

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICANT
FOR BENEFICIAL WATER USE
PERMIT NO. 3358-405 BY
PALMER RANCH, INC.

FILMED

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

APR 3 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 8, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 3358-405 is hereby granted allowing for the construction of a diversion earth dam on the East Fork of Hardscrabble Creek, a tributary of the Missouri River, at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34, Township 26 North, Range 56 East, M.P.M., for the purpose of a reservoir of a capacity not to exceed 3 acre-feet and for the appropriation of 173 acre-feet of water per year from the East Fork of Hardscrabble Creek, a tributary of the Missouri River, in Richland County, Montana, to be diverted from said reservoir and used for water spreading on 115 new acres and supplemental water on 100 acres in Section 27, Township 26 North, Range 56 East, and containing a total of 215 acres, more or less, from February 1 to September 30, inclusive, of each year.
2. The Provisional Permit is granted subject to all prior water rights in the source of supply, including, but not limited to, the watering of livestock by the Objectors in this matter.
3. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permit.
4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.
5. The Applicant's new reservoir dam must be built to meet all local Soil Conservation Service design and specifications for a reservoir dam of this type to ensure proper construction and safety of the structure. Maintenance on the dam and facilities must be completed as needed.

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6. The proposed reservoir shall have installed in it an adequate drainage device at the lowest point in the structure to allow water which is needed to satisfy prior water rights to flow by the point of diversion.

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 used for proof of their water rights.

Done this 3rd day of November, 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 THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 3358-s40S BY PALMER RANCH, INC.)

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, the initial hearing on objections to the above-described application was held in the basement meeting room of the Culbertson State Bank in Culbertson, Montana, at approximately 1:30 p.m., on Wednesday, April 21, 1976, Richard Gordon, Hearing Examiner, presiding.

Pursuant to an Order dated June 10, 1976 of said Hearing Examiner a re-hearing was held in the basement meeting room of the Culbertson State Bank at Culbertson, Montana, at approximately 1:30 p.m. on Thursday, August 19, 1976, Daniel G. Diemert, Hearing Examiner, presiding. This Proposal for Decision incorporates testimony of both the initial hearing and re-hearing for consideration in the above-entitled matter.

Mr. Donald Palmer, representative of the Applicant, appeared and was represented by Aldean Allen Wahl, Esq., at the initial hearing and was represented by Fred Rathert, Esq., at the re-hearing, both being attorneys with the firm of Bjella and Jestrab, Williston, North Dakota.

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Objections were received by the Department from Everett and Emma Baxter, represented by Victor Koch, Esq., Marie C. Johnson, represented by her brother, Harlan Johnson and Geraldine Glasscock Lawson, representing Three Butte Ranch. Mr. Richard Watson and Mr. Howard Reinhardt appeared on behalf of the Department of Natural Resources and Conservation.

MOTIONS

Pursuant to a motion by the Applicant at the initial hearing, Mr. Gordon allowed the later introduction of an affidavit of Donald Palmer which tends to prove that the Applicant now possesses a water right of sufficient quantity to satisfy the application.

At the commencement of the re-hearing, the Applicant asked that the application be treated as one for a new appropriation but if denied, to be treated as an application for change in place of use of an existing water right. This motion was granted.

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. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the East Fork of Hardscrabble Creek, a tributary of the Missouri River.
2. On August 19, 1974, the Department received an

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Application for Beneficial Water Use Permit No. 3358-s40S from Palmer Ranch, Inc. who sought to appropriate 173 acre-feet of water per year from the East Fork of Hardscrabble Creek, a tributary of the Missouri River in Richland County, Montana. The water is to be diverted from the East Fork of Hardscrabble Creek at a point in the NE1/4 NE1/4 NW1/4 of Section 34, Township 26 North, Range 56 East, M.P.M., and used for water spreading on 115 new acres, and for supplemental water on 100 acres all in Section 27, Township 26 North, Range 56 East, and containing a total of 215 acres, more or less, from February 1 to September 30, inclusive, of each year.

3. The Department received objections from Everett and Emma Baxter, Marie C. Johnson and Geraldine Glasscock Lawson for Three Butte Ranch. All objectors alleged that the application, if approved, would deprive them of water for livestock and flood irrigation.

4. The alleged water rights for irrigation purposes claimed by the Objectors has been the result of natural flooding at times of high water in the source of supply.

5. If an adequate drain device is installed in the proposed diversion dam, the rights of prior appropriators will not be adversely affected.

6. It appears that the proposed means of diversion or construction are adequate.

7. The proposed use of water to irrigate hay or crop

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land is a beneficial use.

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

9. The Applicant has not asked for an appropriation of 15 cubic feet per second. It therefore is not necessary to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

10. Based upon the fact that there is natural flooding in the East Fork of Hardscrabble Creek in most years, there appears to be unappropriated waters in the source of supply.

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 3358-s40S should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

2. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.

3. The rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

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

5. Nothing decided herein has bearing on the status of

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water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

6. Montana Water Law does not contemplate the vesting of a valid water use right by means of natural flooding, but rather requires an actual diversion of water.

7. "The common law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865." Mettler vs. Ames Realty Co. (61 Mont. 152, 170).

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

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 3358-s40S is hereby granted allowing for the construction of a diversion earth dam on the East Fork of Hardscrabble Creek, a tributary of the Missouri River, at a point in the NE1/4 NE1/4 NW1/4 of Section 34, Township 26 North, Range 56 East, M.P.M., for the purpose of a reservoir of a capacity not to exceed 3 acre-feet and for the appropriation of 173 acre-feet of water per year from the East Fork of Hardscrabble Creek, a tributary of the Missouri River in Richland County, Montana, to be diverted

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from said reservoir and used for water spreading on 115 new acres and supplemental water on 100 acres in Section 27, Township 26 North, Range 56 East, and containing a total of 215 acres, more or less, from February 1 to September 30, inclusive of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply, including, but not limited to the watering of livestock by the Objectors in this matter.

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

4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

5. The Applicant's new reservoir dam must be built to meet all local Soil Conservation Service design and specifications for a reservoir dam of this type to ensure proper construction and safety of the structure. Maintenance on the dam and facilities must be completed as needed.

6. The proposed reservoir shall have installed in it an adequate drainage device at the lowest point in the structure to allow water which is needed to satisfy prior water rights to flow by the point of diversion.

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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 this Proposed Order, if any, shall be mailed to 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 8th day of October, 1976.

Daniel G. Diemert
DANIEL G. DIEMERT
HEARING EXAMINER

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