

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

App. terminated
no FO -
issued
per log book

IN THE MATTER OF APPLICATION **FILED**
FOR BENEFICIAL WATER USE PERMIT **PROPOSAL FOR DECISION**
NO. 2193-s39E, LESLIE E. STRANGFORD **APR 6 1990**

ISSUES PRESENTED

1. Water Rights; unappropriated water, adverse effect:
What quantum of evidence constitutes conclusive evidence that there is so little unappropriated water that the appropriation proposed in an Application for Beneficial Water Use Permit will adversely affect the Objector's prior existing water right?
2. Water Rights; beneficial use of Objectors:
Is growth of crested wheat grass a beneficial use?
3. Can an objection to a permit application succeed when the point of diversion and place of use are a matter of confusion?

MEMORANDUM

The Applicant, Mr. Leslie E. Strangford, on May 3, 1974, submitted an application to the Department of Natural Resources and Conservation seeking to appropriate 2 acre-feet per annum of water from an unnamed tributary to Box Elder Creek, in Carter County, Montana. The water is to be impounded in a 2-acre-foot reservoir, located at a point in the NE 1/4 NE 1/4 SE 1/4 of Sec. 8, T. 1N., R. 61E., M.P.M., Carter County, Montana, and used for stockwater purposes from January 1 to December 31, inclusive, of each year. In response to this Application, the Department issued

CASE # 2193

CASE # 2193

Interim Permit No. 2193-s39E. The Applicant did not commence construction pursuant to this Interim Permit.

Pursuant to the provisions of the Montana Water Use Act, the Department caused to be published a Notice to Water Users in the Ekalaka Eagle on December 27, 1974, and January 3 and 10, 1975. The notice so published required that objections to the application be filed with the Department on or before February 13, 1975. As a result of this Public Notice to Water Users, Ms. Evelyn M. Knapp and Mr. W.J. Knapp, on January 6, 1975, and on January 21, 1975, Mr. Frank G. Birtic submitted timely objections to the Application. Both objections were on the grounds that the proposed appropriation would adversely affect their prior existing water rights.

As required by the Montana Water Use Act and the Montana Administrative Procedure Act, a hearing on these objections to the subject application was held on July 23, 1975, at Baker, Montana, before James A. Lewis, Hearing Examiner. The Applicant, Mr. Leslie E. Strangford, appeared at the hearing and presented testimony. He was not represented by counsel.

Objector Mr. Frank G. Birtic appeared at the hearing and presented testimony. His son, Mr. George Birtic, also appeared and presented testimony. They were represented by counsel, Mr. Cecil N. Brown, Esq., of Baker, Montana.

Objectors Mr. W.J. Knapp and Ms. Evelyn M. Knapp appeared at the hearing and presented testimony. They were represented by counsel, Mr. Russ Culver, Esq., of Baker, Montana.

Mr. James Rehbein from the Water Rights Bureau of the

CASE # 2193

EPIS # 38AD

Department, presented testimony at the hearing. The Hearing Examiner took official notice of the plat map, notice of appropriation, and staff memorandum presented by Mr. Rehbein at the hearing.

Mr. Leslie Strangford offered into evidence a copy of a Notice of Appropriation in the name of Frank Birtic. This copy was marked as "Applicant's Exhibit No. 1" and received into evidence without objection.

Objector Mr. Frank Birtic offered into evidence a map of the drainage area serving his diversion works, a map showing evaporation of areas of Montana, and a handwritten text of Mr. George Birtic's testimony at the hearing. These were marked as "Objector Birtic's Exhibits Nos. 1, 2 and 3" and received into evidence without objection.

Mr. James Rehbein of the Department testified that the estimated drainage area serving the reservoir is one square mile and the expected average annual runoff in this area of the state is 20 acre-feet per square mile, so that the average annual runoff into the reservoir is approximately 20 acre-feet per annum. There are no dams on Box Elder Creek downstream from the confluence of this unnamed tributary to the North Dakota border.

There is a Notice of Appropriation of Water Right in the Carter County records in the name of John Birtic of Mill Iron. This Notice claims 50,000 miner's inches (being 200,000 cubic feet per irrigation season) of the waters of Royer Creek. The water is claimed for flood irrigation on the E 1/2 of Sec. 9, T. 1N., R. 61E., M.P.M. The Notice was filed on October 3, 1940.

CASE # 2193

SPIS # 33AD

There is a Notice of Appropriation in the Carter County records in the name of Mrs. Wilbur Knapp of Mill Iron. This Notice claims 500 miner's inches of water from Box Elder Creek, and states that the means of diversion consists of a dam and dike diversion network on the banks of said Box Elder Creek, located in SE 1/4 SW 1/4 of Sec. 1, T. 1N., R. 61E. (This water was originally appropriated by Richard W. Schmidt on June 12, 1911).

