STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 217-s42J, 218-s42J AND 1112-s42J, FILED BY MONTANA DEPARTMENT OF STATE LANDS	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Proposed Findings of Fact and Conclusions of Law in this matter entered on September 18, 1974, is hereby adopted as the Final Findings of Fact, Conclusions of Law and the Final Order is hereby ordered.

ORDER

1. The applicant's permits are conditionally granted. Each permit is granted on the condition that each of the applicant's diversion works, as presently constructed, is altered or modified so that all water in Ash Creek is free to pass downstream until such time as the prior appropriators, the Rowseys, have received sufficient water to satisfy their water right.

2. The applicant may not appropriate any water until the Rowseys' water right has been satisfied. An agreement as to when the Rowseys have sufficient water and when the applicant's lessee may begin to appropriate water must be determined between the applicant's lessee and the Rowseys, in cooperation with the Department of Natural Resources and Conservation.

3. Before the applicant alters or modifies its diversion works, the Department of State Lands shall submit its proposed changes to the Department of Natural Resources and Conservation for approval. The Department of State Lands shall not commence any alteration work until the Department of Natural Resources and Conservation has approved a proposed plan for said alteration.

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4. The permits conditionally granted are subject to prior existing water rights.

Done this 28th day of January, 1975.

Irvin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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217-5425

FILMED

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 217-s42J, 218-s42J and 1112-s42J by Montana Department of State Lands	PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to the provisions of the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, after due notice, a public hearing was held August 20, 1974, in the Courtroom of the Powder River County Courthouse, Broadus, Montana, to hear objections to the above three applications. The applicant was represented by Bob Raundal and Wilbur Erbe, employees of the State Land Department, as well as by the Land Department's Staff Counsel, Leo Berry of Helena. The objectors Lynn L. Rowsey and Opal Rowsey were present and were represented by Counsel, Robert J. Brooks of Broadus. The objectors did not testify, but evidence and a witness were presented through their attorney. The applicant's attorney presented evidence and witnesses for the applicant.

PROPOSED FINDINGS OF FACT

1. On August 31, 1973 the Land Department, State of Montana, filed with the Department of Natural Resources and Conservation, Water Resources Division, applications for beneficial water use permit to appropriate water from the South Fork of Ash Creek and from Ash Creek, as well as a side drainage flowing into Ash Creek. Ash Creek is a tributary of Mizpah Creek. The water will be diverted at a point on Ash Creek and at a point on an unnamed drainage which are located in the NE¼ of NE¼ of NW¼ of Section 16, Township 3S, Range 50E of Powder River County. Another point of diversion will be on the South Fork of Ash Creek which is located in the NE¼ of NE¼ of NE¼ of Section 17, Township 3 S., Range 50 E., of Powder River County.

2. The total quantity of water to be appropriated at the diversion point on Ash Creek is 81 acre-feet per annum. The total quantity of water to be diverted at the diversion point on the side drainage is 23 acre-feet per annum. The total quantity of water to be diverted at the diversion point on the South Fork of Ash Creek is 148 acre-feet per annum. The water is to be used for irrigation from May 1 to July 15, inclusive.

3. An objection was filed to each application by Lynn L. and Opal Rowsey of Olive, Montana.

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4. The applicant's diversion works on Ash Creek as well as on the South Fork of Ash Creek consists of a control structure, dikes, and tubes all to the Powder River County Soil Conservation Service (SCS) specifications with a 30" culvert on the South Fork and a 36" culvert on Ash Creek. The applicant's diversion works on the unnamed side drainage consists of a control structure, dikes and tubes, all installed to the Powder River SCS specifications.

5. Interim permits were issued on each project as follows:

(a) For the Ash Creek Project on November 19, 1973;

(b) For the South Fork of Ash Creek on December 18, 1973;

(c) For the unnamed side drainage on December 19, 1973.

Each interim permit was issued subject to all prior water rights, subject to the approval, modification, or denial of the provisional or Final permit, and subject to any determination of existing water rights. Pursuant to these interim permits the proposed projects were in fact constructed.

