

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
4726-g41P BY DAVID H. AND
LAVONNE J. HASTINGS

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

FILMED

APR 9 1980

The Amended Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on February 17, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicants' Provisional Permit No. 4726-g41P is hereby granted allowing for the appropriation of 1.33 cubic feet per second or 600 gallons per minute of water, not to exceed 130 acre-feet per annum, in Pondera County, Montana, to be diverted by means of a well approximately 30 feet deep, located at a point in the $W\frac{1}{2}$ NE $\frac{1}{4}$ of Section 31, Township 28 North, Range 1 East, M.P.M., and impounded in a 100-acre-foot offstream-storage reservoir and used for supplemental irrigation on 128 acres in Section 6, Township 27 North, Range 1 East, M.P.M., and on 280 acres in Section 31, Township 28 North, Range 1 East, M.P.M., and containing a total of 408 acres, more or less, 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, including, but not limited to, those appurtenant to the land owned by the Objectors herein.

3. 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.

4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided by Montana law.

5. This Provisional Permit is granted subject to the following restrictions:

- a. The Applicants shall install and maintain an adequate measuring device at a point upon Pondera Coulee below the location of the well to insure that prior downstream water rights as noted in the original order are being satisfied. Further, the Applicants shall keep and maintain a record of all measurements taken, and shall supply said records to the Department upon request.

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- b. The Applicants shall at all times allow at least 6 cubic feet per second of water to pass the measurement device on Pondera Coulee to satisfy prior downstream water rights during the allowable well-diversion pumping period of March 1 to May 1 of each year, before water may be pumped from the well near Pondera Coulee into the offstream-storage reservoir. This limit of 6 cubic feet per second is and shall be subject to change in the future if the Department determines that more water must be left in Pondera Coulee to protect prior existing water rights.
- c. The Applicant shall also install and maintain an adequate flow meter or other applicable measuring device on the new pumping facility at the well, which will pump water into the storage reservoir during the period allowed herein. Records must also be kept and maintained and shall be supplied upon request to the Department.
- d. The Applicant's offstream-storage reservoir must meet all local Soil Conservation Service design and specification requirements for a reservoir of this type, including the reservoir release structure back into Pondera Coulee if deemed necessary by the local Soil Conservation Service to ensure proper construction and safety of the structure. Maintenance of the reservoir must further be completed on the structure as needed.
- e. The Applicants shall cooperate with other water users in scheduling their withdrawals so that periods of diversion will not adversely affect prior water rights.

Recommendations

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

Done this 24th day of March, 1977.

Derrin Lewis
 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

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 4726-g41P BY DAVID) PROPOSAL FOR DECISION
H. AND LAVONNE J. HASTINGS)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on Tuesday, November 9, 1976 at approximately 1:30 p.m., Gary L. Spaeth, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

Mr. David H. Hastings, the Applicant herein, appeared personally and presented evidence and testimony in support of his Application.

The following objectors personally appeared and presented testimony on behalf of their application. Mr. Harvey Hollandsworth appeared on behalf of the Pondera Creek and Tributary Water Users Association of Brady and the Hollandsworth Ranch also of Brady; Mr. J.A. Broadhurst of Ledger; Mr. Kenneth Broadhurst of Ledger; Mr. O. Ramsey Offerdal of Conrad; Mr. Fred Arnold on behalf of the objection filed by Mr. and Mrs. Fred Arnold of Brady; and Mr. Marvin S. Cheek of Ledger, Montana.

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Objectors not present or represented at the hearing are:
Allen C. Kolstad; Robert L. Pugsley; Ernest H. Stordahl, and
Olaf Smedsrud.

Mr. O. Ramsey Offerdal testified that he is located immediately downstream on Pondera Creek from the Applicant. He noticed that an excavation north of the creek for gravel was made where there are settling ponds, and that these ponds have water in them when the creek is high. But the water in these ponds do fluctuate with the water table and the amount of water in the creek. Mr. Offerdal has an old right dating back to 1898 for 3,000 miners inches filed by Mr. Clark L. Lytle and a 1900 right by Mrs. Ida Lytle for 4 c.f.s. These water rights were put to use because the ditches are there and did go back away from the creek for about 2 miles and that a portion of that right is still presently being used and they hope to continue the expansion of that right. Mr. Offerdal has two wells, one for household uses and one for livestock uses. The household well is approximately 15 feet deep and is about 100 yards from the creek, while the livestock well is about 13 feet deep and is about 200 yards away from the creek.

