

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
3343-s40J BY ROBERT SIVERTSEN AND)
DOUGHTEN FARMS)

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedures Act, after due notice a hearing on objections to the above-named application was held on Thursday, July 1, 1976, at approximately 1:15 p.m., in the Courtroom of the Blaine County Courthouse, at Chinook, Montana, Daniel G. Diemert, hearing examiner, presiding.

David Doughten, representing Doughten Farms, and Robert Sivertsen were present.

Appearing in opposition to the Application were Robert Green and Gordon Aycock, representing the U.S. Bureau of Reclamation; Harold Vosen, representing the U.S. Bureau of Land Management; Ted Ereaux, representing the Malta Irrigation District; and Wallace Harburton and Bud Corrigan, representing Matheson Ditch Company; and Robert G. Munson.

Not present at the hearing but filing objections were the Fort Belknap Indian Community, George Vandeven, and Solicitors Office of the U.S. Department of the Interior.

Howard Reinhardt appeared on behalf of the Department of Natural Resources and Conservation.

NOTICE

At the hearing, the Applicants asked that the application be modified at Item 6 to reflect their intent that although the proposed reservoir has a capacity of 3,000 acre-feet and they only intend to use approximately 1,900 acre-feet per annum for irrigation, the remaining 1,200 acre-feet is not intended to be used for livestock and wildlife purposes each year. Rather, the 3,000 acre-feet includes storage water which would be used if a dry year would occur. The request was granted in order to more accurately reflect the intent of the Applicants.

A Proposed Order (Proposal for Decision) dated September 10, 1976, was issued by the hearing examiner, Daniel G. Diemert.

The Proposed Order as issued on September 10, 1976, provided that the Order would not become final until 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 September 21, 1976, the Department received a letter of exception dated September 20, 1976, from E. R. Wilde, acting regional director for the U.S. Bureau of Reclamation, opposing specific items in the Proposal for Decision as entered on September 10, 1976, in the matter of Application No. 3343-s100 by Robert Sivertsen and Doughten Farms. By letter of September 22, 1976, the Department sent a letter to Mr. Wilde informing him of his opportunity to file a brief in support of his exception. On September 30, 1976, the Department received a letter dated September 29 from Mr. McPhail, regional director of the U.S. Bureau of Reclamation, which stated, "We feel our written exception is self-explanatory and we will not be filing a supporting brief. We would like to reserve the right to request an oral hearing in support of our exception, pending our review of any reply to our exception by the applicant."

By letter of October 1, 1976, to Mr. McPhail, the Department acknowledged receipt of his letter of September 29 and advised him that the Applicant would first have an opportunity to reply to the exceptions and briefs and the Bureau would receive a copy of any reply received from the Applicant. At that time the Bureau could decide if in fact they would definitely like to make oral argument in support of its exception here in Helena before the administrator of the Water Resources Division, or if oral argument is not requested, the administrator would prepare and issue a Final Order, based on the complete application file, including the exceptions and any briefs that may be filed.

On September 22, 1976, the Department received a letter of exception dated September 18, 1976, from Raymond J. Knudson on behalf of the Malta Irrigation District, taking exception to the Proposal for Decision as entered on September 10, 1976, by the hearing examiner. By letter of September 24, 1976, to Mr. Knudson, the Department acknowledged receipt of his letter of exception dated September 18, and informed him of the District's opportunity to file a brief in support of its letter of exception to the Proposed Order within fifteen days after receipt of the Department's letter.

On October 26, 1976, the Department sent another letter to Mr. Knudson, pointing out that the fifteen-day time period for filing the brief had expired. The Department requested in writing within five days after receipt of said letter a reply indicating if the Malta Irrigation District wished to make oral argument here in Helena before the Water Resources Division Administrator in support of its filed letter of exception.

By separate letters of January 11, 1977, to David Doughten and Robert Sivertsen, the Department enclosed a copy of Mr. Wilde's letter of January 5 and requested each to review the proposed conditions contained in said letter and respond in writing by indicating if they agreed or disagreed with the proposed conditions.

