

File

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. 61293-s40C BY MIKE GOFFENA)

* * * * *

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 November 29, 1988 Proposal for Decision, and incorporates them herein by reference.

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

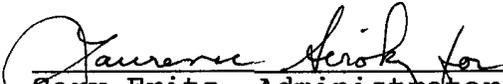
ORDER

That the Application for Beneficial Water Use Permit No. 61293-s40C by Mike Goffena be 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.

Dated this 29 day of December, 1988.


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


Robert H. Scott, 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 Mike Goffena Final Order was duly served upon all parties of record at their address or addresses this 29th day of December, 1988, as follows:

Mike Goffena
P.O. Box 445
Roundup, Montana 59072

Louis Goffena
Musselshell Ranch Co.
P.O. Box 175
Musselshell, Montana 59059

Douglas H. Parrott
Parrott Land and Cattle
P.O. Box 266
Roundup, Montana 59072

Sylvio Rodriguez
Lewistown Field Office Manager
204 South Daws
Lewistown, Montana 59457

Jess Shaw
Mosby, Montana 59058

Glen Hougen
Hougen Land, Inc.
P.O. Box 126
Melstone, Montana 59054

Jerome Goffena, President
High Butte Ranch
18235 Highway 12 East
Roundup, Montana 59072


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. 61293-s40C BY MIKE GOFFENA)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on July 15, 1988, in Roundup, Montana.

Applicant Mike Goffena appeared pro se. Bob Goffena appeared as witness for the Applicant.

Objector Hougen Land Co. was represented by Glen Hougen.

Objector High Butte Ranch was represented by Jerome Goffena, President.

Sterling Sundheim, agricultural engineer with the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") Water Rights Bureau Lewistown Field Office, appeared as DNRC staff witness.

The record closed at the end of the hearing.

Exhibits

The Applicant offered no exhibits.

Objector High Butte Ranch offered no exhibits.

Objector Hougen Land Co. offered one exhibit.

Objector Hougen Exhibit 1, a written statement summarizing

Objector's position attached to a one-page water right abstract and some calculations made by Objector, was admitted without objection.

There was no objection to any of the contents of the Department file (which includes a memorandum prepared by Sterling Sundheim dated July 6, 1988).

PROPOSED FINDINGS OF FACT

1. Section 85-2-302, MCA, provides that, with certain exceptions (inapplicable in this matter), ". . . 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. The Application in this matter was regularly filed on September 19, 1985, at 4:30 p.m.

3. The Application is for a permit to impound 9,000 gpm up to 3,004.2 acre-feet per year from North Willow Creek, from January 1 to December 31, inclusive each year, at a point located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, Township 10 North, Range 27 East, Musselshell County in an on-stream reservoir of 1,500 acre-feet capacity for use as follows: up to 3,000 acre-feet would be used from April 1 to October 31, inclusive, each year for new and supplemental irrigation of 1,078 acres more particularly described as follows: 15 acres (supplemental) located in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 14, Township 10 North, Range 27 East; 44 acres

(supplemental) in the NE $\frac{1}{4}$ Section 23, Township 10 North, Range, 27 East; 5 acres in S $\frac{1}{2}$ SE $\frac{1}{4}$ Section 14, Township 10N, Range, 27 East; 67 acres in SW $\frac{1}{4}$ Section 14, Township 10 North, Range 27 East; 2 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 15, Township 10 North, Range 27 East; 57 acres in S $\frac{1}{2}$ SE $\frac{1}{4}$, Section 15, Township 10 North, Range 27 East; 128 acres in SE $\frac{1}{4}$ Section 22, Township 10 North, Range 27 East; 125 acres in NE $\frac{1}{4}$ Section 22, Township 10 North, Range 27 East; 50 acres in NW $\frac{1}{4}$ Section 22, Township 10 North, Range 27 East; 75 acres in SW $\frac{1}{4}$ Section 22, Township 10 North, Range 27 East; 80 acres in NE $\frac{1}{4}$ Section 23, Township 10 North, Range 27 East; 152 acres in NW $\frac{1}{4}$ Section 23, Township 10 North, Range 27 East; 118 acres in SE $\frac{1}{4}$ Section 23, Township 10 North, Range 27 East; 160 acres in SW $\frac{1}{4}$ Section 23, Township 10 North, Range 27 East, all for irrigation. Up to 4.2 acre-feet would be used from January 1 to December 31, inclusive, of each year in the W $\frac{1}{2}$ of Section 15, Township 10 North, Range 27 East, Musselshell County for stock.

