

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. )  
10,601-s410 BY PEARSON BROTHERS, )  
INC. )

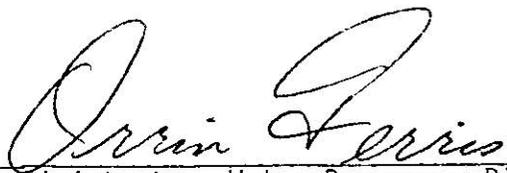
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

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The Proposed Findings of Fact, Conclusions of Law, and Order in this matter,  
as entered on September 15, 1977, by the Hearing Examiner, are hereby adopted as  
the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

Pearson Brothers, Inc. Application for Beneficial Water Use Permit No.  
10,601-s410 is hereby denied.

Done this 28<sup>th</sup> day of October, 1977.

  
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Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE #** 10601

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION

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IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 10,601-s41-0 BY )  
PEARSON BROTHERS, INC. )  
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Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held on July 15, 1977 at Choteau, Montana, for the purpose of hearing objections to the above-named application, William F. Throm, Hearing Examiner, presiding.

Robert Pearson, representing the Applicant, Pearson Brother, Inc., appeared at the hearing and presented testimony on behalf of the above application. The applicant was not represented by Counsel. The Applicant did not introduce exhibits into evidence in support of the above application.

Objectors appearing at the hearing were: Mr. Harry Yeager, Mr. Bruce Lee, representing Meadows Ranch, Inc., Mr. William Reichelt, President, Teton Water Users Association, Mr. J. J. Dietz, Secretary, Teton Water Users Association and Mr. Bruce Bechard also representing that Association. The foregoing all filed timely objections to this Application. In addition to these objectors, Mr. Harry Hodgskiss appeared to make a statement of concern. The Teton Water Users Association introduced into evidence a set of 4 photos showing flow conditions of the lower Teton River near the Teton Water Users Association's point of diversion. These photos were admitted into evidence without objection and were marked as Objectors' Exhibits "A", "B", "C", and "D". Mr. Reichelt also entered into evidence Gaging Station Records for the Teton River, however Mr. Reichelt did not make these records available to the Hearings Examiner therefore they were not received into evidence.

Mr. T. J. Reynolds, Helena Field Office Manager, Water Rights Bureau, appeared at the hearing on behalf of the Department. Mr. Reynolds introduced into evidence a Teton County General Highway Map showing locations

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of the Applicant's proposed point of diversion and objector's points of diversion. The Map was received into evidence without objection and was marked "Department Exhibit "A". The Department also entered into evidence a statement from Mr. Tom Patton, Department Geologist, this was received into evidence without objection and marked as Department's Exhibit "B".

Proposed Findings of Fact

1. On December 3, 1976, Pearson Brothers Inc. represented by Robert V. Pearson, submitted Application Number 10601-s41-0 to the Department of Natural Resources and Conservation to appropriate 1.78 cfs or 800 gpm of water, not to exceed 624 acre-feet per annum for irrigation and 10 acre-feet per annum for wildlife, constituting a total of 634 acre-feet per annum from Hay Coulee, a tributary of Deep Creek, Teton County, Montana, to be impounded in a new 10-acre-foot reservoir on Hay Coulee, at a point in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 17, Township 23 North, Range 6 West, M.P.M., and used for new irrigation on a total of 260 acres, more or less, in said Section 17, from May 15, to August 1, inclusive, of each year, and for wildlife from January 1 to December 31, inclusive of each year.

2. On February 10, 17 and 24, 1977 the Department caused to be duly published in the Choteau Acantha, Choteau, Montana, Public Notice of Application Number 10601-s41-0.

3. a. On March 3, 1977, Thomas F., Bessie V. and T. Michael McCartney filed a timely objection to this Application.

b. On March 17, 1977, the State of Montana Department of State Lands, represented by Gary Amestoy, filed a timely objection to this Application.

c. On March 18, 1977, the Meadows Ranch, Inc. represented by Bertha A. Meadows filed a timely objection to this Application.

d. On March 28, 1977, Harry Yeager filed a timely objection to this Application.

e. On March 30, 1977, The Teton Water Users Association, represented by William E. Reichelt, President, filed a timely objection to this Application.

