

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)046021-41H BY YOLANDA)
BLAKELY)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the December 2, 1994, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Change of Appropriation Water Right G(W)046021-41H by Yolanda Blakely is **DENIED**.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make

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arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 24 day of January, 1995.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

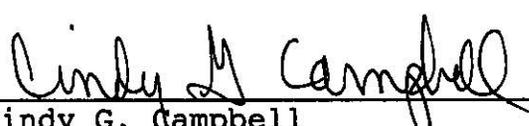
This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 25th day of January, 1995 as follows:

Yolanda Blakely
1250 Carpenter DR
Three Forks, MT 59752

Jack Roadarmel, Jr.
1150 Carpenter LN
Three Forks, MT 59752

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301

Scott Compton, Manager
Bozeman Water Resources
Regional Office
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Bozeman, MT 59715
(via electronic mail)



Cindy G. Campbell
Hearings Unit Legal Secretary.

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

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR CHANGE OF APPROPRIATION WATER)	FOR
RIGHT G(W)046021-41H BY YOLANDA)	DECISION
BLAKELY)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 25, 1994, in Bozeman, Montana, to determine whether an Authorization to Change Appropriation Water Right should be granted to Yolanda Blakely for Application G(W)046021-41H under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1994).

APPEARANCES

Yolanda Blakely (Applicant) appeared at the hearing *pro se*.
Howard Blakely appeared at the hearing as a witness for Applicant.

Objector Jack Roadarmel, Jr. appeared at the hearing *pro se*.
RaeLeen Roadarmel appeared at the hearing as a witness for Objector.

Dale Nerlin appeared at the hearing as an interested person.

Jan Mack, Water Resources Specialist with the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

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EXHIBITS

No exhibits were offered for inclusion in the record. Objector offered two letters of testimony from long-time residents of the area for inclusion in the record. Applicant objected to the inclusion of these letters in the record on the basis that they were irrelevant and that the authors of these letter were not in any way involved in the instant application. Objector countered that these letters established historical facts of what ground had been irrigated by the Nichols-Burrell Ditch water. The Hearing Examiner reserved a ruling on Applicant's objection to the letters being accepted into the record.

The Hearing Examiner sustains Applicant's objection not only because the letters are irrelevant, but because the letters amount to testimony by the authors of the letters and Applicant is not able to cross-examine those persons. To allow the letters into the record would deny Applicant due process.

The Department file was made available for review by all parties who expressed no objection to any part of it; therefore, the Department file is accepted into the record in its entirety.

PRELIMINARY MATTERS

During the hearing, it became clear there was confusion as to which 49 acres were being taken out of irrigation. Applicant had severed 40 miner's inches of a 400 miner's inches water right from the property sold to Dale and Deloris Nerlin leaving 360 miner's inches to be used on the property; however, no parcel of

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land on which the water was to be used was reserved in the transaction. A portion of the severed 40 miner's inches is the right for which a change is sought. In order to clarify the matter, the Hearing Examiner stated she intended to take administrative notice of all water rights involved, requested a copy of the contract for sale of property from Mr. Nerlin, and asked Mr. Mack to contact the Water Master to clarify the area the Water Master had determined was irrigated. There were no objections to the intent or the requests. The contract for sale of property was received from Mr. Nerlin on October 28, 1994. The information requested from Mr. Mack was received on November 9, 1994.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-402(1) (1993) states, in relevant part, "An appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

2. On March 25, 1994, Yolanda Blakely filed an Application for Change of Appropriation Water Right to change the place of use of Statement of Claim 41H-W046021 from 36 acres in the SW $\frac{1}{4}$ of Section 26, and 13 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 35, both in

Township 2 North, Range 2 East, Gallatin County. The proposed new place of use would be 53 acres in the N $\frac{1}{2}$ of Section 35, Township 2 North, Range 2 East, Gallatin County.¹ (Department file.)

3. Pertinent portions of the application were published in the *Bozeman Daily Chronicle* on June 15, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application.

The Department received one timely objection to the application and notified Applicant of this objection by a letter dated August 5, 1994. (Department file.)

4. The proposed water use includes irrigation of some small parks, lawns, and two hedgerows of trees which would be planted along the interstate highway to serve as a sound barrier, in the new place of use. The water would be pumped from the existing Nichols-Burrell Ditch with a ten-horsepower pump at a rate of 260 gallons per minute to sprinkler and drip irrigation systems. It is not clear how Applicant proposes to get the water across the railroad which lies between the ditch and the place of use. (Department records, Department file, and testimony of Applicant and Howard Blakely.)

5. The water Applicant proposes to change is a portion of the 40 miner's inches severed from the original right of 400

¹Unless otherwise specified, all land descriptions are located in Township 2 North, Range 2 East, Gallatin County.

miner's inches from the Gallatin River. The priority date of this water right is May 1, 1863. The original 49 acres in Sections 26 and 35 were flood irrigated using contour ditches. Assuming an efficiency of 55 percent, 3.5 acre-feet per acre of water per year were used for a total of 150.5 acre-feet per year. With the change to sprinkler irrigation, assuming an efficiency of 70 percent, the water use per acre per year would be 2.7 acre-feet for a total of 143.1 acre-feet of water per year on the proposed 53 acres. There was testimony the trees would be irrigated by a drip system which would be at least 70 percent efficient, more than likely it would be more than 70 percent efficient. (Copy of contract, Department file, Department records, and testimony of Howard Blakely.)

