

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 2427-s41S
BY PAT McREYNOLDS

} FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

A hearing was held pursuant to the Montana Administrative Procedure Act and the Water Use Act on November 7, 1974, in Lewistown, Montana, for the purpose of hearing objections to the above-named application. The Applicant was present and represented by his counsel, Bob Foster, Esq., of Lewistown, Montana. The objector, Clarence Sweeney, appeared and presented testimony and was represented by his counsel, William Spoja, Esq., of Lewistown. The Applicant offered into evidence an A.S.C.S. map of the Fish Creek area. This map was received into evidence without objection. The objector offered into evidence an aerial photograph of the Fish Creek area and was received into evidence without objection. Before the Applicant presented his evidence, the objector through his attorney formally objected to the hearing of any evidence concerning irrigation as a beneficial use. At the end of the hearing, this objection was overruled as unnecessary for the reason that no evidence had been presented concerning irrigation as a beneficial use.

A Proposed Order (Proposal for Decision) was issued by the Hearing Examiner, James Lewis, on December 19, 1974.

The Proposed Order as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On January 9, 1975, the Department received a letter of Exception dated January 7, 1975, as filed by William A. Spoja, Jr., on behalf of his objector-client, Clarence Sweeney, in opposition to the Hearing Examiner's Proposed Order of December 19, 1974, in the matter of Application No. 2427-s41S by Pat McReynolds.

On January 10, 1975, the Department received a letter dated January 9, 1975, from K. Robert Foster in reply to Mr. Spoja's letter of Exception dated January 7, 1975.

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The Department by its letter of May 2, 1975, to Mr. Spoja and a copy to Mr. Sweeney, and by a subsequent separate letter to Mr. Foster, attempted to settle this matter with direct replies to Mr. Spoja's Exception letter of January 7, 1975 and Mr. Foster's reply letter of January 9, 1975.

Since this matter could not be settled, the Department by letter of July 30, 1975, informed Mr. Spoja of his opportunity to file a Brief supporting his Exception. On August 13, 1975, the Department received Mr. Spoja's Brief dated August 15, 1975, and on September 25, 1975, the Department received a Reply Brief from Mr. Foster dated September 24, 1975, and filed on behalf of the Applicant, Pat McReynolds.

The Department by letter of October 15, 1975, to Mr. Spoja with copies to Mr. Foster, Mr. McReynolds, and Mr. Sweeney, stated, "In your letter of September 30, you requested another hearing be held in Fergus County to deal directly with evidence concerning water rights related to the subject application. Please be advised that after discussing your request with our legal staff, it has been determined that the next procedure in this matter is for you and Mr. Foster to make oral argument on your objections, exceptions, and briefs here in Helena before the Administrator of the Water Resources Division. Following this hearing, the Administrator can either issue a Final Order on the application or remand it for lack of evidence for another hearing at Lewistown. Therefore, please be advised that this application will now be referred to the Administrator for his review and scheduling of an oral argument hearing. The Administrator will notify you of the time, place, and date for said hearing."

The Administrator of the Water Resources Division issued on November 14, 1975, a Notice of Hearing on Exceptions in the matter of Application No. 2427-s41S by Pat McReynolds, stating that a hearing would be held on Thursday, December 4, 1975, at 11 a.m., before the Administrator of the Water Resources Division, in Room 211, of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the oral argument hearing was to hear oral arguments in support of the exception and briefs filed.

None of the parties in this matter appeared at the oral argument hearing scheduled for Thursday, December 4, 1975, in the Department of Natural Resources and Conservation Building.

The Administrator of the Water Resources Division issued on May 3, 1975, an Order of Remand, remanding Application No. 2427-s41S by Pat McReynolds to the appointed Hearing Examiner, Allen Chronister, for further hearing, to be held as soon as possible and convenient for all parties. The application was

remanded for further hearing by the Administrator upon reading the record in this matter and listening to the tape recording of the proceedings before the Hearing Examiner, and it was found that there was insufficient evidence to sustain the Proposal for Decision.

A remand hearing on Application No. 2427-s415 was scheduled for Wednesday, May 26, 1976, at 1 p.m., in the Courtroom of the Fergus County Courthouse in Lewistown, Montana, with Allan Chronister as the designated Hearing Examiner. This Notice of Remand Hearing was issued by the Administrator on May 13, 1976, and mailed to all parties on May 14, 1976, by certified mail, return receipt requested.

