

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 4234-s40E BY EDWIN KOSS

FILMED
APR) 1990

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the courtroom of the Phillips County Courthouse at Malta, Montana, at 9:00 a.m. on Wednesday, June 30, 1976, Daniel G. Diemert, Hearing Examiner, presiding.

Mr. Edwin Koss appeared and presented evidence and testimony on behalf of this application. He entered three exhibits into the record; pictures taken in 1958 through 1960, which tended to show an excess amount of water flowing in Dog Creek during those years. Mr. Donald Holzhey, a neighbor of Mr. Koss, appeared in support of the application.

Timely objections were filed by Mr. Ervin Crowder, Mr. Vance Spencer, successor in interest to the original Objector, Mr. William E. Spencer, his father and Mr. William French. All Objectors appeared at the hearing and Mr. Willis McKeon, an attorney, represented Mr. William French. A photostat copy of the Notice of Appropriation of Mr. William French was introduced as Objector French's Exhibit A.

Preliminary to the hearing Mr. Koss amended his application by changing his point of diversion to the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, Township 24 North, Range 31 East of the M.P.M. in Phillips County whereupon Mr. Ervin Crowder withdrew his objection.

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A Proposed Order (Proposal for Decision) dated July 28, 1976 was issued by the Hearing Examiner Daniel G. Diemert.

The Proposed Order Notice as issued on July 28, 1976 provided that the Proposed Order would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, and that 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 would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On August 12, 1976 the Department received Exceptions dated August 6, 1976 from Willis M. McKeon filed on behalf of his client William French, taking exception to the Proposed Order issued by the Hearing Examiner on July 28, 1976. On August 10, 1976 the Department received a letter of Exception from the Applicant to the Proposed Order. Also on August 10, 1976 the Hearing Examiner responded to Vance Spencer's letter of August 9, by providing clarification of the Proposed Order he issued.

On August 17, 1976 the Department sent letters to Willis M. McKeon and Edwin Koss informing each of their opportunity to file a Brief supporting their exceptions within fifteen (15) days after receipt of the Department's letter. Copies of these letters were sent to all other parties in this matter.

The Department by letter of October 26, 1976 to Edwin Koss with reference to the Department's letter of August 17, 1976 stated in part as follows:

"In the Department's letter of August 17, it stated in part, 'Please be advised that you now have the opportunity to file a Brief supporting your exception within fifteen (15) days after receipt of this notice.' The above-noted fifteen-day time period for filing the Brief has long since expired without any receipt of your Brief. Since a Brief has not been filed nor any other correspondence concerning this matter, we respectfully request in writing within fifteen (15) days after receipt of this notice a reply indicating if you wish to make oral

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argument here in Helena before the Water Resources Division Administrator in support of your filed letter of Exception."

Also on October 26, 1976 the Department sent a letter to Willis McKeon with reference to the Department's letter of August 17, 1976 advising that since the fifteen day time period for filing his Brief had expired and a Brief had not been filed, that the Department respectfully requested a letter in writing within five (5) days after receipt of the Department's letter, indicating if they still wished to present oral argument in support of their filed exception. The Department did not receive a written reply from Willis McKeon to its letter of October 26, 1976.

On November 22, 1976 the Department received a letter dated November 19, 1976 from Edwin Koss (by Mrs. Koss), which stated, "I do wish to make oral argument in Helena before the Water Resources Division Administrator in support of my filed letter of exception."

The Department by letter of November 23, 1976 responded to Edwin Koss' letter of November 19, by stating, "Please be advised that since you have requested an oral argument hearing on your exception and since it is a matter of record that Mr. McKeon on behalf of Mr. French has requested oral argument in his filed exception, Application No. 4234-s40E will now be forwarded to the Administrator, Water Resources Division, for scheduling of an oral argument hearing."

