

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION) FINAL
WATER RIGHT G(W)119067-41S BY) ORDER
WILLIAM J. AND PATRICIA L. SNAPP)

* * * * *

The Proposal for Decision (Proposal) was entered on September 26, 1995. Applicants filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting an authorization to change a portion of claimed water right 41S-W119067, by changing a portion of the place of use. Forty acres located in the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 13, Township 17 North, Range 16 East, Fergus County, Montana, would be taken out of irrigation. The new place of use would be 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 17 North, Range 16 East, Fergus County, Montana.

The Hearing Examiner proposed several conditions to be placed on the authorization. Applicants take exception to Condition "A" which requires the appropriator to install an adequate flow metering device and keep a written record of the flow rate and volume of all waters diverted to the new place of use, located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, including the period of time. The condition requires Applicants to submit said records by November 30th of each year and/or upon request to the Water Resources Regional Office at 311 West Janeaux, P.O. Box 438, Lewistown, Montana 59457-0438.

CASE # 119067

The Department has the authority to condition, restrict, and limit any authorization to change appropriation water right as it considers necessary to satisfy the criteria listed in Mont. Code Ann. § 85-2-402(2) (1993). Proposed condition "A" ensures the amount of water taken from the consolidated ditch is only that amount needed to irrigate the new place of use thereby avoiding any possible adverse effect by this change to other users down the ditch.

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

Subject to the terms, conditions, restrictions, and limitations below, Authorization to Change Appropriation Water Right G(W)119067-41S is granted to William J. and Patricia L. Snapp to change a portion of claimed water right 41S-W119067, by changing a portion of the place of use. Forty acres located in the N $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 17 North, Range 16 East, Fergus County, Montana, will be taken out of irrigation. The new place of use is 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 17 North, Range 16 East, Fergus County, Montana.

A. This authorization is subject to the condition that the appropriator shall install an adequate flow metering device. The

appropriator shall keep a written record of the flow rate and volume of all waters diverted to the new place of use, located in the SE¼NW¼ of Section 25, including the period of time, and shall submit said records by November 30th of each year and/or upon request to the Water Resources Regional Office at 311 West Janeaux, P.O. Box 438, Lewistown, Montana 59457-0438.

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 (1993).

C. This authorization shall not be construed in any sense as granting a right to the inundation of private property or established roads or any right of access to any source of water or any right-of-way for headgates, diversion dams, pipelines, ditches or other means of conveyance.

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

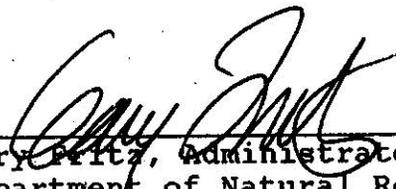
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a peti-

tion 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 30 day of November, 1995.



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, first class mail, at their address or addresses this 1st day of ~~November~~ December, 1995, as follows:

William J. and Patricia Snapp
Rt. 3 Box 3138
Lewistown, MT 59457

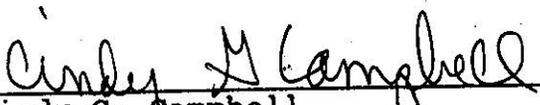
Ervin Weinheimer
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Lewistown, MT 59457

Robert L. Johnson
Suite 507 Montana Bldg.
224 W. Main St.
Lewistown, MT 59457

William E. Berger
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P.O. Box 506
Lewistown, MT 59457

Scott Irvin, WRS
Sam Rodriguez, Manager
Lewistown Water Resources
Regional Office
311 West Janeaux
P.O. Box 438
Lewistown, MT 59457-0438
(via electronic mail)

Vivian A. Lighthizer
Hearing Examiner
Department of Natural
Resources and Conservation
1520 East 6th Avenue
Helena, MT 59620


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 CHANGE OF APPROPRIATION)	FOR
WATER RIGHT G(W)119067-41S BY)	DECISION
WILLIAM J. AND PATRICIA L. SNAPP)	

* * * * *

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 September 6, 1995, in Lewistown, Montana, to determine whether an authorization to change appropriation water right should be granted to William J. and Patricia L. Snapp for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1993).

APPEARANCES

Applicants William J. and Patricia L. Snapp appeared at the hearing in person and by and through counsel, William E. Berger.

Objector Ervin Weinheimer appeared at the hearing in person and by and through counsel, Robert L. Johnson.

Stella Weinheimer and David Weinheimer appeared at the hearing as witnesses for Ervin Weinheimer.

Sam Rodriguez, Manager, and Scott Irvin, Water Resources Specialist, with the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) attended the hearing.

CASE # 119067

EXHIBITS

Applicants' Exhibit 1 is a six-page document setting forth a stipulation and agreement among the parties in Cause #22944 before the District Court of the Tenth Judicial District of the State of Montana in and for the County of Fergus. This exhibit was accepted into the record without objection.

