

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. 49946-s40J BY BYRON HOULD)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision (hereafter, "Proposal") has expired. No exceptions or other arguments were filed by any parties of record. The Department of Natural Resources and Conservation (hereafter, "Department") accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in her Proposal, and expressly incorporates them herein by reference.

THEREFORE, on basis of the record and proceedings herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 49946-s40J is hereby granted to Byron Hould to appropriate from Tuttle Reservoir, whose source is Halfway Coulee, 1030 gpm up to 121 acre-feet per year; 120 acre-feet to be used to irrigate 80 acres; 40 acres on the S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County, and 40 acres in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$

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Section 23, Township 29 North, Range 28 East, Phillips County, and 30 gpm up to 1 acre foot for stock-watering use on the SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County. The waters provided for herein shall in no event be diverted, however, except at those times of surplus water evidenced by water spilling over Tuttle Reservoir, and water spilling over Vandalia Dam, on the mainstream of the Milk River. The priority date for this permit shall be April 27, 1982, 9:23 A.M.

This Provisional Permit is expressly made subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such 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. The Permittee shall in no event cause to be diverted from the source of supply more waters than are reasonably required for the purposes provided for herein. At all times when water is not so required, the Permittee shall cause and otherwise allow said waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittees liability for damages that may be caused by the exercise of any of the rights evidenced by the Permit in this matter. Nor does the Department in issuing any permit acknowledge any liability for damage, even if damage is the necessary and unavoidable consequence of the exercise of this permit.

D. It is the Permittee's responsibility to determine that Tuttle Reservoir is spilling water before diverting any water under this permit. The Permittee shall contact Blatter Ranch at the start of each irrigation season to determine the current water supply conditions and availability of water for his use. The Permittee shall thereafter, during all times of actively appropriating water under this permit, contact Blatter Ranch at least once per week, to confirm that the conditions warrant continued appropriation, i.e. that Tuttle Reservoir remains overflowing. In no event may the Permittee continue diverting water (including diversion by stock) after being notified by Blatter Ranch that Tuttle Reservoir is no long spilling.

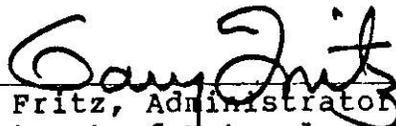
E. The waters appropriated pursuant to this permit shall only be diverted during the winter months, extreme high spring runoff, or when the Bureau of Reclamation is spilling at Vandalia Diversion. During all other periods the Permittee shall not appropriate any water pursuant to this Permit.

F. The Permittee shall contact the Bureau of Reclamation at Malta at the start of each irrigation season to determine the current water supply conditions and the availability of water for his use. This contact shall be made by certified mail through the U.S. Postal Service with return receipt requested.

G. The conditions contained herein relating to Vandalia Reservoir under E and F above may be modified by the Department upon receipt of further evidence or determination by the Department pertaining to the water rights of the U.S. Government of said Reservoir.

H. If at any time after this permit 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 applicant to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

DONE this 23rd day of April, 1984.



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



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 27, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Byron Hould, Application No. 49946-s40J, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Byron Hould, Wagner, MT 59543
2. U.S. Dept. of the Interior, Office of the Solicitor, *Richard K. Aldrich, P.O. Box 1538, Billings, MT 59103
3. U.S. Bureau of Reclamation, *Gordon Aycock, P.O. Box 2553, Billings, MT 59103
4. Blatter Ranch, Iven Blatter, Malta, MT 59538
5. Glasgow Irrigation District, P.O. Box R, Malta, MT 59538
6. Lee Yelin, Missoula Field Office, (inter-department mail)
7. Don Cox, Glasgow Field Office, (inter-department mail)
8. Sarah A. Bond, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 27th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna K. Elser, 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 John
Notary Public for the State of Montana
Residing at Montana City Montana
My Commission expires 3-1-85

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) SECOND CORRECTION
NO. 49946-s40J BY BYRON HOULD)

* * * * *

To all parties of record:

Please note there was a typographical error in the Amendment for Clarification of Proposed & Final Orders in the land description for a point of diversion. The Range should read Range 28; not Range 7-8. Furthermore, because the diversion method is a movable pump, the final points of diversion will be specified in the Permit as only the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 23, Township 29 North, Range 28 East, Phillips County.