4. The pertinent parameters of the Application were published in the Roundup Record Tribune, a newspaper of general circulation in the area of the source, on February 26 and March 5, 1986. Timely objections were received from Jess Shaw, Hougen Land Inc., Musselshell Ranch Co., High Butte Ranch and Parrot Land and Cattle Co. Objectors Shaw, Musselshell Ranch Co., and Parrot Land and Cattle Co. did not appear at the hearing.

5. In the statewide adjudication, Objector Hougen has

claimed irrigation rights (Claim Nos. 204896, 204894, and 204893), oil flooding rights (Claim Nos. 204891, 204892, 204886, 204888, 204889, and 208699) and stock water rights (Claim Nos. 204876, 204926, 208698, 204875, 204900, 204906, 204870, 204916, 204868, 204914, 204909, 204907, 204911, 204925, 204901, 204899, 204917, 204928, 204929, 204927, 204898, 204918, 204904, 204869, 204921, 204923, 204919, 204903, 204865, 204882, 204915, 204879, 204881, 204880, 204864, 204883, and 204878) from North Willow Creek.

Objector High Butte Ranch has claimed stock water rights (Claim Nos. 204976, 204977, 204978, 204975, 204980, 204982, 208405) from North Willow Creek.

6. Both Objector High Butte Ranch and Objector Hougen Land Inc. allege that seepage from the proposed dam and irrigation ditch could cause severe damage to land and stock both downstream from said dam and to soils near the proposed place of use due to the leaching of alkali and other salts from the soil and the resultant contamination of downstream water. Said Objectors also allege that the dam would prevent water from periodically recharging the potholes in North Willow Creek from which potholes Objectors' stock drink.

7. The average annual runoff in excess of record existing uses which is available at Applicants' proposed point of diversion is about 1,450 acre-feet. At least 1,450 excess acre-feet will be available in roughly four to five out of ten years.

(Department file: July 6, 1988 Memorandum from Sterling Sundheim.)

8. The record contains no specific flow rate data for North Willow Creek. However, it is clear from the record that flows are sporadic; that is, after spring runoff ends, flows generally subside to extremely low or nil, except for brief periods when short duration precipitation events result in rapid stream rise followed by rapid subsidence.

9. Applicant plans to construct an earthen dam 900 feet long and 30 feet tall with concrete spillway and headgates. The general plan, which was not submitted for the record, was apparently drawn up with the help of the Soil Conservation Service (SCS); however, Applicant has not yet obtained SCS approval of the project. The design of the dam is such that all the water stored behind it could be released, (testimony of Mike Goffena), although the record does not show at what rate it could be released.

10. Stock would drink directly from the reservoir created by the dam. For irrigation, Applicant would pump water from the dam over a lift of 40 feet.

11. Applicant plans to complete the dam in 1990, but would develop the irrigation over a period of years starting immediately thereafter. Irrigation would be completely developed by 1995.

12. Applicant does not at present know if the reservoir would leak significant amounts of water. In order to make such

determination, core samples 12 feet in depth must be taken and analyzed.

13. Regarding stock water rights, Objector Hougen's stock drink from North Willow Creek even when there is no visible flow therein; that is, they drink from water which remains in potholes in said creek, which potholes are cleaned, recharged, and generally kept potable by sporadic flows caused by unpredictable summer runoff events.

