STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NO. 2950-s40E, 2952-s40E, AND 2957-s40E BY UNITED STATES BUREAU OF LAND MANAGEMENT

EXPLANATION OF FINAL ORDER REISSUANCE

FILMED
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This is to inform you that the attached Final Orders concerning the above-named applications are corrected copies of the initial Final Order previously issued, signed, and dated January 5, 1976, by the Administrator, Water Resources Division.

The following words were inadvertently omitted from the initial Final Order and have been inserted on the attached reissued Final Order :

1. In paragraph 1, line 2 and 3, "modified and" were inserted after the word "hereby".

2. In paragraph 2 (Item 1 of the Order), line 6, "stock watering" was inserted after the word "for".

The Proposed Order as entered on October 27, 1975, by the Hearing Examiner was adopted and only modified on the Final Order to the extent that the word "stock watering" was inserted, since it was also inadvertently omitted from the Proposed Order.

Done this 22nd day of January, 1976.

Orrin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 2950

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NUMBERS 2950-s40E, 2951-s40E, 2952-s40E, AND 2957-s40E, UNITED STATES BUREAU OF LAND MANAGEMENT	PROPOSAL FOR DECISION

ISSUES PRESENTED:

1. Does the bare assertion of a prior existing downstream water right constitute conclusive evidence of adverse effect to that water right?

2. Does the Montana Water Use Act enable the Department to require installation of drainage devices on all reservoirs constructed pursuant to a permit issued according to the provisions of the Montana Water Use Act?

MEMORANDUM

The Applicant, United States Bureau of Land Management, on July 15, 1974, submitted the above-mentioned applications to the Department seeking to change their Application No. 2950-s40E to appropriate 1.5 acre-feet per annum of water, to be impounded in a pit reservoir on an unnamed tributary of Dog Creek, at a point in the NE¼ of the SW¼ of the NE¼ of Section 24, Township 24 N., Range 31 E., M.P.M. By Application No. 2950-s40E, 2 acre-feet per annum of water can be impounded in a pit reservoir in an unnamed tributary of Dog Creek, at a point in the NW¼ of the NE¼ of the SE¼ of Section 19, Township 24 N., R. 32 E., M.P.M. By Application Number 2952-s40E,

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seeking to appropriate 13.5 acre-feet per annum of water to be impounded in a reservoir on an unnamed tributary of Dog Creek, at a point in the SW 1/4 of the NW 1/4 of the NW 1/4 of Section 29, Township 24 N., Range 32 E., MPM and by Application Number 2957-s40E seeking to appropriate 3 acre-feet per annum of water to be impounded in a pit reservoir on an unnamed tributary of Dog Creek at a point in the SE 1/4 of the SE 1/4 of the SE 1/4 of Section 12, Township 24 N., Range 31 E., MPM. The water of all these reservoirs is to be used for multiple uses from January 1 to December 31, inclusive, of each years.

Pursuant to the provisions of the Montana Water Use Act, the Department caused a public notice to water users to be published in the Phillips County News, Malta, Montana, on February 20, February 27, and March 6, 1975. Notice so published required that objections to the applications must have been filed with the Department on or before April 14, 1975. As a result of this public notice to water users, Mr. Ervin J. Crowder submitted timely objections to all of the applications with the Department.

As required by the Montana Water Use Act and the Montana Administrative Procedures Act, a hearing on these objections to the above-named applications of the United States Bureau of Land Management was held on June 11, 1975, in Malta, Montana, before James A. Lewis, Hearing Examiner. The applicant was represented at the hearing by Charles Dahlen and by counsel Mr. Tom Gai, Esq., of Billings, Montana. Mr. Ervin J. Crowder appeared at the hearing and presented testimony in support of his objection. The applicant through counsel offered into evidence a map showing

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the drainage area of Dog Creek, a map showing the range-management plan of the applicant in the Dog Creek area, the annual water requirement of the area, and an annual precipitation chart. These four items were marked as"Applicant's Exhibits 1, 2, 3, and 4," and were received into evidence without objection. After the hearing, the Hearing Examiner, accompanied by John Serquina, Water Rights Analyst for the Department, conducted a field inspection of three sites.

Mr. Charles Dahlen explained for the applicant that the drainage area serving the reservoir contemplated by application number 2950 would be 39.028 acres; that the drainage area serving application 2951 would be comprised of 277.218 acres; that the drainage area serving reservoir application 2952 would be comprised of 85.128 acres; and that the drainage area serving application 2957 would be comprised of 6.150 acres, for a total of 407.524 acres. Mr. Dahlen continued that the average annual precipitation is measured at the Content weather station, and that the nearest available record is 12.152 inches per year. He testified that no excess runoff would result if there were fewer than 6.3 inches of annual precipitation. This would mean that the average annual excess runoff would be 5.8 inches per acre. The drainage area involved in these four reservoirs serving the Dog Creek drainage is approximately 7,784 acres in the entire Dog Creek drainage area above Mr. Crowder's diversion dam. Mr. Dahlen continued that the entire Dog Creek drainage area above the Grimsley and Crowder diversion would produce 552 acre-feet of water annually. Mr. Dahlen continued that Mr. Crowder's 160 acres of irrigated alfalfa would require 158 acre-feet of water

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annually, for a total of 395 acre-feet total annual requirement for all diversion works in the Dog Creek drainage. In these calculations Mr. Dahlen calculates that there are 157 acre-feet in excess of the annual requirements by Mr. Crowder and Mr. Grimsley. Therefore, there are 157 acre-feet of unappropriated water produced in the Dog Creek drainage area.

