

BB

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. 64463-S43D BY WALTER [DECEASED] )  
AND EDNA HOVEN )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of April 8, 1988, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

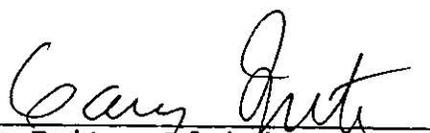
Application for Benefical Water Use Permit No. 64463-s43D by Walter and Edna Hoven is denied.

**CASE # 64463**

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 17 day of May, 1988.



Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6605



Walter L. Rolf, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P O Box 276  
Miles City, Montana 59301  
(406) 232 - 6359

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 19th day of May, 1988, as follows:

Walter and Edna Hoven  
4188 Vaughn Lane  
Billings, MT 59101

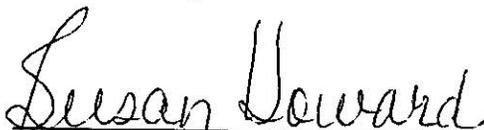
Harley Hoven  
3247 Old Highway 10  
Laurel MT

Emil Sekora  
Route 1, Box 33  
Joliet, MT 59041

Thomas J. Stusek  
Division Circle Building  
3311 Fourth Avenue North  
Billings, MT 59101

Joseph E Mudd  
Bridger Law Office  
P O Drawer AC  
Bridger MT 59014

Keith Kerbel  
Billings Field Manager  
1537 Avenue D, Suite 105  
Billings, MT 59102  
(inter-departmental mail)



Susan Howard  
Hearing Reporter

**CASE # 64663**

BB

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. 64463-s43D BY WALTER (DECEASED)  
AND EDNA HOVEN )

\* \* \* \* \*

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 February 4, 1988, in Billings, Montana. The record was left open for submission of further evidence by either party until February 18, 1988.

APPEARANCES

Applicant Edna Hoven appeared in person.

Applicant's daughter Rose Maldonado represented Applicant.

Objector Emil Sekora did not appear but was represented by Counsel Thomas J. Stusek. (Stusek indicated that because of a snowstorm in the area Sekora could not get to Billings).

Keith Kerbel, Manager of the Billings Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereinafter "Department" or DNRC).

**CASE # 64463**

EXHIBITS

Applicant submitted no exhibits.

Objector submitted no exhibits.

Department offered two exhibits for the record.

Department Exhibit 1 is a photocopy of an Irrigation Statement of Claim for Existing Water Rights No. 005259-s43D filed August 22, 1980, by Emil and Edith Sekora.

Department Exhibit 1 was admitted without objection.

Department Exhibit 2 is a copy of an Irrigation Statement of Claim for Existing Water Rights No. 005260-s43D filed August 22, 1980 by Emil and Edith Sekora.

Department Exhibit 2 was admitted without objection.

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore the Department file in this matter is included in the record in its entirety.

Also made a part of the record in this matter are three affidavits, submitted subsequent to the hearing, in support of the Objector's position. One is by Emil Sekora, Objector. One is by Pat Billingsley, Representative of the Rock Creek Water Users Association. One is by Carl J. Hansen, Commissioner of Rock Creek. Copies of these affidavits were submitted to the Applicant for response but no response was received from the Applicant. The record in this matter closed February 18, 1988.

The Hearing Examiner having reviewed the record in this matter and being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA Section 85-2-302 states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, 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." The exceptions to permit requirements listed in 85-2-306 MCA do not apply in this matter.
2. Application for Beneficial Water Use Permit No. 64463-s43D was duly filed with the Department on May 21, 1987, at 10:35 am.
3. The pertinent portions of the application were published in the Carbon County News, a newspaper of general circulation in the area of the source, on June 25, 1987.
4. The source of the proposed appropriation is Cow Creek, a tributary of Rock Creek, located in Carbon County, Montana. Evidence in the record indicates the source is a perennial stream supplemented by flow from springs.
5. Applicant seeks Permit No. 64463-s43D in order to divert water from Cow Creek for stockwater use from April 15 to September 30 of each year. Applicant wishes to divert water at a rate of 10 gpm up to .80 acre-feet of

water per year from a point in the SW SE SW of Section 6, Township 5 South, Range 22 East, Carbon County, Montana. The water would be pumped to stock tanks located in the SE SW SE of Section 1, Township 5 South, Range 21 East, Carbon County, Montana.

6. A Power and Flow Requirements worksheet was prepared for the file by Keith Kerbel using information supplied on the application. This worksheet indicates that the proposed pump and pipeline are adequate to divert and convey, from the proposed point of diversion to the proposed place of use, the amount of water requested by the Applicant.

