

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 3614-s43Q BY JOSEPH M. FEIST)
FILMED)
APR 9 1990)
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedure Act, after due notice a hearing on objections to the above-named application was held on June 19, 1975, in Billings, Montana. The Applicant, Joseph M. Feist, was present and represented by counsel, Richard Hunt, Esq., of Billings, Montana. Mr. and Mrs. Reinhart Oblander submitted a timely objection to the application with the Department. They were both present at the hearing and represented by counsel, John Sheehy, Esq., of Billings, Montana. The DK Hereford Ranch by Frances V. Shaules submitted a timely objection to the application. Mr. Shaules was present at the hearing and the DK Hereford Ranch was represented by counsel, Ron Ladders, Esq., of Billings. James Rehbein, unit supervisor for the Department, appeared at the hearing and presented testimony.

The Applicant, through counsel, offered into evidence two items which were marked "Applicant's Exhibit 1 and 2," and were received into evidence without objection. The Objector, Mr. Oblander, through counsel Mr. Sheehy, offered into evidence twenty-seven exhibits. Exhibits 23 and 24 were received subject to the Applicant's objection. All the other exhibits were received without objection. Objector Oblander, through his counsel Mr. Sheehy, objected to further proceeding on the grounds that the hearing was announced by faulty notice as giving the wrong source of water. Mr. Sheehy also moved to dismiss the application on the grounds of three separate points.

A Proposed Order (Proposal for Decision) dated October 27, 1975, and a Denial of Motions to Dismiss the Application was issued by the Hearing Examiner, James A. Lewis.

The Proposed Order as issued provided that the Order would become final when 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.

The Department received on November 28, 1975, an Exception (Objections to Proposal for Decision) dated November 26, 1975, as filed by John C. Sheehy on behalf of his clients and objectors, Reinhart and Fannie Ann Oblander, in opposition

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to the Hearing Examiner's Proposed Order of October 27, 1975, in the matter of Application No. 3614-s43Q by Joseph M. Feist.

On December 15, 1975, the Department received John C. Sheehy's Brief supporting his Exception filed on behalf of his clients in opposition to the Proposed Order.

In December 1975 the Department received a Reply Brief (Brief of Applicant Joseph M. Feist) dated December 23, 1975, as filed by Richard J. Hunt on behalf of his client, Applicant Joseph M. Feist.

The Department by its letter of January 7, 1976, to Richard J. Hunt, with copies to Mr. Sheehy, Mr. and Mrs. Oblander, and Mr. Feist, stated that this matter would be forwarded to the Administrator of the Water Resources Division for scheduling of an oral argument hearing, since it was a matter of record in each brief filed that oral argument had been requested. Said letter further stated that all parties would be notified by certified mail when the hearing date, time, and place have been selected.

The Administrator of the Water Resources Division issued on March 2, 1976, a Notice of Hearing on Exceptions in the matter of Application for Beneficial Water Use Permit No. 3614-s43Q by Joseph M. Feist, stating that on Wednesday, March 17, 1976, at 10 a.m., a hearing would be held before the Administrator in Room 211 or the Conference Room, as the situation may require, 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 briefs. If certain parties did not wish to make oral argument, 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 of Hearing on Exceptions was mailed by certified mail to all parties in this matter, including the original objectors and their attorneys.

On March 8, 1976, the Department received a letter from John Sheehy requesting that the oral argument hearing date be changed for personal reasons to another date. On March 9, 1976, the Administrator issued a Notice of Date Change on Hearing on Exceptions notifying the parties herein that the hearing originally scheduled for Wednesday, March 17, 1976, at 10 a.m., had been postponed and rescheduled for 10 a.m., on Thursday, April 1, 1976, in Room 211 or the Conference Room, as the situation may require, of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana.

The oral argument hearing was held in Helena, Montana, on April 1, 1976, in the Department's Conference Room for the purpose of hearing oral arguments in support of the objections, exception, and briefs filed.

Joseph Feist, the Applicant, and his attorney, Richard Hunt, appeared at the hearing and presented testimony in support of the application and the reply briefs as filed.

