

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

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 2679-s40G BY
OLE AND HAROLD JENSEN

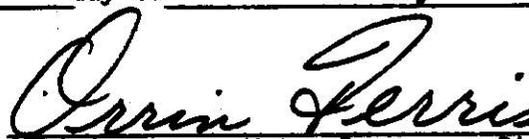
FILMED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
APR 6 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on November 14, 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 Applicants' Application No. 2679-s40G is granted with the condition that a permanent, adequate drainage device, channel, or any other necessary means to satisfy prior existing water rights is installed and when completed, checked by the Department personnel.
2. The Applicants' permit will be revoked unless said permanent drainage device is installed by June 1, 1976, or within an authorized extension of time.
3. The Applicants' permit is subject to all prior existing water rights in the source of supply.

Done this twenty-second day of January, 1976.


Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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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

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BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NUMBER) PROPOSAL FOR DECISION
2679-s40G, OLE & HAROLD JENSEN)

1. WATER RIGHTS, unappropriated water, adverse effect:
Does the bare assertion that the Objectors have not been able to exercise their water rights for the last 2 or 3 years which drought years constitute conclusive evidence that there are no unappropriated waters and that the proposed appropriation will adversely affect prior rights?
2. WATER RIGHTS: Can the Department condition water use permits for stockwater reservoirs subject to installation of a drainage device adequate to protect prior existing rights?
3. ADMINISTRATIVE LAW, WATER RIGHTS: Can the Department revoke an interim permit and deny an Application for Beneficial Water Use Permit because the permittee failed to comply with the conditions of the interim permit?
4. WATER RIGHTS: Adverse Effect: Does equivocal testimony establish the fact that water would not reach the Objectors in any event?

MEMORANDUM

Pursuant to the Montana Water Use and Administrative Procedure Acts a combined hearing on objections to the above-named application and objections to Application Numbers 2364-s40G, 2815-s40G, 2518-s40G, 2517-s40G, 2680-s40G, 2679-s40G,

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was held April 15, 1975 at Chester, Montana.

The Applicant, Harold Jensen, appeared at the hearing and presented testimony. Mr. Mike Burkhartsmeier, Mr. Virgil Jurenka, and Mr. Terry Stevenson all submitted timely objection to the application. Mr. Burkhartsmeier, and Mr. Jurenka appeared at the hearing and presented testimony. All the objectors were represented by counsel, Mr. John Warner, Esq. of Havre, Montana. Mr. Warner presented testimony on behalf of Stevenson.

Through counsel, Mr. Warner, the objectors offered into evidence a map of the Sage Creek area, a copy of a District Court complaint, and 4 lists of notices of appropriation of water right appurtenant to the objectors property. These were marked as objector's Exhibits 1 through 6 and received into evidence without objection.

On July 5, 1974 the Applicant submitted application Number 2679-s40G with the Department seeking to appropriate 2 acre-feet per annum from an unnamed tributary of Laird Creek a tributary of Big Sage Creek in Liberty County, Montana. The water is to be impounded in a 3-acre-foot reservoir on said unnamed tributary at a point in the SE 1/4 of Section 35, T. 37 N., R. 5 E., M.P.M., and used for stockwatering purposes from January 1 to December 31, inclusive, of each year. The application states that the dam and reservoir will be designed by the Soil Conservation Service. The reservoir will serve 80 head of cattle.

On August 13, 1974 the Department issued an Interim Permit Number 2679-s40G based on this application number 2679-s40G.

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On March 12, 1975 Mr. Terry Stevenson submitted timely objection to the application. On March 3, 1975 Mr. Mike Burkhartsmeier submitted timely objection to the application. On March 14, 1975 Mr. Virgil Jurenka submitted timely objection to the application. All of the above objections are on the grounds that there are no unappropriated waters in the proposed source of supply and that the proposed appropriation will adversely affect the objectors prior existing water rights from the source of Sage Creek.

The applicant, Mr. Harold Jensen, testified that, pursuant to his interim permit, he has partially constructed a pit of approximately 3-acre-foot capacity in the SE 1/4 SW 1/4 NW 1/4 of Section 35 T. 37 N., R. SE. Mr. Jensen continued that at a depth of approximately 5 feet he hit groundwater, and thought he could develop this into a good source of stockwater. The pit does impound some surface water which would eventually, if unobstructed, flow into Laird Creek and then into Big Sage Creek.

