

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
77335-s40A BY REUBEN PITSCH)

* * * * *

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 March 16, 1992, 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 77335-s40A by Reuben Pitsch is denied.

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.

FILMED

AUG 28 1992

CASE # 77335

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Dated this 20 day of April, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

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 21st day of April, 1992 as follows:

Reuben Pitsch
Rt. 1
Ryegate, MT 59074

Harry Van Der Voort
Diana Van Der Voort
Big Coulee Route
Ryegate, MT 59074

Eugene & Lois Schaff
202 2nd Ave. East
Ryegate, MT 59074

Town of Melstone
% Alfred S. Barrett, Jr.
P.O. Box 237
Melstone, MT 59054

Zinne Brothers
% Alvin W. Zinne
P.O. Box 124
Broadview, MT 59015

Department of Natural
Resources & Conservation
% Mel McBeath
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Parrott Land & Cattle Co.
% Douglas H. Parrott, Partner
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Larry & Joy Nell Schanz
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Roy W. Olson
Anita Olson
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Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
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1520 E. 6th Ave.
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Cindy G. Campbell
Hearings Unit Legal Secretary



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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
77335-s40A BY REUBEN PITSCH)

* * * * *

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 February 25, 1992, in Ryegate, Montana, to determine whether a Permit should be granted to Reuben Pitsch for the above Application under the criteria set forth in § 85-2-311(1) and (4), MCA.

APPEARANCES

Applicant Reuben Pitsch appeared at the hearing pro se.
Tony Zinne appeared at the hearing as a witness for the Applicant.

Objectors Harry and Diana Van Der Voort appeared at the hearing in person and by and through counsel, John R. Christensen.

Objector Town of Melstone appeared at the hearing by and through Cindy McCaffree on its own behalf and as a witness for Objectors Van Der Voort.

Objector Parrott Land and Cattle Company appeared at the hearing by and through Douglas H. Parrott, Partner, on its own behalf and as a witness for Objectors Van Der Voort.

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Objector Zinne Brothers appeared at the hearing by and through Jim Zinne on its own behalf and as a witness for Objectors Van Der Voort.

Objectors Larry and Joy Nell Schanz appeared at the hearing by and through Larry Schanz on their own behalf and as a witness for Objectors Van Der Voort.

Objectors Roy W., Anita, and Dan Olson appeared at the hearing by and through Roy Olson on their own behalf and as a witness for Objectors Van Der Voort.

Larry Cawlfild, Senior Hydrologist with the Department of Natural Resources and Conservation (Department), appeared at the hearing as an expert witness.

Sam Rodriguez, Manager of the Department's Lewistown Water Resources Regional Office, appeared at the hearing.

John Hunter, Hydrologist with the Department's Lewistown Water Resources Regional Office, appeared at the hearing.

Objectors Ralph and Mildred Schanz and Delphia-Melstone Canal Users did not appear at the hearing and had not made prior explanations to the Hearing Examiner; therefore, in accordance with ARM 36.12.208, they are in default and no longer have status as parties.

Objector Engineering Bureau of the Department had withdrawn its objection to the Application with the provision that certain conditions would be placed on a permit, if issued.

Eugene and Lois Schaff had notified the Hearing Examiner by a letter written on January 21, 1992, that they would be unable

to attend the hearing because they would be out of town. The Schaffs retain their status as objectors.

EXHIBITS

Applicant's Exhibit 1 consists of a copy of a USDA map and three photographs depicting the dam site, pump site, and sprinklers. This exhibit was accepted into the record without objection.

Applicant's Exhibit 2 is a letter to Applicant from John P. Rouane, Jr., District Conservationist with the Billings office of the Soil Conservation Service of the U.S. Department of Agriculture (SCS). The letter sets forth information determined by a preliminary survey of the proposed dam site by the SCS. Mr. Christensen objected to the inclusion of this exhibit into the record because the author was not present at the hearing for cross-examination. The objection was overruled and the exhibit was accepted into the record on its face value.

