

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

\* \* \* \* \*

IN THE MATTER OF THE )  
APPLICATION FOR CHANGE ) FINAL  
OF APPROPRIATION WATER ) ORDER  
RIGHT 43P-G(E)086325 BY )  
RUSSELL BLALACK )

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on July 17, 1998. Applicant filed a timely exception to the Proposal but did not request an oral argument hearing.

The Proposal recommended denying an authorization to change on the basis Applicant has no underlying water right.

For this review, the Department must accept the Proposal's Findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1997) and Mont. Admin. R. 36.12.229 (1997). The Department has considered the exceptions and reviewed the record under these standards and the Department finds the Proposal for Decision is supported by the record and properly applied the law to the facts.

Applicant excepted to Findings of Fact 4, 5, and 7, giving the same argument to each exception. "This is directly contradicted by the DNRC's own records concerning Water Right 43P-E069513, which shows that the point of use was always on in [sic] NW¼NW¼ Section 26."

Although the Department has records that evidence the use of Water Right 43P-E069513 on Applicant's property, those records also evidence that the development works and point of diversion and place of use are located on Objectors Fisher's property as

found in Findings of Fact 4, 5, and 7. Regardless, these records are merely evidence of the parameters of an exempt water right; the filing of a transfer certificate or notice of exempt water right does not by itself, establish either ownership or the parameters of the right. The records as a whole, including testimony and evidence submitted at the hearing and the transfers and notices filed with the Department support the Hearing Examiner's determination that Applicant does not own the underlying right that he seeks to change.

Applicant also excepted to Finding of Fact 9 which finds Applicant does not have an underlying water right to change. The basis for this exception is the allegation that in response to a pre-hearing motion filed by Objector Fisher, the Department stated that determining water rights was outside of its scope. The Department has reviewed the file, including its responses and prehearing motions, and cannot find such a statement.

It is true the Department does not adjudicate water rights. That task is left to the courts by virtue of Mont. Code Ann. § 85-2-211 (1997) *et. seq.* However, it is fundamental that one cannot change what one does not own. Consequently, an Applicant for a change authorization must, at the threshold, prove their ownership and the extent of the right they seek to change.

Finally, Applicant excepts to Conclusion of Law 2 which states, "Applicant does not have an existing water right to change." Applicant argues the conclusion was based on anecdotal evidence and did not consider the legal documents of water right transfer kept by the DNRC itself. Applicant also cites Mont. Code Ann. § 85-2-306 which requires a groundwater appropriator to have possessory interest in the place of use. Applicant fails to cite that Section 306 also requires the appropriator to have "exclusive property rights in the groundwater development works or, if another person has rights in the groundwater development works, with the written consent of the person with those property rights."

The testimony clearly shows Applicant does not own the property where the existing water system is located. Nor does he own any portion of the existing water system, not the tank nor the pipeline nor the spring development. Nor has he ever owned any

cattle which have used any water from the existing water system or grazed on Section 26 land.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

**ORDER**

Application to Change Appropriation Water Right 43P-G(E)086325 by Russell Blalack 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 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 \_\_\_\_\_ day of October, 1998.

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Jack Stults, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation

P.O. Box 201601  
Helena, MT 59620-1601

Final Order  
Application 43P G(E) 086325

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**CASE # 86325**

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Final Order was served upon all parties listed below on this \_\_\_\_ day of October, 1998.

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Mandi Shulund  
Hearings Assistant

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

\* \* \* \* \*

IN THE MATTER OF THE	)	
APPLICATION FOR CHANGE	)	PROPOSAL
OF APPROPRIATION WATER	)	FOR
RIGHT 43P-G(E)086325 BY	)	DECISION
RUSSELL BLALACK	)	

\* \* \* \* \*

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 matter on May 11, 1998, in Billings, Montana, to determine whether an authorization to change a water right should be granted to Russell Blalack for this application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1997).

APPEARANCES

Applicant, Russell Blalack, appeared at the hearing telephonically and by and through counsel, Peter Stanley.

Objectors Esther L. Ottun, Rita O. Pratt, Merna Kincaid and Stewart Kincaid<sup>1</sup> appeared at the hearing in person and by and through counsel, James E. Torske. Objectors C. William Fisher (Bill Fisher) and Roger C. Fisher appeared at the hearing in person and by and through counsel, Chris Mangen, Jr. Don Redding and Jim Lemon appeared at the hearing as witnesses for the Fishers.

Keith Kerbel, Regional Manager of the Billings Water Resources Regional Office of the Department of Natural Resources and

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<sup>1</sup> Merna Kincaid and Stewart Kincaid do not have a water right on the source. They lease the land with the water from Esther L. Ottun who holds the water right from the subject source.

