

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
80964-s76H BY PAUL R. AND JUDITH)
K. NELSON)

* * * * *

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 October 16, 1992, 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, a Beneficial Water Use Permit is hereby granted to Paul R. and Judith K. Nelson to appropriate 40 gallons per minute up to 4.60 acre-feet per year from an unnamed tributary of Sweathouse Creek, more specifically waste and seepage water from the No. 4 Ditch of the North Channel of Bear Creek and runoff water from surrounding irrigation, to be pumped from a collection point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 8 North, Range 21 West, Ravalli County, for sprinkler irrigation from May 1 through October 31, inclusive of each year. The place

CASE # 80964

of use shall be 1.50 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35. The means of diversion shall be drain ditches located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 8 North, Range 21 West, Ravalli County.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The water right granted by this permit is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

C. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Offices, Suite 105, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

D. This Permit is associated with Water Right W128512-76H. These water rights have overlapping places of use. The combined use shall not exceed 96.1 gpm up to 6.87 acre-feet of water per year.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

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.

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 30 day of November, 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 1st day of December, 1992 as follows:

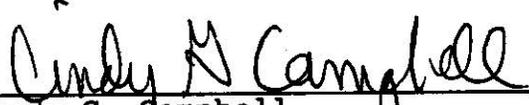
Paul R. & Judith K. Nelson
P.O. Box 177
Victor, MT 59875

J.B. Artman
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Victor, MT 59875

Donald L. Buelke
100 Critter Way
Victor, MT 59875

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(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
80964-s76H BY PAUL R. AND JUDITH)
K. NELSON)

* * * * *

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 September 22, 1992, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be issued to Paul R. and Judith K. Nelson for the above-entitled Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants Paul R. and Judith K. Nelson appeared at the hearing pro se.

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

Objector Donald L. Buelke, DVM, MS, appeared at the hearing pro se.

Michael P. McLane, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing.

EXHIBITS

No exhibits were offered for inclusion into the record.

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.

CASE # 80964

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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(1) (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. Paul R. and Judith K. Nelson duly filed Application for Beneficial Water Use Permit 80964-s76H with the Department on February 25, 1992, at 1:01 p.m. (Department file.)

3. Pertinent portions of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on June 3, 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. Two timely objections were received by the Department. Applicant was notified of the objections by a letter dated June 29, 1992. (Department file.)

4. Applicants seek to appropriate 40.00 gallons per minute (gpm) up to 4.60 acre-feet per year from an unnamed tributary of

Sweathouse Creek¹, more specifically waste and seepage water from the No. 4 Ditch of the North Channel of Bear Creek, at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 8 North, Range 21 West, Ravalli County,² for sprinkler irrigation from May 1 through October 31, inclusive of each year. The proposed place of use is 1.50 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35. The proposed means of diversion is a drain ditch. (Department file and testimony of Paul and Judith Nelson.)

The source, as noticed, is not fully explained. The water Applicants seek to appropriate is not only waste and seepage water from No. 4 Ditch, it is also runoff from surrounding irrigation. (Department file, testimony of Paul and Judith Nelson.)

5. Waste water from irrigation on three sides of Applicant's property flows into their east field, collecting in ditches which carry it to a low area rather than allowing the water to flow in a sheet and collect in the low area. Mr. Nelson testified the tube in Vista Ridge Road is so high the water can escape only by evaporation or seepage. Dr. Buelke testified that the culvert itself is "on grade" and not lower than the sump but that water retention berms have been constructed by persons other

¹The water does not originate from Sweathouse Creek. It originates from Bear Creek and is the result of irrigation of the surrounding property. If the water could escape from the low area, it would flow into an unnamed tributary of Sweathouse Creek, eventually flowing into Sweathouse Creek.