Applicant's Exhibit 3 is a chart which is used to determine the size of pipe needed to pass a certain amount of water. This exhibit was accepted into the record without objection.

Applicant's Exhibit 4 consists of 15 pages and is a copy of a Proposal for Decision In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. 27941-s40A Granted to Zinne Bros., dated May 18, 1988. Applicant intended to use this exhibit to show there was water available for appropriation. Mr. Christensen objected to the inclusion of this exhibit into the record on the grounds it was irrelevant. The

hearing on whether to grant the Application for Beneficial Water Use Permit 27941-s40A had been held March 18, 1982. One cannot assume the information submitted at that time was still true in 1992 without further evidence to support that assumption. The objection was sustained.

Applicant's Exhibit 5 consists of one photograph taken by the Applicant on March 8, 1979; two photographs taken by the Applicant on October 6, 1989; and seven photographs taken by Applicant on May 16, 1991. This exhibit was accepted into the record without objection.

Applicant's Exhibit 6 consists of 16 pages and is a Proposal for Decision In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. 50642-s40A Granted to Zinne Bros., dated May 18, 1988. Applicant intended to use this exhibit to show there was water available for appropriation. Mr. Christensen objected to the inclusion of this exhibit into the record on the same basis as Applicant's Exhibit 4. The hearing on whether to grant Application for Beneficial Water Use Permit 50642-s40A had been held on September 11, 1984. The objection was sustained.

Objectors' Exhibit A consists of 11 pages and is a copy of a Proposal for Decision In the Matter of Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch. Objectors intended to show with this exhibit that Applicant knew since March 6, 1978, that evidence would be necessary to show his proposed means of diversion, construction, and operation of the

appropriation works would be adequate. Applicant objected to the inclusion of this exhibit into the record due to its age. However, one of the reasons the permit was not granted for Application 9357-s40A was that Applicant did not show the proposed means of diversion or construction were adequate. The objection was overruled.

Objectors' Exhibit B consists of ten pages. The first page is a cover letter to John R. Christensen from the Mayor of the Town of Melstone. Six pages are water analyses of the Town of Melstone's water performed by Energy Laboratory, Inc. Three pages are reports of the water quality of the Town of Melstone from the Water Quality Bureau of the Montana State Health Department. This exhibit was accepted into the record without objection.

Objectors' Exhibit C consists of five pages sent to Larry Schanz from Energy Laboratories. The first page lists the parameters used by the Department of Livestock Diagnostic Laboratory in evaluating water for livestock use. The following pages are the results of tests on water samples taken by Larry Schanz in 1988, 1989, and 1990. Applicant objected to the inclusion of this exhibit into the record on the grounds that Mr. Schanz could have taken the water samples anywhere. The objection was overruled and the exhibit was accepted into the record.

Objector's Exhibit D is a copy of a general highway map of Golden Valley County, Montana, depicting the Musselshell River

and Big Coulee Creek. The letters "G", "H," and "J" were added to this exhibit in red ink during the hearing by Larry Schanz to show where the water samples had been taken. This exhibit was accepted into the record without objection.

Objectors' Exhibit E is a copy of a general highway map of Golden Valley County, Montana, depicting the Musselshell River and Big Coulee Creek. An "x" in red ink was placed on the map during the hearing by Harry Van Der Voort to show the location of his property and the two lines under the name Alvin Zinne was placed on this exhibit during the hearing by Jim Zinne to show the location of the Zinne Brothers property. This exhibit was accepted into the record without objection.

Objectors' Exhibit F consists of six pages. The first two pages are a memorandum written on November 4, 1977, from Glenn R. Smith to Stan Jones discussing the salinity of the water in Big Coulee Creek. The third page is a copy of page 72 from the Agriculture Handbook 60, U.S. Department of Agriculture. The fourth page is a copy of a graph from the Agriculture Handbook 60, U.S. Department of Agriculture used to determine salinity hazard. Pages five and six are water quality analyses at Lavina performed by the Montana State Health Department. Applicant objected to the inclusion of this exhibit into the record due to its age. Some of the information included in this exhibit is not affected by age; therefore the objection was overruled and Objectors' Exhibit F was accepted into the record.

