

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT NO. 5151-s76M BY JIM FORD  
F I L M E D  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

APR 9 1990

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedure Act, after due notice a hearing on objections to the above-described application was held in the City Council Chambers, Missoula City Hall, 201 West Spruce, Missoula, Montana, at 1:15 p.m., on Thursday, June 10, 1976, Donald D. MacIntyre, hearing examiner, presiding.

Jim Ford, the applicant, appeared personally and presented testimony in support of his application.

Gaspard W. Deschamps and Paul A. Hanson, the objectors to the application, appeared personally and presented testimony in support of their filed objections. Both objectors were represented by William T. Boone, Esq., of Missoula, who also called as witnesses Myrtle L. M. Dodd and Jack Ray. Objections were also filed by K. J. Ledward, Mr. and Mrs. John Host, and Joseph J. Turk, Jr.; however, these objectors failed to appear and present testimony.

Jim Rehbein appeared personally on behalf of the Department of Natural Resources and Conservation.

Mr. Ford introduced applicant's Exhibits 1 and 2. Applicant's Exhibit No. 1 was an aerial photograph showing the drainage of Butler Creek, with Mr. Deschamps' and Mr. Hanson's lands outlined and the proposed diversion marked thereon. Applicant's Exhibit No. 2, introduced on the rebuttal, tended to show excess or surplus waters upon the lands of Mr. Hanson. Mr. Boone introduced nine exhibits tracing the ownership of the property now belonging to the objectors. He also introduced three aerial photographs upon which overlays were used to depict the land and irrigation areas of the objectors.

MOTIONS

At the hearing, the applicant asked that his application be modified at Item 6 to change the irrigation period from "May 1 to October 15, inclusive" to "April 1 through May 31, inclusive." Since the requested modification resulted in a shorter irrigation season and therefore a smaller appropriation, the applicant's request was duly noted.

A Proposed Order (Proposal for Decision) dated August 10, 1976, was issued by the hearing examiner, Donald D. MacIntyre.

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when the applicant's reply brief is received a copy would be sent to him and then the application file would be forwarded to the administrator of the Water Resources Division for scheduling of the requested oral argument hearing. All parties in this matter would be notified by certified mail of the oral argument hearing date, time, and place, here in Helena, at least two weeks in advance.

On October 19, 1976, the Department received Mr. Ford's reply brief in answer to the brief and exceptions filed by Mr. Boone in the matter of the Proposed Order for Application 5151-s76M. By letter of October 21, 1976, the Department acknowledged receipt of Mr. Ford's reply brief and informed him that his application would be forwarded to the administrator for scheduling of the requested oral argument hearing.

The administrator of the Water Resources Division issued on November 16, 1976, a "Notice of Oral Argument Hearing on Exceptions to Proposal for Decision," in the matter of Application for Beneficial Water Use Permit No. 5151-s76M by Jim Ford, stating that on Wednesday, December 1, 1976, at 10 a.m., an oral argument hearing would be held before the administrator of the Water Resources Division in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing was to hear oral arguments in support of the written exceptions and briefs. If certain parties did not wish to make oral arguments, they were requested to so advise in writing before the hearing of their wish to waive this right. In such case, the exceptions and briefs would stand as filed. This notice was mailed by certified mail to all parties in this matter, including the original objectors and their attorneys.

The oral argument hearing before the administrator was held in Helena, Montana, on December 1, 1976, in the Department's Conference Room for the purpose of hearing oral arguments in support of the application, objections, exceptions, and briefs as filed in this matter.

The applicant, Mr. Ford, was not present at the oral argument hearing and was not represented by another party on his behalf.

Mr. Boone, attorney for the exceptors, Mr. Deschamps and Mr. Hanson, appeared and presented oral argument in support of their objections and exceptions. Messrs. Deschamps and Hanson also appeared and presented testimony.

Joseph J. Turk, Jr., one of the original objectors to the application, attended the hearing with his daughter but did not present testimony.

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

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On May 25, 1977, the Department received Mr. Boone's letter dated May 24, providing comments to Mr. Ford's answers to the six questions.

