

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT NO. 1940-ss41-I,
TREASURE STATE ACRES, INC.

FILMED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

APR 10 1975

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, entered on January 28, 1975, by the Hearing Examiner, are hereby modified and adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

1. The Applicant's application to sever or sell decreed water rights is approved with the following limitations:

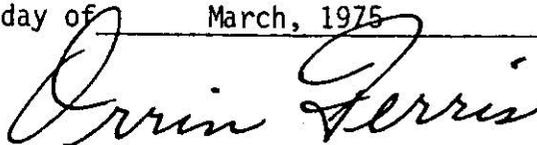
(a) That the sale of seventy (70) percent of the May 1, 1865 decreed water rights, being a total of 56.7 miner's inches; the April 30, 1867 decreed water right, being a total of 84 miner's inches; and the May 31, 1896 decreed water right, being a total of 105 miner's inches, is approved. This represents that portion of the decreed water right which at the present time would be supplied by Ten Mile Creek, at the confluence of Ten Mile and Seven Mile Creeks.

(b) The approval is subject to modification if it is found that it would have an adverse impact on the prior existing groundwater rights in the area.

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2. This approval is granted subject to prior existing water rights.

Done this twenty-fourth day of March, 1975.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION TO)
SEVER OR SELL APPROPRIATION)
WATER RIGHT NO. 1940-ss41-I,)
TREASURE STATE ACRES, INC.)

PROPOSAL FOR DECISION

Pursuant to the provisions of the Montana Water Use Act, Section 89-865, et seq., R. C. M. 1947, a hearing was held October 10, 1974, at Helena, Montana, for the purpose of hearing objections to the granting of the application captioned above. The applicant, Treasure State Acres, Inc., was represented by its President, Tom Allen, and the purchaser, Frank Schatz, was also present. Mr. John F. Bell, counsel for the parties involved in the proposed sale and transfer was present. Objections were filed by Ms. Margaret Nelson, Mr. and Mrs. Theodore Tenneson, Mr. Grant Buswell, Reber Realty and Development Co., Inc., Mr. Richard Kelly, and Mr. Joseph J. Zimmerman. Those present at the hearing and giving testimony were Mr. Grant Buswell, Mr. Robert Nelson who testified on behalf of his wife Ms. Margaret Nelson, Mr. Joseph Zimmerman, Ms. Rita Tenneson, and Mr. Joseph E. Reber on behalf of Reber Realty and Development Co., Inc., as its vice president and counsel. The special qualifications of Mr. Robert H. Nelson were entered into the record. Mr. Nelson is a consulting mining geologist and a Montana Registered Professional Engineer.

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PROPOSED FINDINGS OF FACT

1. On April 4, 1974, Treasure State Acres, Inc., through its President, Tom Allen, duly filed with the Department of Natural Resources and Conservation, Water Resources Division, an application to sell the following decreed water rights of the Ten Mile Creek decree number 4989, decreed March 28, 1903, to Prickly Pear Land Co.; eighty-one (81) miner's inches with a priority date of May 1, 1865; one-hundred and twenty (120) miner's inches with a priority date of April 30, 1867; and one-hundred and fifty (150) miner's inches with a priority date of May 31, 1896. The present point of diversion is in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 10N, Range 3W, M.P.M., and the proposed point of diversion is in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, Township 10N, Range 4W, M.P.M. The new place of use will be four hundred (400) acres described as in the E $\frac{1}{2}$ of Section 15, Township 10N, Range 4W, and the NE $\frac{1}{4}$ of Section 22, Township 10N, Range 4W. The reason for such an application is that the land on which the decreed water rights are presently being used is being developed for housing.

2. Mr. Grant Buswell, an objector, testified that the present point of diversion of the decreed water rights in question was below the mouth of Seven Mile Creek on Ten Mile Creek. He further pointed out that the proposed point of diversion would be above the confluence of Seven Mile and Ten Mile Creeks.

3. Mr. Robert H. Nelson, on behalf of the objection of his wife, Mrs. Margaret Nelson, explained the nature of the aquifer supplying water to the wells in the area. Mrs. Nelson has four wells on her property which were drilled many years ago. Along Ten Mile Creek and south of Country Club Avenue there are more than fifty wells supplying local residents. According to Mr.

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Nelson, Ten Mile Creek is the major supplier to this aquifer. The static head on objector's property has been lowered 2.6 feet as a result of present practices. Mr. Nelson introduced into evidence a record of water flow in Ten Mile Creek along his wife's property from January 1, 1961 thru August 22, 1974.

4. Mr. Joseph Reber testified on behalf of the objection of Reber Realty and Development Co., Inc., that they were primarily concerned with the lowering of the water level in what was referred to as the old gravel pit near the old Kessler Brewery.

5. Mr. Zimmerman and Mrs. Tenneson, as objectors, were concerned with the effect that this sever and sale would have on their decreed water rights in the Green Meadow Ranch development.

6. The applicants introduced into evidence a copy of the water rights under the 1903 decree number 4989.

7. From studies conducted by the Department, it was determined that at the confluence of Ten Mile Creek and Seven Mile Creek that Ten Mile Creek supplied approximately seventy (70) percent of the water in the stream with Seven Mile Creek supplying the remaining thirty (30) percent. Thus seventy (70) percent of the water rights in question is supplied by Ten Mile Creek, and the remaining thirty (30) percent is supplied by Seven Mile Creek.

8. The applicants decreed water rights having a priority date of April 30, 1867 and May 31, 1896 are only flood rights and are not good except during periods of high water.

9. An objection to the hearing was raised by Mr. Buswell and was subsequently concurred in by Mr. and Mrs. Theodore Tenneson. Such objection was

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denied by separate motion.

10. The proposed sever and sale would result in Ten Mile Creek going dry from five (5) to fourteen (14) days earlier from the Broadwater Hotel area to the mouth of Seven Mile Creek.

From the foregoing Proposed Findings of Fact the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-893, R.C.M. 1947, Department approval to sever or sell a water right on Ten Mile Creek is required.
2. The criterion for the issuance of such Department approval as set forth at Section 89-893, R.C.M. 1947, have in part been met.
3. The application to sever or sell appropriation water right may be granted in accordance with the provisions of Chapter 8, Title 89, of the Laws of the State of Montana.

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

PROPOSED ORDER

1. The applicant's application to sever or sell decreed water rights is approved with the following limitations:
 - a. That only the sale of seventy (70) percent of the May 1, 1865 decreed water rights being a total of 56.7 miner's inches, the April 30, 1867 decreed water right, being a total of 84 miner's inches, and the May 31, 1896 decreed water right, being a total of 105 miner's inches be approved. This represents that portion of the decreed water right which at the present time would be supplied by Ten Mile Creek at the confluence of Ten Mile Creek and Seven Mile Creeks. If the Transfer of the entire decreed water rights were allowed, this would be detrimental to those later water rights on Ten Mile

Creek above the confluence of Seven Mile and Ten Mile Creeks.

b. The approval is subject to modification if it is found that it would have an adverse impact on the prior existing ground water rights in the area. The Department shall monitor the water level and decide whether this approval should be modified. Such monitoring should take into consideration that there are at least fifty (50) wells in the area which are primarily responsible for the draw down on the aquifer.

2. This approval is granted subject to prior existing water rights.

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.

DATED this 28 day of January, 1975.


GARY L. SPAETH
HEARING EXAMINER

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