

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
9387-g40-0 BY 3-D RANCH)

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

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 right was held in the courtroom of the Valley County Courthouse in Glasgow, Montana on Tuesday, May 3, 1977, commencing at approximately 2:30 p.m., Richard Gordon, Legal Counsel for the Department and appointed Hearing Examiner herein presiding.

The Applicant, 3-D Ranch, appeared through Victor Donovan, who appeared personally and presented testimony in support of the application. Also appearing personally and presenting testimony on behalf of the Applicant were Richard Hickel, a well driller; and Clinton Whitmyer, a geologist and well driller. The Applicant was represented by Counsel, Matthew Knierim, Esq., Glasgow, Montana.

The Objector, Stanley G. Russell, appeared personally and presented testimony in support of his objection. Also appearing personally and presenting testimony on behalf of the Objector were Stanley Olsen, a neighbor of the Objector; and Dr. Darrel Dunn, a geologist-hydrologist. The Objector was represented by Counsel, Lawrence Miyasato, Esq., Glasgow, Montana.

The Objector, Esther Abern, appeared personally in support of the combined objection of Wayne and Esther Abern.

The Objector, June Slattum, appeared personally in support of her objection. The Objector, Goldyn C. Birkoski, did not appear personally but was represented by Counsel, John Langen, Esq., Glasgow, Montana.

The Objector, JoAnn Arneson, appeared personally in support of the combined objection of Hubert D. and JoAnn Arneson.

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Steve White, DNRC staff geologist, and Forrest Tevebaugh, DNRC Glasgow Area Office, appeared personally on behalf of the Department. Neither the Objector Leonard L. Thornton, nor the Objector Grace Thornton appeared personally or through counsel.

A Proposed Order (Proposal for Decision) dated July 14, 1977, was issued by the Hearing Examiner Richard Gordon.

The Proposed Order as issued on July 14, 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, if any, should be filed with the Department within ten (10) days after service upon the parties herein, and upon receipt of any written exception, opportunity would be provided to the Exceptor and to all adversely affected parties to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On July 22, 1977, the Department received a letter dated July 21, 1977, from Lawrence Miyasato, attorney for the Objector Stanley G. Russell, requesting an extension of time until August 12, in which to file any possible exceptions on behalf of his client. By letter of July 27 to Mr. Miyasato, the Department granted said requested extension of time to August 12.

On August 1, 1977, the Department received a letter of Exception from Stanley Russell. On September 7, the Department received from Mr. Russell a letter dated September 6, amending his Exception letter of August 1, 1977, and on September 16, the Department received a letter dated September 10, from Mr. Russell adding a paragraph to his Exception which was omitted previously.

Mr. Miyasato by letter of August 12, to the Department advised that he had not been contacted by his client, Mr. Russell, and thus would forego filing any exceptions.

By letter of August 16, 1977, to Mr. Russell, the Department acknowledged receipt of his Exception letter as received on August 1, and advised him of his

opportunity to file a brief in support of his exception within ten days after receipt of the Department's letter. Mr. Russell by letter received August 29, requested an extension of time until September 7, to prepare and file a brief or amended exception. The Department by letter of August 31, to Mr. Russell granted an extension of time until September 9, to file a brief or amended exception.

The Department by letter of September 20, 1977, to Mr. Russell, made reference to his Exception letter received on August 1, and subsequent letters of September 6 and 10, 1977 and stated, "It is our understanding by verbal request of September 13 to the chief of this Bureau and by letter of September 14, 1977, that you wish to withdraw your amended Exception letter of September 6 and letter of September 10, and submit a new concise and to-the-point amended Exception." Mr. Russell was further informed that he would have until September 27, 1977, to officially withdraw his letters of September 6 and 10, and submit a new amended Exception letter. It was further pointed out that the letters of September 6 and 10 would not be returned to Mr. Russell if they were withdrawn. The two letters if withdrawn would remain with the application file, however, they would not be used in the final decision on the application.

On September 26, 1977, the Department received Mr. Russell's new amended letter of Exception as dated September 23, 1977. Mr. Russell's introductory paragraph states, "In response to your letter of September 20, this will withdraw my exception and amended exception letters of August 1, September 6 and 10 and will offer concise amended exception." In Mr. Russell's closing comment he stated, "In order to expedite this application process, this objector believe(s) these exceptions can be resolved by the Administrator without need of further oral argument hearing."

