

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

-----  
IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. )  
9019-s42M BY JACK AND BETTY DOWNS )

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER  
-----

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held June 21, 1977 in the courtroom of the Dawson County Courthouse at Glendive, Montana, for the purpose of hearing objections to the above-named application.

The Applicants, Jack and Betty Downs appeared at the hearing and were represented by Mr. Fran Mertes, a registered engineer in the state of Montana. Mr. Mertes offered into evidence a map of the project area, however, this map was not received into evidence as it was mounted on hardboard and was large and cumbersome and the Department had a reduced duplicate of this map; Montana Mean Annual Runoff from page 5, Montana Resources Board Inventory Series No. 4 marked as Applicant's Exhibit No. 1; an aerial photo composite of the Malkuch dam and reservoir area marked as Applicant's Exhibit No. 2; and a copy of a Well Log Report for a stockwater well drilled for Jack Downs in the NW $\frac{1}{4}$  of Section 33, Township 17 North, Range 52 East, by Dan Haggerty and Sons, drillers license No. 13, marked as Applicant's Exhibit No. 3-a and a location map of wells, marked as Applicant's Exhibit 3-b. All exhibits were received into evidence without objections.

Timely objections to this application were filed by Frank and James Malkuch and by Gordon and Rick Peuse. Frank and James Malkuch were represented by counsel, Mr. Harry J. Mehr, Attorney at Law, and Mr. Ralph Compton, a registered engineer. The Applicants and their representative, and all objectors with their representatives were present at this hearing. Objectors Frank and James Malkuch represented by

**CASE # 9019**

counsel Harry J. Mehr offered into evidence a copy of a Notice of Appropriation of Water Rights for 350 miners inches of water from Upper Seven Mile Creek, dated March 17, 1964. This notice was marked as Objector's Exhibit No. 1. This exhibit was received into evidence without objection.

Rick Peuse stated that they have a Provisional Permit to appropriate water from Upper Seven Mile Creek at a point below the Malkuch Reservoir and their concerns are for protection of that permit, he offered no evidence.

Vivian Lighthizer, Glasgow Field Office Manager for the Water Rights Bureau, Water Resources Division, Montana Department of Natural Resources and Conservation appeared as the Department representative and presented into evidence a map of the project area marked as Department's Exhibit No. 1. This exhibit was received into evidence without objection, and is a duplicate of the map introduced by Mr. Fran Mertes, but not received into evidence.

A Proposed Order (Proposal for Decision) dated August 4, 1977 was issued by the Hearing Examiner William F. Thom.

The Proposed Order Notice as issued on August 4, 1977 provided that the Order would not become final until accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order, shall be filed with the Department and with opposing parties within ten (10) days of receipt of same. Upon receipt of any written exceptions, the Department will provide an opportunity to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On August 30, 1977 the Department received a letter dated August 27, 1977 from the Applicant's which stated: "We wish to keep file open on the proposed order. We are preparing comments to the proposed order relative to the restrictions. Our comments will be in within 30 days."

The Department by letter of August 31, 1977 to the Applicants with copies to Messrs. Frank and James Malkuch, Mr. Mehr, Messrs. Gordon and Rick Peuse and Mr. Mertes, made reference to their letter of August 27, 1977 and stated in part as follows:

"Please be informed that on page 8 of the Proposal for Decision there is a notice which states:

'This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department and with opposing parties within ten (10) days of receipt of same. Upon receipt of any written exceptions, the Department will provide an opportunity to file briefs and to make oral arguments before the Administrator of the Water Resources Division.'