Objector Mr. Ervin J. Crowder testified that in addition to the 160 acres of irrigated alfalfa as calculated by the BLM's witness, Mr. Charles Dahlen, that he, Mr. Crowder, has the right to divert 150 acre-feet per annum by virtue of permit number 95-s40E, issued by the Montana Department of Natural Resources and Conservation on October 3, 1974.

As required by law, the Hearing Examiner hereby makes the following proposed findings of fact and conclusions of law and order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation:

1. By the above-mentioned four subject applications, the applicant intends to impound 19 acre-feet of water in four reservoirs serving the Dog Creek drainage area. The water is to be used for multiple uses, including stock water from January 1 to December 31, inclusive, of each year.

2. Objector, Ervin J. Crowder, has two apparent prior existing water rights. One right, which has a priority date prior to 1968, is for the irrigation of 160 acres of alfalfa by means of the Crowder dikes as shown on page 18 of the Phillips County Resources Survey published in 1968. The other is an apparent prior existing water right for 150 acre-feet per annum to irrigate 70 acres in the

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NW 1/4 of Section 22, Township 24 N., Range 13 E., M.P.M., Phillips County, Montana, containing a total of 70 acres, more or less. This right has a priority date of October 3, 1974, by virtue of permit number 95-s40E issued by the Department of Natural Resources and Conservation.

3. In an average year there are unappropriated waters in the proposed source of supply, the Dog Creek drainage area, sufficient to satisfy all the applicant's projects and all prior existing water rights.

4. The reservoir constructed pursuant to application number 2952 has been constructed without a drainage device.

From the foregoing proposed findings of fact, the following proposed conclusions of law are hereby made:

1. Permit is required by the BLM to appropriate water from unnamed tributaries to Dog Creek in Phillips County, Montana.

2. The evidence did not establish conclusively that the proposed appropriations would adversely affect the objector's prior existing water rights. Rather, the evidence tended to show that the proposed appropriations would in most years not adversely affect the objector's prior existing water rights.

3. Issuance of this permit subject to prior existing water righrs and requiring installation of a drainage device in all reservoirs to adequately protect those prior existing water rights will protect those rights.

4. The proposed means of diversion and construction are adequate except that they lack installation of an adequate drainage device to protect prior existing water rights.

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5. The proposed uses of water for stock water, wildlife, and oil and gas water well drilling are beneficial uses.

From the foregoing proposed findings of fact and conclusions of law, the Hearings Examiner hereby makes the following proposed order:

PROPOSED ORDER

1. The applicant's application number 2950-s40E be granted allowing the appropriation of 1.5 acre-feet of water per annum from an unnamed tributary of Dog Creek in Phillips County, Montana. The water is to be impounded in a 1.5 acre-foot reservoir on said unnamed tributary at a point in the NE1/4 of the SW1/4 of the NE1/4 of Section 24, Township 24N, Range 31E., M.P.M., and used for water fowl, wildlife and oil and gas well drilling from May 1 to December 31, inclusive of each year.

2. Applicant's application number 2951-s40E be granted allowing the appropriation of 2 acre-feet of water per annum be impounded in a pit reservoir on an unnamed tributary of Dog Creek at a point in the NW1/4 of the NE1/4 of the SE1/4 of Section 19, Township 24N,, Range 32E., M.P.M.

3. That the applicant's application 2952-s40E be granted allowing the appropriation of 13.5 acre-feet of water per annum to be impounded in a reservoir on an unnamed tributary of Dog Creek at a point in the SW1/4 of the NW1/4 of the NW1/4 of Section 29, Township 24N., Range 32E., M.P.M.

4. That the applicant's application 2957-s40E be granted

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allowing the appropriation of 3 acre-feet of water per annum to be impounded in a pit reservoir on an unnamed tributary of Dog Creek at a point in the SE1/4 of the SE1/4 of the SE1/4 of Section 12, Township 24N., Range 31E., M.P.M.

5. That all of the above reservoirs be equipped by June 1, 1976, with a drainage device, bypass or other means adequate to release water to protect prior existing water rights.

6. That all of the above-named reservoirs be subject to all other prior existing water rights from the source of Dog Creek.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division, 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 the Proposed Order. 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 27th day of October, 1975.

James A Lenon

HEARING EXAMINER

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