

BARBER

FINAL ORDER

APPEALED

TO

DISTRICT COURT

Case # 110197

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

* * * * *

IN THE MATTER OF THE APPLICATION TO)
CHANGE APPROPRIATION WATER RIGHT) FINAL
41Q-110197 BY ROBERT L. AND CLAUDIA) ORDER
J. BARBER)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on January 24, 2001. Applicant filed timely exceptions to the Proposal, but did not request an oral argument hearing.

The Proposal recommended granting the change of purpose of use of the underlying water right from stock to domestic and place of use from the Objector's property to the Applicant's household provided the diversion works are modified to evenly split the water available at the point of diversion. Applicant's Objection to the Proposal for Decision excepts to the modification asserting that the modification is contrary to the manner in which the diversion has operated for 17 years and contrary to the agreement by the parties about how the underlying water right was to be split. Applicant contends that the diversion works on the ground today define the respective portions of the underlying right for the Parties. After considering these assertions and reviewing the record, the Department believes the Applicant has misconstrued how a change of water right is accomplished under the law.

Prior to 1973, it was possible to change a water right without approval by the State. However, since the effective date of Montana Water Use Act (1973) the only lawful way to change a water right in Montana is by obtaining authorization from the Department under Mont. Code Ann. § 85-2-402. Before authorizing a change in a water right, the Department must first determine if the criteria in Mont. Code Ann. § 85-2-402(2) are met by the proposed change of water right. The change criteria preclude changes that may adversely affect the use of existing water rights. Mont. Code Ann. § 85-2-402(2)(a). If the criteria are not met, the Department may still authorize the change

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subject to terms or conditions it considers necessary to satisfy the change of use criteria. Mont. Code Ann. § 85-2-402(8).

According to the records of the Department and the testimony of the Parties, half of Water Right 41Q 110197-00 was conveyed to the Applicant in 1983. The use for Water Right 41Q 110197-00 is stock water and the place of use is on Objector's property. Until the current Application, no change of purpose or place of use of any portion of the underlying water right has been requested of the Department.

With this Application the Department has been asked to determine if changing half of a stock water right used on Objector's property to domestic use on Applicant's property adversely affects any existing water rights. The Hearing Examiner determined that the criteria could be met if the water were evenly split at the point of diversion so that only half of the flow is directed for Applicant's use. The Hearing Examiner reasoned that if Applicant took more than half of the water, Objector's portion of the split right would be adversely affected. The Department agrees with the Hearing Examiner's analysis.

The fact that 17 years of use of this stock water right for domestic purposes in a different location may have occurred under agreement by the parties is irrelevant to the inquiry as to whether or not the change of purpose and place of use meet the criteria for granting a change authorization. The Department's records on the underlying right, which are of record in this proceeding, show that a split of the underlying right occurred in 1983, but the purpose and place of use of the underlying right remained unchanged. Even though water may have, in fact, been routed for domestic use by agreement of the parties or otherwise, as a matter of law the entire water right has remained a stock water right for use on Objector's property. This Change Authorization renders Applicant's use of half of the underlying right for domestic purposes on Applicant's property legal.

The Proposal also recommended denying the request for the added point of diversion. No exceptions to this portion of the Proposal were received.

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)(1999) and Mont. Admin. R. 36.12.229 (1999). The Department has considered the exceptions and reviewed the record under these standards. The Department finds the Proposal is supported by the record and the facts were properly applied to the law.

THEREFORE, the Department of Natural Resources and Conservation accepts and adopts the Findings of Fact and Conclusions of Law as contained in the January 24, 2001, Proposal for Decision, and incorporates them by reference.

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

ORDER

Authorization to Change Appropriation Water Right is hereby denied in part and granted in part to Robert L. and Claudia J. Barber to change 41Q-W110197-00. The application to add a point of diversion is **DENIED**.

Subject to the terms, conditions, restrictions, and limitations listed below, the application to change is granted to **change** the purpose of use to domestic, and their place of use to their house, lawn, and garden within the SW¼SE¼NW¼ in Section 26, Township 17 North, Range 6 West, Cascade County, Montana.

A. The original spring box and means of conveyance must be modified so the co-appropriators' shares of the spring depart the original in separate, equal sized pipes installed at equal elevations in the spring box so the spring flows are equally divided.

B. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2 and § 85-2-404.

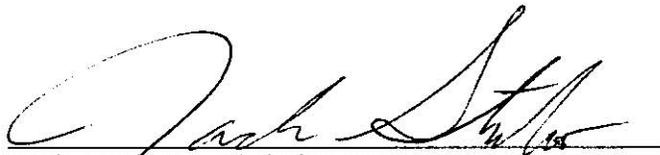
C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by the Appropriator's

exercise of this authorization. Nor does the Department in issuing this change in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

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 or the oral proceedings to the district court.