On April 6, 1977 the Administrator issued a Notice of Oral Argument Hearing on Exceptions to Proposal for Decision in the matter of Application for Beneficial Water Use Permit No. 4234-s40E by Edwin Koss. The Notice set the oral argument hearing for Wednesday, April 27, 1977, at 9:00 a.m. in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. Copies of this Notice were sent to all parties to this matter by certified mail, return receipt requested.

The Department received a telephone call prior to the date of the scheduled oral argument hearing requesting that the hearing be cancelled, since it had been reported that all concerned parties in this matter had met and reached an agreement. The Administrator cancelled the oral argument hearing, therefore said hearing was not held on April 27, 1977.

The Department by letter of May 17, 1977 to Edwin Koss stated in part, "As you know, an oral argument hearing was formally scheduled here in Helena for April 27, 1977, however, it was cancelled on April 26, because it had been reported that all concerned parties in this matter had met and reached an agreement. At the present time we have not received an agreement from you, as signed by you and the objectors. We would appreciate receiving such an agreement as soon as practicable, so we can prepare and issue the Final Order on this matter, or take other action as necessary."

On August 18, 1977 the Department sent another letter to Edwin Koss in reference to its letter of May 17, 1977, stating in part: "On May 25, 1977, I talked to you by telephone and you stated that the objectors had backed out of the agreement and that you would be sending a letter in a few weeks after you see your attorney. Please be advised that the Department has not received any letter as noted above in our telephone conversation of May 25. Therefore, we respectfully request a written reply indicating your choice of one of the following three alternatives: 1) Submit the previously discussed agreement, if one can be reached, between yourself and the objectors, 2) request an oral argument hearing, or 3) withdraw the application. Please be further advised that if no written response is received by this Department on or before September 6, 1977 we will proceed to reschedule the oral argument hearing, as you initially requested in your letter of November 19, 1976."

On September 6, 1977 the Department received a reply from Edwin Koss, which requested an oral argument hearing. Therefore, the Department by letter of September 7, 1977 to Edwin Koss, with copies to Ervin Crowder, Vance Spencer, William French and Willis McKeon, informed them that Application No. 4234-s40E will be routed to the Administrator for scheduling of said requested hearing.

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On November 14, 1977 the Administrator issued a second Notice of Oral Argument Hearing on Exceptions to Proposal for Decision in the matter of Application for Beneficial Water Use Permit No. 4234-s40E by Edwin Koss. This Notice set the oral argument hearing for Thursday, December 1, 1977, at 1:30 p.m. in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. Copies of this Notice were also sent to all parties in this matter by certified mail, return receipt requested.

The oral argument hearing before the Administrator was held in Helena, Montana on December 1, 1977 at 1:30 p.m. in the basement Conference Room of the former St. John's Hospital across the street from the Department's office building.

The Applicant, Edwin Koss, was present and presented testimony in support of his application and exception. He was accompanied by Andy Amen. Mr. Koss was not represented by counsel.

Mr. Willis McKeon, appeared on behalf of his clients and presented testimony supporting their exceptions opposing the Proposed Order. Mr. William French and Mr. Vance Spencer also appeared and presented testimony. Mr. Ervin Crowder was not present.

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

The Administrator of the Department's Water Resources Division, hereby makes the following Final Order, based on the Hearing Examiner's Proposed Order of July 28, 1976, the application, objections, exceptions, the testimony of the oral argument hearing held on December 1, 1977, both hearing tape recordings, 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 in this matter, as entered on July 28, 1976, 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. Subject to the conditions cited below, the Permittee's Provisional Permit No. 4234-s40E is hereby granted allowing for the appropriation of 7.5 cubic feet of water per second, not to exceed 345 acre-feet of water per annum to be diverted by means of the Crowder Dike from Dog Creek, a tributary of Flat Creek, at a point in the NW $\frac{1}{4}$, NW $\frac{1}{4}$, NW $\frac{1}{4}$ of Section 22, Township 24 North, Range 31 East, M.P.M., Phillips County, Montana and released from said Crowder Dike to be used for new irrigation of 45 acres in the S $\frac{1}{2}$ of Section 16, and 15 acres in the SE $\frac{1}{4}$ of Section 17; and for supplemental irrigation of 125 acres in the NE $\frac{1}{4}$ of Section 21; 125 acres in the S $\frac{1}{2}$ of Section 16 and 35 acres in the SE $\frac{1}{4}$ of Section 17, containing a total of 345 acres, more or less, all in Township 24 North, Range 31 East, from January 1 to December 31, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply, and subject to any final determination of prior existing rights in the source of supply as provided for by Montana law.

