

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
68033-S76G BY ROBERT HOLLENBACK)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on November 2, 1992. The Proposal recommended that the above-entitled Application be denied. On November 24, 1992, Objector Ed Janney filed a timely exception to the Proposal.

Mont. Code Ann. § 2-4-621(1) (1991) and Mont. Admin. R. 36.12.229(1) (1991) provide that exceptions may be filed by any party adversely affected by a hearing examiner's proposal for decision. Here the decision proposed by the Hearing Examiner is adverse to Applicant and does not adversely affect Objector. Therefore, Objector's Exceptions are not properly before the Department.

WHEREFORE, based upon the record herein, the Department adopts without modification the findings and conclusion of the Proposal for Decision and issues the following:

ORDER

Application for Beneficial Water Use Permit 68033-s76G by Robert Hollenback is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

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petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 15 day of December, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 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 duly served upon all parties of record at their address or addresses this 16th day of December, 1992, as follows:

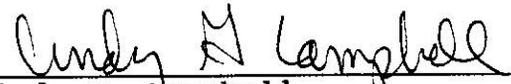
Robert Hollenback
141 I-90 N
Deer Lodge, MT 59722

Ed Janney
110 North Frontage Road
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CASE # 68033

John E. Stults
Hearing Examiner
Department of Natural
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T.J. Reynolds and
Jim Beck
Helena Water Resources
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Cindy G. Campbell
Hearings Unit Legal Secretary

Immediately prior to the hearing the parties were given the opportunity to review the Department's file on this application. No objection was expressed against any part of the file being made a part of the record. At the beginning of the hearing, the Hearing Examiner entered the Department's file into the record in its entirety.

During the prehearing conference, the Hearing Examiner asked the parties if they had any objection to official notice being taken of In the Matter of Application for Beneficial Water Use Permit No. 63377-s76G by Robert and Debby Hollenback,² particularly the May 13, 1990, Findings, Conclusions, and Order on Remand³ with special attention to the Findings and Conclusions on water availability. Neither party objected to its inclusion in the record by official notice. The parties had expected the use of this prior case file in the present proceeding, especially Objector who referred to the prior case on his objection form. Therefore, official notice has been taken of the prior case with the scope of the notice expanded to the Department's entire file to ensure an accurate understanding of the material in the case documents. The Hearing Examiner notes that In re 63377-s76G by Hollenback was limited to the same source of water and the same parties as the present matter.

² Hereinafter referred to as Hollenback or In re 63377-s76G by Hollenback.

³ This document includes by reference the May 12, 1988, Proposal for Decision.

In the course of reaching a decision in this matter, the Hearing Examiner took official notice of records maintained by the Department on water rights in the vicinity of the proposed appropriation. Notice was also taken of the Department's current definition of "conjunctive use" as stated on page 43 of the Water Rights Bureau manual, *New Appropriations Verification Policy*, February 20, 1987. Facts in this Proposal for Decision which have been derived from the noticed materials are identified as such.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 68033-s76G was filed with the Department on May 13, 1988, at 3:59 p.m. (Department's file)

2. Applicant proposed on the application form to appropriate 150 gallons per minute (gpm) up to 55 acre-feet (AF) per year of water from an unnamed tributary of the Clark Fork River by means of a pump in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 8 North, Range 9 West, Powell County, Montana,⁴ for sprinkler irrigation of 23 acres of pasture in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28. The period of diversion and use would be April 1 through October 31 of each year. (Department's file)

3. Applicant owns Permit to Appropriate Water 63377-s76G issued June 22, 1992, to appropriate 100 gpm up to 62 AF per year of water from an unnamed tributary of the Clark Fork River by

⁴ Unless otherwise indicated, all land descriptions are in Township 8 North, Range 9 West, Powell County, Montana.

means of a pump in the SE¼SE¼SE¼ of Section 28 for sprinkler irrigation of 23 acres of pasture in the SE¼SE¼ of Section 28. The period of diversion and use is April 1 through October 31 of each year. The source, point of diversion, means of diversion, purpose, place of use, and period of diversion and use are the same as those in the present application. (Department's file and Hollenback file)