Dated this 26th day of March, 2001.



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 26th day of March, 2001, as follows:

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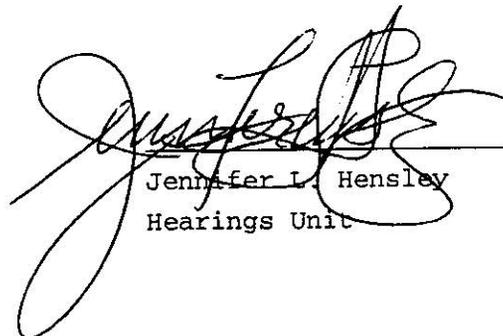
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Jennifer L. Hensley
Hearings Unit

Chuck

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

* * * * *

IN THE MATTER OF APPLICATION TO)
CHANGE APPROPRIATION WATER RIGHT) PROPOSAL
41Q-G(W)110197-00 BY ROBERT L. AND) FOR
CLAUDIA J. BARBER) DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on January 10, 2001, in Great Falls, Montana, to determine whether an authorization to change appropriation water right should be issued to the Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. §85-2-402 (2) (1999).

APPEARANCES

Applicant appeared by and through counsel K. Dale Schwanke. Robert Barber testified for the Applicant.

Objector Tom L. Gerhart appeared in person, and by and through counsel Robert M. Kampher.

Scott Irvin, Regional Manager of the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (hereafter Department) was called to testify by the Hearings Examiner.

EXHIBITS

Both Applicant and Objector offered exhibits for the record.

Applicant offered six exhibits for the record; all were accepted into the record.

Applicant's Exhibit 1 is a hand drawn map of the water development area.

Applicant's Exhibit 2 is a seven page copy of a Gerhart/Barber contract for deed.

Applicant's Exhibit 3 is a two page copy of a deed between Gerhart and Barber.

Applicant's Exhibit 4 consists of three photographs:

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Photograph 4A shows the Barber diversion box shown in Applicant's Exhibit 1.

Photograph 4B shows the Gerhart stock tank shown in Applicant's Exhibit 1.

Photograph 4C shows the inlet pipes to the Gerhart stock tank shown in Applicant's Exhibit 1.

Applicant's Exhibit 5 is a hand drawn side view sketch of the Barber diversion box shown in Applicant's Exhibit 1.

Applicant's Exhibit 6 is a hand drawn sketch of the Gerhart stock place of use.

Objector offered seven exhibits for the record; all were accepted into the record. Exhibits numbered 4, 5, 7, 10, 11, and 12 were not offered.

Objector's Exhibit 1 is a two page copy of *STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS STOCK WATER* number 41Q-110197.

Objector's Exhibit 2 is a two page copy of Acknowledgement of Claim 41Q-W110197.

Objector's Exhibit 3 is copy of a RECEIPT AND AGREEMENT OF SELL AND PURCHASE.

Objector's Exhibit 6 is page 3 of a three page copy of the *ABSTRACT OF CONTRACT FOR DEED* showing "EXHIBIT A".

Objector's Exhibit 8 is copy of a February 18, 1988 letter to Thomas and Beverly Gerhart.

Objector's Exhibit 9 is five page copy of the Department Water Right Records regarding the transfer of claim 41Q-W110197.

Objector's Exhibit 13 is eight photographs:

Photograph 13b shows the Gerhart stock tank.

Photograph 13c shows the Gerhart stock tank inlet pipes.

Photograph 13d shows the Gerhart stock tank.

Photograph 13h shows the Gerhart stock tank.

Photograph 13j shows the intake pipe to the Barber domestic use in the Barber diversion box.

Photograph 13k shows the Gerhart stock tank inlet pipes.

Photograph 13w shows the Gerhart stock tank.

Photograph 13y shows the Gerhart stock tank.

PRELIMINARY MATTERS

At the beginning of the hearing the Parties stipulated that the change in purpose of use to domestic and place of use for the domestic use are not at issue. The issues are the criteria of §85-2-402(2)(a) and (b), MCA.

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. Application for Change of Appropriation Water Right 41Q 110197-00 in the name of Robert L. and Claudia J. Barber and signed by Robert L. Barber was filed with the Department on January 21, 1999 at 2:15 PM.
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to add a point of diversion at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ in Section 26, Township 17 North, Range 6 West, Cascade County, Montana, to change the purpose of use to domestic, and change the place of use to their house, lawn, and garden within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section 26, Township 17 North, Range 6 West, Cascade County, Montana. All changes apply to Applicant's portion of water right 41Q-W110197.
4. Applicant's portion of water right 41Q-W110197 is one-half the flow of the spring up to the limit of the right identified in *STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS STOCK WATER* number 41Q-110197 filed January 26, 1982 by Tom Gerhart. Twelve gallons per minute (hereafter gpm) is the flow claimed on claim 41Q-110197. The spring development works of claim 41Q-110197 was the original spring box, a stock tank, and pipeline connecting the two. The claimed flow was the entire flow of the spring; the spring flow was not measured at the time of filing the claim. (Department file, testimony of Robert Barber, Tom Gerhart)
5. The actual changes requested in the application were made in 1983 without application to, or the approval of, the Department. There are

no physical changes intended to Applicant's current diversion works or use of the water. The application seeks after the fact approval of the changes made in 1983. (Department file, testimony of Robert Barber)

