

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 2457-s43A, BY
WALTER AND MARIE PAPEZ

)
FILMED

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

APR 6 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on May 5, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

1. The Applicant's Provisional Permit is granted, allowing the appropriation of sixty (60) acre-feet of water per annum from the South Fork of Spring Creek, to be diverted from September 15 to May 1, in Section 33, Township 3 North, Range 14 East, M.P.M., to be used for irrigation and livestock-watering purposes and to be stored in a 45-acre-foot reservoir. Said permit is granted, allowing for the change in point of diversion from May 15 to September 15 of an apparent existing water right from a point approximately one quarter of a mile above the reservoir in question to the reservoir, itself.

2. The permit is granted subject to the Applicant's construction of an adequate bypass to insure that the waste water from the thirty-six (36)-acre tract of land is diverted around the reservoir and back into the drainage in question.

3. The permit is granted subject to either the installation of a drainage device in the dam which would be of sufficient capacity to carry

CASE # 2457

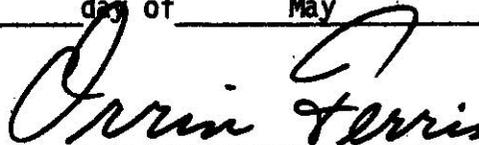
all of the water in said stream and devices for measuring water flowing into and out of the reservoir in question or the construction of a bypass around the reservoir and dam which would be capable of carrying all of the waters of said stream.

4. The plans for such facility must be approved by this Department and notification made when completed, as required by law (Form No. 617).

5. The permit is granted subject to the maintenance of sufficient water in said stream during the nonirrigation season for livestock-watering purposes.

6. The Provisional Permit is granted subject to prior existing rights.

Done this twenty-third day of May 1975.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

CASE # 2457

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 2457-s43A by Walter and Marie
Papez _{43B}

} PROPOSAL FOR DECISION
}

Pursuant to the Montana Water Use Act, Section 89-865, et seq., R. C. M. 1947, after due notice, a hearing on objections to the above-named Application for Beneficial Water Use Permit No. 2457-s43A was held October 1, 1974, in the courtroom of the Sweet Grass County Courthouse, Big Timber, Montana. The applicants, Walter and Marie Papez, were present and were represented by Mr. Dan Yardley of the firm of Yardley and Yardley of Livingston, Montana. Mr. Conrad Fredricks of the firm of Josephson and Fredricks of Big Timber and Mr. Ben Berg and Mr. Richard Andriolo of the firm of Berg, Angel, Andriolo and Morgan of Bozeman represented the following objectors: Sidney J. and Dorrene E. Huyser; Wayne and Rose Anderson; Opal K. Stephens; Francis Blake Jr., of the Keewaydin Ranch Corporation; Kaia Cosgriff; Paul and Bobbie Gilbert; and Harry and Alfreda Boeh all of Big Timber, Montana. All were present except Wayne and Rose Anderson. The Objector, Cecil J. Carl, was present but was not represented by counsel.

An on site inspection was conducted by the Hearing Examiner the morning immediately after the hearing. All parties were represented either by themselves or through counsel, Mr. Conrad Fredricks, and no testimony or evidence was received during the inspection.

A Proposal for Decision was submitted to the Administrator, Water Resources Division, Department of Natural Resources and Conservation, hereinafter referred

CASE # 2457

7245 # 33A0

to as the Department. After due consideration and the receipt of timely filed exceptions by Mr. Dan Yardley on behalf of the applicant and Mr. Richard Andriolo on behalf of the objectors, the Proposal for Decision was returned to the Hearing Examiner for the receipt of additional evidence and review of the proposal in light of any of the comments received.

Based on the evidence and testimony received at the hearing, the on site inspection, the admission of additional evidence received subsequent to the hearing, and the comments made in reference to the first Proposal for Decision submitted to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation, the Hearing Examiner as required by law and the order of the Administrator, Water Resources Division, hereby makes the following Proposal for Decision.