On January 10, 1977, the Department received a letter from Faye Seel in which she requested an oral argument hearing on the District's exception in Helena, before the Water Resources Division Administrator.

Mr. Sivertsen by letter of February 10, 1977, to the administrator of the Water Resources Division, stated he did not agree to the conditions proposed by the exceptors and requested an oral argument hearing.

By letter of February 16, 1977, to Mr. Sivertsen, the Department acknowledged receipt of his letter of February 10, 1977, and advised him that all the exceptors in this matter would be notified of his request for an oral argument hearing and further, that the application would be forwarded to the administrator for scheduling of said requested oral argument hearing. Copies of this letter were mailed to Faye Seel, David Doughten, E. R. Wilde, and Tom Gai.

The administrator of the Water Resources Division issued on April 6, 1977, a "Notice of Oral Argument Hearing on Exceptions to Proposal for Decision," in the matter of Application for Beneficial Water Use Permit No. 3343-s40J by Robert Sivertsen and Doughten Farms, stating that on Tuesday, April 26, 1977, at 1:30 p.m., an oral argument hearing would be held before the administrator of the Water Resources Division in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing was to hear oral arguments in support of the written exceptions and briefs. If certain parties did not wish to make oral arguments, they were requested to so advise in writing before the hearing of their wish to waive this right. In such case, the briefs would stand as filed. This notice was mailed by certified mail to all parties in this matter, including the original objectors and their attorneys.

On April 13, 1977, the administrator issued a new notice rescheduling the oral argument hearing for Thursday, May 12, 1977, at 1:30 p.m., in the Department Conference Room in Helena, Montana.

The oral argument hearing before the administrator was held in Helena, Montana, on May 12, 1977, in the Department Conference Room for the purpose of hearing oral arguments in support of the objections, exceptions, and briefs filed in this matter.

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The Applicants were represented by Robert Sivertsen who presented testimony in support of the application. The Applicants were not represented by counsel.

Ed Bartlett, attorney for the Field Solicitor, U.S. Department of the Interior, appeared on behalf of the U.S. Bureau of Reclamation and presented oral argument in support of its objections and exceptions. Gordon Aycock also appeared on behalf of the U.S. Bureau of Reclamation.

Raymond Knudson and Ted Ereaux appeared and presented oral argument on behalf of the Malta Irrigation District's objections and exceptions.

Wallace Warburton appeared and presented oral argument on behalf of Matheson Ditch Company.

The hearing was also attended by several Department personnel other than the Water Resources Division Administrator.

The administrator of the Department Water Resources Division hereby makes the following Final Order, based on the hearing Examiner's Proposed Order of September 10, 1976, the application, objections, exceptions, briefs, the testimony of the oral argument hearing held on May 12, 1977, both hearing tape recordings, and all pertinent information and documents filed by parties to this matter, and made a permanent record of the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on September 10, 1976, 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:

FINAL ORDER

1. The Applicants' Provisional Permit No. 3343-s40J is hereby conditionally granted, allowing for the construction and filling of a 3,000-acre-foot reservoir and a withdrawal not to exceed 1,300 acre-feet of water per annum for irrigation from said reservoir on Dry Fork, a tributary of Battle Creek, in Blaine County, Montana, at a point in the S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 34 North, Range 19 East, M.P.M., and used for irrigation on 48 acres in Section 2, 230 acres in Section 3, and 40 acres in Section 10, all in Township 33 North, Range 19 East, and 123 acres in Section 34 and 13 acres in Section 35, all in Township 34 North, Range 19 East, and containing a total of 509 acres, more or less, of new and supplemental irrigation from April 1 to November 1, inclusive, of each year, and for storage and 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.

3. The Provisional Permit is granted subject to any final determination of existing water rights as provided by Montana law.

