

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 7575-s42M AND 8877-s42M BY HAROLD A. GAUB	}	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
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Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice a hearing on objections to the above-described applications was held in the Courtroom of the Prairie County Courthouse, Terry, Montana, on Tuesday, November 23, 1976, at approximately 9:30 a.m., Richard Gordon, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

The Applicant, Harold A. Gaub, appeared personally and presented evidence and testimony in support of his applications.

Gottlieb Ulrich appeared personally and presented testimony in support of his objection. Mr. Ulrich appeared in a representative capacity for the interests of the Ulrich Estate. Rudolph Ulrich appeared personally and presented testimony in support of the Ulrich objection. Gottlieb Ulrich and Rudolph Ulrich were represented by Counsel James P. Lucas, Esq., of Miles City, Montana.

Donald Ulrich and Kurt Ulrich each appeared personally and presented testimony in support of their combined objection to Application for Beneficial Water Use Permit No. 7575-s42M and in support of their combined objection to Application for Beneficial Water Use Permit No. 8877-s42M. They were represented by Counsel Cecil N. Brown, Esq., of Terry, Montana.

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

The Applicant introduced into evidence one exhibit: an aerial photograph of the Spring Creek area showing the lands in question.

A Proposed Order (Proposal for Decision) dated January 9, 1977, was issued by the Hearing Examiner, Richard Gordon.

The Proposed Order Notice as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

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On January 24, 1977, the Department received from Counsel for the Objectors, Rudolph Ulrich, Gottlieb Ulrich, and the Ulrich Estate, "Exceptions to Proposed Order and Proposal for Decision," dated January 19, 1977. Counsel's cover letter dated January 20 stated, "We do not desire to file briefs or make oral argument, as most of the problems arise from the disputed fact situation."

No other party to this matter took exception to the Proposal for Decision.

By letter of January 26, 1977, the Department acknowledged receipt of Counsel's Exception and informed him that since he did not wish to file briefs or make oral argument, the Department would inform the Applicant of his opportunity to file a reply or reply brief to the filed exceptions.

The Department by letter of January 26, 1977, to the Applicant, informed him in part that since the Exceptors did not wish to file briefs or make oral argument before the Administrator of the Water Resources Division that he would have the opportunity to file a written Reply or Reply Brief in answer to the Exception filed by Counsel for Objectors Rudolph Ulrich, Gottlieb Ulrich, and the Ulrich Estate. The Applicant was further advised that when his reply was received, a copy would be sent to Counsel for the Objectors and then the application files would be forwarded to the Water Resources Division Administrator for preparation and issuance of a Final Order, taking into full consideration all testimony, documents, exceptions, briefs, etc., included in each application file.

On February 8, 1977, the Department received the Applicant's Reply Brief letter, dated February 4, in reply to the Department's letter of January 26, 1977, and Counsel for the Objectors' Exception filed on January 19 in opposition to the Proposal for Decision.

The Department by letter of February 17, 1977, to the Applicant, acknowledged receipt of his Reply Brief and requested him to notify the Department if he wished to proceed to an oral argument hearing.

On May 16, 1977, the Department received a letter also dated May 16 from the Applicant, which stated, "I, Harold Gaub, do not request an Oral Argument Hearing before the Division Administrator on my Application Nos. 8877-s42M and 7575-s42M."

The Department by letter of May 17 to the Applicant acknowledged receipt of his Reply Brief and advised that since none of the parties in this matter wished to hold an oral argument hearing, the application files would be forwarded to the Water Resources Division Administrator for preparation and issuance of a Final Order.

Since none of the parties in this matter specifically requested an oral argument hearing on the objections, exception, and reply brief before the

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Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposed Order of January 9, 1977, the objections, exception, reply brief, and all other pertinent information of record for two applications.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on January 9, 1977, 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 to the extent that in Item No. 4 the size of the gated tube has been changed and a new Item No. 9 is added as follows:

FINAL ORDER

1. Subject to conditions cited below, the Applicant's Provisional Permit No. 7575-s42M is hereby granted allowing the appropriation of not to exceed 40 acre-feet of water per annum from Spring Creek, a tributary of Cabin Creek, in Prairie County, Montana, to be diverted from said Spring Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, Township 12 North, Range 54 East, M.P.M., by means of a diversion dike and used for new irrigation by water spreading on a total of 25 acres, more or less, in said Section 10 from March 1 to July 1, inclusive, of each year.

2. Subject to the conditions cited below, the Applicant's Provisional Permit No. 8877-s42M is hereby granted allowing the appropriation of not to exceed 6.68 cubic feet per second of water or 3,000 gallons per minute of water and not to exceed 90 acre-feet per annum of water from Spring Creek, a tributary of Cabin Creek, in Prairie County, Montana, to be diverted from said Spring Creek by means of a pump located above the diversion dike referred to in the previous paragraph, said pump to be located at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, Township 12 North, Range 54 East, M.P.M., and used for new irrigation purposes by water spreading on a total of 30 acres, more or less, in said Section 10 from February 1 to June 1, inclusive, of each year.