DONE this 11th day of June, 1984.

Sarah A. Bond

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

CASE # 49946

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
NO. 49946-s40J BY BYRON HOULD)	FOR
)	DECISION

* * * * *

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 Malta, Montana on January 4, 1984.

Byron Hould (hereafter the "Applicant") appeared pro se, attending with members of his family, Denver and Harold Hould.

Ivan and Catherine Blatter, appeared for Objector Blatter Ranch.

Objector Bureau of Reclamation (hereafter "Bureau") appeared by and through its counsel, Gerald Moore, accompanied by Bob Green and Tim Felchle.

Lee Yelin, staff expert for the Montana Department of Natural Resources and Conservation (hereafter, "Department") also appeared.

Representatives of Objector Malta Irrigation District appeared but did not participate.

Representatives of Objector Glasgow Irrigation District appeared but declined to participate.

This Proposal for Decision (hereafter "Proposal") is a recommendation, not a final decision. Any party adversely affected by this Proposal may file exceptions to this Proposal with the Hearing Examiner, 32 S. Ewing, Helena, Montana 59620, within 20 days after service of this Proposal. A final decision will not be made until after expiration of the time period for the filing of the exceptions and thorough Departmental consideration of the exceptions and comments filed.

STATEMENT OF CASE

The Applicant and Objectors appeared at the date and time set for hearing. An off-the-record discussion resulted in an agreement among the parties that the objections to the permit application would be withdrawn and the Applicant would agree to certain conditions, restrictions and limitations in the permit. All parties agreed that the statutory criteria for permit issuance could only be met by strictly limiting the permit to allow appropriation only at specified times under specified conditions.

Based upon the proceedings and documents in the record herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On April 27, 1982, the Applicant filed an Application for Beneficial Water Use Permit seeking to use 1030 gallons per minute (hereafter "gpm") up to 121 acre-feet: 1000 gpm up to 120

acre-feet for irrigation use between April 15 and October 15, inclusive, and 30 gpm up to 1 acre-foot for stock-water use between May 1 and October 15, inclusive. The water is to be diverted in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County; SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County; and in NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County. The irrigation use will be new flood irrigation on 40 acres in the S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County, and 40 acres in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County. The stock use will be in the SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County.

2. The Applicant proposed to pump water from a reservoir, (partially occurring on his land) commonly known as Tuttle Reservoir, and to transport the water to the land to be irrigated by means of gated pipe canal. Irrigation would be by water spreading.

3. Tuttle Reservoir impounds water over lands of the Applicant and Objector Blatter Ranch. The Blatter Ranch claims a filed appropriation right of 953.1 acre-feet per year for irrigation from Halfway Coulee, which it satisfies Blatter Ranch evidences its claim with a Statement of Claim of Existing Water Rights for the Water Courts of the State of Montana.

4. The Bureau objected to the granting of the instant application on the grounds that, "Any new consumptive use of water in the Milk River Basin above Vandalia Dam will adversely

affect the existing water rights of the Milk River Project, all natural flow of the Milk River which is useful for irrigation development has been appropriated. An adequate supply of water for existing users is possible only because of imports from St. Marys River Basin and Storage at Fresno and Nelson Reservoir." (Bureau's objection)

5. An objection was filed by Malta Irrigation District-Glasgow Irrigation District, stating as its basis, the same stated by the Bureau.

6. At the hearing, after an off-the-record discussion, all parties stipulated to the existence of the statutory criteria necessary for the granting of a permit only at those times when water is spilling over Tuttle Reservoir, and also at Vandalia Dam, on the mainstream of the Milk. At these times, this excess or surplus water cannot be used by the Objectors, and therefore can be appropriated by Applicant without injury thereto.

