

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
11,180-s43D BY DONALD R. LEE)

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

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on January 18, 1978, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Application For Beneficial Water Use Permit No. 11,180-s43 by Donald R. Lee is hereby granted allowing the appropriation for a maximum of 2.22 cubic feet of water per second or 1,000 gallons per minute, not to exceed 200 acre-feet per annum for irrigation and 2 acre-feet per annum for stock watering, constituting a total of 202 acre-feet per annum of seepage from the West Fork Ditch Company Canal, Carbon County, Montana, to be diverted by means of a new 10 acre-foot pit reservoir at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, Township 7 South, Range 20 East, M.P.M., and used for new irrigation on approximately 30 acres in Section 29 and 50 acres in Section 32, Township 7 South, Range 20 East, M.P.M. and containing a total of 80 acres, more or less, from April 15 to October 15, inclusive, of each year, and for stock watering from June 1, to November 1, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior existing water rights in the source of supply, including, but not limited to prior decreed rights and not necessarily limited to water rights in the source of supply of those objecting herein, and is subject to any final determination of prior existing water rights, as provided by Montana law.

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3. The Provisional Permit is subject to the following additional conditions:
- a. As stipulated by the Objectors and agreed to by the Permittee, Parshall measuring flumes shall be properly installed and maintained by the Permittee at all of his points of diversions from the West Fork Ditch Company canal not already equipped with such measuring devices.
 - b. A satisfactory flow meter shall be installed and maintained on the pump serving this project. Adequate records showing the period, rate and volume of water diverted shall be furnished to the Department upon request.
 - c. This permit is for the appropriation of salvaged waters only which constitute a new or independent source of supply and which would not otherwise contribute to the stream system. The burden of proof for the quantification of the volume of such waters diverted and appropriated rests entirely upon the Permittee.
 - d. The Permittee shall install a satisfactory release or bypass structure in his project in order that all water other than that salvaged and rightfully claimed under 3-c above may be made available to satisfy prior water rights on the source of supply on lawful demand.
 - e. Plans and specifications for this project shall be submitted to the Department for review and approval prior to the start of construction and shall be constructed in accordance with said approved plans and specifications.

RECOMMENDATION

The Permittee has testified that the primary interest of the proposed project is to increase the productivity of his seeped lands through installation of drainage measures with secondary benefits being derived from the use of salvaged

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waters for new irrigation purposes. It is therefore recommended that the Permittee consult with a qualified professional engineer or governmental agency for a feasibility study of the proposal prior to further financial involvement. If the project proves to be feasible, then detailed plans and specifications should be prepared to construct the project in accordance with the terms and conditions of this order.

Done this 3rd day of March, 1978.

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. 11,180-s43D BY)
DONALD R. LEE)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing was held on September 21, 1977, at Red Lodge, Montana, for the purpose of hearing objections to the above named Application for Beneficial Water Use Permit, William F. Throm, Hearing Examiner, presiding.

The Applicant, Donald R. Lee, appeared at the Hearing to present testimony on his own behalf. He was not represented by legal counsel, nor did he introduce any exhibits in support of the application.

Objectors present at the hearing were Oliver Wilson, President, and Toivo Lantta, Director, Rocky Fork Decreed Users, Inc., representing that Incorporation; James Kane, representing Mr. Benjamin K. and Ms. Phyllis Karas and also representing James Roat, President of the West Fork Ditch Company. The objectors were not represented by legal counsel and did not introduce exhibits supporting their objections.

In addition to the above, Mrs. Francis Owen, who was an objector, appeared to make a statement on her own behalf.

Mr. Don Riddle, Office Manager of Billings Water Rights Field Office appeared and presented the Montana Department of Natural Resources and Conservation. Mr. Riddle did not introduce exhibits supporting Department testimony.

