

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

FILMED

IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT NO. 3195-g76H BY ERNEST SZCHENYI  
APR 1990 FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice a hearing on the objections to the above-described application was held in the Ravalli County Courthouse, Hamilton, Montana, at approximately 1:15 p.m., on Thursday, May 18, 1976, Gary L. Spaeth, Hearing Examiner, presiding.

The Applicant, Ernest Szchenyi, was not present at the hearing nor was he represented.

Ellen G. Bradshaw, Stan B. and Vivian K. Parr, Thelma Ochs, H. J. and Clara Del Kragh, May F. Morton, and Gertrude M. Vance filed timely objections with the Department. Ellen G. Bradshaw appeared personally on behalf of her objection and the objections of Stan B. and Vivian K. Parr and presented testimony and evidence in support of their objections. Gertrude M. Vance and Thelma Ochs appeared personally and presented evidence and testimony in support of their objections. H. J. Kragh appeared personally on behalf of his objection and the objection of Clara Del Kragh and presented evidence and testimony in support of their objection.

James Rahbein appeared personally on behalf of the Department of Natural Resources and Conservation.

A Proposed Order (Proposal for Decision) was issued by the Hearing Examiner, Gary L. Spaeth, on July 21, 1976.

The Proposed Order as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On August 9, 1976, the Department received an untimely brief letter of Exception dated August 1, 1976, as filed by the objectors, Vivian Parr, Stan B. Parr, Ellen G. Bradshaw, Mary Morton, Gertrude M. Vance, and Thelma Ochs, in opposition to the Hearing Examiner's Proposed Order of July 21, 1976, in the matter of Application No. 3195-g76H by Ernest Szchenyi.

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By letter of August 18, 1976, the Department sent a letter to Ellen G. Bradshaw, with copies to Ernest Szchenyi, Larry Persson, Mr. and Ms. Stan B. Parr, Mary F. Morton, Thelma Ochs, and Gertrude M. Vance, acknowledging receipt of the untimely letter of Exception and informing them that to be consistent with past Departmental handling of other untimely exceptions to other applications, they were granted the opportunity to file a Brief supporting their exception within fifteen days after receipt of the Department's notice. They were further informed of their opportunity to request an oral argument hearing on their Exception before the Administrator of the Water Resources Division.

The Exceptors in this matter did not file a Brief nor request an oral argument hearing within the fifteen-day period provided, nor was an extension of time requested. Therefore, the Department by letter of October 26, 1976, to Ellen G. Bradshaw, Mr. and Ms. Stan B. Parr, Mary Morton, Gertrude M. Vance, and Thelma Ochs, with copies to Ernest Szchenyi and Larry Persson, stated that the fifteen-day-time period for filing a Brief had expired without the Department's receipt of their Brief, and it was assumed that they had decided not to file a Brief supporting their untimely Exception. The Exceptors were respectfully requested once again to notify the Department within five days after receipt of said letter indicating if they wished to present oral argument before the Water Resources Division Administrator in support of their filed untimely letter of Exception. They were advised that if oral argument was not requested by November 5, 1976, this matter would be forwarded to the Administrator of the Water Resources Division for preparation and issuance of a Final Order, based on the entire present application file, including their Exception.

On November 3, 1976, the Department received a letter dated November 1, 1976, from Ellen G. Bradshaw, which states:

"We the above people are of the same opinion on this matter with Mr. Ernest Szchenyi and the pond as in letters, and the hearing we had last spring here. It would be wise to send one of your men over and check water this time of year. I, Ellen G. Bradshaw, am signing this for all of us as we are in agreement on this and I have no time to run these people down for signatures. Parrs are in Texas and last time I wrote them it took 2 weeks, 5 days to get a letter there." (Signed by Ellen G. Bradshaw.)

The Department by letter of November 5, 1976, to Ellen G. Bradshaw, with copies to Ernest Szchenyi and Larry Persson, advised that since a supporting Brief was not filed nor oral argument requested in support of their untimely letter of exception, the Applicant would be contacted and afforded the opportunity to

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file a Brief or reply to their Exception or request oral argument.