The administrator of the Department's Water Resources Division hereby makes the following Final Order, based on the hearing examiner's Proposal for Decision of August 10, 1976, the application, objections, exceptions, briefs, the testimony of the oral argument hearing held on December 1, 1976, 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 August 10, 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 applicant's Provisional Permit No. 5151-s76M is hereby conditionally granted, allowing the appropriation of no more than 0.222 cubic foot per second, equivalent to approximately 100 gallons per minute, not to exceed 7.04 acre-feet per annum, to be divided among the uses as follows: 4.33 acre-feet for irrigation purposes from April 1 to May 31, inclusive, of each year; 0.25 acre-foot per annum for stock watering; and 2.46 acre-feet per annum for fishpond purposes, each from January 1 to December 31, inclusive, of each year. The water will be appropriated from Butler Creek, a tributary to the Clark Fork River in Missoula County, Montana, at a point in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 19, Township 14 North, Range 19 West, by means of a 4-inch plastic inlet pipe approximately 270 feet long, and impounded in a 2.46-acre-foot capacity offstream dugout pond with a 0.41-acre surface area, located at a point in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 19, Township 14 North, Range 19 West. The water will be returned to Butler Creek by means of a 4-inch plastic outlet pipe, approximately 40 feet long. The 4.33 acre feet of water noted above will be used to irrigate a portion of a 10-acre plot in the NW $\frac{1}{4}$  of Section 19, Township 14 North, Range 19 West.

2. The Permittee shall not under any circumstances either fill the fishpond, water stock, or irrigate therefrom during times in which there is no surplus water available in the source of supply. The Permittee shall not be allowed to have water flowing through the pond from Butler Creek via the 4-inch inlet and outlet pipes, except during times as there is surplus water available without adversely affecting downstream water users in the source of supply for the beneficial uses, and periods of use herein granted, except further, at times when downstream water users do not have a need for the water

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responsibility of the parties not to abuse their water rights at the expense of the other.

10. The Permittee shall notify the Department prior to construction of the pond dugout, in order that arrangements can be made for a Department engineer to be available during construction to determine if seepage into the pond from Butler Creek is occurring. If seepage is evident, it shall be sealed before construction can proceed. All reasonable engineering recommendations made by the Department shall be followed by the Permittee. The design and construction of the project shall be in accordance with all applicable local Soil Conservation Service specifications, and shall also be subject to scrutiny in accordance with Section 89-702, et seq., R.C.M. 1947, which requires dams and dikes to be constructed in a secure manner.

11. The above conditions to the granting of this Provisional Permit shall also hold and be in full effect for any predecessor(s) in interest to the Permittee herein, in the exercise of said Provisional Permit herein granted.

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 beneficially used in order to provide proof of their water rights, should the need arise.

Done this 17<sup>th</sup> day of October, 1977.

  
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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

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IN THE MATTER OF THE APPLICATION            )  
FOR BENEFICIAL WATER USE PERMIT            )     PROPOSAL FOR DECISION  
NO. 5151-s76M, BY JIM FORD                 )  
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Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described Application was held in the City Council Chambers, Missoula City Hall, 201 W. Spruce, Missoula, Montana, at approximately 1:15 p.m. on Thursday, June 10, 1976, Donald D. MacIntyre, Hearing Examiner, presiding.

Mr. Jim Ford appeared personally and presented testimony in support of his Application.

Mr. Gaspard W. Deschamps and Mr. Paul A. Hanson, the Objectors to the Application, appeared personally and presented testimony in support of their filed objections. Both Objectors were represented by William T. Boone, Esq., of Missoula who also called as witnesses Mrs. Myrtle L.M. Dodd and Mr. Jack Ray. Objections were also filed by K. J. Ledward, Mr. and Mrs. John Host and Joseph J. Turk, Jr.; however, these objectors failed to appear and present testimony.

Mr. Jim Rehbein appeared personally on behalf of the Department of Natural Resources and Conservation.

Mr. Ford introduced Applicant's Exhibits 1 and 2. Applicant's Exhibit No. 1 was an aerial photograph showing

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the drainage of Butler Creek with Mr. Deschamps and Mr. Hanson's lands outlined and the proposed diversion marked thereon. Applicant's Exhibit No. 2, introduced on rebuttal, tended to show excess or surplus waters upon the lands of Mr. Hanson. Mr. Boone introduced nine exhibits tracing the ownership of the property now belonging to the Objectors. He also introduced three aerial photographs upon which overlays were used to depict the land and irrigation areas of the Objectors.