²Unless otherwise specified, all land descriptions are located in Township 8 North, Range 21 West in Ravalli County.

than the Applicants, which keep the water from going into the culvert. Applicants have seen the water accumulate to a depth of two feet in this area. Applicants propose to collect this water in a sump and pump it out with a three horsepower pump through a sprinkler irrigation system rather than letting it stand until it evaporates or seeps away. This use would be in addition to Applicants' decreed water use which is five miner's inches. (Testimony of Judith Nelson, Dr. Buelke, and Michael McLane.)

6. Originally, the property now owned by Dr. Buelke, Mr. Artman, Applicants, and three other owners was an irrigated farm of approximately 55 acres. The source of water is a decreed right from the North Channel of Bear Creek delivered by No. 4 Ditch. The property has now been subdivided and in the process of subdividing, the irrigation system has also been divided and can no longer operate in the historic manner. Historically the waste water would collect in the lower areas where it would be picked up and reused. The Ravalli County Water Resources Survey shows the entire area, at least at the time of the survey, under irrigation. Now, of course, with the division of land, water still accumulates in the low areas as it did previously but it can no longer be picked up and reused as it was because some of the ditches have been obliterated and the different owners may not agree to using the water in that manner. (Department file, Department records, and testimony of Applicants, J.B. Artman, Dr. Buelke, and Michael McLane.)

7. Applicants have constructed a sump, three feet deep with

concrete rings. There are at least three ditches on Applicants' property which lead to the sump. Applicants' irrigation system would consist of a three horsepower pump which has a capacity to pump 40 gpm into six sprinkler heads which would have quarter-inch nozzles. Their deiced water would also be routed to the sump, mixed with the waste water and pumped out using this system which according to Mr. Artman has been in use all this season. (Testimony of Mr. Artman, Paul Nelson, and Judith Nelson and Department file.)

8. No. 4 Ditch, after it crosses Pleasant View Road from the south to the north, is located on the high ground to the west and north of Applicants' property. The soils are mostly decomposed granite and quite porous, consequently Applicants also get seepage from this ditch. (Department file, testimony of Dr. Buelke.)

When Applicants first moved onto their property, they would experience a flood each time Les Hinman, their neighbor to the west, irrigated. In order to manage that excess water, Mr. Hinman dug a ditch at the east edge of his field which collects the runoff and channels that water into Applicants' ditch so that water can be controlled and used for irrigation of the west side of their property. (Testimony of Paul Nelson and Judith Nelson.)

When Mr. Artman irrigates his property located immediately north of Applicants' property, the runoff flows onto Applicants' property, where it is collected by ditches and routed to the sump. Applicants also get some runoff from the irrigated

property to the south of them across Pleasant View Road. This water is also collected by a ditch and routed to the sump.

(Testimony of Judith Nelson and Paul Nelson, and Department file.)

9. Objector Artman questioned whether the proposed use was beneficial because Applicants had no livestock and the place of use was "nothing but a weed patch." Paul Nelson testified that the place of use was covered by knapweed when they bought the property, but since then they had established a good stand of grass. Dr. Buelke testified that Applicants have made an improvement in the neighborhood by the management of their property. Whether the growth on the proposed place of use is weeds or grass is immaterial. Applicants intend to establish a good stand of grass on those places and with proper agricultural practices, would most likely achieve that goal. (Testimony of J.B. Artman, Dr. Buelke, and Paul Nelson.)

10. Applicants would be mixing the waste water with their decreed water and therefore would be able to use any amount of waste water that collects in the sump. The proposed flow rate of 40 gpm is the capacity of the pump, not the rate water flows into the sump. However, since Applicants have no control of the waste water that flows over their property and collects in the sump, the capacity of the pump is also the rate at which the water is being diverted for beneficial use. Applicants are unable to quantify the flow rate and amount of waste water that would collect in the sump. The volume of 4.60 acre-feet of waste water

requested on the Application is an estimate. This amount is approximately 3.07 acre-feet per acre per year which is slightly below the amount recommended for granitic soils in a normal year. For granitic soils, in this area according to the SCS Irrigation Guide, it is recommended that 3.25 acre-feet per acre of water be applied for a normal year. For a dry year, 4.58 acre-feet of water per acre should be applied. (Testimony of Judith Nelson, Paul Nelson, and Department file.)