4. The Department notified Applicant by letter and a Notice and Statement of Opinion, Form 612, dated December 13, 1991, that for the protection of prior existing water rights conditions would be placed on his permit, if approved. One of the conditions identified the conjunctive use that would exist involving Permit 63377-s76G and the proposed appropriation. The condition limited the combined appropriation of that conjunctive use to 150 gpm up to 62 AF per year. Applicant was notified that the conditions would be applied to the application unless Applicant disagreed with them and requested a hearing on them. The record contains no evidence that Applicant disagreed with the proposed conditions or that he requested a hearing on them.

On January 21, 1992, Applicant was sent a final draft of the Public Notice to Water Users on this application. The Notice contained the condition limiting the conjunctive use. Applicant was notified by an accompanying letter that if the Notice contained an error he must contact the Department immediately through the Citizens' Advocate Office. The record contains no

evidence that the Applicant found the Notice to contain any errors. (Department's file and testimony of Jim Beck)

5. Pertinent portions of the application were published in the Silver State Post, a newspaper of general circulation in the area of the proposed source, on January 30, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. The notices included the condition limiting the conjunctive use of Permit 63377-s76G and the proposed appropriation. (Department's file)

6. The Department received an objection filed against this application by Objector Ed Janney. The objection contends unappropriated water is not available in the proposed source sufficient to satisfy the proposed appropriation and Objector's existing water right for watering stock. (Department's file)

7. Objector owns a right to divert water from the proposed source for stock watering purposes with a priority date of 1961 or 1962.⁵ Applicant acknowledges that Objector owns a water right from the proposed source for watering stock. (Hollenback file and testimony of Ed Janney and Robert Hollenback)

⁵ There are serious questions about the extent of Objector's water right. The water right has not been documented with the Department nor has it been claimed before the Montana Water Courts in the statewide adjudication of existing water rights. The Department in Hollenback found the flow rate of this water right to be 90 gpm plus 60 gpm of carriage water. Objector, however, stated on his objection form that the extent of the water right is 20 gpm. His testimony at the hearing in this matter on his use of water did not contradict the 20 gpm flow rate.

8. Permit 63377-s76G contains the following condition:

The Permittee shall allow the waters to remain in the source of supply at times when the water is needed for established senior downstream stock water uses. The Permittee, by April 1 of each year, shall present in writing to the Helena Water Resources Regional Office a planned schedule of water use for that season which will not interfere with senior stockwater uses.

(Hollenback file)

9. The May 13, 1990, Findings, Conclusions, and Order on Remand granting Permit 63377-s76G states on page 4 as part of amended Conclusion of Law 6:

To assure that no adverse effect results in the granting of this application, the permit shall be conditioned to require the Applicant prepare a plan each season, after consultation with the Objector, of the planned schedule of water use that will not interfere with the Objector's senior stockwater right.

(Hollenback file)

10. The reason Applicant filed Application 68033-s76G is because he contends the condition on Permit 63377-s76G makes that Permit useless. The present application is Applicant's effort to obtain entitlement to an identical appropriation but without the condition. Applicant also requested that Permit 63377-s76G be modified to eliminate the condition stated in Finding of Fact 8 above. (Testimony of Robert Hollenback)

11. As of the day of the hearing in this matter, Applicant had not attempted to use Permit 63377-s76G. Neither had Applicant attempted to develop a plan or consult with Objector in an effort toward complying with the condition on Permit 63377-s76G. (Testimony of Robert Hollenback)

12. The pattern of use of Objector's historic stock water right involves rotation of the stock through different fields and pastures. It was not constant throughout the summer months and it changed from year to year. The condition on Permit 63377-s76G provides a procedure for these two water users to coordinate their separate uses thereby minimizing conflicts. (Hollenback file)