Certified-return-receipt-requested No. 989976 shows you received the Proposal for Decision in Lindsay, Montana on August 6, 1977. The date of delivery is not indicated on the receipt, however. Assuming you received the Proposal for Decision on August 6, the ten (10) day period for filing any Exceptions would have expired on approximately August 16 or 17. To the best of our knowledge, the first time we were made aware of any dissatisfaction with the Proposed Order was on August 26, 1977, when Fran Mertes discussed this matter with the Chief of the Water Rights Bureau. Even the date of August 26 is at least a week over the ten-day period for filing any Exception. Therefore, based on the above facts, you are hereby afforded the opportunity to file your untimely comments to the Proposed Order on or before September 16, 1977. In your letter of August 27, you refer to the fact that you are preparing comments to the Proposed Order, therefore, if what you are filing are strictly comments and not exceptions, you would not be entitled to request an oral argument hearing before the Water Resources Division Administrator strictly on your comments.

**CASE # 9019**

However, if you are using the words comments and exceptions as meaning one and the same, any exceptions you file will also be untimely and the Administrator will reserve the right to disallow any untimely exception and any possible request for an oral argument hearing."

The Department did not receive a reply to its letter of August 31, 1977 from the Applicants. Therefore, the Department sent a letter dated October 20, 1977 to the Applicants, which stated in part: "The Department did not receive any written comments on or before September 16, nor within the 30 days you mentioned in your letter of August 27. Therefore, we must conclude that you do not intend to pursue this matter further and the Water Resources Division Administrator will now prepare and issue a Final Order on your Application No. 9019-s42M."

Since none of the parties in this matter filed exceptions, nor requested an oral argument hearing before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of August 4, 1977 and all other information of record in the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on August 4, 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 by changing Condition No. 2a, 2b, 2c 2d and 3 to Condition No. 3, 4, 5, 6 and 7 and by adding Condition No's. 8, 9, 10 and 11.

#### FINAL ORDER

1. Subject to the conditions cited below, the Permittees' Provisional Permit No. 9019-s42M is hereby granted allowing for the appropriation of 2 cubic feet of water per second or 900 gallons per minute of water, not to exceed 342 acre-feet per annum from Seven Mile Creek, a tributary of the Yellowstone River in Dawson County, Montana, to be diverted from Seven Mile Creek by means of a pump at points in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$ , the NE $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$ , and on the dividing line between the SE $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  and the SW $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  and by a check dam at a point in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$ , all in Section 30, Township 17

North, Range 52 East, M.P.M. and used for new irrigation on a total of 114 acres, more or less, in said Section 30 from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior existing water rights in the source of supply and any final determination of existing water rights in the source of supply.

3. The check dam shall be constructed with a satisfactory means of releasing or by-passing without impoundment, all flow when required to satisfy prior rights to downstream water right users.

4. The check dam and pump shall be designed and operated with the minimum depth of water practical for the manufacturers designed pump submergence.

5. The plans and specifications for the check dam and the means of diversion shall be submitted to the Department of Natural Resources and Conservation for approval prior to construction of the project.

6. The Permittees shall not be allowed to divert water when the Malkuch reservoir is without water (that is substantially dry) and has not had an opportunity during the calendar year for one filling.

7. The Permittees shall not be allowed to divert water other than between the dates of April 15 to October 15, inclusive, of each year.

8. The granting of this Provisional Permit in no way guarantees that the Permittees will be able to exercise their Provisional Permit.

9. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with 89-898, R.C.M., 1947.

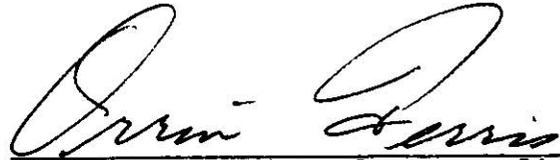
10. The Permittees or their successor upon receipt of notification from the Department that prior appropriators on the source of supply are being unduly adversely affected by this appropriation, shall immediately cease withdrawing water from the source and shall not resume pumping until such time as the Department provides written notice to the Permittees, or their successor to resume pumping.

11. The above conditions to the granting of this Provisional Permit shall hold for any predecessor in interest to the Permittees herein named.