The Objectors, Reinhart and Fannie Ann Oblander, appeared and were represented by their attorney, Mr. Sheehy. They presented testimony in support of their objections, exception, and brief as filed. Mr. Sheehy offered into evidence two items which were marked as "Objector's Proposed Exhibits 1 and 2." Exhibit 1 is a listing of Applications for Appropriations on Arrow Creek (taken from Yellowstone County Courthouse records), showing the appropriator, amounts, date of instrument, date recorded, and Book and Page number. Exhibit 2 is a plat of part of the townsite of Ballantine, showing particularly the Oblander property and the course of Arrow Creek. Objector's Proposed Exhibit 1 was denied and Exhibit 2 was accepted by the Administrator.

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

An attempt was made after the hearing to reach a Stipulation between the parties in this matter; however, none was agreed upon. The Administrator of the Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposed Order of October 27, 1975, and the attached Denial of Motions to Dismiss the Application, the objections, exceptions, briefs, the testimony of the oral argument hearing held on April 1, 1976, 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, and the attached Denial of Motions to Dismiss the Application in this matter, as entered on October 27, 1975, 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 Applicant's Provisional Permit No. 3614-s43Q is hereby conditionally granted to appropriate when available and not needed to satisfy prior water rights downstream on Arrow Creek a total maximum diversion of 2,000 gallons per minute of water, not to exceed 106 acre-feet per annum, from Arrow Creek, a tributary of the Yellowstone River, in Yellowstone County, Montana, to be diverted from Arrow Creek at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, Township 2 North, Range 29 East, M.P.M., by means of a dam, and impounded in an enlarged existing storage reservoir on Arrow Creek with a new capacity of 2 acre-feet. Water will be withdrawn from the 2-acre-foot reservoir by means of an electric-driven pumping facility, connected to gated pipe to irrigate ditched row crops. The water will be used for supplemental-

irrigation purposes on 44 acres and new irrigation on 6 acres, all located in said Section 8, Township 2 North, Range 29 East, M.P.M., from May 1 to September 30, inclusive, of each year.

2. The Provisional Permit as granted is subject to all prior water rights in the source of supply, including, but not limited to, the prior water rights of the downstream objector, Oblander, and any final determination of prior existing water rights as provided by Montana law.

3. The Permittee must not prevent prior appropriators from reasonably exercising their water rights under any changed conditions brought about as a result of this Provisional Permit.

4. The Permittee must, in order to protect prior water rights downstream, pass a sufficient uninterrupted flow of water through his diversion facility when beneficially needed by the objector, Oblander, to exercise his stock-watering right, as well as any other water rights by the objectors and any other prior water-right users downstream.

5. This Provisional Permit is granted in addition and separate from the Permittee's prior water right established for the 44 acres in Section 8, Township 2 North, Range 29 East, M.P.M. The priority date of the Provisional Permit shall date from September 13, 1974, at 11:40 a.m.

6. The issuance of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

7. The Permittee shall install and maintain an adequate drainage device in the dam to insure safety and so as to enable complete drainage of the storage reservoir to enable him to pass water sufficient to satisfy all downstream prior water-right users.

8. It shall be the responsibility of the objectors to notify the Permittee when, in fact, there is insufficient water in Arrow Creek to satisfy both the prior rights of the objectors and the water use granted by this permit. It shall be the responsibility of the Permittee to cease diverting water immediately pursuant to this permit when there is insufficient water in Arrow Creek to satisfy both the prior water rights of the objectors and the water use granted by this permit, whether or not he is notified by the objectors. It shall be the responsibility of each of the parties not to abuse his water rights at the expense of the other.

