

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 9357-s40A BY REUBEN PITSCH)

* * * * *

Pursuant to the Montana Water Use Act, Montana Code Annotated (MCA) Title 85 Chapter 2, and the contested case provisions of Montana Administrative Procedures Act, MCA §§ 2-4-600 et seq., a hearing on the above entitled application was held November 7, 1977, at Ryegate, Montana, William Throm presiding as Hearing Officer. A Proposal for Decision (Proposal) was issued on March 6, 1978. Exceptions were timely filed by objectors Harry VanDerVoort, Eugene Schaff, John Schanz, Larry Schanz and Alvin Zinne, by objector Roy W. Olson, and by Alex N. Munn, as well as by the applicant, Reuben Pitsch.

APPLICANTS EXCEPTIONS

Applicant's exceptions were filed March 16, 1978, a Brief in support thereof was filed on April 27, 1978. For clarity, the (Department of Natural Resources and Conservation) (hereafter, "department") will respond to the issues as argued in the supporting brief.

1. The application should be granted as a matter of law because of the failure of the department to take action within the time requirements of the Montana Water Use Act, particularly Sections 89-880 through 89-886, Revised Codes of Montana, 1947.

The issue is, as are most of the issues presented in the brief, merely stated baldly - i.e. accompanied with no citations

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to supporting legal authority. Logically, this argument is a two edged sword, cutting more persuasively against objectors. If the statutory time frame is a jurisdictional limit of the department, then the department has, by definition, no power either to approve or to deny the permit.¹ Since the department, and the department alone, has the authority and duty to issue permits, once the department is divested of jurisdiction, no other entity exists with authority to issue the permit and, of course, the permit cannot simply issue itself. The department must determine that certain statutory criteria exist prior to its issuance of a permit. The department has the discretion and duty to rule upon existence of those criteria - a ruling prerequisite to any permit issuance.

Thus, if the department has no jurisdiction to make these rulings, and no other entity may act in its stead, the permit cannot be issued nor can it arise as a matter of law. RCM 1947 § 89-885.

If the legislature had intended time to provide for automatic permit issuance absent departmental action within these periods it could easily have so stated. For example, in MCA § 82-4-337(1)(c)(iii), the statutory authority for the board of land commissioners to issue applications for operating permits for mining activities, the legislature clearly stated, "Failure

¹ Jurisdiction is defined, inter alia, as "the authority, capacity, power or right to act" (citations omitted) Black's Law Dictionary, 3rd Edition, p991.

of the board to act upon a complete application within the extension period constitutes approval of the application, and the permit shall be issued promptly upon receipt of the bond as required in § 82-4-338."

The precedent in the First Judicial District is, Carey, et al v Montana Department of Natural Resources and Conservation, Civil Cause No. 43556. Therein, Judge Bennett stated, in pertinent part:

The Water Use Act does not provide a remedy or describe the consequence of the DNR's failure to hold a hearing within the 60 day period prescribed by § 85-2-309, MCA. There is no mention of that time period being jurisdictional. § 85-2-310, MCA, includes time limits for granting or denying a water use permit. That section also provides that "the time may be extended upon agreement of the applicant, or, in those cases where an environmental impact statement must be prepared or in other extraordinary case, not more than 60 days upon order of the department." When those two sections are read in conjunction it appears that the purpose for the time periods is primarily for the protection of the applicant,...

It is therefore evident that the 60 day limit is directory and not jurisdictional.²

Because the language providing for the time period for hearings was considered in conjunction with the time period for departmental action on the application, logically neither of the statutes may be deemed jurisdictional. See also, Sullivan v District Court, 122 Mont. 1 (1948).

2. The Objections filed after the Notice of Application was published by the department are improper and do not meet the requirements of Section 89-882, RCM 1947.

² § 85-2-309 was previously codified at § 89-883, RCM, 1947. § 85-2-310, MCA, was previously at § 89-884, RCM, 1947.

Whether the filed objections are valid is a determination expressly within the discretion of the department. "If The Department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection..." 89-883 RCM 1947. (emphasis added).

The department determined that the objectors stated valid objections and held a public hearing pursuant to its statutory mandate to hold a hearing upon such a determination.