6. The Montana Water Court has decreed a right to Applicant for one cubic foot per second of the waters of the Gallatin River for irrigation of 36 acres in the SW $\frac{1}{4}$ of Section 26 and 13 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 35 during the period of March 1 to November 4, inclusive of each year. According to the Water Master's Report and the map submitted by Applicant, this water right has been used to irrigate property in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 35 and the SW $\frac{1}{4}$ of Section 26 that has been taken from Applicant by a change in the Gallatin River channel and is now located on the east side of the Gallatin River precluding irrigation under the claimed right. The Government Land Office surveys prepared in 1868 show the original location of the property on the west side of the river. The Water Resources Survey performed in the

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early 1950's show the river encroaching on the property; however, at that time there was no irrigation on the property claimed to be irrigated by Applicant. The aerial photographs taken in 1979 and 1980 show the property on the east side of the river, indicating irrigation by this right has not occurred for at least 14 years. (Department file, Department records, and testimony of Jan Mack.)

7. The water users on the Nichols-Burrell Ditch, Mr. Nerlin and Objector Roadarmel, have the same priority date of May 1, 1863 which is also the priority date claimed by Applicant. The last two years, Mr. Nerlin and Objector Roadarmel have been short of water in the existing ditch because the flow of the river falls below the level of the ditch and sufficient water to satisfy the water rights of both Mr. Nerlin and Objector Roadarmel cannot enter the ditch. When there is sufficient water in the river to flow into the ditch, there is a tremendous ditch loss and generally there is not sufficient water for the Roadarmels to use all of their water right. Mr. Nerlin and Objector Roadarmel have shared the water by alternating usage. Last year both Mr. Nerlin's and Objector Roadarmel's crops were stressed by lack of water. (Testimony of Jack Roadarmel, Jr. and Dale Nerlin.)

8. Applicant owns the property where the water is to be put to beneficial use. (Testimony of Yolanda Blakely.)

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9. There are no planned uses or developments for which a permit has been issued or for which water has been reserved in the source of supply. (Department file and records.)

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. Mont. Code Ann. Title 85, chapter 2, part 4.

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. See Findings of Fact 2 and 3.

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by a preponderance of evidence that the following criteria, set forth in Mont. Code Ann. § 85-2-402(2) 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.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving

methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

4. An applicant is required to prove the criteria in subsections 85-2-402(2)(f) and (g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department the criteria, as applicable, may not be met. No valid objections relative to subsections 85-2-402(2)(f) or (g) were filed for this application. Therefore, Applicant is not required to prove the criteria in subsections (2)(f) or (g).

5. The proposed use, irrigation, is a beneficial use. Mont. Code Ann. § 85-2-102(2) (1993). The proposed types of irrigation are efficient and water would not be wasted. See Finding of Fact 5.

6. Applicant has not proven by a preponderance of evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 6 and 7.

7. Applicant has not proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 4.

8. An applicant is required to show by a preponderance of evidence that all the criteria necessary for the issuance of a permit have been met. Since Applicant in this matter has failed to demonstrate that the means of diversion, construction, and

operation of the appropriation works are adequate and that the proposed change will not adversely affect the water rights of other persons, no finding is necessary as to whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved, or whether Applicant has possessory interest in the proposed place of use. See *In re Application 53221 by Carney* and *In re Application 61333 by Pitsch*.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

ORDER

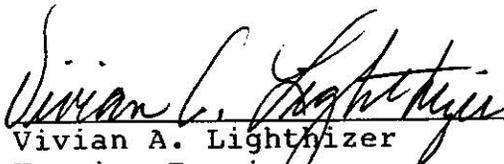
Application for Change of Appropriation Water Right G(W)046021-41H by Yolanda Blakely is DENIED.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 2th day of December, 1994.


Vivian A. Lightizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6615

MEMORANDUM

In denying an authorization to change appropriation water right at this point, the Hearing Examiner does not purport to have determined that the proposed change could not be granted, given sufficient evidence of no adverse effect to the water rights of other persons and an adequate means of diversion. For example, Applicant could apply for a change in point of diversion and place of use to take water directly from the Gallatin River and pipe the water to the proposed place of use without using the Nichols-Burrell Ditch. It is the proposed use of the Nichols-Burrell Ditch that would cause an adverse effect to the present ditch users who have already instituted an alternating system whereby one user is allowed to use all the water in the ditch then the other is allowed to use all the water in the ditch.

It concerns the Hearing Examiner that Objector Roadarmel has such tremendous ditch loss. In order to make a beneficial use of the water, Mr. Roadarmel and Mr. Nerlin should seek some method to reduce the ditch losses. Excessive ditch losses could be seen as waste of water which is forbidden by Mont. Code Ann. § 85-2-114 (1993).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 2nd day of December, 1994, as follows:

Yolanda Blakely
1250 Carpenter DR
Three Forks, MT 59752

Jack Roadarmel, Jr.
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Cindy G. Campbell
Hearings Unit Legal Secretary