PROPOSED FINDINGS OF FACT

1. On May 31, 1974, at 1:20 p.m., Walter Papez and Marie K. Papez, husband and wife, hereinafter called Applicants, made application with the Department for Beneficial Water Use Permit, Application No. 2457-s43A. The Application is for fifty (50) acre-feet per annum of water for supplemental irrigation on a total of sixty (60) acres, more or less, in Section 33, Township 3N, Range 14E M.P.M. to be used from May 1 to October 15, inclusive; and ten (10) acre feet of water to be used for stock-watering purposes in the south one-half of Section 33, Township 3N, Range 14E M.P.M. from January 1 to December 31, inclusive. Such appropriation would be accomplished by the construction of a dam on the South Fork of Spring Creek which is also known as the South Fork of Ten Mile Creek in Sweet Grass County. The capacity of the reservoir would be sixty (60) acre feet and would cover approximately ten point five (10.5) surface acres.

CASE # 2457

CASE # 2457

2. The South Fork of Spring Creek is a small stream which is fed by a few small springs and by the runoff from upstream irrigation. Such water is used for irrigation during the summer season and in the winter is used to provide stock water for the objectors and others located below the reservoir in said drainage. The maximum flow of the creek during any time of the year does not exceed two hundred miners inches. There is sufficient flow in the winter of each year to keep the water from freezing. If such winter flow were reduced then the stream would ice up and would generally stop flowing.

3. At the hearing it was testified that the reservoir was constructed in December of 1973 and is located in the Southeast Quarter of Section 33, Township 3N, Range 14E M.P.M. and is approximately five hundred (500) feet upstream from the junction of the South Fork of Spring Creek and Spring Creek. The capacity of the reservoir is approximately 45 acre feet.

No measuring devices were installed to measure the flow of the waters into the reservoir and no outlet was installed at the bottom of the dam for the release of water. The only outlet is an overflow pipe which allows water to escape from the reservoir only when it is filled to capacity. Such has been the case since February of 1974 when the reservoir was filled and the flow of water to and from the reservoir has remained substantially the same since that time except when pumping operations were conducted for about two weeks in June of 1974. The applicants failed to obtain Department approval as required by the 1973 Water Use Act for such pumping and continued such until ordered to cease and desist by the Department.

4. At the hearing the objectors through counsel offered into evidence Exhibits identified as Objectors Exhibits "A" through "L". Exhibit "A" is a copy of a letter sent by Donald D. MacIntyre to Mr. Papez on June 26, 1974; Exhibit "B" is a copy of a letter sent by Donald MacIntyre to Mr. Conrad

CASE # 2457

CASE # 2457

Fredricks on July 8, 1974; Exhibit "C" is a copy of a letter sent by Donald MacIntyre to Mr. Conrad Fredricks on July 15, 1974; Exhibit "D" is a certified copy of a notice of water right for Harry E. Boeh and Alfred M. Boeh of Big Timber, Montana filed on the 26th of June 1973 for 100 miner's inches of a tributary of Ten Mile Creek; Exhibit "E" is a certified copy of a notice of water right for Harry E. Boeh of Big Timber, Montana filed on the 19th of September, 1972 for 150 miners inches of a tributary of Ten Mile Creek; Exhibit "F" is a certified copy of a notice of water right for J. Art Stephens of Big Timber, Montana filed on the 3rd of March, 1966 for 400 miners inches of water of Ten Mile Creek, and that John Huyser, and J. Art Stephens predecessor in title appropriated and took said water in the spring of 1938; Exhibit "H" is an affidavit by John A. Huyser of Big Timber, Montana stating that the affiant had used water from Ten Mile Creek from 50 to 150 inches of water; Exhibit "I" is a certified copy of a notice of water right for James A. Stephens filed on the 15th day of March, 1966 for 110 miners inches of water from Ten Mile Creek; Exhibit "J" is a certified copy of a notice of water right for John Kamps, Peter Borgman and Martin J. Abrahamse filed on the 9th day of April, 1904 for four hundred and fifty miners inches of water in Ten Mile Creek; Exhibit "K" is a certified copy of a notice of water right for P. J. Magelssen and Albert Crest filed on the 3rd of January, 1910 for five hundred (500) inches of water from Ten Mile Creek; and Exhibit "L" is a certified copy of a notice of water right for Theordore S. Lavold filed on the 3rd of January 1910 for five hundred (500) inches of water from Ten Mile Creek.

