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

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 4409-S42I AND NO. 4410-S42I
BY CURTIS LUCKCUCK

FILMED
APR 7 1990

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The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of February 19, 1976, and incorporates them herein by reference.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law incorporated herein, the Department hereby makes the following:

ORDER

Application for Beneficial Water Use Permit No. 4409-s42I and Application for Beneficial Water Use Permit No. 4410-s42I are hereby denied.

DONE this 3rd day of March, 1986.

Gary Fritz

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 E. 6th Avenue, Helena, MT 59
(406) 444 - 6605

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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 4, 1986, she deposited in the United States mail, postage prepaid, a Final Order, an order by the Department on the Applications by Curtis Luckcuck, Application No. 4409-s42I and No. 4410-s42I, Applications for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Carl Smith, Olive, MT 59343
2. Laurence R. and Barbara Sampson, Broadus, MT 59371
3. Keith Kerbel, Manager, Water Rights Bureau Field Office, Billings, MT (inter-departmental mail)
4. Gary Fritz, Administrator, Water Resources Division (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 4th day of March, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Sam R. Allen

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 4410

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

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 4410-S42-I by CURTIS LUCKCUCK AND NO. 4409-S42-I BY CURTIS LUCKCUCK	)	PROPOSAL FOR DECISION

The hearing on objections to the above-entitled applications was held after due notice in the courtroom of the Powder River County Courthouse, Broadus, Montana, at 1:00 p.m. on Thursday, November 13, 1975, Gary L. Spaeth, Hearing Officer presiding, pursuant to the Montana Water Use Act and Administrative Procedures Act. The applications were consolidated for hearing since the waters involved in both applications are from the same source and that the parties are identical to both applications.

The applicant, Mr. Curtis Luckcuck, was present and presented testimony on behalf of his application.

The objectors, L.R. and Barbara Sampson submitted a timely objection and appeared personally and presented testimony on behalf of their objection.

The Department having fully considered the evidence and being fully advised of the premises hereby makes the following findings of fact:

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FINDINGS OF FACT

1. On December 9, 1974, the applicant submitted with the Department two Applications for Beneficial Water Use Permit. Application No. 4409-s42-I is for 10 acre-feet per annum of water to be impounded in a 10 acre-foot reservoir on Dry Gulch, a tributary of the Little Powder River at a point in the NW1/4SE1/4SE1/4 of Section 19, Township 5 South, Range 52 East, M.P.M. Application No. 4410-s42-I is for 10 acre-feet per annum of water to be impounded in a 10 acre-foot reservoir on an unnamed tributary of Dry Gulch at a point in the NW1/4 SE1/4NW1/4 of Section 29, Township 5 South, Range 52 East, M.P.M. The water under both applications would be used from January 1 to December 31 inclusive of each year for the watering of approximately 150 head of cattle and calves.

2. On June 7, 1975, L.R. and Barbara Sampson submitted a timely objection to the application on the grounds that the proposed diversion would adversely affect his prior existing rights.

3. The objectors, L.R. and Barbara Sampson are husband and wife and their farming operation is located immediately adjacent and downstream from the ranch of the applicant.

4. The objectors offered into evidence a Notice of Appropriation filed for record October 6, 1909 with the County clerk and recorder in and for Custer County, Montana by Gordon Stout. The filed appropriation was for 1,000 miners

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inches per second "of the waters of a Dry Gulch running east south of east and west of centerline Section 20, Township 5 South, Range 52 East." That the means of diversion would be by "a ditch which would divert the water from said stream at a point upon the section line between Section 20 and 21 about 200 yards south of the quarter corner on said section line" where a dam was to be erected. From testimony at the hearing, it appears the dam was not built nor was any water diverted or used under this Notice of Appropriation.