The Department received a letter from Mr. Spojka dated May 17, 1976, requesting at least a 30-day delay in the remand hearing scheduled for May 26, 1976, in Lewistown. Mr. Foster was contacted by telephone on May 19, 1976, at 10:30 a.m., and agreed that the 30-day-delay request could be granted. By letter dated May 19, 1976, to Mr. Spojka with copies to Mr. McReynolds, Mr. Foster, and Mr. Sweeney, the Department granted Mr. Spojka's request, and on May 19, 1976, the Administrator of the Water Resources Division issued a Notice of Scheduled Hearing Postponement stating that the remand hearing on Application No. 2427-s415, originally scheduled for Wednesday, May 26, 1976, in the Courtroom of the Fergus County Courthouse in Lewistown, Montana, is postponed until further notice.

Mr. Spojka by letter of June 18, 1976, to the Department indicated that progress was being made and a Stipulation possibly could be agreed to in early July with Mr. Foster, counsel for the Applicant.

On September 1, 1976, the Department received a letter dated August 31, 1976, and an attached Stipulation with an Exhibit "A," dated July 30, 1976. The Stipulation dated July 30, 1976, was signed by Pat McReynolds, the Applicant, and Clarence J. Sweeney, the objector.

The Administrator of the Water Resources Division hereby makes the following Final Order, based on the Proposed Order (Proposal for Decision) issued by the Hearing Examiner on December 19, 1974, the objections, exceptions, briefs, the stipulation of July 30, 1976, and all pertinent information filed by all parties to this matter and made a permanent record of the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in the matter of Application No. 2427-s415 by Pat McReynolds, as entered on December 19, 1974, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified

to coincide with the agreed-upon stipulation of July 30, 1976, and except that the Proposed Order is further modified as follows:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted, subject to, attached and made a part hereof, the Stipulation of July 30, 1976, for Application No. 2127-s418 to appropriate 425 gallons per minute of water not to exceed 4 acre-feet per annum, in Fergus County, Montana, to be diverted from six developed springs, tributary to Fish Creek, and impounded in a 4-acre-foot storage reservoir at a point in the NW¹/₄, NE¹/₄, SW¹/₄ of Section 23, Township 17 North, Range 18 East, N.P.M., and used for stock watering from January 1 to December 31, inclusive, of each year.

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

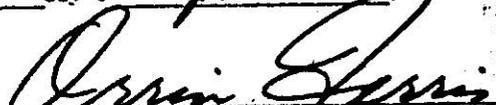
3. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

4. The Stipulation of July 30, 1976, as agreed upon and signed by the Applicant, Pat McReynolds, and the Objector, Clarence J. Sweeney, is hereby attached to this Final Order and made a part hereof.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights.

Done this 30th day of September 1976.


Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-109, 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

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

IN THE MATTER OF APPLICATION)
FOR THE BENEFICIAL WATER USE)
PERMIT NO. 2427-s41S BY)
PAT MC REYNOLDS)

ORDER OF REMAND

The above entitled matter came before the undersigned for FINAL ORDER AND DECISION after receipt of the PROPOSAL FOR DECISION issued by James A. Lewis, Hearing Examiner, dated December 19, 1974. EXCEPTIONS to the PROPOSAL FOR DECISION were filed by Clarence J. Sweeney, an objector, and by William A. Spoja, Jr., attorney for Mr. Sweeney. A hearing on EXCEPTIONS was scheduled for Thursday, December 4, 1975, at 11 a.m., in Helena; however, none of the parties involved in this matter appeared.

Upon reading the record in this matter and listening to the tape recording of the proceedings before the Hearing Examiner, I find that there is insufficient evidence to sustain the PROPOSAL FOR DECISION.

NOW, THEREFORE, IT IS HEREBY ORDERED, that the above-entitled matter is REMANDED to Allen Chronister, Hearing Examiner, for further hearing, to be held as soon as possible and convenient for all parties. It is further ordered that evidence shall be presented at said hearing concerning the following:

- (1) Exactly what the applicant is applying for in said Application, and how that relates to Mr. McReynold's Application No. 2428-s41S;
- (2) The exact source of water from which the Applicant proposes to appropriate;
- (3) The exact land description of the proposed place of use;

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- (4) The exact location of the proposed diversion and impoundment facilities;
- (5) The adequacy of the proposed means of diversion and impoundment from a safety standpoint;
- (6) Applicant's existing water right in Fish Creek, unnamed tributaries, and springs directly related to the application, including those of Mr. Sweeney; and
- (7) Any other matter which the Hearing Examiner considers relevant.

Dated this 3rd day of May, 1976.