#### MOTIONS

At the hearing, the Applicant asked that his Application be modified at Item 6 to change the irrigation period from "May 1 to October 15, inclusive" to "April 1 through May 31, inclusive." Since the requested modification resulted in a shorter irrigation season and therefore a smaller appropriation, the Applicant's request was duly noted.

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, Water Resources Division, Department of Natural Resources and Conservation.

#### PROPOSED FINDINGS OF FACT

1. On April 2, 1975, Mr. Jim Ford, Applicant herein, applied for Beneficial Water Use Permit No. 5151-s76M with the Department of Natural Resources and Conservation, seeking to appropriate 32 acre-feet of water per annum, to be impounded in a dugout of 1.5 surface acres to be diverted off-stream from

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Butler Creek, a tributary of the Clark Fork River at a point on the SW1/4 of the NE1/4 of the NW1/4 of Section 19, Township 14 North, Range 19 West, Missoula County, to be used for new irrigation on 8 acres and for supplemental irrigation on 2 acres, for a total of 10 acres, more or less, in Section 19, from May 1 to October 15, inclusive, of each year, and for fish and stock-watering from January 1 to December 31, inclusive, of each year.

2. On March 18, 1976, Mr. Gaspard W. Deschamps and Mr. Paul A. Hanson, filed timely objections to the above-described application alleging "there are no surplus waters in this stream available for appropriation and use by others." Objections of Mr. & Mrs. John Host, Joseph J. Turk, and Katherine J. Leward were also received by the Department on February 18, March 17, 26, 1976 respectively.

3. On May 26, 1976 a letter requesting the withdrawal of the above-mentioned application was received from Mr. Ford by the Montana Department of Natural Resources and Conservation. Subsequently Mr. Ford notified the Department that he now wished to reinstate his application. It was reinstated and the objectors were so notified by certified mail, return receipt requested on May 27, 1976.

4. At the hearing Mr. Ford testified that he wished to divert Butler Creek water only during times when there were excess waters above the amount necessary to satisfy existing water rights. It has been his experience to see water of sufficient quantity in Butler Creek to flow beyond Mr.

Hanson's and Mr. Deschamps' diversions. He wishes to con-

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struct a fish pond with a surface area of 1.5 acres and 10-12 feet deep at its deepest point. He intends to fill the pond by means of a 4 inch pipe during the March and April runoff for fish and stockwatering purposes and return the water to Butler Creek by means of another 4 inch pipe after the pond has been filled. He only intends to irrigate during those months where there is excess water available. At times when the flow of Butler Creek is not sufficient to satisfy existing rights, he will not make a "consumptive" use of the water, but merely pump into the pond through another 4 inch pipe and release it back into Butler Creek through another 4 inch pipe. There is a spring arising on Mr. Ford's land which he intends to develop to supplement the proposed diversion, however, no application has yet been filed on the spring.

5. Mr. Jim Rehbein from the Department of Natural Resources and Conservation, testified at the hearing that he had no figures which would indicate the total drainage annually from Butler Creek. Based upon the Soil Scientist's report, Mr. Rehbein estimated that to irrigate 10 acres at the intended place of use, would require 21 acre-feet of water per annum on a normal year if the crop to be grown in alfalfa. Mr. Rehbein pointed out, however, that only a small area of the 10 acres could actually be seeded to alfalfa so that the requirement would be somewhat less than 21 acre-feet per annum. As a result of this field investigation,

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Mr. Rehbein stated that during the irrigation season the Objectors, Deschamps and Hanson, do use all of the water from Butler Creek, but there would be excess water earlier in the year. Mr. Rehbein testified that the proposed diversion by the Applicant would cause a loss of about 2-acre feet per year through evaporation and seepage.

