

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT)
NO. 4962-s41A BY)
MONTANA DEPARTMENT OF STATE LANDS)

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on August 16, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 4962-s41A is hereby granted allowing for the appropriation of 3.4 cubic feet per second, equivalent to 1,527 gallons per minute of water, not to exceed 374 acre-feet per annum from the Red Rock River, a tributary of the Beaverhead River, in Beaverhead County, Montana, to be diverted from the Red Rock River by means of the Roe Outlaw Ditch at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 11 South, Range 10 West, M.P.M., and used for irrigation on 92 new acres in Section 9 and 95 new acres in Section 16, all in Township 11 South, Range 10 West, M.P.M., and containing a total of 187 acres, more or less, from May 1 to September 15, inclusive, of each year.

2. The Provisional Permit is issued subject to all prior water rights in the source of supply. Such prior rights shall include, but are not limited to, those of the objector, Roe Ranch Company.

3. In order to effectuate the provisions of this Order, the Applicant shall be prepared to install a larger culvert through the railroad and highway rights-of way, should such be found necessary to adequately transport the water necessary to satisfy the Provisional Permit in addition to existing water rights.

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

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

Recommendation

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

Done this 30th day of September, 1976.

Orin Ferris

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

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 5189-s41A BY NED) PROPOSAL FOR DECISION
WELLBORN AND JAMES MCBEE AND)
4962-s41A BY MONTANA DEPARTMENT)
OF STATE LANDS)

Pursuant to the Montana Water Use Act and Administrative Procedures Act, after due notice, a hearing on objections to the above-named applications was held on Thursday, June 24, 1976 at 1:00 p.m. in the courtroom of the Beaverhead County Courthouse, at Dillon, Montana, Daniel G. Diemert, Hearing Examiner, presiding.

Applicant Ned Wellborn was present and represented by Richard F. Burns. The Department of State Lands was represented by Mr. Randy Biehl and Mr. Robert Conboy.

The sole objector to both applications was the Roe Ranch Company, which was represented by Mr. W. G. Gilbert, Jr. who called his witnesses Mr. Roe, the President of Roe Ranch Company and Mr. Doyle, the manager of the Ranch.

Mr. T. J. Reynolds appeared on behalf of the Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. The Department of Natural Resources and Conservation received applications from the Department of State Lands, and Mr. Ned Wellborn and James McBee on March 5, 1975 and

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April 8, 1975 respectively. Both Applications contemplate the same diverting device and irrigation system so the hearings were consolidated. The Wellborn-McBee Application calls for the appropriation of 3.4 cubic feet per second or 1,525.92 gallons per minute not to exceed 36 acre-feet per annum for irrigation from May 1 to September 15, inclusive, of each year to be diverted from the Red Rock River at a point in the SW1/4 SW1/4 SW1/4 of Section 25, Township 11 South, Range 10 West of the Montana Principal Meridian in Beaverhead County, Montana to irrigate 18 new acres in the NW1/4 of Section 15, Township 11 South, Range 10 West. The Montana Department of State Lands Application as amended, calls for the diversion of 3.4 cfs or 1,525.92 gallons per minute not to exceed 374 acre-feet per annum to be diverted from the Red Rock River in the SW1/4 SW1/4 SW1/4 of Section 25, Township 11 South, Range 10 West in Beaverhead County to be used to irrigate 95 new acres in Section 16 and 92 new acres in Section 9, both in Township 11 South, Range 10 West from May 1 to September 15, inclusive, of each year.

2. The Department of Natural Resources and Conservation received objections from the Roe Ranch Company to the application by the Department of State Lands on November 12, 1975 and to the Wellborn-McBee application on April 22, 1976 alleging that the Applicants had no right to use the Roe Outlaw Ditch and that the natural flow of the Red Rock River was over appropriated.

3. The Applications call for diversion of water from the Red Rock through an existing diversion ditch known as the Roe Outlaw Ditch, which will cross the Roe Ranch Co. property and then through a railroad right-of-way, under the railroad by means of an 18 inch culvert, then under the highway and flow along the highway right-of-way to a point in Section 15 where a pump with a 2,112 gallon per minute or 4.7 c.f.s. capacity will divert the water from the Roe Outlaw Ditch to the places of use.

4. Mr. Biehl, Mr. Conboy, and Mr. Wellborn testified that in their opinion there is sufficient unappropriated water in the Red Rock River to satisfy these applications and that the existing means of diversion, the Roe Outlaw Ditch and the culverts which transverse railroad and highway rights-of-way are large enough to transport the requested amount of water.

5. There seem to be some ambiguity as to the total appropriation in terms of cubic feet per second. Based upon the testimony that the proposed pump has a capacity of 2,112 gallons per minute, the appropriation would require 4.7 cubic feet per second to satisfy the capacity of the pump. The advertisements for the two applications asked for 3.4 cubic feet per second each which would be a total of 6.8 cubic feet per second. The Applications however, called for 3.4 cubic feet per second for State Lands and .4 cubic feet

per second for Wellborn-McBee for a total of 3.8 cubic feet per second.

6. It appears that when Highway 91 was constructed there developed in the vicinity certain springs which flowed into a barrow pit and have since been appropriated and used by Roe Ranch Co. and others instead of using water in the Roe Outlaw Ditch. The Applicants do not, however, allege abandonment by Roe Ranch Co. of its water right flowing in the Roe Outlaw Ditch. Mr. Wellborn has been on his present ranch for about 4 years and to his knowledge no one else has used water out of the Roe Outlaw Ditch. If the new appropriations being applied for in the instant proceeding require larger culverts under the highway and railroad he has already obtained their approval to replace them. He doubts very much, however, that any new culverts will be necessary.

