

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
79625-s76F BY THEODORE AND RUBY G.)
HARRIS)

* * * * *

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 August 7, 1992, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Application for Beneficial Water Use Permit 79625-s76F by Theodore and Ruby G. Harris is hereby denied.

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.

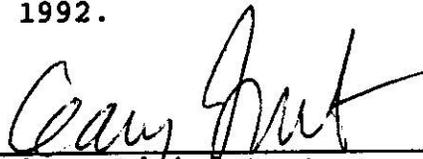
CASE # 79625

FILMED

NOV 16 1992

BY _____

Dated this 29 day of September, 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 30th day of September, 1992 as follows:

Theodore Harris
Ruby G. Harris
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Bonner, MT 59823

Ed McLean
500 Benton
Missoula, MT 59801

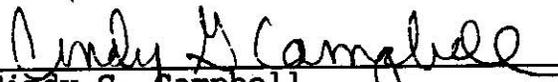
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(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Legal Secretary

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
79625-S76F BY THEODORE AND RUBY G.)
HARRIS)

* * * * *

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 July 23, 1992, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Theodore and Ruby G. Harris for the above-entitled Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants Theodore and Ruby G. Harris appeared at the hearing pro se.

Objector J. B. Yonce appeared at the hearing pro se.

Objector Wills Cattle Company (Wills) appeared at the hearing by and through Sidney Wills.

Objector Ed McLean appeared at the hearing by and through counsel Randy Cox.

Les Woldstad appeared at the hearing as a witness for Objector Ed McLean.

Lee Yelin, Water Rights Specialist with Land and Water Consulting Inc. (Land and Water), appeared at the hearing as a witness for Objector McLean.

Larry Schock, Civil Engineering Specialist with the Missoula

CASE # 79652

Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

EXHIBITS

Objector McLean offered six exhibits for inclusion into the record. There were no objections to any of these exhibits. They are therefore accepted into the record.

Objector McLean's Exhibit 1 is a rectangular channel analysis and design worksheet prepared by Lee Yelin by entering certain information into a computer model program to determine the flow rate of Blixit Creek.

Objector McLean's Exhibit 2 is a circular channel analysis and design worksheet prepared by Lee Yelin by entering certain information into a computer model program to determine the flow rate through a culvert.

Objector McLean's Exhibit 3 is a copy of a 1980 USDA aerial photograph which has been enhanced to show the locations of Union Creek, Arkansas Creek, Blixit Creek, MacDonald Ditch, and McLean Ditch. The scale of this photograph copy is eight inches equals a mile.

Objector McLean's Exhibit 4 is a copy of a portion of a USGS map which has been enhanced to show part of Arkansas Creek used as a carrier of Union Creek water by Objector Wills, the location of MacDonald Ditch, and the McLean lateral.

Objector McLean's Exhibit 5 is an enlarged copy of page 13 of the Missoula Water Resources Survey.

Objector McLean's Exhibit 6 consists of four photographs.

Photograph 1 shows the pipe that carries MacDonald Ditch water, Arkansas Creek as it flows under the McLean flume, all at the immediate location of the proposed diversion. Photograph 2 shows the proximity of the McLean flume, the MacDonald Ditch pipe and Arkansas Creek to the proposed diversion. Photograph 3 shows the location of the Arkansas Creek dam used by Objectors Wills and McLean. Photograph 4 shows the downstream diversion used by Objectors Wills and Yonce.

Department's Exhibit 1 is a contour map produced by Larry Schock after surveying the proposed point of diversion and place of use and taking elevation shots of the equipment crossing over Arkansas Creek and the equipment crossing over Blixit Creek. The point labeled 0'0" is the point where Blixit Creek flows into Arkansas Creek. This exhibit was accepted into the record without objection.

The Department file was made available for review by all parties who had no objection to any part of it. Therefore the Department file is accepted into the record in its entirety.

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

1. Mont. Code Ann. § 85-2-302 (1991) 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. Theodore and Ruby G. Harris duly filed the above-entitled Application with the Department on October 16, 1991, at 11:45 a.m. (Department file.)

3. Pertinent portions of the Application were published in the Missoulian on February 26, 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.

Three timely objections to the proposed project were received by the Department. The Department notified the Applicants of these objections by a letter dated March 23, 1992. (Department file.)

4. Applicants propose, according to the notice published in the newspaper and sent to individuals and public agencies, to appropriate 309.67 gallons per minute (gpm) up to 99.50 acre-feet of the waters of Blixit Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, Township 13 North, Range 16 West, Missoula County¹ by means of a headgate and ditch. The proposed period of appropriation and diversion is from May 1 through October 31, inclusive of each year. The proposed places of use are 32 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 7.80 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 for a

¹Unless otherwise specified, all land descriptions in this Proposal are in Township 13 North, Range 16 West, Missoula County.

total of 39.80 acres to be flood irrigated. However, at the hearing Applicants testified that a dam and a pond would be the means of diversion or maybe a dam wouldn't be needed to raise the water high enough to flow into the ditch which would convey the water to the place of use, that just a pond would do or they might pump the water out of the pond. Mr. Harris stated at one point that the source would actually be Arkansas Creek on which Applicants have water rights and that this Application was just in case some water from Blixit Creek might seep or flow into the pond, Applicants would be legal. The proposed diversion, if a dam or pond, would also capture Arkansas water. Mr. Harris also testified that the place of use would not be the entire 39.80 acres, but would be a few acres on the west side of that field. (Department file and testimony of Applicants and Lee Yelin.)

