

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. 46920-s76F BY ELLA E. HALVERSON )

\* \* \* \* \*

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 parties of record.<sup>1</sup> 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 herein 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. 46920-s76F is denied in its entirety.

<sup>1</sup> At the request of the Applicant, the period for filing exceptions was extended from August 1, 1983, to August 11, 1983. No communication was received within the extended period.

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 16<sup>th</sup> day of September 1983.

Gary Fritz  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 6605

AFFIDAVIT OF SERVICE

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

Mary Lohrman, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 16, 1983, she deposited in the United States mail, certified, an order by the Department on the Application by Ella E. Halverson, Application No. 46920-s76F, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Ella E. Halverson, P. O. Box 404, Milltown, Montana 59851
2. John E. Manley, P. O. Box 73, Drummond, Montana 59832
3. James J. Masar, Attorney at Law, P. O. Box 150, Deer Lodge, Montana 59722
4. Sarah A. Bond, Hearing Examiner (hand deliver)
5. T. J. Reynolds, Helena Field Office, (inter-office mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Mary Lee Lohrman

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

On this 16 day of Sept, 1983, before me, a Notary Public in and for said state, personally appeared Mary Lohrman, known to me to be the Clerk 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.

Jim P. Gilman

Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1/21/84



CASE # 46920

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. 46920-s76F BY ELLA E. HALVERSON        )

\* \* \* \* \*

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 11, 1983, in the Department's Conference Room in Helena, Montana. The record closed at the end of the hearing.

Ella E. Halverson (the "Applicant"), P. O. Box 404, Milltown, Montana 59851 appeared pro se. John E. Manley, P. O. Box 73, Drummond, Montana 59832 (the "Objector"), was represented by James J. Masar, Attorney at Law, P. O. Box 150, Deer Lodge, Montana 59722. T. J. Reynolds and Jim Beck, representatives of the Department's Helena 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 by August 1, 1983, 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 expiration of the period for filing exceptions.

### STATEMENT OF ISSUES

The issue in this proceeding is whether the Applicant should be granted a permit to appropriate surface water from Douglas Creek.

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

### FINDINGS OF FACT

1. On June 11, 1982, the Applicant filed with the Department an application seeking authorization to appropriate 150 gallons per minute up to 25 acre-feet (ac-ft) of water for placer mining purposes from June 1 to December 31, inclusive, of each year. Douglas Creek is claimed as the source of supply, the waters thereof to be diverted at the  $W\frac{1}{2}$   $W\frac{1}{2}$  of Section 3, Township (T) 12 North (N), Range (R) 13 West (W), in Powell County.

2. On October 14, 21, and 28, 1982, the Notice of Application (Notice) was published in the Silver State Post, a newspaper published at Deer Lodge, Montana. The Notice set December 2 as the deadline for filing objections to the application.

3. On November 24, 1982, an objection to the granting of the application was filed with the Department by John E. Manley. Manley asserted in his filed objection that there are no unappropriated waters in Douglas Creek; and, that excavation in the stream bed may cause a change in the surface water-groundwater hydrology of upper Douglas Creek, thereby adversely affecting his right to appropriate water downstream.

4. On January 5, 1983, the Administrator of the Department's Water Resources Division issued a Notice of and Order for Hearing, setting the date for a contested case hearing for January 25, 1983.

5. On January 7, 1983, the Notice of and Order for Hearing was served by mail on the parties of record.

6. On January 17, 1983, Manley's counsel requested a continuance of the contested case hearing. The request was made because Manley would be out-of-state during the week of January 25 and therefore unavailable to present testimony.

7. On January 21, 1983, the Hearing Examiner issued an Order granting the continuance and rescheduling the contested case hearing for March 11, 1983.

8. The Applicant proposes to appropriate water in order facilitate placer mining on four mining claims located in the upper reaches of Douglas Creek. The four claims which the Applicant intends to mine are named Fork Horn 1, Fork Horn 2, Hard Luck and Lucky Dog.

9. An injunction pendente lite has been entered in a quiet title action against the Applicant in J. Villareal v. L. Halverson No. DV-82-106 (3rd J. Dist. Ct., September 2, 1982), prohibiting her from "prospecting, digging, washing gravel or otherwise working" on the Fork Horn 1 and Fork Horn 2 claims during the pendency of the action.

10. The Applicant intends to divert water from Douglas Creek (creek) by means of a 3.5 horsepower pump. The Applicant proposes to run the pumps for only six hours a day. Water will be conveyed from the creek by pipeline into a sluice box which will outflow into an unlined settling pond located about 25 feet from the creek. The size of the settling pond is proposed to be 6 feet in depth, 50 feet in width and 50 feet in depth (about 0.17 ac-ft); and, will have a capacity for 55,000 gallons of water.

11. Settling pond water will return to the creek only when the water overflows the walls of the pond. No evidence was presented regarding the amount of time it will take for any of the pond water to be returned to the creek.

