

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 2841-s40G BY
ELWIN STANBERRY

FILMED
APR } 1976

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on March 30, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

The Application for Beneficial Water Use Permit No. 2841-s40G by Elwin Stanberry is hereby denied.

Done this 23th day of April, 1976.

Erwin Harris

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 # 2841

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 2841-s40G BY ELWIN STANBERRY)

Pursuant to the Montana Water Use Act and Administrative Procedures Act, after due notice, a hearing on objections to the above-named application was held on October 22, 1975 at Chester, Montana. The Applicant, Mr. Elwin R. Stanberry of Rudyard, Montana, appeared at the hearing and presented testimony on behalf of his application.

The following filed with the Department timely objections to the above application: Mr. William Erbe of the Montana Department of State Lands; Mr. Arthur Rambo, Gildford, Mt.; Mr. Terry Stevenson, Hingham, Mt.; Mr. Virgil Jurenka, Hingham, Mt.; and Mr. Mike Burkhartsmeier, Hingham, Mt.

Mr. Randall Biehl appeared at the hearing on behalf of the Objector of the Department of State Lands. The Objectors, Terry Stevenson, Virgil Jurenka and Mike Burkhartsmeier appeared and were represented by Counsel, Mr. John Warner of Havre. Mr. Arthur Rambo did not appear personally but was represented at the hearing by Counsel, Mr. Warner.

As required by law, the Hearing Examiner hereby makes the

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following Proposed Findings of Fact, Conclusions of Law and Order:

PROPOSED FINDINGS OF FACT

1. On July 8, 1974 at 1:30 p.m., the Applicant submitted to the Department an Application for Beneficial Water Use Permit seeking to appropriate 31 acre-feet of water from an unnamed tributary of Sage Creek in Hill County, Montana. The water is to be impounded in a 31-acre-foot reservoir on said unnamed tributary at a point in the SW1/4 NW1/4 SW1/4 of Section 14, Township 36 North, Range 8 East, M.P.M., and used for wildlife and stockwatering from January 1 to December 1, inclusive, of each year.

2. The site of the proposed application is about five miles from the main channel of Sage Creek. There are three reservoirs between the site and the mouth of the proposed unnamed tributary with Sage Creek.

3. From testimony received from the Applicant, he has a reservoir and dam upstream about 1/2 to 3/4 mile from his proposed reservoir and dam under this application. This reservoir was constructed in about 1954 or 1955.

4. The Applicant testified that the dam would have a gate in the bottom and thus could be drained.

5. While the intended use of the dam is for wildlife and stockwatering purposes, the Applicant testified that his livestock would have no trouble watering at his existing dam and reservoir.

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6. The Objector, Burkhartsmeier, Rambo, Stevenson, and Jurenka, through their counsel, submitted six exhibits. Without objection the exhibits were received into evidence as Objectors' Exhibits Nos. 1 - 6. Objectors' Exhibit No. 1 is a map of the Sage Creek drainage showing the location of the proposed application, the land of each of the Objectors as well as the location of other users and applications in the basin. Exhibit No. 2 is the Complaint filed by the Objectors in the twelfth Judicial District against the Sage Creek Colony. It also details the water rights claimed by each of the Objectors. Exhibits Nos. 3 - 6 are copies of the filings made by the Objectors or their predecessors in interest to the waters of Sage Creek. These filings are also listed in Objectors Exhibit No. 2.

7. The apparent prior rights of the Objectors are listed below:

<u>Date of Appropriation</u>	<u>Amount</u>	<u>Appropriator</u>	<u>Present Holder</u>
6/18/1898	25 cfs	Myron B. Sprague	Burkhartsmeier
6/18/1898	50 cfs	Byron & Bessie Schwartz	Burkhartsmeier and Rambo
7/17/1898	4 cfs	George K. Jackson	Stevenson
8/1/1900	7 cfs	Clinton Sailor	Stevenson
8/1/1900	14 cfs	Stella May Sailor	Stevenson
4/19/1904	5 cfs	Carl W. Shaw	Stevenson
10/1/1904	5 cfs	Benona Sprague	Burkhartsmeier
9/8/1904	25 cfs	Myron B. Sprague	Stevenson and Burkhartsmeier
9/30/1904	15 cfs	John Quackinbusch	Stevenson and Burkhartsmeier

<u>Date of Appropriation</u>	<u>Amount</u>	<u>Appropriator</u>	<u>Present Holder</u>
10/9/1904	20 cfs	Lula Blanch and Mary Louise MacKenzie Stevenson	
5/12/1908		MacKenzie et al	Jurenka
4/27/1910	8 cfs	Bessie E. MacKenzie	Jurenka
11/28/1911	100 cfs	Darwin H. Campbell	Jurenka
4/27/1910	8 cfs	Bessie E. MacKenzie	Jurenka
11/28/1911	100 cfs	Darwin H. Campbell	Jurenka
5/16/1911	5 cfs	Darwin H. Campbell	Jurenka
5/16/1912	5 cfs	Genevieve G. Campbell	Jurenka
5/17/1912	5 cfs	Orville O. Miranda	Jurenka

For purposes of this Order, the listing of rights in the Complaint was used.

8. From Objector's Exhibit No. 2, the Objectors, Burkhartsmeyer, Rambo, Stevenson and Jurenka, have lateral ditches and storage reservoirs which hold in excess of 2,500 acre-feet of water. They have also used since 1898 the waters of Sage Creek for the purposes of irrigating approximately 2,000 acres of land and for stockwatering.

9. The Objector, Mr. Burkhartsmeyer, testified that his downstream reservoir had water in 1971 and had water in most previous years. He further testified that because of the increased number of dams, the reservoir was receiving less and less water in recent years. This same conclusion was reiterated by the Objector, Mr. Rambo.

10. The Objector, Mr. Jurenka, testified that he was receiving far less water than he had in the past. That this was not caused by less waterfall in the Sage Creek basin but rather by an increase in the number of reservoirs upstream

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from his diversion points.

11. The Montana Department of State Lands objection was based on the grounds that the proposed application would interfere with an apparent prior use right to approximately 15-20 acre-feet of water per year for a reservoir about three miles downstream from the proposed site on said unnamed tributary of Sage Creek. The water is used for stockwater, irrigation on 8.4 acres and for wildlife purposes.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provision of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from said unnamed tributary of Sage Creek.
2. There are at no times unappropriated waters in said unnamed tributary of Sage Creek.
3. Valid prior water rights of prior appropriators of water from said unnamed tributary of Sage Creek must, by statute, be protected.
4. The apparent prior rights of the Objectors and other appropriators would be adversely affected if this permit were granted.
5. The proposed means of diversion is adequate.
6. The proposed use of the water constitutes beneficial use.

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7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued.

8. The Application for Beneficial Water Use Permit should not be granted.

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

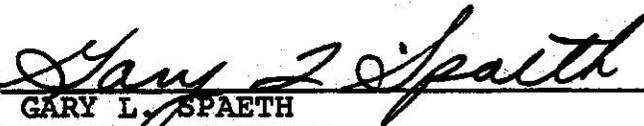
ORDER

1. The Application for Beneficial Water Use Permit No. 2841-s40G by Elwin Stanberry is hereby denied.

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 30th day of March, 1976.


GARY L. SPAETH
HEARING EXAMINER

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