5. Exhibits "B" and "C" were objected to as being irrelevant to the application in question.

6. Subsequent to the hearing a letter from Mr. Sidney J. Huyser was received. Mr. Huyser stated that on May 20th, 21st, and 22nd, 1974 approximately

CASE #2457

seventy-five (75) inches of water was flowing into the dam. The applicant then was given the opportunity to reply to such statement and did so by submitting three documents for consideration. After the objectors were given an opportunity to reply or object, each document was received into the record. The first document is a letter from William Bretzel contradicting Mr. Huyser's statement as to the amount of water flowing on the dates specified by Mr. Huyser. The second document is a letter from Martin Stene, Water Commissioner, stating that the Stephens Ranch and William Bretzel received water through the South Fork of Spring Creek on the 20th day of June, 1974. The third document is a copy of the Water Commission Report that is on file at the Sweet Grass County Courthouse, and lists the day by day distribution of water for the month of May, 1974.

7. The applicant offered into evidence three exhibits which were identified as Applicant Exhibits One through Three. Exhibit "One" is a certified copy of a notice of water right filed September 18, 1923 for one hundred (100) inches of water of the South Fork of Spring Creek. Exhibit "Two" is a certified copy of a notice of water right filed May 11, 1925 for one hundred (100) inches of water of the South Fork of Spring Creek. Each notice was filed by Adelbert Whitney, and it was testified at the hearing that both exhibits represented the same water right. Exhibit "Three" is the final decree in the adjudication of the rights to the use of waters of Big Timber Creek including the North Fork of Big Timber Creek entered April 1, 1911. An objection was made as to the relevance of each of the applicants' exhibits.

8. The apparent prior water rights of the objectors as established by the testimony and evidence introduced at the hearing is as follows with the exception of the objector, Cecil J. Carl, for which no testimony or evidence was intro-

CASE # 2457

CASE # 2457

duced as to the nature of his water right:

<u>OWNER</u>	<u>LAND</u>	<u>WATER RIGHT</u>	<u>DATE OF PRIORITY</u>
Harry & Alfreda Boeh	Sec 34 T3N R14E	250 MI	Prior to 1946 B 20 WR 187
Wayne & Rose Anderson	Sec 18 T2N R14E	150 MI	April 6, 1904 B 19 WR 195
Kaia Cosgriff	Sec 18 T2N R15E	150 MI	April 6, 1904 B 19 WR 195
Paul & Bobbie Gilbert	Sec 13 T2N R14E	500 MI	Dec 14, 1909 B 19 WR 364
	Sec 13 T2N R14E	150 MI	April 6, 1904 B 19 WR 195
Keewaydin Ranch Corp.	Sec 19 T2N R14E	500 MI	Dec. 13, 1909 B 19 WR 365
Opal K. Stephens, individually & as executrix of the estate of James A. Stephens, Deceased.	Sec 27 34 & 35 T3N R14E	110 MI	March 15, 1966 B 44 MIS 165
		300 MI	Spring 1938 B 20 WR 71
		400 MI	Spring 1938 B 20 WR 75
Sidney & Dorene Huyser	SE $\frac{1}{4}$ Sec 27 T3N R14E	150 MI	1923 B 43 MIS 94

9. A portion of the drainage of the South Fork of Spring Creek is used by two owners of decreed water rights of stockholders of the Big Timber Canal Company of water rights are Opal K. Stephens, individually and as Executrix of the Estate of James A. Stephens, deceased, and William Bretzel. The decreed water rights are diverted from the South Fork of Spring Creek by ditches at a point above the reservoir constructed by the applicant. In addition the applicants can divert one hundred (100) miner inches of decreed water of the North Fork of Big Timber Creek to the drainage of the South Fork of Spring Creek.