Conservation (Department), appeared at the hearing and was called to testify by Applicant.

#### EXHIBITS

Applicant offered no exhibits for the record. Objectors Fisher offered seven exhibits for the record which were accepted without objection. Objectors Ottun and Kincaid offered seven exhibits for the record which were accepted with no objection.

Fishers' Exhibit 1 is a copy of a portion of a topographic map which has been altered to show the location of the spring and tank in Section 23, Township 1 North, Range 31 East<sup>2</sup> owned by Objectors Fisher. The map shows the location of the pipeline in Section 26 which is used to deliver water to the tank located in Section 35 which is owned by Objector Ottun and leased by Objectors Kincaid. Section 26 is owned by Applicant.

Fishers' Exhibits 2 and 3 are photographs taken by C. William Fisher approximately three weeks before the hearing. These photographs show the previous location of the water tank by the mound of earth where it was installed. Mr. Fisher was facing south when taking these photographs.

Fishers' Exhibits 4 and 5 are photographs taken by C. William Fisher approximately three weeks before the hearing. These photographs show the present location of the water tank. Mr. Fisher was facing south when taking these photographs.

Fishers' Exhibit 6 was taken by C. William Fisher approximately three weeks before the hearing. This photograph shows where the steel posts were driven. Mr. Fisher was facing southeast when taking this photograph.

Fishers' Exhibit 7 was taken by C. William Fisher approximately three weeks before the hearing. This photograph shows the location of the spring. Mr. Fisher was facing south when taking this photograph.

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<sup>2</sup>Unless otherwise stated all land descriptions in this Proposal are located in Township 1 North, Range 31 East, Big Horn County, Montana.

Ottun's Exhibit A consists of two pages and is a copy of a Notice of Appropriation of Water Right filed with the Big Horn County Clerk and Recorder, December 15, 1961, by St. Clair Ottun.

Ottun's Exhibit B consists of 10 pages and is a copy of Statement of Claim 43B-W029348 and accompanying documents.

Ottun's Exhibit C and G are the same. They are copies of an Amendment to Statement of Claim 43P-W029348 with a copy of a portion of a topographic map attached to Exhibit G.

Ottun's Exhibit D is a reduced copy of the topographic map attached to the Amendment.

Ottun's Exhibit E and F are two photographs taken by Merna Kincaid at the Fisher tank. These photographs show a white plastic pipe which diverted the water away from the Ottun pipeline, leaving Mrs. Kincaid without water.

#### PRELIMINARY MATTERS

On February 26, 1998, Peter Stanley notified the Hearing Examiner he would be representing the interests of Applicant, Russell Blalack in this matter. However, his name was not added to the notice list so he did not receive the Notice of Hearing and Discovery Dates mailed on March 18, 1998. Mr. Stanley did, however, participate in the conference call where the date for the hearing and the discovery were set. Since Mr. Stanley did not receive a copy of the March 18, 1998, Notice, he did not know where the hearing was to be held and was approximately ten minutes late for the hearing. That is the only prejudice caused by this oversight and no further action is needed.

On April 28, 1998, the Hearing Examiner received a Motion for Discovery Sanctions from Objectors Fisher. Applicant had not responded to their discovery demands. Objectors Fisher objected to Applicant presenting any evidence through undisclosed witnesses on the grounds of surprise and prejudice. Again at the beginning of the hearing, Objectors Fisher moved for sanctions. The Hearing Examiner ruled that the hearing would proceed and if Applicant presented surprise witnesses or evidence, a decision

would be made at that time. Applicant presented no surprise witnesses nor evidence.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

#### FINDINGS OF FACT

1. Application for Change of Appropriation Water Right 43P-G(E)0086235 in the name of and signed by Russell Blalack was received in the Department's Billings Water Resources Regional Office on October 23, 1996, at 2:30 p.m. (Department file.)
2. Pertinent portions of the application were published in the *Big Horn County News*, a newspaper of general circulation in the area of the source on August 6, 1997. 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 proposed change. Four objections to the proposed change were received by the Department. Applicant was notified of the objections by a letter from the Department dated September 8, 1997. (Department file.)
3. Applicant seeks to change the place of use by adding three stock tanks to an existing water system with a point of diversion in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 23 and places of use in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 26 and the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 35. The additional places of use would be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  all in Section 26. (Department file and testimony of Applicant.)
4. Applicant does not own the property where the existing water system is located. Nor does he own any portion of the existing water system, not the tank nor the pipeline nor the spring development. Nor has he ever owned any cattle which have used any water from the existing water system or grazed on Section 26 land. (Testimony of Roger Fisher and Bill Fisher.)
5. The spring which is located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 23 is located on Objectors Fisher's property. The spring was first used by Richard and Agnes Fisher in 1939. At that time there was a tank at the spring which was used for stock watering. In the early 1940s a torrential rain washed the original tank out and