14. North Willow Creek is a tributary of the Musselshell River. Little Wall Creek, a tributary of North Willow Creek, enters North Willow Creek below the site of the proposed reservoir, but above points of diversion of the Objectors. Little Wall Creek contributes an average 1,400 acre-feet per year to North Willow Creek, after all claimed uses in Little Wall Creek drainage are accounted for.

15. The only water rights with points of diversion between the proposed point of diversion and the confluence of Little Wall Creek and North Willow Creek are Applicants'. (Testimony of Mike Goffena.)

16. There is a significant amount of alkali and other salts in the soils in the area of the proposed point of diversion and place of use. These salts have been leached from the soil by seepage from a BLM dam presently located upstream of Applicant's proposed dam site on North Willow Creek, and have contaminated North Willow Creek for 1½ miles downstream from said dam.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, Ch. 2, part 3, MCA (1987).

2. The Department gave proper notice of the hearing, and all substantive procedural requests with law and rules appearing fulfilled, the matter is properly before the Examiner.

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), MCA, 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. Irrigation and stock water are beneficial uses of the water resource. Section 85-2-102(2), MCA.

5. The record indicates that, at least in some years (four or five years out of ten), there will be a minimum 1,450 acre-feet of water physically available for storage in the proposed reservoir. (Finding of Fact 7.) However, in order to satisfy

Section 85-2-311(1), MCA, such water must also be legally available to Applicant, i.e., the evidence must show that at least in some years Applicant will not be called for such water during periods of storage. See generally, In the Matter of the Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley, March 21, 1988 Proposal for Decision, p. 40.

Downstream uses on North Willow Creek account for about 700 acre-feet per year. These volumes should be adequately supplied in an average year by Little Wall Creek, which contributes an average of 1,400 acre-feet per year to North Willow Creek. (Finding of Fact 14.) Accordingly, in the average year there will be no calls on the Applicant due to insufficient volume.

The Examiner recognizes that flow rate may also be a factor in determining legal availability. Regardless of whether sufficient volumes are annually generated by a stream, flow rate may at times be insufficient to supply downstream users. A call may therefore be made on a permittee simply for more flow. However, a water storer can collect water when he does not need it, and can use stored water at times when direct flow is unavailable (either physically or due to call). Thus, in storage cases, so long as there is sufficient unappropriated volume, downstream flow requirements are not dispositive.

6. Regarding the alleged adverse effects due to potential saline seep, the Department has jurisdiction only where such salinization will affect the water rights of other

appropriators. Accordingly, any effect saline seep may have on soils near the proposed place of use cannot be determinative in this matter.

The possibility of salinization of North Willow Creek due to a leaking reservoir does, however, bear on water rights. Further, the evidence does show that salinization has been a problem in the area in the past. (Finding of Fact 16.) Therefore, issuance of any permit herein must be conditioned on assurance that the reservoir will not leak and cause salinization of North Willow Creek.

7. The allegation of adverse effect to Objectors by deprivation of recharge to stock water potholes presents an interesting problem. In most years, North Willow Creek does not flow throughout the year. Therefore, in order to supply their stock, Objectors often rely on such water as remains in riverbed potholes, which potholes are periodically recharged by sporadic short-duration runoff events. (Findings of Fact 8, 13.) If enough runoff is captured by Applicant, Objectors argue, these potholes will not be recharged. However, Objectors do not know what flow is required to recharge the potholes, nor do they specify how often it must occur to adequately supply the animals. Thus, they argue that no new appropriation can take place which would deprive them of any of this sporadic flow. In other words, they assert that the entire flow of North Willow Creek which is not already diverted must remain undiverted in order that the potholes may be filled as frequently as they have been in the

past.

