

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

FILMED

APR 5 1990

IN THE MATTER OF THE  
APPLICATION FOR BENEFICIAL  
WATER USE PERMIT NO. 1438-s42KJ  
by EVA SWART

)  
) PROPOSED FINDINGS OF FACT,  
) CONCLUSIONS OF LAW AND ORDER

Pursuant to the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947 and after due notice a hearing was held at 7:00 p.m. September 25, 1974 in Forsyth, Montana for the purposes of hearing objections to the above-named application. The following proposed findings of fact, conclusions of law and order are this hearing examiner's recommendations to the Administrator, Division of Water Resources of the Department, as a result of the hearing.

PROPOSED FINDINGS OF FACT

1. On January 30, 1974 at 1:10 p.m. an application for beneficial water use permit (hereinafter called application) was received by the Department from Eva Swart (hereinafter called applicant) to appropriate 10 acre-feet of water from an unnamed tributary of Lone Tree Creek, a tributary of Sand Creek, a tributary of the Missouri River. The proposed point of diversion is in the NE $\frac{1}{4}$  of NE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 10, Township 8 North, Range 42 East, Rosebud County, Montana. A field inspection performed by Jim Rehbein of this Department shows that the intended diversion consists of a pit behind a small dam across a dry coulee. The period of the proposed diversion would be from January 1 to December 31, inclusive for the purpose of livestock watering.
2. The only objector present at the hearing was Martin Barley who contended that this proposed diversion would unreasonably adversely affect with his water right. It is a fact that Mr. Barley has a water right filed on p. 527 of Book A with the County Clerk in Rosebud County, date of filing 1899, for 800 miners inches appurtenant to 325 acres of irrigated land. Mr. Barley testified that he has allowed his brothers to construct reservoirs above his own point of diversion ever since 1919. These dams constructed by his brothers in the period of 1919 to 1960 by Mr. Barley's own estimate, took up approximately  $\frac{3}{4}$  of the water right which he had taken previously to 1919. Since 1960, when his brothers sold the ranch to the Western Cattle Company, four (4) more reservoirs have been built and more water has been taken from that which Mr. Barley used. Mr. Barley testified that his actual use is less than 100 inches per season, when the creek runs. Mr. Barley, the objector, also noted that he can appropriate water from the Cartersville Ditch Company but has never taken any since the 1940's.

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Upon questioning by the applicant's counsel, Mr. R. C. Harkins, Mr. Barley stated that even if the applicant's water were allowed to flow down the creek, it would not reach him because of the reservoirs in between. Testimony also indicated that in the spring time, there are unappropriated runoff waters which go past Mr. Barley's point of diversion.

PROPOSED CONCLUSIONS OF LAW

1. Mr. Barley has the first filed right for water from Sand Creek, but he has not used the amount filed for, and he has allowed upstream users to appropriate more than 3/4 of the water right which he did use at the time of filing.
2. The proposed use will not have an unreasonable adverse affect with the objector's use.

PROPOSED ORDER

The application is granted subject to existing rights, contingent upon installation of a drainage device at least 12" in diameter in the bottom of the dam within 2 years of the date of this order.

NOTICE: This is a proposed order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation, pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6 (2)-P6190. Written exceptions to this proposed order shall be filed with the Administrator within five (5) days of service of this proposed order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

07-1-30 1970  
Date

James Lewis  
James Lewis  
Hearing Examiner

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