

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

FILMED
 IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 4806-s40D BY C. G. GLASSCOCK
 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APR 15 1977

A hearing on the objections to this Application was held on November 5, 1976, in Jordan, Montana. The Applicant, C. G. Glasscock, was present and was represented by George Huss of Miles City. The Objector, Little Dry Water Users Association, was represented by its secretary, Gerhard Helm, and its president, Anton Hafla. Objector Helm Hereford Ranch was also represented by Mr. Helm. An objection was filed by the Department of Natural Resources and Conservation, but no one was present to represent that objection and the statements contained therein were not considered for purposes of this decision.

A Proposed Order (Proposal for Decision) dated November 24, 1976, was issued by the hearing examiner, Allen B. Chronister.

The Proposed Order Notice as issued provided that the order would not become final until accepted by the administrator of the Water Resources Division, and that any written exceptions to the Proposed Order shall be filed with the Department within fifteen (15) days of receipt of same and upon receipt of any written exceptions by the Department, opportunity would be provided to file briefs and to make oral arguments before the administrator of the Water Resources Division.

On December 20, 1976, the Department received an Exception, "Objections to Proposed Findings of Fact, Conclusions of Law, and Order, and their Proposed Findings of Fact, Conclusions of Law, and Order," dated December 17, 1976, and filed by Little Dry Water Users Association and Helm Hereford Ranch, in opposition to the Proposed Order in the matter of Application No. 4806-s40D by C. G. Glasscock.

The Department sent identical letters dated December 23, 1976, to the two exceptors (Little Dry Water Users Association and Helm Hereford Ranch), acknowledging receipt of their exception and advising them of their opportunity to file a brief supporting their exception by January 17, 1977. Copies were sent to the Applicant and his legal counsel, Mr. Huss.

On January 17, 1977, the Department received a letter dated January 14 from John R. Carr, which stated, "On behalf of the Little Dry Water Users Association, I am enclosing herewith their written Notice to you that they do not intend to file any written brief, and their request for a hearing before the Administrator. It should be noted that Mr. Gerhard W. Helm, of Helm Hereford Ranch, who is in my office today, advises that his name was incorrectly included in the objections

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and Proposed Findings which we prepared and submitted to your office sometime ago, and that their name should be deleted therefrom. By this I do not mean they are withdrawing from the protest but that they are handling their own matters separately. Please advise us when the hearing, if any, will be held before the Administrator."

Attached to Mr. Carr's letter quoted above was a letter dated January 14, 1977, from the Little Dry Water Users Association, which stated, "Reference is made to your letter of December 23, 1976, directed to the Little Dry Water Users Association. Said Association does hereby advise you they do not intend to file a supporting brief, as it is felt that the Association's position is adequately presented in the Objections and Proposed Findings. However, the Association would like, and does hereby request, that a hearing be held before the Water Resources Division Administrator so that someone on behalf of the Association can present oral argument in support of the proposed findings which have heretofore been submitted."

By letter of January 18, 1977, to Mr. Carr, the Department acknowledged receipt of his letter of January 14 and advised him that since he was not going to file a brief supporting his exceptions the Applicant would be informed of his opportunity to file a reply brief.

The Department by letter of January 18 to the Applicant, advised him of his opportunity to file a reply brief in reply to the exceptions filed against the Proposal for Decision within fifteen days after receipt of the letter. The Applicant was further advised that since the Little Dry Water Users Association through its president, Anton Hafla, had requested an oral argument hearing on its exception, said hearing would be held sometime after the Department received his reply brief.

On January 28, 1977, the Department received the Applicant's reply brief dated January 27 and filed by Mr. Huss on behalf of the Applicant.

By letter of January 31, 1977, to Mr. Huss, the Department acknowledged receipt of his reply brief and advised that the application would be forwarded to the administrator of the Water Resources Division for scheduling of said requested oral argument hearing.

On April 6, 1977, the administrator of the Water Resources Division issued a "Notice of Oral Argument Hearing on Exceptions to Proposal for Decision," in the matter of Application No. 4806-s40D by C. G. Glasscock III, notifying all parties in this matter that on Friday, April 29, 1977, at 10 a.m., an Oral Argument Hearing would be held before the Administrator in the Courtroom of the

Garfield County Courthouse, at Jordan, Montana, for the purpose of hearing oral arguments in support of the written exceptions and briefs.

The oral argument hearing before the administrator was held in Jordan, Montana, on April 29, 1977.

George W. Huss appeared on behalf of his client, the Applicant, and presented oral argument in support of the Proposal for Decision and briefs. The Applicant, Mr. Glasscock, was also present.