5. When asked if they had any engineering designs for the project, Applicants stated that a beaver had constructed a dam in approximately the same location as the proposed dam and that proved it could be done and was feasible. However, Applicants produced no photographs nor specifications of the beaver dam which is no longer in place. (Testimony of Applicants.)

6. Applicants own the proposed place of use. (Testimony of Applicants.)

7. Mrs. Harris took measurements of Blixit Creek in October when the water was lowest; however, Applicants produced no flow measurements during the hearing. The measurements taken by Mrs. Harris are in the Department file on a form designed by Land and

Water which indicate Blixit Creek was flowing at a rate of .69 cubic feet per second (cfs) or 309.67 gpm on October 6, 1991.

(Department file and testimony of Ruby Harris.)

8. On July 20, 1992, Lee Yelin took some measurements on Blixit Creek. At that time Blixit Creek was flowing at approximately 0.16 cfs or 71.81 gpm. (Testimony of Lee Yelin.)

9. Sidney Wills is a long-time resident of the area. He believes Blixit Creek is running this year as it normally does. (Testimony of Sidney Wills.)

10. Mrs. Harris reviewed the Department records and determined there were no water rights below their proposed point of diversion on Blixit Creek, nor were there any planned uses or developments for which a permit has been granted or for which water has been reserved. (Testimony of Ruby Harris and Department file.)

11. There is a lateral located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 where water is turned out into McLean's ditch to irrigate a field located in the S $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, then the water is flumed over Union Creek to irrigate a field in the N $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 owned by Objector McLean. The flume is out at this time but it will be replaced this fall. According to the contour map produced by Larry Schock, the lateral could be flooded by Applicants' proposed diversion, if it is a dam. Water would also inundate two road crossings, one over Arkansas Creek and the other over Blixit Creek. Although the water would probably not rise over the flumes, it would rise to at least the bottom of the

flumes and saturate the bed on which the flumes lie which could weaken them as the beaver dam did. (Department's Exhibit 1 and testimony of Les Woldstad.)

12. Both Blixit Creek and Arkansas Creek have been straightened. Blixit Creek now runs directly north along the fence line between the SE $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 15. Then Blixit Creek flows into Arkansas Creek. Arkansas Creek has been manipulated so it now flows over to the line between the SE $\frac{1}{4}$ of Section 15 and the SW $\frac{1}{4}$ of Section 14 then directly north for approximately 400 feet, then in a west northwesterly direction to the center of Section 15 where it flows under the McDonald Ditch flume and the McLean lateral flume, then on to Union Creek in the NW $\frac{1}{4}$ of Section 15. (Testimony of Lee Yelin and Objector McLean's Exhibits 3, 5, and 6.)

13. Although the Objectors may have no water rights on Blixit Creek or Arkansas Creek below the Applicants' proposed point of diversion, they do have water rights on Union Creek downstream from the confluence of Arkansas Creek. There are two diversions on Union Creek. One is the diversion shared by Objectors Yonce and Wills and the other is just for the Yonce property. (Objector McLean's Exhibit 3 and testimony of Ruby Harris and Lee Yelin.)

14. Objectors Wills and McLean take Union Creek water from McDonald Ditch and place it in Arkansas Creek at a point near the center of Section 15. Arkansas Creek is then used as a carrier for this water until it is taken out and used for irrigation in

the NW¼ of Section 15. Applicants' proposed project would interfere with this practice. (Testimony of Lee Yelin.)

15. Les Woldstad rents the McLean property. Mr. Woldstad believes that the McLean lateral would not be able to handle the additional water that would be the result of Applicants' project if the diversion would be a dam. (Testimony of Les Woldstad.)

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. See Findings of Fact 2 and 3.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Finding of Fact 1.
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) and (4), 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;
 - (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 Applicants have not met the criteria for issuance of a permit. The proposal set forth at the hearing was not the same as published in the newspaper and sent to individuals and agencies. See Finding of Fact 4. Applicants did not produce any engineering for the proposed project merely stating that a beaver had proved it could be done. See Finding of Fact 5. It is not known how many acres would be irrigated, nor what the proposed means of diversion would be. See Finding of Fact 4.

5. Since an applicant is required to show by substantial credible evidence that all the criteria for issuance of a permit have been met, and since Applicants in this matter have failed to demonstrate the proposed means of diversion, construction, and operation of the proposed works are adequate, no finding is necessary as to whether there are unappropriated waters in the

source of supply, whether the water rights of prior appropriators would be adversely affected 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. In re Application 53221-s400 by Carney; In re Application 61333-s40A by Pitsch.

PROPOSED ORDER

Application for Beneficial Water Use Permit 79625-s76F by Theodore and Ruby G. Harris is hereby 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. 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 7th day of August, 1992.

Vivian A. Lighthizer

Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(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 7th day of August, 1992 as follows:

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