

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

FILMED

MAR 13 1991

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 73404-76M BY DAVE C. MURRAY)

* * * * *

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 January 2, 1991, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No.73404-76M is hereby granted to Dave C. Murray to appropriate groundwater at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, Township 16 North, Range 23 West, Missoula County, by means of a developed spring. The water shall be appropriated at a rate not to exceed 75 gallons per minute up to 60.5 acre-feet per year for commercial water-bottling purposes from January 1 to December 31, inclusive of each year. The bottling plant (place of use) shall be located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 21.

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A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

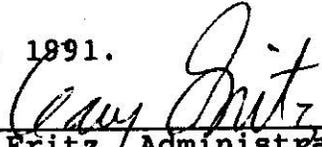
B. The Permittee shall install an adequate flow metering device to allow the flow rate and volume of water diverted from the spring to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records to the Missoula Water Resources Division Field Office upon demand.

C. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

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 30 days after service of the Final Order.

Dated this 7 day of February, 1991.



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 12th day of February, 1991 as follows:

Dave C. Murray
P.O. Box 26
Huson, MT 59846

Alfred and Linda Barone
c/o Bar-One Ranch
Box 2000
Huson, MT 59846

V.L. and Angela Van Hise
Rising Sun Tavern Road
Clarksberg, NJ 08510

Michael P. McLane
Field Manager
Missoula Water Resources
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Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Secretary

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

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* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 73404-76M BY DAVE C. MURRAY)

* * * * *

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 held on November 27, 1990, in Missoula, Montana.

Applicant Dave C. Murray appeared at the hearing in person and by and through counsel, Robert H. Scott.

Lee Yelin, former Water Right Specialist with the Department of Natural Resources and Conservation (hereafter Department), now a Water Right Consultant with Land and Water, appeared as an expert witness for the Applicant.

Objectors Alfred and Linda Barone appeared at the hearing by and through Jerry Marble, Manager of the Bar-One Ranch.

Objectors V.L. and Angela Van Hise appeared at the hearing by and through counsel, Christopher B. Swartley.

Robert L. Deschamps III, Missoula County Attorney and part time farmer and rancher, appeared at the hearing as a witness for Objectors Van Hise.

Michael P. McLane, Field Manager of the Missoula Water Resources Division Field Office of the Department, appeared at the hearing.

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EXHIBITS

Applicant's Exhibit 1 consists of two maps mounted on either side of a large piece of cardboard. One map is made up of parts of enlarged USGS Quadrangle maps and the other consists of an enlarged copy of page 35 in the Missoula County Water Resources Survey book. (Only the letter 3 is on the exhibit, however the Examiner confirmed the page number in one of the Department's books.) With the Quadrangle maps is a hand drawn enlargement of the proposed point of diversion as it relates to Fire Creek, Ninemile Creek and the Parent (Fisher) Ditch.

Applicant's Exhibit 2 consists of two pages and is a copy of a water analysis by the Montana Environmental Laboratory. Counsel for Objectors Van Hise objected to this exhibit on the basis the exhibit is hearsay. Since hearsay is allowed under the informal rules of evidence, the objection was overruled.

Applicant's Exhibit 3 is a hand-drawn design of the proposed diversion works.

Applicant's Exhibit 4 is a spring box construction design.

Applicant's Exhibits 1, 3, and 4 were accepted into the record without objection.

The Department's file was made available for review by all parties who made no objection to any part of the file. It is therefore accepted into the record in its entirety.

FINDINGS OF FACT

1. Section 85-2-302, MCA, 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."

2. Dave C. Murray filed the above-entitled Application with the Department on January 17, 1990, at 9:45 a.m.

3. Pertinent portions of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on April 11, 1990.

4. The Applicant proposes to appropriate 75 gallons per minute (gpm) up to 60.50 acre-feet per year of the waters of a developed spring for commercial water-bottling purposes. The proposed point of diversion and place of use is the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, Township 16 North, Range 23 West, Missoula County. Applicant proposes to divert the spring water 12 hours each day of each year.

5. The means of diversion would be buried perforated pipe to collect the water which would be channeled into a spring box then to the proposed bottling plant. The diversion works and the bottling plant would be constructed according to specifications required by the Department of Health and Environmental Sciences. The spring box would be equipped with an overflow device to allow the excess water from the spring to flow into Fire Creek. (Testimony of Applicant and Applicant's Exhibits 3 and 4.)