3. The Notice of Hearing did not adequately inform applicant of the procedure to be followed at the hearing.

Once again, this argument is devoid of inherent logic as well as supporting legal authorities. Further, this argument is untenable by a party represented by counsel from the onset, basically alleging unfair surprise of the fundamental rule of law that "The party holding the affirmative of the issue must produce the evidence to prove it, therefore the burden of proof lies on the party who would be defeated if no evidence were given on either side." § 93-1501-1 RCM 1947. It is axiomatic in administrative law that the proponent of an order bears the burden to prove to the agency the existence of the legal requisites of the order's issuance. 3 Davis, Administrative Law Treatise § 16.9 p 256(2d.Ed). Further, as the amended version of § 89-885 RCM 1947, makes clear, that the applicant must prove the existence of the statutory criteria by substantial credible evidence, § 85-2-311(7) MCA 1981.

That the hearing examiner may have somewhat inarticulately explained the law does not excuse any party, particularly one represented by counsel from the onset, from knowledge of the necessity to show the statutory criteria for the permit issuance.

4. That the Notice provision of the Proposal for Decision notates applicant's protections under the due process section of the Constitution of the State of Montana and the United States, in that the same requires that these exceptions be submitted within 10 days after receipt of the Proposal for Decision when in fact, a transcript of the hearing cannot be made available during that period of time.

This exception was filed, though excluded from applicant's list of issues in the supporting brief. Because the transcript was available for applicant's use in brief writing, this eliminated any prejudice resulting from the earlier lack of transcript availability.

5. Whether the hearing examiner failed to rule upon applicant's Objections (re: departmental exhibits Nos. 1,2) interposed during the course of the hearing.³

The hearing examiner properly received into evidence the departmental Exhibits Nos. 1 and 2.

Pursuant to the Montana Administrative Procedures Act, Exhibits No. 1 and 2 are automatically included in the record.

"The record in a contested case shall include:

(g) all staff memoranda or data submitted to the hearing examiner or members of the agency or evidence in connection with their consideration of the case", RCM § 82-4209(5)(g).

³ Although initially listed as the issue No. 4, this issue is subsequently supported as argument No. V., Brief p4,9.

6. The hearing examiner failed to make findings of fact in accordance with the Montana Administrative Procedures Act.

Although the specific proposed findings of fact in the proposal are phrased to reflect their testimonial nature, this phraseology does not impair their function as proposed findings. The Proposal clearly lists the contested findings under the heading Proposed Findings of Fact, so, rather than an oral recitation of the testimony, the findings of fact section is obviously a statement of only those facts the examiner proposed as established, and upon which he based his conclusions of law.

7. The hearing examiner in preparing proposed finding of fact No.14 and the conclusions of law springing therefrom used an exhibit objected to by both applicants and objectors and testified to as having limited value and from that exhibit assumed conditions at the point of decision that were beyond the scope of testimony introduced at the Hearing.

As noted in response to argument No. 5, the exhibits were properly received in the record. The practice of admitting evidence for a limited purpose is well accepted, even when the formal rules of evidence apply.* Upon the objection of the parties, the examiner followed the proper procedure in ruling the evidence of limited value because not site specific data, but admissible for comparative and estimative purposes.

* See, for example, Rule 105 Montana Rules of Evidence. Limited Admissibility. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request, shall restrict the evidence to its proper scope.

Further, the table included in proposed finding No. 14, derived from the contested exhibits, was expressly amended, and was "reduced on a direct proportional basis to that portion of the watershed contributing to the source of supply of this application". Proposal, p7.

8. The Proposal for Decision assumes facts based upon conjecture and speculation that the proposed appropriation would increase the salinity of the watershed, which facts even if true are without the scope of the department's authority.

