Permit No. 3597-s40J

EXHIBIT "A"
STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NO. 3597-s40J AND 3599-s40J BY W.D. AND MARY E. VOSEN

FILMED APR 9 1990

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on November 18, 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 conditions cited below, the Applicants' Provisional Permit No. 3597-s40J is hereby granted allowing the appropriation of no more than 4 acre-feet of water per annum, to be impounded in a 4-acre-foot stock pit on an unnamed tributary of Squaw Coulee, at a point in the NE¼ NE¼ SW¼ of Section 7, Township 31 North, Range 16 East, M.P.M., in Hill County, Montana, to be used for wildlife and stock-water purposes from January 1 to December 31, inclusive, of each year.

2. Subject to conditions cited below, the Applicants' Provisional Permit No. 3599-s40J is hereby granted allowing the appropriation of no more that 2 acre-feet of water per annum, to be impounded in a 2-acre-foot stock pit on an unnamed tributary of Squaw Coulee at a point in the SE¼ NW¼ SE¼ of Section 8, Township 31 North, Range 16 East, M.P.M., in Hill County, Montana, to be used for wildlife and stock-water purposes from January 1 to December 31, inclusive, of each year.

3. Each Provisional Permit is granted subject to all prior water rights in the source of supply.

4. Such prior rights shall include, but shall not necessarily be limited to, those downstream water rights found as being prior to the Applicants' rights as set forth in Proposed Conclusions of Law, paragraphs 3, 4, 5, and 6.

5. In order to effectuate the provisions of the Proposed Order, paragraph 4 above, the Applicants shall install an adequate bypass facility around each pit, or an adequate drainage device in each pit, or an adequate pumping system in each pit, or some other means acceptable to the Department by which the Applicants will be able to ensure that water will not be appropriated in the above-described pits at such times when prior downstream water rights are as yet unsatisfied.

CASE # 3597

6. 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.

7. 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.

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 11th day of January, 1979.

Orin Gerris

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

CASE # 3597

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

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NO. 3597-s40J and 3599-s40J BY W. D. and MARY E. VOSEN	))))	PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described applications was held in the City of Havre Council Chambers, in Havre, Montana, at approximately 1:00 p.m. on Thursday, April 22, 1976, Richard Gordon, Hearing Examiner, presiding.

Mr. W.D. Vosen and Ms. Mary E. Vosen, the Applicants herein, appeared personally and presented testimony in support of their application.

Mr. Raymond H. Patrick, the Objector herein, appeared personally and presented evidence and testimony in support of his objection. Mr. Patrick was represented by counsel, Morton B. Goldstein, Esq., of Havre, Montana. Mr. Patrick introduced into evidence one exhibit: a copy of a Water Resources Survey Map for Township 31 North, Range 16 East of the Montana Principal Meridian. Said exhibit was marked and entered as Objector's Exhibit No. 1.

Mr. Robert Decker, Mr. Richard Watson and Mr. Howard Reinhardt appeared personally on behalf of the Department of Natural Resources and Conservation.

CASE # 3597

MOTIONS

At the hearing, the Applicants moved that they be allowed to modify each of their applications. The Applicants moved that each of the applications be modified down from the originally requested 5 acre feet each, so that Application No. 3597-s40J instead request a total appropriation of 4 acre-feet per annum, and so that Application No. 3599-s40J instead requests a total appropriation of 2 acre-feet per annum. As each of the requested modifications resulted in a lower requested appropriation than was originally applied for and was originally noticed, the Applicants' motions were 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 Divison, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On September 12, 1974, Mr. W. D. Vosen, Ms. Mary E. Vosen and the Estate of L. R. Crowe, the Applicants herein, filed Application for Beneficial Water Use Permit No. 3597-s40J with the Department of Natural Resources and Conservation seeking to appropriate 5 acre-feet of water per annum to be impounded in a 5 acre-foot stock pit on an unnamed tributary of Squaw Coulee at a point in the NE1/4 NE 1/4 SW1/4 of Section 7, Township 31 North, Range 16 East of the Montana Principal Meridian in Hill County, Montana, to be used for wildlife purposes and for stockwater purposes for the watering of 180 head of livestock, from January 1 to December 31, inclusive, of each year.