7. Mr. Wellborn feels that since water is going past the final diversion there must be unappropriated water in the Red Rock River.

8. Evidence was introduced which indicated that an 18 inch culvert 20 feet long with a 10 inch drop will carry 9.45 cubic feet per second.

9. Mr. T. J. Reynolds of the Department testified that the Department of State Lands place of use would require from 337 acre-feet per annum to 449 acre-feet per annum depending upon the rainfall during the year and that the Wellborn-McBee would require 34 acre-feet per annum to 47

acre-feet per annum.

10. Mr. Roe, the President of Roe Ranch Company, does not want the provisional permits granted, because the Applicants do not have the right to use the Roe Outlaw Ditch, and secondly, in his opinion, there isn't enough water to satisfy prior existing rights. The Roe Ranch Company irrigates something less than 100 acres from the Roe Outlaw Ditch. He has never seen the Red Rock River dry, but there are times when they have been very short of water.

11. Mr. Doyle, the manager of the Roe Ranch Company, has lived in the Beaverhead Valley all of his life and has been with the Roe Ranch Company for about 25 years. He is also president of the Water Users Association and has been for four years. In his opinion there are no unappropriated waters in the "natural flow" of the Redrock River. The water users release more water from Lima Dam than normally flows in the Red Rock River. For instance, on June 5 of this year they began releasing water and have released 33,000 miners inches while the normal flow of the Red Rock River is 20,000 inches.

12. To Mr. Doyle's knowledge the Roe Ranch Company has not irrigated from the Roe Outlaw Ditch in 25 years. There is always water flowing into the Clark Canyon Reservoir.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made.

PROPOSED CONCLUSIONS OF LAW

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1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the Red Rock River.

2. There are times when there are unappropriated waters in the source of supply available for appropriation by the Applicants for the purposes requested herein. This conclusion is based upon the fact that testimony indicated that there is always water flowing into the Clark Canyon Reservoir and no downstream appropriators objected to the applications.

3. The acquisition of an easement across the Roe Ranch Company to use the Roe Ditch is not a prerequisite to this Department's issuance of a provisional permit. The acquisition of a right-of-way, however acquired, will be necessary for a valid water right.

4. 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.

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

6. The proposed means of diversion appears adequate, however, if it becomes evident that the 18 inch culvert does not have sufficient capacity to carry an amount of water necessary to satisfy existing water rights and the water rights applied for in this matter, the Applicants shall

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install a culvert of sufficient capacity and shall bear all costs attendant thereto.

7. The proposed use of the water constitutes a beneficial use.

8. The issuing of a provisional permit by the Department in no way reduces the Applicants' liability for damages caused by the appropriation, nor does the Department in issuing the provisional permits in any way acknowledge liability for damage caused by the Applicants' exercise of their provisional permits.

9. The Objector and other persons appear to have valid water rights which are satisfied by the Roe Outlaw Ditch though they are not exercised every year and these existing water rights shall not be adversely affected through the exercise of these provisional permits.

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

11. Nothing decided herein has bearing upon the status of water rights claimed by the Applicants nor the Objector 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 above Proposed Findings of Fact and

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Proposed Conclusions of Law, the following Proposed Order is hereby made.

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicants' Provisional Permit No. 4962-41A is hereby granted allowing for the appropriation of 3.4 cfs or 1,527 gpm of water, not to exceed 374 acre-feet per annum from the Red Rock River, a tributary of the Beaverhead River in Beaverhead County, Montana, to be diverted from the Red Rock River by means of the Roe Outlaw Ditch at a point in the SW1/4 SW1/4 SW1/4 of Section 25, Township 11 South, Range 10 West, M.P.M., and used for irrigation on 92 new acres in Section 9, and 95 new acres in Section 16, all in Township 11 South, Range 10 West, M.P.M., and containing a total of 187 acres, more or less, from May 1 to September 15, inclusive, of each year.
2. Subject to the conditions cited below, the Applicants' Provisional Permit No. 5189-s41A is hereby granted allowing for the appropriation of .4 cfs or 180 gpm of water and not to exceed 36 acre-feet per annum from the Red Rock River, a tributary of the Beaverhead River, in Beaverhead County, Montana, to be diverted from the Red Rock River by means of the Roe Outlaw Ditch, at a point in the SW1/4 SW1/4 SW1/4 of Section 25, Township 11 South, Range 10 West, M.P.M., and used for new irrigation on a total of 18 acres, more or less, in Section 15, Township 11 South, Range 10 West, M.P.M. from May 1 to September 15, inclusive, of each year.

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

4. Such prior rights shall include, but are not limited to those of the Objector, Roe Ranch Company.

5. In order to effectuate the provisions of this Proposed Order, the Applicants shall be prepared to install a larger culvert through the railroad and highway rights-of-way should such be found necessary to adequately transport the water necessary to satisfy these Provisional Permits in addition to existing water rights.

6. The issuing of the Provisional Permits by the Department in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permits, nor does the Department, in issuing the Provisional Permits, in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

7. The Provisional Permits are granted subject to any final determination of prior existing water 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 this Proposed Order, if any, shall be

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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 16th day of August, 1976.



DANIEL G. DIEMERT
HEARING EXAMINER

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