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. 60662-S76G BY WAYNE AND KATHLEEN HADLEY	))))	FINAL ORDER

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The period for filing exceptions or comments to the Proposal for Decision in this matter, issued March 21, 1988, has expired. Timely written exceptions were received from Applicants Wayne and Kathleen Hadley.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation (Department or DNRC) hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision, and incorporates them herein by reference with the modifications specifically set forth below.

The Department notes that Dan McQuary was water commissioner on Peterson Creek in 1983 and 1984, although said years were omitted in the enumeration given in Finding of Fact 8 of the Proposal. Therefore, the first sentence of Finding of Fact 8 is hereby corrected and amended to read, "In 1973, 1974, 1977, 1978, 1981, 1983, 1984, 1985, 1986 and 1987, Dan McQuary served as water commissioner on Peterson Creek.[1]"

RESPONSE TO EXCEPTIONS

I. Applicants first assert that water commissioner McQuary stated at the hearing that water was available in 5 out of 12 years, thereby implicitly alleging that Finding of Fact 8 is erroneous. The record does not support this assertion.

McQuary testified that he believed from his experience as water commissioner on Peterson Creek, that in ". . . seven out of ten years, he [Applicant] will get no water. Three out of ten I'm going to say he will have some water [during the] high water period which would be . . . the most I've ever seen . . . is seven days." In other words, due to senior appropriators' water requirements, the water commissioner would be able to allow Applicant to divert water only in three years out of ten and then only during the brief high water period. The rest of the time Applicant would not be allowed to divert.

McQuary's testimony forms the basis of Finding of Fact 8 and, although derived from incomplete records which do not account for five years when there <u>may</u> have been greater flows in the source (McQuary has only acted as commissioner for 10 years out of the past 15), it is the best evidence of record bearing on legal availability of water; there is no evidence in the record to support a finding that Applicants would be able to divert water more often than has been estimated by the commissioner. Because the testimony of the local water commissioner constitutes substantial credible evidence, and because the record contains no evidence which contradicts or outweighs his testimony, it is hereby concluded that Finding of Fact

8 is not erroneous. City of Billings v. Billings Firefighter's Local No. 521, 39 St. Rptr. 1844 (1984); Universal Camera Corp v. NLRB, 340 U.S. 474 (1951).

Applicants' next assertion, that the Hearing Examiner erroneously proposes denial based on the "moot" possibility of illegal diversions by Applicants, misses the point. Based inter alia on Finding of Fact 8, the Hearing Examiner concluded that there would never be a year when unappropriated water was available in the source in the amount requested throughout the requested period of appropriation. That is, he concluded that there would never be a year when there would be sufficient water in the source to supply senior appropriators as well as Applicants' full requested appropriation. The most the record would support is that 250 gpm would be available to Applicant in some years for up to 7 days during "high water", and 7 days is not a sufficient period to divert the requested 60.3 acre feet even assuming continuous diversion. (At 250 gpm, diversion of 60.3 acre feet would require 54.6 days of continuous diversion.) Thus, it is Applicants' failure to show that unappropriated water would be available for more than 7 days, even in one year, which forms the basis of the proposed denial of the appropriation as requested. The Hearing Examiner did not ever reach the question of illegal diversion. (The footnote cited by Applicant merely speculates that minimizing the possibility of illegal diversions is the reason for the evolution of the "one year in ten rule". It is in no way a determination that Applicant would illegally divert.)

II. Although the record shows that there is not sufficient unappropriated water available to supply the full requested amount of water throughout the requested period of appropriation, it was concluded that unappropriated water was available during periods of "high water". As Mr. Hadley testified he could beneficially use whatever amount he could get, modifying the requested period of diversion to the period of "high water" was contemplated in order that the requirement that unappropriated water be in the source throughout the period of diversion would be fulfilled based on the record as compiled. See MCA §85-2-312(1).

In his deliberations regarding the contemplated modification, the Hearing Examiner concluded that the modified permit would not be administrable unless the "high water" period was more narrowly defined, because different people might disagree as to when "high water" occurs in Peterson Creek. However, defining the period of "high water" by specific calendar date was found not possible. See second full paragraph, Proposal for Decision at p. 15. (Applicants' assertion that the Hearing Examiner unreasonably expected them to provide specific calendar dates is apparently based on a misreading of this paragraph). The Hearing Examiner then suggested that, were the flow rate which constituted "high water" known, the Permit could be conditioned so that the period of diversion was determined by the magnitude of the flow of Peterson Creek rather than calendar dates. For example, if "high water" had been defined as when Peterson Creek flow equalled or exceeded 10 cfs[1] as measured at Applicants' point

[1]The flow of 10 cfs is given for purposes of example only and is not in any way derived from the record in this matter.

of diversion (or elsewhere), the permit could have been conditioned to allow diversion only when the flow of Peterson Creek equalled or exceeded 10 cfs at that point. However, because the term "high water" had not been defined specifically and numerically on the record, such a condition was determined not feasible. Accordingly, the Hearing Examiner proposes denial.