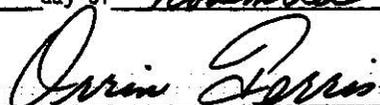
9. In the event Condition 8 above does not work satisfactorily for the objectors, the following procedure should be followed: If any of the objectors or

other existing water-right users have factual proof within a three-year period after the effective date of this order, showing that they are being adversely affected as a result of the Permittee's appropriation during the period granted to the point that they cannot reasonably exercise their prior water rights under any changed conditions, they must inform the Department and the Permittee in writing setting forth the factual proof by certified mail immediately of such alleged factual adverse effect, and upon receipt of said notice the Department will conduct a full field investigation of the alleged factual adverse effect, prepare a written report of the findings, and the Administrator of the Water Resources Division, after consideration of all facts presented, will issue an appropriate order to all concerned parties, including any modification of the permit, if necessary. The Order as issued, shall be final in answering the alleged adverse effect and may further condition, modify, or in an extreme case, revoke Provisional Permit No. 3614-s43Q.

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.



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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announced by faulty notice as giving the wrong source of water. Mr. Sheehy also moved to dismiss the application for grounds that 1) there was no evidence presented that there is unappropriated water available in the source of supply; 2) the notice was faulty as giving the wrong source of water and 3) that the proposed appropriation would adversely affect the Oblander rights because the proposed diversion shuts off the stream and adversely affects the Oblander right to stock water from that source.

Mr. Jim Rehbein, Unit Supervisor for the Department, appeared at the hearing and presented testimony. Mr. Rehbein testified the drainage area serving this development is approximately 25 square miles of drainage area in this vicinity and produces 2,750 acre feet of water per annum. Mr. Rehbein testified that the Department's Soil Scientist had calculated that the proposed appropriation would require 150 acre-feet per annum to irrigate the crop requested. Mr. Rehbein testified that there are no reservoir or dams from this source of water which might be adversely affected by the development. The Applicant, Mr. Joseph Feist, testified that he wants the water for irrigating corn. He testified that he intends to enlarge the existing dam to 50 feet by 7 feet. He testified that he intends to irrigate by means of a 20 horse-power electric motor, through a 6 inch pump which produces approximately 2,000 gallons per minute. He testified that he has irrigated 44 acres for the last two years and intends to put 6 acres into cultivation. Mr. Feist testified that the S.C.S. told him that the proposed appropriation wouldn't require 150 acre-feet of water per annum to grow his crop. He testified that to impound 150 acre-feet of water he would need to impound water for thirty days. He testified that he has had a three phase electric

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facility installed at the proposed sight of the pump. He intends to install a meter, accurate to plus or minus one percent at the end of the gated pipe. Mr. Feist has farmed this land since 1969. He testified that the existing dam structure was constructed in March or April of 1973. He testified that the water he applied to irrigate his field had, in fact, increased the siltation problem, upon the Objector Mr. Oblander's property. Mr. Feist testified that he intends to correct this siltation problem so that soil will no longer be washed upon Mr. Oblander's property. Mr. Feist testified that the dam will only be closed during those periods he is irrigating his crop. Objector, Mrs. Oblander testified that they have land downstream from the proposed appropriation which they use for grazing land. The cattle grazed upon this property are watered from the source of Arrow Creek. Objector, Mr. Reinhart Oblander testified that the carrying capacity of his land downstream from the proposed appropriation is approximately 20 head of cattle. Mr. Oblander testified that there is a pump on his land which diverts water from the source of Arrow Creek to a trailer court which water is used for watering lawns. He testified that this well was once dry in 1974. Water from this well was first diverted in May of 1973. Mr. Oblander testified that the error in notice had not confused him. Objector DK Hereford through Mr. Shaules, testified that the basis of their objection is that they do not want to be forced to release water downstream to appropriators from the proposed point of diversion, because the Applicant has dried up the stream. They offered one exhibit in evidence; a copy of a water right which was marked as Objector's Exhibit No. 1 and received into evidence without objection. DK Hereford Ranch has approximately 120 to 130 acres under irrigation

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at the present time. From the foregoing, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law and Order 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 Applicant intends to divert 2,000 gallons per minute of water and not to exceed 150 acre-feet per annum for the purpose of irrigating corn.
2. The drainage areas supplying the proposed diversion produces approximately 2,750 acre-feet per annum.
3. Prior existing water rights on Arrow Creek use approximately 420 acre-feet per annum for irrigation and stock water.
4. Objector Mr. Oblander has an apparent prior existing water right to water the number of animal units carried by his property below the proposed point of diversion.
5. The Applicant has in the past, adversely affected Mr. Oblander's property rights by allowing siltation on the Oblander property downstream from his point of diversion.
6. Evidence produced at the hearing indicated that Arrow Creek was not flowing through the Oblander property at some time in the summer of 1974.

