

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. 64800-s40B BY USDI, BUREAU)
OF LAND MANAGEMENT)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 4, 1988 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit No. 64800-s40B by USDI, Bureau of Land Management is hereby denied without prejudice.

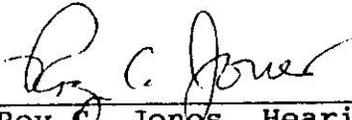
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

CASE # 64800

Dated this 22 day of November, 1988.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
Water Resources Division
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(406) 444-6605


Roy C. Jones, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 1269
Glasgow, Montana 59230
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 23rd day of November, 1988, as follows:

Gary and Toni Keller
Box 83
Roy, Montana 59471

U.S. Department of Interior
Bureau of Land Management
Airport Road
Lewistown, Montana 59457

Ron Roman
Montana State Board
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Department of State Lands
Capitol Station
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Irene V. LaBare
Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 64800-s40B BY USDI, Bureau)
of Land Management)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on Tuesday, May 17, 1988 in Lewistown, Montana.

APPEARANCES

Applicant appeared by and through John C. Chaffin, Attorney for the Bureau of Land Management (BLM), United States Department of the Interior, Office of the Solicitor, Billings, Montana.

- Joe Frazier, Hydrologist with BLM, appeared as witness for the Applicant.

- Dave McIlnay, BLM Area Manager of the Judith Resource Area, appeared as witness for the Applicant.

- Doug Ayers, M.S. Degree in Wildlife Management and employed by BLM (job title not in record), appeared as witness for the Applicant.

Objectors Gary and Toni Keller appeared by and through Gary Keller, Roy Montana.

- Robert L. Fink, Roy, Montana, appeared as witness for Objector Keller.

Objector Montana Department of State Lands (DSL) sent a letter to the Hearing Examiner dated April 19, 1988. In said letter, DSL declined to appear at the hearing and outlined its objections and ideas of a suitable solution. This letter was immediately added to the Department of Natural Resources and Conservation (Department) file for Application No. 64800-s40B. The Hearing Examiner notes that Objector DSL's concerns are mirrored by Objector Keller's concerns about the DSL reservoir in Section 6, Township 17 North, Range 22 East, Fergus County. Since Objector DSL did not appear at the hearing, its objection is hereby dismissed.

EXHIBITS

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

Before the start of the hearing and before the file was reviewed, Applicant offered three documents consisting of four pages for inclusion in the file. These were:

- 1) a Demand for Witnesses and Summary of Testimony dated May 21, 1988 and sent to Applicant by Objector Keller (one page),
- 2) a list of witnesses for the Objector (Keller), dated May 11, 1988, sent to the Applicant (one page), and
- 3) a Supplemental Witness List and Summary of Testimony dated May 16, 1988 and sent by Applicant's Attorney to Objector Keller (two pages).

All of these documents had been exchanged prior to the hearing but too late to have been received by the Hearing Examiner.

These were examined as part of the file by both parties prior to the start of the hearing. After the hearing started, they were offered and entered into the record as part of the Department file without objection.

During the course of the hearing, Applicant offered four exhibits for inclusion in the record. All were admitted without objection.

Applicant's Exhibit 1: A photocopy of USGS topographic maps showing the drainage area above the proposed BLM dam and the DSL reservoir on Bear Creek.

Applicant's Exhibit 2: A handwritten table showing actual flow measurements and dates taken by Mr. Frazier at key points in the unnamed tributary of Bear Creek, the source stream of the proposed BLM dam.

Applicant's Exhibit 3: A handwritten table showing water quality test results for samples taken from the source, an unnamed tributary of Bear Creek.

Applicant's Exhibit 4: Copy of a letter from Dan Vincent of the Montana Department of Fish Wildlife and Parks to David McIlnay of the BLM concerning a fishery in the proposed reservoir.

During the course of the hearing, Objector offered six exhibits for inclusion in the record. All were admitted without objection.

Objector's Exhibit 1: A copy of a Contract for Deed between Dale K. and Sharon V. Knox and Gary Lynn and Antoinette J. Keller (objectors) as vendors and purchasers of the property and water rights upon which Objectors base their objection.

Objector's Exhibit 2: A photocopy of a Department of Natural Resources and Conservation Water Right Listing by Owner Name listing the Knox (Keller) water rights.

Objector's Exhibit 3: A photocopy of an aerial photograph of the Objector's property upon which his ditches, dikes, and reservoir are drawn.

Objector's Exhibit 4: A series of eight 35mm photographs labelled BB through II, inclusive. Photos show views of existing BLM reservoir in Section 1, Township 17 North, Range 21 East.

Objector's Exhibit 5: One 35mm photograph of Bear Creek at the county road in Section 5, Township 17 North, Range 22 East.

Objector's Exhibit 6: A series of four 35mm photographs (labelled B, C, D, and E) of the DSL reservoir in Section 6, Township 17 North, Range 22 East.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in 85-2-306, MCA, do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 64800-s40B was duly filed with the Department on March 6, 1987 at 11:07 AM.