Mr. Harvey Hollandsworth, an objector, testified that he is about 10 miles downstream from the Applicant on Pondera Coulee. Mr. Hollandsworth testified that he has a use right which dates back to about 1885 to 1890 which was diverted by

Bob Lytle, a brother of Clark Lytle and he obtained this information by an interview with Clark and a daughter of Bob Lytle. At present he uses the water for stockwater and does not irrigate. He further testified that the creek was as dry as he had ever seen it in 1974. He further testified that in the summer season after the main spring runoff the pumping by the Applicant would adversely affect downstream flows.. That normally the big runoff comes between the 10th and 15th of March and continues until the end of April. He would be opposed to granting any diversion from Pondera Coulee either by way of direct diversion or by pump in a well near the creek from May 1 to September 30, inclusive, of each year.

Mr. Fred Arnold testified that he has an old use right which has been used continually from about 1893 to 1895 to the present. That his family has been in the area since 1913 and has used the waters of Pondera Coulee for stockwater. He is not concerned with the use of depleting the water during the early season, but is concerned about the period after May 1 until the fall period. His location is approximately 10-15 miles downstream from that of the Applicant.

Mr. Marvin Cheek testified that he agreed with Mr. Arnold's statement; that he was concerned about the creek drying up after the first of May through the rest of the summer and that he was not concerned with early pumping.

The creek dried up completely about two years ago which would have been 1974. Mr. Cheek further testified that the area of his ranch was homesteaded in 1889 and that livestock had been using the waters of Pondera Coulee since that time and he has a filed right from 1964 for livestock watering, but has not used any of the waters for irrigation. Because of the length of time that Mr. Cheek has been on the creek, there have been some years in which he has had to haul water for stockwatering purposes.

Mr. Don D. Cheek of Ledger, who is not an objector in this hearing, but is a member of the Pondera Creek and Tributary Water Users Association testified that he is the brother of Marvin and that they have used the waters from Pondera Coulee from time to time and is primarily concerned with the depletion of the creek.

Mr. Kenneth Broadhurst has approximately 3500 acres located in Liberty County approximately 5 miles from the mouth of Pondera Coulee. Of that 3500 acres, he farms approximately 1200 acres with the remainder in grazing, and have about 200 head of livestock. He uses the water from Pondera Coulee for irrigation on about 75 acres of alfalfa and for livestock watering. That the waters that he is using were first used in 1916 by his grandfather when he homesteaded in the area. That 1974 was a very dry year and the water supply was totally depleted. With increased withdrawals in irrigation in the basin, it could create a serious problem for him in

his farming operation in the future. That he has wells approximately 20 feet off of Pondera Coulee and that water level follows the level of the creek.

Mr. J. A. Broadhurst is the father of Ken Broadhurst and has lived along the creek for approximately 60 years and has used the water of Pondera Coulee for livestock and household purposes. That in 1974 there was not enough water to supply their needs as they have existed for over the last 60 years.

Mr. Robert L. Pugsley, Jr., of Pugsley Ranches, Inc. testified that he lives upon the Marias River near the mouth of Pondera Coulee with the Marias River. That they have 6,000 acres where they directly water livestock out of Pondera Coulee and are dependent upon the waters of Pondera Coulee for such livestock watering purposes.

Mr. Harvey Hollandsworth testified on behalf of the Pondera Creek and Tributary Water Users Association and presented testimony on behalf of the objector, Ernest H. Stordahl who was not present at the hearing. According to Mr. Hollandsworth, Mr. Stordahl irrigates approximately 35-40 acres and has a small ranch and waters livestock from the coulee. Mr. Stordahl, according to Mr. Hollandsworth, has a filed right which dates back to the 40's but Mr. Hollandsworth was not sure as to the amount of that right. Mr. Stordahl is located between the Hollandsworth Ranch and the Offerdal place.

Mr. Hollandsworth further went on to point out that Allen Kolstad has a ranch located upon Pondera Coulee which is located between the Cheek's and the Broadhurst's ranches. Mr. Kolstad, according to Mr. Hollandsworth, uses the waters of Pondera Coulee to water approximately 500-600 head of yearlings each year. That he has a filed right for livestock watering purposes dating back to 1917 or earlier. That in 1974 Mr. Kolstad had to move his yearlings away from Pondera Coulee because of the lack of stockwater in Pondera Coulee.

Mr. Hollandsworth further went on to state the position of the association in that they are not opposed to offstream storage and if some criteria could be established to determine when peak flows are, that pumping should be allowed when there are between 1 to 2 cfs of water in Pondera Coulee at the Applicant's location.

