

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 1976-s40H)
BY EUGENE L. BROST)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on April 23, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions and limitations cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 4.67 cubic feet per second or 2,100 gallons per minute of water and not to exceed 202 acre-feet per year from Big Sandy Creek, a tributary of the Milk River, in Hill County, Montana, to be diverted from Big Sandy Creek at points in the W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 18, Township 52 N, Range 10 E, Hill County, Montana, with up to 2 acre-feet of water per annum of the 202-acre-foot total to be used for stock watering from January 1 to December 31, inclusive, of each year, and up to 200 acre-feet of water per annum of the 202-acre-foot total to be used for new irrigation on a total of 80 acres, more or less, in said Section 18 from April 15 to September 1, inclusive, of each year.

2. The Provisional Permit granted herein conveys no grant to interfere with the real property rights of any party in any manner, even should such interference prove to be a necessary and unavoidable consequence of any exercise of the Provisional Permit granted herein.

3. The Permittee may only appropriate from Big Sandy Creek pursuant to the Provisional Permit granted herein at such times when there will remain in Big Sandy Creek, below the Permittee's points of diversion and subsequent to the Permittee's appropriation, sufficient water to satisfy the valid apparent water rights of prior downstream users.

4. The Permittee is not, however, to be held accountable for streamflow conditions which are neither a direct nor an indirect result of the Permittee's appropriation or other action. Such unaccountability on the part of the Permittee shall specifically include, but shall not be limited to, unaccountability for a

CASE # 1978

downstream loss of flow due to, heretofore existing underground stream channels along Big Sandy Creek.

5. The Provisional Permit is granted subject to all prior water rights in the source of supply.

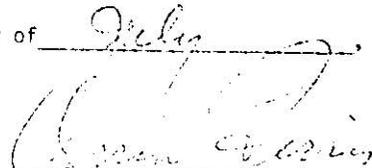
6. At the discretion of the Department of Natural Resources and Conservation, the Permittee shall install and maintain adequate measuring devices to enable the Permittee to keep a record of all quantities of water diverted, as well as of the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by this Department.

7. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation. These parties shall keep a record of records of water used for their activity.

Done this 21st day of July, 1976.


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 # 1978

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE) PROPOSAL FOR DECISION
PERMIT NO. 1978-s40H BY)
EUGENE L. BROST)

Pursuant to the Montana Water Use Act, and the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the Council Chambers of the Havre City Hall at Havre, Montana, on Thursday, March 4, 1976 at 1:00 p.m., Richard Gordon, Hearing Examiner presiding.

Mr. Eugene L. Brost, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant was represented by counsel, John Warner, Esq., of Havre, Montana. The Applicant offered into evidence on exhibit: a map of the portion of the Big Sandy Creek containing the Applicant's proposed project. Said exhibit was entered and numbered as Applicant's Exhibit No. 1.

Mr. Gordon C. Sands, an Objector herein, appeared personally and presented evidence and testimony in support of his objection. Mr. Sands offered into evidence one exhibit: an affidavit dated March 4, 1976 setting forth the basis for Mr. Sand's objection. Said exhibit was entered and numbered as Objector's Exhibit No. 1.

Mr. Joe E. Damson, an Objector herein, appeared personally and presented testimony in support of his objection.

Mr. Richard Watson and Mr. Howard Reinhardt appeared personally and testified on behalf of the Department of Natural Resources and Conservation.

