

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 2571-s40R,
ALFRED C. PEDERSEN

FILMED

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

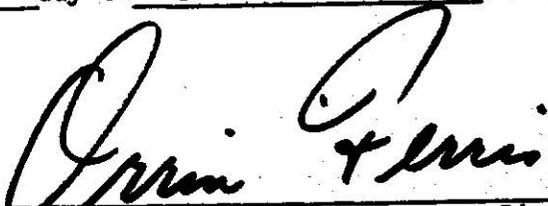
The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on August 28, 1975, by the Hearing Examiner are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

1. The Applicant's permit is granted, allowing the appropriation of 10 cubic feet per second and not to exceed 100 acre-feet of water per annum, to be diverted from Big Muddy Creek at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, Township 32 North, Range 56 East, M.P.M., Sheridan County, Montana, and used to irrigate 94 acres in Section 6 and 27 acres in Section 5, all in Township 32 North, Range 56 East, from March 1 to October 30, inclusive, of each year.

2. The permit is granted subject to all prior existing water rights drawing from Big Muddy Creek.

Done this 1st day of October, 1975.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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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

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 2571-s40R, ALFRED C. PEDERSEN)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts after due notice a hearing was held in Plentywood, Montana on May 8, 1975 for the purpose of hearing objections to the above-named application.

The Applicant, Alfred C. Pedersen, appeared at the hearing and presented testimony. He was represented by counsel, Mr. Tom Darland, Esq. of Plentywood, Montana. He called Mr. Don McCann of Plentywood as a witness.

Mr. John Martin, Manager of the Medicine Lake Wildlife Refuge, appeared at the hearing and presented testimony on behalf of the objector, United States Fish and Wildlife Service. They were not represented by counsel.

None of the other objectors appeared at the hearing.

The Applicant offered into evidence with right of substitution a scale drawing of the proposed project. This drawing was marked Applicant's Exhibit Number 1 and received into evidence without objection. The Applicant also offered into evidence requesting right of substitution with a certified copy, three Notices of Appropriation of Water Right appurtenant to the Applicant's property.

Mr. Don McCann, the engineer who designed the proposed project testified for the applicant.

The Objector, U.S. Fish and Wildlife Service offered into evidence two copies of Notices of Appropriation of Water Right.

These photocopies were marked as Objectors Exhibits Numbers 1 & 2 and received into evidence without objection.

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The Objector, U.S. Fish and Wildlife Service also offered into evidence a letter from the Fish and Wildlife Service to the Bureau of Indian Affairs purporting to show that the Bureau of Indian Affairs has agreed to allow the Fish and Wildlife Service to use the BIA reserved water right for the Medicine Lake Wildlife Refuge.

Counsel, Mr. Tom Darland, for the Applicant objected to receiving this letter into evidence on the grounds that it is self-serving and violates the best evidence rule. The Hearing Examiner took this Objection under advisement at the hearing and hereby excludes the letter from evidence as being hearsay too far afield to be admitted even under relaxed rules of evidence.

As required by law the Hearing Examiner hereby makes this Proposed Findings of Fact, Conclusion of Law, and Order to the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On June 12, 1974 the Applicant submitted an application with the Department seeking to appropriate 10 cubic feet per second not to exceed 100 acre feet per annum to be diverted from Big Muddy Creek at a point in the NW 1/4 NW 1/4 NE 1/4 of Section 6 T. 32 N. R. 56E Sheridan County, Montana and used to irrigate 27 acres in Section 5 and 94 acres in Section 6, all in T. 32 N., R. 56E. and containing a total of 121 acres, more or less, from March 1 to October 30, inclusive of each year.

2. On February 3, 1975, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation by their Counsel, Marvin J. Sonosky, Esq., of Washington D.C. submitted a timely objection to the application on the grounds that the proposed diversion would adversely affect their Indian reserved water rights. The deadline for submitting objections as published in the legal notice

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in the Plentywood Herald is January 22, 1975; therefore this is not timely objection.

On January 20, 1975, the Field Solicitor of the United States Department of the Interior submitted a timely objection to the application on the grounds that the proposed diversion will adversely affect the Indian reserved water rights of the Fort Peck Indian Reservation.

On December 13, 1974 Mr. Tim W. Hjort filed timely objection to the application on the grounds that the proposed diversion would adversely affect the water table on his property.

On January 20, 1975 the United States Fish and Wildlife Service filed a timely objection to the application on the grounds that the proposed diversion would adversely affect the Medicine Lake Wildlife Refuge's prior existing water rights.

On December 13, 1974 Ms. Elaine E. Hjort filed a timely objection to the application on the grounds that the application would alter water tables on her property and make future development questionable.

3. The applicant has owned the property since 1956. The property is not located on the Fort Peck Indian Reservation. The applicant intends to cultivate hay and grain on the acreage to be irrigated. Irrigation of this acreage will increase the production from this acreage which will in turn increase the value of the farm.

4. The control gate of the proposed diversion will be constructed in the bank of Big Muddy Creek about 8 feet above the bottom of the creek and will divert floodwater into a 24 inch pipe which will convey the water to the land to be irrigated. The gate will be capable of diverting water only in times of extreme high streamflow. The water will be held in dikes approximately 24 inches high until the water has soaked into the soil to a 10 inch depth. If any water remains after soaking in, the excess water will be re-

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leased down Antelope Creek across the next adjacent downstream landowner (Hjorts) and eventually into the Medicine Lake Wildlife Refuge.

5. The Medicine Lake Wildlife Refuge has several filed water rights appurtenant to the refuge. Two of these rights claim a total appropriation, with a 1936 priority date, of 55,000 cfs. from the source of Big Muddy Creek. The refuge has never been short of water in the last 6 years. From the foregoing Proposed Findings of Fact the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSION OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Big Muddy Creek.
2. There are in times of extreme high streamflow unappropriated waters in the source of supply.
3. The apparent prior water rights of the objector, Medicine Lake Wildlife Refuge, will not be adversely affected because the proposed means of diversion will appropriate water only in times of extreme high streamflow.
4. The proposed means of diversion were designed by an engineer and are adequate.
5. The proposed use of water is for irrigating cropland and is a beneficial use.
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 issued or for which water has been reserved.
7. The criteria for issuance of a permit set forth at Section 89-885 R.C.M. 1947 have been met.

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8. The application for beneficial water use permit may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

Based on the above Proposed Findings of Fact and Conclusions of Law, the following Order is proposed.

PROPOSED ORDER

1. The Applicant's permit is granted allowing the appropriation of 10 cubic feet per second and not to exceed 100 acre-feet per annum to be diverted from Big Muddy Creek at a point in the NW1/4 NW1/4 NE1/4 of Section 6 T.32N. R. 56E, M.P.M. Sheridan County, Montana and used to irrigate 94 acres in Section 6 and 27 acres in Section 5, all in T. 32N., R. 56E. from March 1 to October 30 inclusive of each year.
2. The permit is granted subject to all prior existing water rights drawing from Big Muddy Creek.

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 this proposed Order shall be filed with the Department within ten (10) days of receipt of same. Upon receipt of any written exceptions by the Department, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

Dated this 29th day of August, 1975.

HEARING EXAMINER

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