Mr. Steve White, a geologist with the Department, testified as to the hydrology of the application. He concluded that at least 95%, if not 100% of the water for the well of the Applicant would come from the waters of Pondera Coulee. Mr. White introduced into evidence three exhibits which were denoted and accepted into the record as Department's Exhibits No. 1, 2, and 3. Department's Exhibit No. 1 is a chart of the water flows and the stream depletion with the well located approximately 100 feet from the stream. Department's Exhibit No. 2 is a stream depletion chart showing a well 200 feet from the stream.

Department's Exhibit No. 3 is a rate of depletion on the basis of 1 through 300 days and was used to compute the charts which were introduced as Department's Exhibits 1 and 2.

The Applicant, Mr. David H. Hastings, testified that he had a filed right which was filed prior to the 1973 Montana Water Use Act. At the present time he has reached no firm decision as to how far away the well should be from that stream, but is examining test holes which he has in the area which are from a quarter to three-eighths of a mile away from the stream. In answering a question directed to the Applicant by Mr. Robert L. Pugsley, Jr., he stated that at this time he does not plan under this application, of increasing the acres irrigated but just using the water that he obtains from the well for supplemental irrigation on the 408 acres presently irrigated.

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 January 31, 1975 the Department received an Application for Beneficial Water Use Permit No. 4726-g41P from the Applicant requesting to appropriate 1.33 cubic feet per second or 600 gallons per minute of water, not to exceed 130

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acre-feet per annum, in Pondera County, Montana, to be diverted by means of a well approximately 30 feet deep, located at a point in the W1/2 NE1/4 of Section 31, Township 28 North, Range 1 East, M.P.M., and impounded in a 100-acre foot reservoir and used for supplemental irrigation on 128 acres in Section 6, Township 27 North, Range 1 East, M.P.M., and on 280 acres on Section 31, Township 28 North, Range 1 East, M.P.M., and containing a total of 408 acres, more or less, from January 1 to December 31, inclusive, of each year.

2. The Department received timely objections from Harvey Hollandsworth, President, Pondera Creek and Tributary Water Users Association, J. A. Broadhurst, Allen C. Kolstad, Robert L. Pugsley, Jr., on behalf of Pugsley Ranches, Inc., Harvey G. Hollandsworth on behalf of Hollandsworth Ranch, Kenneth Broadhurst, Ernest H. Stordahl, O. Ramsey Offerdal, Olaf Smedsrud, Mr. and Mrs. Fred Arnold, and Marvin S. Check. All of the objections claimed that the pumping of the water would adversely affect the flow of Pondera Coulee along which they have irrigation and stockwatering rights.

3. There are at times of the year when there are unappropriated waters in the source of supply available for appropriation by the Applicant for the purposes herein applied for. Those times generally occur in the early spring until about May 1 along Pondera Coulee and when there are more than 2 cubic feet per second of water flowing in Pondera Coulee near the Applicant's proposed well.

4. If certain restrictions are placed upon the Applicant's pumping, the right to prior appropriators will not be adversely affected.

5. It appears that the proposed means of diversion or construction are adequate.

6. The proposed use of water is a beneficial use.

7. 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.

8. The Applicant has not asked for an appropriation of 15 cubic feet per second or more. It therefore is not necessary to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

Based upon the above Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made.

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 4726-g41P should be granted in accordance with the provisions of Chapter 8, Title 89, of the Revised Codes of Montana.

2. 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.

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

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

5. Nothing decided herein has bearing on the status of water rights claimed by the Applicant 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, Proposed Conclusions of Law, the Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 4726-g41P is hereby granted allowing for the appropriation of 1.33 cubic feet per second or 600 gallons per minute of water, not to exceed 130 acre-feet per annum, in Pondera County, Montana, to be diverted by means of a well approximately 30 feet deep, located at a point in the W1/2 of the NE1/4 of Section 31, Township 28 North, Range 1 East, M.P.M., and impounded in a 100 acre-foot reservoir and used for supplemental irrigation on 128 acres in Section 6, Township 27 North, Range 1 East, M.P.M., and on 280 acres in Section 31, Township 28 North, Range 1 East, M.P.M., and containing a total of 408 acres, more or less, 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, including but not limited to those appurtenant to the lands owned by the objectors herein.

3. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damages caused by the Applicant'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 Applicant's exercise of his Provisional Permit.

4. 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.