6. Applicant has had a sample of the water analyzed to determine the suitability for public drinking water. The analysis determined the water was suitable. Applicant also had

the water of Ninemile Creek tested for contamination. That test showed Ninemile Creek was contaminated. (Applicant's Exhibit 2, Department file and testimony of Applicant.)

7. The subject spring is located approximately 100 yards from Ninemile Creek and 75 feet from Fire Creek. Fire Creek is a tributary to Ninemile Creek. The spring is approximately five to ten feet higher in elevation than the creek bottoms. There was no channel connecting the spring with any surface source before the Applicant dug into the spring. The source of the water in the spring is unknown, it may be underground flow of any of the streams in the area or it may be groundwater that is not directly connected to any of the surface water sources. (Testimony of Applicant, Lee Yelin, and Applicant's Exhibit 1.)

8. Applicant has owned the proposed point of diversion and place of use for nearly three years. Before digging into the spring, Applicant observed water dripping from the rocks and the hill bank. Noticing the water was very cold, he dug into the area to develop the water for his domestic use. This resulted in a steady flow of water from the spring which Applicant determined was sufficient for commercially bottling water. (Testimony of Applicant.)

9. Applicant has a pond located upgradient from the spring which was filled by a ditch from Fire Creek. This ditch has been shut off and the pond dried out for almost three years to be sure the water in the spring did not come from Fire Creek via seepage from the pond. There was no change in the flow of the spring.

Applicant has been monitoring the spring closely over the last two years and even during periods of very low flow in Fire Creek, the spring has continued to flow steadily. (Testimony of Lee Yelin and Applicant.)

10. Objectors Van Hise have three Statements of Claim, W107876-76M, W107877-76M, and W107873-76M. Claims No. W107876-76M and W107877-76M are located on Fire Creek and W107873-76M is located on Ninemile Creek. All are up-gradient from the proposed point of diversion. In their written objection, they stated the proposed project might lower their water usage. During the hearing, Objectors Van Hise's counsel expressed concern that the Applicant would invest substantial funds in the project then not be able to obtain the necessary water because Objectors Van Hise had begun to use all the water they had rights to use. Objectors Van Hise contend there are no unappropriated waters in Fire Creek or Ninemile Creek. (Applicant's Exhibit 1, and Department file.)

11. Robert Deschamps has run cattle on and irrigated the Van Hise property for approximately 11 years and some of the Barone property last season and some of this season. Mr. Deschamps has, however, been aware of the use of Ninemile Creek waters on Objectors Barone's property east of Ninemile Creek for several years.

12. The system claimed under Van Hise's Water Right Claim No. W107876-76M on Fire Creek is not operational at the present time. Mr. Deschamps has used the system claimed under Van Hise's Water Right Claim No. W107877-76M. He has never used the Van

Hise diversion on Ninemile Creek. (Testimony of Robert Deschamps.)

13. Fire Creek is not a reliable source; it was described as a "flashy" creek. Mr. Deschamps testified that Fire Creek has been dry at least twice in the past. Fire Creek had water in it all year during the last two years. Three years ago it dried up completely and Mr. Deschamps was unable to irrigate from that source. (Testimony of Robert Deschamps and Lee Yelin.)

14. Objectors Barone have claimed three water rights on Ninemile Creek, Statements of Claim No. W099260-76M, W099261-76M, and W111122-76M. Barones have three points of diversion for irrigation purposes and one point of diversion for stockwater on Ninemile Creek, all downstream of the Applicant's proposed point of diversion. (Applicant's Exhibit 1, Department file, and testimony of Applicant, Robert Deschamps, and Lee Yelin.)

15. Mr. Deschamps' main diversion to irrigate Barone's property on the east side of Ninemile Creek was the Barone diversion in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, Township 16 North, Range 23 West, under Water Right Claim No. W099260-76M. He did not use the diversion for Water Right Claim No. W111122-76M at all. The diversion for Water Right Claim No. W(G)111122-76M was originally a ditch from Ninemile Creek which was used to flood irrigate the property on the west side of the creek. At the present time there is a pump in Ninemile Creek to supply a wheel line sprinkler system which irrigates that property on the west

side of Ninemile Creek. (Testimony of Robert Deschamps and Applicant's Exhibit 1.)

16. There is a problem with the means of diversion for Barone's Water Right Claim No. W099260-76M. It is a headgate located on a side channel of Ninemile Creek. The headgate is located rather high in comparison with the level of the main channel. Outside of high runoff periods, the side channel has to be dammed as well as part of the main channel to raise the water level enough to flow through the headgate.