It is axiomatic in the long established water law of Montana that a senior priority water use right includes protection against unreasonable interferences with that use. State ex rel Crowley v District Court, 108 Mont. 89,88 P2d,23(1939). This fundamental tenet of water law is statutorily recognized in § 89-891 RCM 1947, "...Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow, or the lowering of a water table, artesian pressure or water level, if the prior appropriator can reasonably exercise his water right under the changed condition." (emphasis added). Given that the objector's water rights are for stock watering uses, should the proposed appropriation increase the salinity of the water to the extent that the stock will not drink the water, or so that the water is not fit for the stock to drink, then the objectors are protected against, and the department prohibited from issuing, a permit for that appropriation. The reasonable use of their water as drinking

water for stock is protected against injury by junior appropriators. State ex rel Crowley v District Court in and for Gallatin County, supra, § 89-891 RCM 1947.

9. The conclusions of law incorrectly place the burden of proof, by clear and convincing evidence that the right of a prior appropriator will not be adversely affected by upon applicant instead of upon objector.

The burden of proof is upon the applicant to show the department that the statutory criteria for issuance of a permit exist. Regardless of whether that burden must be met by "clear and convincing" standard, or by a lesser substantial credible evidence standard, that burden remains in an application for new use, upon the proponent, or applicant. The clear and convincing standard applies to an applicant for appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more". § 89-885(6) RCM 1947. Applicant's reasoning would, if accepted, have the effect of reading that section as mandating use of the clear and convincing standard for an "application" for an appropriation of 15 cfs. This the statute does not say. The standard must be applied to the applicant for an appropriation. Here, although the application may not have specified 15 cfs or more, the hearings examiner found that the result of the proposed appropriation would be an appropriation of 15 cfs or more.⁵

⁵ Appropriate is defined as meaning "... to divert, impound or withdraw (including by stock for stock water) a quantity of water." § 89-867(3) RCM 1947

Hence, because the hearing examiner found that the appropriation would be for 15 cfs or more, the clear and convincing standard is the appropriate standard of proof herein.

10. The past practice of the department in issuing permits for impoundments subject to later approval of plans and specifications for dams and spillways as expressed by members of the department to applicant actively mislead him as to the nature of proof required at the hearing.

As noted in the hearing examiner's response of March 28, 1978, there is no corroborating evidence that the alleged erroneous advice was, in fact, given to the applicant. Further, because of the lack of specific binding departmental rule or regulation on this point, it is within the agency's discretion to impose prior design and specification requirements on any applicant where it deems that necessary to protect prior appropriators.

Discretion is vested in the agency, subject only to the requirement that if the application is denied or approved in a modified form, or subject to departmentally specified terms or conditions, the applicant must first be granted an opportunity to be heard. § 89-884(2) RCM 1947 . This applicant has had more than ample opportunity to be heard prior to the proposed denial of the permit application.

11. Whether the proposed order and conclusions of law numbered 9 are properly based upon the facts found by the Proposal for Decision.

The argument headed No. 11 merely reiterates arguments headed 1-10 above.

SUMMARY OF DEPARTMENTAL RESPONSE TO APPLICANT'S EXCEPTIONS

In summary, the hearings examiner's findings of fact were based upon substantial credible evidence as established on the record and are hereby affirmed. The conclusions of law are substantially correct, and are hereby affirmed. Further, any error in the department's failure to act within the statutory time limits has not been shown to be prejudicial.

OBJECTORS' EXCEPTIONS

a. Objectors Harry VanDerVoort, Eugene Schaff, John Schanz, Larry Schanz and Alvin Zinne, by and through their counsel, filed a brief in opposition to applicant's exceptions for Proposal for Decision. The department's response thereto is made clear in its response to applicant's brief, above.

b. Roy W. Olson and Alex N. Munn filed a letter stating their opposition to the granting of the permit, and their agreement with the permit application denial.

Wherefore; Based upon the Findings of Fact and Conclusions of Law in the Proposal for Decision, the Proposal being expressly incorporated herein, and upon the record of proceedings in this case, including all briefs and memoranda filed by the parties hereto, the following Final Order is hereby issued.

ORDER

The Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch is hereby denied.

NOTICE

This order may be appealed to the appropriate District Court pursuant to the judicial review provisions of the Montana Administrative Procedures Act.

DONE this 19th day of December, 1983.

