

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 50640-s40A BY DAVID AND/OR)
JOYCE SHEROD)

FINAL ORDER

* * * * *

Pursuant to the Montana Administrative Procedure Act the above-captioned matter was noticed for hearing. Prior to the date set for hearing, Mr. Van Der Voort withdrew his objection. After the Applicant agreed to issuance of a Conditional Permit, the Department of Natural Resources and Conservation withdrew its objection, and the hearing was cancelled.

The time period for filing objections or exceptions to the Proposal for Decision of February 7, 1985, has expired. No exceptions or objections have been received. Therefore, being fully advised, with the corrections made below, the Department of Natural Resources and Conservation hereby incorporates and adopts herein by reference, the Proposal for Decision as the Final Order in the above-captioned matter.

Errors

For the sake of clarity, the Department hereby corrects the following minor errors in the Proposal.

CASE # 50640

On page 3, Finding of Fact Number 6, the quote should read, "The Engineering Bureau would agree to issuance of a permit for your application under the conditions listed on the attached "Notice and Statement of Opinion. . . . "

On page 4, subparagraph 4 of Finding of Fact Number 7 (which begins on page 3) should read, "4. The flow rates may be adjusted. . . . "

The source of water for the Application was omitted from the Proposed Order, but has been added herein for completeness.

WHEREFORE, based on the foregoing, the Department hereby issues the following:

FINAL ORDER

Subject to the terms, restrictions and limitations described below, the Application for Beneficial Water Use Permit Number 50640-s40A by David and/or Joyce Sherod is hereby granted to appropriate, from an unnamed tributary of Custer Gulch Coulee, 300 gpm up to 97 acre-feet from the point of diversion in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, Township 5 North, Range 20 East, Golden Valley County, between June 1 and September 1 for the new sprinkler irrigation on 50 acres located in the NE $\frac{1}{4}$ of Section 27, Township 5 North, Range 20 East, Golden Valley County. Water will be withdrawn by means of a pump from an

CASE # 50640

existing 5.9 acre-foot capacity reservoir located in the NW¼NE¼NE¼ of said Section 27. The priority date for this Permit shall be July 22, 1982, 3:21 p.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 the waters to remain in the source of supply.
- C. Nothing herein shall be construed to affect or reduce the Permittee's 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.

CASE # 50640

- D. The Permittee shall cease exercising the permitted appropriation once the flow rate in the Musselshell River at the USGS gauging station near Roundup, Montana drops below the following amounts for the months indicated: June, 145.3 cfs; July, 227.3 cfs; August, 194.8 cfs; September, 94.5 cfs; or the flow rates as adjusted or updated by the Lewistown Field Office.
- E. The Permittee shall measure or meter all water withdrawals under this Permit and submit the amounts, dates and times of those withdrawals to the Water Rights Bureau on a weekly basis.
- F. 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 a 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 the existing rights or allow the Permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected.

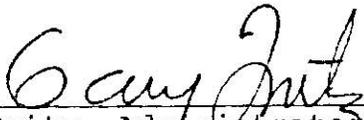
CASE # 50640

G. It is the Permittee's responsibility to determine what the stream flow conditions of the Musselshell River are before diverting water under this Permit. The Permittee shall call the Water Rights Field Office in Lewistown at 538-7459 to confirm that an adequate flow is available in the Musselshell River for his diversion. The Permittee shall check the flow rate twice a week (after 10 a.m. Tuesday and Friday) or as often as conditions demand (determined by Water Rights Field Office) during his diversion, to ensure that adequate flow is available for his diversion and for existing rights.

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 12 day of April, 1985.



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

CASE # 50640
5

AFFIDAVIT OF SERVICE
MAILING

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 17, 1985, she deposited in the United States mail, First class mail, an order by the Department on the Application by David and/or Joyce Sherod, Application No. 50640-s40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. David and/or Joyce Sherod, Rygate, MT 59074
2. Dept. of Natural Resources and Conservation, Steven Fry, 32 S. Ewing, Helena, MT 59620
3. Harry Van Der Voort, Ryegate, MT 59074
4. John Maynard, Hearing Examiner, Department of Justice, Agency Legal Services Bureau, Justice Building, 215 North Sanders, Helena, Montana 59620
5. Sam Rodriguez, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources Division (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

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

On this 17th day of April, 1985, before me, a Notary Public in and for said state, personally appeared Donna 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 3-1-88

CASE NO
50640

Lehrer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

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

IN THE MATTER OF THE APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 50640-s40A BY DAVID AND/OR
JOYCE SHEROD.