Objectors' Exhibit G is a copy of the Final Order In the Matter of the Application for Beneficial Water Use Permit No. 9357-s40A by Reuben Pitsch where the Proposal for Decision dated March 6, 1978, was incorporated into the Final Order. Applicant objected to the inclusion of this exhibit into the record. The Hearing Examiner expressed an intent to take administrative notice of the Department's records. There being no objection to this intent, Objectors' Exhibits G, H, and I would have been available from that source. The objection was overruled and Objectors Exhibits G, H, and I were accepted into the record.

Objectors' Exhibit H is a copy of the Proposal for Decision In the Matter of the Application for Beneficial Water Use Permit No. 61333-s40A by Reuben C. Pitsch dated March 12, 1991, in which the Application was denied because Applicant had not provided substantial credible evidence the means of diversion, construction, and operation of the proposed diversion works were adequate.

Objectors' Exhibit I is a copy of the Final Order In the Matter of the Application for Beneficial Water Use Permit No. 61333-s40A by Reuben Pitsch where the Department accepts and adopts the Findings of Fact and Conclusions of Law as contained in the March 12, 1991, Proposal for Decision.

Department's Exhibit 1 consists of 24 pages and is a report dated January 1992 and entitled "Water Availability in the Musselshell River Basin" by Larry Cawlfeld, P.E. Objectors Van Der Voort objected to the inclusion of this report into the

record since their counsel had not seen this document until the hearing date. Mr. Christensen had been given an opportunity to examine the document before the hearing began; however he did not believe he had sufficient time to analyze it to determine exactly what Mr. Cawlfild was stating in the report. Objection was overruled and Department's Exhibit 1 was accepted into the record.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, it is entered into the record in its entirety.

PRELIMINARY MATTERS

During the hearing, Applicant amended his Application from 320 acre-feet per year to 200 acre-feet per year based on the preliminary survey by the SCS. Since the amendment was a reduction of the amount of water requested, none of the Objectors would be prejudiced; therefore, there is no need to publish the notice of application again.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

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 therefor except by applying for and receiving a permit from the department."

2. Reuben Pitsch duly filed the above-entitled Application with the Department on April 10, 1991, at 1:15 p.m. (Department file.)

3. Pertinent portions of the Application were published in the Harlowton Times-Clarion, a newspaper of general circulation in the area of the source, on May 9, 1991. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application.

Ten timely objections to the proposed project were received by the Department. Applicant was notified of the objections by a letter from the Department dated June 3, 1991. (Department file.)

4. Applicant seeks to appropriate 200 acre-feet of the waters of Big Coulee Creek by means of a dam located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, Township 5 North, Range 19 East, in Golden Valley County, for supplemental irrigation and stock water.¹ The proposed place of use for the irrigation is 308.50 acres in Section 35 and 15.70 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 36. The proposed place of use for stock water is the NW $\frac{1}{4}$ of Section 35. The proposed period of appropriation is from October 1 through June 30, inclusive of each year. The proposed period of use for irrigation is from April 1 through October 1, inclusive

¹Unless otherwise specified, all land descriptions in this Proposal are located in Township 5 North, Range 19 East, Golden Valley County.

of each year. The proposed period of diversion for stock water is from January 1 through December 31, inclusive of each year. The capacity of the on-stream dam would be 100 to 150 acre-feet. (Department file and testimony of Applicant.)

5. Applicant owns the proposed places of use. (Testimony of Applicant and Department file.)

6. A preliminary survey of the proposed dam site was performed by Merlin Nelson of the SCS Office in Billings, Montana. As a result of this survey it was determined that the maximum fill height would be 18 feet with approximately 10,000 yards of fill in the embankment, plus an additional 3,500 cubic yards of foundation and core trench preparation. The reservoir would have a usable storage capacity of approximately 100 acre-feet. There would be room enough on the left abutment of the proposed dam for a vegetated earthen spillway of 400 to 500 feet in width. A corrugated metal pipe with a diameter of 18 to 21 inches would be used for an outlet through the dam. (Applicant's Exhibits 2 and 3 and testimony of Applicant.)