11. There are other decreed water holders to the east of Applicants' property. Most of these water right owners are not using decreed water at the present time because the ditches have been obliterated or it is simply not worth the effort required to get the water. Further, Mr. McLane testified that those persons have their water delivered by a separate lateral. This lateral follows the south side of Pleasant View Road originating at the dividing box shared by Nelson, Hinman, Buelke, and Artman. Water is carried to the east along the south side of Pleasant View Road where it crosses the road to the north near the Richie property. This site is just east of Applicants' property. There was a discussion among the parties at the hearing that Mrs. Pat Richie had a right to use water from the proposed source; however, Mr. McLane testified that Mrs. Richie received her water from a different lateral and that he had no knowledge of her relying on the proposed source. Mr. Artman testified that Mrs. Richie does irrigate the back side of her fields with the unnamed tributary of Sweathouse Creek. (Testimony of Dr. Buelke, Mr. Artman, and

Mr. McLane.)

12. Dr. Buelke's objection to this Application is if a permit is granted for the use of the waste water, there would be, according to Dr. Buelke, a double water privilege to the Applicants property which Dr. Buelke thinks would set a bad precedent. Further, Dr. Buelke is concerned that if a permit is granted for this application, every subsequent land owner would file a "water claim" on every "wet spot" that exists. Dr. Buelke has two such wet spots on his property and they are a nuisance for him just as the Nelsons' wet spot is for them. Dr. Buelke is also concerned that the waste water collected in Applicants' sump would be inseparable from the decreed water.

Dr. Buelke believes the underlying problem of the neighborhood is that from the point where No. 4 Ditch crosses Pleasant View Road to the west of Applicants' property, there are approximately 60 acres that need water from that ditch. The water users have tried to work together informally. The informal use is when a person has five acres, that person receives the ditch full of water once every 12 days; if a person has eight acres, the time of water use is proportional, which isn't really enough to go around in granitic soils. If the water were distributed by decreed right amount, no one would derive a beneficial use of the water. Five inches of water would run out five feet and disappear into the ground; it takes a full ditch of water to carry the water across the field. (Testimony of Dr. Buelke.)

Mr. Artman testified that when a person needs the water that person calls the other users and asks for it. This informal system appears to have worked well in the past although there are always a few persons who do not cooperate. (Testimony of J.B. Artman.)

13. It is not clear how Applicants receive their decreed water. It appears from the record that the waste from Mr. Hinman's irrigation is credited to the decreed right and used on the west side of Applicants' property. There are maps in the Department file that indicate the decreed water was historically routed to Applicants' property by laterals from No. 4 Ditch. One traditional point of diversion, in this Proposal called No. 1, was located on the east side of Lot 5 and the other, in this Proposal called No. 2, is located in the center of the boundary between Lots 16 and 20. Traditional point of diversion No. 2 is located on the north boundary of Mr. Artman's property and since there is considerable animosity between Applicants and Mr. Artman, No. 2 is not used to deliver decreed water to Applicants.' Traditional point of diversion No. 1 crosses Mr. Hinman's property then appears to cross over the western border of Mr. Artman's property where it proceeds just inside Artman's

³However, Applicants have the right, under Mont. Code Ann. § 85-2-414, to conduct water from or over the land of another for beneficial use. That right includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use.

border down to Applicant's property where it could enter Applicants' ditch on the northern edge of their property. It is unknown if this lateral is used to transport decreed waters to Applicants. Since the decreed water was not at issue, it was not discussed at length during the hearing.