Gary Fritz

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

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AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Mary R. Lohrman, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on December 19, 1983, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Reuben Pitsch, Application No. 9357-s40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Reuben Pitsch, Rt 1, Ryegate, MT 59074
2. James B. Zinne, Ryegate, MT 59074
3. Alvin W. Zinne, Ryegate, MT 59074
4. Martin C. Zinne, Secretary, Coulee Hill Ranch Inc, RR 1, Box 14, Ryegate, MT 59074
5. Roy W. Olson, Lavina, MT 59046
6. Alex N. Munn, RR, Lavina, MT 59074
7. Larry R & Joy N. Schanz, Ryegate, MT 59074
8. Mrs. Ralph Schanz & Ms. Sylvia Helmerichs, Ryegate, MT 59074
9. Eugene Schaff, Ryegate, MT 59074
10. Johnny Schanz, RR 1, Ryegate, MT 59074
11. Harry VanDerVoort, Big Coulee Rt, Ryegate, MT 59074
12. William N. Jensen, Attorney at Law, Hibbs, Sweeney & Colberg, Suite 1201, First Northwestern Bank Center, 175 North 27th Street, Billings, MT 59101
13. Thomas M. Ask, Attorney at Law, 226 Main, Roundup, MT 59072
14. William S. Mather, Attorney at Law, Securities Building, Billings, MT 59101
15. Richard Shifley, Shifley Ranch, Big Coulee Rt, Ryegate, MT 59074
16. Douglas Y. Freeman & Laurence R. Martin, Attorneys at Law, 10 West 4th Street, Hardin, MT 59034
17. Mabel Edson, PO Box 494, Manhattan, MT 59741
18. Sam Rodriguez, Lewistown Field Office (inter-department mail)
19. Gary Fritz, Administrator (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Mary R. Lohrman

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 19th day of December, 1983, before me, a Notary Public in and for said state, personally appeared Mary Lohrman, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-7-85

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

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 9357-s40A
BY REUBEN PITSCH

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PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on November 7, 1977, at Ryegate, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch, William F. Thom, Hearing Examiner, presiding.

The Applicant, Reuben Pitsch, appeared at the hearing and presented testimony in support of the application. Mr. Pitsch was represented by legal counsel, William Jensen, of the law firm of Hibbs, Sweeney and Colberg, Billings. No exhibits were introduced supporting the application.

Ten Objectors attended the hearing and presented testimony or statements. The Objectors were represented by legal counsel. Thomas M. Ask, Attorney at Law represented Mr. Eugene Schaff. Bill Mather, Attorney at Law of the firm Moulton, Bellingham, Long and Mather represented Harry Van Der Voort. The Objectors introduced four exhibits supporting their objection to wit: Exhibit No. 1, a photo of Big Coulee Creek, showing saline conditions; Exhibit No. 2, a photo of Schaff's garden after being irrigated with water from Pitsch's dam; Exhibit No. 3, a copy of Montana Department of Natural Resources and Conservation letter to Eugene Schaff citing USGS gaging station records on Big Coulee Creek; and Exhibit No. 4, a copy of an abstract of claimed water rights on Big Coulee Creek, prepared by Mid Mountain Title Company. The Objector's exhibits were marked accordingly and received into the record with the following objections noted: The Applicant

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stated that Exhibits No. 1 and No. 2 did not portray significant data and Exhibit No. 3 contained errors. Objectors present were Mr. James B. Zinne, Mr. Alvin W. Zinne, Mr. Martin C. Zinne, Secretary, Coulee Hill Ranch, Inc., Mr. Roy W. Olson, Mr. Alex N. Munn, Mr. Larry R. Schanz, Mr. Eugene Schaff, Mr. Johnny Schanz, Mr. Harry Van Der Voort, and Mr. Richard Shifley.