By letter of November 5, 1976, to Ernest Szchenyi in care of Marc Bielenberg of Hamilton, Montana, with a copy to Larry Persson, the Department informed Mr. Szchenyi that under the circumstances he would have the opportunity to file a written Reply or Reply Brief in answer to the letter of Exception dated August 1, 1976, as filed by the five objectors. He was also informed of his right to request oral argument. Mr. Szchenyi was respectfully requested to reply within five days indicating how he wanted to proceed. He was also informed that if he decided not to file a Reply or Reply Brief in response to the objectors' Exception or decide not to request oral argument, the Water Resources Division Administrator would proceed to prepare and issue a Final Order on this matter.

No written Reply or Reply Brief or oral argument hearing request was received from the Applicant or any representative of the Applicant; therefore, it was assumed no such document or oral argument hearing was believed necessary by the Applicant.

Since none of the parties in this matter requested an oral argument hearing on the Exception before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposed Order (Proposal for Decision) issued by the Hearing Examiner on July 21, 1976, the objections, untimely letter of exception, and all pertinent information filed by all parties to this matter and made a permanent record of the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in the matter of Application No. 3195-g76H by Ernest Szchenyi, as entered on July 21, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby slightly modified as follows, with the inclusion of Item 5.

#### FINAL ORDER

1. The Applicant's Provisional Permit No. 3195-g76H is hereby granted allowing the appropriation of 0.32 cubic foot per second or 144 gallons per minute of water, 12 acre-feet for irrigation and 2.2 acre-feet for stock watering, for a total not to exceed 14.2 acre-feet per year of water from a 0.5-acre-foot ground-water pit fed by ground-water seepage and springs, located near Skalkaho Creek, in Ravalli County, at a point in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 8, Township 5 North, Range 20 West, M.P.M., and to be used for irrigation on 6 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 8, from April 15 to October 15, inclusive, of each year, and for stock watering from January 1 to December 31, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply. Such prior rights shall include, but are not necessarily limited to, those claimed by the objectors at the hearing and discussed herein.

3. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permit.

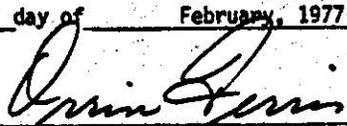
4. This Provisional Permit is granted subject to any final determination or prior existing water rights in the source of supply provided for by Montana law.

5. This Provisional Permit does not grant the Applicant the right to divert surface water from Skalkaho Creek or any other surface-water source, into the 0.5-acre-foot ground-water pit. This permit grants only the appropriation of ground water by means of a ground-water pit as described above.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights.

Done this 28<sup>th</sup> day of February, 1977.

  
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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

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

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IN THE MATTER OF APPLICATION                    )  
FOR BENEFICIAL WATER USE PERMIT            )  
NO. 3195-<sup>g</sup>76H BY ERNEST SZCHENYI        )     PROPOSAL FOR DECISION

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Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the Ravalli County Courtroom, Hamilton, Montana, at approximately 1:15 p.m. on Thursday, May 18, 1976, Gary L. Spaeth, Hearing Examiner, presiding.

The Applicant, Mr. Ernest Szchenyi, was not present at the hearing nor was he represented.

Ms. Ellen G. Bradshaw, Mr. Stan B. Parr and Vivian K. Parr, Ms. Thelma Ochs, H.J. and Clara Del Kragh, Ms. May F. Morton, and Gertrude M. Vance filed timely objections with the Department. Ms. Ellen G. Bradshaw appeared personally on behalf of her objection and the objections of Mr. Stan B. and Vivian K. Parr and presented testimony and evidence in support of their objections. Ms. Gertrude M. Vance and Ms. Thelma Ochs appeared personally and presented evidence and testimony in support of their objections. Mr. H.J. Kragh appeared personally on behalf of his objection and the objection of Clara Del Kragh and presented evidence and testimony in support of their objection.

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Mr. James Rehbein appeared personally on behalf of the Department of Natural Resources and Conservation.

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

PROPOSED FINDINGS OF FACT

1. On August 1, 1974, the Applicant filed an Application for Beneficial Water Use Permit No. 3195-s76H with the Department seeking to appropriate .32 cubic feet per second or 144 gallons per minute, 12 acre-feet for irrigation and 2.2 acre-feet for stockwatering, for a total not to exceed 14.2 acre-feet per year of water from a 0.5 acre-foot groundwater pit fed by groundwater seepage and springs, located near Skalkaho Creek in Ravalli County at a point in the SW1/4 SE 1/4 NW1/4 of Section 8, Township 5 North, Range 20 West, M.P.M., and to be pumped from said pit at a flow rate of 144 gallons per minute and used for irrigation on 6 acres in the SE1/4 NW1/4 of Section 8, from April 15 to October 15, inclusive of each year, and for stockwatering from January 1 to December 13, inclusive, of each year.