6. Applicant has not proven that a second point of diversion is being added. Testimony at the hearing was that the "Barber Diversion Box" (ie, the point of diversion being added) would have no water in it were it not for the flows piped in from the original diversion box or the "other source". Both parties emphasized that the "other source" was not part of the issue before me here. Thus, the evidence is that the only water at the proposed new point of diversion that is to be considered here is water that came from the original point of diversion. Since the water at issue comes from the original point of diversion, there is no new point of diversion for this water right.

(Testimony of Robert Barber, Tom Gerhart, Scott Irvin)

7. Applicant has proven the proposed purpose of use and place of use changes will not adversely affect the use of existing water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved when the original diversion works are modified from their current condition. (Testimony of Robert Barber, Tom Gerhart, and stipulation described in Preliminary Matters)

8. Applicant has proven the proposed diversion, construction, and operation of the appropriation works for the proposed purpose of use and place of use changes are adequate if the shared spring flows are divided equally at the original spring box. Because pipes of different size at different elevations are now used to split the right, the system as it exists is not adequate to divide the flows of the spring water right according to ownership during periods of low flows. The inadequacy can be easily corrected by installing pipes of equal size and level in the original spring box. Splitting the right at the Barber Diversion Box would be problematic because there are other sources which feed the box. (Testimony of Tom Gerhart)

9. Applicant has proven the proposed domestic use of water is a beneficial use of water. Domestic use, including lawn and garden irrigation, is a beneficial use of water. (Department file)
10. Applicant has proven he 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. (Department file)
11. No valid 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

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 has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. §85-2-402 (1999).
2. Applicant has not met the criteria for issuance of an authorization to add a point of diversion. See Findings of Fact 6.
3. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for change approval. Mont. Code Ann. § 85-2-402 (8) (1999).
4. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of an authorization to change the place and purpose of use of this water right. See Findings of Fact 7 through 10. Mont. Code Ann. §85-2-402 (8) (1999).

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

PROPOSED ORDER

Authorization to Change Appropriation Water Right is hereby denied in part and granted in part to Robert L. and Claudia J. Barber to change 41Q-W110197-00. The application to add a point of diversion is **DENIED**.

Subject to the terms, conditions, restrictions, and limitations specified below, the application to change IS **GRANTED** to change purpose of use to domestic, and their place of use to their house,

lawn and garden within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section 26, Township 17 North, Range 6 West, Cascade County, Montana.

A. The original spring box and means of conveyance must be modified so the co-appropriators' shares of the spring depart the original spring box in separate, equal sized pipes installed at equal elevations in the spring box so the spring flows are equally divided.

B. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2 and § 85-2-404.

C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by the Appropriator's exercise of this authorization. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

MEMORANDUM

This change authorization application should have been initiated in 1983 when the diversion works for the appropriation were installed.

Given the hindsight of operation and use of the system from 1983 until today, this right was not properly split in 1983 and that resulted in the current disagreement between the Parties. One of the areas of contention occurred when the pipe from the original diversion box to the Barber Diversion Box was plugged, and water flowed overland to the pea gravel placed at the Barber Diversion Box. This circumstance is one of the factors that prompted Applicant to apply to add their diversion box as a pint of diversion. However, if the flows are properly split at the original diversion box, there should be no overland flows. Without a source of water, there cannot be an additional point of diversion.

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 service of the proposal. 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 24TH day of January, 2001.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Hearing Notice, Appointment of Hearing Examiner, and Discovery Order was served upon all parties listed below on this

25th day of January, 2001.

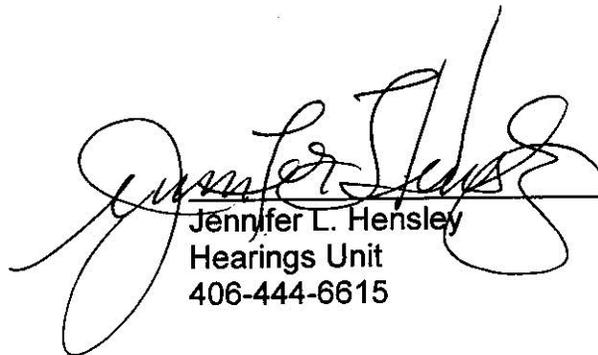
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