Anton Hafla and Gerhard Helm appeared on behalf of the Little Dry Water Users Association and presented oral argument in support of their exception opposing the Proposal for Decision. Mr. Helm was also representing Helm Hereford Ranch, an objector in this matter. Neither Mr. Hafla nor Mr. Helm was represented by counsel.

The oral argument hearing was conducted by the administrator and assisted by Forrest Tevebaugh, Water Rights Bureau Field Office Manager for the Department in Glasgow, Montana.

During the course of the oral argument hearing, several motions and a stipulation were made, which the administrator took under advisement and will rule on herein:

STIPULATION

At the oral argument hearing it was verbally stipulated by all parties and further agreed by all parties that written agreement to the stipulation would be sent to the administrator, agreeing that: "The Water Resources Division Administrator's hearing can be held and the Final Order can be written under the law without the tape of the contested case hearing held on November 5, 1976, in Jordan, Montana, in the matter of Application for Beneficial Water Use Permit No. 4806-s40D by C. G. Glasscock III."

It was understood by Mr. Huss that the record would consist of the exhibits, application, objections, proposed findings of fact, proposed conclusions of law, proposed order, objection to proposed findings of fact, and brief in support of the proposed order. In fact, the present record consists of all documents contained in the application file except the hearing tape of November 5, 1976, which has been unfortunately misplaced and will be returned to the application record if and when it is found.

The administrator did not receive written, signed statements of the stipulation from the parties who agreed that they would send said signed statement of stipulation. However, since the parties did agree verbally to the stipulation, the administrator rules that the verbal stipulation shall remain in force.

MOTIONS

1. The administrator introduced a letter dated April 26, 1977, from Richard L. Bondy, chief of the Engineering Bureau, Water Resources Division, Department of Natural Resources and Conservation, presenting information on calculations of the expected maximum possible discharges through the primary outlet pipe of the applicant's proposed dam, for an 18-inch gated irrigation outlet and a 36-inch outlet pipe.

Mr. Huss, counsel for the applicant, objected to the introduction of Mr. Bondy's letter into the record on the grounds that Mr. Bondy is arguing his objection with this letter, when he should have introduced the evidence at the first hearing; his statements in his letter do not take into account if in fact water, if released from the applicant's proposed reservoir, will reach the objectors; and the calculations made by Mr. Bondy were not known to be proper calculations without having their own engineer review them.

It is hereby the ruling of the administrator that in part Mr. Huss's objection to Mr. Bondy's letter of April 26, 1977, is sustained at least to the extent that it cannot be used as a means of Mr. Bondy arguing his objection and further, the fact that the letter does not take into account if the released water would even reach the objectors. Mr. Huss's objection is overruled, at least in part, that the administrator will allow only the formulas and calculations in Mr. Bondy's letter into the record, on the ground that said calculations are readily available to the administrator and the public as a daily service of the Department, and further, that similar information was introduced into the record at the first hearing as Applicant's Exhibit "B," which is a letter signed by T. F. Stark, Soil Conservation Service Area Engineer.

2. Mr. Huss objected to the oral argument hearing being held on the grounds that under the Department rules the exceptions to the Proposed Order were required to be filed within fifteen (15) days; however, he believes the exceptions were not filed within the fifteen-day period, are therefore untimely, and should not have been accepted.

It is hereby the finding of the administrator that the exceptions by the Little Dry Water Users Association and Helm Hereford Ranch as received by the Department on December 20, 1976, are valid and timely exceptions for the following reasons:

A. The hearing examiner's Proposal for Decision was signed on November 24, 1976. According to the Affidavit of Service, attached to the Proposed Order, it was mailed to all parties on December 1, 1976. It

is important to the Proposed Order was mailed to Mr. Helm secretary and Mr. Hafla as president of the Little Dry Water Users Association at Rock Springs, Montana. Mr. Helm was also mailed a copy as president of the Helm Hereford Ranch at Rock Springs, Montana. Certified-return receipts show that Mr. Glasscock received his copy on December 7, 1976, at Cohagan, Montana, as signed for by Karen Glasscock. Mr. Huss received his on December 2, 1976, at Miles City, Montana, as signed for by Betty McCourt. Mr. Helm's copy was signed for on December 3, 1976, by Mr. Lawrence H. Losinski at Angela, Montana, which was a Friday (Mr. Losinski is apparently the postmaster at Angela, Montana). Mr. Helm testified at the oral argument hearing that mail was delivered only on Mondays and Fridays to their residences. Therefore, it is concluded that Mr. Helm received his official copy of the Proposal for Decision on December 6, 1976, a Monday, as he testified at said hearing. It is therefore the administrator's finding, based on facts and Mr. Helm's testimony, that Mr. Helm received the Proposal for Decision on December 6, 1976, their exception was dated and signed on December 17, 1976 (a Friday), and received by the Department on December 20, 1976. Simple arithmetic indicates that the exception was timely and that Mr. Helm's 15 days started on December 6, meaning the deadline for the 15 days would have fallen on December 20, 1976, the date on which the exception was received by the Department.