4. The Provisional Permit is granted subject to prior Indian (Assiniboine and Gros Ventre Indians of the Fort Belknap Reservation) reserved water rights in the source of supply.

5. The issuing of a Provisional Permit by the Department in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

6. The Provisional Permit is granted subject to the right of the Department to revoke the Permit in accordance with Section 89-387, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-393, R.C.M. 1947.

7. It shall be the responsibility of the prior water-right users to notify the Applicants herein when in fact there is insufficient water downstream during the period of appropriation granted the Applicants herein to satisfy both the prior water rights downstream and the water use granted by this Provisional Permit. It shall be the responsibility of the Applicants to cease diverting or impounding water immediately pursuant to this Provisional Permit when there is insufficient water to satisfy prior downstream water-right users and the water use granted by this Provisional Permit. It shall be the responsibility of the parties not to abuse their water rights at the expense of the other.

8. The Provisional Permit is granted subject to the condition that the Applicants must allow the normal flow (outflow from reservoir must equal inflow) of Dry Fork to flow by or through their diversion in order that it may satisfy prior downstream water rights, except during the winter months, or when Dry Fork is at flood stage, or when there are surplus waters in the source of supply, only when by so impounding said granted waters it does not adversely affect prior downstream water-right users.

9. This Provisional Permit is granted subject to the condition that after the final determination of prior existing water rights in the area have been completed, this Permit can be reduced to reflect the Applicants' prior water rights to be intermingled with the project granted herein, so there will be no duplication of water rights.

10. The Applicants herein shall install and maintain adequate measuring devices at the dam outlet as well as on the reservoir to record the amounts of water released from the reservoir and the level at which the reservoir exists at

any given time. Further, the Applicants shall keep a record of the periods of diversion and impoundment as well as the releases. Such records shall be presented to the Department by the Applicants upon request by the Department.

11. The Applicants shall, prior to construction, present to the Department for inspection and approval the project engineering design and specifications. The size of the reservoir release pipe must also be approved by the Department, as based on hydrology operation and design. All engineering recommendations made by the Department shall be followed by the Applicants. Further, the design and construction of the project shall be in accordance with all applicable local Soil Conservation Service specifications, and shall also be subject to scrutiny in accordance with Section 89-702, et seq., R.C.M. 1947, which requires that dams be constructed in a secure manner.

12. The above conditions to the granting of this Provisional Permit shall also hold and be in full effect for any predecessor in interest to the Applicants herein, in the exercise of said Provisional Permit granted herein.

RECOMMENDATION

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical and keep a log of records of water beneficially used in order to provide proof of their water rights, should the need arise.

Done this 30th day of August, 1977.

Orin Ferris
Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 3343

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 3343-s40J BY)
ROBERT SIVERTSEN AND DOUGHTEN)
FARMS)

PROPOSAL FOR DECISION

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 Thursday, July 1, 1976 at approximately 1:15 p.m. in the Courtroom of the Blaine County Courthouse at Chinook, Montana, Daniel G. Diemert, Hearing Examiner, presiding.

David Doughten, representing Doughten Farms, and Robert Sivertsen were present.

Appearing in opposition to the Application were Robert Green and Gordon Aycock, representing the U. S. Bureau of Reclamation, Harold Vosen, representing the U. S. Bureau of Land Management, Ted Ereaux, representing the Malta Irrigation District, Wallace Warburton and Bud Corrigan, representing Matheson Ditch Company and Robert G. Munson.

Not present at the hearing, but filing objections were the Fort Belknap Indian Community, George Vandeven, and Solicitor's Office of the U. S. Department of the Interior.

Mr. Harold Reinhardt appeared on behalf of the Department

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of Natural Resources and Conservation.

