

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. 50765-s41Q BY NILSON)
ENTERPRISES, INC.)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. A timely exception was received on August 24, 1984, from Thomas E. Krenzelok, who was an untimely Objector in this matter. For the reasons stated below, and after having given the objection due consideration the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the August 7, 1984 Proposal for Decision, and incorporates them herein by reference.

RESPONSE TO EXCEPTION

Thomas Krenzelok has made a general exception to the Proposal for Decision in this matter, alleging that there is not enough water, that the Applicant "will need more water all the time", that there is no real way to regulate pump rate, and that the pumping will never be regulated. Attached to his exception is a statement from Bernice Busch, previous owner of the property now owned by Tom and Gloria Krenzelok, stating that Willow Creek went dry on the property for a period of about 45 days in May and June, 1971.

CASE # 50765

As an untimely Objector, Mr. Krenzelok technically is not a party in this matter, and thereby is not entitled to file an exception to the Proposal. See Administrative Rules of Montana §§ 36.12.202(19), 36.12.219, and 36.12.299(1). Although these rules were not effective until April 27, 1984, they codify the Department's previous administrative procedures for water right contested case hearings, and embody the general procedures of the Montana Administrative Procedures Act and the Water Use Act under which the Department has acted.

However, even if Mr. Krenzelok's exception were to be considered procedurally correct, it fails to state an exception to the Proposal for Decision to which specific response may be made. Mr. Krenzelok states that the applied-for amount of 750 gallons of water per minute "is not enough", and that the Applicant "will need more water all the time." To support this statement, he makes allegations that there is no real way to regulate the Applicant's pumping rate and that, in the Objector's opinion, pumping will never be regulated. In addition, Mr. Krenzelok submits unsubstantiated data concerning pumping rates for sprinkler irrigation, and statements by himself and his predecessor on the property concerning water availability.

Such information may be considered in making a decision if it is presented on the record in a contested case hearing. However, Mr. Krenzelok is submitting this material after the record in this matter has been closed; his arguments therefore cannot be considered in the final decision-making process.

CASE # 50765
2

Apart from the alleged factual information which Mr. Krenzelok has attempted to introduce after the record has been closed in this matter, the only exception which remains is an implied allegation that the Findings of Fact concerning water need and water availability are incorrect. MCA § 2-4-621(3) states in part, "The agency in its final order...may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence...". The Department finds no basis for making such a determination in this matter.

In conclusion, it should be noted that Mr. Krenzelok did not take exception to Proposed Conclusions of Law 4, 5 and 6, which state that he does not have any water use rights which might be affected by the Applicant's proposed appropriation. Mr. Krenzelok's silence on this issue, in conjunction with the procedural and substantive flaws of his exception, indicate that he has no supportable basis for exception in this matter.

Therefore, based upon the Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:

CASE #

50745

FINAL ORDER

1. Subject to the terms and restrictions listed below, a Provisional Permit is granted to the Applicant to divert 750 gallons per minute up to 287.50 acre-feet per annum from April 1 through June 30, inclusive, of each year from Big Willow Creek. Water may be diverted from the following points, NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 3, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 10, NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 10, all in Township 19 North, Range 7 East, Cascade County, Montana. Water appropriated shall be used for new sprinkler irrigation on 125 acres in the following locations: SW $\frac{1}{4}$ Section 3, 30 acres; NW $\frac{1}{4}$ Section 10, 30 acres; SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 10, 20 acres; SE $\frac{1}{4}$ Section 10, 40 acres; W $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 11, 5 acres; all in Township 19 North, Range 7 East, Cascade County, Montana.

2. This Permit is subject to all prior and existing water rights in the source of supply, and any final determination of those rights as provided by Montana Law.

3. This Permit is issued in conjunction with Provisional Permit No. 7967-s41Q. The combined appropriation as granted shall not exceed a total of 750 gallons per minute up to 287.50 acre-feet per annum.

4. Nothing herein shall be construed in any way to affect or reduce the Permittee's liability for damages which may be caused by the exercise of the Provisional Permit, nor does the Department in issuing this Provisional Permit acknowledge liability for damages caused by the exercise of this Permit.

CASE #

50765

5. The Permittee shall in no event cause to be diverted from the source of supply pursuant to this Permit more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the Permittee, pursuant to this Permit, shall cause and otherwise allow the water to remain in the source of supply.