3. Pertinent portions of the Application were published in the News-Argus, a newspaper of general circulation in the area of the source, on April 8 and April 15, 1987. A timely objection was received (April 30, 1987) from Gary and Toni Keller of Roy, Montana.

In a letter dated January 20, 1988 from Wayne Zinne of BLM, the Department was informed of an error in calculating the reservoir volume. The new pertinent portions of the application were published in the News-Argus on February 3, 1988. A timely objection was received (February 9, 1988) from the Montana Department of State Lands.

A notice of this hearing was duly served on all parties on April 5, 1988.

4. By this application, Applicant seeks to appropriate one cubic foot per second (cfs) up to 62.20 acre feet (AC-FT) per year from an unnamed tributary of Bear Creek by means of a new reservoir of 62.2 AC-FT capacity. The means of diversion is to be a dam on the source in the NW1/4 SE1/4 NE1/4, Section 1, Township 17 North, Range 21 East, Fergus County, Montana. The water is to be used for fish (up to 61.26 AC-FT) and stockwater (up to 0.94 AC-FT) in the NW1/4 SE1/4 NE1/4, Section 1, Township 17 North, Range 21 East. Water is to be appropriated from January 1 through December 31, inclusive. (From Applicant's Application for Beneficial Water Use Permit and Applicant's January 20, 1988 letter in the Department File.)

The February 3, 1988 public notice erroneously listed the annual volume correction for fish pond use as 62.26 AC-FT instead of 61.26 AC-FT as specified in Applicant's January 20, 1988 letter. This one AC-FT error added to the 0.94 AC-FT stock use resulted in an erroneous advertised total volume of 63.20 AC-FT. However, the reservoir capacity was correctly listed as 62.20 AC-FT in the public notice. Also, throughout the hearing, Applicant consistently referred to a "62 AC-FT" reservoir.

5. "Normal" flow in the source at the proposed damsite produces a volume of about 77 AC-FT per year (Frazier testimony).

6. The term "normal flow", as used by Mr. Frazier, does not include seasonal runoff nor major storm runoff. (Frazier testimony and analysis of Applicant's Exhibit 2 which shows an average flow of 47.7 GPM for the seven dates such measurements were taken. 47.7 GPM times 1440 minutes per day times 365 days per year divided by 325,851 gallons per acre-foot = 76.9 AC-FT. Rounded off, this equals the 77 AC-FT in Finding of Fact 5.) For the remainder of this Proposed Order, the Examiner adopts Mr. Frazier's definition of "normal flow".

7. Normal flow in the source disappears into exposed gravels in the source channel and does not generally reach the DSL reservoir in Section 6, Township 17 North, Range 22 East, Fergus Co. (Frazier testimony and Applicant Exhibit 2). However, seasonal and storm runoff do reach the DSL reservoir. Objectors rely on such flows to recharge the reservoir.

8. The normal flow of water at the proposed damsite probably comes from seepage of upstream dams and upstream irrigation return flows. Without this water there probably is not sufficient water in the source to support a new 62 AC-FT reservoir (Frazier testimony).

9. The proposed means of diversion will be a cored earthen-filled dam, with a 24" trickle tube. Said dam will back up 7.79 surface acres of water up to 20 feet deep creating a 62.20 AC-FT reservoir. The earth will be compacted around the trickle tube. A 2" drain pipe to supply a stock tank will be placed in compacted earth through the dam. The soil was probed at the damsite to determine proper core depth. The proposed construction methods meet BLM specifications (Frazier testimony). The water depth should allow a trout fishery (Frazier testimony and Applicant's Exhibit 4).

10. The 2" drain pipe could empty the reservoir, but it would be very slow (Frazier testimony).

11. Applicant's proposed dam would capture about 10% of the source flow (ie. seasonal and storm runoff) that would reach the DSL reservoir. So, during initial fill, there would be about a 10% impact on DSL reservoir. After initial fill, the trickle tube would reduce that impact to about 5% (Frazier testimony). Since Applicant did not specify that these figures were calculated for a drought year, it is assumed they refer to a "normal" year. This is further supported by the tone of the rest of Applicant's testimony.

12. No mention was made at the hearing regarding evaporation losses from the proposed reservoir. However, a March 17, 1988 letter to the Department from B. Gene Miller of BLM states that the trickle tube "...would pass all inflows (minus evaporation and seepage losses) once the BLM reservoir fills." and later in the letter "If the BLM reservoir fills during spring runoff, the trickle tube would pass additional inflows the remainder of the year..." (Department file). This indicates that in some years there may not be enough water in the source to keep the reservoir full.

13. Objector Keller (and dismissed Objector DSL) indicated that an adequate drainage device may satisfy their objections (Keller Objection Form and DSL April 19, 1988 letter in Department file). However, Applicant has rejected such a drainage device as an acceptable solution to Objector's concerns (Notice and Statement of Opinion, Form 612, in Department File).

14. Objector has a property right interest (contract for deed) in water rights possibly adversely affected by Applicant's proposed dam (Keller testimony and Objector's Exhibits 1 and 2).