3. This Provisional Permit as granted is inclusive of, not additional to, prior water rights the Permittee may establish or has established from the same source of supply and point of diversion.

4. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

5. The issuing of a 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 a Provisional Permit, in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

6. The Permittee shall submit the following to be prepared by a competent professional to the Department within 180 days after receipt of the Provisional Permit or within any extension of time authorized by the Department:

- A. Detailed plans to scale of the Crowder and Koss dike systems including the direction of flow of water from Dog Creek through the Crowder and Koss dikes. (Submit also sizes and measurements where applicable.)
- B. Show the locations of each dike, existing spillway in the Crowder dike, dike drainage facilities, and proposed placement of culvert or culverts, in the Crowder dike.
- C. Cross-section of both the Crowder and Koss dikes, showing elevations of existing dikes, proposed culvert(s), existing spillway and appropriate fields to be irrigated.
- D. Also submit any additional plans or information to assist in determining the proper location, size and elevation for placement of the pipe(s) or culvert(s) in the Crowder dike.

7. The Department will after receipt of Item 6 above, modify, approve, or deny the plans. An on-site field investigation may also be necessary to fully evaluate this matter to reach a fair and equitable placement of the diversion facility in the Crowder dike.

8. The above conditions to the granting of this Provisional Permit shall hold in full effect for any successor in interest to the Permittee herein named.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a record of water used for their own proof of their water rights and use.

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Done this 16th day of June, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 4234-s40E BY EDWIN KOSS)

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the courtroom of the Phillips County Courthouse at Malta, Montana, at 9:00 a.m. on Wednesday, June 30, 1976, Daniel G. Diemert, Hearing Examiner, presiding.

Mr. Edwin Koss appeared and presented evidence and testimony on behalf of this application. He entered three exhibits into the record; pictures taken in 1958 through 1960, which tended to show an excess amount of water flowing in Dog Creek during those years. Mr. Donald Holzhey, a neighbor of Mr. Koss, appeared in support of the application.

Timely objections were filed by Mr. Ervin Crowder, Mr. Vance Spencer, successor in interest to the original Objector, Mr. William E. Spencer, his father, and Mr. William French. All Objectors appeared at the hearing and Mr. Willis McKeon, an attorney, represented Mr. William French. A photostat copy of the Notice of Appropriation of Mr. William French was introduced as Objectors' French Exhibit A.

Preliminary to the hearing Mr. Koss amended his application by changing his point of diversion to the NW1/4 NW1/4

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NW1/4 Section 22, Township 24 North, Range 31 East of the M.P.M. in Phillips County where upon Mr. Ervin Crowder withdrew his objection.

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 of the Water Resources Division, Department of Natural Resources and Conservation:

PROPOSED FINDINGS OF FACT

1. On November 25, 1974 the Department received an Application for Beneficial Water Use Permit No. 4234-s40E from Mr. Edwin Koss who sought to appropriate 7.5 cubic feet of water per second, not to exceed 345 acre-feet per annum for irrigation of 345 acres of new and supplemental acreage located in Sections 16, 17, and 21 all in Township 24 North, Range 31 East of the M.P.M. in Phillips County, Montana from January 1 to December 31, inclusive, of each year. The amended application called for a point of diversion in the NW1/4 NW1/4 NW1/4 of Section 22, Township 24 North, Range 31 East to be diverted through a 30 inch pipe in an existing dike owned by Ervin Crowder. The Crowder diversion contains water appropriated from Dog Creek, a tributary of Flat Creek, in Phillips County, Montana.