The Applicants must be able to account for the waste water separately from the decreed water. Applicants have been unsuccessful in measuring the waste water; however, if Applicants could measure the decreed water before it mingles with the waste water, then measure the total amount of water pumped through the sprinkler system and subtract the amount of decreed water diverted they would be able to determine the amount of waste water diverted. If, in fact, the decreed water is delivered to Applicants' property via diversion No. 1, Applicants could measure that water before it is allowed to flow into the sump. Regardless of how the decreed water is delivered, it must be routed through the perimeter ditch located on the north, west and south borders of Applicants' property. (Map on graph paper in Department file.) Applicants could devise a measuring method in the perimeter ditch to measure the incoming decreed water and by keeping track of the hours the system is operated, could establish the amount of water pumped through the sprinkler system. Then by subtracting the decreed amount of water from the total pumped one would know the quantity of waste water appropriated. (Department file.)

14. Dr. Buelke has a spring fed pond on his property that

allows him to irrigate mostly by sprinkler system although he does some flood irrigation. Dr. Buelke does pick up some of the waste water from leakage from No. 4 Ditch and from the neighbors' irrigation as it works its way down to his pond. (Testimony of Dr. Buelke.)

15. Neither Dr. Buelke nor J.B. Artman would be affected by the proposed appropriation of waste water. Dr. Buelke is not located on the proposed source and therefore cannot be affected. Mr. Artman testified that he would not be affected by the proposed appropriation. (Department file and testimony of J.B. Artman.)

16. There are no planned uses or developments for which a permit has been issued or for which water has been reserved with which the proposed appropriation would unreasonably interfere. (Testimony of Michael McLane, Judith Nelson, Paul Nelson, and Department file.)

17. Applicants own the property where the water will be put to beneficial use. (Testimony of Paul Nelson.)

18. Applicants are aware that if a permit is issued for the waste water, that right would only be good as against junior appropriators and that the creators of such waste cannot be compelled to continue to create such waste water. (Department file and testimony of Paul and Judith Nelson.)

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 1, 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 Mont. Code Ann. § 85-2-311(1) and (4) (1991), 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 proposed use of water, irrigation, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2), (1991) See Finding of Fact 4. Applicant can use any amount of waste water diverted for irrigation. See Findings of Fact 7, 9, and 10. The proposed use of water would benefit Applicants by maintaining or elevating the value of their property. See Finding of Fact 9. The estimated amount of water to be appropriated is reasonable for the proposed purpose. See Finding of Fact 10.

5. The Applicants have 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. See Finding of Fact 17.

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. See Finding of Fact 16.

7. The record contains substantial credible evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 5, 6, 8, 11, and 15. However, in order to ensure Applicants do not exceed their decreed right under the guise of appropriating waste water, which would adversely affect prior appropriators, Applicants must devise some

method of measuring the decreed water separately from the waste water. See Finding of Fact 13.

8. The record contains substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 5, 7, 8, and 10.

Mr. Artman provided evidence Applicants' system has been in use for the current irrigation season and Applicants had diverted water from the proposed source and for the proposed purpose prior to receiving a permit to do so. See Finding of Fact 7. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1991). The Department has no statutory authority to deny a permit on such grounds. See In re Application No. 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application No. 61978-s76LJ by Town.

9. The record contains substantial credible evidence that the water Applicants seek to appropriate, i.e., waste and seepage, is unappropriated water. Once the water flows onto Applicants' property it is beyond the control of previous users, and is therefore unappropriated. Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966); Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933); In re Application

55362-s76H by Kenney.

The acquisition of a right to the seepage and waste water derived from seepage of No. 4 Ditch and the runoff from Les Hinman, J.B. Artman, and the irrigator north of Pleasant View Road is only good as against junior appropriators. Mr. Hinman, Mr. Artman, and the other irrigator cannot be compelled to continue to waste so that Applicants would have a source. Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930); Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); See also Finding of Fact 18.