The Department agrees. This record will not support a conclusion that the requisites of MCA §85-2-311(1)(a) are met for the period of diversion requested. However, modification to restrict diversion to a period denominated simply as "high water" is untenable because the ambiguity of said term, which can not be more narrowly defined based on this record, would render the permit unadministrable.

Therefore, the Department issues the following:

FINAL ORDER

Application for Beneficial Water Use Permit No. 60662-S76G by Wayne and Kathleen Hadley is hereby denied without prejudice.

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 thirty (30) days after service of the Final Order.

DONE this 31st day of May, 1988.

Lawrence Siroky for
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 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 served by mail upon all parties of record at their address or addresses this 31st day of May, 1988, as follows:

Wayne and Kathleen Hadley
P O Box 835
Deer Lodge, MT 59722

Vanisko Ranches, Inc.
890 Yellowstone Trail
Deer Lodge, MT 59722

Ted Jacobson
910 Carter
Deer Lodge, MT 59722

Richard and Regina Greany
522 Burnt Hallow Road
Deer Lodge, MT 59722

T J Reynolds
Helena Field Manager
1520 East Sixth Avenue
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James J. Masar
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Lawrence and Mary Gebhardt
110 East Side Road
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Hollie G Hoover
1201 Kohrs
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Chester L. Monson
1200 Kohrs
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Susan Howard
Susan Howard
Hearings Reporter

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. 60662-S76G BY WAYNE AND KATHLEEN HADLEY	))))	PROPOSAL FOR DECISION

* * * * * * * * * *

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 December 11, 1987 in Deer Lodge, Montana.

Appearances

Wayne F. Hadley and Kathleen Hadley, the Applicants in the matter, were represented by the aforementioned Wayne F. Hadley.

Objector Ted Jacobson appeared pro se.

- - Dan McQuary, water commissioner on Peterson Creek, appeared as a witness for Objector Jacobson.

Objector Lawrence Gebhardt appeared pro se.

Objector Chester Monson appeared pro se.

Objector Hollie Hoover appeared pro se.

Jim Beck, Agricultural Specialist with the Helena Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter "department" or "DNRC"), appeared as DNRC staff witness.

Exhibits

No party introduced exhibits for the record. There was no objection to the contents of the department file.

PROPOSED FINDINGS OF FACT

1. Section 85-2-302 (MCA) provides that "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. The Application was regularly filed November 4, 1985 at 3:12 p.m.

3. The pertinent facts of the Application were published in the Silver State Post, a newspaper of general circulation in the area of the source, on March 19 and 26, 1987. Timely objections were received from Vanisko Ranches, Inc., Ted Jacobson, Hollie Hoover, Chester Monson, Mary and Lawrence Gebhardt, and Richard and Regina Greany. A notice of this hearing was duly served on all parties on November 12, 1987.

4. By this Application, Applicants seek to divert 250 gallons per minute (gpm) up to 60.30 acre-feet per annum from Peterson Creek, a tributary of the Clark Fork River, between April 1 and December 31, inclusive each year by means of a pump to be located in the SE¼NW¼SE¼ of Section 14, Township 7 North, Range 9 West, Powell County, Montana. Two hundred fifty gpm up to 60.00 acre-feet per annum would be used from May 1 to September 30, inclusive, each year to sprinkler irrigate 25.00 acres located in the W½SE¼ of Section

14, Township 7 North, Range 9 West, Powell County, Montana and .30 acre-feet would be used from April 1 to December 31, inclusive, each year in the SE¼NW¼SE¼ of Section 14, Township 7 North, Range 9 West, Powell County, Montana, for stock.

5. Applicants have filed a late Statement of Claim for Existing Water Rights (No. 211292-76G for irrigation water). Applicants intend to abandon any irrigation appropriation made pursuant hereto, if said claim is validated upon adjudication in the Water Court.

6. Applicants assert that there is sufficient water in Peterson Creek early in the irrigation season, and sporadically throughout the late irrigating season, to supply senior rights and allow them to appropriate, and the evidence does show that there are, during such periods, large flows at the proposed points of diversion and at the mouth of Peterson Creek.