12. Eventually, the settling pond will fill up with waste sediment (i.e., ore, dirt and rock). When this occurs, the Applicant, instead of removing the sediment with a backhoe, plans to dig another new pond downstream. The Applicant proposes to use only one pond at a time, although a total of five ponds may be needed to complete the entire mining process in the creek area.

13. No materials are proposed to be excavated from the creek banks or bed. Mining excavation will be limited to an area 100 feet east of the creek.

14. Manley is a rancher and farmer who owns about 900 acres of land located between 4.5 and 7 miles downstream from the Applicant's point of diversion. Manley is the successor in

interest to ten decreed water rights. Senate Bill 76 claims have been filed for each right. These existing water rights allow Manley to divert, on a cumulative basis, 716 miner's inches up to 5,704 ac-ft from June 1 to October 1, inclusive, of each year, for flood and sprinkler irrigation of his land. Eight of the ten decreed rights allow Manley to store water in three separate reservoirs on the creek. The lands to which the decreed water rights are appurtenant to are generally described as being located in Sections 14, 15, 16, 20 and 21, T 12 W, R 21 W, all in Powell County. The creek is claimed as the source of supply of each decreed right.

15. There are water shortage problems in the creek basin. The shortage is so severe that creek users annually purchase replacement water from the nearby Nevada Creek Project. This "Project" was constructed by the State Water Conservation Board in 1939 and consists of a dam, reservoir and canal system for water distribution. The Project reservoir is located on Nevada Creek about 10 miles southeast of Helmville, Montana; and, has a water storage capacity for the full irrigation of 1,000 acres and provides a supplemental supply for 10,000 acres of land. The canal system incorporates two main canals known as the North Helmville Canal and the Douglas Creek Canal.

16. In any given year, Manley has never been able to fill all his decreed water rights. Since 1939, Manley has purchased Nevada Creek replacement water for a neighbor ranch. In return, the rancher allows Manley to use his Douglas Creek water right.

The replacement water is transported to the neighbor ranch via the Douglas Creek Canal.

17. Absent from this record is credible evidence demonstrating that only insignificant volumes of water will be consumed in the Applicant's proposed mining process; and, that any water diverted will be directly returned to the creek within a short time period so as to allow for downstream use. Proof of these two factors is essential to establishing that the Applicant's proposed use is a non-consumptive use.

18. Water is available in the creek for non-consumptive uses only.

19. The Applicant admitted on the record at the hearing that she will never be able to beneficially use all the water applied for in the application (i.e., 25 ac-ft). No other evidence was introduced regarding how much water the Applicant actually intends to use or needs for her placer mining process.

20. The Applicant's proposed means of diversion are reasonable and customary for her intended appropriation.

21. There are no planned uses or developments for which a permit has been issued or water reservations which the proposed use will affect.

PERTINENT STATUTORY EXCERPTS

MCA Section 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 for which water has been reserved...."

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

CONCLUSIONS OF LAW

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. Ella E. Halverson is speculating as to the amount of water that she can apply to beneficial use. There is insufficient evidence in the record to determine the volumes of water the Applicant proposes to put to beneficial use.

4. The Applicant did not prove by substantial credible evidence that are unappropriated waters in Douglas Creek at times when the water can be put to beneficial use; in the amount proposed for appropriation; and throughout the period during the proposed appropriation, the amount requested is available. The Applicant further did not prove by substantial credible evidence that the rights of a prior appropriator will not be adversely affected.

5. Appropriating water for placer mining is a "beneficial use", as that term is defined in 85-2-102(2), MCA.

6. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works were adequate; that the proposed use of water is a beneficial use; and, that 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 foregoing Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 46920-s76F be denied.

DONE this 18<sup>th</sup> day of July, 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 Section 2-4-623(5), the Department is required to serve its final decision upon each party by first class mail.

MEMORANDUM

I.

The primary reason that the Hearing Examiner has recommended that this application be denied is because the Applicant is speculating in the amount of water needed for her placer mining project. The Applicant admitted, during cross-examination by Manley's counsel, that she "will never use 25 acre-feet of water in a year" (the amount applied for). See, Finding 19. No other evidence exists in the record which would indicate how much water the Applicant actually intends to put to beneficial use. Id.

Under Montana Law, the intention to appropriate water must be one which is definitely formulated and not speculative. Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900) (The "policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses." 24 Mont. at 17.). Speculating in the amount of water needed for any project is not a sufficient basis for granting a permit. In re Diamond City Mining Co. (Dept. Final Order, May, 1983).

Other equally compelling reasons also exist for denying this permit. As noted in the Findings of Fact, water is available in Douglas Creek for non-consumptive uses only. See, Finding 18. In a true non-consumptive use, only insignificant volumes of water are lost during the appropriation process; and, any waters

diverted are directly returned to the source of supply within a short time period so as to allow for downstream use. Diamond City, supra.