CASE # 2457

7842 # 3640

The decreed waste waters of Gene Dribnenki also flow into the drainage of the South Fork of Spring Creek. Prior to the construction of the reservoir by the applicants, all of the water flowing in the South Fork of Spring Creek during the irrigation season was appropriated and used for irrigation purposes by the applicants and others and by those diverting decreed water from said drainage.

The last point of diversion on the South Fork of Spring Creek before the reservoir in question is that of the applicants which is located approximately a quarter ($\frac{1}{4}$) mile above the reservoir. At such point the applicant and William Bretzel are able as a matter of practice, to withdraw all of the water of the South Fork of Spring Creek at that point. Such diversion is accomplished by placing a concrete structure across the stream which is left there until the fall when water is no longer needed for irrigation. There generally is no water passing by such diversion, except on those occasions when the water is of sufficient quantity to go over the earthen dike. While there is some recharge between the point of diversion, and the reservoir, it is insignificant. The recharge created by increased seepage from the reservoir would at least equal the flow of the stream as it existed before the construction of the dam in question. The applicants would be appropriating the recharge found within the quarter mile stretch of the stream between the present point of diversion and the reservoir, but would be contributing to the recharge of the stream below the reservoir. Thus the net effect on the stream at a point approximately one third ($\frac{1}{3}$) mile below the present point of diversion and right below the reservoir by such change of diversion would be negligible. There are no other diversions located along this stretch of the stream in question.

10. There are additional forks or branches feeding Ten Mile Creek above some of the objectors. But these forks do not supply sufficient water to fill the appropriations and a mutual sharing of water is required. Moreover, the

CASE # 2457

FOHS # 2300

objectors, Sidney J. Huyser and Dorrene E. Huyser, while not directly below the dam, are adversely affected by the dam as the earlier appropriators on Ten Mile Creek require them to forgo their later appropriation on the North Fork of Ten Mile Creek when they are not receiving sufficient water down the South Fork of Ten Mile Creek.

11. The purpose of the dam and reservoir in question is not wholly to appropriate additional water, but to change the place of use, or purpose of use of the apparent prior existing right of the applicant with a priority date of May 11, 1925. The application is for a change in the point of diversion, a conversion to a pumping system and the appropriation of water from the South Fork of Spring Creek during the non-irrigation season for livestock purposes. Prior to the construction of the reservoir, the applicant would convey their one hundred (100) miners inches of appropriated water down the South Fork of Spring Creek and above the location of the present dam and reservoir, divert said water to irrigate their lands on each side of the reservoir. There are two tracts of lands consisting of approximately thirty-six (36) acres and twenty-four (24) acres. The thirty-six (36) acre tract is located northwest of the dam and any waste water resulting from irrigation of this tract would flow into the reservoir and would thus be reusable by the applicant. This tract has not been irrigated before. Waste water from the irrigation of the twenty-four (24) acre tract flows directly into the South Fork of Spring Creek at a point below the dam.

12. The pumping system employed by the applicants would utilize a combination of sprinkling and flood irrigation.

13. There is excess water in the South fork of Spring Creek during the nonirrigation season, but all the water is appropriated during the irrigation season. During the nonirrigation season the rights of prior appropriators

CASE # 2457

CASE # 2457

will not be adversely affected; that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued for which water has been reserved. The means of diversion are not adequate.