6. The Permittee shall take whatever steps are necessary to correct any adverse affects to downstream appropriators' water rights shown to result from appropriation under this Permit.

7. The Permittee shall diligently adhere to the terms and conditions of this Permit. Failure to adhere to the terms and conditions may result in a revocation or modification of the Permit.

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 28th day of November 1984.



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

CASE #

17265

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 November 30, 1984, she deposited in the United States mail, Certificate mail, an order by the Department on the Application by Nilson Enterprises, Inc., Application No. 50765-s41Q, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Nilson Enterprises, Inc., P.O. Box 2603, Great Falls, MT 59403
2. Herbert H. & Laura M. Maki, Rt 1 N., Box 2515, Belt, MT 59412
3. Bowman Ranch, Inc., Rosemary L. Bowman, Secretary, P.O. Box 153, Belt, MT 59412
4. Thomas E. Krenzelo, Box 461, Belt, MT 59412
5. Sam Rodriguez, Manager, 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 30th day of November, 1984, 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 3-1-85

CASE #

50765

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. 50765-s41Q BY NILSON)
ENTERPRISES, INC.)

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Great Falls, Montana, on May 8, 1984.

STATEMENT OF THE CASE

On November 15, 1982, an Application for Beneficial Water Use Permit No. 50765-s41Q was filed with the Department of Natural Resources and Conservation (hereafter "Department") by Nilson Enterprises, Inc. The Applicant generally seeks to divert 750 gallons per minute (gpm) up to 287.5 acre-feet per annum from three (3) diversion points out of Big Willow Creek a tributary of Belt Creek. The water is to be diverted for new sprinkler irrigation of 125 acres. The Application originally sought a diversion period from April 1 to October 31, inclusive, of each year.

Relevant portions of this Application were duly published for three successive weeks in the Great Falls Tribune, a newspaper of general circulation printed and published in Great Falls, Montana.

CASE #
50765

Timely objections were filed to the Application by Herbert H. and Laura M. Maki and Bowman Ranch, Inc. An untimely objection to the Application was filed by Thomas E. Krenzelok.

In an attempt to settle the objections to this Application, the Applicant agreed to reduce the Application to 400 gpm up to 134 acre-feet per annum, to be diverted between April 1 and June 15, inclusive, of each year. Objector Krenzelok did not wish to withdraw his objection subject to the reduced flow-rate, volume and period of use offered by the Applicant. Therefore, the Application was revised at the hearing to reflect the original amounts of water requested by the Applicant and the period of appropriation requested was identified to be April 1 through June 30, inclusive, of each year.

The Applicant, Nilson Enterprises, Inc., was represented at the hearing by Diane Volk, President, and Roy Volk, Treasurer.

Objectors present at the hearing and testifying on their own behalf were Herbert Maki and Thomas Krenzelok. Bowman Ranch, Inc., was represented by Rosemary Bowman, Secretary. Wayne Forder appeared on behalf of Forder Land and Cattle Company.

The Department was represented by Mr. Sterling Sundheim, Agricultural Engineer for the Lewistown Field Office of the Department's Water Rights Bureau.

EXHIBITS

The Applicant offered the following exhibits into the record, to wit:

A-1: A series of 4 maps outlining the approximate location of the diversions of each of the Objectors and the boundaries of the Applicant's proposed project.

A-2: A scale drawing of the Applicant's proposed project including diversion points, outline of fields to be irrigated and specifications of the proposed irrigation plan.

The Applicant's Exhibits were introduced into the record with no objections.

The Objectors introduced the following exhibits into the record, to wit:

O-1: Statement of Claim No. W-188107 for irrigation purposes by Thomas and Gloria Krenzelok.

O-2: Statement of Claim No. W-188124 by Thomas and Gloria Krenzelok for stockwatering purposes.

O-3: Acknowledgment of Claim No. W-22181 for stockwatering purposes by Herbert and Laura Maki.

O-4: Statement by Bowman Ranch, Inc. concerning the pending Application, and Statement of Claim Nos. 2909 and 2938 for irrigation and stockwatering purposes respectively by Bowman Ranch, Inc.

All of the Objector's Exhibits were introduced into the record with no objections.

The Department introduced the following exhibits into the record, to wit:

D-1: Soils report by Sterling Sundheim dated June 29, 1983.

D-2: Field Report by Sterling Sundheim dated February 17, 1984.