3. The Provisional Permits are granted subject to all prior water rights in the source of supply, including, but not necessarily limited to, those objecting herein to the applications and herein claiming existing water rights.

4. The Applicant shall install and maintain in the base of the diversion dike across Spring Creek a gated tube of at least 36 inches in diameter so as to allow sufficient water to flow unimpeded along the main channel of Spring Creek through the dike to satisfy downstream prior rights, with such gated tube to be open at such time when downstream prior rights would be adversely affected if the tube were closed.

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5. The Applicant shall not appropriate water or otherwise interfere with the flow of Spring Creek pursuant to any Provisional Permit granted herein at such time when to do so would adversely affect the rights of appropriators.

6. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices so as to enable the Applicant to keep a record of all quantities of water actually diverted from the main channel of Spring Creek and as well to enable the Applicant to keep a record of the periods of diversion and impoundment. Such records shall be presented to the Department upon demand by the Department.

7. The issuing of Provisional Permits by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permits nor does the Department in issuing Provisional Permits in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permits.

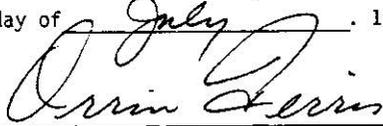
8. These Provisional Permits are granted subject to any final determination to prior existing water rights in the source of supply as provided by Montana law.

9. The installation of the diversion dike across Spring Creek and the gated tube 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 properites on said source of water.

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 7th day of July, 1977.



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 NOS. 7575-s42M and) PROPOSAL FOR DECISION
8877-s42M BY HAROLD A. GAUB)

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the Courtroom of the Prairie County Courthouse, Terry, Montana, on Tuesday, November 23, 1976, at approximately 9:30 a.m., Richard Gordon, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

The Applicant, Mr. Harold A. Gaub, appeared personally and presented evidence and testimony in support of his applications.

Mr. Gottlieb Ulrich appeared personally and presented testimony in support of his objection. Mr. Gottlieb Ulrich appeared in a representative capacity for the interests of the Ulrich estate. Mr. Rudolph Ulrich appeared personally and presented testimony in support of the Ulrich objection. Mr. Gottlieb Ulrich and Mr. Rudolph Ulrich were represented by Counsel, James P. Lucas, Esq., of Miles City, Montana.

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Mr. Donald Ulrich and Mr. Kurt Ulrich each appeared personally and presented testimony in support of their combined objection to Application for Beneficial Water Use Permit No. 7575-s42M and in support of their combined objection to Application for Beneficial Water Use Permit No. 8877-s42M. They were represented by Counsel, Cecil N. Brown, Esq., of Terry, Montana.

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

The Applicant introduced into evidence one exhibit: an aerial photograph of the Spring Creek area showing the lands in question.

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 February 25, 1976 the Department received Application for Beneficial Water Use Permit No. 7575-s42M from Harold A. Gaub seeking to appropriate 40 acre-feet of water per annum from Spring Creek, a tributary of Cabin Creek, in Prairie County, Montana, to be diverted from Spring Creek at a point in the NW1/4 SE1/4 NW1/4 of Section 10, Township 12 North, Range 54 East of the Montana Principal Meridian by means of a diversion dike and used for new irrigation by

water spreading on a total of 25 acres, more or less, in said Section 10, from March 1 to July 1, inclusive, of each year.

2. On June 30, 1976 the Department received Application for Beneficial Water Use Permit No. 8877-s42M from Harold A. Gaub requesting to appropriate 6.68 cubic feet of water per second or 3,000 gallons of water per minute and not to exceed 90 acre-feet of water per annum from Spring Creek, a tributary of Cabin Creek, in Prairie County, Montana, to be diverted from Spring Creek by means of a pump located above the diversion dike proposed in Application for Beneficial Water Use Permit No. 7575s42M, such point of diversion to be in the NW1/4 SE1/4 NW1/4 of Section 10, Township 12 North, Range 54 East of the Montana Principal Meridian, and used for new irrigation purposes by water spreading on a total of 30 acres, more or less, in said Section 10 from February 1 to June 1, inclusive, of each year.

3. On April 27, 1976 the Department received an objection to Application for Beneficial Water Use Permit No. 7575s42M from Donald and Judith Ulrich and from Kurt and Judy Ulrich, alleging a prior filed and use right to water from Spring Creek for the stockwatering of approximately 100 cows with calves since at least 1910 and for the irrigation of approximately 16 acres of land since 1959. The Objectors allege that the proposed appropriation would adversely affect each such prior right.

4. On June 2, 1976 the Department received an objection to Application for Beneficial Water Use Permit No. 7575-s42M from Mr. Gottlieb Ulrich for the Ulrich estate, alleging a prior stockwater use right to water from Spring Creek used since at least 1911 for the watering of approximately 200 head of livestock. The Objector alleged that the proposed appropriation would adversely affect such prior right.