This latter assertion is untenable. Objectors are entitled only to that flow which will convey their appropriation to the point of diversion or impoundment thus allowing them reasonable operation of their right. See Section 85-2-401, MCA. Although filling these small storage reservoirs (potholes), which in themselves require only small amounts of water, may indeed require a large amount of carriage water which ultimately flows past, Objectors are only entitled to what is actually needed to supply their stock. To obtain water actually needed, Objectors may call the source, i.e., prevent Applicant from impounding, until their rights are satisfied.¹

It is true that, given stream conditions such as these, the prior appropriation system may not function optimally. Runoff events, e.g. summer storms, feeding the creek can be of such short duration that by the time it is determined that runoff is occurring, but that Objectors' potholes are not being filled, the resultant flows may already be subsiding, too late for a call on the source to be effective. However, all appropriators in this part of semi-arid Eastern Montana are under the same pressure to

¹Objectors' water rights are exercised by direct diversion, i.e., the stock drink from the source when it flows (the cattle themselves are the means of diversion), and by impoundment, i.e., the potholes store water for later consumption. Whether the potholes constitute an impoundment as a matter of law is a question which has not been raised, and will not be decided here as the issue is not pivotal. Regardless, Objectors must obtain flows to water their cattle at all and such flows will automatically recharge the potholes.

make a judgment as to conditions and place a call on the source as rapidly as possible if and when a creek rises. Applicant cannot be foreclosed from obtaining unappropriated water simply on the basis of an unfavorable climatic milieu, common to all who appropriate from North Willow Creek.

As Objectors may here call Applicant for water, just as they would need to call any other upstream junior appropriator who may be diverting or impounding needed water when North Willow Creek flows, and as no other adverse effect has been alleged by Objectors (other than that discussed supra in the Conclusion of Law 6), the Examiner concludes there will be no adverse effect so long as there is no salinization, and providing that Applicant can adequately respond to a call placed by Objectors, that is, so long as Applicant's means of diversion, construction and operation is adequate.

8. Applicant has described the proposed dam to a certain extent. (Finding of Fact 9.) However, it remains unknown how much flow the dam would be capable of passing if a call were put on Applicant by downstream seniors.

The general rule is that, if called, the junior appropriator must allow the entire flow to pass, that is, he may not impound at all, until the asserted senior use is satisfied. Thus, if the means of impoundment is an onstream dam, the dam must be designed so that the maximum flow of the creek can be passed through or by. If an onstream dam cannot pass flows equal to maximum potential inflows, an Applicant may still satisfy the

criterion by showing that the flow the dam can pass will nevertheless be sufficient to satisfy all downstream uses which may be asserted.

Applicant has stated that the dam will be designed so that all of the stored water may be released. However, the flow rate at which this could be accomplished was not specified; therefore, neither can the maximum "bypass" or "flow through" be ascertained. Applicant's failure to specify the outflow capacity of the proposed structure, coupled with lack of North Willow Creek flow data, has rendered impossible a determination of whether the dam would be capable of adequate response to downstream requirements. In other words, Applicant has not proven the means of diversion, construction and operation of the dam to be adequate.

WHEREFORE, based on the foregoing, the Hearing Examiner proposes the following:

ORDER

That the Application for Beneficial Water Use Application No. 61293-s40C by Mike Goffena be denied without prejudice.

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 (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exceptions within 20 days of the date of service of the exceptions.

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. Section 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 new 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.

Dated this 29 day of November, 1988.



Robert H. Scott, 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 29th day of November, 1988, as follows:

Mike Goffena
P.O. Box 445
Roundup, Montana 59072

Louis Goffena
Musselshell Ranch Co.
P.O. Box 175
Musselshell, Montana 59059

Douglas H. Parrott
Parrott Land and Cattle
P.O. Box 266
Roundup, Montana 59072

Sylvio Rodriguez
Lewistown Field Office Manager
1537 Avenue D, Suite 105
Billings, Montana 59102-457

Lewistown

Jess Shaw
Mosby, Montana 59058

Glen Hougen
Hougen Land, Inc.
P.O. Box 126
Melstone, Montana 59054

Jerome Goffena, President
High Butte Ranch
18235 Highway 12 East
Roundup, Montana 59072

Sally Martinez
Sally Martinez
Secretary