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 record of water used for their own proof of their water rights and use.

Done this 10<sup>th</sup> day of February, 1978.



Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE # 9019**



STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION

-----  
IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 9019-s42M BY JACK AND )  
BETTY DOWNS )  
-----

PROPOSED  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held June 21, 1977 in the courtroom of the Dawson County Courthouse at Glendive, Montana, for the purpose of hearing objections to the above named application.

The Applicants, Jack and Betty Downs appeared at the hearing and were represented by Mr. Fran Mertes, a registered engineer in the State of Montana. Mr. Mertes offered into evidence a map of the project area, however, this map was not received into evidence as it was mounted on hardboard and was large and cumbersome and the Department had a reduced duplicate of this map; Montana Mean Annual Runoff from page 5, Montana Resources Board Inventory Series No. 4 marked as Applicant's Exhibit No. 1; an aerial photo composite of the Malkuch dam and reservoir area marked as Applicant's Exhibit No. 2; and a copy of Well Log Report for a stockwater well drilled for Jack Downs in the NW $\frac{1}{4}$  of Section 33, T. 17 N., R. 52 E., by Dan Haggerty and Sons, drillers license No. 13, marked as Applicant's Exhibit No. 3-a and location map of wells, marked as Applicant's Exhibit 3-b. All exhibits were received into evidence without objections.

Timely objections to this application were filed by Frank and James Malkuch and by Gordon and Rick Peuse. Frank and James Malkuch were represented by counsel, Harry J. Mehr, Attorney at Law, and Mr. Ralph Compton, a registered engineer. The Applicants and their representative, and all objectors with their representatives were present at this hearing. Objectors Frank and James

**CASE #** 9019

Malkuch represented by counsel Harry J. Mehr offered into evidence a copy of Notice of Appropriation of Water Rights for 350 miners inches of water from Upper Seven Mile Creek, dated March 17, 1964. This Notice was marked as Objector's Exhibit No. 1. This exhibit was received into evidence without objection.

Rick Peuse stated that they have a Provisional Permit to appropriate water from Upper Seven Mile Creek at a point below the Malkuch Reservoir and their concerns are for protection of that permit, he offered no evidence.

Vivian Lighthizer, Glasgow Field Office Manager for the Water Rights Bureau, Water Resources Division, Montana Department of Natural Resources and Conservation appeared as Department representative and presented into evidence a map of the project area marked as Department's Exhibit No. 1. This exhibit was received into evidence without objection, and is a duplicate of the map introduced by Mr. Fran Mertes but not received into evidence.

#### PROPOSED FINDINGS OF FACT

1. On July 27, 1976, the Applicant submitted to the Department Application No. 9019-s42M to appropriate 900 gallons of water per minute and not to exceed 342 acre-feet per annum from Seven Mile Creek, a tributary of the Yellowstone River in Dawson County, Montana. The water is to be diverted from Seven Mile Creek by means of a check dam in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 30, and a centrifugal pump powered by a 75 horsepower motor at pumpsites in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  and on the dividing line between the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 30. The water will be delivered by buried pipeline and used for new irrigation on a total of 114 acres, more or less, in the NE $\frac{1}{4}$  of said Section 30, Township 17 North, Range 52 East from February 1 to November 1, inclusive, of each year.
2. The method of irrigation is to be center pivot sprinkler irrigation.

3. Objectors Frank and James Malkuch have an apparent water use right for 350 miners inches of water (8.75 cfs or 3927 gpm) on Upper Seven Mile Creek based on "Notice of Appropriation of Water Rights" dated the 17th day of March, 1964. (Reference Objector's Exhibit No. 1)

4. Objector Gordon Peuse has a Provisional Permit to appropriate water from Upper Seven Mile Creek at a rate not to exceed 13.36 cubic feet per second or 6,000 gallons per minute and a quantity of 610 acre-feet per annum with a priority date of April 2, 1976.