Thus, in granting this Permit, the Department authorizes the appropriation of waste and seepage by the Applicants, by the specified means, only to the extent that such waste and seepage occurs. Nothing in this Proposal prevents the creators of the waste from improving the efficiency of the No. 4 Ditch or the changing of the method of irrigating to a more efficient system by Mr. Hinman, Mr. Artman, or the irrigator north of Pleasant View Road. Nothing in this Proposal compels them to continue to furnish this source for the Applicants.

10. Applicants proved by substantial credible evidence that unappropriated waters exist in the source of supply at times when the water can be put to the beneficial use proposed by the Applicants. See Findings of Fact 5 through 10. Although the evidence is not conclusive as to whether the full amount which Applicants seek to appropriate will always be available throughout the period Applicants seek to appropriate, if the

Applicants can make beneficial use of such lesser amounts of water as are available, the criteria of Mont. Code Ann. § 85-2-311(a)(ii) and (iii) will be satisfied. In re Application 49230-s76M by Grant Hanson; In re Application 55362-s76H by Kenney.

As the nature of the proposed use, sprinkler irrigation of 1.5 acres in the east field by mixing the decreed water with the waste water, allows beneficial use of whatever amount of water is available, and as Applicant proved by substantial credible evidence that some amount of unappropriated water is available throughout the period, the criteria of Mont. Code Ann. § 85-2-311(a)(ii)(iii) are met.

11. Dr. Buelke's objection that the issuance of a permit for the appropriation of waste water would grant a double water right for the Applicants' property is unfounded. See Finding of Fact 12. The granting of a permit for this Application would establish a right to use up to 4.60 acre-feet of waste water and nothing more. As for the objection that the granting of a permit for the instant Application would open the flood gates, so to speak, for every subsequent land owner to file an application to appropriate from every wet spot that exists, that objection is not valid. Every person is entitled to file an application for a beneficial use permit and will receive a permit if the criteria for issuance of a permit are met. See In re Application 25534-76H by Griff; In re Application 28224-s41I by Loomis and Edenfield. Dr. Buelke, himself, appropriates waste and seepage from No. 4 Ditch and neighboring irrigation. See Finding of Fact

14. The record is not clear whether Dr. Buelke has a water right to appropriate these waters.

The proposed use will not interrupt the current method of sharing the water. The informal method now in use appears to be the only method to derive beneficial use from the decreed waters. See Finding of Fact 12. The water proposed to be appropriated is water that would stand in the low spot on Applicants' property and could not be used by anyone other than Applicants. See Finding of Fact 5.

Based upon 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, a Beneficial Water Use Permit is hereby granted to Paul R. and Judith K. Nelson to appropriate 40 gallons per minute up to 4.60 acre-feet per year from an unnamed tributary of Sweathouse Creek, more specifically waste and seepage water from the No. 4 Ditch of the North Channel of Bear Creek and runoff water from surrounding irrigation, to be pumped from a collection point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 8 North, Range 21 West, Ravalli County, for sprinkler irrigation from May 1 through October 31, inclusive of each year. The place of use shall be 1.50 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35. The means of diversion shall be drain ditches located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 8 North, Range 21 West, Ravalli County.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The water right granted by this permit is subject to the authority of the court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

C. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Missoula Water Resources Regional Office, Holiday Village Professional Offices, Suite 105, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

D. This Permit is associated with Water Right W128512-76H. These water rights have overlapping places of use. The combined use shall not exceed 96.1 gpm up to 6.87 acre-feet of water per year.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424,

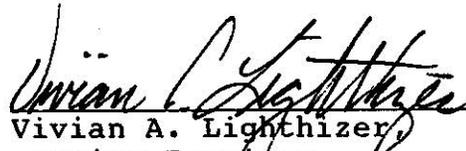
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NOTICE

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 16th day of October, 1992.


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 16th day of October,

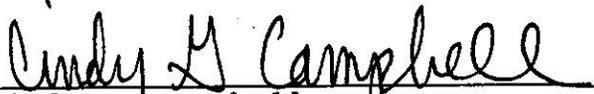
1992, as follows:

Paul R. & Judith K. Nelson
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