

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 1957-s41N BY
HOFER BROTHERS

}
FILMED FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER
APR 6 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on October 10, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

Application for Beneficial Water Use Permit No. 1957-s41N is hereby terminated.

Done this 12th day of December, 1975.

Orrin Ferris
Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

CASE # 1957

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 1957-s41N, HOFER BROTHERS)

ISSUES

1. ADMINISTRATIVE LAW, WATER RIGHTS:

Does the Hearing Examiner have the power to dismiss an Application for Beneficial Water Use Permit with prejudice upon the Applicant's motion to withdraw the Application?

MEMORANDUM

Pursuant to the Montana Water Use and Administrative Procedures Acts a hearing on objections to the above-named application was held on May 15, 1975 at Chester, Montana.

Mr. Ed Hofer appeared at the hearing on behalf of the Applicant and through counsel, Mr. Paul Bunn, Esq., of Chester, Montana withdrew Application No. 1957-s41N. Mr. Ray V. Kalbfleisch, Esq., counsel for Objector Sun Agriculture Incorporated, moved that the application be dismissed with prejudice for reason that this is the second time his client has been forced to appear at a hearing on objections. Mr. Don Lee, Esq., counsel for Objector Mr. Harrold E. Henry, joined in that motion to dismiss with prejudice.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law and Order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

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PROPOSED FINDINGS OF FACT

1. The Applicant has withdrawn the application.

From the foregoing Proposed Findings of Fact, the Hearing Examiner hereby makes the following Proposed Conclusions of Law.

PROPOSED CONCLUSIONS OF LAW

1. While the Applicant's continued submission and withdrawal of his Application for Beneficial Water Use Permit may be justifiably annoying to the objectors, there is no authority or basis for precluding the Applicant from submitting a future Application for Beneficial Water Use Permit.

2. The Montana Constitution, Article IX §3, provides that all waters within the boundaries of the state "are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." [Emphasis added]. See also Section 89-866, R.C.M. 1947.

3. Water may be appropriated only pursuant to the Montana Water Use Act and Section 89-885, T.C.M. 1947, entitles an Applicant to a permit if the criteria listed therein are met. While an application may be denied if any of these criteria are not met, there is no provision in the Act upon the basis of which a person may be precluded from submitting an application.

From the foregoing Proposed Findings of Fact and Conclusions of Law, the Hearing Examiner hereby makes the following Proposed Order:

PROPOSED ORDER

1. That Application No. 1957-s41N be terminated.

NOTICE

This is a Proposed Order and will become final when accepted by the Administrator, Water Resources Division, Department of Natural Resources and

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Conservation. Written exceptions to this Proposed Order may be filed with the Administrator within ten (10) days upon receipt of same. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

DATED this 10th day of October, 1975.

James A. Lewis
HEARING EXAMINER
By ABC

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