7. Applicant would install measuring devices both upstream and downstream from his proposed reservoir so that he could measure and release the natural flow of Big Coulee Creek during the period of July 1 through September 30 and at other periods to satisfy prior rights. (Testimony of Applicant.)

8. Applicant has two center pivot sprinkler systems that irrigate over 320 acres. Applicant does not get enough water to fully irrigate this acreage. Applicant believes the only way to

provide more water to these sprinklers is to construct a dam across Big Coulee Creek to supplementally irrigate the acreage. It is not clear how the water would be conveyed to the center pivot systems. (Testimony of Applicant and Department files.)

9. Applicant was relying on the SCS to produce engineering plans for the proposed reservoir. The SCS did not perform any surveys for the proposed dam until approximately a month before the hearing date. The letter setting forth what SCS had performed with respect to the proposed dam was dated February 24, 1992, the day before the hearing. (Testimony of Applicant and Applicant's Exhibit 2.)

10. Applicant submitted Application for Beneficial Water Use Permit 9357-s40A to the Department on September 1, 1976, to construct a reservoir on Big Coulee Creek in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35. That Application was denied because Applicant failed to provide evidence the proposed means of diversion and construction were adequate as well as other requirements of law. Applicant submitted to the Department Application for Beneficial Water Use Permit 61333-s40A on December 11, 1985, to construct a reservoir on Big Coulee Creek at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 4 North, Range 18 East, in Golden Valley County. That Application was denied because Applicant failed to provide substantial credible evidence the proposed means of diversion, construction, and operation were adequate. (Objectors' Exhibits A and H.)

11. There are times during the proposed period of appropriation when flows in Big Coulee Creek are high enough that all users are satisfied and water continues downstream into the Musselshell River. There are also times when there is no flow in Big Coulee Creek during the proposed period of appropriation. Flows in Big Coulee Creek vary considerably throughout a year and from year to year. (Department file and testimony of Applicant and Objectors Schanz, Olson, Van Der Voort, and Zinne Brothers.)

12. The Town of Melstone uses Musselshell River water for their municipal water supply. Water samples taken by the Mayor of Melstone, Alfred S. Bassett, at various places on the Musselshell River generally showed the water samples were not fit for livestock and certainly not for human consumption. The Town of Melstone has had problems meeting the requirements of the Montana Department of Health and Environmental Sciences (DHES) for human consumption even after the water has been treated. Melstone has constructed an off-stream reservoir to be filled when water is available to help supply the needs of the town, but if there is no water in the Musselshell River the reservoir can't be filled. (Testimony of Cindy McCaffree and Objectors' Exhibit B.)

13. Objectors Schanz have sent samples of water from Big Coulee Creek to Energy Laboratories, Inc. at different times from October 19, 1988, to September 25, 1990, in reaction to the loss of four head of cattle in 1988. According to the parameters set forth by the Department of Agriculture, when water contains total

dissolved solids (TDS) exceeding 7,000 milligrams per liter (mg/l), it is unsuitable for livestock. The sample taken at a point in Section 30, Township 5 North, Range 20 East, contained 3970 mg/l TDS, which is acceptable for stock water. However, the sample taken at a point in Section 9, Township 5 North, Range 20 East, contained 7,310 mg/l TDS which is over the 7,000 mg/l TDS, established by Department of Livestock as unfit for stock water use. The samples submitted on October 28, 1988, yielded much the same results. A water sample submitted on January 5, 1989, taken at a point in Section 9, Township 5 North, Range 20 East, contained 10,700 mg/l TDS, an extremely high level. A water sample submitted on September 25, 1990, at a point in Section 9, Township 5 North, Range 20 East, where Big Coulee Creek enters contained 9,440 mg/l TDS, while a sample taken where Big Coulee Creek flows out of Section 9, Township 5 North, Range 20 East contained 10,500 mg/l TDS. A third sample taken at a point in Section 30, Township 5 North, Range 20 East, contained 4,350 mg/l TDS. In a dry year such as 1988, Big Coulee Creek does not get flushed out. Without the flushing action of high water periods, the total dissolved solids become more concentrated. Objectors Schanz believe if Applicant is permitted to construct a dam across Big Coulee Creek, the conditions experienced in 1988 would become the normal condition on the stream; the total dissolved solids would become more and more concentrated; and Objectors Schanz would not be able to exercise their stock water or irrigation rights. Objectors Schanz are located approximately