Montana Department of Natural Resources and Conservation personnel and witnesses present and testifying on behalf of the Department were Mr. Stan Jones, Hearing Representative and Mr. T.J. Reynolds, Helena Field Office Manager, Water Rights Bureau. The Department was not represented by legal counsel. Four exhibits were introduced by the Department to wit: Exhibit No. 1, USGS discharge records for Big Coulee near Lavina, Montana, consisting of 6 sheets for water years, 1966-1972, Exhibit No. 2, Montana Department of Natural Resources and Conservation Memorandum dated November 4, 1977 from Glenn R. Smith to Stan Jones, Subject: Reuben Pitsch Water Right; Exhibit No. 3, Montana Department of Natural Resources and Conservation letter to Reuben Pitsch, dated November 2, 1977 from Glenn R. Smith; Exhibit No. 4, General Highway Map of Golden Valley County, Montana, showing point of diversion of Applicant and Objectors. The Department exhibits were marked accordingly and received into the record for what they are worth with the following objections.

The Applicant and Objectors took exception to the Departments Exhibits No. 1 and No. 2 on the grounds that streamflow measurements and water quality samples taken at Lavina, Montana, some 40 river miles from the proposed point of diversion, cannot be used to indicate streamflow and water quality conditions at the point of diversion.

PROPOSED FINDINGS OF FACT

1. On September 1, 1976, the Department received an Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch to appropriate

2.67 cfs or 1,200 gpm of water and not to exceed 499 A.F. per annum to be impounded in a new 499 A.F. reservoir on Big Coulee Creek, a tributary of the Musselshell River, at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 35, T. 5 N., R. 19 E., M.P.M., and used for supplemental irrigation on 315.4 acres in Sec. 35, and 23.3 acres in Sec. 36, all in T. 5 N., R. 19 E., M.P.M., and containing a total of 338.7 acres, more or less, from April 20 to September 30, inclusive, of each year.

2. On January 20, 27, and February 3, 1977, the Department caused to be duly published in the Times Clarion, Ryegate, Montana, notice of the above Application for Beneficial Water Use Permit No. 9357-s40A.

3. The Department received 12 objections to the above application as follows:

January 28, 1977 from Eugene Schaff

February 3, 1977 from the Engineering Bureau, Montana Department of Natural Resources and Conservation by Roy Koch.

February 3, 1977 from Roy W. Olson

February 9, 1977 from Johnny Schanz

February 14, 1977 from Larry R. & Joy Nell Schanz

February 17, 1977 from Alvin W. Zinne

February 17, 1977 from Sylvia Helmerichs and Mrs. Ralph Schanz

February 22, 1977 from Coulee Hill Ranch, Inc. by Martin C. Zinne, Secretary

February 23, 1977 from Harry Van Der Voort

February 24, 1977 from Mabel Edson

February 28, 1977 from Alex N. Munn

February 28, 1977 from James B. Zinne

4. Mr. Pitsch testified that he proposes to build a dam across Big Coulee Creek at the point of diversion shown on the map (Department Exhibit No. 4) and to be used for supplemental irrigation by a center pivot irriga-

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tion system with a 1,200 gpm capacity pump on 315.4 acres in Sec. 35 and 23.3 acres in Sec. 36, all in T. 5 N., R. 19 E. from April 20th to September 30th, inclusive, annually. He testified the water he intends to store will be water flowing during the non-irrigation months, primarily from spring run-off, which is not being used. He stated that during the period he is collecting the water he will allow additional flow to continue in order that downstream prior appropriators will have their stock watering needs fulfilled. He stated that he believes there is enough water to fill the reservoir from unappropriated waters, principally flood water. He stated that after the reservoir is filled annually, the balance of the water in the creek belongs to prior appropriators and that this flow will be unobstructed during normal years, that when he is not filling the reservoir during periods of high water and when he is not using his prior water rights, the water flowing into the reservoir will flow out. He testified that he did not believe the proposed use will adversely affect prior appropriators in any way, including by saline seep or water quality. In fact, he stated that water quality should benefit by allowing a better flow from water stored in the reservoir. He stated there is already an alkali problem on the creek. Mr. Pitsch testified that he does not have a design for the dam and does not know how much water can be stored, that the volume requested is an estimate on his part. Neither did he know, or have plans, for spillway requirements.

Mr. Pitsch testified that if the application is approved he will get technical assistance from the Soil Conservation Service and will build the dam in accordance with their plans and specifications and will provide adequate drainage and measuring devices to satisfy all prior water rights.

5. On cross-examination by Mr. Ask, Mr. Pitsch acknowledged that during a normal year, nearly all the flood waters from the source of supply during the spring runoff would be impounded by the proposed dam.