B. It is not a Department rule that all exceptions must be filed within 15 days after receipt of the hearing examiner's Proposal for Decision. The time limitations are designated solely by the hearing examiner at his own discretion and may vary from 10 to 15 days, with extensions granted if so requested. It has been past history of the Department to accept exceptions and/or objections if they are reasonably within the time limit set forth in the Proposed Order.

3. Mr. Huss also objected to the oral argument hearing being held on the grounds that the time-period provisions on acting on an application under Section 89-884, R.C.M. 1947, had expired.

Mr. Huss's objection is hereby overruled. Section 89-884, R.C.M. 1947, provides neither for the voiding of agency action after the 180-day time period, for the automatic transformation of a proposal for decision into a final decision after the 180-day time period, nor for any other specific remedy. This document constitutes the agency's final decision.

The Administrator of the Department's Water Resources Division hereby makes the following Final Order, based on the hearing examiner's Proposed Order of November 24, 1976, the application, objections, exceptions, briefs, the testimony of the oral argument hearing held on April 29, 1977, in Jordan, Montana, 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 November 24, 1976, by the hearing examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposal for Decision, page 1, lines 3 and 4, are corrected to read "Mr. George W. Huss" instead of "Mr. Dewey Huss," except that the Proposed Findings of Fact, page 2, item 2, line 3, is corrected to read "500 acre-feet" instead of "506 acre-feet," and further, except that the Proposed Order is hereby modified as follows:

FINAL ORDER

1. The Applicant's Provisional Permit No. 4806-s40D is hereby conditionally granted for Application No. 4806-s40D to appropriate, only when available without adversely affecting and not needed to satisfy prior downstream water-right users on Little Dry Creek, a total not to exceed 980 acre-feet of water per annum from Little Dry Creek, a tributary of Big Dry Creek, in Garfield County, Montana.

The water is to be impounded in a new 500-acre-foot reservoir on Little Dry Creek at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, Township 14 North, Range 37 East, M.P.M., and used for new irrigation on 102 acres in Section 13, 30 acres in Section 14, 27 acres in Section 22, 40 acres in Section 23, and 10 acres in Section 24, all in Township 14 North, Range 37 East, M.P.M., and 20 acres in Section 18, Township 14 North, Range 38 East, M.P.M., and for supplemental irrigation on 87 acres in Section 21, Township 14 North, Range 37 East, M.P.M., containing a total of 316 acres, more or less, from April 1 to October 15, inclusive, of each year.

The eighty-seven supplemental acres will be sprinkle irrigated by means of a pump from the reservoir at a rate of 1.67 cubic feet per second. The remaining 229 acres of new land will be flood irrigated by releasing stored water from the reservoir downstream to Little Dry Creek and pumped from Little Dry Creek onto the 229 acres and flood irrigated. The total amount herein granted for said irrigation purposes shall not exceed 980 acre-feet per annum.

The Permittee will be allowed to impound water during the year when heavy, spring runoff or floods occur and during other periods of heavy precipitation

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when to so impound said waters will not affect prior water rights downstream on Little Dry Creek.

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

3. The issuing of the 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.

4. The Permit by law must be provisional. Section 89-880(4), R.C.M. 1947, provides, "A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination."

5. 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.

6. At the discretion of the Department, the Permittee shall, with adequate notice given, install and maintain an adequate measuring device (or devices) so as to enable the Permittee to keep a record of all quantities of water actually diverted and impounded from Little Dry Creek, and as well to enable the Permittee to keep a record of the periods of diversion and impoundment. Such records shall be presented to the Department by the Permittee upon demand by the Department.

7. Upon completion of this project, the Permittee shall provide the Department with the release flow water rate in cubic feet per second or gallons per minute from the reservoir for irrigation purposes below the reservoir, and also the pumping flow rates at which the water will be pumped from Little Dry Creek onto the lands for flood irrigation purposes. This information will be attached to the Department's copy of the Provisional Permit and made a permanent part of the application file.