five miles downstream from Applicant's proposed point of diversion. (Testimony of Larry Schanz and Objectors' Exhibits C and D.)

14. Objectors Olson usually irrigate in April, May, or June, depending on the water availability. The Olsons have had a problem with salinity and alkali. They have given up trying to raise a garden even though the soil is sandy, there is just too much alkali in it. The Olsons irrigated the garden out of Big Coulee Creek as well as their hay crop. They also use Big Coulee Creek for stock water. Mr. Olson believes if Applicant builds a dam across Big Coulee Creek, the total dissolved solids in the creek would become more concentrated since the flow of the creek would no longer be available to flush them out. Objectors Olson are located approximately 18 miles downstream from Applicant's proposed point of diversion. (Testimony of Roy Olson, Objectors' Exhibit E and Department file.)

15. Zinne Brothers use Big Coulee Creek for stock water. In 1976, Applicant released some water from a storage reservoir which was very salty. As a consequence, Zinne Brothers had to move their livestock to a pasture with a better source of water. Zinne Brothers fear the damming of Big Coulee Creek would cause an increased salinity problem because the high runoff waters would no longer flush out the creek and they would no longer be able to exercise their stock watering rights. Zinne Brothers are located approximately three miles downstream from Applicant's

proposed point of diversion. (Testimony of Jim Zinne and Department file.)

16. Objectors Van Der Voort rely on water from Big Coulee Creek for irrigation and stock water. Van Der Voorts have had water shortages in the past. Often when the creek is dry at Van Der Voorts' place, there is water at Lavina which is located approximately two and one-half miles upstream. If Applicant constructs a dam across Big Coulee Creek, it would capture the high runoff; the only water Van Der Voorts can depend upon for irrigation. Van Der Voorts are located approximately 15 miles downstream from Applicant's proposed point of diversion.

(Testimony of Harry Van Der Voort, Objectors' Exhibit E, and Department file.)

17. Parrott Land and Cattle Company has a ranch on the Musselshell River approximately 15 miles west of Lavina. Normally irrigation occurs on the ranch around the first of June, but if it has been a dry winter and dry spring, it will occur as early as the middle of April if water is available. Douglas Parrott believes the proposed project would adversely affect the ranch's water rights on the Musselshell River. (Testimony of Douglas Parrott.)

18. In 1990, a feasibility study for the placement of dams on tributaries of the Musselshell River was performed. The Big Coulee Creek site was the most economical to build with respect to storage, and it would require supplemental water from the Musselshell River to fill the reservoir. At the meetings held to

discuss the various proposed sites, the Big Coulee Creek site was the first to be thrown out because of the water quality problem. (Testimony of Douglas Parrott.)

19. Larry Cawfield conducted a simplified water availability analysis on the Musselshell River in response to a petition from Musselshell River water users to close the river to further issuance of irrigation permits. The results of the analysis was that the two most critical months were July and August. In July it was found there is water between two and three and one-half years out of ten. In August there is water available between one and two and one-half years in ten. In June there is water available for appropriation eight and one-half to nine years out of ten and in September there is water available five and one-half years to seven years out of ten.

In response to the analysis, the Department is preparing rules for closure of certain reaches of the Musselshell River. The rules will probably seek to close the river to further irrigation applications in July and August and to all irrigation except supplemental irrigations in June and September.

(Testimony of Larry Cawfield.)