7. Because of the withdrawal of the objections, no evidence was presented on the record.

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

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject-matter and the parties herein.

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

3. Based upon agreement of the parties, the application for permit, as conditioned herein, is uncontested.

4. The parties stipulated to the existence of the statutory criteria necessary for the permit issuance at only those times when both Tuttle Reservoir and Vandalia Dam are spilling water. No evidence was presented on the record.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the documents on record herein, the Hearing Examiner makes the following proposed order:

PROPOSED ORDER

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 49946-s40J is hereby granted to Byron Hould to appropriate from Tuttle Reservoir, whose source is Halfway Coulee, 1030 gpm up to 121 acre-feet per year; 120 acre-feet to be used to irrigate 80 acres; 40 acres on the S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County, and 40 acres in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County, and 30 gpm up to 1 acre foot for stock-watering use on the SE $\frac{1}{4}$ Section 23, Township 29 North, Range 28 East, Phillips County. The waters provided for herein shall in no event be diverted, however, except at those times of surplus water evidenced by water spilling over Tuttle Reservoir, and water spilling over Vandalia Dam, on the mainstream of the Milk River. The priority date for this permit shall be April 27, 1982, 9:23 A.M.

This Provisional Permit is expressly made subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such 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. The Permittee shall in no event cause to be diverted from the source of supply more waters than are reasonably required for the purposes provided for herein. At all times when water is not so required, the Permittee shall cause and otherwise allow said waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittees liability for damages that may be caused by the exercise of any of the rights evidenced by the Permit in this matter. Nor does the Department in issuing any permit acknowledge any liability for damage, even if damage is the necessary and unavoidable consequence of the exercise of this permit.

D. It is the Permittee's responsibility to determine that Tuttle Reservoir is spilling water before diverting any water under this permit. The Permittee shall contact Blatter Ranch at the start of each irrigation season to determine the current water supply conditions and availability of water for his use. The Permittee shall thereafter, during all times of actively appropriating water under this permit, contact Blatter Ranch at least once per week, to confirm that the conditions warrant continued appropriation, i.e. that Tuttle Reservoir remains

overflowing. In no event may the Permittee continue diverting water (including diversion by stock) after being notified by Blatter Ranch that Tuttle Reservoir is no long spilling.

E. The waters appropriated pursuant to this permit shall only be diverted during the winter months, extreme high spring runoff, or when the Bureau of Reclamation is spilling at Vandalia Diversion. During all other periods the Permittee shall not appropriate any water pursuant to this Permit.

F. The Permittee shall contact the Bureau of Reclamation at Malta at the start of each irrigation season to determine the current water supply conditions and the availability of water for his use. This contact shall be made by certified mail through the U.S. Postal Service with return receipt requested.

G. The conditions contained herein relating to Vandalia Reservoir under E and F above may be modified by the Department upon receipt of further evidence or determination by the Department pertaining to the water rights of the U.S. Government of said Reservoir.

H. If at any time after this permit 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 applicant to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow

the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

DONE this 17 day of January, 1984.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. All parties are urged to review this document carefully for accuracy. Objections and exceptions must be filed with (received) by the Hearing Examiner and Conservation on or before February 6, 1984.

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 17, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Byron Hould, Application No. 49946-s40J, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Byron Hould, Wagner, MT 59543
2. U.S. Dept. of the Interior, Office of the Solicitor, %Richard K. Aldrich, P.O. Box 1538, Billings, MT 59103
3. U.S. Bureau of Reclamation, %Gordon Aycok, P.O. Box 2553, Billings, MT 59103
4. Blatter Ranch, Iven Blatter, Malta, MT 59538
5. Glasgow Irrigation District, P.O. Box R, Malta, MT 59538
6. Lee Yelin, Missoula Field Office, (inter-department mail)
7. Don Cox, Glasgow Field Office, (inter-department mail)
8. Sarah A. Bond, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 17th day of January, 1984, before me, a Notary Public in and for said state, personally appeared Donna K. Elser, 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

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