MOTIONS

At the hearing the Applicant noted that 2 of the 4 proposed points of diversion (the second and the third), as supplied in the original application are in error and do in fact, as therein described, each miss touching upon the Big Sandy Creek by several feet. The Applicant moved that the application be amended so as to provide that the originally proposed points of diversion at the NE1/4 NE1/4 SW1/4 and at the NE1/4 SE1/4 SW1/4 all of Section 18, Township 32 North, Range 15 East of the Montana Principal Meridian be changed so as to provide for proposed points of diversion at the NW1/4 NE1/4 SW1/4 and at the NE1/4 SW1/4 SW1/4, all of Section 18, Township 32 North, Range 15 East of the Montana Principal Meridian. As it was clearly the intention of the Applicant and of the Department of Natural Resources and Conservation from the outset, to describe points which do in fact lie upon the Big Sandy Creek for proposed diversion from the Big Sandy Creek, as it appears to have been the belief of all parties that the Applicant proposed to appropriate

water from the Big Sandy Creek at points along the Big Sandy Creek, and as the two errors were each of only several feet in magnitude and do not seem to propose any additional problems either to parties objecting herein or to parties potentially objecting herein, the Applicant's motion is hereby granted, and the application is hereby amended.

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

PROPOSED FINDINGS OF FACT

1. On August 4, 1974, the Applicant, Mr. Eugene L. Brost, filed Application No. 1978-s40H with the Department of Natural Resources and Conservation seeking to appropriate 2,100 gallons of water per minute and not to exceed 200 acre-feet per year from April 15 to September 1, inclusive, of each year at points in the W1/2 SE1/4 NW1/4 in the NW1/4 NE1/4 SW1/4, in the NE1/4 SW1/4 SW1/4, and in the NW1/4 NE1/4 NW1/4 (see Motions above) all in Section 18, Township 32 North, Range 15 East of the Montana Principal Meridian in Hill County, Montana, to be used for irrigation on a total of 80 acres, more or less, in the W1/2 of Section 18, Township 32 North, Range 15 East, of the Montana Principal Meridian, and further seeking to appropriate 2,100 gallons of water per minute not to exceed 2 acre-feet of water per annum for

livestock watering of 80 animal units from January 1 to December 31, inclusive, of each year.

2. On January 23, 1975 Mr. Gordon C. Sands filed an objection to the above-described application alleging that the Objector is the owner of certain lands on the east side of Big Sandy Creek, that such land has as part of its duly described boundary, "the west bank of Big Sandy Creek," that such land is contiguous to certain of the lands described as the place of use of the Applicant's proposed appropriation, and is contiguous to certain of the Applicant's proposed points of diversion, and finally alleging that the Applicant would thus have to enter upon Objector's land in order to appropriate water pursuant to the proposed application. The Objector requested that the permit be denied.

3. On January 28, 1975 Mr. Charles W. McGee filed an objection to the above-described application alleging insufficient water in Big Sandy Creek for the irrigation of 80 additional acres. The Objector requested that the permit be denied. Neither the Objector nor a representative of the Objector appeared at the hearing.

4. On February 3, 1975 Mr. Joe E. Damson filed an objection to the above-described application alleging that Big Sandy Creek is slow running and almost dry during the summer months, further alleging that the amount of water sought to be appropriated by the Applicant is excessive and would leave the creek bed dry during the spring and summer. The Objector requested that the permit be denied.

5. On February 3, 1975 Mr. George Lotton filed an objection to the above-described application alleging that Big Sandy Creek is slow running and almost dry during the summer months, further alleging that the amount of water sought to be appropriated by the Applicant is excessive and would leave the creek bed dry during the spring and summer. The Objector requested that the permit be denied. Neither the Objector nor a representative of the Objector appeared at the hearing.

6. On February 3, 1975 Mr. Ben Mueller and Ms. Doris Mueller filed an objection to the above-described application alleging that Big Sandy Creek is slow running and almost dry during the summer months, further alleging that the amount of water sought to be appropriated by the Applicant is excessive and would leave the creek bed dry during the spring and summer. The Objectors requested that the permit be denied. Neither the objectors nor a representative of the Objector appeared at the hearing.