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)
FOR BENEFICIAL WATER USE PERMIT)
NO. 2427-~~s~~41S by PAT McREYNOLDS)

PROPOSAL FOR DECISION

A hearing was held pursuant to the Montana Administrative Procedure and Water Use Acts on November 7, 1974 in Lewistown, Montana, for the purpose of hearing objections to the application above named. The applicant was present and represented by his counsel, Mr. Bob Foster, Esq. of Lewistown, Montana. The objector, Mr. Clarence Sweeney appeared and presented testimony. The objector, was represented by his counsel, Mr. William Spoja, Esq. of Lewistown. The Applicant offered into evidence an A.S.C.S. map of the Fish Creek area. This map was received into evidence without objection. The objector offered into evidence an aerial photograph of the Fish Creek Area. This photograph was received into evidence without objection. Before the Applicant presented his evidence, the objector through his attorney formally objected to the hearing of any evidence concerning irrigation as a beneficial use. At the end of the hearing this objection was overruled as unnecessary for reason that no evidence had been presented concerning irrigation as a beneficial use.

PROPOSED FINDINGS OF FACT

1. On May 28, 1974 Pat McReynolds made application with the Department

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of Natural Resources and Conservation for Beneficial Water Use Permit. The application requested to appropriate 20 acre-feet per annum from six unnamed springs in the vicinity of Fish Creek for the purposes of providing stock water and impounding water to cover the surface of a marsh. The water is to be appropriated by means of a dam and reservoir located in the NW $\frac{1}{2}$ NE $\frac{1}{2}$ NW $\frac{1}{2}$ of Section 23, T. 17 N., R. 18 E., in Fergus County, Montana. After the reservoir is filled to its capacity of 20 A.F., any additional flow from the springs will be placed into the surface waters of Fish Creek.

2. On September 16, 1974, Clarence J. Sweeney of Bozeman, Montana filed a timely objection to the above named application. The objection is based upon the grounds of (1) unreasonable adverse effect on prior existing water right (2) upset natural ecology of the Valley (3) inadequate construction of the reservoir.

3. The objector has filed water right for use on lands in Section 15, from the source of the surface waters of Fish Creek as evidenced by the Montana Water Resources Board, Water Rights Survey as field checked on April 22, 1970. Priority date of this right is July 5, 1893. This filed right is for 100 miners inches and was used on a maximum of about 60 acres by the objector's grandfather. The objector now irrigates only about 20 to 30 acres. The objector has other filed water rights but not from the source of Fish Creek. There are several springs above the objector's land, but below the proposed diversion.

4. The objector indicated that he was concerned about preserving the natural ecology of the Valley particularly the fish life. No conclusive evidence was offered to indicate that the proposed diversion would in fact adversely affect the fish life.

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5. The objector was concerned that the dam be safely constructed in accordance with plans drawn up by a competent engineer so as to minimize the danger of the dam giving way. He is particularly concerned with the period of the high waters of the Spring runoff, when the water is often up to the foundation of his house, and the addition of 20 A.F. of reservoir water to the already high waters would possibly cause a flood which would destroy his buildings.

Testimony indicated that the applicant does intend to build the dam according to plans drawn up by an A.S.C.S. engineer, and that he has no intention of constructing an unsafe structure. The application states that the surface waters of Fish Creek will be diked out of the reservoir and that the high waters of the Spring runoff will not enter the reservoir and will not increase the burden upon the dam.

PROPOSED CONCLUSIONS OF LAW

1. The objector does have an apparent prior existing right to the surface waters of Fish Creek.
2. The six springs which are the source of water for the proposed diversion apparently contribute to the flow of the surface water of Fish Creek.
3. Testimony tended to show that the proposed reservoir will not unreasonably adversely affect the objector's existing water rights.
4. Without ruling on the power of this Hearing Examiner to deny an application on the grounds of upsetting the Ecology, it is hereby ruled (arguendo) that the evidence of damage to the ecology was inconclusive.
5. If this dam is constructed according to the A.S.C.S. engineering plans, as the Applicant declares, the proposed means of construction will be adequate.

PROPOSED ORDER

The application should be granted subject to:

1. The Objector's apparent existing water right and all other possible prior existing water rights.
2. Receipt of and approval by this Department of the A.S.C.S. plans of the method of construction.
3. Installation of a drainage device of at least 12" diameter at the bottom of the dam.

NOTICE: This is a proposed Order and will become final when accepted by the Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation, Helena, Montana. Any party adversely affected by this proposed order may file exceptions with the Administrator within ten (10) days of receipt of this order. Thereafter opportunity will be provided to file briefs and make oral arguments before the Administrator.

DATED: _____

Dec 19 1974

James A Lewis
JAMES LEWIS
Hearing Examiner

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