6. Mr. Eugene Schaff testified that he has lived in the area all his life and that he operates the 79 Ranch just below Mr. Reuben Pitsch on Big Coulee Creek and has operated this ranch for 25 years. He stated that Big Coulee Creek is a small stream that in normal years does not provide enough water to satisfy all the needs, however, at times in the spring the snowmelt or runoff from rains provides plenty of water. He testified that salinity problems exist all along the creek and that floodwaters help to keep the salts flushed out. He testified that he believes Reuben Pitsch's proposed dam will make the problem worse by reducing flood flows and the flushing action. Mr. Schaff stated that he has irrigated 30 acres along the creek by pump irrigation from Big Coulee Creek since 1973 and depends upon flood water for the only irrigation he gets when there is not enough water in the stream for pump irrigation. He testified that he also depends upon the stream for livestock water and that if the quality and quantity of water are not maintained, he will have no water for this purpose as his wells are saline.

7. Mr. Harry Van Der Voort testified that he ranches 15 to 20 miles downstream from Reuben Pitsch on Big Coulee Creek and has done so since 1941. He testified that his use rights for irrigation and stock water date even before 1941. He testified that there is a salinity problem on the creek and that he depends upon the flushing action of floodwaters to clean it up. He stated that he also depends upon stream flow for stockwater and in addition, in a good year, gets a couple of irrigations from flood water and always hopes for at least one irrigation. He testified that in a normal spring there is excess water to his needs for a week or two. He stated that he flood irrigates 30 acres by means of a 2,600 gpm pump, sprinkle irrigates another 20 acres of alfalfa with a 500 gpm pump, and uses water for watering 600-700 head of livestock in the winter and 75-80 head in the summer.

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8. Mr. Alex Munn testified that he depends upon flood water to irrigate 35 acres and up to 160 acres, at times, with a 600 gpm pump. In addition, he testified that he diverts flood waters by means of a rock dam for 600 acres of water spreading on hayland. He further testified that almost every year he has to replace the rock dam due to washouts. He also testified that he depends upon quality water for livestock uses.

9. Mr. John Schanz testified that his main concern was the danger of saline seep caused by seepage from the proposed impoundment. He stated that he uses Big Coulee Creek water for 30 to 50 head of livestock and for irrigation of his yard and garden.

10. Mr. Alvin Zinne testified that he uses the creek only for livestock watering, but is afraid of salinity resulting from the dam. He stated that when Reuben Pitsch released water from one of his other dams last summer, the cows quit drinking the creek water because of salinity and he had to move them.

11. Mr. Martin Zinne testified that he lives about 6 miles downstream from Reuben Pitsch; that he has a prior water right for about 12 acres and for stock watering of 40 to 150 head of livestock year around. He stated that last summer after irrigating with water released from Reuben Pitsch's dam into Big Coulee Creek the ground turned so white he had to quit. He also testified that he had to move 56 head of cattle this year because of poor water quality which he attributed to the saline water discharge from Pitsch's dam.

12. Mr. Roy Olson testified that he lives about 20 miles downstream from Reuben Pitsch and that he has prior water rights and irrigates 20 acres of alfalfa by means of a sprinkler system with a 200-300 gpm pump. He stated that there is not sufficient water in Big Coulee Creek to satisfy present rights. He further stated that saline seep is a real problem.

In addition to his irrigation use, he waters about 70 head of livestock from the creek. Mr. Olson acknowledged that there are periods in the spring when there is excess water.

13. Mr. Rick Shifley testified that he is afraid of the creek water quality becoming worse as a result of the proposed impoundment. He stated that he waters 250 head of livestock from Big Coulee Creek.

