

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

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 3344-s40R, BY
SMITH FARMS, INC.

FILMED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

APR 7 1976

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on January 5, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

1. The Applicant's Provisional Permit No. 3344-s40R is granted allowing the appropriation of 2.22 cubic feet per second or 1,000 gallons per minute of water and not to exceed 80 acre-feet per annum from Sand Creek, a tributary of Medicine Lake, in Sheridan County, Montana. The water is to be diverted from Sand Creek at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, Township 31 North, Range 58 East, M.P.M., and used for irrigation on a total of 80 acres, more or less, in the NE $\frac{1}{4}$ of Section 5, Township 31 North, Range 58 East, from April 1 to October 1, inclusive, of each year.

2. The Applicant's permit is granted subject to the following conditions:

- a. That when water is available, sufficient quantities shall be released by the Applicant to insure that the water in the stock-watering locations of the objectors does not become stagnant;
- b. That the Applicant shall not pump water when there is less than 75 cubic feet per second of water flowing into the Medicine Lake National Wildlife Refuge;

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c. That the Applicant shall not be able to pump at such times when the streamflows are insufficient to provide water for the objectors.

3. The Provisional Permit No. 3344-s40R is granted subject to all prior existing water rights in Sand Creek.

4. This order may be subject to modification if it is found in a later study that the U.S. Fish and Wildlife Service's beneficial-use requirements are not 75 cubic feet per second.

Done this twenty-second day of January 1976.

Orin Ferris
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

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE) PROPOSAL FOR DECISION
PERMIT NO. 3344-s40R by)
SMITH FARMS, INC.)

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing on objections to the above-named Application was held on September 22, 1975, at Plentywood, Montana. Mr. Ed Smith, President of Smith Farms, Inc., appeared at the hearing and presented testimony on behalf of the Applicant. Mr. Loren Henke, Mrs. Burnette Henke, Mr. Jorgen Christensen, and the U.S. Fish and Wildlife Service through its Regional Director, Charles M. Loveless, filed timely objections to the application. Mr. Henke, Ms. Henke, and Mr. Christensen appeared at the hearing and presented testimony in support of their objections. The U.S. Fish and Wildlife Service was represented at the hearing by counsel, Mr. Thomas Gai. Mr. Richard Watson, Department Field Manager from Glasgow, presented testimony as to what he observed during his field investigation of September 11, 1975.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, and Conclusions of Law, and Order.

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PROPOSED FINDINGS OF FACT

1. On August 16, 1974, at 11:04 a.m., the Applicant filed with the Department an Application for Beneficial Water Use Permit to appropriate 2.2 cubic feet per second or 1,000 gallons per minute of water and not to exceed 160 acre-feet per annum from Sand Creek, a tributary of Medicine Lake in Sheridan County, Montana. The water is to be diverted from Sand Creek at a point in the NE1/4 SW1/4 NE1/4 of Section 5, T. 31N., R. 58 E., M.P.M., by way of a pump from an already existing pit to a sprinkler system for 80 acres located in the NE1/4 and 80 acres in the NW1/4 of Section 5, from April 1 to October 1, inclusive, of each year.

2. Mr. Smith testified that he had requested the Department to withdraw from the Application the 80 acres located in the NW1/4 and to reduce the amount requested by half. This request was granted at the hearing.

3. Ms. Burnette Henke has 160 acres which is immediately adjacent to the property of the Applicant and downstream from the point of diversion. She has an apparent prior water right to water 25 to 35 head of cattle from Sand Creek.

4. The Objector, Mr. Loren Henke, is immediately adjacent to the property of Ms. Henke and downstream from the point of diversion. Mr. Henke also leases the property of Ms. Henke. He has an apparent prior water right to the waters of Sand Creek for 25 to 30 head of cattle.

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5. The Objectors, Mr. Loren Henke, Ms. Burnette Henke, and Mr. Jorgen Christensen, were concerned with how this Application would affect their livestock water. All three objectors were particularly concerned about the application drying up the flow of the stream, leaving only stagnant pools. From their testimony, the pools are very seldom dry and are apparently maintained by a high water level in the streambed. Yet this water will become stagnant and cattle do not do as good drinking stagnant water as fresh water.

6. The U.S. Fish and Wildlife Service, through its Hydraulic Engineer, Mr. Donald G. Stewart, testified that their concerns were how the application would affect their water right in Sand Creek. Judicial Notice was taken of their water filing of November 7, 1936. The filing was for 75 cfs for flood control, water conservancy as provided for in "Federal Migratory Bird Conservation Act of February 18, 1929," and for irrigation of 3,640 acres. The water is used in conjunction with the management of the Medicine Lake National Wildlife Refuge.

