

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
NO. 3626-041N, BY  
NOFER BROTHERS

**FILMED** FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER  
APR 9 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on November 18, 1975, 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 permit is granted allowing the appropriation of 6 acre-feet of water per annum for stock-watering purposes, to be used from January 1 to December 31, inclusive, of each year. The water is to be diverted from Strawberry Creek by means of an existing diversion dam into an enlargement of an existing pit in the NW<sub>4</sub>, SW<sub>4</sub>, NW<sub>4</sub> of Section 33, Township 36 North, Range 4 East, N.P.M.

2. The permit does not grant the right to irrigate from this pit.

3. The permit is granted subject to all prior existing water rights, and to protect these rights a drainage device adequate to drain the 6-acre-feet of water of the subject application shall be installed in the pit.

Done this \_\_\_\_\_ day of \_\_\_\_\_ December \_\_\_\_\_, 1975.

*12/12/75 per log entry*

Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE # 3626**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

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IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE ) PROPOSAL FOR DECISION  
PERMIT NO. 3626-s41N, HOFER )  
BROTHERS )  
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ISSUES

1. Does a lone allegation that a downstream appropriator has a prior existing water right and that he has been in recent years unable to exercise his right because the source of water was dry in July and August constitute conclusive evidence that the proposed appropriation will adversely affect the prior existing water right?

2. Can a landowner be required to seal an existing stockwater pit rather than enlarge his facilities to obtain additional stockwater?

MEMORANDUM

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing was held in Chester, Montana on May 15, 1975 for the purpose of hearing objections to the above-named application.

Mr. Edward Hofer appeared at the hearing and presented testimony on behalf of the Applicant, Hofer Brothers. The Applicant was represented by counsel, Mr. Paul Bunn, Esq., of Chester, Montana.

Sun Ag. Incorporated and Mr. Harrold Henry filed timely objections to the application.

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Mr. Gary Ahlestad appeared at the hearing and presented testimony on behalf of the Objector Sun Ag. Incorporated. They were represented by counsel, Mr. Rae V. Kalbfleisch, Esq., of Shelby, Montana.

Mr. Harrold Henry appeared at the hearing and presented testimony. He was represented by counsel, Mr. Dan Lee, Esq., of Shelby, Montana.

Mr. Paul Bunn, counsel for the Applicant, offered into evidence several photocopies of Notices of Appropriation of Water Rights which would be appurtenant to the applicant's property. Mr. Kalbfleisch objected to receiving these photocopies into evidence on the grounds that the copies were not certified copies and that he had not been given an opportunity to inspect the copies. The Hearing Examiner accepted the copies into evidence on condition that Mr. Kalbfleisch and Mr. Lee be given the opportunity to examine the photocopies and to register their objections.

Mr. Lee, counsel for objector Mr. Henry, offered into evidence with request for right of substitution of a copy of a Notice of Appropriation of a Water Right. This request was granted and Mr. Lee was given 15 days to submit the copy to the Hearing Examiner. Mr. Lee asked that the Hearing Examiner take judicial notice of the Water Resources Survey for Liberty and Toole Counties.

Mr. Kalbfleisch, counsel for Objector Sun Ag. Inc., offered into evidence several copies of Notices of Appropriation of Water Rights which were appurtenant to the Sun Ag. Inc.'s property.

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Mr. Paul Bunn agreed to stipulate that these copies be received into evidence. The copies were received into evidence and are now part of the file.

At the request of Objector Mr. Harrold Henry, the Hearing Examiner took official notice of the Water Resources Survey for Liberty and Toole Counties.

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

PROPOSED FINDINGS OF FACT

1. On September 16, 1974 the Applicant submitted an application with the Department seeking to appropriate 6 acre-feet per annum of water from the source of Strawberry Creek. The additional water is to be impounded by means of an existing dam and stored by enlarging an existing reservoir at a point in the NW 1/4 SW 1/4 NW 1/4 of Sec. 33, T. 36N., R. 4E., M.P.M. and used for stock watering from January 1 to December 31, inclusive, of each year.

2. On March 6, 1975 Sun Ag. Incorporated submitted a timely objection to the application on grounds that there are no unappropriated waters in the proposed source of supply and that the proposed diversion would adversely affect their prior existing water rights.