CASE # 3597

2. On September 12, 1974 Mr. W. D. Vosen, Ms. Mary E. Vosen and the Estate of L. R. Crowe, the Applicants herein, filed Application for Beneficial Water Use Permit No. 3599-s40J with the Department of Natural Resources and Conservation, seeking to appropriate 5 acre-feet of water per annum to be impounded in a 5 acre-foot stock pit on an unnamed tributary of Squaw Coulee at a point in the SE1/4 NW1/4 SE1/4 of Section 8, Township 31 North, Range 16 East of the Montana Principal Meridian, in Hill County, Montana, to be used for wildlife purposes and for stockwatering purposes for 180 head of stock from January 1 to December 31, inclusive, of each year.

3. On May 9, 1975, Mr. Raymond H. Patrick filed an Objection to each of the above-described Applications alleging in each such objection that the Objector has four dams located below the proposed stock pits which were constructed in the early 1960's and are used for sprinkler irrigation. In each objection, the Objector requested that the proposed stock pits each be modified to one, to one and one-half acre feet of water per annum.

4. At the combined hearing conducted on both of the Applications Mr. W. D. Vosen testified that although the hearing notices described the proposed facilities as reservoirs, the Applicants at no time intended to construct or apply for reservoirs. Mr. Vosen testified that the Applicants only intend to construct standard stock water pits. Mr. Vosen testified that each stock water pit would be

CASE # 3597

constructed at the head of each small coulee involved. The Applicants testified that they are principally concerned with the requested 4 acre-feet stock pit, as such pit would be constructed in a 348 acre field of stubble upon which the Applicants would like to allow 150 head of cattle to graze for as long as possible following the early fall harvest, but upon which there is presently located no water supply. The Applicants testified that water is present at the heads of the two coulees involved only during spring runoff, and as well, occasionally later in the season immediately following heavy sudden rainfall. The Applicants testified that at most other times of the year both coulees are dry. The Applicants testified that in 1975 they kept the cattle in the area of the smaller proposed pit from July 3 to November 15. The Applicants testified that they would like to be able to move the cattle into that pasture earlier in the season, and then move the cattle to the previously described 348 acre pasture with the larger proposed pit immediately after harvest. The Applicants testified that they would then like to be able to keep the cattle in the 348 acre pasture for as long as possible throughout the fall and winter months. The Applicants testified that although there are existing reservoirs on their property constructed in the 1940's, and that although there are two developed springs on their property, there have not previously been any collection facilities located

CASE # 3597

at the two proposed sites for the stockwater pits sought herein. The Applicants testified that the proposed 2 acre feet pit is at the head of a coulee draining into one of the Applicant's two existing reservoirs. The Applicants testified that the existing reservoir was built for stockwatering in 1941, and is approximately 10 rods square and used to be 10-12 feet deep, although recently it has become clogged with silt which the Applicants testified that they intend to remove. The Applicants testified that there is no drainage device in this existing reservoir, but that there is a spillway. The Applicants testified that although water occasionally runs through the spillway in small quantities during peak runoff, it does not do so in quantities great enough to wash out the road which runs across the spillway. The Applicants thus testified that the amount of water which the Objector presently receives from this drainage above the existing reservoir is in fact quite small. The Applicants testified that the other proposed pit (the smaller one) would be located at the head of a coulee which does result in appreciable flow into any of the Applicants' facilities. The Applicants testified that the amount of water available every year in each of these drainages varies greatly depending upon precipitation. The Applicants testified that all water sought for appropriation herein arises on the Applicant's

CASE # 3597

own land. The Applicants testified that no irrigation use of the water sought is planned, and that the only non stockwater use would be for wildlife on a year round basis. The Applicants testified that the planned facilities will be stockwater pits rather than reservoirs and consequently no drainage devices are planned, and no drainage devices would be economically feasible. The Applicants testified that should the permit be denied for the 4 acre-feet pit, water which the pit would have trapped would not reach any of the Objector's downstream facilities as the runoff in the coulee does not flow in the coulee for any significant distance below the site of the proposed pit, but rather seeps rapidly into the ground and disappears entirely. The Applicants thus alleged that granting the 4 acre-feet appropriation sought in Application No. 3597-s40J would not deprive the Objector of any water he is presently receiving. Throughout the hearing, the Applicants referred to a large aerial photgraph they had borrowed specifically for the hearing. The photograph was "on loan" and could not be entered herein as a formal exhibit. The Applicants testified that several smaller individual aerial photographs depicting portions of land shown on the single large photograph might possibly be obtained and presented into evidence herein. No such photographs were received by the Hearing Examiner, nor was an explanation for their non-receipt offered. The Applicants testified that the Objector does not fully utilize the water stored in his downstream facilities.