5. From testimony received at the hearing from the objector, L.R. Sampson, it appears that he has diverted the waters of Dry Gulch to irrigate certain lands located adjacent and downstream from those lands of the applicant on Dry Gulch. ~~The diversion works of the objector consists primarily of a reservoir~~ and well water supplies small pond with two ditches diverting water from the pond. There is also a rather large flood dike located at the lower end of his property. From looking at the map and from testimony at the hearing, the objector irrigates between 28 and 40 acres of land by and through his system.

6. The applicant, Mr. Luckcuck, in 1964 installed a system of feeder dikes on Dry Gulch in the area immediately adjacent and upstream from that of the objector. The total number of acres irrigated by this feeder dike system is about 22. There are also other diversions located on Dry Gulch upstream from the objector, and from testimony at the hearing it appears

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that these diversions are relatively insignificant.

7. According to the objector, Mr. Sampson, he generally had enough water to irrigate the majority of his lands on Dry Gulch prior to 1964, but since the installation of the dike system by the applicant in that year he has been without water most of the time. The objector further stated that since 1964 he has only been able to obtain even in the good years, a maximum of 20 acre-feet.

8. The available drainage of Dry Gulch is approximately 1,125 acres, and that the irrigation ratio for the drainage would range from 25:1 to as high as 40:1. If the first ratio is correct, Dry Gulch would provide adequate water for approximately 45 acres of water. 1125÷25=45. Using the second ratio, Dry Gulch would provide water for only 28 acres of irrigation. 1125÷40=28. Existing irrigation on Dry Gulch is at least 50 to 60 acres.

From the proposed Finding of Fact, the 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 waters from Dry Gulch.

2. There are no unappropriated waters in the source of supply.

3. The rights of prior appropriators will be adversely affected if these applications are granted.

4. The objector, Mr. Sampson, has an apparent prior water

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right to the waters of Dry Gulch based upon a use of those rights dating back to at least 1947. The filed Notice of Appropriation by Mr. Stout in 1909 appears to be an invalid water right since the diversion works were never constructed and that water was never diverted pursuant to that appropriation at any time over the last 62 years.

5. The proposed means of diversion is adequate. That the proposed use of water for livestock watering purposes is a beneficial use.

6. That the criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947 have not been met.

Based on the above Proposed Findings of Fact and Conclusions of Law, the following Order is proposed:

PROPOSED ORDER

1. The Applications for Beneficial Water Use Permit No. 4409-s42-I and Application for Beneficial Water Use Permit No. 4410-s42-I are hereby denied.

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 within ten 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.

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DATED this 19th day of February, 1976.

Gary L. Spaeth
GARY L. SPAETH
HEARING EXAMINER

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CASE

Form No. 621-A (Nov 3/75)

AFFIDAVIT OF SERVICE
(Proposed Order)

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Ronald J. Guse, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on February 20, 1976, he deposited in the United States mail, "certified mail, return receipt requested," a copy of the Proposed Order by the Department Hearing Examiner on the application by Curtis Luckcuck, Application No. see below*, for a permit to appropriate water, addressed to each of the following persons or agencies:

*4409-s42-I and 4410-s42-I

1. Mr. Curtis Luckcuck, E. L. Bar Ranch, Broadus, MT 59317 111156
2. Mr. Laurence R. and Ms. Barbara Sampson, Broadus, MT 59317 111157
3. Mr. Don Riddle, Room 211, Department of Natural Resources and Conservation, 1245 North 29th Street, Billings, MT 59101 (sent regular mail)**
4. Messrs. Ralph Saunders and R. Scott Guenthner, Room 211, Department of Natural Resources and Conservation, 1245 North 29th Street, Billings, MT 59101 (sent regular mail)**

**Sent regular mail since they are Department employees.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Ronald J. Guse

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

On this twentieth day of February, 1976, before me, a Notary Public in and for said State, personally appeared Ronald J. Guse, known to me to be the Assistant Chief, Water Rights Bureau, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

T. J. Reardon
Notary Public for the State of Montana

NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My Commission Expires July 23 1977

Residing at

My commission expires

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