PROPOSED FINDINGS OF FACT

1. On December 22, 1976 the Department received Application for Bene-

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ficial Water Use Permit No. 11,180-s43D from Donald R. Lee to appropriate 2.22 cubic feet per second or 1,000 gallons of water per minute, not to exceed 400 acre-feet per annum for irrigation and 2 acre-feet per annum for stockwatering, constituting a total of 402 acre-feet per annum of seepage from the West Fork Ditch Company Canal, Carbon County, Montana, to be diverted by means of a new 10 acre-foot pit reservoir at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, Township 7 South, Range 20 East, M.P.M., and used for new irrigation on 60 acres in Section 29 and 100 acres in Section 32, Township 7 South, Range 20 East, M.P.M., and containing a total of 160 acres, more or less, from April 15 to October 15, inclusive, of each year, and for stock watering from June 1 to November 1, inclusive, of each year.

2. On May 12, 19, and 26, 1977 the Department caused to be duly published in the Carbon County News, Red Lodge, Montana, notice of the above Application for Beneficial Water Use Permit No. 11,180-s43D.

3. On June 10, 14, and 20, 1977, the Department received objections to the above application from Benjamin K. and Phyllis Karas, Rocky Fork Decreed Users, Inc., and Mr. and Mrs. William F. Owen, respectively.

4. The Applicant, Mr. Donald R. Lee testified that he and his brother, Richard Lee own 320 acres in Carbon County which is supplied with about 50 miners inches of water from the West Fork Ditch. Of the 320 acres about 120 acres is under the West Fork Ditch and out of this 120 acres about 100 acres could be irrigated. Of the 100 acres about one third is so seepy that it is impossible to get equipment over it to put up hay. Mr. Lee testified that they tried for a number of years to put up hay on this acreage, but finally had to give up and pasture it off. Mr. Lee testified that the ditch is very gravelly in this area and in deplorable condition and that he has talked to the West Fork Ditch people a number of times about ways the ditch seepage and

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overflow could be stopped, but that no remedy has been proposed. He testified that his main concern is to increase the productivity of his land, therefore, he has come up with the idea of constructing drains leading to a pit reservoir where the water will be collected and pumped and conveyed by pipeline to higher land he owns which is above the West Fork Ditch, here it will be used for new irrigation by sprinkler on hayland consisting of about 80 acres. Mr. Lee testified that he has water rights for this acreage, but that these rights are so low in priority that water is seldom available, therefore, he is seeking a more reliable source of supply through the salvage method proposed. He proposes to pump at the rate of approximately 1,000 gallons per minute if the system will yield that volume of water. Mr. Lee testified that he did not believe prior appropriators would be adversely affected by the appropriation he has proposed. He also testified that he would install Parshall measuring flumes at all points of diversion from the West Fork Ditch which are not now equipped with measuring devices in consideration for the objector's withdrawing their objections to the granting of this permit.

5. Mr. James Kane testified that the parties he was representing were objecting to the permit because the West Fork Ditch was short of water, that all users, with the exception of Mr. Lee, have measuring flumes at their diversions and that Mr. Lee has three diversions with no measuring devices and that without a means of measuring the water Mr. Lee diverts there is no way of knowing whether or not there is excess water and whether or not the water has been equitably distributed. Mr. Kane further testified that he and the objectors represented by him would withdraw their objections if Mr. Lee would properly install and maintain Parshall measuring flumes at his three additional points of diversion, from the West Fork Ditch, not already equipped with such devices.

6. The Rocky Fork Decreed Users, Inc. represented at the hearing by Oliver Wilson and Toivo Lantta testified that Rock Creek and its tributaries depends upon return flows from natural seepage and irrigation waste water to satisfy prior water rights and that if permits were granted for the use of these seepage and waste waters for irrigation of new lands then prior water rights holders would be adversely affected, as there is already a short supply of water from Rock Creek.

7. Mrs. Francis Owen testified that they do not take water from the West Fork Ditch and that their objection was filed in support of water users who do draw from this source of supply. She stated that their source of supply is from Willow Creek and that she does not know if the Applicant's proposed appropriation would affect the Willow Creek source of supply or not, but if it did, then she would object to the granting of the permit.

8. Based upon the testimony of all parties at the hearing Rock Creek and its tributaries on this reach of the stream are fully appropriated during the irrigation season, however, the application, in fact, is for salvage of seepage water from the West Fork Ditch Company which is a tributary to the West Fork of Rock Creek.