15. Objector has water rights from DSL reservoir in Section 6, Township 17 North, Range 22 East, Fergus Co. (Keller testimony and Objector's Exhibit 2). Examiner notes the discussion concerning the exact number of acres irrigated. It is unclear from the record whether the 266 acres claimed by Mr. Knox, Objector's predecessor, is the total historically irrigated acres; or whether 483 acres were historically irrigated but only 266 are filed on Statements of Claim; or whether Objector's reference to new dikes indicates new acres to be irrigated or only better management of water on acres already irrigated. The fact remains that at least 266 acres of irrigation are claimed by Objector to be irrigated from Bear Creek and the DSL reservoir.

16. Objector has water rights downstream from DSL reservoir for instream stock use from Bear Creek. Starting at the county road between Sections 5 and 6, Township 17 North, Range 22 East, approximately 3/4 of a mile below the DSL reservoir, water in Bear Creek is Objector's only stockwater source in that pasture (Keller testimony and Objector's Exhibit 3).

17. It was acknowledged that water does enter Bear Creek below the DSL reservoir (Keller and Fink testimony). However, no testimony was given, nor does the Department file contain evidence specifying the amount of water - either by amount of flow or volume, or by per cent of flow or volume - contributed to Bear Creek by tributaries below the DSL reservoir, nor by springs or seeps below the county road in Section 5.

18. Applicant's figures concerning the proposed dam's 5% to 10% impact on water available to DSL reservoir were accepted by Objector and Objector alleges that this impact is adverse, especially in water short years (Applicant's cross-examination of Objector's Witness Fink and Objector's closing statement).

19. Water quality in the source is sufficient to support a fishery (Frazier testimony) and since stock is already drinking the water (Keller testimony), the water quality appears sufficient for that purpose.

20. Montana Department of Fish Wildlife and Parks has agreed to stock the proposed reservoir with fish (Frazier testimony and Ayers testimony).

21. There are no applications pending before the Department for either future uses of water or water reservations with which this application would interfere (Frazier testimony as obtained from Dave Schmitt of the Water Rights Bureau, Lewistown Field Office).

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) 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.

4. The proposed uses of water, fish pond and stock water, are beneficial uses of water [85-2-1-2(2), MCA].

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate to appropriate 62.2 AC-FT of water and to support the proposed uses. (Finding of Facts 9 and 19).

6. 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 (Finding of Fact 21).

7. There is unappropriated water in the source of supply at times when water can be put to the proposed use and in the amount sought by the Applicant but not throughout the period of proposed diversion (Findings of Fact 5, 6, 7, 11, and 12).

8. The proposed reservoir would adversely affect the water rights of a prior appropriator.

Applicant's figures show that in a normal year there will be a 10% reduction in seasonal and storm runoff water available to DSL reservoir during the initial fill which impact would be reduced to 5% thereafter (in a normal year) by merit of the 24" trickle tube (Finding of Fact 11). These figures were not disputed by Objector (Finding of Fact 18). This 5% reduction is related to capture of runoff events (Finding of Facts 6, 7, 11, and 12).

The logical question is whether a 5% reduction in available water represents an adverse affect. Applicant says no; Objector says yes. Obviously, a 5% impact in a normal year means a larger impact during a less than normal year. We also have Objector's statement that a 10% water reduction in water short years is a 10% reduction of water needed and used by the objector (Finding of Fact 18). By the unchallenged use of the words "water short years" it can be presumed that in some years there is not enough water in the source to supply all of Objector Keller's existing water rights.

The Hearing Examiner has to agree with the Objector. Even a 5% reduction in available water is an adverse impact especially in years when water is short. The record shows the adverse impact could be reduced to an amount acceptable to the objector by the installation of an adequate drainage device but Applicant has rejected such a solution (Findings of Fact 12 and 13). Therefore, Applicant has not proven by substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

9. The Proposal for Decision in this matter is rendered on the basis of a failure of proof concerning adverse affect to prior appropriators rather than a conclusive showing that no unappropriated water ever exists in the source. And since the proposed means of diversion could conceivably accomodate an intermittent water supply, the Proposed Order is made without prejudice. If Applicant should submit another application for this project, to the extent the new application and any objections thereto are identical to the matter now before the Department, the Department will take judicial notice of pertinent facts found in this matter.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 64800--s40B by USDI, Bureau of Land Management is hereby denied without prejudice.

CASE # 64800

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, including the legal land descriptions. Any party adversely affected by the proposal for decision may file exceptions thereto with the Hearing Examiner. The exceptions must be filed within 20 days after the proposal is served upon the party (2-4-623, MCA).

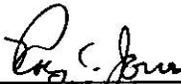
Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party [2-4-621(1), MCA]. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Done this 4th day of October 1988.



Roy C. Jones, Hearing Examiner
Department of Natural Resources
and Conservation
P.O.Box 1269
Glasgow, Montana 59230
(406) 228-2561

CASE #64800

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was served by mail upon all parties of record at their address or addresses this 18th day of October, 1988, as follows:

Gary and Toni Keller
Box 83
Roy, Montana 59471

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Irene LaBare
Legal Secretary

CASE # 64800