2. The Department received objections from Ervin J. Crowder, William E. Spencer, and William R. French on October 2, 20, 21, 1975, respectively. Mr. Ervin Crowder's objection related only to the point of diversion and was withdrawn after amendment of the application. Mr. French and Mr.

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Spencer objected on the ground that there is rarely unappropriated waters in the source of supply and that their prior water rights would be adversely affected. Mr. Vance Spencer is the son and successor in interest to William E. Spencer, now deceased.

3. Mr. Howard Reinhardt attended the hearing on behalf of the Department of Natural Resources and Conservation.

4. It appears that there has been alterations in the flow of streams in the area prior to the enactment of the Water Use Act. For example, the Applicant herein, Mr. Koss, complained that prior to 1969 he had used Dog Creek water for approximately 17 years and that as a result of the construction of dikes in 1969, he has since been deprived of the water. Since Dog Creek is not an adjudicated stream, it appears that Mr. Koss may have acquired a water right through use of Dog Creek water.

5. The Applicant is aware that there is not water available every year for appropriation and has no intention of interfering with prior water rights, but when there is water available, he would like to use it.

6. Mr. Vance Spencer testified that since 1969 they have used over 2 cubic feet of water per second to irrigate 160 acres. Some of this water came from Crowder's diversion and some of it spilled out of the north end of Crowder's dike. In his opinion there is only one year out of ten when there is excess water available.

7. Mr. French would like to agree upon the means of diversion that would not require regulation because in his

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opinion it could be a source of disagreement among all of the neighbors. He feels that there is excess water available only about 20% of the time. Mr. French has no objection to an appropriation if it can be made in such a way as to not require constant supervision and constructed in such a manner that only excess flows would be appropriated.

8. The Applicant feels that much of the water which satisfies both Mr. French's and Mr. Spencer's water rights does not flow through Crowder's dike.

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 Dog Creek.
2. Claims of prior interference with the existing water use rights, perfected prior to the effective date of Montana Water Use Act, are irrelevant to and beyond the scope of a hearing on an application for a provisional permit.
3. It appears that both objectors, Mr. Spencer and Mr. French, have valid water rights on Dog Creek.
4. There are at times unappropriated waters in the source of supply available for appropriation by the Applicant for the purposes requested herein.
5. Pursuant to Section 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 by a provision requiring satisfaction of those rights.

7. The use of a mechanically regulatable diverting device would adversely affect appropriators in that it would require their constant vigilance to protect their water rights. The proposed 30 inch culvert should be installed at a level in the dike which will cause only excess waters to flow through it to the Applicant.

8. The proposed means of diversion is adequate provided that it is constructed in such a way as to allow the Applicant to appropriate only excess water.

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 constitutes a beneficial use.

11. 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.

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

13. Nothing decided herein has bearing upon the status

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of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing upon 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 Proposed Findings of Fact and 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. 4234-s40E is hereby granted allowing the appropriation of 7.5 cubic feet of water per second, not to exceed 345 acre-feet per annum to be diverted from Dog Creek, a tributary of Flat Creek, at a point in the NW1/4 NW1/4 NW1/4 of Section 22, Township 24 North, Range 31 East of the M.P.M., in Phillips County, Montana to be used for irrigation purposes on Section 16, 17, and 21 all in Township 24 North, Range 31 East from January 1 to December 31, inclusive, of each year.

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

3. In order to protect those prior water rights, the Applicant shall install his diverting culvert at a level in the Crowder dike so that only surplus waters are appropriated. Said culvert shall be of a permanent, non-regulatable design.

4. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage

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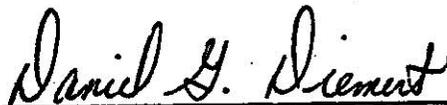
caused by the Applicant's exercise of its Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

5. This Provisional Permit is granted subject to any final determination of prior existing 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 July, 1976.



DANIEL G. DIEMERT
HEARING EXAMINER

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