After carefully reviewing the entire record, the Hearing Examiner has found that there is insufficient evidence to conclude that the Applicant's proposed use is a non-consumptive use. See, Finding 17. The Applicant failed to prove when (if ever) the waters proposed to be diverted will be "directly returned" to Douglas Creek. Id. The Applicant clearly stated on the record that water will return to the creek only when settling pond water overflows the walls of the pond. No estimate was given (despite the persistent questioning of the Hearing Examiner and Manley's counsel) as to how long the water would remain in the ponds; or, if the settling pond water would return to Douglas Creek through the groundwater regime. Thus, it is entirely possible (in view of the lack evidence to the contrary) that significant volumes of water may remain in the settling pond for days, weeks or months. Cf., Diamond City, supra.

The only other evidence concerning the return flow of water to Douglas Creek came from the Department's Helena Field Office Staff. The Staff presented extensive testimony that settling pond water would, in their "expert" opinion, infiltrate into the Douglas Creek groundwater regime, and therefore, the water would eventually return to the creek. For the reasons given below, the Hearing Examiner has given absolutely no weight to the Staff's testimony.

Much of the Staff's "expert" testimony focused on complex factual issues of subterranean geology and groundwater hydrology. The Staff's testimony is not believable because they failed to establish the evidentiary foundation necessary to enable an agricultural engineer to render an expert opinion on geology and hydrology issues. As a result, the Staff was testifying, as matter of law, far beyond the bounds of their technical expertise. To further complicate matters, no field investigation was made of the Douglas Creek area by the Staff. Why the Helena Field Office Staff would even attempt to give an expert opinion on the geology and hydrology of Douglas Creek without first making an independent field investigation is a mystery to the Hearing Examiner. ~~The sciences of geology and hydrology involve making judgments that are both qualitative and quantitative in nature. These sciences require, virtually without exception, a field survey or investigation of the area before a competent judgement or opinion can be formed. Absent a field investigation in this case, the Hearing Examiner will not rely on the opinions of the Staff. See generally, Jack Hirschy Livestock, Inc. v. John P. Schonenberger and the Department of Natural Resources and Conservation, No. 9163 (5th J. Dist. Ct., June 15, 1979).~~

Evidence presented from the Objector (when coupled with the Applicant's speculation (Conclusion 3) and her failure to prove that the proposed application is a non-consumptive use) further strengthens the Hearing Examiner's recommendation. Manley

testified that Douglas Creek is a heavily appropriated stream; and, that there are virtually no surplus waters available for new consumptive uses. Manley's credible testimony was that he is unable to fill his decreed water rights on an annual basis. See, Finding 16. In fact, he has resorted to purchasing replacement water in order to irrigate his lands. Id. Clearly, further appropriations that consume significant volumes of water from Douglas Creek will only exacerbate the current current water shortage problems in the basin.

In summary, the Applicant failed to prove that her proposed use is a non-consumptive use, that there are unappropriated waters are available in Douglas Creek for her proposed use and that the proposed use will not adversely affect the water rights of a prior appropriator. See, Conclusion of Law 4.

## II.

One other issue deserves a few comments from the Hearing Examiner. At the hearing, Manley's counsel introduced evidence establishing that an injunction had been entered against the Applicant prohibiting her from working two of her mining claims in the upper reaches of Douglas Creek. See, Obj. Ex. 3; see also, Finding 8. According to counsel, since the Applicant could not legally work on the mining claims, she could not convey the water to her proposed place of use. Therefore, the permit should be denied. The Hearing Examiner disagrees.

While it is true that Applicant's right to convey water to her place of use is currently prohibited, this "impediment" would not

in itself preclude the Department from issuing a beneficial use permit. The Department's statutory duty is to determine whether any application meets the criteria necessary for granting a permit. See, 85-2-311, MCA. And, under §85-2-311, an applicant is not required to own or prove that he owns the property over which the water is proposed to be conveyed. See, In re Rausch (Dept. Final Order, May, 1983). see also, 93 C. J. S. Waters, §171, p. 912.

When property ownership is disputed (e.g., by an Objector), that issue must be resolved by a district court, not the Department. Id. If it is subsequently determined by a court that an appropriator lacks good title to the "disputed property", then obviously the appropriator has no legal right to convey the water to the place of use. As a result, the proposed appropriation could never be put to beneficial use within the time specified in the permit. Failure to commence, prosecute, or complete the work on an appropriation project within the time stated in the permit is grounds for revocation. See, 85-2-314, MCA.

K.B.R.

AFFIDAVIT OF SERVICE  
PROPOSAL FOR DECISION

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

Patti K. Miller, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 19, 1983, she deposited in the United States mail, Certified Return Receipt Mail mail, an order by the Department on the Application by Ella E. Halverson, Application No. 46920-s76F, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Ella E. Halverson, P. O. Box 404, Milltown, Montana 59851
2. John E. Manley, P. O. Box 73, Drummond, Montana 59832
3. James J. Masar, Attorney at Law, P. O. Box 150, Deer Lodge, Montana 59722
4. Kent B. Roberts, Hearing Examiner (hand deliver)
5. T. J. Reynolds, Helena Field Office, (inter-office mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by

Patti Miller

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

On this 19th day of July, 1983, before me, a Notary Public in and for said state, personally appeared Patti Miller, known to me to be the Clerk 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.

James P. Gilman

Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1/21/84

CASE # 46920