On February 6, 1975 Harrold E. Henry submitted a timely objection to the application on grounds that the proposed

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diversion would adversely affect his prior existing water rights.

3. The Applicant intends to enlarge an existing stock-water pit from its present 6 acre-foot capacity to a 12 acre-foot capacity stock water pit. The existing pit was designed by the Soil Conservation Service, and so is the enlargement. The pit is filled from the source of Strawberry Creek by means of a small ditch from the creek to the pit. The present 6 acre-foot pit goes dry before fall so the cows don't have water in the fall. The existing diversion dike is located in the bed of Strawberry Creek and diverts the entire flow of Strawberry Creek into the existing 6 acre-foot pit where the overflow runs back into Strawberry Creek.

On an average year Strawberry Creek will run until the end of July. The pit bottom is sandy and sometime the pit is fed by groundwater.

Mr. Hofer is willing to install a drainage device capable of draining the increased 6 acre-foot capacity proposed by the subject application.

Mr. Hofer believes that the greatest portion of runoff to Strawberry Creek comes from the Sweetgrass Hills.

If the existing 6 acre-foot pit were sealed so that it would not seep then it would be adequate to water the cattle on that pasture. It takes 2 hours to fill the pit.

4. Objector Mr. Harrold Henry, adjacent downstream landowner, has water rights appurtenant to his property which he purchased with the property in 1952. These rights were established by both use and filed appropriation. Mr. Henry

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diverts water from Strawberry Creek by means of a diversion ditch. He has no dam or storage facilities in the Creek. Mr. Henry was born on the farm and has lived there all his life. He has seen years in the past when he did not get as much water as he customarily appropriated. In 1973 Mr. Henry did not irrigate at all, because Strawberry Creek was dry. Mr. Henry has been using water by this means of appropriation since 1936. Mr. Henry believes that Strawberry Creek and Snow Coulee are major tributaries of Trail Creek. Mr. Henry believes that a dam upstream from him will adversely affect his water right in dry years.

Mr. Henry irrigates 60 acres by means of flood irrigation from the above described point of diversion. He has in the past watered about 400 head of cattle from Strawberry Creek. Mr. Henry customarily irrigates once in mid-April. Mr. Henry's irrigation is shown on Page 19, of Part II of the Liberty County Portion of the Liberty and Toole County Water Resource Survey. Mr. Henry has no objection to the Applicant being granted a permit to appropriate additional stockwater if he needs it, but does object to irrigation.

5. Mr. Gary Ahlestad, President of Objector, Sun Ag. Inc., testified that their predecessor in interest Mr. Peter Havegard, irrigated about 250 acres from the source of Trail Creek. Sun Ag. Inc. irrigates about 200 acres from Trail Creek. In 1972 Trail Creek was dry and they did not irrigate at all.

Mr. Ahlestad estimates that there has been water adequate for his full customary usage in only 5 of the last 15 years.

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Mr. Ahlestad believes that most of the water which he uses comes from the area of Snow Coulee and Strawberry Creek. Mr. Ahlestad has no objection to the Applicant being granted a permit to appropriate additional stockwater, but thinks that lining the existing pit with bentonite would give the Applicant adequate stockwater.

From the foregoing 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 Strawberry Creek.
2. The rights of prior appropriators will be protected if this permit is conditioned to protect those rights.
3. The proposed use is a beneficial use.
4. The proposed means of construction are adequate.
5. The Applicant may determine in his capacity as land-owner, whether enlarging the pit or lining the pit is the best means of gaining additional stockwater.
6. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947 have been met.
7. The Application for Beneficial Water Use Permit may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

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

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PROPOSED ORDER

1. The Applicant's permit is granted allowing the appropriation of 6 acre-feet of water per annum for stockwater purposes to be used from January 1 to December 31, inclusive, of each year. The water is to be diverted from Strawberry Creek by means of an existing diversion dam into an enlargement of an existing pit in the NW 1/4 SW 1/4 NW 1/4 of Sec. 33, T. 36N., R. 4E., M.P.M.

2. This permit does not grant the right to irrigate from this pit.

3. The permit be granted subject to all prior existing water rights and to protect those rights a drainage device adequate to drain the 6 acre-feet of water of the subject application shall be installed in the pit.

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 14th day of November, 1975.

James A. Lewis  
HEARING EXAMINER *By: ABC*

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