6. Testimony by both applicant and objector at the public hearing indicated that normally there is not any water flowing in Ash Creek during the summer months except after a storm has occurred. A field investigation by the Water Rights Bureau found that this testimony was apparently correct. Thus, the evidence shows that Ash Creek is not a stream with a continuous flow during the summer months.

7. A certified copy of a water right record for one thousand five hundred miners inches (1,500) for Mrs. H.M. Rowsey dated April 26th, 1910; as well as a certified copy of a water right record for five hundred (500) inches dated June 20th, 1907, both for Ash Creek were submitted into evidence at the public hearing. Thus, the Rowseys are apparently prior appropriators.

8. The Rowseys are apparently prior appropriators and are downstream from the applicant's proposed points of appropriation.

9. There was testimony at the public hearing on behalf of the objectors stating that the applicant's diversion works as presently constructed would not adequately pass the amount of water to which the Rowseys are entitled, considering the nature and circumstances of water flow on the Ash Creek drainage. Further, after the water backed up to a certain point, it would go into the applicant's spreader system before the Rowseys' water right would be satisfied. The Water Rights Bureau conducted a field investigation in an effort to obtain firsthand information to supplement evidence, testimony and data that it already possessed, and it found that the applicant's diversion works as presently constructed do not adequately pass the amount of water that the Rowseys would be entitled to if there were a sizable amount of water flowing in Ash Creek.

From the foregoing proposed findings of fact the following proposed con-

clusions of law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required in order for applicant to appropriate water for a beneficial use from Ash Creek, the South Fork of Ash Creek, and the unnamed side drainage.

2. Under the provisions of Section 89-880(3), R.C.M. 1947,

> "A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation granted in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree. A person may not obtain any vested right, to an appropriation obtained under a provisional permit, by virtue of construction of diversion works, purchase of equipment to apply water, planting crops, or other action, where the permit would have been denied or modified if the final decree had been available to the department."

3. The criteria for issuance of a permit as set forth in Section 89-885, R.C.M. 1947, are as follows:

> "The Department shall issue a permit if:
> (1) there are unappropriated waters in the source of supply;
> (2) the rights of a prior appropriator will not be adversely affected;
> (3) the proposed means of diversion or construction are adequate;
> (4) the proposed use of water is a beneficial use;
> (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved."

4. Although Ash Creek does not normally have unappropriated waters, there may be a time when there will be unappropriated waters in the source of supply.

5. The proposed use of water for irrigation is a beneficial use for which water may be appropriated.

6. However, as presently constructed each of the proposed uses will interfere unreasonably with and adversely affect the prior appropriators, Lynn and Opal Rowsey.

7. The application may be granted on the condition that the applicant alters construction of each project so that the water right of the prior appropriators is satisfied before the applicant receives any water.

Based on the above proposed Findings of Fact and Conclusions of Law, the following order is proposed:

PROPOSED ORDER

1. The applicant's permits are conditionally granted. Each permit is granted on the condition that each of the applicant's diversion works, as presently constructed, are altered or modified so that all water in Ash Creek is free to pass downstream until such time as the prior appropriators, the Rowseys, have received

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sufficient water to satisfy their water right.

2. The applicant may not appropriate any water until the Rowseys' water right has been satisfied. An agreement as to when the Rowseys have sufficient water and when the applicant's lessee may begin to appropriate water must be determined between the applicant's lessee and the Rowseys, in cooperation with the Department of Natural Resources and Conservation.

3. Before the applicant alters or modifies its diversion works, the Land Department shall submit its proposed changes to the Department of Natural Resources and Conservation for approval. The Land Department shall not commence any alteration work until the Department of Natural Resources and Conservation has approved a proposed plan for said alteration.

4. The permit conditionally granted is subject to existing rights.

NOTICE

This is a proposed order and will become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the proposed order shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

September 18, 1974
Date

James P. Nugent
James P. Nugent
Hearing Examiner

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