

Kent's Copy

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. 42136-s76M BY DARELL AND)
SHAWN L. BABCOCK)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No exceptions or other argument were filed by any of the parties of record. The Department accepts and adopts the Findings of Fact and Conclusions of the Hearing Examiner as contained in his Proposal for Decision, and incorporates them by reference..

Therefore, on the basis of all the files, records and proceedings herein, the Department makes the following:

ORDER

The Application for Beneficial Water Use Permit No. 42136-s76M is granted to Darell and Shawn Babcock to appropriate 3 gallons per minute up to 1.5 acre-feet per year for domestic purposes from January 1 to December 31, inclusive, of each year. The source of supply shall be South Fork of Petty Creek. The point of diversion and place of use shall be in the SW1/4 SW1/4 SW1/4 of Section 30, Township 13 North, Range 22 West, Missoula County. The priority date for this permit shall be February 9, 1982, at 3:25 p.m.

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

A. This Permit is subject to all prior and existing rights, including, but not by way of limitation, the right of Clyde

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Schreckendgust to irrigate 45 acres, more or less, out of the source of supply in accordance with his historical demand on that source of supply. This Permit is also subject to any final determination of existing rights as provided by Montana law. Nothing herein shall be construed to authorize diversions by the Permittees to the detriment of any senior appropriator.

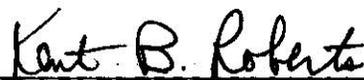
B. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this Permit. Nor does the Department in issuing this Permit acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittees shall diligently adhere to the terms and conditions of this Permit. Failure to adhere to the terms and conditions may result in the revocation or modification of this Permit.

DONE this 25th day of May, 1983.



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



Kent B. Roberts, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

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.

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 May 31, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Darell and Shawn L. Babcock, Application No. 42136-s76M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Clyde Schreckendgust, N.W. 349 Hallaway Lane, Florence, MT 59833.
2. Darell & Shawn Babcock, Box 33, Alberton, MT 59820
3. Kent Roberts, Hearing Examiner (hand deliver)
4. Dave Pengelly, Missoula Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl Wallace

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

On this 31 day of May, 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 Kohn
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 42134

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. 42136-s76M BY DARRELL AND)
SHAWN L. BABCOCK)

* * * * *

The above-entitled matter came on for hearing before Kent B. Roberts, a Hearing Examiner with the Department of Natural Resources and Conservation, on March 9, 1983 at the Department's Water Rights Bureau Field Office, Missoula, Montana. The record of the hearing closed on March 9, 1983.

Darrell and Shawn Babcock (hereinafter the "Applicants"), Star Route 550, Alberton, Montana 59820 appeared pro se in this matter. Clyde Schreckendgust, N.W. 349 Hallaway Lane, Florence, Montana 59833, an Objector in this proceeding, appeared pro se. Dave Pengelly and Lynette Kemp, representatives from the Department's Missoula Field Office, also appeared at the hearing. This Proposal is a recommendation, not a final decision.

Any party adversely affected may file exceptions to this Proposal. Such exceptions must be filed within 20 days after service of this Proposal with the Hearing Examiner, Department of Natural Resources and Conservation, 32 S. Ewing, Helena, Montana 59620. Notice is hereby given that a final decision shall not be made until after the expiration of the period for filing exceptions.

STATEMENT OF ISSUE

The issue in this proceeding is whether the Applicants should be granted a permit to appropriate water from South Fork of Petty Creek.

Based upon all the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On February 9, 1982, the Applicants filed with the Department an application seeking authorization to appropriate 3 gallons per minute up to 1.5 acre-feet of water for domestic use continually through the year. The source of water supply is the South Fork of Petty Creek, the waters thereof to be diverted at a point in the SW1/4 SW1/4 SW1/4 of Section 30, Township 12 North, Range 20 West, in Missoula County. The place of use of the water is proposed to be in the same location as the point of diversion.

2. The Applicants propose to divert creek water through a ditch and into a holding pond. From the pond, the water will then be pumped into a cistern.

3. On May 12, 19 and 26, 1982, the Notice of Application (hereinafter the "Notice") was published in the Missoulian. The Notice set June 30, 1982 as the deadline for filing objections to the application.