7. The Hearing Field Report dated November 25, 1987, prepared by Keith Kerbel indicates that the pasture the proposed appropriation would service suffers a shortage of stockwater at certain times. The Highline Ditch presently used for stockwater is not a reliable source at times during the summer months.

8. There are no planned uses or developments of Cow Creek water for which a permit has been issued or for which water has been reserved apparent from the record.

9. Water is physically available at the Applicant's proposed point of diversion in the amount requested. Supplement to Application for Beneficial Water Use, completed by Walter Hoven at the time of the application, and testimony by Rose Maldonado, indicates that springs keep Cow Creek flowing past the proposed pump site. No evidence was presented as to the actual flow rate of these springs other than that they flow more than the Applicant proposes to divert.

10. Objector Sekora has a Statement of Claim No. W-005259-s43D filed for forty miners inches of water from Cow Creek to irrigate 140 acres of land in Sections 20 and 21 of Township 4 South, Range 22 East from April 15 to November 1 of each year. (Department Exhibit 1)

11. The Applicant presented no evidence or testimony to indicate that there would be any time within the proposed diversion period during any year when there would be water in Cow Creek in excess of that called for and used by Objector Sekora.

12. Objector Sekora's claimed point of diversion is located over two miles downstream from the Applicant's proposed point of diversion.

13. Statements by Attorney Stusek and Keith Kerbel, and by affidavit from Objector Sekora, indicate that the Carbonado Ditch supplied by water from Rock Creek is the main source of water for irrigating Sekora's land. Water from Cow Creek is used as a supplemental source of water when water is insufficient or unavailable from the Carbonado Ditch. Water in the Carbonado Ditch may be shut off early in the irrigation season and then Sekora must rely entirely on Cow Creek water to irrigate. Affidavit by Sekora indicates this has been the case the last two years.

14. The flow of Cow Creek at times during the summer is very small and according to affidavits by Sekora and Hansen is substantially less than the forty miners inches claimed by Sekora on Claim No. W-005259-s43D. Affidavits by Sekora, Billingsley, and Hansen all contend that any appropriation of water from Cow Creek will have a definite adverse effect on Objector Sekora's water right, particularly during low summer flows.

15. Keith Kerbel's field report and affidavit by Objector Sekora indicate that the period of shortage in Cow Creek is during the irrigation season. There may be water available for appropriation outside of the normal irrigation season, but this application requests water from April 15 to September 30. This would generally fall within the parameters of the irrigation season and does fall within the period of use, April 15 to November 1, claimed by Sekora on Claim No. W-005259-s43D.

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

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law, or rule, have been fulfilled, therefore the matter was properly before the Hearing Examiner.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.
3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:
  - (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 use of water, for stockwater purposes, is a beneficial use of water. See MCA 85-2-102(2).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (Finding of Fact 6)

6. 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. (Finding of Fact 8)

7. It appears that there is water available at the Applicant's proposed point of diversion in the amounts requested. (Finding of Fact 9) However the evidence indicates that this water is part of that needed to satisfy the downstream senior water right of the Objector. (Findings of Fact 10, 13, and 14)

If there was any time when the Objector would not be using the entire flow of Cow Creek, there would then be water available for appropriation by a junior water user. However in this case the Applicant has failed to show that there is ever a time, during the April 15 to November 1 irrigation

season claimed by the Objector, when the entire flow of Cow Creek is not being appropriated by the Objector. (Finding of Fact 11) Since the Applicant's proposed period of use and the Objector's claimed period of use coincide, the Applicant has failed to meet their burden of showing that there are unappropriated waters in the source of supply during the period they seek to appropriate it.

8. The only adverse affect alleged by the Objector is related to the issue of whether there is any unappropriated water in the source. Since the Applicant has not shown that there is unappropriated water, the issue of adverse affect to the Objector cannot be adequately addressed.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 64463-s43D by Walter and Edna Hoven is hereby 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 new 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 8 day of April, 1988.

Walter L Rolf

Walter L. Rolf, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Rights Bureau  
P.O. Box 276  
5 No. Prairie  
Miles City, Montana 59301  
(406) 232-6359

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**CASE # 64463**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served upon all parties of record at their address or addresses this 15th day of April, 1988, as follows:

Walter and Edna Hoven  
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Billings MT 59101

Harley Hoven  
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(inter-departmental mail)

  
Susan Howard  
Hearing Reporter

**CASE # 64463**