The Richard W. Schmidt Notice of Appropriation claims 500 miner's inches of water from Rock Creek in Carter County, and states that the means of diversion consists of a dam and ditch 60 inches by 30 inches, which carries water from Rock Creek at a point upon its banks on the SE 1/4 SW 1/4 Sec. 1, T. 1N., R. 61E.

Mr. Rehbein continued that because the legal land description of the point of diversion of the Knapp and the Schmidt claims is exactly the same, and because this point of diversion is from Rock Creek and not from Box Elder Creek and because the unnamed tributary site of the proposed reservoir is not tributary to Rock Creek, the appropriations from this point of diversion in the SE 1/4 SW 1/4 Sec. 1, T. 1N., R. 61E., M.P.M., could not be adversely affected by the appropriation proposed by the subject application.

The Applicant, Mr. Leslie Strangford, testified that he intends to construct a 2-acre-foot-pit-type reservoir, to be used for stock water from January 1 to December 31, inclusive, of each year, to be located in the NE 1/4 NE 1/4 SE 1/4 of Sec. 8, T. 1N., R. 61E., M.P.M. He estimates that the reservoir would catch water which would, if unobstructed, flow into the Birtic dikes. There

CASE # 2193

EPL 11-32-20

will be some evaporation loss from the reservoir. It is not likely that the reservoir will be full year-round.

The water lost to evaporation would be replaced by any runoff occurring after the time of evaporation. From S.C.S. aerial photos, Mr. Strangford estimates that the total drainage area of the unnamed tributary serving the Birtic dikes is 470 acres. There is no other feasible source of water on this west half of Section 8, which is the pastureland to be served by the proposed reservoir. Any water which flows past Mr. Birtic's dikes would flow into Box Elder Creek. Water very seldom flows past the Birtic dikes into Box Elder Creek. This spring, Mr. Strangford went down to the site and saw water impounded in a stock water reservoir located downstream from his project but upstream from the Birtic dikes. The dam is partially washed out but does yet impound some water. There have been no stock in the area around this reservoir for 10 to 15 years. Mr. Strangford has looked at the Birtic dikes this season and has seen mostly crested wheat grass and tall wheat grass growing there, and he did not see any clover or alfalfa. Mr. Strangford has never known Box Elder Creek by any other name.

Mr. Frank Birtic testified that he owns land in Sec. 9, T. 1N., R. 61 E., and that he owns a dike system which irrigates a hay meadow in said Section 9. This hay meadow is comprised of a little over 16 acres. There are five dikes in this system; they are not equipped with drainage devices capable of draining excess water from one dike to the other. These dikes were first constructed in 1940. Mr. Birtic can remember only 2 or 3 times that

CASE # 2193

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the water has overflowed from his dikes. Mr. Birtic believes that the proposed pit would adversely affect his dike system because the pit would actually impound more than 2 acre-feet per year. There is one dam above Mr. Birtic's dikes, which has been constructed since 1940. Mr. Birtic believes that this dam has since washed out and holds no water; although he has not been to the site, he has looked at this dam from the fenceline.

Mr. Birtic estimates that his dikes are served by a drainage area of 472 acres which produce an average annual runoff of 20 acre-feet.

Mr. Frank Birtic has not looked at the dikes this season and does not know what type of hay crop is growing there.

The Birtics have cut hay on these 16 acres only 2 or 3 times in the last 16 years.

Mr. George Birtic testified that he believed that the proposed pit would actually impound 4 to 6 acre-feet of water per annum, for reason that once the pit had filled to its 2-acre-foot capacity, then from use and evaporation the quantity of water would be reduced and then with precipitation the reservoir would again fill up to its 2-acre-foot capacity.

Because the evapotranspiration diagram (Objector's Exhibit No. 2) gives the potential evaporation from a reservoir in this area of Montana as approximately 2 acre feet per annum, Mr. Birtic estimates that the proposed pit would lose 7 feet per year to evaporation.

CASE # 2193

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CASE # 2193

7

Mr. George Birtic believes that the proposed pit would substantially reduce the quantity of water reaching his dikes, because all of the water held by the pit would, if unobstructed, flow into the Birtic dikes.

Water has flowed past the dikes only twice in the last 20 years that Mr. Birtic can remember.

The land served by these dikes is not used for hay every year. This land was last hayed in 1972. When the land is not used for hay, it is used for irrigated pasture.

Mr. George Birtic estimates that 16 acres of hay meadow served by these dikes require 1 1/2 to 2 acre-feet of water per care or a total of 24 to 32 acre-feet of water per growing season.