4. On May 27, 1982, Clyde Schreckendgust filed with the Department an objection to the granting of the application. Schreckendgust is the holder of a filed appropriation right, having a priority date of March 8, 1906. The appropriation right

allows Schreckendgust to divert 10 cubic feet per second up to 3,000 acre-feet from May 1 to October 30, inclusive, of each year for irrigation of 45 acres located in the N1/2 NW1/4 in Section 25, Township 13 North, Range 23 West. Petty Creek is claimed as the source of water supply. The point of diversion is claimed to be in the SW1/4 SW1/4 SW1/4 of Section 30, Township 13 North, Range 22 West in Missoula County.

5. On February 23, 1983, the Administrator issued the Notice of Hearing, scheduling a contested case hearing for March 9, 1983. A copy of the Notice of Hearing was served on the same day by mail on all parties.

6. At the hearing, Schreckendgust agreed to withdraw his objection and waive any and all rights to further contest the application upon the condition that any permit that is granted be subject to his prior and existing water right.

7. All parties stipulated to the existence of statutory grounds necessary for the granting of the application.

PERTINENT STATUTORY EXCERPTS

MCA §85-2-311 provides in part that the Department must issue a permit if the Applicant proves by substantial credible evidence that "(1) there are unappropriated waters in the source of supply (a) at times when the water can be put to the 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; [and] (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...."

Based upon the forgoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. The Montana Department of Natural Resources and Conservation has jurisdiction over the parties and the subject matter of this hearing.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. Based upon the agreement of the parties, the application is uncontested.

4. The parties stipulated to the existence of statutory grounds necessary for the granting of the application herein and no evidence was presented on the record.

5. Any of the foregoing Conclusions which should be more properly deemed Findings, or any of the foregoing Findings which should be more properly deemed Conclusions, are hereby adopted as such.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 42136-s76M, as set forth in Appendix A, be granted.

DONE this 6th day of April, 1983.

Kent B. Roberts

Kent B. Roberts, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

NOTICE

Pursuant to MCA §2-4-623(5), the Department is required to serve its final decision upon each party by first class mail.

MEMORANDUM

The Hearing Examiner urges the parties to carefully review the proposed permit as set forth in Appendix A. This proposed permit embodies, in the Examiner's opinion, the agreement made between the parties at the hearing. Parties wishing to comment further on this proposed permit must file their comments within 20 days after service of this Proposal. Otherwise, if no comments are received, a Final Order shall be issued granting the permit as proposed herein.

APPENDIX A: THE PROPOSED PERMIT

The Applicant for Beneficial Water Use Permit No. 42136-s76M is hereby granted to Darrell and Shawn Babcock, to appropriate 3 gallons per minute up to 1.5 acre-feet per year for domestic purposes from January 1 to December 31, inclusive, of each year. The source of supply shall be South Fork of Petty Creek.

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The water shall be diverted at a point in the SW1/4 SW1/4 SW1/4 of Section 30, Township 13 North, Range 22 West, Missoula County. The place of use of the water shall be the same as the location described for the point of diversion. The priority date for this permit shall be February 9, 1982 at 3:25 p.m.

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

A. This permit is subject to all prior and existing rights, including, but not by way of limitation, the right of Objector Clyde Schreckendgust to irrigate 45 acres, more or less, out of the source of supply in accordance with his historical demand on that source of supply. This permit is also subject to any final determination of existing 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 effect 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 caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

C. The Permittee shall diligently adhere to the terms and conditions of this permit. Failure to adhere to the terms and conditions may result in the revocation of this permit.

K.B.R.

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AFFIDAVIT OF SERVICE

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 6, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Darell and Shawn L. Babcock, Application No. 42136-s76M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

- 1. Clyde Schrechendgust, N.W. 349 Hallaway Lane, Florence, MT 59833.
- 2. Darell & Shawn Babcock, Box 33, Alberton, MT 59820
- 3. Kent Roberts, Hearing Examiner (hand deliver)
- 4. Dave Pengelly, Missoula Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Cheryl L. Wallace

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

On this 5th 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.

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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