6. Among the exhibits introduced on behalf of Objectors, Deschamps and Hanson, was an agreement dated February 17, 1903 between their, (Hanson & Deschamps), predecessors in interest by which they agreed to share the water of Butler Creek on an alternate weekly basis. This arrangement is still in force at the present time. Mrs. Dodd, who has lived on a ranch at the end of Butler Creek since 1907 stated that it was her experience that Hanson and Deschamps have used all of the water of Butler Creek during the irrigation season and that none had ever gone to waste. Mr. Ray acquired the land which Objector Hanson now owns in 1935 and lived there for 4 years. He stated that while on the land he followed the terms of the 1903 agreement during the irrigation season. It was his experience that every year there is a period of high water, usually 10 days at the most. He never witnessed any surface returned flow to the stream because of the gravelly nature of the soil. Mr. Deschamps irrigates approximately 190 acres from Butler Creek and has always adhered to the April 1 alternate week

agreement. After July 1 of each year there usually isn't enough water in Butler Creek by the time it gets to his property to be of any value so he allows Mr. Hanson to use all the water in Butler Creek. He objects to the Application because there are artesian springs on his land which he believes are fed by Butler Creek water and any withdrawal from the creek could harm these springs. There are times during the year when the flow of Butler Creek will be of such a quantity that it will flow over his headgate and through a drain pond into the Grass Valley Slough. There have been times when he has been able to irrigate all of his land with Butler Creek water even though he has a water right of 350 miners inches from the Grass Valley French Ditch. Water in the Grass Valley French Ditch is regulated by the directors of the project. Mr. Hanson irrigates approximately 115 acres and waters approximately 100 head of cattle with Butler Creek water. He always tries to use all the water in Butler Creek during the weeks he is entitled to it. He feels that granting another water right on Butler Creek would be injurious to him because most of the year he is operating with a shortage of water as it is and any additional withdrawal would increase that shortage. It has been his experience that Butler Creek usually dries up at his ranch by mid-July and the first of August. In his opinion there are no appropriable waters from the time of spring runoff

through the irrigation season. Mr. Hanson testified that the standing water depicted in Applicant's Exhibit No. 2 does not last long after it first appears.

7. Mr. Rehbein would estimate that there is a ditch loss of about 1 cubic feet per second from the point at which Butler Creek flows out of the Hanson property and to where it reaches the Deschamps property. The Objectors feel that there is no surplus water in Butler Creek and any granting of the Provisional Permit would have an adverse effect upon existing rights.

Based on the above Findings of Fact, the following 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 Butler Creek.

2. For a time during the spring runoff there are unappropriated waters in the source of supply.

3. Valid prior water rights of prior appropriators of water from Butler Creek must, by statute, be protected.

4. The rights of prior appropriators must be protected and any Provisional Permit granted must be conditioned subject to those prior rights.

5. The Objectors presenting evidence at the hearing appear to have valid water rights along Butler Creek.

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6. By conditioning the Permit to require irrigation only from spring runoff waters, the rights of prior appropriators will be protected.

7. The proposed means of diversion is adequate.

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

9. 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.

10. The outlet pipe / <sup>from</sup> the proposed fish pond must be placed in such a manner that during times when there is no surplus water in the source of supply as much water will return to Butler Creek as is being diverted from it.

11. 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.

12. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those applied for, nor does anything herein have a 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 Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than .222 cubic feet per second or 100 gallons per minute, not to exceed 32 acre-feet per annum from Butler Creek, a tributary of the Clark Fork River in Missoula County, Montana, to be impounded in a dug-out pond with a 1 and 1/2 acre surface area and a capacity of 6-7 acre-feet located in the SW1/4 of the NE1/4 of the NW1/4, Section 19, Township 14 North, Range 19 West. The point of diversion from Butler Creek is at a point in the SW1/4 of the NE1/4 of the NW1/4, Section 19, Township 14 North, Range 19 West. The water will be pumped from Butler Creek by means of a 5 horse-power pump through a 4 inch inlet pipe into the pond and returned to Butler Creek by means of another 4 inch outlet pipe. Thirty acre-feet of water will be used to irrigate a portion of a 10-acre plot in the NW1/4 of Section 19, Township 14 North, Range 19 West from April 1 to May 31, inclusive, of each year, and the remaining 2 acre-feet of water for the purposes of a fish pond and stockwatering from January 1 to December 31, inclusive, of each year.

2. Under no circumstances may the Applicant either fill the fish pond or irrigate therefrom during times in which there is no surplus water available in the source of supply. To accomplish this end, the Applicant shall install

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the outlet from the fish pond in such a way as to allow a return flow of the same amount as is being diverted into the pond except during times as there is surplus water in the source of supply.

3. 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.

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 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 10<sup>th</sup> day of August, 1976.

  
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DONALD D. MacINTYRE  
HEARING EXAMINER