7. There are, however, several water right holders between Hadley's proposed point of diversion and the mouth of Peterson Creek, who often do not receive their full appropriations despite the fact that large flows of water are present at both the proposed point of diversion and at the mouth of Peterson Creek. The reason that there can be large flows at the mouth and not a short distance upstream is that significant return flows and imported flows enter near the mouth of Peterson Creek. (Testimony of Jacobson, McQuary, Gebhardt, and Monson.) Thus, although there may be large flows at the proposed point of diversion and at the mouth of Peterson Creek, it does not necessarily follow that part, or any, of the flow of Peterson Creek will be available to the Objectors located in between.

8. In 1973, 1974, 1977, 1978, 1981, 1985, 1986 and 1987, Dan McQuary served as water commissioner on Peterson Creek.[1] He has observed the pattern of water occurrence in Peterson Creek during those years. His testimony shows that there would not be sufficient water in Peterson Creek in 7 out of 10 years to supply all senior rights, much less allow for any diversion by Applicant. In 3 out of 10 years Applicant could divert, but only during periods of spring runoff (high water). (Testimony of McQuary.)

9. Even if there is insufficient water available to supply amounts requested, Applicants can make use of whatever amount they can get. (Testimony of Wayne Hadley.)

10. Because Peterson Creek water is derived from a "low altitude watershed", periods of high water last only up to seven days. Further, the high water period may occur at any time between March 1 and July 1. (Testimony of McQuary.)

11. It cannot be determined from the record what flow of water must be present in Peterson Creek (during the period of high water) to make 250 gpm available for Applicants' use.

12. There is no record evidence of other planned uses or development for which a permit has been issued or for which water has been reserved.

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[1]Mr. McQuary was not hired as water commissioner in 1975, 1976, 1979, 1980 or 1982. Whether this phenomenon was due to occurrence of water in excess of the needs of the appropriators, occurrence equal to the needs, or because there was little or no water to apportion, or for other reasons, cannot be ascertained from the record.

PROPOSED CONCLUSIONS OF LAW

1. The department has jurisdiction over the subject matter hereunder, and over the parties hereto. MCA Title 85, Chapter 2, Part 3 (1985).

2. The department gave proper notice of the hearing and, all substantive and procedural requirements of law and rule appearing fulfilled, the matter is properly before the Hearing Examiner. (Finding of Fact 3.)

3. The department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following MCA §85-2-311 criteria are met:

(1)(a) there are unappropriated waters in the source of supply:

- (i) at times when the water can be put to the use proposed by the applicant,
- (ii) in the amount the applicant seeks to appropriate; and
- (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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.

4. The proposed uses, irrigation and stock water, are beneficial uses. MCA §85-2-102.

5. The proposed uses will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved. (Finding of Fact 12.)

6. MCA §85-2-311(1)(a) requires that there be unappropriated water in the source of supply under certain conditions; that is when applicant can use it, and in the amount applicant seeks throughout the period of diversion.

"Unappropriated water" is an ambiguous term, which unfortunately is not defined in the Water Use Act. However, its analogue, "appropriated water", may be defined by referring to MCA §85-2-102(1). By extrapolating from the definition of "appropriate" given therein, it is found that "appropriated water" means water which is diverted, impounded, withdrawn or reserved (by a public agency, see MCA §85-2-316). Accordingly, "unappropriated water" is undiverted, unimpounded, unwithdrawn and unreserved water; i.e., it is that amount of water in the source which is neither in a state of capture, nor reserved. The term thus includes all unreserved water which at a given point in time, though claimed or decreed, remains in the source.

To meet the requirements of MCA §85-2-311(1)(a), sufficient unappropriated (unreserved, uncaptured) water must exist in the source to supply the amount applicant seeks throughout the period of

supply, as water does not run uphill.[3] Accordingly, for water appropriation purposes, "source of supply" is defined as that portion of the body of water, named on the application as the source, which lies above the proposed point of diversion, together with tributaries joining it above the proposed point of diversion.

Water which is physically present at the proposed point of diversion would seem to be uncaptured water. Thus, one might assume that, in order to fulfill the requirements of MCA §85-2-311(1)(a), an applicant need only prove that at least in some years sufficient unreserved water physically exists at the point of diversion to supply the amount requested throughout the period of appropriation. However, the effect of the operation of the priority system on the source (as it has been defined) must still be accounted for.

Any downstream senior appropriator, if he legitimately requires more water, is legally entitled to demand that a junior permittee cease using any water until the senior receives all of the water to which he is entitled, providing that cessation of use by the junior would in fact result in an increase in supply to the senior. Therefore, it is just as if the senior had the ability, as well as the right, to divert the entire flow of the source just above the permitted point of diversion, and if such diversion were to occur, then water would not physically exist at the junior's point of diversion.