20. The acreage used in the Musselshell River water availability analysis is the acreage actually irrigated. It is possible the latent irrigation rights claimed would become active after the adjudication of the water rights in Montana is complete because those rights would then have to be used within ten years

or they would be lost. If that occurs, the analysis would be skewed. (Testimony of Larry Cawlfeld.)

21. The Musselshell River gets its flow from its various tributaries. If the flow of the tributaries is reduced or stopped, the flow of the river will be reduced. Any time water is taken from Big Coulee Creek, there will be an effect on the Musselshell River. It may be a very small effect, nevertheless, an effect. (Testimony of Larry Cawlfeld and Douglas Parrott.)

22. The Water Quality Bureau of DHES and the Department of Fish, Wildlife, and Parks have applied for an in-stream reservation on the Musselshell River to maintain the quality of water.

23. There are no planned uses for which a permit has been granted or for which water has been reserved that would be adversely affected by the proposed appropriation.

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

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 set forth in § 85-2-311(1) and (4), MCA, are met:

- (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
 - (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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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; and
- (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

. . . .
(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. Applicant has not proven that the appropriation works would be adequately constructed and operated to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority. Applicant did submit a letter from the SCS sketching in a few details for the proposed dam and Applicant expressed the intent to have the dam

constructed according to SCS specifications. See Finding of Fact 9. However, Applicant has not received a great deal of cooperation from the SCS in the past and there was no indication there would be in the future.

5. There is no evidence in the record describing the means of conveyance or the method of operation. Applicant stated several times during the hearing that he would be required to release water to the downstream users; however, the only evidence of a way to release the water was the chart used to determine the size of pipe needed to pass a certain amount of water. See Finding of Fact 6. Applicant presented no headgate design. Applicant stated he would install measuring devices upstream and downstream from his proposed reservoir, however, he did not specify the type and design of measuring device he would use. See Finding of Fact 7.

6. Applicant has, since 1978, known that he would be required to present substantial credible evidence that the proposed means of diversion, construction, and operation of the proposed appropriation works would be adequate. See Finding of Fact 10. Yet he waited for the SCS to supply a design for the proposed project, knowing full well that the SCS will not provide a complete design until an applicant has a water right in hand. In re Application 61333-s40A by Pitsch. When it became apparent that the SCS was not going to produce the required dam design, if indeed Applicant had a bona fide intent to proceed with the

proposed project, he could have retained a professional engineer to design the project.

7. No person may construct or cause to be constructed a dam or reservoir that will contain 50 acre-feet or more for the purpose of accumulating, storing, appropriating, or diverting any of the waters of Montana, except in a thorough, secure, and substantial manner. Moreover, any person proposing to construct a dam or reservoir that will contain more than 50 acre-feet of water shall make application to the Department for a determination of whether the dam would be a high-hazard dam. Mont. Code Ann §§ 85-15-208 and 209 (1985). There is no evidence in the record that Applicant has applied for a high-hazard dam determination nor is there evidence in the record that the dam would be constructed in a secure and substantial manner.

8. There being nothing in the record that resolves the deficiencies with regard to the design, construction, and operation of the proposed appropriation works, it is concluded that the criterion set forth in § 85-2-311(1)(c), MCA (1989) is not met.

9. Since an Applicant is required to show by substantial credible evidence that all the criteria for issuance of a permit have been met, and since Applicant in this matter has failed to demonstrate the proposed means of diversion, construction, and operation of the proposed works are adequate, no finding is necessary as to whether there are unappropriated waters in the source of supply, whether the water rights of prior appropriators

would be adversely affected, or whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. In re Application 53221-s400 by Carney; In re Application 61333-s40A by Pitsch.

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

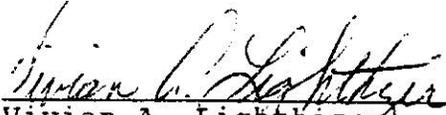
Application for Beneficial Water Use Permit 77335-s40A by Reuben Pitsch is denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 16th day of March, 1992.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 16th day of March, 1992 as follows:

Reuben Pitsch
Rt. 1
Ryegate, MT 59074

Ralph & Mildred Schanz
P.O. Box 217
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