

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 6322-s43D BY  
JOHN B. OBERT

FILED  
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FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 20, 1976, by the Hearing Examiner, are hereby slightly modified and adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Permittee's Provisional Permit No. 6322-s43D is hereby granted allowing the appropriation of 2.25 cubic feet of water per second, equivalent to 1,010.25 gallons per minute, not to exceed 300 acre-feet of water per year, from Clear Creek, a tributary of Rock Creek, from October 15 to April 15, inclusive, of each year, and store said water in a new 300-acre-foot offstream reservoir at a point in the SE $\frac{1}{4}$  of Section 33, Township 5 South, Range 21 East, and to be used for irrigation purposes on 110 new acres, more or less, in said Section 33 from April 15 to October 15, 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, the adjudicated water rights of the Rocky Fork (Rock Creek) Decreed Users, Inc.'s, water rights in Rock Creek.

3. In order to protect the prior water rights in Rock Creek, the Permittee shall telephone either Oliver Wilson or another officer of the Objector, Rocky Fork (Rock Creek) Decreed Users, Inc., on any day after April 1 and up to April 15, inclusive, of each year in which he wishes to divert water from Clear Creek. Upon finding from the officer of the Rocky Fork (Rock Creek) Decreed Users, Inc., that the water commissioner on Rock Creek has not limited withdrawals from said creek, he may appropriate water on that day.

4. The issuing of a 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 a Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

5. The Permittee's new 300-acre-foot reservoir must be built to meet all local Soil Conservation Service designs and specifications for a reservoir of

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this type to insure proper construction and safety of the structure. Maintenance on the facilities must be completed as needed.

6. This Provisional Permit is granted subject to any final determination of prior existing rights in the source of supply as provided for 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 21<sup>st</sup> day of December, 1976.

*Orvin 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

BE # 6322

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. 6322-s43D BY JOHN B. OBERT )  
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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 second floor courtroom of the Carbon County Courthouse, Red Lodge, Montana at approximately 1:30 p.m., on Monday, August 30, 1976, Daniel G. Diemert, Hearing Examiner, presiding.

The Applicant appeared at the hearing and was represented by Mr. Joe Mudd, an attorney from Bridger, Montana.

Objections were received by the Department from Roy Hunt, Edith Hunt, Wilbur Schanck, Diamond T Bar Ranch by Mike Williams, President, Walter Schwend, Baptiste J. Bertolino, Lyle M. Kamppinen, Mrs. Glenn Monte, and the Rocky Fork Decreed Users, Inc. by Oliver Wilson, President.

Mr. Don Riddle attended the hearing on behalf of the Department of Natural Resources and Conservation.

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:

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PROPOSED FINDINGS OF FACT

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

2. On August 27, 1975 the Department received an Application for Beneficial Water Use Permit No. 6322-s43D by John B. Obert who sought to appropriate 2.25 cubic feet of water per second, equivalent to 1,010.25 gallons of water per minute not to exceed 300 acre-feet of water per year from Clear Creek, at a point in the E 1/2 NE1/4 of Section 32, Township 5 South, Range 21 East, M.P.M., from October 15 to April 15, inclusive, of each year and to store said water in a new 300 acre-foot reservoir located in the SE1/4 of Section 33, Township 5 South, Range 21 East. The water will then be diverted from said reservoir for irrigation purposes on 110 new acres, more or less, in said Section 33, and used from April 15 to October 15, inclusive, of each year.

3. The Department received objections from Roy Hunt, Edith Hunt, Wilbur Schanck, Diamond T Bar Ranch by Mike Williams, Walter Schwend, Baptiste J. Bertolino, Lyle Kamppinen, Mrs. Glenn Monte and the Rocky Fork Decreed Users, Inc. by Oliver Wilson, President.

4. In times of water shortage many decreed users on Rock Creek have been forced to discontinue withdrawals by order of the local water commissioner while Provisional Permittees in the area have not been restricted in their

withdrawals because of lack of jurisdiction on the part of the water commissioner.

5. There are at times unappropriated waters in the source of supply. It appears that these times exist only during the nonirrigation season.

6. If appropriations are limited to only those times when prior appropriators are not irrigating, the rights of those prior appropriators will not be adversely affected.

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

8. The proposed use of water to irrigate is 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 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.

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 6322-s43D by John B. Obert should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

2. Pursuant to Section 89-886(1), R.C.M. 1947, valid

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rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

3. The rights of a prior appropriator 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.

6. The Department can designate a person to notify a water user of times when there are surplus waters in the source of supply without delegating its statutory authority to administer and regulate water rights in the State of Montana.

Based on 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 Applicants'

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Provisional Permit No. 6322-s43D is hereby granted allowing the appropriation of 2.25 cubic feet of water per second, equivalent to 1,010.25 gallons of water per minute, not to exceed 300 acre-feet of water per year from Clear Creek, a tributary of Rock Creek from October 15 to April 15, inclusive, of each year and store said water in a new 300 acre-foot off-stream reservoir at a point in the SE1/4 of Section 33, Township 5 South, Range 21 East and to be used for irrigation purposes on 110 new acres, more or less, in said Section 33 from April 15 to October 15, 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 the adjudicated water rights of the Rocky Creek Decreed Users, Inc. water rights in Rock Creek.

3. In order to protect the prior water rights in Rock Creek the Applicant shall telephone either Oliver Wilson or another office of the Objector, Rocky Creek Decreed Users, Inc. on any day after April 1 and up to April 15, inclusive, of each year in which he wishes to divert water from Clear Creek. If the water commissioner on Rock Creek has not limited withdrawals from said creek he may appropriate water on that day.

4. The issuing of a 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

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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.

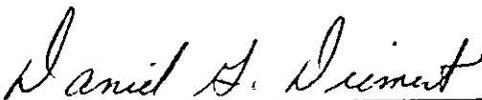
5. The Applicants new 300 acre-foot reservoir must be built to meet all local Soil Conservation Service design and specifications for a reservoir of this type to insure proper construction and safety of the structure. Maintenance on the facilities must be completed as needed.

6. 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.

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 20<sup>th</sup> day of October, 1976.

  
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Daniel G. Diemert  
Hearing Examiner

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