

- a. Excavation and placement of spoil shall be entirely out of the channel proper of Dugan Creek and shall be at such distance from Dugan Creek so as not to impair or reduce the free flow of Dugan Creek.
- b. No structure, excavation or impedement shall be made in the bed of Dugan Creek.
- c. A satisfactory means shall be provided and maintained by the Permittee so as to regulate and control the volume of water diverted from Dugan Creek and impounded in the pit reservoir, such regulating and control device shall be so designed as to take water from Dugan Creek only when Dugan Creek is at flood stage.
- d. The proposed structure and means of diversion shall be built in accordance with applicable Soil Conservation Service Plans and Specifications or those of a qualified professional engineer. Said Plans and Specifications shall be submitted to the Department at the earliest possible date for Department review and approval, preferably before the start of construction in order to avoid later costly modifications which may be necessary to impose.

3. The permits as granted are provisional and by law are subject to prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

4. The Provisional Permits are granted subject to the right of the Department to revoke the permits in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

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5. The issuance of the Provisional Permits by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permits, nor does the Department in issuing the Provisional Permits in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permits.

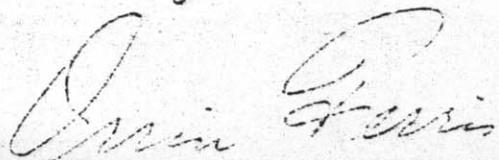
6. The above conditions to the granting of the Provisional Permits shall hold in full effect for any successor in interest to the Permittee herein named.

RECOMMENDATION

Since under the provisions of Section 89-880 (5) (b), R.C.M. 1947, a permit is not required prior to constructing the pits and appropriating the water applied for under the Applications for Beneficial Water Use Permits, the subject matter of the Proposal for Decision, and since the Department may require the Applicant to modify the construction of the pits if the Department determines that the rights of other appropriators have been or will be adversely affected by the appropriation, it is recommended that the Applicant submit Plans and Specifications to the Department for departmental review and approval prior to the start of construction of either of the two projects.

It is further recommended 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 24th day of August, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 12277

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NOS. 12,276-s39FJ and 12,277-s39FJ)
BY OSCAR QUAM RANCH)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on April 26, 1978, at Ekalaka, Montana, for the purpose of hearing objections to the above-named Applications for Beneficial Water Use Permit Numbers 12,276-s39FJ and 12,277-s39FJ, William F. Throm, Hearing Examiner, presiding.

The Applicant, Oscar Quam, appeared at the hearing and presented testimony in support of the applications. Mr. Quam was represented by legal counsel, Richard O. Harkins, Attorney at Law, Ekalaka, Montana. One exhibit was introduced supporting the application, to wit: Applicant's Exhibit No. A-1, a project location map showing approximate watershed boundaries. The Applicant's exhibit was marked accordingly and received into the record without objections. Appearing at the hearing and testifying in support of the application was Luther Waterland, operator of the Applicant's ranch.

Mr. Russell A. and Neva Bonsell, Objectors, attended the hearing and presented testimony or statements. The Objectors were represented by legal counsel, Mr. Gene Huntley, Attorney at Law, Baker, Montana. The Objectors introduced five exhibits supporting their objection to wit: Objector's Exhibits No. 0-1, Russell Bonsell, Notice of Appropriation executed May 21, 1969; No. 0-2 Peter D. Sjoblom, Notice of Appropriation executed January 30, 1899; No. 0-3, Peter O. Sjoblom, Notice of Appropriation executed October 12, 1903; No. 0-4, copy of aerial photo showing Objectors' irrigated lands lying below the proposed project; and 0-5, Notice of Water

Rights filed June 2, 1903 by P.O. Sjoblom. The Objectors' exhibits were marked accordingly and received into the record without objections. No other Objectors were present.

Montana Department of Natural Resources and Conservation personnel and witnesses present and testifying on behalf of the Department were Mr. Stan Jones, Hearings Assistant, Water Rights Bureau and Mr. Don Riddle, Billings Field Office Manager. The Department was not represented by legal counsel.