Mr. George Birtic has not looked at the dikes this season and does not know what type of hay crop is growing there.

Objector, Mrs. Knapp testified that she was not certain where Mr. Strangford proposed to build his reservoir, but she thought it was about 5 miles upstream from the Knapp property. The Knapps claim a water right from Box Elder Creek. The Knapp farmstead is located in Sec. 1, T. 1N., R. 61E. Mrs. Knapp was not certain where the Birtic dikes are located.

The Knapps claim a water right of 500 miner's inches, as listed in their abstract of title which is recorded in Book B of Water Rights, Page 88. Mrs. Knapp believes that Rock Creek is the same as Box Elder Creek. The Knapps have owned and lived on this land since 1939.

Objector Mr. Knapp, testified that he has purchased about \$4,000 worth of pipe and other irrigation equipment, but that he cannot reach the water now because the banks are too steep. He intends to have the bank worked over. Mr. Knapp, has, himself,

never irrigated from the source of Box Elder Creek.

From the foregoing, the file and the record, the Hearing Examiner hereby makes the following Proposed Findings of Fact.

PROPOSED FINDINGS OF FACT

1. The Applicant has applied to construct an S.C.S. designed 2-acre-foot-pit reservoir in the NE 1/4 NE 1/4 SE 1/4 of Sec. 8, T. 1N., R. 61E., M.P.M., on an unnamed tributary to Box Elder Creek, Carter County, Montana. The water is to be used for stockwater purposes from January 1 to December 31, inclusive, of each year.

2. The Objector, Mr. Birtic, has an apparent prior existing water right to irrigate 16 acres of hay land downstream from the proposed diversion.

3. The substance of Mr. Birtic's objection appears to rest in the fact that a 2-acre-foot pit might possibly appropriate more than 2 acre-feet.

4. The testimony and evidence did not conclusively show that Objector Mr. Knapp does have an apparent prior existing water right; rather, the testimony and evidence tended to show that Mr. Knapp is contemplating an appropriation of water without following the exclusive application procedure as set forth in Section 89-880, et seq., R.C.M. 1947.

5. Because the Birtic system is generally unattended and because the Birtic system is spreader dikes without drains from one dike to another and because the crop is largely crested wheat grass, the Birtic use of water is not efficient.

6. In some years of marginal water supply, the appropriation of an additional 2 acre-feet of water might prevent Birtic from cutting any hay crop whatsoever. This would be an unreasonable adverse effect.

7. In those years when water flows past the Birtic dikes, there are unappropriated waters in the proposed source of supply.

8. There is a small dam upstream from the Objectors, but downstream from the Applicant, which impounds a small amount of water which has not been put to beneficial use for some 10 to 15 years.

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

PROPOSED CONCLUSIONS OF LAW

Under the provisions of Section 89-880, R.C.M. 1947:

1. A permit is required to appropriate water by means of a pit reservoir from said unnamed tributary to Box Elder Creek.
2. At some times there are unappropriated waters in the proposed source of supply.
3. In years of marginal water supply, the granting of this application would have an unreasonable adverse effect upon Frank Birtic's apparent prior existing water right to irrigate hay by means of spreader dikes.
4. By acquiring a right to use the water impounded in the intervening reservoir, the Applicant might impound water without unreasonably affecting the Birtic use.

EPIS **CASE #** 2193

5. Mr. Knapp did not successfully show a prior water right, which must be protected.

6. A beneficial water use permit cannot be granted for more than the quantity applied for.

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

PROPOSED ORDER

That the Applicant's application be granted subject to the following terms, conditions, and limitations:

1. The Applicant must acquire sufficient control over the intervening reservoir so that this reservoir will not impound any water whatsoever during those periods when the Applicant is impounding water in the subject reservoir.

2. The reservoir shall be subject to all prior existing water rights and to protect those rights there must be installed in the reservoir a drainage device or bypass adequate to protect those prior existing rights.

3. The permit allows the appropriation of 2 acre-feet of water per annum and the reservoir must be constructed in such a manner that it does not appropriate more than 2-acre-feet of water by means of a pit-type stock-water reservoir on an unnamed tributary to Box Elder Creek, located in the NE 1/4 NE 1/4 SE 1/4 of Sec. 8, T. 1N., R. 61E., M.P.M., and used from January 1 to December 31, inclusive, of each year.

8915
CASE # 2193

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator, Water Resources Division, Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department within ten (10) days of receipt of same. Upon receipt of any written exceptions by the Department, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 14th day of November, 1975.

James A. Lewis

HEARING EXAMINER

By: ABC

CASE # 2193