

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR ~~PERMIT~~ ^{PERMIT}
BENEFICIAL WATER USE PERMIT NO. 7750-s40-0 BY LEITH D. WIMMER } APR } APPROVED FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on May 27, 1977, 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 is hereby granted allowing the appropriation of no more than 0.94 cubic foot per second or 425 gallons per minute of water and not to exceed 207 acre-feet per year of water from the Milk River, a tributary of the Missouri River, in Valley County, Montana; to be diverted from the Milk River at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, Township 28 North, Range 40 East, N.P.M., and used for new irrigation on 40 acres in Section 19 and 50 acres in Section 30, all in Township 28 North, Range 40 East, N.P.M., and containing a total of 90 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including, but not necessarily limited to, all valid prior existing rights of those objecting herein.

3. The Applicant may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water rights.

4. The Provisional Permit is granted subject to any prior Indian (Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation) reserved water rights in the source of supply.

5. The Applicant shall install and maintain an adequate measuring device, to be approved by the Department, on the pump used to divert the water in the

CASE # 7750

source of supply, and the Applicant shall take adequate stream-level measurements at the point of diversion so as to enable the Applicant to keep a record of the amount of water being diverted and the level of the stream at which point water is being diverted. Such records shall be presented to the Department for inspection upon demand by the Department. Said record shall be kept on a daily basis at such times when the Applicant is diverting.

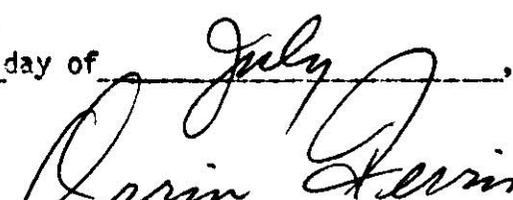
6. The granting of a Provisional Permit in no way grants the Applicant any right to violate real property or any other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

7. 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 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

CASE # 7750

REPORT THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 7750-s49-0 BY LEITH D. WISSER)

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 for a new water use permit was held in the courtroom of Valley County Courthouse at Glasgow, Montana, on Monday, April 3, 1977, beginning at approximately 10:00 a.m., Donald D. MacIntyre, Legal Counsel for the Department and appointed Hearing Examiner herein, presiding.

The Applicant, Mr. Leith D. Wissar, appeared personally and presented testimony in support of this application.

The Objector, Mr. Gene Etchart, President, Hinsdale Livestock Company, appeared personally at the hearing. Hinsdale Livestock Company was represented by Counsel, Mr. Matthew W. Knierim, Glasgow, Montana.

Mr. Marvin J. Sonosky, General Counsel, 2030 M. Street, N.W. Washington, D.C. filed an objection on behalf of the Assiniboine and Sioux Tribes, Fort Peck Indian Reservation. No appearance was made by this Objector. Mr. E. L. Meredith, Solicitors Office, U. S. Department of Interior, Billings, Montana, filed an objection on behalf of the U. S. Department of Interior but no appearance was made.

CASE # 7750

Objector, Glasgow Irrigation District, appeared at the hearing and testimony was presented by Mr. Sever Enkerud. The Glasgow Irrigation District was not represented by Counsel.

Mr. Forrest Tovebaugh attended the hearing and presented evidence on behalf of the Department.

Mr. Pat Naag presented testimony through an Affidavit submitted by the Objector's attorney Mr. Knierim. No objection was taken to the filing of the Affidavit and the Applicant made no request for cross-examination with respect to the Affidavit submitted.

EXHIBITS

At the hearing the Applicant introduced into evidence three exhibits, to wit:

1. A rating table for the Milk River at Nashua, Montana;
2. A copy of Applicant's own conversion of flow rates in cubic feet per second taken at Nashua, Montana for the period January 1975 through August 1976; and,
3. A letter by the Applicants received by the Department on September 3, 1976 concerning Applicant's response to the objection filed in this matter.