14. Since the apparent water right of the applicant is later in time to others in the drainage, the applicant's right is shut off at times during the irrigation season. When the applicant is able to divert his water right, he does so at all times during the period within which the right is good. In other words, he uses it when he has it. There would be no increase in the per annum amount of water diverted under his existing right if this application were approved. The only possible increase in burden upon his apparent water right would be caused by the decrease of water from the twenty four (24) acre tract with the addition of irrigation on the thirty six (36) acre tract. With the addition of at least forty five (45) acre feet of water, assuming the reservoir is filled at the beginning of the irrigation season, into the drainage and the seepage from the reservoir, the net effect on the drainage in question of the increased acreage under irrigation is negligible. Thus there is no increase in the burden of the use of the applicant's apparent water rights under this application.

From the foregoing proposed findings of fact the following proposed conclusions of law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under Chapter 8 of Title 89, R. C. M. 1947, a permit to change a point of diversion, place of use, purpose of use, place of storage, and appropriate water from the South Fork of Spring Creek for a beneficial use is required.

2. The criteria for issuance of a permit set forth at Section 89-885, and 892 R. C. M. 1947 have in part been met. There is unappropriated water in the South Fork of Spring Creek during the non-irrigation season which is approximately from September 15 to May 1. That the change of point of diversion of an apparent existing right to a point one quarter mile ($\frac{1}{4}$) downstream from the present point of diversion would not adversely affect other water users in the drainage. The increase in the burden of the applicants' apparent water right caused by the increase in acres irrigated is offset by the addition of other water (that is already in the reservoir) into the drainage during the irrigation season and the seepage from the applicants' reservoir.

3. Applicants' objections to Exhibits "B" and "C" is denied. The letters were sent with reference to the dam in question but were improperly denoted as referring to another dam. The exhibits taken collectively clear up the confusion caused by each taken separately.

4. Objectors' objection to Applicants' Exhibits "One" and "Two" is denied. Since the applicant intends to change the point of diversion of his apparent existing water right then evidence as to what the right is, is relevant.

5. The Application for Beneficial Water Use Permit as modified may be granted in accordance with the provisions of Chapter 8 of Title 89 of the R. C. M. 1947.

Based on the above findings of fact and conclusions of law, the following order is proposed.

PROPOSED ORDER

1. The Applicants' permit is granted allowing the appropriation of sixty (60) acre feet per annum of water from the South Fork of Spring Creek to be

CASE # 2457

7275 # 3240

diverted from September 15 to May 1 in Section 33, Township 3N, Range 14E. M.P.M. to be used for irrigation and livestock water purposes to be stored in a 45 acre-foot reservoir. Said permit is granted allowing for the change in point of diversion from May 15 to September 15 of an apparent existing water right from a point approximately one quarter of a mile above the reservoir in question to the reservoir itself.

2. The permit is granted subject to the applicants construction of an adequate by-pass to insure that the waste water from the thirty-six (36) acre tract of land is diverted around the reservoir and back into the drainage in question.

3. The permit is granted subject either to the installation of a drainage device in the dam which would be of sufficient capacity to carry all of the water in said stream and devices for measuring water flowing into and out of the reservoir in question or the construction of a by-pass around the reservoir and dam which would be capable of carrying all of the waters of said stream.

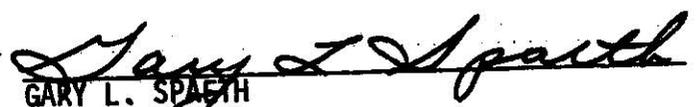
4. The plans for such facility must be approved by this Department and notification made when completed, as required by law (Form 602).

5. The permit is granted subject to the maintenance of sufficient water in said stream during the nonirrigation season for livestock water purposes.

6. The permit is granted subject to prior existing rights.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the proposed order shall be filed with the Department within five (5) days of service upon the parties herein. 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 5th day of May, 1975.


GARY L. SPAETH
Hearing Examiner

CASE # 2457