5. On September 21, 1976 the Department received an objection to Application for Beneficial Water Use Permit No. 8877-s42M from Donald and Judith Ulrich and from Kurt and Judy Ulrich alleging the same facts and effect as contained in their combined objections to Application for Beneficial Water Use Permit No. 7575-s42M (see paragraph No. 3 above).

6. For purposes herein, based upon testimony given at the hearing, it is found that the Objectors, Donald and Judith Ulrich and Kurt and Judy Ulrich together possess valid downstream use rights to water in Spring Creek in the amount of 300 miners inches flowing in the Ulrich dike system, 10 acre-feet of water stored in a dam in the NW1/4 SE1/4 of Section 11, Township 12 North, Range 54 East of the Montana Principal Meridian, and 20 acre-feet of water stored in a dam across Spring Creek in the SW1/4 of Section 11, Township 12 North, Range 54 East of the Montana Principal Meridian. For purposes herein, based upon testimony given at hearing, it is found that the Objector, Gottlieb Ulrich (for the Ulrich estate) possesses valid prior downstream

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water rights to water in Spring Creek in the amount necessary to water between 200 and 300 head of cattle.

7. For purposes herein, based upon testimony given at hearing, it is found that there is at times, when at least the above-described water rights are satisfied, unappropriated water in the source of supply.

8. If any Provisional Permits granted herein are conditioned to allow the appropriation of water only at such times when there is unappropriated water available in the source of supply, the rights of prior appropriators will not be adversely affected.

9. For purposes herein, based upon testimony given at the hearing, it is found that a gated tube of at least 18 inches in diameter located in the main channel of Spring Creek at the base of the proposed diversion dike is necessary to ensure that the Objector's prior downstream water rights will not be adversely affected by the proposed diversion dike at such times when the Applicant may not validly appropriate water pursuant to any conditions imposed upon any Provisional Permit granted herein.

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

11. The proposed use of water constitutes a beneficial use.

12. 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.

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

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to 89-880, R.C.M. 1947, permits are required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, Application for Beneficial Water Use Permit No. 7575-s42M and Application for Beneficial Water Use Permit No. 8877-s42M should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

3. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of Beneficial Water Use Permits.

4. The rights of prior appropriators will be protected if permits are conditioned so as to protect those rights.

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

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

PROPOSED ORDER

1. Subject to conditions cited below the Applicant's Provisional Permit No. 7575-s42M is hereby granted allowing the appropriation of not to exceed 40 acre-feet of water per annum from Spring Creek, a tributary of Cabin Creek, in Prairie County, Montana, to be diverted from said Spring Creek at a point in the NW1/4 SE1/4 NW1/4 of Section 10, Township 12 North, Range 54 East of the Montana Principal Meridian, by means of a diversion dike and used for new irrigation by water spreading on a total of 25 acres, more or less, in said Section 10 from March 1 to July 1, inclusive, of each year.

2. Subject to the conditions cited below, the Applicant's Provisional Permit No. 8877-s42M is hereby granted allowing the appropriation of not to exceed 6.68 cubic feet of water per second or 3,000 gallons of water per minute and not to exceed 90 acre-feet of water per annum from Spring Creek, a tributary of Cabin Creek, in Prairie County, Montana, to be diverted from said Spring Creek by means of a pump located above the diversion dike referred to in the previous paragraph, said pump to be located at a point in the NW1/4 SE1/4 NW1/4 of Section 10, Township 12 North, Range 54 East of the Montana Principal Meridian and used for new irrigation purposes by water spreading on a total of 30 acres, more or less, in said Section 10 from February 1 to June 1, inclusive,

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of each year.

3. The Provisional Permits are granted subject to all prior water rights in the source of supply, including but not necessarily limited to those objecting herein to the Applications and herein claiming existing water rights.

4. The Applicant shall install and maintain in the base of the diversion dike across Spring Creek a gated tube of at least 18 inches in diameter so as to allow sufficient water to flow unimpeded along the main channel of Spring Creek through the dike to satisfy downstream prior rights, with such gated tube to be open at such time when downstream prior rights would be adversely affected if the tube was closed.

5. The Applicant shall not appropriate water or otherwise interfere with the flow of Spring Creek pursuant to any Provisional Permit granted herein at such time when to so would adversely affect the rights of appropriators.

6. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices so as to enable the Applicant to keep a record of all quantities of water actually diverted from the main channel of Spring Creek and as well to enable the Applicant to keep a record of the periods of diversion and impoundment. Such records shall be presented to the Department upon demand by the Department.

7. The issuing of Provisional Permits by the Department in no way reduces the Applicant's liability for damage

caused by the Applicant's exercise of his Provisional Permits nor does the Department in issuing Provisional Permits in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permits.

8. These Provisional Permits are granted subject to any final determination to prior existing water rights in the source of supply 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 the 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 exception, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 9th day of January, 1977.



RICHARD GORDON
HEARING EXAMINER