5. The Objector testified that he has a reservoir on Squaw Coulee located below the point where the drainages of the two coulees in question meet. The objector testified that this reservoir has a maximum capacity of approximately 99 acre-feet of water. The Objector testified that said reservoir is utilized for storage of water for the sprinkler irrigation of approximately 70 acres of alfalfa and grain. In response to the Applicants' allegations, the Objector testified that the reservoir was utilized as fully for such irrigation as his pumping system would allow last year. The Objector testified that only 3 or 4 acre-feet remained in the reservoir following his last irrigation, and that such 3 or 4 acre-feet could not be utilized due to the nature of his pumping system which was designed with full Soil Conservation Service assistance. The Objector testified that he has a second reservoir on the same drainage with a maximum capacity of approximately 15-25 acre-feet of water for the sprinkler irrigation of approximately 9.5 acres of alfalfa and for the additional irrigation of a 6.7 acre plot. The Objector testified that last year only approximately 3,000 to 4,000 gallons remained in the reservoir following the irrigation season, and that again, such water was not used only because of the nature of his sprinkler irrigation system. The Objector testified that he has a third reservoir on the same drainage with a maximum capacity of approximately 35 acre-feet of water for the sprinkler irrigation

CASE # 3597

of approximately 30-35 acres of barley and alfalfa. The Objector testified that these three reservoirs were built between 1960 and 1970 and have been used continually since construction. The Objector testified that these reservoirs, particularly the first, presently contain insufficient water for a full season of irrigation use. The Objector testified that the above-described reservoirs and irrigation systems were all built pursuant to Soil Conservation Service specifications, and have spillways. The Objector testified that the 99 acre-feet reservoir, which is the Objector's last reservoir along the drainage, has a drainage device and a trickle tube. The Objector testified that water will flow over the spillways on an average of only approximately 2 out of every 10 years, depending largely upon the snowfall in the drainage for that particular year. The Objector testified that his reservoirs are interconnected on the same drainage basin, so that filling one entirely is generally accomplished at the expense of not filling the others. The Objector testified that he further possesses a permit for a fourth facility in the drainage in question. The Objector testified that the permit is for a pit of approximately 1.5 acre-feet. Department of Natural Resources and Conservation records show that on October 8, 1975 the Objector herein was issued Provisional Permit No. 5621-s40J, with a priority date of June 5, 1975, for the appropriation of an annual amount of water not to exceed 2 acre-feet. The Objector testified in response to the Applicant's testimony that water which the

CASE # 3597

Applicant intends to appropriate in the 4 acre-feet pit does in fact presently reach the Objector's downstream facilities. The Objector testified that he believes that except in very wet years there is no unappropriated water in the source of supply, as the spillway on the 99 acre-feet reservoir is rarely used. The Objector testified that he would not object to the proposed facilities if they were constructed with adequate drainage devices so as to ensure the satisfaction of his alleged prior water right before any appropriation would be allowed by the Applicants pursuant to any permits granted herein. The Objector testified that wildlife frequent his present water storage facilities, just as they would frequent the Applicants' proposed facilities.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from unnamed tributaries of Squaw Coulee.

2. Pursuant to Montana water law for appropriation first made before the effective date of the Montana Water Use Act, actual valid beneficial use of the water constitutes the basis for claiming a water right. Pursuant to Montana water law for appropriation first made after the effective date of the Montana Water Use Act (July 1, 1973), the Application for, and subsequent issuance of a Beneficial

CASE # 3597

Water Use Permit constitutes the basis for claiming a water right. The mere riparian claim that water (not alleged to have been previously beneficially used by a party) arises on or flows through that party's property are irrelevant.

3. Pursuant to Montana water law, as between the two parties hereto, the Applicant is to have a first priority to water in the drainage for his existing facilities built in 1941. The Objector appears to have second priority to water in the drainage for his three existing facilities built between 1960 and 1970. As priority pursuant to rights acquired under the Montana Water Use Act is based upon the date of application for permit, the Applicant herein would have third priority to water in the drainage for their two proposed pits herein, based on an application date of September 12, 1974. And finally, the Objector would have fourth priority to water in the drainage for his 2 acre-feet reservoir permit based upon an application date of June 5, 1975, notwithstanding the earlier issuance of said permit to the Objector.