5. Seven Mile Creek and Upper Seven Mile Creek are one and the same and the drainage area of the source of supply for Applicant's appropriation is 42 square miles or 26,880 acres, more or less. (Reference Department Exhibit No. 1), and according to "Montana Mean Annual Runoff" from Montana Water Resources Board Inventory Series No. 4, (Reference Applicant's Exhibit No. 1), will produce as a mean 851 acre-feet of runoff water per year.

6. Objectors Frank and James Malkuch's point of diversion is located about 5 miles downstream from Applicant's proposed point of diversion. The drainage area of Objector Malkuch's source of supply is 109 square miles or 69,760 acres, more or less. (Reference Department's Exhibit No. 1). According to "Montana Mean Annual Runoff" cited above, this area will produce a mean runoff of 2,209 acre-feet of water per year.

7. Objectors Gordon and Rick Peuse's point of diversion is located 7½ miles more or less downstream from Applicant's proposed point of diversion.

8. On December 22, 1976 Objectors Frank and James Malkuch filed a timely objection claiming all water rights in Seven Mile Creek from March through remainder of year to freeze up for a use of 350 miners inches for irrigation of 310 acres from April to September and livestock watering of 100 head.

9. On January 27, 1977 Objectors Gordon and Rick Peuse filed a timely "Objection to Application" of Applicants Jack and Betty Downs, citing their permit and expressing a fear that Applicant's permit if granted would adversely affect their prior rights.

10. Applicants, through their consultant Fran Mertes, testified that the 342 acre-feet requested is surplus water to downstream prior rights; that the water would not be diverted at a rate greater than 900 gallons per minute; that the three feet per acre appropriation is less than the water requirements for alfalfa taking into account the efficiency of irrigation application; that prior rights of downstream users are recognized; that surplus water flows into the Yellowstone River almost daily throughout the year and that it is this surplus water now going to waste for which Applicant is seeking a permit to put to beneficial use.

Mr. Mertes also testified that the drainage area above the Malkuch dam is 102.5 square miles or 65,000 acres (Reference Department Exhibit No. 1) that the mean annual runoff is 0.4 inches or 2,186.7 acre-feet; that the Malkuch dam has a surface area of 47.6 acres (Reference Applicant's Exhibit No. 2) and maximum depth of 15 feet which according to accepted procedures of the engineering profession is capable of storing 428.4 acre-feet; that the mean annual runoff from the drainage area is capable of satisfying all prior rights as well as that rate and quantity requested by Applicants; that inspite of the number of impoundments on the drainage above Applicant's point of diversion these impoundments through seepage losses to aquifers provide adequate sustained flow to the Applicants and Objectors.

11. Objectors Frank and James Malkuch, through legal counsel Mr. Harry Mehr, testified that there is not sufficient water flowing in Seven Mile Creek

surplus to the prior rights of Mr. Joe Shenk of 200 miners inches and Frank and James Malkuch of 350 miners inches to justify the approval of this application. Mr. Mehr testified that the only water available to prior rights holders in Seven Miles Creek is that water which flows over the spillway of the Lindsay dam approximately seven miles upstream from the Malkuch dam. He further testified that water has not flowed over that spillway for a number of years. Mr. Mehr further testified that there are 30 or more existing dams on Seven Mile Creek which impound all runoff water in a normal year and that although water from Seven Mile Creek may very well discharge into the Yellowstone River the source of that water is from other drainages entering Seven Mile Creek between the Malkuch dam and the Yellowstone River, which is below Applicants proposed point of diversion.

12. Rick Peuse testified that he was not objecting to the granting of this permit providing that his prior right is not adversely affected. He stated that his prior right is by a permit issued by the Department (Reference Attachment 1). Said permit is for 13.36 cubic feet per second or 6000 gallons per minute and a quantity of 610 acre feet per annum with a priority date of April 2, 1976.