Mr. Mike Burkhartsmeier testified that he has water rights from Sage Creek as evidenced by the list of notices of appropriation of water introduced as objectors' exhibit number 4. He owns 4800 acres adjacent to Sage Creek. He has a reservoir on Sage Creek which covers 350 surface acres. He uses the water for stockwater and he makes hay on the edge of this reservoir. The reservoir is equipped with a large pipe which he uses to flood 84 acres behind a large dike. He irrigates another 45 acres with small ditches.

He raises crested wheat grass and native blue joint on these

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irrigated acres. He has raised up to 140 tons of hay. He usually runs up to 150 head of cattle. In recent years he has not been able to irrigate to the customary full amount.

This reservoir is labeled Magnum Reservoir on the Department's plat map.

In the spring of 1974 the Hutterite Colony released water down to Mr. Burkhartsmeier upon a judge's order.

Mr. Burkhartsmeier thinks that the recent water appropriations upstream have dried up Sage Creek and prevented him from exercising his water rights.

Mr. Maynard Johnson testified that for the last 4 years there has been no runoff and that his reservoirs have been dry.

Mr. Virgil Jurenka testified that, as evidenced by objector's Exhibit Number 3, he uses water from the source of Big Sage Creek for stockwater and irrigation. He has a concrete and rock diversion dam right in the creek bottom from which he diverts water into a reservoir from which he irrigates 98 acres of alfalfa and 55 acres of small grain. He has not been able to irrigate since 1972. He believes that the creek has been dried up because of the drought and also because of other dams constructed upstream. The Department plat map of T. 35 N., R. 9 E., shows Mr. Jurenka's irrigated acreage but does not show his point of diversion. He has seen new dams on the John Duncan property, the Sage Creek Hutterite Colony, the Turner property, and several on side coulees where he didn't know the property owner.

He has not had sufficient water sine 1972. Even before 1972 Mr. Jurenka had been required to respect prior appropriators. Big Sage Creek normally dries up in the fall.

On behalf of Mr. Stevenson, Mr. John Warner testified that Mr. Stevenson claims water rights from the source of Big Sage Creek dating back to 1898 as evidenced by Objector's Exhibit No. 6.

To clarify issues of fact raised at the hearing, the Hearing Examiner requested Department personnel to make a field investigation of the Big Sage Creek area. The personnel made the inspection and prepared a report, copies of which were served on all parties. 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.

PROPOSED FINDINGS OF FACT

1. The Applicant seeks to appropriate 3 acre-feet of water for stockwatering purposes from an intermittant coulee which is tributary to Laird Creek, a tributary of Big Sage Creek.

2. The pit was designed by Soil Conservation Service personnel and was constructed according to the Soil Conservation Service specifications.

3. The pit was constructed pursuant to an interim permit number 2679-s40G issued by the Department on August 13, 1974. Item 12 (2) of this Interim Permit required "the permanent installation of an adequate drainage device, channel or any other necessary means to satisfy existing water rights."

4. The dam is not equipped with any drainage device of any type.

5. There has been a drought and very little runoff in the drainage area serving Big Sage Creek for the last 2 or 3 years.

6. Mr. Virgil Jurenka has an apparent prior existing right to take water from the source of Big Sage Creek for the quantity of his actual beneficial use.

7. Mr. Mike Burkhartsmeier has an apparent prior existing right to take water from the source of Big Sage Creek for the quantity of his actual beneficial use.

8. Mr. Terry Stevenson has an apparent prior existing right to take water from the source of Big Sage Creek for the quantity of his actual beneficial use.

9. The testimony did not establish that the subject water of the application would not reach the objectors in any event.

10. There was no evidence presented showing the streamflow available in Big Sage Creek or the drainage area, precipitation and proportion of runoff serving Big Sage Creek above the objector's point of diversion.

11. The field investigation by Department personnel determined that the objectors and the applicants all had adequate water to fill their diversion works this May of 1975.

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

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 above-mentioned unnamed tributary to Big Sage Creek.

2. In May of 1975 there were unappropriated waters in Big Sage Creek and its tributaries.

3. Conditioning the permit subject to prior existing rights and requiring installation of an adequate drainage device will protect prior existing rights.

4. The means of construction are not adequate for lack of a drainage device.

5. The proposed use is a beneficial use. Stockwater is a beneficial use. From the foregoing Proposed Findings of Fact and Conclusions of Law, the Hearing Examiner hereby makes the following Proposed Order.

PROPOSED ORDER

1. That the Applicant's permit not be approved until the permanent installation of an adequate drainage device, channel, or any other necessary means to satisfy existing water rights is completed and checked by the Department personnel.

2. That the Applicant's application be denied unless said drainage device is installed by June 1, 1976.

NOTICE

This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department and with opposing parties within (10) days of receipt of same.

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