Three exhibits were introduced by the Department to wit: Exhibit D-1, copy of aerial photo of a portion of Little Beaver Creek and Dugan Creek showing the proposed points of diversion and the Objectors' irrigated lands; Exhibit D-2, Stan Jones' work sheet showing hydrologic computations for the watersheds involved; and Exhibit D-3, Soil Conservation Service Pit Type Tank Tables of Volumes consisting of 9 sheets. The Department's exhibits were marked accordingly and received into the record with objections to Department Exhibit D-2 by counsel for the Objectors on the grounds that foundation documents supporting the computations were not referenced properly or introduced into evidence. The objection was taken under advisement by the Hearing Examiner and it is hereby ruled that although the documents used were not introduced into evidence and were not thoroughly referenced, they are public documents available to the Objector and sufficiently described in the testimony so as to be unmistakable should the Objector see fit to obtain them, furthermore, the documents were offered to be made available to the Objector should he request them. The Hearing Examiner has reviewed the computations and has found them to be substantially correct to support the conclusions drawn by the Department witness in the testimony presented.

PROPOSED FINDINGS OF FACT

1. On April 18, 1977, the Department received two Applications for Beneficial Water Use Permits Nos. 12,276-s39FJ and 12,277-s39FJ by Oscar Quam. Application No. 12,276-s39FJ is to appropriate 1.5 acre-feet of water per annum from an unnamed tributary of Little Beaver Creek, to be impounded in a new 1.5 acre-foot pit reservoir on said unnamed tributary at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, Township 2 North, Range 57 East, M.P.M. and used for stock watering from January 1 to December 31, inclusive, of each year, in Carter County, Montana. Application No. 12,277-s39FJ is to appropriate 1.5 acre-feet of water per annum from Dugan Creek, a tributary of Little Beaver Creek, to be impounded in a new 1.5 acre-foot pit reservoir on Dugan Creek at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26, Township 2 North, Range 57 East, M.P.M. and used for stock watering from January 1 to December 31, inclusive, of each year, in Carter County, Montana.

2. On September 23 and 30, and October 7, 1977, the Department caused to be duly published in the Ekalaka Eagle, Ekalaka, Montana, notice of the above Application for Beneficial Water Use Permits Nos. 12,276-s39FJ and 12,277-s39FJ.

3. On October 27, 1977, the Department received an objection to Application No. 12,276-s39FJ (assumed to be in reference to Application No. 12,276-s39FJ) from Russell A. and Neva Bonsell.

4. On October 27, 1977, the Department received an objection to Application No. 12,277-s39FJ from Russell A. and Neva Bonsell.

5. Dugan Creek, the proposed source of supply for Application for Beneficial Water Use Permit No. 12,277-s39FJ, is an intermittent stream, the volume of water to be appropriated is less than 15 acre-feet, the proposed means of appropriation is by impoundment in a pit and the proposed

purpose of use is for livestock watering.

6. The Dugan Creek watershed, above the Applicants' proposed point of diversion, consists of 10 square miles, more or less.

7. The Objector has apparent prior filed water rights on Dugan Creek.

8. The unnamed tributary of Little Beaver Creek, the proposed source of supply for Application for Beneficial Water Use Permit No. 12,276-s39FJ, is an intermittent stream; the volume of water to be appropriated is less than 15 acre-feet; the means of appropriation is by impoundment in a pit; and the purpose of use is for livestock watering.

9. The watershed above the Applicants' point of diversion on the unnamed tributary of Little Beaver Creek consists of one-half square mile, more or less, whereas the Little Beaver Creek watershed above the Objector's point of diversion consists of 73 square miles, more or less. The intercepted portion of the Little Beaver Creek watershed is less than 0.7% of the watershed supplying the Objector's claimed appropriated water rights.

10. The Objector has apparent prior filed water rights on Little Beaver Creek.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880(5)(b), R.C.M. 1947, a permit is not required before constructing an impoundment or pit and appropriating water for use by livestock, if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is from a source other than a perennial flowing stream.

2. In accordance with the provisions of Section 89-880(1) and (5)(b), Oscar Quam did submit Applications for Beneficial Water Use Permits Nos. 12,276-s39FJ and 12,277-s39FJ to the Department and said applications were the subject matter of this hearing, and did meet the conditions set forth in "1" above.