8. This Provisional Permit will be used in conjunction with a claimed 1956 prior existing water right by the Permittee. After the final determination of prior existing water rights in the area have been completed, this Provisional Permit could be reduced to what is actually being beneficially used under the two water rights, so there will be no duplication of rights.

9. The Provisional Permit is granted subject to the condition that at least a 18-inch drainage device be installed in the bottom of the dam, so that water may be released if necessary to satisfy downstream prior water rights. The construction of the project must conform and be constructed to the engineering design, specifications, and safety standards of the local Soil Conservation Service, in order to protect prior water rights downstream and to ensure the safety of any downstream residences or other properties on said source of water.

Recommendation

The Department strongly 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 18th day of July 1977.

Orrin Ellis

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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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)
PERMIT NO. 4806-s40D BY) PROPOSAL FOR DECISION
C. G. GLASSCOCK, III)

A hearing on the objections to this Application was held on November 5, 1976, in Jordan, Montana. The Applicant Mr. Glasscock was present and was represented by Mr. Dewey Huss of Miles City. The Objector Little Dry Water Users Association was represented by its secretary, Mr. Gerhard Helm, and its president, Mr. Anton Hafla. The Objector Helm Herford Ranch was also represented by Mr. Gerhard Helm. An objection was filed by the Department of Natural Resources and Conservation but no one was present to represent that objection, and the statements contained therein were not considered for purposes of this decision.

Based upon the record herein, the following proposal for decision is made as required by the Montana Water Use and Administrative Procedure Acts:

PROPOSED FINDINGS OF FACT

1. The Applicant proposes to construct a dam on Little Dry Creek in Garfield County Montana, and to thereby impound

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and appropriate 980 acre feet of water per year. The Applicant intends to irrigate 316 acres, from April 1 to October 15, of which 200 will be new irrigation. The return flow from this irrigation will drain into Little Dry.

2. The proposed dam would be built to Soil Conservation Service specifications, would cover about 45 surface acres, and would impound about 506 acre-feet of water at full capacity. The dam would contain a spillway and a drainage pipe device.

3. The proposed dam would be located on the extreme headwaters of the drainage, and would trap the runoff from about 6000 acres of land, while there are about 390,000 acres of land in the entire drainage of Little Dry Creek. The damsite is 35 to 40 miles upstream from the diversion point of the Objector Little Dry Water Users Association.

4. The Little Dry is not a perennial stream, but flows primarily during the four to six week spring runoff and during periods of heavy rains.

5. It is undisputed that during the spring runoff in most years there is water in the Little Dry far in excess of the needs of the present users. As the runoff subsides so does the volume of water, until later in the summer the majority of any flow present is the result of rainfall somewhere on the drainage.

6. The main concerns of the objectors are as follows:

a. That the granting of this application will lead to further applications, the total effect of which will be to drastically affect the Objectors' water usage.

b. That they not be denied the benefit of the flows resulting from late-season rains that may fall solely upon the headwater areas of the creek.

7. There is apparently no real information available as to the frequency of occurrence of heavy rains solely upon the Applicant's portion of the drainage, nor as to the amount of rain that would be necessary in order to get a usable flow of water 35 miles downstream to the Little Dry Water Users' diversion.

PROPOSED CONCLUSIONS OF LAW

1. There is unappropriated water in Little Dry Creek at the Applicant's proposed point of diversion during the spring runoff.

2. Allowing the Applicant to impound spring runoff waters will not interfere with prior rights on Little Dry Creek.

3. The present application may not be denied simply because there may be more like it to follow. Each such application must be evaluated on its merits, considering the appropriation and water use situation on the stream at that time.

4. The Applicant should be allowed to trap late season rainfalls as needed to fill his 980 acre feet appropriation, since there is no evidence that this will harm the Objectors as a practical matter.

5. The rights of the Objectors can be adequately protected by conditioning the permit.

PROPOSED ORDER

It is proposed that the Application be granted subject to the following conditions:

1. This permit is subject to all prior water rights.
2. An adequate drainage device must be installed in the dam so that water may be released if necessary to satisfy downstream prior rights.
3. The Department and the Objectors should closely monitor the conditions on the stream during the two irrigation seasons subsequent to construction of the dam to determine whether a specific condition regarding the release of late-season rainwaters is necessary.

DATED: November 24, 1976


ALLEN B. CHRONISTER
HEARING EXAMINER

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator, Department of Natural Resources and Conservation Water Resources Division. Written exceptions to this Proposed Order shall be filed with the Department within fifteen (15) 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, Water Resources Division.