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

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NO. 2948-S40E AND 2953-S40E, UNITED STATES BUREAU OF LAND MANAGEMENT.	)))))	PROPOSAL FOR DECISION

ISSUES

1. Does a bare showing of a prior existing water right from the same source downstream from the proposed point of diversion, constitute conclusive evidence of adverse effect.

2. Shall the Department require installation of a drainage device to protect prior existing water rights.

MEMORANDUM

Pursuant to the Montana Water Use and Administrative Procedure Acts, a hearing on objections to the above-named application was held June 11, 1975, at Malta, Montana. Mr. Charles S. Dahlen, Resource Manager of the Malta office of the Bureau of Land Management, appeared at the hearing and presented testimony on behalf of the applicant. The applicant was represented by counsel, Mr. Tom Gai, Esq., of Billings, Montana. Mr. Ervin J. Crowder and Mr. Charles G. Barnard filed timely objections to the applications. Mr. Ervin J. Crowder appeared at the hearing and presented testimony in support of his objection. Mr. Barnard did not appear nor did he send a representative.

The Applicant, through Counsel, offered into evidence a map showing the drainage area of the Dog Creek area, a map showing the

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range management plan of the Applicant, an annual water requirement of the area, and an annual-precipitation chart, measured at the Content Weather Station. These four items were marked as Applicant's Exhibit 1, 2, 3, and 4, and 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, the subject of the combined hearing on the seven reservoirs in the immediate vicinity. As a result of this inspection, it was determined that Application No. 2953-S40E does not have a drainage device. On July 15, 1974, the applicant submitted Application No. 2948-S40E, seeking to appropriate 2.0 acre-feet of water per annum from an unnamed tributary of Telegraph Creek, to be impounded in a pit-type reservoir in the SE¼ SE¼ NE¼ of Section 23, Township 24N., Range 31E, in Phillips County, Montana. The water is to be used for stock water, waterfowl, wildlife, and oil and gas well drilling. On February 27, 1975, Mr. Ervin J. Crowder submitted a timely objection to the Application to the Department on the grounds that the proposed appropriation will deprive his irrigation system of needed water. On April 10, 1975, Mr. Charles Barnard submitted a timely objection to the Application to the Department on the grounds that in times of small runoff, these proposed impoundments would deny water to legally filed prior water rights. Mr. Charles S. Dahlen testified for the Applicant that the reservoir proposed in Application No. 2953-S40E would be served by a 9.838-acre-area drainage and the reservoir proposed in Application No. 2948-S40E would be served by a 99.272-acre-drainage area. The Applicant testified that the average annual precipitation as measured at the Content

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Weather Station, the nearest available records, is 12.125 inches per year. He testified that no excess runoff would result with 6.3 inches of annual precipitation. This would mean that the average annual excess runoff would be .8 inches per acre. The drainage area involved would produce approximately 632.84 acre-inches per annum. Mr. Tom Gai stated that the Bureau of Land Management does not believe that the Department has jurisdiction of water rising on Bureau of Land Management land and that they follow the application and hearing procedure only in the spirit of cooperation.

Objector, Mr. Ervin J. Crowder testified that he has a permit to appropriate water, Permit No. 986-S40E, with a priority date for November 16, 1973. The source and point of diversion in this appropriation shall be ground water by means of a pit at a point in the SW¼ NW¼ NE¼ of Section 27, Township 24 N., Range 31 E., M.P.M., Phillips County, Montana. The water shall be used for irrigation purposes from April 1 to September 30, inclusive, of each year on 160 acres in the S½ S½ of Section 22, and 160 acres in the N½ N½ of Section 27, all in Township 24 N., Range 31 E., M.P.M., Phillips County, Montana, and containing a total of 320 acres, more or less. The waters appropriated shall be diverted at a rate not to exceed 1.11 cubic feet per second or 500 gallons per minute and a quantity of 500 acre-feet of water per annum. The diversion and distribution works for this appropriation shall be completed and water shall be applied to beneficial use as specified above on or before October 1, 1975, or within any authorized extension of time. The Notice of Completion of Surface Water Development, Form No. 602, shall be filed on or before December 1, 1975. This permit is issued

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subject to the condition that the Applicant's pit will not exceed seven feet in depth. The applicant testified that this pit is actually served by the waters of Telegraph Creek, the creek to which the subject applications are tributary. The Hearing Examiner inspected the size of the pit and determined that there are no steps towards construction of this proposed appropriation as of June, 1975. As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact to the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation of the State of Montana.

PROPOSED FINDINGS OF FACT

1. The pit proposed in Application No. 2948-S40E has been constructed without installation of a drainage device, bypass, or other suitable means to protect prior existing water rights. The reservoir proposed in Application No. 2953-S40E has been constructed without any drainage device installed in the dam, to protect prior existing water rights.

2. There was no evidence presented indicating the area of drainage serving the objectors' pit from the course of Telegraph Creek or the amount of drainage produced by the total drainage area serving the pit in Telegraph Creek, or the proportion represented by the Applicant's proposed appropriations.

3. Mr. Crowder does have a prior existing water right to irrigate 320 acres at a rate not to exceed 500 gallons per minute. From the foregoing Proposed Findings of Fact, the Hearing Examiner hereby makes the following Proposed Conclusions of Law:

PROPOSED CONCLUSIONS OF LAW

1. A permit is required by the U.S. Bureau of Land Management to appropriate water from an unnamed tributary to Telegraph Creek

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in Phillips County, Montana.

2. Evidence did not establish conclusively that the proposed appropriations would adversely affect the Objector's prior existing water right.

3. Issuance of this permit subject to prior existing water rights and requiring installation of a drainage device to adequately protect those prior existing water rights will protect those prior existing water rights. The proposed reservoirs and construction are adequate, except that they lack installation of an adequate drainage device to protect prior existing water rights. The proposed uses of water are for stockwater, wildlife, and oil and gas water well drilling, and is a beneficial use.

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

PROPOSED ORDER

1. That the Applicant's Application No. 2948-S40E be granted, allowing the appropriation of 2 acre-feet per annum of water by means of a pit reservoir located in the SE¼ SE¼ NE¼ of Section 23, Township 24 N., Range 31 E., Phillips County, Montana. Said water to be appropriated from an unnamed tributary of Telegraph Creek.

2. That the Applicant's Application No. 2953-S40E be approved allowing the appropriation of 3 acre-feet per annum of water from an unnamed tributary of Telegraph Creek to be appropriated in a pit-type reservoir in the NE¼ NE¼ NE¼ of Section 29, Township 24, Range 32 E., Phillips County, Montana.

3. That both of the said pit reservoirs be equipped with a drainage device, bypass, or other means adequate to protect prior existing water rights; said drainage device, bypass, or other means adequate to protect the prior existing water rights be installed

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prior to June 1, 1976.

4. That both of these pit reservoirs be subject to all other prior existing water rights from the source of Telegraph 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 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 argements before the Administrator of the Water Resources Division.

DATED this 14 day of October, 1975.

James A. Lewis
Hearing Examiner
By: ABC

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