

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
81412-s76H BY DENNIS W. AND VERLA)
M. STUCKER)

* * * * *

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 April 13, 1993, 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 81412-s76H by Dennis W. and Verla M. Stucker is 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.

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

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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 20 day of May, 1993.



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 24th day of May, 1993 as follows:

Dennis W. & Verla M. Stucker
152 Waddell Ln
Darby, MT 59829

Wes McAlpin
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)

T.J. Reynolds, Manager
Helena/Missoula Water
Resources Regional Offices
1520 E. 6th Ave.
Helena, MT 59620-2301

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
81412-S76H BY DENNIS W. AND VERLA)
M. STUCKER)

* * * * *

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 March 30, 1993, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Dennis W. and Verla M. Stucker under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants Dennis W. and Verla M. Stucker appeared at the hearing pro se.

Brian Bemis appeared at the hearing as a witness for the Applicants.

Wes McAlpin, Water Resource Specialist III with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

R. H. (Arlo) White, Water Resource Specialist II with the Department's Missoula Water Resources Regional Office, appeared at the hearing.

Cindy G. Campbell, Hearings Unit Legal Secretary, appeared at the hearing.

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Objector John Germann did not appear at the hearing. The record shows a properly constituted Notice of Hearing was served upon all parties on February 25, 1993, by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1991). Return receipts were received by the Department, each with a signature indicating receipt. On March 11, 1993, the Department received a motion from Mr. Germann requesting a continuance of the hearing until June, stating it was economically infeasible for him to travel from California for the hearing, then to return to California a few days later. The motion was denied on the basis that economic infeasibility was not good cause to continue a hearing. The denial of motion was mailed on March 15, 1993, to Mr. Germann's California address. The Hearing Examiner received no further communication from Mr. Germann prior to the hearing or subsequent thereto. Therefore in accordance with Mont. Admin. R. 36.12.208 (1991), Mr. Germann is in default and no longer retains status as a party in this matter.

EXHIBITS

Applicants offered no exhibits for 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.

PRELIMINARY MATTERS

The Hearing Examiner takes official notice of the record In the Matter of Application 78964-76H by Becky and Brian Bemis

concerning the diversion works and the recommended flow rate per acre for that area.

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. Dennis W. and Verla M. Stucker duly filed the above-entitled application with the Department on April 9, 1992, at 12:45 p.m. (Department file.)

3. Pertinent portions of the file were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source on December 9, 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. Applicants were notified of one objection by a letter from the Department dated January 4, 1993, and of the other by a letter from the Department dated January 6, 1993. (Department file.)

4. Applicants seek to appropriate 417 gallons per minute not to exceed 23.92 acre-feet of water per year from Bunkhouse Creek,¹ a tributary of the Bitterroot River, at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, Township 3 North, Range 21 West, in Ravalli County, Montana, by means of a headgate and ditch. The proposed period of diversion is from April 1 through September 30, inclusive of each year for flood irrigation of 14 acres in the W $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, Township 4 North, Range 21 West, in Ravalli County.

The flow rate requested is slightly over the recommended flow rate of 17 gallons per minute per acre; however Applicants irrigate only 13 days during the season and therefore need a higher flow rate to apply the necessary amount of water in the relatively short time. (Department file, Preliminary Matters, and testimonies of Dennis Stucker and Brian Bemis.)

5. The proposed diversion works have been in place for many years and work well. Applicants would use the water on the established rotation basis; 24-hour use every other week for a total of 13 days each irrigation season. The water would be applied to the land by means of spreader dikes. (Department file and testimony of Dennis Stucker.)

6. Applicants' predecessors, Rhonda and Ricky Twardoski, measured the flow rate in Waddell Ditch at a rate of 1436 gallons

¹Although the Application was changed from Bunkhouse Creek to an unnamed tributary of the Bitterroot River, Applicant testified at the hearing that the source was Bunkhouse Creek. The water flows out of Bunkhouse Creek into Bunkhouse Waste Ditch which then flows into the Waddell Ditch.

per minute. However there was no measurement of the flow rate of Bunkhouse Creek or the Bunkhouse Waste Ditch. (Department file and testimony of Dennis Stucker.)

7. There are 15 Statements of Claim filed before the Water Court for the waters of Bunkhouse Creek and two Statements of Claim for Bunkhouse Creek waste water. (Department file and records.)

8. Applicants own the proposed place of use. (Department file.)

9. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved that would be adversely affected by the proposed project. (Testimony of Wes McAlpin and Department records.)

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 Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 2.

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 the water, flood irrigation, is a beneficial use. Mont. Code Ann. § 85-2-102(2)(a) (1991). The amount of water requested is within Department guidelines and therefore are not wasteful. See Findings of Fact 4 and 5.

5. Applicants have failed to provide substantial credible evidence there are unappropriated waters in the source of supply

at the proposed point of diversion at times when the water can be put to the use proposed in the amount Applicants seek to appropriate and that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. It is true Applicants' predecessor measured the waters flowing in the Waddell Ditch; however, Applicants need to measure the flow rate of the waters flowing in Bunkhouse Creek before it flows into Waddell Ditch to show the amount of water available for appropriation. Such measurements should be taken over the entire irrigation season. See Findings of Fact 6 and 7.

6. An applicant is required to show by substantial credible evidence that all the criteria for issuance of a permit have been met. Mont. Code Ann. § 85-2-311(1) (1991). Applicants in this matter have failed to demonstrate there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate, or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. Therefore, no finding is necessary as to whether the water rights of a prior appropriator would be adversely affected; whether the proposed means of diversion, construction, and operation of the appropriation works are adequate; whether the proposed use would interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; or whether the Applicants own the proposed place of use. In re Application

53221-s400 by Carney; In re Application 61333-s40A by Pitsch; In re Application 77335-s40A by Pitsch.

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

PROPOSED ORDER

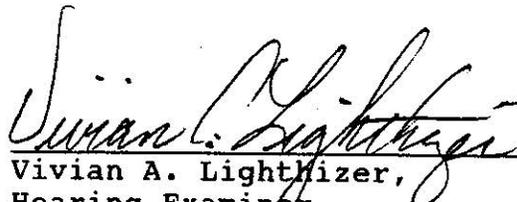
Application for Beneficial Water Use Permit 81412-s76H by Dennis W. and Verla M. Stucker is denied.

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. The defaulted objector is restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objector on other substantive issues.

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 13th day of April, 1993.


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

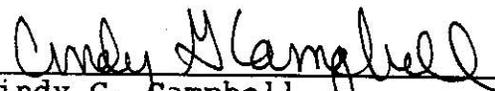
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 13th day of April, 1993 as follows:

Dennis W. & Verla M. Stucker
152 Waddell Ln
Darby, MT 59829

John Germann
72-755 Cactus Crt #C
Palm Desert; CA 92260-5330

Wes McAlpin
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