7. At the hearing the Applicant testified that he plans to sprinkle irrigate approximately 80 acres pursuant to the above-described application. The Applicant testified that said 80 acres is presently utilized as pasture land. The Applicant testified that he plans to grow alfalfa and feed grain on said 80 acres, and plans to irrigate from 4 points of diversion with a single 6" portable pump. The Applicant testified that he has requested a total of 202

acre-feet of water per year pursuant to Soil Conservation Service recommendations. The Applicant testified that he intends to irrigate once in early June, and a second time in early July. The Applicant further testified that he plans to water approximately 80 animal units each fall pursuant to the above-described application. The Applicant testified that he believes that there is sufficient water available in the Big Sandy Creek for such use. The Applicant further testified that his proposed six inch pumping system could not operate at all when Big Sandy Creek is almost dry. However, the Applicant testified that last summer the creek was approximately 20 feet wide throughout the summer at his proposed points of diversion, and that there appeared to be ample water available for his proposed appropriation.

8. Mr. Gordon C. Sands testified that the boundary of his land, as shown on Applicant's Exhibit No. 1 is in error in that the western boundary of his land actually extends to the west bank of the Big Sandy Creek, and is not located along the east bank as the exhibit would seem to indicate. Mr. Sands testified that the location of the boundary in fact constitutes the basis of his objection herein, in that several of the Applicant's proposed points of diversion along the west bank of Big Sandy Creek do touch and lie upon Objector's land. Mr. Sands testified that he is herein

objecting to the encroachment upon his land by the Applicant and not to the appropriation of water by the Applicant, apart from such encroachment.

9. Mr. Howard Reinhardt testified on behalf of the Department of Natural Resources and Conservation by reading into the record portions of a letter written by Mr. Ronald J. Guse of the Department of Natural Resources and Conservation, as mailed by certified mail to all parties herein. The letter noted in pertinent part that there are United States Geological Survey records available for Big Sandy Creek, measured at a point in the same section as the proposed appropriation. Mr. Guse's letter further noted that continuous records are available from February 1946 to November 1953, and that annual maximum figures are available for the water years from 1955 to 1965. Mr. Guse's letter stated that according to such records, the maximum discharge for seven years, being the period from 1946 to 1953, was 25.2 subic feet of water per second or 18,240 acrefeet of water per year. The highest annual runoff was 80,020 acre-feet in 1952, and the lowest was 68 acre-feet in 1949.

10. Mr. Joe Damson testified that there is insufficient water available in the Big Sandy Creek to keep the Big Sandy Creek from running entirely dry if the permit is granted. Mr. Damson testified that he owns a total of 27 acres of land on both sides of Big Sandy Creek where U.S. Highway 2

crosses the creek, downstream from the Applicant's proposed points of diversion. Mr. Damson testified that he possesses a filed water right to waters from the Big Sandy Creek for year-round stockwatering, for lawn and garden uses, and for "supplies". Mr. Damson testified that although no stock has been watered pursuant to this claimed filed right for the past two years, in the past as many as 40 head of stock have been watered. Mr. Damson testified that he did not know the total amount of or the date of first use of said claimed filed right. In response to a request by the Hearing Examiner, Mr. Damson testified that he would supply the Hearing Examiner with the above information within 30 days of the hearing, for introduction into evidence. No such information was received from Mr. Damson. Mr. Damson testified that for two years, sometime between 1962 and 1964, there was no water available in Big Sandy Creek at his property for the entire two year period, except during short periods of snow melt and flash flood. Mr. Damson testified that the United States Geological Survey flow figures cited above are misleading in that the 1952 figures constitute flood stage measurements which are not useful for irrigation purposes. Mr. Damson testified that other such high water readings represent temporary flash flood conditions which also can not be put to beneficial use for irrigation. Mr. Damson testified that when there is not a flash flood condition along the Big