13. As one of his duties as an employee of the Department for the past eleven years, Jim Beck has responsibility for the interpretation of conditions on water use permits and for determining whether the permitted appropriations are being exercised in substantial accordance with their conditions. He testified he is likely to be the Department employee responsible for interpreting the subject condition on Permit 63377-s76G and making the initial determining of whether the Permit is being exercised in substantial accordance with the condition. Jim Beck's opinion is that the condition does not require Objector's agreement with Applicant's planned water use schedule for the schedule to be approved by the Department and, upon approval, for Applicant to exercise the Permit. (Testimony of Jim Beck)

14. Only 50 gpm would be a new appropriation of water over and above what Applicant is already entitled to divert from the source under Permit 63377-s76G. However, this 50 gpm would be used in conjunction with Permit 63377-s76G which means that they would be joined together for use together in time to increase the total flow rate or volume diverted. With regard to flow rate the

effect of this is if Applicant were to exercise the proposed appropriation of 50 gpm it would be in addition to the existing entitlement to 100 gpm. Therefore, in order for the full amount of the proposed appropriation to be exercised, 150 gpm must be available in the proposed source. (Department's file, Department's policy manual, Hollenback file, and testimony of Robert Hollenback and Jim Beck)

15. In Hollenback considerable effort was put toward accurately estimating, albeit without taking actual measurements, the flow of water in the proposed source at the point of diversion in that case, which is identical to the point proposed in the present application. Estimates of average flow were 122 gpm and 168 gpm. The Department found the average flow was approximately 140 gpm. (Hollenback file)

16. Applicant measured the flow of water in the proposed source nineteen times from February 23, 1992, through May 4, 1992. Two six-inch Cipolletti weirs were used to make the measurements. The weirs were loaned to Applicant by Jim Beck. One of the weirs was placed and provided flow rate measurements at the proposed point of diversion. The other was placed and provided measurements in immediate proximity to the boundary between Applicant's and Objector's properties.

The flow rates measured at the proposed point of diversion ranged from lows of 67.4 gpm on April 14 and May 4 to a high of 190.7 gpm on March 4. The flow rates measured at the property

boundary ranged from lows of 48.3 gpm on April 4 and 8 to a high of 130.1 gpm on March 4.

There is a general pattern of decline in the amount of flow in the source at the proposed point of diversion over the period measurements were taken. The high flows in the source are generally in the spring. Only one measurement during the proposed period of diversion, April 1 through October 31, exhibited a flow of water in the proposed source greater than 100 gpm; that was a flow of 123.9 gpm on April 29. (Department's file, Hollenback file, and testimony of Robert Hollenback, Jim Beck, and Ed Janney)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1991).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled. See Findings of Fact 1, 2, 4, 5, 6, and 7. Therefore, the matter is properly before the Hearing Examiner. Mont. Code Ann. §§ 85-2-302, 307, 308, and 309(1) (1987).

3. The Department must issue a Beneficial Water Use Permit if the applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) (1987) 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 above-entitled application was filed in May 1988.

See Finding of Fact 1. The statutes controlling this application are those in effect at the time of filing. See Mont. Code Ann. § 1-2-109 (1991); General Agricultural Corporation v. Moore, 166, Mont. 510, 534 P.2d 859; In re Applications 49632-s41H, G120401-41H, and G120403-41H by Estate of Lena Ryen; In re Application 24550-s410J by Anderson Ranch. The addition of § 85-2-311(4) describing what constitutes substantial credible evidence simply made explicit concepts that were inherent but unstated in prior statutory language, however. Furthermore, 1989 amendment of § 85-2-311(1)(a) corrected a semantic impasse identified by the courts⁶ which virtually halted the issuance of new water rights. Because of their nature, these elements of the existing statutes

⁶ In re Don Brown, Cause 50612, 1st Judicial Dist., June 15, 1987.

should be applied to applications received prior to their effective date. See generally In re Application G155812-43A by Rogerric J. and Karen K. Knutson; In re Application 2482-s41S by Wayne Hannah. Therefore, Mont. Code Ann. §§ 85-2-311(1)(a) and (4) (1991) shall apply as to the present application.