4. There are at times unappropriated waters in the source of supply available for appropriation by the Applicants for the purposes requested herein. Such times occur only when there is water in the source of supply sufficient to satisfy valid downstream prior water rights. Such valid downstream water rights prior to the appropriation sought in

CASE # 3597

Application No. 3597-s40J should include the Objector's right to the three downstream facilities built between 1960 and 1970 and holding a total of approximately 152 acre-feet of water, but such downstream prior rights should not include the two acre-feet right granted by Provisional Permit No. 5621-s40J to the Objector herein. The water right granted by Provisional Permit No. 5621-s40J should be inferior to any permit rights granted to the Applicants herein. Such valid downstream rights prior to the appropriation sought in Application No. 3599-s40J should include the Applicant's own right to fill the reservoir constructed in 1941 to its maximum original capacity, as well as the Objector's right to fill his three downstream facilities built between 1960 and 1970 holding a total of approximately 152 acre-feet of water, but such downstream prior rights should not include the 2 acre-feet right granted by Provisional Permit No. 5621-s40J. The water right granted by Provisional Permit No. 5621-s40J should be inferior to any permit rights granted to the Applicants herein. Water present in the source of supply in excess of valid prior downstream water rights should constitute unappropriated water for purposes herein.

5. 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.

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

CASE # 3597

7. Proper scheduling of appropriation by the Applicants should insure that the prior existing water rights of the Objector will be protected. Proper scheduling should thus provide that the Applicants may only appropriate water pursuant to any Provisional Permit granted herein when there is unappropriated water in the source of supply.

8. The proposed means of diversion and storage are adequate, provided that some sort of adequate bypass facility is constructed around each pit, or provided that some sort of adequate drainage device is constructed for each pit, or provided that some sort of pumping method is employed for each pit, or provided that some other means acceptable to the Department is utilized to enable the Applicant to refrain from appropriating water pursuant to any Provisional Permit granted herein at such times when prior downstream water rights are as yet unsatisfied.

9. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damages 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 its Provisional Permit.

10. The proposed use of the water constitues beneficial use.

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

12. The Applications for Beneficial Water Use Permit should be granted in accordance with the provision of Chapter 8, Title 89 of the Revised Codes of the State of Montana.

13. Nothing decided herein has bearing on the status of water rights claimed by the Applicants 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.

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 conditions cited below the Applicant's Provisional Permit No. 3597-s40J is hereby granted allowing the appropriation of no more than 4 acre-feet of water per annum to be impounded in a 4 acre-foot stockpit on an unnamed tributary of Squaw Coulee at a point in the NE1/4 NE1/4 SW1/4 of Section 7, Township 31 North, Range 16 East of the Montana Principal Meridian in Hill County, Montana, to be used for wildlife and stock water purposes from January to December 31, inclusive, of each year.

2. Subject to conditions cited below, the Applicant's Provisional Permit No. 3599-s40J is hereby granted allowing

CASE # 3597

the appropriation of no more than 2 acre-feet of water per annum to be impounded in a 2 acre-foot stockpit on an unnamed tributary of Squaw Coulee at a point in the SE1/4 NW1/4 SE1/4 of Section 8, Township 31 North, Range 16 East of the Montana Principal Meridian in Hill County, Montana, to be used for wildlife and stockwater purposes from January 1 to December 31, inclusive, of each year.

3. Each Provisional Permit is granted subject to all prior water rights in the source of supply.

4. Such prior rights shall include but shall not necessarily be limited to those downstream water rights found as being prior to the Applicant's rights as set forth in Proposed Conclusions of Law, Paragraphs No. 3 and 4.

5. In order to effectuate the provisions of Proposed Order Paragraph No. 4 above, the Applicant shall install an adequate bypass facility around each pit, or an adequate drainage device in each pit, or an adequate pumping system in each pit, or some other means acceptable to the Department by which the Applicants will be able to ensure that water will not be appropriated in the above-described pits at such times when prior downstream water rights are as yet unsatisfied.

6. 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 its Provisional Permit,

CASE # 3597

nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

7. 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.

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 the 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 28th day of May, 1976.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER

CASE # 3597