9. Based upon the testimony of the Applicant the total acreage to be irrigated under this permit will be approximately 80 acres and not 160 acres as applied for.

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, Rocky Fork Decreed Users, Inc., represented by Oliver Wilson, President and Toivo Lantta, Director, and Mr. Benjamin K. and Ms. Phyllis Karas, the West Fork Ditch Company and James Kane, all represented

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by James Kane, have apparent prior 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. Mr. & Mrs. William F. Owen apparently do not have a prior water right from the source of supply, therefore, their objection does not constitute a valid objection.

4. There are unappropriated waters from the source of supply which are apparently being wasted and are contributing to seeped areas on the Applicant's property and are rendering these areas relatively unproductive for agricultural purposes. The Applicant has a legal right to improve the productivity of his land by providing drainage measures and salvaging the unappropriated waters thus made available and heretofore not being applied to beneficial uses, however, the water so salvaged must constitute a new or independent source of supply and cannot be waters that would have otherwise found their way to the stream system. The burden of proof for quantification of the rate and volume of salvaged water available for appropriation rests with the Applicant. Nevertheless, in accordance with Section 89-866(3) of the Montana Water Use Act, the Department must encourage the development of facilities which would conserve such waters for beneficial use and for the maximization of the use of those waters in the State of Montana.

5. The rights of prior appropriators will not be adversely affected if the permit is conditioned so as to protect those rights.

6. The proposed means of diversion or construction will be adequate if plans and specifications for the project are submitted for Department review and approval prior to the start of construction and the project is constructed in accordance with the approved plans and specifications.

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

8. 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.

9. The Application For Beneficial Water Use Permit No. 11,180-s43D by Donald R. Lee may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. Subject to the conditions cited below, the Application For Beneficial Water Use Permit No. 11,180-s43D by Donald R. Lee is hereby granted allowing the appropriation for a maximum of 2.22 cubic feet of water per second or 1,000 gallons per minute, not to exceed 200 acre-feet per annum for irrigation and 2 acre-feet per annum for stock watering, constituting a total of 202 acre-feet per annum of seepage from the West Fork Ditch Company Canal, Carbon County, Montana, to be diverted by means of a new 10 acre-foot pit reservoir at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, Township 7 South, Range 20 East, M.P.M., and used for new irrigation on approximately 30 acres in Section 29 and 50 acres in Section 32, Township 7 South, Range 20 East, M.P.M. and containing a total of 80 acres, more or less, from April 15 to October 15, inclusive, of each year, and for stock watering from June 1 to November 1 inclusive, of each year.

2. The Provisional Permit is granted subject to all prior existing water rights in the source of supply, including, but not limited to prior decreed rights and not necessarily limited to water rights in the source of supply of those objecting herein, and is subject to any final determination of prior existing water rights, as provided by Montana Law.

3. The Provisional Permit is subject to the following additional conditions.

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- a. As stipulated by the Objectors and agreed to by the Applicant, Parshall measuring flumes shall be properly installed and maintained by the Applicant at all of his points of diversions from the West Fork Ditch Company canal not already equipped with such measuring devices.
- b. A satisfactory flow meter shall be installed and maintained on the pump serving this project. Adequate records showing the period, rate and volume of water diverted shall be furnished to the Department upon request.
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- d. The Permittee shall install a satisfactory release or bypass structure in his project in order that all water other than that salvaged and rightfully claimed under 3-c above may be made available to satisfy prior water rights on the source of supply on lawful demand.
- e. Plans and specifications for this project shall be submitted to the Department for review and approval prior to the start of construction and shall be constructed in accordance with said approved plans and specifications.

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RECOMMENDATION

The Applicant has testified that the primary interest of the proposed project is to increase the productivity of his seeped lands through installation of drainage measures with secondary benefits being derived from the use of salvaged waters for new irrigation purposes. It is therefore recommended that the Applicant consult with a qualified professional engineer or governmental agency for a feasibility study of the proposal prior to further financial involvement. If the project proves to be feasible, then detailed plans and specifications should be prepared to construct the project in accordance with the terms and conditions of this order.

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 of 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 18th day of January, 1978.



WILLIAM F. THROM
HEARING EXAMINER

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