The Department by letter of September 28, to Mr. Russell acknowledged receipt of his new Exception letter and informed him that the Applicant and his legal counsel would be granted the opportunity to file a Reply Brief in reply to Mr. Russell's Exception and Argument.

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By letter of September 28, 1977, to Mr. Knierim, the Department advised him of his opportunity to file a Reply Brief on behalf of his client in response to the letter of Exception and Argument filed by Mr. Russell, within fifteen days after receipt of the Department's letter.

On September 30, 1977, the Department received Mr. Knierim's Reply Brief as dated September 29, 1977. Mr. Knierim stated in his conclusion, "The findings and proposed order are sufficient in their present form. Applicants request that the Administrator adopt them as prepared by Mr. Gordon." Mr. Knierim further stated, "Applicants do not request oral argument."

The Department by letter of October 4, 1977, to Mr. Knierim with copies to Victor Donovan, Stanley Russell and Lawrence Miyasato, stated, "This will acknowledge receipt of your Reply Brief dated September 29, 1977, as filed on behalf of your client 3-D Ranch in the matter of Application No. 9387-g40-0. An Exception letter dated September 23, 1977, was filed by Stanley Russell to the Hearing Examiner's Proposal for Decision in this matter. Please be advised that since an oral argument hearing has not been requested by Mr. Russell nor by yourself, that the Administrator of the Water Resources Division will now proceed to prepare and issue a Final Order taking into full account all documents in the application file."

Since none of the parties in this matter specifically requested an oral argument hearing on the objections, exceptions, and briefs 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 July 14, 1977, the objections, exceptions, briefs 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 July 14, 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 old Item 3 to new Item 4, old Item 7 is new Item 3, old Item 4 is new Item 5 as amended, old Item 5 is new Item 6, old

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Item 6 is new Item 7, and Items 8, 9, and 10 are newly added conditions.

FINAL ORDER

1. Subject to the conditions cited below, the Permittee's Provisional Permit No. 9387-g40-0 is hereby granted allowing the appropriation of no more than 3 cubic feet of water per second or 1,350 gallons of water per minute, not to exceed 570 acre-feet of water per annum, in Valley County, Montana, to be diverted by means of a well, approximately 80 feet deep, at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, Township 34 North, Range 42 East, of the Montana Principal Meridian, to be used for new irrigation on 150 acres, and for supplemental irrigation on 77 acres, all located in said Section 35, and containing a total of 227 acres, more or less. Said appropriation to be limited to use within the period April 1 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 in the source of supply of those objecting herein.

3. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

4. The Permittee may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water right in the source of supply.

5. The Permittee shall install and maintain an adequate flow meter measuring device to accurately measure the rate and volume of water diverted from the well. The Permittee shall keep an accurate written log record of periods of diversion. This includes the times and dates the pump was started and shut off, the rate water is diverted during each pumping period, and the total volume of water diverted during each period. Such records shall be presented to the Department upon demand by the Department.

6. The granting of a Provisional Permit in no way grants the Permittee any right to violate the property or 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 granting of this Provisional Permit in no way guarantees that the Permittee will be able to exercise the Provisional Permit.

8. 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.

9. The Permittee or his 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 Permittee, or his successor, to resume pumping.

10. The above conditions to granting of this Provisional Permit shall hold for any predecessor in interest to the Permittee 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 8th day of November, 1977.

Orin Ferris
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 NO.) PROPOSAL FOR DECISION
9387-g40-0 BY 3-D RANCH)

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The Objector, Stanley G. Russell, appeared personally and presented testimony in support of his objection. Also appearing personally and presenting testimony on behalf of the Objector were Stanley Olsen, a neighbor of the Objector; and Dr. Darrel Dunn, a geologist-hydrologist. The Objector was represented by Counsel, Lawrence Miyasato, Esq., Glasgow, Montana.

The Objector, JoAnn Arneson, appeared personally in support of the combined objection of Hubert D. and JoAnn Arneson.

The Objector, Esther Abern, appeared personally in support of the combined

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objection of Wayne and Esther Abern.

