

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  
83286-41H BY FREDERICK C. AND )  
BETSY B. FEHSENFELD )

\* \* \* \* \*

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 February 11, 1997, 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 listed below, Beneficial Water Use Permit 83286-41H is granted to Frederick C. and Betsy B. Fehsenfeld to appropriate 139.00 gallons per minute up to 69.68 acre-feet of groundwater per year at a point in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 22, Township 01 South, Range 04 East, Gallatin County, Montana. The water shall be used as follows: 139.00 gallons per minute up to 69.00 acre-feet per year for irrigation of 29.00 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 22 and 0.68 acre-feet per year for stock water to be used in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 22. The period of use for irrigation shall be from May 1 through October 15, inclusive of

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each year and for stock water, the period of use shall be from January 1 through December 31, inclusive of each year. The period of diversion shall be from January 1 through December 31, inclusive of each year. The means of diversion will be a well and pump.

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 issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

C. The permittee shall install a measuring device that will allow the flow rate and volume of water diverted to be measured. The type of device and place of installation shall be determined by the Regional Manager of the Bozeman Water Resources Regional Office. Upon receipt of this permit Applicant shall contact the Regional Manager, Scott Compton, at Bozeman Water Resources Regional Office, 151 Evergreen Dr., Suite C, Bozeman, MT 59715.

D. 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 Mont. Code Ann. § 85-2-424.

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 10 day of March, 1997.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(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, first class mail, at their address or addresses this 10<sup>th</sup> day of March, 1997 as follows:

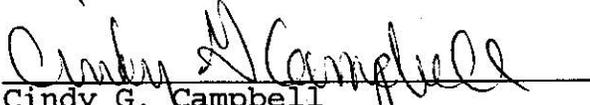
Frederick C. Fehsenfeld  
Betsy B. Fehsenfeld  
905 Juniper Ave.  
Boulder, CO 80304

Susan Callaghan  
Montana Power Company  
40 E. Broadway  
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Liter Spence  
Montana Dept of Fish,  
Wildlife & Parks  
1420 E. 6th Ave.  
Helena, MT 59640-0701

Scott Compton, Manager  
Bozeman Water Resources  
Regional Office  
151 Evergreen Dr., Suite C  
Bozeman, MT 59715  
(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

  
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 )            PROPOSAL  
FOR BENEFICIAL WATER USE PERMIT )            FOR  
83286-41H BY FREDERICK C. AND        )            DECISION  
BETSY B. FEHSENFELD                    )

\* \* \* \* \*

Objectors, Montana Power Company and Montana Department of Fish, Wildlife, and Parks, have withdrawn their objections to the above-entitled matter. However, Applicants are not relieved of the duty to present evidence to satisfy their substantive burden of proof when objections have been withdrawn.

The Hearing Examiner, having been fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Right Permit 83286-41H in the name of and signed by Frederick C. and Betsy B. Fehsenfeld was filed with the Department of Natural Resources and Conservation (Department) on October 13, 1992.

2. Pertinent portions of the application were published in the *Bozeman Daily Chronicle* on August 25, 1993. 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 objections to the proposed project were received by the Department. Applicants were notified of the objections by a letter from the Department dated December 13, 1993.

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3. Applicants seek to appropriate 139.00 gallons per minute up to 69.68 acre-feet of groundwater per year at a point in the ~~E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$~~  of Section 22, Township 01 South, Range 04 East, Gallatin County, Montana. The proposed uses are 139.00 gallons per minute up to 69.00 acre-feet per year for irrigation of 29.00 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 22 and 0.68 acre-feet per year for stock water to be used in the ~~E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$~~  of said Section 22. The proposed period of use for irrigation is from May 1 through October 15, inclusive of each year and for the stock water the proposed period of use is from January 1 through December 31, inclusive of each year. The proposed period of diversion is from January 1 through December 31, inclusive of each year. The proposed means of diversion is a well and pump. (Department file.)

4. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. The well was completed on March 26, 1993, by a driller licensed by the state of Montana. The well was authorized by an interim permit issued October 28, 1992. A seven to ten horsepower electric pump would supply a four-inch mainline which is reduced to three-inch hand lines with three-sixteenth nozzles on the sprinkler heads for the irrigation of hay and pasture. The water would be available for stock in a tank at the well head. (Department file.)

5. The proposed uses of water, irrigation and stock, are beneficial uses of water. The irrigation would increase the

production of hay and pasture grasses to use in the pursuit of a viable stock raising venture. (Department file.)

6. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator would not be adversely affected. The location of the well is approximately 300 yards from all surrounding domestic wells in an area where the water table is recharged during the irrigation season by other irrigation projects. Two adjacent neighbors have irrigation wells a similar distance from their domestic wells and experienced no problems during the summer of 1988 which was one of the driest years on record. Applicants reviewed the Department's water rights records on June 18, 1993, and found no existing water rights which would be affected by the proposed project. (Department file.)

7. Applicants have proven by a preponderance of 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 the amount requested is reasonably available during the period in which Applicants seek to appropriate. An aquifer test was performed on April 6, 1993, the time of year when the water table is lowest because all the irrigation ditches in the area had been dry for several months. The beginning static water level was 14 feet below the measuring point which was 37 inches above the ground's surface. After pumping the well at 139 gallons per minute for 25 minutes, the drawdown stabilized at

44.5 feet from the measuring point. When the pumping ceased, there was full recovery to 14 feet from the measuring point in three minutes. (Department file.)

8. Applicants have proven by a preponderance of evidence the proposed use would not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. There are no pending projects on this source for which permits have been issued or for which water has been reserved under state law. The Gallatin River has been closed by statute as part of the Upper Missouri River Basin closure. That closure does not include groundwater which is the source for this application. Mont. Code Ann. § 85-2-343(2)(a). There are reservations on the Upper Missouri River and in some areas there are groundwater reservations; however there are no groundwater reservations in the area of the proposed appropriation. (Department file and records.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

10. Applicants have proven by a preponderance of evidence they have 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. Applicants own the property where the water would be put to beneficial use. (Department file.)

Based upon the foregoing Findings of Fact and 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 substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicants have met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 10. Mont. Code Ann. § 85-2-311 (1995).

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 listed below, Beneficial Water Use Permit 83286-41H is granted to Frederick C. and Betsy B. Fehsenfeld to appropriate 139.00 gallons per minute up to 69.68 acre-feet of groundwater per year at a point in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 22, Township 01 South, Range 04 East, Gallatin County, Montana. The water shall be used as follows: 139.00 gallons per minute up to 69.00 acre-feet per year for irrigation of 29.00 acres located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 22 and 0.68 acre-feet per year for stock water to be used in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 22. The period of use for irrigation shall be from May 1 through October 15, inclusive of each year and for stock water, the period of use shall be from

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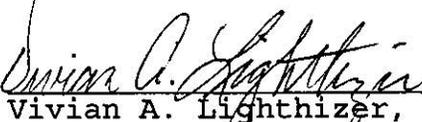
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NOTICE

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 11<sup>th</sup> day of February, 1997.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 201601  
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

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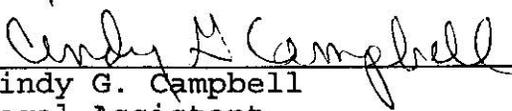
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Montana Power Company  
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(via electronic mail)

  
Cindy G. Campbell  
Legal Assistant