 19, 1963.

The Objectors Exhibits were introduced into the record with no objections.

The Department introduced the following exhibits into the record, to-wit:

D-1: Statement of Claim of Existing Water Right No. W-036391-43D by David Zier.

D-2: Two maps, the first being a soils survey map of the Applicant's proposed place of use (more specifically pages 31 and 32 of the Carbon County Soil Survey); and a map from the Carbon County Water Resources Survey showing the Applicant's existing point of diversion and existing conveyance facility, existing place of use and

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new proposed point of diversion.

D-3: A photocopy of a U.S.G.S. topographical map showing the point of diversion of the Consolidated Ditch from Rock Creek and the subsequent diversions of several smaller ditches from the Consolidated Ditch.

The Department's exhibits were introduced into the record with no objections.

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

PROPOSED FINDINGS OF FACT

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

2. The waste waters claimed by the Applicant would flow into Willow Creek after being used on the Applicant's land under the claimed existing use. Under the Applicant's proposed change, any unused waters would still be available in the Willow Creek drainage.

3. The Applicant's claimed right has been duly filed under Claim No. W-036391-43D with a claim of 200 miners inches (2244 gallons per minute) up to 900 acre-feet per annum to be used on 160 acres.

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4. Under the proposed change the Applicant seeks to divert a maximum of 100 miners inches (1122 gallons per minute), or a maximum of one-half of the water available to him.

5. Applicant has a supplemental decreed right for 95 inches of water from Rock Creek for the irrigation of 160 acres of land in said Sections 22, 26 and 27.

6. The Applicant has a supplemental permit, No. 16327-s43D, for the use of 1300 gallons per minute up to 230 acre-feet per annum for the irrigation of 65 acres in the NE $\frac{1}{4}$ of said Section 27 and 30 acres in the SE $\frac{1}{4}$ of said Section 22.

7. Willow Creek is a tributary of Cooney Reservoir.

8. Willow Creek is a tributary of Red Lodge Creek which is a tributary of Rock Creek.

9. Willow Creek is a decreed stream under case No. 2484, Carbon County, Montana.

10. The Consolidated Ditch is upstream of the Applicant.

11. The Rock Creek Water Users Association and the Rocky Fork Decreed Users, Inc. have members with water rights downstream from the Applicant and make use of the waters of Willow Creek.

12. The Hearing Examiner hereby takes administrative notice of the following findings from the Irrigation Guide for Montana published by the United States Department of Agriculture-Soil Conservation Service:

a) The Applicant's proposed place of use is in Climatic Area III.

b) The total consumptive use requirement for alfalfa

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in Climatic Area III is 23.03 inches per acre.

c) Sprinkler irrigation efficiency is approximately 65%.

d) The maximum amount of water necessary to irrigate 160 acres of alfalfa in a dry year is 472 acre-feet.

PROPOSED CONCLUSIONS OF LAW

1. MONT. CODE ANN. Section 85-2-402 (1981) directs the Department to:

"...approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons....The Department may approve a change subject to such terms, conditions, restrictions and limitations it considers necessary to consider the rights of other appropriators, including limitations on the time for completion of the change."

2. Claim No. W-036391-43D is prima facie evidence of the Water Right claimed by the Applicant in this matter.

3. Water appropriated under an existing right may be turned into the natural channel of another stream and withdrawn or diverted at a point downstream for beneficial use, but the waters of that stream may not thereby be diminished in quantity or deteriorated in quality to the detriment of a prior appropriator (MONT. CODE ANN., Section 85-2-411 (1981)).

4. The burden of proving adverse affect of the proposed Application in this matter is on the Objectors.

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5. The Applicant will need to be able to measure the water diverted into the unnamed draw and subsequently into Willow Creek and also the amount of water diverted from Willow Creek to show that the waters being diverted are actually waters which he placed into the source to augment his supply rather than merely an appropriation of new waters.

6. The waters diverted pursuant to this change shall not exceed the amount necessary to properly irrigate the Applicant's land in conjunction with waters diverted pursuant to Permit No. 16327-s43D and Claim No. W-36392-43D.

PROPOSED ORDER

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

1. Application for Change of Appropriation Water Right No. 42133-c43D by David Zier is hereby granted to divert 1,122 gallons per minute up to 450 acre-feet per annum from May 1 through October 15, inclusive, of each year from Willow Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, Township 5 South, Range 20 East, Carbon County, to be used on 160 acres in the SE $\frac{1}{4}$ of Section 22, E $\frac{1}{2}$ of Section 27 and the W $\frac{1}{2}$ of Section 26, all in Township 5 South, Range 20 East, M.P.M., Carbon County, for irrigation purposes. This change authorization is granted subject to the following express conditions:

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- C. The Applicant shall keep written records of the flow rates and period of time waters are diverted into said unnamed draw and concurrent records of the waters diverted from this new diversion on Willow Creek. Said records shall be made available to the Department upon request.
- D. At no time shall the combined appropriation pursuant to this authorization and Provisional Permit No. 16327-s43D exceed 472 acre-feet per annum.
- E. This Authorization to Change is subject to the authority of court-appointed water commissioners, if and when appointed, to measure and distribute to the parties using waters in the source of supply the water to which they are entitled, including the waters granted in this Authorization to Change. The holder of this Authorization to Change shall pay his

proportionate share of the fees and compensation and expenses as fixed by the District Court, incurred in the distribution of the waters granted in this Authorization to Change.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before April 1, 1983.

DONE this 10th day of March, 1983.

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

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AFFIDAVIT OF SERVICE
PROPOSAL FOR DECISION

STATE OF MONTANA)
) ss.
County of Lewis & 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 10, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by David Zier, Application No. 42133-c43D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

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7. Pat Billingsley, Joliet, MT 59041
8. John Teini, Roberts, MT 59070
9. Keith Kerbel, Billings Area Office Supervisor, DNRC, (inter-department mail)
10. Dave Pengelly, Hearing Examiner, DNRC, (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

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

On this 10th 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.

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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 Lohm

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

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