The Objector, Hinsdale Livestock Company, offered into evidence four exhibits, to wit:

1. A copy of a transformer and meter readings for the Hinsdale Livestock Company for two pumps known as Fort Helena's pump No. 1 and No. 2 used for diverting waters of the Milk River on to the lands of Hinsdale Livestock Company;
2. A copy of a customers ledger for the Hinsdale Livestock Company for the period 1956 to 1976;
3. Copies of two drainage maps showing location of pumps No. 1 and 2 and the location of the proposed point of diversion and also the Nashua gauging station; and,
4. A letter dated March 31, 1977 from Carl Weissman to Mr. Gene Echart concerning a Jacuzzi FL8 pump which

was purchased in October of 1972 from the Weissman and Sons Corporation.

At the hearing the Department of Natural Resources and Conservation offered into evidence three exhibits, to wit:

1. A copy of an aerial photograph showing the area to be irrigated by the proposed diversion and the site of the pumps presently being used by Hinsdale Livestock Company;
2. A copy of surface water records for the period 1967-1975 prepared by the USGS, Water Resources Division, Fort Peck Field Office with respect to the Milk River at Nashua; and
3. The Jacuzzi Brothers Inc., performance standards for single stage centrifugal pumps.

Said exhibits were admitted into evidence as part of the record of the proceedings. All motions not specifically ruled on herein which were made at the hearing and not ruled on at that time are hereby denied.

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 Rights Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On March 18, 1976 the Department received Application for Beneficial Water Use Permit No. 7750-s40-0 by Leith D. Wimmer, seeking to appropriate 0.94 cubic feet per second or 425 gallons per minute of water and not to exceed 207 acre-feet per annum from the Milk River, a tributary of the Missouri River, in Valley County, Montana. The water is to be diverted from the Milk River at a point in the SE1/4 NE1/4 SE1/4 of Section 19, Township 28 North, Range 40 East, M.P.M., and used for new irrigation on 40 acres in Section 19, and 50 acres in Section 30, all in Township

23 North, Range 49 East, M.P.M., and containing a total of 90 acres, more or less, from April 15 to October 15, inclusive, of each year.

2. On July 23, 1976 the Department received an objection to the above-described application from United States Department of Interior that the land which the Applicant intends to apply water is within the boundaries of the Fort Peck Indian Reservation or seeks to appropriate waters arising upon, flowing by or flowing through the Reservation. On August 20, 1976 the Assiniboine and Sioux Tribes, Fort Peck Indian Reservation filed an objection to the application based on the same objection as that of the United States Department of Interior.

3. On August 24, 1976 Hinsdale Livestock Company, Gene Etchart, President, filed an objection to the above-described application alleging that during dry periods there is an inadequate flow of water in the Milk River to supply Hinsdale Livestock Company's existing two pump sites located downstream from Applicant's proposed diversion point.

4. On August 25, 1976 the Department received an objection to the above-described application from the Glasgow Irrigation District alleging a prior water right which would allegedly be effected by the granting of the permit to the Applicant herein due to insufficient unappropriated water in the source of supply.

5. For purposes herein, based upon the testimony given at the hearing, it is found that there is no unappropriated water in the source of supply during low streamflow periods.

CASE # 7750

6. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant intends to divert water from the Milk River when the waters are available for appropriation.

7. For purposes herein, based upon testimony given at the hearing, it is found that the Glasgow Irrigation District claims a prior right to the return flows of the Milk River.

8. For purposes herein, based upon the record of the hearing, it is found that the Assiniboine and Sioux Tribes of the Fort Peck Reservation claim a prior Indian reserved water right in source of supply.

9. For purposes herein, based upon testimony given at the hearing, it is found that the Objector, Hinsdale Livestock Company, is a successor in interest to the water rights of Mr. N.P. Maag, s/p/a/ Pat Maag. Further it is found that Mr. Maag commenced appropriating water from the Milk River at a point in Section 27, Township 28 North, Range 40 East, M.P.M. in 1947, by means of an 8 inch Fairbanks Morse Centrifical pump. Later in 1948 a second identical pump with a smaller motor was placed at a site on the Milk River located in Section 28, Township 28 North, Range 40 East, M.P.M. by Mr. Maag to appropriate additional water. These pumps have been used continuously and openly from the date of their installation.