3. The Applicant has met all the requirements of the Montana Water Laws and may proceed with construction of the pits described in the above cited applications and may appropriate the water for livestock use. Furthermore, the Applicant is not required by Montana Water Law to prove, by any degree of evidence whatsoever, prior to the start of construction of the projects and appropriation of the water applied for, that the criteria set forth in Section 89-885, R.C.M. 1947, are met.

4. Montana Water Laws do not delegate to the Department the authority or prerogative to deny the permits which were the subject matter of this hearing, however, if the Department determines, after processing the applications, that the rights of other appropriators have been or will be adversely affected, it may require the Applicant to modify the construction of the pits and issue the permits subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators. (Emphasis added)

5. Construction of the 1.5 acre-foot pit, as described in Application No. 12,276-s39FJ on an unnamed tributary of Little Beaver Creek and appropriation of the water for use by livestock in all probability, will not unreasonably adversely affect the rights of prior appropriators.

6. Construction of the 1.5 acre-foot pit as described in Application No. 12,277-s39FJ and appropriation of water from Dugan Creek for use by livestock, may at times, adversely affect the rights of prior appropriators, therefore, terms, conditions, restrictions or limitations considered necessary by the Department to protect the rights of prior appropriators should be imposed.

PROPOSED ORDER

1. Application for Beneficial Water Use Permit No. 12,276-s39FJ may be granted to the Oscar Quam Ranch to appropriate 1.5 acre-feet of water per annum from an unnamed tributary of Little Beaver Creek, to be impounded

in a new 1.5 acre-foot pit reservoir on said unnamed tributary at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, Township 2 North, Range 57 East, M.P.M. and used for stock watering from January 1 to December 31, inclusive, of each year, in Carter County, Montana.

2. Application for Beneficial Water Use Permit No. 12,277-s39FJ may be granted to the Oscar Quam Ranch to appropriate 1.5 acre-feet of water per annum from Dugan Creek, a tributary of Little Beaver Creek, to be impounded in a new 1.5 acre-foot pit reservoir outside of the Dugan Creek channel proper at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26, Township 2 North, Range 57 East, M.P.M. and used for stock watering from January 1 to December 31, inclusive, of each year, in Carter County, Montana, subject to the following terms, conditions, restrictions and limitations:

- a. Excavation and placement of spoil shall be entirely out of the channel proper of Dugan Creek and shall be at such distance from Dugan Creek so as not to impair or reduce the free flow of Dugan Creek.
- b. No structure, excavation or impedement shall be made in the bed of Dugan Creek.
- c. A satisfactory means shall be provided and maintained by the Permittee so as to regulate and control the volume of water diverted from Dugan Creek and impounded in the pit reservoir, such regulating and control device shall be so designed as to take water from Dugan Creek only when Dugan Creek is at flood stage.
- d. The proposed structure and means of diversion shall be built in accordance with applicable Soil Conservation Service Plans and Specifications or those of a qualified professional engineer. Said Plans and Specifica-

tions shall be submitted to the Department at the earliest possible date for Department review and approval preferably before the start of construction in order to avoid later costly modifications which may be necessary to impose.

3. The permits as granted are provisional and by law are subject to prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

RECOMMENDATION

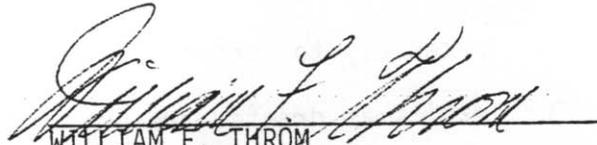
Since, under the provisions of Section 89-880(5)(b), R.C.M. 1947, a permit is not required prior to constructing the pits and appropriating the water applied for under the Applications for Beneficial Water Use Permits, the subject matter of this Proposal for Decision, and since the Department may require the Applicant to modify the construction of the pits if the Department determines that the rights of other appropriators have been or will be adversely affected by the appropriation. It is recommended that the Applicant submit Plans and Specifications to the Department for departmental review and approval prior to the start of construction of either of the two projects.

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 28th day of June, 1978.


WILLIAM F. THROM
HEARING EXAMINER

CASE # 10277