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was scheduled for January 24, 1985 in Ryegate, Montana. Notice of the hearing was served on Harry Van Der Voort, an objector to the application, and Steven Fry, on behalf of the Department of Natural Resources and Conservation, the other objector to the application. Prior to the date scheduled for hearing Harry Van Der Voort notified the Water Rights Bureau of the Department of Natural Resources and Conservation, 613 Northeast Main Street, P.O. Box 438, Lewistown, Montana 59457, that he was withdrawing his objection to the beneficial water use permit application of David and Joyce Sherod. Following Mr. Van Der Voort's withdrawal of his objections the Water Rights Bureau notified the applicant and proposed certain conditions for the protection of prior existing water rights that the applicant subsequently agreed to. As a result, the Department's objections were withdrawn and the hearing was cancelled.

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 Gary Fritz, Administrator, Water Resources Division, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59620, within 20 days after

CASE # 50640

1 service of this proposal. A final decision will not be made
2 until after expiration of the time period for the filing of
3 the exceptions and thorough departmental consideration of the
4 exceptions and comments filed.

5 Based upon the proceedings and documents and the record
6 herein the Hearing Examiner makes the following:
7

8 FINDINGS OF FACT

9 1. On July 22, 1982 David and/or Joyce Sherod,
10 hereinafter referred to as the applicants, filed an
11 application for beneficial water use permit seeking to use
12 300 gallons per minute up to 97 acre-feet for new sprinkler
13 irrigation use between June 1 and September 1, inclusive.
14 The water is to be diverted in the NW¼NE¼NE¼ Sec. 27, Twp. 5
15 N., R. 20 E., Golden Valley County. The irrigation use will
16 be for new sprinkler irrigation on 50 acres in the NE¼ of
17 Sec. 27, Twp. 5 N., R. 20 E., Golden Valley County.

18 2. Harry Van Der Voort objected to the granting of the
19 instant application on the grounds that "every time someone
20 takes water out of these tributaries to Big Coulee Creek it
21 hurts the flow of said creek. There just isn't enough water
22 in this area to warrant any more new irrigation."

23 3. The Bureau objected to the granting of the instant
24 application on the grounds that "this application would take
25 water from the Dead Man's Basin in Delphia-Melstone Projects,
26 which divert water from the Musselshell River."

27 4. The Bureau stated that it would agree to the
28 issuance of the permit under the following conditions:

- 29 1. Subject to all prior existing water rights in the source of supply.
- 30
- 31 2. Subject to any final determination of existing rights as provided by Montana law.
- 32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

3. The permittee shall cease exercising the permitted appropriation once the flow rate in the Musselshell River at the USGS gauging station near Roundup, MT drops below the following amounts for the months indicated:
June, 145.3 cfs;
July, 227.3 cfs;
August, 194.8 cfs;
September, 94.5 cfs;
OR the flow rates as adjusted or updated by the Lewistown field office.

4. The flow rates may be adjusted when the adjudication process is completed, or if additional information on existing water rights becomes available.

5. The permittee shall measure or meter all water withdrawals under this permit and submit the amounts, dates, and times of those withdrawals to the Water Rights Bureau on a weekly basis.

5. On January 4, 1985 the Department received a letter from Harry Van Der Voort stating the following:

This is to notify you that I hereby withdraw my objections in regard to use permit number 50640-s40A by David and/or Joyce Sherod. Respectfully yours, Harry Van Der Voort.

6. On January 7, 1985 the Lewistown Water Rights Bureau wrote Mr. and Mrs. Sherod indicating the following: "The Engineering Bureau would agree to issuance of a permit for your application on the conditions listed on the attached 'Notice and Statement of Opinion'."

7. The conditions listed in the "Notice and Statement of Opinion" are the following:

- 1. Subject to all prior existing water rights and source of supply.
- 2. Subject to any final determination of existing rights as provided by Montana law.
- 3. The permittee shall cease exercising the permitted appropriation once the flow rate in the Musselshell River at the USGS gauging station near Roundup, MT drops below the following amounts for the months indicated:
June, 145.3 cubic feet per second (cfs);
July, 227.3 cfs;

1 August, 194.8 cfs;
2 September 94.5 cfs;
3 OR the flow rates as adjusted or updated
4 by the Lewistown field office.

4 4. The flow may be adjusted when the
5 adjudication process is completed or if
6 additional information on existing water
7 rights becomes available.

6 5. The permittee shall measure or meter all
7 water withdrawals under this permit and
8 submit the amounts, dates, and times of
9 those withdrawals to the Water Rights
10 Bureau on a weekly basis.

9 8. On January 9, 1985, David Sherod advised the
10 Department that he accepted the conditions and did not
11 request a hearing.

