

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT G(W)045381-01-76H BY MARVIN)
P. REYNOLDS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was scheduled to be held at 10:00 a.m. on January 17, 1992, in Missoula, Montana. During a prehearing conference which began at 10:00 a.m., certain conditions were proposed and accepted by all parties present. The record in the above-entitled matter was opened at 12:15 p.m. The conditions were read into the record and each party present agreed to those conditions. The record was closed at approximately 12:30 p.m.

APPEARANCES

Applicant Marvin Reynolds appeared pro se.

Objectors Charlie and Nancy Lee appeared by and through Lee Yelin, Water Right Specialist with Land and Water Consulting Inc.

Objector James Lea Simpson appeared pro se.

Objectors Donald J. and Donna B. Kelleher appeared by and through Dave Brough, Kellehers' ranch manager, and counsel Robert Scott.

Objectors Herbert and Kathryn Wanke appeared pro se.

Objectors Willard A. and E. Emogene Clucas and James P. and Donna J. Crider did not appear at the hearing nor had they made previous arrangements with the Hearing Examiner; therefore, in

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5. The primary concern of the Objectors was use of the ditch during times of diminished flow. The increased losses from a ditch delivery system has the potential for consuming more water from the source which would result in less water for the Objectors as junior water right holders. Objectors are not against the use of the ditch during the period of high stream flow associated with spring runoff.

6. There was an informal meeting held on site on December 20, 1991. In attendance were the Applicant; James Simpson; Herbert Wanke; Lee Yelin; Dave Brough representing Objector Kelleher; Wes McAlpin, Water Resource Specialist with the Missoula Regional Office of Department of Natural Resources and Conservation; and Michael McLane, Regional Manager of the Department's Missoula Regional Office. The meeting participants indicated a desire to seek resolution through conditions rather than go to hearing. Conditions were proposed to limit Applicant's use of the ditch to a period of high runoff and at the time a water commissioner begins to allocate water. Mr. McLane sent a stipulation out to all parties for signature of agreement, but only three parties responded. Therefore a hearing in this matter was scheduled.

7. The conditions proposed at the prehearing conference are:¹

¹The wording on the conditions imposed by this Authorization may vary slightly to comply with Department standard language; however, the content will be substantially the same.

losses are virtually eliminated, the period of use limitation will not apply.

7. The Applicant shall install adequate measuring devices on both diversion systems.

8. The Applicant shall install an adequate and reasonably efficient diversion for the ditch system.

8. Applicant owns the place where the water will be put to beneficial use.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA.

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

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-402(2), MCA, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

Marvin P. Reynolds to add a point of diversion located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, Township 10 North, Range 20 West, on Sweeney Creek in Ravalli County, to Statements of Claim W045381-76H and W045382-76H.

1. This Authorization is subject to all prior existing water rights in the source of supply. Further, this Authorization is subject to any final determination of existing water rights, as provided by Montana law.

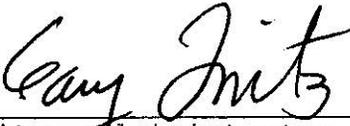
2. The water right changed by this Authorization is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Appropriator shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

3. If, at any time after this Authorization is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Appropriator to show cause why the Authorization should not be modified or revoked. The Department may then modify or revoke the Authorization to protect existing water rights or allow the Authorization to continue

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petition in the appropriate court within 30 days after service of the Final Order.

Dated this 29 day of January, 1992.



Gary Fritz, Administrator
Department of Natural
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Water Resources Division
1520 East 6th Avenue
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Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 30th day of January, 1992 as follows:

Marvin Reynolds
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Florence, MT 59833

James Lea Simpson
NW 5149 US Hwy 93 S
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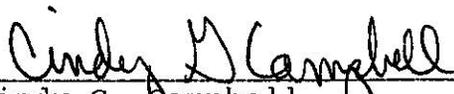
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Cindy G. Campbell
Hearings Unit Legal Secretary