14. Mr. Stan Jones presented stream flow information from the U.S. Geological Survey gaging station records on Big Coulee Creek at Lavina, Montana, situated approximately 40 river miles below the Applicant's proposed point of diversion. Although these records do not necessarily reflect accurate data as to the hydrologic conditions of that portion of the Big Coulee watershed constituting the source of supply for this application, they do offer reasonably reliable information on peak flows that could be anticipated and upon which design criteria should be based. The following table is derived from the above records for the water years 1966 through 1971 and is reduced on a direct proportional basis to that portion of the watershed contributing to the source of supply of this application:

Water Years	1971	1970	1969	1968	1967	1966
Extremes (cfs)	115	50	295	585	163	2400
Drainage Area (sq. mi.)	232	232	232	232	232	232
Discharge (cfs per sq. mi.)	0.5	0.22	1.27	2.5	0.7	10.3
Drainage Area for this application (sq. mi.)	118	118	118	118	118	118
Discharge at Applicant's P.O.D. (cfs)	59	26	150	295	83	1215

From the above tabulation it is readily concluded that in order to appropriate (impound) only that rate of flow (2.67 cfs) requested in this application, a very large by-pass structure or release device would be required in the proposed dam. Such structure would require the capability of discharging all inflows in excess of 2.67 cfs. The proposed means of diversion or construction as described by the Applicant offered no plans from which a conclusion could be drawn, that such conditions can be physically or reasonably met.

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Mr. Jones also presented testimony showing that water samples taken at the mouth of Big Coulee Creek contained high concentrations of salt. He stated that since these samples were taken at the U.S. Geological Survey gaging station, about 40 river miles downstream from the Applicant's proposed point of diversion, and on a very limited number of samplings, that no conclusions could be drawn from them relating to salinity problems that could be expected to develop as a result of the proposed project except as a warning that salinity problems may worsen and that further studies would be required in order to make reasonable projections as to possible adverse affects to prior appropriators by increased salt concentrations in their water supplies and the potential for property damage as a result of saline seep caused by seepage from the proposed reservoir and return flows from the proposed irrigated lands.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a Beneficial Water Use Permit is required by the Applicant to appropriate water from the proposed source of supply.
2. The Objectors have apparent prior existing water rights from the source of supply which, by law, must be protected. However, the quantification and final determination of the validity of such rights must await the adjudication process mandated by Section 89-870 et seq., of the Montana Water Use Act, and any permits issued must be subject to that final determination.
3. There are unappropriated waters in the source of supply:
 - a) At times when the water can be put to the use proposed by the Applicant.
 - b) In the amount the Applicant seeks to appropriate.
 - c) However, the amount requested is not necessarily

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available throughout the period during which the Applicant seeks to appropriate and is not available in that amount in every year.

4. The rights of prior appropriators will be adversely affected unless:

- a) Means are provided in the impoundment structure to release or by-pass inflows from the source of supply in excess of 2.67 cfs at all times,
- b) Means are provided in the impoundment structure to release impounded water at a rate of flow not less than the rate of inflow at all times when the rate of inflow from the source is 2.67 cubic feet per second or less,
- c) The quality of water appropriated by prior water rights holders from the source of supply is maintained at a level satisfactory for livestock and irrigation purposes or equal to that under the conditions which would have existed without the impoundment, whichever condition is the least restrictive.

5. The proposed means of diversion or construction are not adequate to show:

- a) The volume of water to be appropriated,
- b) That the rate of flow for the appropriated waters will not exceed the rate of flow requested,
- c) That the rate of flow for the appropriated waters will not equal 15.0 cubic feet per second or more at any time.

6. The proposed use of water, will be a beneficial use, however, care-

ful management will be required.

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 application is for less than 15.0 cubic feet per second, however, the proposed means of appropriation is by impoundment in a new 499 acre-foot reservoir on Big Coulee Creek which would, in fact, result in the appropriation of flows in excess of 15.0 cubic feet per second at such times as the flows from the source of supply at the point of diversion exceed this rate and exceed the capacity of the structure ^{to} discharge the inflow rate regardless of the storage stage. The Applicant has failed to prove, by clear and convincing evidence, that at such times the rights of prior appropriators will not be adversely affected.

9. The Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch should not be granted in accordance with the provisions of Chapter 8 of Title 89 of the laws of the State of Montana.

PROPOSED ORDER

1. The Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch is hereby denied.

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 after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions will be granted. 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 6th day of March, 1978.


WILLIAM F. THROM
HEARING EXAMINER

CASE # 9357