

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

* * * * *

IN THE MATTER OF THE)
APPLICATION FOR BENEFICIAL) FINAL
PERMIT 76H-103855 BY CHARLES) ORDER
L. AND GLORIA P. MCELFISH)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on September 15, 1999. On October 8, 1999, the Department received a request for an extension of time, 30 days to file exceptions. The request was granted. On November 3, 1999, the Department received exceptions to the Proposal without a request for oral argument. On November 19, 1999, the Department received a request from Objectors Phillip R. And Thelma E. Taylor for an extension of time to respond to Applicant's exceptions.

The Proposal recommended denying Application for Beneficial Water Use Permit 76H-103855.

Nothing in either the Exceptions to Proposal for Decision or the Response to the Exceptions change the facts available in the file and presented at the hearing.

Applicants did not prove by a preponderance of evidence there was water physically or legally available at the proposed point of diversion.

Applicants did not prove by a preponderance of evidence the proposed means of diversion, construction, and operation of the

CASE # 103855

appropriation works are adequate.

Applicants did not prove by a preponderance of evidence the proposed use would not adversely affect the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation.

The statute, Mont. Code Ann. § 85-2-311 (1999), is clear. Unless the criteria for issuance of a permit are proven by a preponderance of evidence, the Department cannot issue a beneficial water use permit. Applicants did not meet their burden.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 15, 1999, Proposal for Decision, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 76H-103855 by Charles L. and Gloria P. McElfish 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 this 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 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 23rd day of December, 1999.



Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies a true and correct copy of this Final Order was served on all persons listed below this 27th day of December, 1999, as follows:

CHARLES L AND GLORIA P MCELFISH
PO BOX 813
VICTOR MT 59875

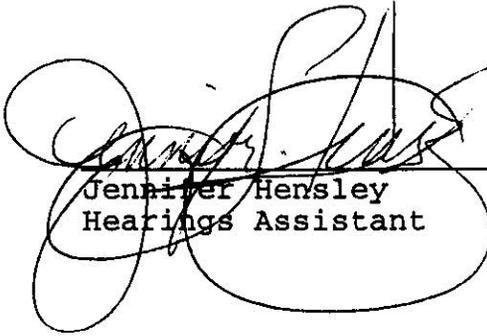
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HELENA MT 59620-1601


Jennifer Hensley
Hearings Assistant

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

* * * * *

IN THE MATTER OF THE) PROPOSAL
APPLICATION FOR BENEFICIAL) FOR
PERMIT 76H-103855 BY CHARLES) DECISION
L. AND GLORIA P. MCELFISH)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on July 20, 1999, in Hamilton, Montana, to determine whether a beneficial water use permit should be granted to Charles L. and Gloria P. McElfish for the above entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1997).

APPEARANCES

Charles L. And Gloria P. McElfish (Applicants) appeared at the hearing and presented their own case.

Objectors Phillip R. and Thelma E. Taylor appeared at the hearing and presented their own case.

Objector David A. Smith appeared at the hearing.

Wes McAlpin, Water Resources Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing and presented testimony about maps of the area.

EXHIBITS

Neither the Applicant nor the Objectors offered exhibits for the record.

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 Beneficial Water Use Permit 76H-103855 in the name of and signed by Charles L. and Gloria P. McElfish was filed with the Department on June 9, 1998, at 11:33. (Department file.)

2. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on March 4, 1999. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined by be interested in or affected by the application. Two objections to the application were received by the Department. Applicants were notified of the objections by a letter from the Department dated March 31, 1999.

3. Applicants seek to appropriate 155 gallons per minute up to 35.5 acre-feet of water per year from Branch Creek at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 08 North, Range 21 West and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 31, Township 08 North, Range 20 West, Ravalli County. The proposed use is irrigation. The

proposed place of use is nine acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 31, Township 08 North, Range 20 West. The proposed means of diversion is a pump in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 31 and gravity flow in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, Township 08 North, Range 21 West, Ravalli County. The proposed period of diversion is from April 1 through October 31, inclusive of each year.

4. Applicants have not proven by a preponderance of evidence there is water physically or legally available at the proposed point of diversion in the source, in the amount Applicants seek to appropriate. There were measurements taken, but because of manipulations between Branch Creek and the Soper Ditch and because of uncertainty concerning the means and point of diversion it is not certain what the measurements establish. (Department file and testimony of Charles McElfish, Philip Taylor, and David Smith.)

5. Applicants have not proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicants are not clear about where their conveyance, Soper Ditch, begins or where exactly they propose to divert the water or how they propose to divert the water. On the one hand they propose to pump from Branch Creek, but then they might use gravity flow to get the water from Soper Ditch by moving some of the rocks from

David Smith's diversion¹. They might flood irrigate, but they might have to use a sprinkler system. (Testimony of Charles McElfish.)

6. Applicants have proven by a preponderance of evidence the proposed use of water, irrigation, is a beneficial use of water. The flow rate and volume of water requested is reasonable for flood irrigation on nine acres. (Department file.)

7. Applicants have not proven by a preponderance of evidence the proposed use will not adversely affect the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation. Until it is clear where the proposed point of diversion would be and what the means of diversion and conveyance would be, it is not known whether the diversion would adversely affect anyone. (Department file and testimony of Charles McElfish, Philip Taylor, and David Smith.)

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

9. No objections relative to water quality were filed

¹David Smith is vehemently against this manipulation of his diversion.

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.)

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 this 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 and 2. Mont. Code Ann. § 85-2-307 (1997).

2. Applicants have not met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 4, 5, and 7. Mont. Code Ann. § 85-2-311 (1997).

WHEREFORE, 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 76H-103855 by Charles L. and Gloria P. McElfish is hereby **DENIED**.

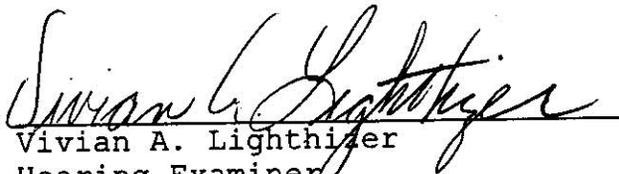
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as directed 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 15th day of September, 1999.


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

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served on all parties listed below on this 15th day of September, 1999.

CHARLES L & GLORIA P MCELFFISH
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