7. The U.S. Fish and Wildlife Service is the last water user on Sand Creek. The U.S. Fish and Wildlife Service has taken measurements of Sand Creek at a culvert under a county road located just upstream from the refuge. The U.S. Fish and Wildlife Service submitted records of all their measurements taken since 1966. These measurements show that at certain times there is more than 75 cfs of water flowing into the refuge. From the testimony of Mr. Stewart, there are also times that there is no water flowing into the refuge from Sand Creek.

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8. Mr. Smith raised the question of beneficial use by the U.S. Fish and Wildlife Service of the waters flowing into the refuge. Mr. Smith submitted for consideration two samples of water. One was taken from Sand Creek and the other from Medicine Lake. The purpose of such exhibits was to show that once the water of Sand Creek had flowed into Medicine Lake, that it became unusable due to salinity. The samples were given to the Department's hydrologists, who concluded that because of the time span involved that their measurements would be of questionable accuracy. Thus, such tests were not conducted and such data is not available. From testimony received, it is apparent that the waters released from Medicine Lake are of questionable value due to its high salinity, while the waters of Sand Creek are satisfactory for irrigation.

9. Mr. Smith requested that the U.S. Fish and Wildlife Service submit records of the discharge flows from Medicine Lake. Again the purpose was to question the validity and quantity of the water right of the U.S. Fish and Wildlife Service. Such exhibits were submitted and were received into evidence. There was testimony that other streams contributed to the waters of Medicine Lake. Also the measurements of the inflow from Sand Creek and the release of water from Medicine Lake were not taken on the same days. Based on the foregoing Proposed Findings of Fact, the Hearing Examiner hereby makes the following Proposed Conclusions of Law.

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PROPOSED CONCLUSIONS OF LAW

1. The objectors, Mr. Loren Henke, Ms. Burnette Henke, and Mr. Jorgen Christensen, have an apparent prior water right to the waters of Sand Creek for stock watering purposes.

2. The U.S. Fish and Wildlife Service has an apparent prior water right to 75 cfs of water of Sand Creek, to be used in conjunction with the management of the Medicine Lake National Wildlife Refuge. The U.S. Fish and Wildlife Service is the last point of diversion downstream from the Applicant. There is some question as to the validity of the volume of the appropriation of the U.S. Fish and Wildlife Service, but there is insufficient evidence in the record to reduce such right. There is, instead, ample testimony from the expert witness of the Service, Mr. Stewart, that the entire 75 cfs is required for their needs.

3. That under the provisions of 89-880, R.C.M. 1947, a permit is required to appropriate waters of Sand Creek.

4. That there are unappropriated waters in Sand Creek during certain times of the year.

5. That conditioning the permit subject to apparent prior existing rights will protect those rights.

6. That the proposed means of diversion are adequate.

7. That the proposed use is a beneficial use.

8. That the criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, have been met.

Based on the foregoing Findings of Fact, and Conclusions of Law, the Hearing Examiner hereby makes the following Proposed Order.

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PROPOSED ORDER

1. That the Applicant's permit be granted allowing the appropriation of 2.22 cfs or 1,000 gallons per minute of water and not to exceed 80 acre-feet per annum from Sand Creek, a tributary of Medicine Lake in Sheridan County, Montana. The water is to be diverted from Sand Creek at a point in the NE1/4 SW1/4 NE1/4 of Section 5, T. 31N., R. 58 E., and used for irrigation on a total of 80 acres, more or less, in the NE1/4 of Section 5, T. 31 N., R. 58 E., M.P.M., from April 1 to October 1, inclusive, of each year.

2. The Applicant's permit be granted subject to the following conditions:

a. That when water is available, sufficient quantities shall be released by the Applicant to insure that the water in the stockwatering locations of the objectors does not become stagnant.

b. That the Applicant shall not pump water when there is less than 75 cfs of water flowing into the Medicine Lake National Wildlife Refuge.

c. That the Applicant shall not be able to pump at such times when the streamflows are insufficient to provide water for the objectors.

3. The permit is granted subject to all prior existing water rights in Sand Creek.

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4. This order may be subject to modification if it is found in a later study that the U.S. Fish and Wildlife Service's beneficial use requirements are not 75 cfs.

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 ten (10) days of receipt of same. Upon receipt of any written exceptions the Department will provide an opportunity to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 5th day of January, 1976.

Gary J. Smith
HEARING EXAMINER

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