MOTION

At the hearing, the Applicants asked that the application be modified at Item 6 to reflect their intent, that although the proposed reservoir has a capacity of 3,000 acre-feet and they only intend to use approximately 1800 acre-feet per annum for irrigation, the remaining 1200 acre-feet is not intended to be used for livestock and wildlife purposes each year. Rather the 3,000 acre-feet includes storage water which would be used if a dry year would occur. The request was granted in order to more accurately reflect the intent of the Applicants.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On August 16, 1974, the Department of Natural Resources and Conservation received Application for Beneficial Water Use Permit No. 3343-s40J from Robert Sivertsen and Doughten Farms seeking to appropriate 1,800 acre-feet of water per year for irrigation and 1,200 acre-feet per year for wildlife and stockwatering, constituting a total not to exceed 3,000 acre-feet from Dry Fork, a tributary of Battle Creek, in Blaine County, Montana, to be impounded in a new 3,000 acre-foot reservoir on Dry Fork, at a point in the S1/2 S1/2 SE1/4 NE1/4 of Section 34, Township 34 North,

Range 19 East, M.P.M., and used for irrigation on 48 acres in Section 2, 280 acres in Section 3, and 40 acres in Section 10, all in Township 35 North, Range 19 East; and 128 acres in Section 34 and 13 acres in Section 35 all in Township 34 North, Range 19 East, and containing a total of 509 acres, more or less, of new and supplemental irrigation from April 1 to November 1, inclusive, of each year, and for wildlife and stockwatering from January 1 to December 31, inclusive, of each year.

2. The Department received objections from the Office of the Solicitor of the United States Department of the Interior on March 22, 1976; Robert G. Munson on March 16, 1976; the Bureau of Reclamation of the United States Department of Interior on March 25, 1976; the Fort Belknap Indian Community on March 29, 1976, George VandeVen on March 31, 1976; Malta Irrigation District on April 6, 1976; Matheson Ditch Company on April 12, 1976; and the Bureau of Land Management of the United States Department of Interior on April 15, 1976.

3. Mr. Sivertsen has owned his present farm for about 5 years and now irrigates with floodwaters from Dry Fork. In his opinion there is a lot of runoff which goes out of the area and eventually out of the State of Montana without being appropriated and in addition this runoff causes a lot of erosion.

4. Mr. Doughten now has 250 acres under flood irrigation with an extremely early water right to 500-600 acre-feet of

water per annum. He pointed out that the project is not intended to be filled completely in its first year but only with excess runoff. Although he has worked closely with the ASCS office in the area, the definite construction plans of the dam are not yet under way. The ASCS office has told him that in constructing the proposed dam he will have to core to about 12 feet.

5. Gordon Aycock has been a hydrologist for the Bureau of Reclamation for 5 years in the Billings office. The Bureau of Reclamation has developed the Milk River and now provides irrigation from Havre past Glasgow. In 1918 the Bureau of Reclamation constructed a canal to supplement the Milk River with water from the St. Mary River and today approximately 1/3 of the Milk River is water from St. Mary River. Mr. Aycock introduced a document which was labeled Objectors Bureau of Reclamation Exhibit No. 1. It stated that the United States and Canada would divide equally all of the water in the Milk above the first 666 cfs. In addition to the canal the Bureau of Reclamation has also constructed Fresno Reservoir and Nelson Reservoir which have active storage capacity of 127,000 acre-feet of water and 66,000 acre-feet of water respectively. He introduced a chart which was labeled Bureau of Reclamation Exhibit No. 2 which indicated that the Bureau of Reclamation has spilled at Fresno Dam in seven of the years since January, 1966 through December, 1975. It is his opinion that there is

excess water in the Milk River drainage only at times when the Bureau of Reclamation is spilling at Fresno Dam. The Bureau of Reclamation has placed a moratorium on further irrigation from its projects on the Milk River. Mr. Aycock stated that the Bureau of Reclamation would have no objection to appropriations of water during the winter months. He requested that should a Provisional Permit be granted that it contain conditions similar to those included on Application Nos. 4840-s40J, 4841-s40J, and 4842-s40J, all being appropriations from either the Milk or its tributaries.