Sandy Creek, when there is insufficient water available for the present proposed appropriation. Mr. Danson testified that from the middle of June until the end of September, when Mr. Danson ceases watering his lawn, it is necessary to dig potholes 4 feet deep into the stream bed in order to be able to withdraw sufficient water from the creek for watering the lawn. Mr. Danson testified that this procedure is necessary every year, and that in the above-described two year period even this procedure proved unsuccessful. Mr. Gordon C. Sands testified that based upon his knowledge of the Big Sandy Creek, the presence of underground channels near the Danson's property would cause the creek to be dry even when there is no upstream diversion, and even when there is water flowing at upstream points along the Big Sandy 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 89-880, R.C.M. 1947, a permit is required to appropriate water from the Big Sandy Creek.
2. The issue of real property rights, and of access across or on real property is not properly within the discretion of the Hearing Examiner for consideration herein. The grant of a Provisional Permit herein in no way grants the Applicant any right to violate real property rights of any other party, nor does it excuse the Applicant from any

liability for same, even if such violation is a necessary and unavoidable consequence of exercising a Provisional Permit granted herein. Similarly, testimony that the granting of a permit herein would lead to the violation of real property rights of a party is not along grounds for the denial of a Permit, even if such violation is a necessary and unavoidable consequence of exercising a proper Provisional Permit granted herein.

3. There are at times unappropriated waters in the source of supply principally when there is in the source of supply water in excess of the amount needed to satisfy all prior rights in the source of supply.

4. Pursuant to 89-886(1) R.C.M. 1947, the valid rights of prior appropriators must be protected in the issuing of a Beneficial Water Use Permit.

5. The rights of prior appropriators will be protected if the permit is conditioned, limited, and modified so as to protect those rights.

6. The Objector, Mr. Joe Damson, appears to have a valid use right along Big Sandy Creek.

7. The Applicant should not be held accountable for stream flow conditions which are neither a direct or indirect result of the Applicant's appropriation or other actions. Such unaccountability on the part of the Applicant should include but should not necessarily be limited to downstream loss of flow due to heretofore existing underground stream channels along the Big Sandy Creek.

8. The Provisional Permit should be granted only if it is subject to all prior water rights in the source of supply.

9. The proposed means of diversion is adequate.

10. The proposed use of the water constitutes a beneficial use.

11. The proposed use will not interfere unreasonably with other planned uses or development for which a permit has been issued or for which water has been reserved.

12. The Application for Beneficial Water Use Permit should be granted in accordance with the provision of Chapter 8, Title 89 of the Revised Codes of Montana.

13. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party, except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions and limitations cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 4.67 cubic feet of water per second, or 2,100 gallons of water per minute,

and not to exceed 202 acre-feet of water per year from Big Sandy Creek, a tributary of the Milk River in Hill County, Montana, to be diverted from Big Sandy Creek at points in the W1/2 SE1/4 NW1/4, in the NE1/4 NE1/4 SW1/4, in the NE1/4 SW1/4 SW1/4, and in the NW1/4 NE1/4 NW1/4, all of Section 18, Township 32 North, Range 15 East of the Montana Principal Meridian, up to 2 acre feet of the 202 acre feet total, to be used for stockwatering from January 1 to December 31, inclusive, of each year, and up to 200 of the 202 acre feet total and for irrigation on a total of 80 acres more or less, in said Section 18, from April 15 to September 1, inclusive, of each year.

2. The Provisional Permit granted herein conveys no grant to interfere with the real property rights of any party in any manner, even should such interference prove to be a necessary and unavoidable consequence of any exercise of the Provisional Permit granted herein.

3. The Applicant may only appropriate from the Big Sandy Creek pursuant to the Provisional Permit granted herein at such times when there will remain in Big Sandy Creek below the Applicant's points of diversion and subsequent to the Applicant's appropriation, sufficient water to satisfy the valid apparent water rights of prior downstream users.

4. The Applicant is not, however, to be held accountable for streamflow conditions which are neither a direct or an indirect result of the Applicant's appropriation or other action. Such unaccountability on the part of the Applicant shall specifically include but shall not be limited to unaccountability for a downstream loss of flow due to heretofore existing underground stream channels along the Big Sandy Creek.

5. The Provisional Permit is granted subject to all prior water rights in the source of supply.

6. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices to enable the Applicant to keep a record of all quantities of water diverted, as well as of the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by this Department.

7. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana Law.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, 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.

DATED this 23^d day of April,
1976.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER

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