The Objector, June Slattum, appeared personally in support of her objection. The Objector, Goldyn C. Birkoski, did not appear personally but was represented by Counsel, John Langen, Esq., Glasgow, Montana.

Steve White, DNRC staff geologist, and Forest Tevebaugh, DNRC Glasgow Area Office, appeared personally on behalf of the Department. Neither the Objector Leonard L. Thornton, nor the Objector Grace Thornton appeared personally or through counsel.

STIPULATIONS

In accordance with 89-8-100, R.C.M. 1947, by oral stipulation of all parties present at the hearing, it was stipulated that the common law and statutory rules of evidence would apply in the presentation of evidence at this hearing.

EXHIBITS

At the hearing the Applicant offered into evidence one exhibit to-wit:

1. A copy of a Well Log Report prepared by Hickel and Tooke Drilling Company for the 3-D Ranch dated November 16, 1976.

Said exhibit was admitted into evidence as Applicant's Exhibit No. 1.

At the hearing the Objector, Stanley Russell, offered into evidence three exhibits to-wit:

1. Copies of Notice of Appropriation No. 15563, filed on 8-20-57 by W. W. Russell in the miscellaneous records of Valley County, Montana;
2. An aerial photo depicting certain features and parcels of land constituting the Russell appropriation works and places of use;
3. A copy of a document entitled, Report of Investigation by Earth Sciences Services, Inc., prepared for the Objector by Dr. Darrel Dunn.

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Said exhibits were admitted into evidence as Objector's Exhibits Nos. 1, 2, & 3 respectively.

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 August 2, 1976 the Department received Application for Beneficial Water Use Permit No. 9387-g40-0 from the 3-D Ranch, seeking to appropriate 3 cubic feet of water per second or 1,350 gallons of water per minute and not to exceed 570 acre-feet of water per annum, in Valley County, Montana to be diverted by means of a well approximately 80 feet deep at a point in the SE1/4 SE1/4 NW1/4 of Section 35, Township 34 North, Range 42 East of the Montana Principal Meridian, to be used for new irrigation on 150 acres and for supplemental irrigation on 77 acres, all in said Section 35, and containing a total of 227 acres, more or less. Said appropriation to be used from April 1 to October 15, inclusive, of each year.

2. On November 19, 1976 the Department received an objection to the above-described application from Stanley G. Russell alleging a prior filed use right filed on August 20, 1957 to 400 acre-feet of water per annum from the East Fork of Snow Coulee, used to irrigate 200 acres of hayland located in a part of Section 20, Township 33 North, Range 42 East of the Montana Principal Meridian. Objector alleged that his prior right would be adversely affected by the requested appropriation.

3. On December 14, 1976 the Department received an objection to the above-

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described application from Leonard L. Thornton alleging a prior water right for two wells of undescribed use and one "surface water hole" used for stockwater, all of undescribed location, quantity and priority. The Objector alleged that such rights would be adversely affected by the proposed appropriation.

4. On December 17, 1976 the Department received an objection to the above-described application from Goldyn C. Birkoski alleging a prior filed and use right to the use of two stockwater wells on West Fork, a tributary of Snow Coulee, and three wells on Snow Coulee, used year-round for the watering of approximately 150 head of livestock with a priority date of 1948. The Objector alleged that said water rights would be adversely affected by the proposed appropriation.

5. On December 17, 1976 the Department received an objection to the above-described application from Wayne and Esther Abern alleging a prior year-round right of undescribed location, quantity or priority, to groundwater for stockwatering. The Objectors alleged that said rights would be adversely affected by the proposed appropriation.

6. On December 20, 1976 the Department received an objection to the above-described application from June Slattum alleging that the proposed appropriation might "interfere with my right to use of water on my land." The right in question was not further described.

7. On December 20, 1976 the Department received an objection to the above-described application from Hubert D. and JoAnn Arneson alleging that the proposed appropriation might, "affect the underground water supply to my land in the future." No specific water right was alleged or further described.