5. This Provisional Permit is granted subject to the following restrictions:

(a) The Applicant will only be allowed to pump from his well from March 1 to May 1 of each year. If the Applicant desires to pump at other times of the year, the Applicant shall be required by this Order to place a measuring device in Pondera Coulee near the location of the well and the Applicant shall be allowed to pump from his well at any time when there are more than 2 cfs flowing past this measuring device.

6. The Applicant shall submit specific plans for the dam and reservoirs to the Department for approval before proceeding with construction. The Department shall grant

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such approval if it determines that the dam is safe.

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 mailed to 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 26th day of January, 1977.


GARY L. SFAETH
HEARING EXAMINER

ions are that instead of 2 cfs flowing in Pondera Coulee in the vicinity of the well, that at least 6 cfs should be required. They further recommended that this proposal follow very closely the Proposal issued in the Application for Beneficial Water Use Permit No. 4078-s41P by Harold A. Philips. Mr. Philips' point of diversion on Pondera Coulee is approximately two miles above that of the Applicant's.

This Hearing Examiner feels that the Department should be consistent when granting Proposals on a stream when they are essentially the same. Even though this Proposal is for a well as opposed to the direct diversion requested by Mr. Philips, the water supply for the well would come from Pondera Coulee. It is the Hearing Examiner's feeling that it is the same as the Philips' application. I only regret that this information had not been introduced at the hearing. The 2 cfs as opposed to the 6 cfs was accepted on the basis of the testimony at the hearing. At no time in the record was 6 cfs referred to. The parties hereto were allowed additional time in which to come up with some proposal and it would have been hoped at that time that some agreement could have been reached. Instead of prolonging this particular hearing, which is not in the Hearing Examiner's opinion in the best interest of any of the parties, this Hearing Examiner therefore recommends an Amended Proposal For Decision to the

Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. The Amended Proposal for Decision will incorporate the original proposal and it will be amended to read as follows:

AMENDED PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 4726-g41P is hereby granted allowing for the appropriation of 1.33 cubic feet per second or 600 gallons per minute of water, not to exceed 130 acre-feet per annum, in Pondera County, Montana, to be diverted by means of a well approximately 30 feet deep, located at a point in the W1/2 NE1/4 of Section 31, Township 28 North, Range 1 East, M.P.M., and impounded in a 100-acre foot off-stream storage reservoir and used for supplemental irrigation on 128 acres in Section 6, Township 27 North, Range 1 East, M.P.M., and on 280 acres in Section 31, Township 28 North, Range 1 East, M.P.M., and containing a total of 408 acres, more or less, 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, including, but not limited to those appurtenant to the land owned by the Objectors herein.

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

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

4. 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.

5. This Provisional Permit is granted subject to the following restrictions:

a. The Applicant shall install and maintain an adequate measuring device at a point upon Pondera Coulee below the location of the well to insure that prior downstream water rights as noted in the original order are being satisfied. Further, the Applicants shall keep and maintain a record of all measurements taken, and shall supply said records to the Department upon request.

b. The Applicant shall at all times allow at least 6 cubic feet of water per second to pass the measurement device on Pondera Coulee to satisfy prior downstream water rights during the allowable well diversion pumping period of March 1 to May 1 of each year, before water may be pumped from the well near Pondera Coulee into the offstream storage reservoir. This flow of 6 cfs is and shall be subject to change in the future if the Department determines that more water must be left in Pondera Coulee to protect prior exist-

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ing water rights.

c. The Applicant shall also install and maintain an adequate flow meter or other applicable measuring device on the new pumping facility at the well, which will pump water into the storage reservoir during the period allowed herein. Records must also be kept and maintained and shall be supplied upon request to the Department.

d. The Applicant's offstream storage reservoir must meet all local Soil Conservation Service design and specification requirements for a reservoir of this type, including the reservoir release structure back into Pondera Coulee if deemed necessary by the local SCS, to ensure proper construction and safety of the structure. Maintenance of the reservoir must further be completed on the structure as needed.

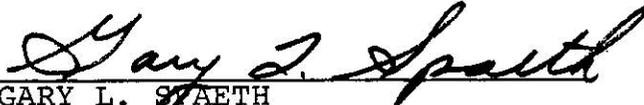
6. The Applicants shall cooperate with other water users in scheduling his withdrawals so that periods of diversion will not adversely affect prior water rights.

NOTICE

This is Proposed Order and will not be 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 mailed to the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exception,

opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 17 day of February, 1977.


GARY L. SPAETH
HEARING EXAMINER