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 to appropriate water from the source of Arrow Creek.
2. The proposed use of the water is a beneficial use.
3. The proposed means of diversion are adequate.

4. There are unappropriated waters in the source of supply.

5. Objector Mr. Oblander has an apparent prior existing downstream water right.

6. The proposed means of diversion have in the past been inadequate in that they allow siltation of dirt onto the Oblander property located downstream.

7. The Objector, DK Hereford has an upstream prior existing water right, which as a matter of law, cannot be adversely affected by the proposed diversion.

8. The criteria for issuance of a beneficial water use permit as set out in Section 89-885, R.C.M. 1947, have been met.

9. The permit may be issued under Montana Water Law.

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 permit be granted allowing the appropriation of 2,000 gallons per minute of water and not to exceed 150 acre-feet per annum to be diverted from Arrow Creek at a point in the SE1/4 SE1/4 SW1/4 of Section 8, T. 2 N., R. 29 E., M.P.M., Yellowstone County, Montana, and used for supplemental irrigation on 44 acres and new irrigation on 6 acres, located in said Section 8, from May 1 to September 30, inclusive, of each year.

2. The permit is issued subject to all prior existing water rights including the water right of the downstream Objector Mr. and Mrs. Oblander to water stock for the carrying capacity of their downstream pasture.

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3. To protect the Oblander downstream prior water right, this permit is issued subject to the conditions that the Applicant always be sure that the water is reasonably accessible from the source of Arrow Creek to the Oblander property for the maximum carrying capacity of the Oblander stock.

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 arguments before the Administrator of the Water Resources Division.

DATED this 27th day of October, 1975.



JAMES A. LEWIS
HEARING EXAMINER

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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) DENIAL OF MOTIONS TO
PERMIT NO. 3614-s43Q,) DISMISS THE APPLICATION
JOSEPH M. FEIST)

Objector Reinhart Oblander, through his counsel, Mr. Sheehy, moved to dismiss the Application for the following three reasons:

1. That the hearing had been announced by public notice which was faulty because it gave the source of the water as an unnamed tributary to Arrow Creek instead of Arrow Creek;
2. There was no evidence presented to show that there is unappropriated water available from Arrow Creek;
3. The proposed appropriation would adversely affect the Oblander's right to water stock from Arrow Creek. In Montana the adverse affect must be shown to be unreasonable.

At the hearing Mr. Oblander testified that the faulty notice did not confuse him, but rather that he knew the correct location of the proposed diversion. At the hearing, the Department pursuant to its statutory duty, presented evidence showing that the average annual runoff serving the proposed diversion is 2,750 acre-feet per annum, of which only 420 acre-feet per annum have been appropriated to beneficial use.

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PWE # 3840

The testimony at the hearing indicated that the Oblander stock had been unable to obtain water from the source of Arrow Creek for only a few days in the summer of 1974, and that these days were not continuous, but rather occurred on some separate occasions.

Mr. Oblander's testimony that he was not confused by the notice obviates the need to renote the hearing, as there was no mistake in fact. The Department's uncontroverted evidence that there is unappropriated water available in the source of supply makes the granting of a permit mandatory by the Montana Water Use Act and dismissing the Application would be contrary to the statute, 89-885, et seq. R.C.M. 1947. The testimony that the Oblander stock could not obtain water for a few days is not, without more, conclusive evidence that the effect of the proposed diversion is unreasonable and therefore adverse.

The Hearing Examiner, for the reasons above stated, hereby denies the Objector Mr. Oblander's motions to dismiss.

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