17. In order to divert for Water Right Claim W(G)111122-76M in August of last year (1989), damming of Ninemile Creek was required to keep water in the pumping pit. Mr. Deschamps described the flow of Ninemile Creek last year to be below average. However, Mr. Deschamps did not call a junior water user for water in 1989. (Testimony of Robert Deschamps.)

18. Applicant readily agreed that Objectors Van Hise and Barone have senior water rights and if a legitimate call for water were made (if the Permit is granted) Applicant as a junior water right owner, would be required to cease diverting until those senior water rights were satisfied. (Testimony of Applicant.)

19. Although Ninemile Creek is a decreed stream, there has never been a water commissioner on the stream and there have been very few disputes based on water supplies. There has never been a call for water by any of the water rights owners on Ninemile Creek. (Testimony of Lee Yelin.)

20. There are no permits pending nor are there reservations for water from Ninemile Creek. There are two Applications for Permit to use the waters of Fire Creek. However, these proposed projects are upstream from the Applicant's proposed point of diversion. There are no reservations for water use from Fire Creek. (Testimony of Lee Yelin and Applicant.)

Based upon the foregoing Findings of Fact and upon the record in this matter, 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. Title 85, Chapter 2, Part 3, MCA.

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 § 85-2-311(1), MCA, are 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;

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

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(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; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(4) To meet the substantial credible evidence standard in this section, the applicant shall 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.

4. The proposed use, commercial water bottling, is a beneficial use of water. See § 85-2-102(a), MCA.

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

6. Applicant has possessory interest in the proposed place of use. See Finding of Fact 8.

7. 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. See Finding of Fact 20.

8. There are unappropriated waters in the source of supply at the proposed point of diversion, at times when the Applicant proposes to put those waters to beneficial use. The water is

available in the amount requested throughout the proposed period of use. See Findings of Fact 8 and 9.

Although Objectors Van Hise believe there are no unappropriated waters in the source, there was no evidence introduced into the record to substantiate that belief. The Applicant has submitted uncontroverted evidence that there is a steady flow from the spring and that flow did not diminish when the flows in Fire Creek were very low. Although there may be a connection between the Applicant's source and the Objectors' source, it must remain speculative, without data from the Applicant's actual use, whether the waters intended to be used are part of the surface flows. See In re Application No. 27522-76F by Stanley and Nina Cadwell. Should it be determined through Applicant's use that a connection exists, there is no evidence in the record this water is appropriated. If there is no direct connection between the sources, there is evidence the development of the spring could increase the amount of water in Fire Creek and Ninemile Creek. See Finding of Fact 5 and 7.

9. There is substantial credible evidence that the water rights of prior appropriators will not be adversely affected. See Findings of Fact 9, 10, 18, and 19.

Mr. Deschamps testified to some difficulty obtaining enough water later in the irrigation season, however a large part of that problem is due to the location of the headgate. As long as an appropriator can reasonably exercise his water right there is no adverse effect. Having to partially dam the source to raise

the water level so it will flow into a headgate placed high above the creek bottom is not an adverse effect nor is having to call for water from a junior appropriator. See In re Application No. 54911-42M by Sackman. The record indicates there has never been a call for water in the area. Mr. Deschamps has been active in the area for some years, yet he testified he had never called for water. Based on the data available, one must conclude there will be no adverse effect to prior water users.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No.73404-76M is hereby granted to Dave C. Murray to appropriate groundwater at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, Township 16 North, Range 23 West, Missoula County, by means of a developed spring. The water shall be appropriated at a rate not to exceed 75 gallons per minute up to 60.5 acre-feet per year for commercial water-bottling purposes from January 1 to December 31, inclusive of each year. The bottling plant (place of use) shall be located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 21.

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

B. The Permittee shall install an adequate flow metering device to allow the flow rate and volume of water diverted from the spring to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records to the Missoula Water Resources Field Office upon demand.

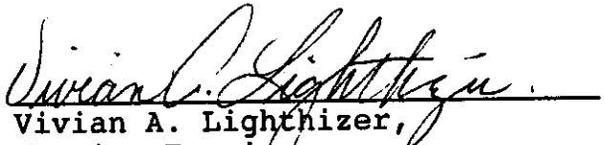
C. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

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 within 20 days after service of the exception. However, 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 January, 1991.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 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 duly served upon all parties of record at their address or addresses this 2nd day of January, 1991 as follows:

Dave C. Murray
P.O. Box 26
Huson, MT 59846

Alfred and Linda Barone
c/o Bar-One Ranch
Box 2000
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