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[3]The term "source" is often used expansively; i.e., it can refer to an entire drainage system, or it can mean an entire stream from headwaters to mouth, including all streams tributary to it. However, strictly speaking, "source" is the point of origin. American Heritage Dictionary (New College Edition, 1980).

appropriation. This does not mean that the applicant must prove there will be sufficient unappropriated water present in the source throughout the period of appropriation every year, for such a requirement would obviate the reason for assigning priority dates to newly permitted water rights; i.e., if sufficient water were always available, there would be no reason to have a system of priority. Therefore, the department has concluded that the statute requires proof that unappropriated water will be available as set forth in MCA §85-2-311(1)(a), in at least some years.[2] See In the Matter of Application for Beneficial Water Use Permit No. 41255-g41B by A. W. Allred, Proposal for Decision, 8/28/82, p. 20. (Adopted by Final Order, 11/1/84). Accordingly, an applicant must prove by substantial credible evidence that, at least in some years, there is sufficient unreserved, uncaptured water in the source to supply the amount requested throughout the period of appropriation.

This formulation of the rule requires a definition of "source of supply", as neither "source", nor "source of supply", is defined in the Water Use Act. Common sense dictates that water occurring downstream from a proposed point of diversion cannot be a source of

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[2]The phrase "in at least some years" requires explanation. As a general rule, the department holds that unappropriated water is available in at least some years if it is available, as set forth in MCA §85-2-311(1)(a), approximately one year in ten. However, the general rule seems to be predicated upon a judgement as to how often unappropriated water must be available to the permittee in order to minimize the possibility of the permittee illegally diverting in order to recoup his investment in the proposed project. Thus, what constitutes "some years" could vary in accordance with the type of project proposed.

When a senior makes a legitimate "call" on the junior for water, the junior must heed the "call". Thus, a legitimate "call" for water results in the constructive capture of that water, as the "call" prevents the junior permittee from legally diverting the water. Accordingly, it may be concluded that unappropriated (uncaptured, unreserved) water exists in the source of supply, only if it is shown that unreserved water, for which no "call" has been made, physically exists at the point of diversion.

The complete formulation of the rule is thus as follows. In order to satisfy the criterion set forth in MCA §85-2-311(1)(a), the applicant must prove by substantial credible evidence that, at least in some years, sufficient unreserved water will be physically present at the point of diversion to supply the amount requested throughout the period of appropriation, and that, at least in some years throughout the period of appropriation, no legitimate calls for water will be made on him by a senior appropriator.[4]

In the instant case, the source is Peterson Creek and tributaries entering it above Applicants' point of diversion. The record shows that sufficient unreserved water exists physically at the point of diversion to supply the amounts requested throughout the period of appropriation in most years. (Findings of Fact 6, 12.) However, the evidence also shows that every year Applicants will either be called for water by downstream senior appropriators,

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[4]Being shut down by a water commissioner is the equivalent of being called for water.

or the water will be "captured" for the seniors by the water commissioner. (Findings of Fact 7, 8.) Therefore, it is hereby concluded that there will never be a year when sufficient unappropriated water exists in the source to allow Applicants to divert the amount requested throughout the desired period of appropriation.

7. MCA §85-2-312 authorizes the department to shorten the period of appropriation if that would result in fulfillment of the conditions of MCA §85-2-311. Because the evidence does suggest that during periods of "high water" there may be sufficient water in the source to supply the seniors <u>and</u> the amount Applicants request, throughout the "high water" period (a maximum of 7 days) in at least some years (3 out of 10), the department could grant a permit with a limited period of appropriation. Unfortunately, in this case the period during which "high water" occurs can not be defined.

The "high water" period can not be stated in terms of specific dates, i.e., it can not be defined as a particular week because the 7 days of high water can occur any time between March 1 and June 30 (120 days), (Finding of Fact 10), nor can it be defined as March 1 through June 30 because high water will not be available throughout the full 120-day period. It can not be defined as coincident with a specific flow in Peterson Creek, as "high water" was not described on the record in terms of a specific flow rate.

If high water had been described in terms of a specific flow, a permit could be issued with the period of diversion defined as that period when the flow of Peterson Creek equals or exceeds the

specified rate. However, simply limiting diversion to periods of "high water" is not feasible, as the unquantified term is susceptible of widely variant interpretation.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner propounds the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 60662-S76G by Wayne and Kathleen Hadley be denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 21 day of March, 1988.

Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 22nd day of March, 1988, as follows:

Wayne and Kathleen Hadley
P O Box 835
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James J. Masar
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Vanisko Ranches, Inc.
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Lawrence and Mary Gebhardt
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Ted Jacobson
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