12 9. Based on the withdrawal of the objections, no
13 evidence was presented on the record.

14 Based upon the foregoing proposed Findings of Fact the
15 Hearing Examiner makes the following:

16
17 CONCLUSIONS OF LAW

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

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

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

28 4. The statutory criteria of section 85-2-311, MCA,
29 for issuance of a permit have been met.

30 Based upon the foregoing Findings of Fact and
31 Conclusions of Law and upon the documents on record herein
32 the Hearing Examiner makes the following proposed Order.

CASE # 50640

PROPOSED ORDER

1
2 Subject to the terms, restrictions and limitations
3 described below, the application for beneficial water use
4 permit number 50640-s40A by David and/or Joyce Sherod is
5 hereby granted to appropriate 300 gpm up to 97 acre-feet from
6 the point of diversion in the NW¼NE¼NE¼ Sec. 27, Twp. 5 N.,
7 R. 20 E., Golden Valley County, between June 1 and September
8 1 for new sprinkler irrigation on 50 acres located in the NE¼
9 Sec. 27, Twp. 5 N., R. 20 E., Golden Valley County. The
10 priority date for this permit shall be July 22, 1982, 3:21
11 p.m.

12 This provisional permit is expressly made subject to the
13 following express conditions, limitations and restrictions:
14

15 A. Any rights evidenced herein are subject to all
16 prior and existing rights, and to any final
17 determination of such rights as provided by Montana
18 law. Nothing herein shall be construed to
19 authorize diversions by the permittee to the
20 detriment of any senior appropriator.
21

22 B. The permittee shall in no event cause to be
23 diverted from the source of supply more waters than
24 are reasonably required for the purposes provided
25 for herein. At all times when water is not so
26 required, the permittee shall cause and otherwise
27 allow said waters to remain in the source of
28 supply.
29

30 C. Nothing herein shall be construed to affect or
31 reduce the permittee's liability for damages that
32 may be caused by the exercise of any of the rights

CASE # 50640

1 evidenced by the permit in this matter. Nor does
2 the Department in issuing any permit acknowledge
3 any liability for damage, even if damage is the
4 necessary and unavoidable consequence of the
5 exercise of this permit.
6

7 D. The permittee shall cease exercising the permitted
8 appropriation once the flow rate in the Musselshell
9 River at the USGS gauging station near Roundup,
10 Montana drops below the following amounts for the
11 months indicated: June, 145.3 cfs; July, 227.3
12 cfs; August, 194.8 cfs; September, 94.5 cfs; or the
13 flow rates as adjusted or updated by the Lewistown
14 field office.
15

16 E. The permittee shall measure or meter all water
17 withdrawals under this permit and submit the
18 amounts, dates and times of those withdrawals to
19 the Water Rights Bureau on a weekly basis.
20

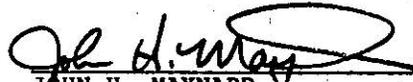
21 F. If at any time after this permit is issued, a
22 written complaint is received by the Department
23 alleging that diverting from this source is
24 adversely affecting a prior water right, the
25 Department may make a field investigation of the
26 project. If during a field investigation the
27 Department finds sufficient evidence supporting the
28 allegation, it may conduct a hearing in the matter
29 allowing the applicant to show cause why the
30 permit should not be modified or revoked. The
31 Department may then modify or revoke the permit to
32 protect the existing rights or allow the permit to

CASE # 50640

1 continue unchanged if the hearings officer
2 determines that no existing water rights are being
3 adversely affected.
4

5 G. It is the permittee's responsibility to determine
6 what the stream flow conditions of the Musselshell
7 River are before diverting water under this permit.
8 The permittee shall call the Water Rights Field
9 Office in Lewistown at 538-7459 to confirm that an
10 adequate flow is available in the Musselshell River
11 for his diversion. The permittee shall check the
12 flow rate twice a week (after 10 a.m. Tuesday and
13 Friday) or as often as conditions demand
14 (determined by Water Rights Field Office) during
15 his diversion, to ensure that adequate flow is
16 available for his diversion and for existing
17 rights.
18

19 DATED this 7th day of February, 1985.
20

21 
22 JOHN H. MAYNARD
23 Hearing Examiner
24
25
26
27
28
29
30
31
32

CASE # 50640

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I hereby certify that I mailed a true and accurate copy of the foregoing, postage prepaid, by U.S. mail, to the following:

David and Joyce Sherod
Ryegate MT 59074

Harry Van Der Voort
Ryegate MT 59074

Steven Fry
Department of Natural Resources
and Conservation
32 South Ewing
Helena MT 59620

DATED: February 23, 1985 *Ronald Elmer*

CASE # 50640