5. Applicant must prove by substantial credible evidence that the following criterion set forth in Mont. Code Ann. § 85-2-311(1)(a) (1991) is met:

- (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
 - (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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available.

6. To meet the substantial credible evidence standard in Mont. Code Ann. § 85-2-311(1) the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1991).

7. Applicant has shown a lack of bona fide intent to appropriate 100 gpm of the flow rate or any of the 55 AF of volume proposed by the present application. See Findings of Fact 2, 3, 4, 10, and 14. Therefore no permit can be issued to Applicant for such. See Mont. Code Ann. § 85-2-310(3) and (4) (1987); see also Mont. Code Ann. § 85-2-311(d) (1987).

8. Applicant failed to prove that an additional 50 gpm of unappropriated water is available at the proposed point of diversion during the proposed period of use. One occurrence of flow 23.9 gpm above Applicant's existing entitlement is not sufficient proof that water is sufficiently available to satisfy a new appropriation, especially since that one occurrence was early in the period when evidence shows flows are highest. See Findings of Fact 14, 15, and 16. Such a single occurrence cannot be the basis for a finding that unappropriated water is reasonably available during the proposed period of use. There being nothing in the record that shows 50 gpm of unappropriated water is reasonably available in the source at the proposed point of diversion during the proposed period of appropriation, it is concluded that the criterion set forth in Mont. Code Ann. § 85-2-311(1)(a) (1991) is not met.

9. Since an Applicant is required to show by substantial credible evidence that all the criteria necessary for the issuance of a permit have been met, and since Applicant in this matter has failed to demonstrate there are unappropriated waters in the source of supply at the proposed point of diversion, no finding is necessary as to whether the water rights of prior appropriators would be adversely affected, whether the proposed means of diversion and operation of the appropriation works are adequate, whether the proposed use is beneficial, or whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which

water has been reserved. See In re Application 53221-s400 by John E. and Betty J. Carney.

10. The Department may modify a water use permit if the permit is not being followed. See Mont. Code Ann. § 85-2-314 (1991). Applicant requested that Permit 63377-s76G be modified, alleging that the permit could not be followed. See Finding of Fact 10. Applicant has not shown, however, that Permit 63377-s76G is made useless by the condition stated in Finding of Fact 8. See Findings of Fact 8, 9, 11, 12, and 13. To the contrary, the evidence in the record in this matter indicates that Applicant will be able to appropriate water under Permit 63377-s76G. See Findings of Fact 12, 15, and 16. Furthermore, nothing in the record indicates that circumstances have changed since the Department decided to issue Permit 63377-s76G; if made today, the decision would be the same. Insufficient reason exists for the Department to modify Permit 63377-s76G; therefore it shall remain as issued.

PROPOSED ORDER

Application for Beneficial Water Use Permit 68033-s76G by Robert Hollenback is denied.

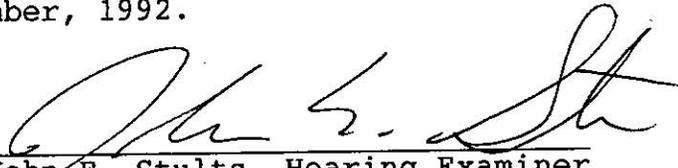
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the

proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 2nd day of November, 1992.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
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(406) 444-6612

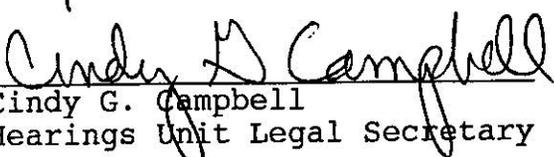
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 2nd day of November, 1992, as follows:

Robert Hollenback
141 I-90 N
Deer Lodge, MT 59722

Ed Janney
110 North Frontage Road
Deer Lodge, MT 59722

T.J. Reynolds and
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Cindy G. Campbell
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