He stated that there is presently negligible surface flow in the creek and that he obtains his water by digging into the creek bottom to make a big well.

13. Mr. Joe Shenk, landowner and prior appropriator (1957) with a dam located just below Applicants proposed point of diversion testified that water does flow most of the time in Seven Mile Creek through his property, and that he has no objection to Applicants proposal. He further testified that this continuous flow is either spring fed or seepage from Lindsay Dam and that at other times there are flood flows either from snowmelt or rainfall that are in excess of existing needs that could be put to beneficial use. He could not make an estimate of the rate or volume of continuous flow, but indicated it to be relatively small.

14. Ms. Vivian Lighthizer, Glasgow Field Office Manager for the Water Rights Bureau, Water Resources Division appeared as the Department representative and testified that the proposed use is a beneficial use and that Seven Mile Creek was not flowing at the time of the Department's field investigation on June 15, 1977 but that there were several fresh water pools which were spring fed. She testified further that she visited the site of the Malkuch reservoir with Mr. James Malkuch who also stated that the reservoir was spring fed.

15. There are at times unappropriated waters in Seven Mile Creek that occur as the result of runoff from rainfall or snowmelt and as the result of springs originating along the course of Seven Mile Creek and further that such water does not always occur as a perennial flowing surface stream, but rather as an intermittently flowing stream.

#### PROPOSED CONCLUSIONS OF LAW

1. The Objectors to this application have apparent prior appropriations to the water of Seven Mile Creek for irrigation and livestock watering purposes./1

2. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the proposed source of supply being Seven Mile Creek.

3. There are unappropriated waters in the source of supply.

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

5. The proposed means of diversion is adequate.

6. The proposed use of water is a beneficial use.

7. 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.

8. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, have been met.

9. This Application for Beneficial Water Use Permit may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

Based on the above Proposed Findings of Fact and Conclusions of Law, the following Order is proposed.

/1 NOTE: The Objectors have records of water right filings and permits. The validity of such would be somewhat questionable as to whether the amount stated in the filing or Permit was ever put to beneficial use. It was not considered within the jurisdiction of the Hearings Examiner to rule on such; therefore, the filings and Permit were used as an indicia of a right in the preparation of this order.

PROPOSED ORDER

1. The Application of Jack and Betty Downs for Beneficial Water Use Permit No. 9019-s42M is granted allowing the appropriation of 2 cubic feet per second or 900 gallons per minute of water and not to exceed 342 acre-feet per annum from Seven Mile Creek, a tributary of the Yellowstone River in Dawson County, Montana. The water is to be diverted from Seven Mile Creek by means of a pump at points in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , and on the dividing line between SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  and by a check dam at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ , all in Section 30, Township 17 North, Range 52 East, M.P.M. and used for new irrigation on a total of 114 acres, more or less, in said Section 30 from April 15 to October 15, inclusive, of each year.

2. This Applicant's permit is granted subject to all prior existing water rights in the source of supply and any final determination of existing water rights in the source of supply, and is further conditioned as follows:

a - The check dam shall be constructed with a satisfactory means of releasing or by-passing, without impoundment, all flow when required to satisfy prior rights to downstream users.

b - The check dam and pump shall be designed and operated with the minimum depth of water practical for manufacturers designed pump submergence.

c - The plans and specifications for the check dam and the means of diversion shall be submitted to the Department of Natural Resources and Conservation for approval prior to construction of the project.

d - Water shall not be diverted when the Malkuch reservoir is without water, that is substantially dry, and has not had an opportunity during the calendar year for one filling.

3 - Water shall not be diverted other than between the dates of April 15 to October 15, inclusive, of each year.

NOTICE

This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department and with opposing parties within ten (10) days of receipt of same. Upon receipt of any written exceptions, the Department will provide an opportunity to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 4<sup>th</sup> day of August, 1977.

  
WILLIAM F. THROM, HEARINGS EXAMINER