4. Mr. Robert Pearson testified for the Applicant, Pearson Brothers, Inc., and stated that an earth-fill dam of 10 acre-foot capacity would be constructed across Hay Coulee to impound excess water and that a measuring device would be installed to assure that what flowed into the dam would flow out to satisfy downstream prior water rights holders. He further testified that the water would be used for wildlife, and irrigation of 260 acres of barley and hay. Water would be applied by use of two center pivot irrigation systems operated individually by one pump and motor installation. Mr. Pearson testified that at times there was a lot of water flowing in Hay Coulee but he did not know if there would be enough in dry years. He also testified that this year water was coming in on his land but did not make it to the road (about two miles below his point of diversion). Mr. Pearson stated that he did not have plans or specifications or construction details on the dam. He did not know what height it would be or whether or not a core trench would be constructed.

5. Objector Harry Yeager testified that he would have no further objections to issuing of the permit as long as Pearson Brothers, Inc. followed DNRC regulations. He stated that March and April is the only time that Hay Coulee normally flows into Deep Creek.

6. Mr. Bruce Lee stated that Meadows Ranch uses Hay Coulee below the Applicant's proposed point of diversion for stockwater purposes and that if the requirement that prior rights will not <sup>be</sup> adversely affected were made and followed then Meadows Ranch would have no objection to the issuance of this permit.

7. Mr. William Reichelt testified that the Teton River is fully appropriated; that some of the Teton Water Users Association members have some of the earliest water rights on the river yet do not get water during dry periods; that this is the third year in the past five that water is in short supply; that the Teton Water Users Association members irrigate about 2,475 acres of hay and grain and water about 3,000 head of cattle and have three community water points on the Teton River; that July through August are the critical months and that the accumulative affect of additional appropriations from the source of supply will adversely affect Teton Water Users Association members. He further testified that gaging station records, introduced as Teton Water Users Exhibit "E" showed an abundance of water only about one year out of three or 33% of the time.

8. Mr. Bechard testified that many times the lower end of the Teton River dries up and is short of water for cropland as well as for livestock uses and that people with older water rights are getting no water at all.

9. Mr. Dietz testified that there is no more water available in the lower end of the Teton River on a reliable basis and that he is forced to pump water for cattle in addition to hauling water from town for 100 head. He also questioned the adequacy of a 10 acre-foot reservoir to provide irrigation water for 260 acres in addition to wildlife benefits.

10. Mr. Henry Hodgskiss, a Deep Creek Water User testified that Hay Coulee water supply is very unreliable in that it depends upon return flow from irrigation waste water diverted from Deep Creek by the J. C. Salmond's Ranch. He questioned the economic feasibility of investing in a costly irrigation system for such an unreliable water supply.

11. Mr. T. J. Reynolds testified that in his opinion Hay Coulee was flowing at the rate of about 10 gallons of water per minute at the present time.

He also testified that he did not think the Teton Water Users Association would be adversely affected by the proposed appropriation, if granted, because the water in Hay Coulee does not normally reach as far as the Meadows Ranch (Reference Department's Exhibit "A") except during periods of heavy runoff. Mr. Reynolds also stated that, if granted, he did not believe there would be any detectable adverse affect on the Teton Water Users Association prior rights by the appropriation of the water applied for from Hay Coulee. This is also supported by an opinion from Tom Patton, Department Geologist, attached hereto and marked as Department Exhibit "B".

Mr. Reynolds recommended that if the permit were granted that inflow and outflow measuring devices be installed and measurement records be provided to the Department upon request.

Proposed Conclusions of Law

1. The Objectors to this application have apparent prior rights to the waters of the Teton River of which Deep Creek and Hay Coulee are tributaries.
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, Hay Coulee.
3. There are insufficient unappropriated waters in the source of supply in the amount the Applicant seeks to appropriate and the amount requested is unavailable throughout the period during which the Applicant seeks to appropriate.
4. The proposed means of diversion is inadequate to supply the water in the amount the Applicant wishes to appropriate.
5. The criteria for issuance of a permit set forth in Section 89-885 R.C.M. 1947 have not been met.

6. The Application for Beneficial Water Use Permit may 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. Pearson Brothers, Inc. Application for Beneficial Water Use Permit No. 10,601-s41-0 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 filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and make oral arguments before the Administrator of the Water Resources Division.

DATED the 15<sup>th</sup> day of September, 1977.



WILLIAM F. THROM, HEARINGS EXAMINER

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