Objector's Exhibit A is a photograph taken by Stella Weinheimer in January or February of 1993.

Objector's Exhibit B is a copy of a letter from the Law Offices of Robert L. Johnson to William A. Spoja, Jr. dated June 8, 1995, concerning a water management plan for the use of the consolidated Warm Springs Ditch.

Applicants objected to both Objector's exhibits on the basis that they do not pertain to this hearing. The Hearing Examiner reserved a ruling on these exhibits until the issuance of this Proposal. After due consideration of these exhibits, the Hearing Examiner finds these exhibits are not relevant to and are beyond the scope of the hearing. The photograph indicates property damage and the letter discusses a water management plan for the ditch to deal with the alleged property damage from the use of the ditch. The Department has no jurisdiction over property damage. These exhibits are not accepted into the record.

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. An application for change of appropriation water right in the name of and signed by William J. and Patricia L. Snapp was filed with the Department on March 29, 1995. (Department file.)

2. Pertinent portions of the application were published in the *News Argus* on May 24, 1995. 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. One timely objection was received by the Department. Applicants were notified of the objections by a letter from the Department dated July 1, 1995. (Department file.)

3. Applicants propose to change a portion of claimed water right 41S-W119067, by changing a portion of the place of use. Forty acres located in the N $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 17 North, Range 16 East, Fergus County, Montana¹ would be taken out of irrigation. The proposed place of use is 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25. The use will continue to be irrigation. The period of use remains from May 1 through October 31, inclusive of each year. The point of diversion will remain in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 23, Township 17 North, Range 17 East, Fergus County, Montana. (Department file and testimony of William Snapp.)

¹Unless otherwise stated, all land descriptions in this Proposal are located in Township 17 North, Range 16 East, Fergus County, Montana.

4. Applicants have proven by a preponderance of evidence the proposed use will not adversely affect the 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. There are no planned uses for which permits or reservations have been granted in the source of supply. Applicants would not adversely affect the water rights of other persons since this is simply a change in place of use and no additional water would be used. No additional burden would be placed on the source, nor would there be an additional burden placed on the consolidated ditch.' (Department file and testimony of William Snapp.)

5. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. The means of diversion, headgates, would not be changed. The means of conveyance, the consolidated ditch which crosses Objector's property, then separates into a ditch owned by Applicants, would remain the same. The operation of the diversion works would remain the same.

Objector's objection is primarily the problem with seepage from the consolidated ditch onto his property rendering that area

'In 1983, Applicants, Objector, and the Deerfield Hutterite Colony entered into an agreement to consolidate their separate ditches into a single ditch which crosses Objector's property. Applicants' ditch begins at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23 Township 17 North, Range 17 East, where it flows in the "Upper Ditch" on Applicants' property until it meets the consolidated ditch. After the water leaves Objector's property it again flows into a ditch owned by Applicants.

not arable. However, there is no evidence on the record that this change would increase the seepage and exacerbate the problem. On the contrary, Applicants testified there would be no more water flowing through the ditch than there is under the current usage. (Department file and testimony of David Weinheimer, Ervin Weinheimer, and William Snapp.)

6. Applicants have proven by a preponderance of evidence the proposed use of water is a beneficial use. Applicants have been unable to irrigate the acreage in the N $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13 since 1983, due to the consolidation of the ditches. By changing the place of use to the proposed place of use, Applicants would be able to generate income by raising salable crops or feed for marketable livestock. (Department file and testimony of William Snapp.) Irrigation is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a) (1993).

7. 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 proposed place of use. (Department file.)

8. 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.)

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 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.

2. Applicants have met all the criteria for issuance of an authorization to change appropriation water right. See Findings of Fact 3 through 8.

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, Authorization to Change Appropriation Water Right G(W)119067-41S is granted to William J. and Patricia L. Snapp to change a portion of claimed water right 41S-W119067, by changing a portion of the place of use. Forty acres located in the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 13, Township 17 North, Range 16 East, Fergus County, Montana, will be taken out of irrigation. The new place of use is 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 17 North, Range 16 East, Fergus County, Montana.

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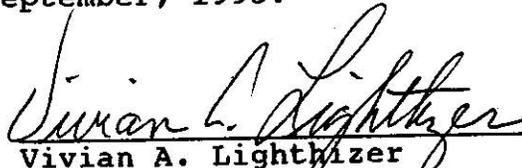
NOTICE

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 26th day of September, 1995.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6615

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, first class mail, at their address or addresses this 26th day of September, 1995, as follows:

William J. and Patricia Snapp
Rt. 3 Box 3138
Lewistown, MT 59457

Ervin Weinheimer
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William E. Berger
409 Montana Bldg.
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Sam Rodriguez, Manager
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