The Department's Exhibits were introduced into the record with no objections.

PROPOSED FINDINGS OF FACT

The Proposed Findings of Fact listed below are to be used solely for the purpose of reaching a decision in this matter and have no bearing on matters outside the scope of this Application and hearing.

1. The source of supply of the proposed Application is Big Willow Creek, a tributary of Belt Creek.

2. The Applicant seeks to divert 750 gpm up to 287.5 acre-feet per annum for sprinkler irrigation of 125 acres from April 1 to June 30, inclusive, of each year. The water is to be diverted from three separate diversions points along Big Willow Creek.

3. The Applicant, Nilson Enterprise, Inc., possesses Provisional Permit No. 7967-s41Q for 350 gpm up to 240 acre-feet for irrigation of 100 acres from Big Willow Creek. The 100 acres specified in this Permit generally overlap the 125 acres requested in the pending Application.

4. The flow of water in Big Willow Creek on June 16, 1983, was approximately 2500 gpm in the vicinity of the Applicant's proposed diversions.

CASE #

50765

5. June of 1983 could be considered an average year in terms of water availability. Generally the flow of water in Big Willow Creek tends to decline after the middle to the end of June.

6. Herbert Maki has an existing stockwater right documented by Statement of Claim No. W-22181-41Q. Mr. Maki's stockwater useage is downstream from the Applicant's proposed diversions.

7. Bowman Ranch, Inc., has an existing stockwater use from the source documented by Statement of Claim No. W-2938-41Q. This stockwater use is downstream from the Applicant's proposed diversions.

8. Bowman Ranch, Inc., has a claim of water from Big Willow Creek for subirrigation of approximately 55 acres pursuant to Claim No. W-2909-41Q. This claimed subirrigation use is downstream from the Applicant's proposed diversions.

9. Objector Thomas Krenzelok has an existing stockwater use from Big Willow Creek filed under Statement of Claim No. W-188124-41Q. This stockwater use is downstream from the Applicant's proposed diversions.

10. Objector Krenzelok claims an irrigation right (Claim No. W-188107-41Q) from Big Willow Creek for a diversion of 2.5 cubic feet per second (cfs) for the irrigation of 40 acres. This irrigation right is not being exercised at this time, nor has it been historically used.

11. Objector Krenzelok claims a subirrigation right for lands along Big Willow Creek, downstream from the Applicant's proposed diversions. No Statement of Claim of Existing Water Right is available in the Department's records to document this claim.

12. Forder Land and Cattle Company has a claim of stockwater useage from Big Willow Creek pursuant to Statement of Claim No. W-207907-41Q. This stockwater use is downstream from the Applicant's proposed diversions.

13. Forder Land and Cattle Company claims water from Big Willow Creek for subirrigation purposes, however, there is no Statement of Claim of Existing Water Right for such subirrigation purposes in the Department's water rights records.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and the subject matter of this hearing.

2. MCA § 85-2-311 (1981) directs the Department to issue a permit if:

- (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 water 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;
- (5) 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.
- (6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;
- (7) except as provided in sub-section 6, the applicant proves by substantial credible evidence the criteria listed in sub-sections 1 through 5.

CASE #

50765

3. In an average year there is sufficient water in the source to satisfy existing downstream stockwater uses and the new use sought by the Applicant throughout the period of April 1 to June 15. Such flows are at times available until the end of June. There was substantial credible evidence presented to show that the criteria of § 85-2-311(1), MCA, (1981) have been met.

4. Each of the Objectors to the Application possess valid existing stockwater rights from the source of supply downstream from the Applicant. The record reflects that in an average year the proposed diversion of water by the Applicant will not adversely affect the stockwater rights of the downstream users.

5. Objector Krenzelok claims an existing right for an irrigation diversion from the source downstream from the Applicant. However, the Objector stated during the hearing that said irrigation diversion is not in fact being used, therefore, any diversion by the Applicant would not adversely affect the Objectors exercise of this right, since it is not being exercised.

6. Objectors Krenzelok and Forder Land and Cattle Company stated at the hearing that they had subirrigation rights from Big Willow Creek downstream from the Applicant. However, the record does not reflect that any Statements of Claim of Existing Water Right were filed on said subirrigation rights. MCA § 85-2-226 states that "the failure to file a claim of existing right as required by MCA 85-2-221 establishes a conclusive presumption of abandonment of that right." Therefore, it is concluded that any

rights to subirrigation claimed by either of the above Objectors has been abandoned by said Objectors by virtue of their failure to file a statement of claim to protect such rights. Therefore, any diversion by the Applicant upstream of said claims cannot adversely affect their rights, because the rights apparently no longer exist.