7. Mr. Harold Vosen of the Bureau of Land Management feels that an appropriation of 3,000 acre-feet in one year would be detrimental to prior water right holders on the Milk River, but if the Applicants only appropriate surplus waters he feels that prior water rights can be protected.

8. Mr. Wallace Warburton of the Matheson Ditch Company feels the application should not be granted because the dam has not been shown to be safe and in his estimation waters now serving prior rights would be appropriated in the Applicants attempt to appropriate only surplus waters.

9. Mr. Robert G. Munson did not object to the application as long as the reservoir would not back water up onto his land.

10. From the above 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 Dry Fork, a tributary of Battle Creek.
2. During the winter months and flood stage there are unappropriated waters in the source of supply available for appropriation by the Applicants for the purposes requested herein.
3. Pursuant to section 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.
4. The rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.
5. The proposed means of diversion appears to be adequate, however, it will be incumbent upon the Applicants to install a pipe or culvert in the proposed dam of sufficient size to allow prior appropriators to satisfy their rights if they would have been able to satisfy those rights had the proposed project not been constructed.
6. The proposed use of water constitutes a beneficial use.
7. The issuing of a Provisional Permit by the Department in no way reduces the Applicants' liability for damages caused by the appropriation, nor does the Department in issuing the Provisional Permit in any way acknowledge liability

for damage caused by the Applicants' exercise of their Provisional Permits.

8. The Applicants may fill the proposed reservoir only during the winter months, when Dry Fork is at flood stage or when the Bureau of Reclamation is spilling water at Fresno Dam.

9. Montana Water law sanctions a single filling of a reservoir..."in any year to store and use in that year and succeeding years what he has a right to use..." FEDERAL LAND BANK v. MORRIS 112 Mont. 445, 456.

10. A Provisional Permit on the tributaries of the Milk River should be issued subject to all prior Indian (Assiniboine and Gros Ventre Indians in the Fort Belknap Reservation) reserved water rights in the source of supply.

11. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

12. Nothing decided herein has bearing upon the status of water rights claimed by the Applicants, nor the Objectors other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed water rights of any other party except in relation to those rights herein applied for to the extent necessary to reach a conclusion herein.

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

PROPOSED ORDER

1. Subject to the conditions cited below the Applicants Provisional Permit No. 3343-s40J by Robert Sivertsen and Doughten Farms is hereby granted allowing for the construction and filling of a 3000 acre-foot reservoir and a withdrawal not to exceed 1800 acre-feet of water per annum for irrigation from said reservoir on Dry Fork, a tributary of Battle Creek, in Blaine County, Montana, at a point in the S1/2 S1/2 SE1/4 NE1/4 of Section 34, Township 34 North, Range 19 East, M.P.M., and used for irrigation on 48 acres in Section 2, 280 acres in Section 3, and 40 acres in Section 10, all in Township 33 North, Range 19 East, and 128 acres in Section 34 and 13 acres in Section 35, all in Township 34 North, Range 19 East, and containing a total of 509 acres, more or less, of new and supplemental irrigation from April 1 to November 1, inclusive, of each year, and for storage and stockwatering 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.

3. The Provisional Permit is granted subject to any final determination of existing water rights as provided by Montana law.

4. The Provisional Permit is granted subject to the permanent installation of an adequate device, channel, or any other necessary means to satisfy existing water rights.

5. The Provisional Permit is granted subject to prior Indian (Assiniboine and Gros Ventre Indians of the Fort

Belknap Reservation) reserved water rights in the source of supply.

6. The Provisional Permit is granted subject to the condition that except during the winter months, when Dry Fork is at flood stage, or when there are surplus waters in the source of supply, the Applicants must allow the normal flow of Dry Fork to flow by their diversion in order that it may satisfy prior existing water rights.

7. The issuing of a Provisional Permit by the Department in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permit, nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

ORDER

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 this 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 10th day of September, 1976.

Daniel G. Diemert

DANIEL G. DIEMERT
HEARING EXAMINER