the stock watered at the spring site and in the coulee where the water flowed until it was absorbed in the ground. It did not flow sufficiently to reach Applicant's property in Section 26. In 1961, the Fishers developed the spring, purchased a new stock tank, and had it installed down the coulee at a dry, level area. Everyone involved in the project believed the tank was placed on the Fisher property. Fishers paid for all the improvements. At that same time Mr. Fisher contacted St. Clair Ottun to give him the opportunity to use the excess water. Mr. Ottun then buried a pipe across Section 26 into Section 35 where he installed a stock tank. Mr. Ottun filed a notice of appropriation of water right with the Big Horn County Clerk and Recorder on December 15, 1961, claiming all the unappropriated water from the Fishers' spring. (Testimony of Roger Fisher, Bill Fisher and Esther Ottun.)

6. Some time after 1961, Mrs. Gertrude Petit, Applicant's grandmother, appeared at Mr. Roger Fisher's home and wanted to know where her land was located. Mr. Fisher took her to Section 26. Since there were no fences and the Fisher cattle would graze on Section 26 occasionally, Mrs. Petit wanted some "lease." Mr. Roger Fisher paid her a "grass lease" up until she passed away. Then he paid lease to Mr. Blalack's mother and subsequently Mr. Blalack until he (Blalack) started fencing portions of Section 26. There was never a written lease between the Fishers and Mr. Blalack or his predecessors. (Testimony of Roger Fisher and Bill Fisher.)

7. Applicant contends the lease Objectors Fisher had with Applicant is the same as the lease agreement between Objector Ottun and Objectors Kincaid. It is not. Objector Ottun owned the land and the water right prior to the lease and used both in her ranching endeavors. She is now leasing the land with the use of the water to the Kincaids. As previously stated, Applicant has never owned any cattle to use any of the property in Section 26, nor has he ever owned any cattle to drink any water in that area, either on or off Section 26.

When the Fishers developed the spring and installed the tank in 1961, they intended to place the tank on their property in Section 23. No one can say for sure if the tank was ever located on Section 26 since the boundary had not been surveyed. Fishers believe the tank may have been located close to the boundary or

maybe on the boundary, but not inside the Blalack property in Section 26. The intent was to maintain water for Fisher cattle where they had always watered and to provide the Ottuns with live water from the spring. Fishers had never intended to develop water for a third party or to place the water tank on another's property. (Testimony of Roger Fisher and Bill Fisher.)

8. In 1996, the tank had to be moved. The overflow pipe to Ottun's pipe had been plugged, broken or disconnected by parties unknown causing the water to flow over the tank, creating a bog around the tank. The Fishers lost two cows in the bog. They hired Don Redding to move the tank up the draw in a northeasterly direction about 400 feet. (Testimony of Roger Fisher, Bill Fisher, Esther Ottun, Merna Kincaid, and Don Redding.)

9. It is the Department's determination that Mr. Blalack does not have an underlying water right to change. Although Mr. Blalack has filed a notice of water right exempt from the adjudication process with the Department, acceptance of the form by the Department does not constitute a recognition by the state of Montana that the right is a valid existing water right. The person who files a Notice of Water Right, Form 627, has the responsibility of establishing the existence of the water right. Mr. Blalack has failed to do this.

Since Mr. Blalack has not established the existence of a water right, there is no need to determine whether the criteria for issuance of an authorization have been met.

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, 2, and 3. Mont. Code Ann. § 85-2-402 (1997).

2. Applicant does not have an existing water right to change. See Findings of Fact 4 through 9.

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

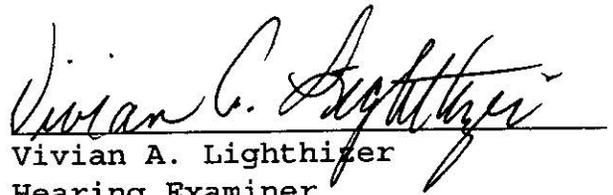
**PROPOSED ORDER**

Application to Change Appropriation Water Right 43P-G(E)086325 by Russell Blalack 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. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. 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.

Dated this \_\_\_\_ day of July, 1998.

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

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was duly served upon all parties listed below this \_\_\_ day of July, 1998.

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