10. For purposes herein, based upon testimony given at the hearing, it is found that Willow Creek is a tributary to the Milk River and that said Willow Creek flows into the Milk River

CASE # 7750

below the proposed Applicant's site and above the site where the pumps and used by Objector Hinsdale Livestock. Based upon the testimony given at the hearing it is found that Willow Creek flows only during periods of heavy rain fall or spring runoff. At the times it contributes to the flow of the Milk River, there is an adequate amount of water in the Milk River for the appropriators. Willow Creek does not contribute water to the Milk River during dry periods.

11. For purposes herein, based upon the record of the hearing, it is found that a measuring device could be installed by the Applicant at the point of diversion to provide a record of the quantity of water diverted from the source of supply.

12. For purposes herein, based upon testimony given at the hearing, it is found that if any provisional permit granted herein is conditioned to allow the appropriation of water only at such times when there is unappropriated water available at the source of supply, the rights of prior appropriators will not be adversely affected.

13. For purposes herein, based upon testimony given at the hearing, it is found that the proposed means of diversion or construction are adequate.

14. For purposes herein, based upon the record of the hearing, it is found that the proposed use of water constitutes a beneficial use.

15. For purposes herein, based upon the record of the hearing, it is found that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been

CASE # 7750

issued or for which water has been reserved.

16. For purposes herein, based upon the record of the hearing, it is found that the Applicant does not propose to appropriate in excess of 15 cubic feet of water per second.

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

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to Section 89-880, R.C.M. 1947, a Beneficial Water Use Provisional Permit is required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, the Application for Beneficial Water Use Provisional Permit No. 7750-s40-0 must be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

3. Based upon the above Proposed Findings of Fact and any conditions and limitations appearing therein, it is concluded that the criteria for issuance of a Provisional Permit delineated at Section 89-885, R.C.M. 1947 have been met.

4. Specifically it is concluded that although there is no unappropriated water available in the source of supply during low stream flow periods, there may be periods during the year when unappropriated water is available for appropriation by the Applicant.

5. Pursuant to Section 89-886(1), R.C.M. 1947 the valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit. It is concluded that the rights of prior appropriators would be protected if the permit is conditioned so as to protect those rights.

CASE # 7750

6. Issuing of a Provisional Permit in no way reduces the Applicants liability for damage caused by the Applicants exercise of his Provisional Permit.

7. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein newly 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.

8. 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 Applicants Provisional Permit is hereby granted allowing the appropriation of no more than 0.94 cfs or 425 gpm of water and not to exceed 207 acre-feet per year from the Milk River, a tributary of the Missouri River, in Valley County, Montana, to be diverted from the Milk River at a point in the SE1/4 NE1/4 SE1/4 of Section 19, Township 28 North, Range 40 East, M.P.M., and used for new irrigation on 40 acres in Section 19 and 50 acres in Section 30, all in Township 28 North, Range 40 East, M.P.M., and containing a total of 90 acres, more or less from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including

CASE # 7750

but not necessarily limited to all valid prior existing rights of those objecting herein.

3. The Applicant may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water rights.

4. The Provisional Permit is granted subject to any prior Indian (Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation) reserved water rights in the source of supply.

5. The Applicant shall install and maintain an adequate measuring device to be approved by the Department on the pump used to divert the water in the source of supply, and the Applicant shall take adequate stream level measurements at the point of diversion, so as to enable the Applicant to keep a record of the amount of water being diverted and the level of the stream at which point water is being diverted. Such records shall be presented to the Department for inspection upon demand by the Department. Said record shall be kept on a daily basis at such times when the Applicant is diverting.

6. The granting of a Provisional Permit in no way grants the Applicant any right to violate real property or any other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

7. The Provisional Permit granted is subject to any final determination of prior existing water rights in the source of

CASE # 7750

supply as provided for by Montana law.

NOTICE

This is a Proposal for Decision and will not be final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the proposal, if any, should be filed with the Department within ten (10) days of service herein. Upon receipt of any written exception, opportunity will be provided to the exceptor and the adversely affected party to file briefs and to make oral argument before the Administrator of the Water Resources Division.

DATED this 27th day of May, 1977.


DONALD D. MACINTYRE
HEARING EXAMINER

CASE # 7750