7. Water right claims for subirrigation are recognized as valid rights. The limit of such rights is generally the volume of water necessary to produce a comparable crop utilizing a conventional flood or sprinkler system. The claimant does not have a right to expect a continuation of the existing subirrigation process so long as the right can be reasonably exercised by a conventional diversion scheme. MCA § 85-2-401(1). It is concluded that the Applicant's proposed use will not unreasonably interfere with the existing subirrigation use claimed by Bowman Ranch, Inc.

8. The Applicant's proposed use of water for irrigation purposes is a beneficial use.

9. The Applicant's proposed means of diversion by means of a pump and a sprinkler irrigation system is adequate for the Applicant's purposes.

10. The Applicant's 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.

11. The Applicant seeks less than 10,000 acre-feet a year or 15 cubic feet per second, therefore the Applicant's burden of proof is substantial credible evidence.

Based upon the proposed Findings of Fact and Proposed Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

1. Subject to the terms and restrictions listed below, a Provisional Permit is granted to the Applicant to divert 750 gallons per minute up to 287.50 acre-feet per annum from April 1 through June 30, inclusive, of each year from Big Willow Creek. Water may be diverted from the following points, NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 3, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 10, NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 10, all in Township 19 North, Range 7 East, Cascade County, Montana. Water appropriated shall be used for new sprinkler irrigation on 125 acres in the following locations: SW $\frac{1}{4}$ Section 3, 30 acres; NW $\frac{1}{4}$ Section 10, 30 acres; SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 10, 20 acres; SE $\frac{1}{4}$ Section 10, 40 acres; W $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 11, 5 acres; all in Township 19 North, Range 7 East, Cascade County, Montana.

2. This Permit is subject to all prior and existing water rights in the source of supply, and any final determination of those rights as provided by Montana Law.

3. This Permit is issued in conjunction with Provisional Permit No. 7967-s41Q. The combined appropriation as granted shall not exceed a total of 750 gallons per minute up to 287.50 acre-feet per annum.

CASE #

50765

4. Nothing herein shall be construed in any way to affect or reduce the Permittee's liability for damages which may be caused by the exercise of the Provisional Permit, nor does the Department in issuing this Provisional Permit acknowledge liability for damages caused by the exercise of this Permit.

5. The Permittee shall in no event cause to be diverted from the source of supply pursuant to this Permit more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the Permittee, pursuant to this Permit, shall cause and otherwise allow the water to remain in the source of supply.

6. The Permittee shall take whatever steps are necessary to correct any adverse affects to downstream appropriators water rights shown to result from appropriation under this Permit.

7. The Permittee shall diligently adhere to the terms and conditions of this Permit. Failure to adhere to the terms and conditions may result in a revocation or modification of the Permit.

CASE #

50765

DONE this 7th day of August, 1984.

David L. Pengelly

David Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 5004, Missoula, MT 59806
(406) 721 - 4284

NOTICE

Objections or exceptions to this Proposal for Decision must be filed with Gary Fritz, Administrator, Water Resources Division, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59620, no later than 20 days from service hereof. Any party adversely affected by this proposal may request oral argument in the exception. If no oral argument is requested, it is waived.

CASE #

50765

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 August 8, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by NILSON ENTERPRISE, INC., Application No. 50765-s41Q, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Nilson Enterprise, Inc., P.O. Box 2603, Great Falls, MT 59403
2. Herbert H. & Laura M. Maki, Rt 1 N., Box 2515, Belt, MT 59412
3. Bowman Ranch, Inc., Rosemary L. Bowman, Secretary, P.O. Box 153, Belt, MT 59412
4. Thomas E. Krenzelo, Box 461, Belt, MT 59412
5. Clerk of Court, Cascade County Courthouse, c/o Fran Oswald, Great Falls, MT 59403
6. Sam Rodriguez, Water Rights Bureau Field Office, (interp-departmental mail)
7. David Pengelly, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

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

On this 8th day of August, 1984, 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.

Needy Kohn
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-7-85

CASE #
50765