2. Mr. Tom Patton, geologist for the Department, submitted for inclusion into the record a memorandum on his study of the application. The site is located on a terrace deposit formed by the Bitterroot River. The creek is probably an effluent stream (meaning water from groundwater storage) in this area because of the presence of springs adding water

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to the stream flow. A high water table, particularly during the irrigation season is also reported in this area. The pit will produce a drawdown when it is pumped. This cone will force water to flow to the pit and either reduce discharge from the aquifer to the stream, or cause increased recharge from the stream to the aquifer. Since the permeability of the aquifer should be relatively high, and the creek only 50 feet away, it is likely that the discharge from the aquifer will be lessened and recharged from the stream may be induced.

3. The Objector, H.T. and Clara Del Kragh testified that they have two springs approximately 150 to 200 feet apart. The springs are in a small (approximately 3 acre) plot between Skalkaho Creek and the Hedge Ditch and are located approximately 500 yards east to northeast of the proposed pit of the Applicant. The Kraghs have used the springs for stockwatering purposes and have a stockwatering right for approximately 2 acre-feet per year on the springs. The Kraghs have applied to develop the springs to a capacity of 100 gallons per minute for irrigation purposes, but the priority date is junior to that of the Applicant in this matter, if the permit is granted.

4. Mr. Patton concluded that the objection concerning the springs is based on the fact that the flow from the springs may be reduced, that these springs are at least 200 feet from the proposed pit, and the pit is reported to be only 50 feet from the creek. Thus the drawdown cone should be expected to reach the creek before the spring,

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consequently they should not be affected.

5. The other objectors at the hearing were concerned primarily with the fact that there are certain times of the year that there is a shortage of water in the area. This shortage primarily occurs during periods other than during the irrigation season. They were primarily wondering how to get water when there was no water available. It was explained if the permit is granted, the Applicant would be only able to appropriate water when it was available in his pit, and would not adversely affect prior water right users.

6. The Objector, Mr. Kragh, questioned the legal description as to the location of the Applicant. Mr. Rehbein also raised some questions as to the approximate legal description of the application.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water under this application.

2. There are at times unappropriated water in the source of supply available for appropriation by the Applicant for the purposes requested herein. Such times generally occur in the high water period in the Skalkaho Creek and during the irrigation season.

3. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

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4. The proposed means of diversion are adequate.

5. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damages caused by the appropriation, nor does the Department, in issuing a permit, in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permit.

6. The proposed use of water constitutes a beneficial use.

7. 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.

8. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

9. Nothing decided herein has bearing on the status of water rights claimed by the applicant other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. The Applicant's Provisional Permit No. 3195-s76H is hereby granted allowing the appropriation of 0.32 cubic

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feet per second or 144 gallons per minute, 12 acre-feet for irrigation and 2.2 acre-feet for stockwatering, for a total not to exceed 14.2 acre-feet per year of water from a 0.5 acre-foot groundwater pit fed by groundwater seepage and springs, located near Skalkaho Creek, in Ravalli County, at a point in the SW1/4 SE1/4 NW1/4 of Section 8, Township 5 North, Range 20 West, M.P.M., and to be used for irrigation on 6 acres in the SE1/4 NW1/4 of Section 8, from April 15 to October 15, inclusive, of each year, and for stockwatering from January 1 to December 31, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply. Such prior rights shall include, but not necessarily be limited to those claimed by the objectors at the hearing and discussed herein.

3. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

4. This Provisional Permit is granted subject to any final determination or prior existing water rights in the source of supply provided for by Montana law.

## NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department. Written exceptions to the Proposed Order, if any, shall be filed with the Department

within ten (10) days of service upon the parties herein.  
Upon receipt of any exceptions, opportunity will be provided  
to file briefs and make oral arguments before the Administrator  
of the Water Resources Division.

DATED this 2<sup>nd</sup> day of July, 1976.

*Gary L. Spaeth*

GARY L. SPAETH  
HEARING EXAMINER

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