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8. On December 20, 1976 the Department received an objection to the above-described application from June Slattum, Leonard Thornton, Esther Abern, JoAnn Arneson, and Grace Thornton, alleging a possible adverse effect to two wells located in the NW1/4 NW1/4 Section 27, Township 34 North, Range 42 East, one such well filed for on 3-25-63 and first used in 1917; the other filed for on 6-25-69 and first used in 1969. Each well has been used for domestic, garden and livestock watering in undescribed quantities.

9. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant proposes to irrigate 227 acres of land with a center pivot sprinkler system utilizing a 16 inch well approximately 85 feet deep. The water is to be withdrawn by means of a pump requiring 1,350 gallons of water per minute, with its intake located 40 feet below the surface level.

10. For purposes herein, based upon testimony given at the hearing, it is found that the well can be expected to produce 1,350 gallons of water per minute (apart from the question of the availability or prior appropriation of such water).

11. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant is proposing a maximum of 96 days of pumping at the requested rate, but that the Applicant does not intend to have to pump for the full 96 days in most years, the actual period of pumping to be a function of crop requirements (malting barley is presently contemplated) and rainfall.

12. For purposes herein, based upon testimony given at the hearing, it is found that the aquifer from which the proposed appropriation is to be made may be hydrologically connected to Snow Coulee, and therefore both the aquifer

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and Snow Coulee may be considered to be the same source of supply.

13. For purposes herein, based upon testimony given at the hearing, it is found that at times there is unappropriated water in the source of supply available for appropriation and that such times occur only when there is both water in the source of supply in excess of all prior water rights in the source, and further when the withdrawal by the Applicant will not adversely affect any such prior existing water rights in the source.

14. 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 in the source of supply available for appropriation, the rights of prior appropriators will not be adversely affected.

15. For purposes herein, based upon testimony given at the hearing, it is found that each of the Objectors herein alleging a pre-July 1, 1973 priority water right appears to possess a valid water right in an amount not to exceed the amount actually appropriated to a beneficial use.

16. For purposes herein, based upon testimony given at the hearing, it is specifically found that the Objector, Stanley Russell, is entitled to a prior water right to appropriate 600 gallons of water per minute from Snow Coulee for sprinkler irrigation.

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

18. For purposes herein, based upon testimony given at the hearing, it is found that the proposed use of water constitutes a beneficial use.

19. For purposes herein, based upon testimony given at 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 issued or for which

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water has been reserved.

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

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, a Beneficial Water Use Provisional Permit is required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, the Provisional Permit No. 9387-g40-0 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 specifically based upon any conditions and limitations appearing therein, it is concluded that the criteria for the issuance of a Provisional Permit as delineated at 89-885, R.C.M. 1947 have been met.

4. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Provisional Permit. It is concluded that the rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

5. It is concluded that the issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit.

6. It is concluded that nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything decided herein have bearing upon the status of claimed

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rights of any other party, except in relation to those rights herein newly applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and upon the above Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 3 cubic feet of water per second or 1,350 gallons of water per minute and not to exceed 570 acre-feet per annum, in Valley County, Montana, to be diverted by means of a well, approximately 80 feet deep, at a point in the SE1/4 SE1/4 NW1/4 of Section 35, Township 34 North, Range 42 East of the Montana Principal Meridian, to be used for new irrigation on 150 acres and for supplemental irrigation on 77 acres, all located in said Section 35, and containing a total of 227 acres, more or less; said appropriation to be limited to within the period April 1 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 in the source of supply 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 right in the source of supply.

4. The Applicant shall install and maintain an adequate measuring device so as to enable the Applicant to keep a record of all quantities of water withdrawn from the source of supply as well as periods of such withdrawal. Such

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records shall be presented to the Department for inspection upon demand by the Department.

5. The granting of a Provisional Permit in no way grants the Applicant any right to violate the property or 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.

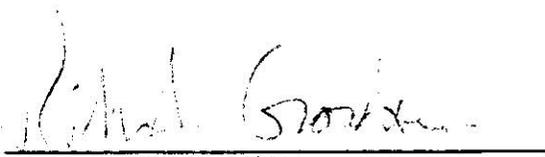
6. The granting of a Provisional Permit in no way guarantees that the Applicant will be able to exercise the Provisional Permit.

7. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided 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, 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 to all adversely affected parties to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 14th day of July, 1977.



RICHARD GORDON
HEARING EXAMINER

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