

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT,
NO. 4636-S76H BY
JAMES D. AND COY L. WALTERMIRE

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on September 16, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the provisions cited below, James D. and Coy L. Waltermire's Provisional Permit No. 4636-S76H is hereby granted allowing the appropriation of 0.26 cubic foot per second or equivalent to 120 gallons per minute of water, not to exceed 80 acre-feet per annum, for irrigation; 0.002 cubic foot per second or equivalent to 1 gallon per minute of water, not to exceed 2.25 acre-feet per annum for stock water; and 0.01 cubic foot per second or equivalent to 5 gallons per minute of water, not to exceed 2 acre-feet per annum for domestic and garden purposes; for a total not to exceed 84.25 acre-feet of water per year for irrigation, stock watering, domestic, and garden purposes, from O'Brien Creek, a tributary of the Bitterroot River, in Missoula County, Montana, to be impounded in a 0.25-acre-foot reservoir on said creek, at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, Township 13 North, Range 20 West, M.P.M., and used for stock watering from January 1 to December 31, inclusive, of each year; for domestic and garden purposes from April 1 to November 1, inclusive, of each year; and for irrigation purposes on a total of 20 acres, more or less, in said Section 28 from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply. The Provisional Permit is granted with the stipulation that when a determination is reached as to the nature and extent of the Permittee's water rights under the 1905 decree for S. V. Kenton, this Provisional Permit shall be accordingly amended to reflect such prior water rights.

3. The issuing of a Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit.

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

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Recommendation

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

Done this 12th day of October, 1976.

Erin Ferris

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 # 4634

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 4636-s76H BY JAMES D. AND COY)
L. WALTERMIRE)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and the Administrative Procedures Act, after due notice, a hearing on objections to the above-named application was held on Monday, May 17, 1976, in the Mayor's Conference Room, Missoula City Hall, Missoula, Montana, Gary L. Spaeth, Hearing Examiner, presiding.

A timely objection was filed to the above application by the estate of W. C. Maclay and William Richard Maclay, Sr., and Fleta Elizabeth Kenna, as Executors and sole heirs. The estate of W. C. Maclay was represented by Mr. Sherman V. Lohn of the Missoula firm of Garlington, Lohn and Robinson. Mr. Delos Robbins of Route 5, Missoula, Montana, appeared on behalf of the objection of the estate of W. C. Maclay. The Waltermires were represented by Mr. Lohn J. Dale of the Missoula firm of Milodragovich, Dale and Dye.

Mr. James D. Waltermire appeared on behalf of his application and presented testimony.

On October 24, 1975 the estate of W. C. Maclay and William Richard Maclay, Sr., and Fleta Elizabeth Kenna, as Executors and sole heirs filed with the Department an objection to the above application. The Objectors based their

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objection on the grounds, "that there are no unappropriated waters in the proposed source, and that the interests of the Objector would be adversely affected by the proposed Application."

Mr. Waltermire, through his testimony, introduced into the record three exhibits denoted as Applicants' Exhibits A-C. Applicants' Exhibit A was a Certificate of Survey No. 529 by Ainsworth and Associates as to the location of the Waltermire property on O'Brien Creek. Applicants' Exhibit B is an aerial photograph with the Waltermire property drawn in by Ainsworth and Associates. Applicants' Exhibit C is a certified copy of a 1905 decree on O'Brien Creek entered in the case of Fleta L. Maclay, Plaintiff, v. Gilbert Graves, Charles Jennings and S.V. Kenton, Defendants.

The Objector, the estate of W. C. Maclay, through the testimony of Mr. Robbins, entered into the record an exhibit which was labeled as Objectors' Maclay Exhibit No. 1. Objectors' Maclay Exhibit No. 1 was a sketch of O'Brien Creek showing the country road, the upper and lower Maclay Ditch, and the Waltermire and Maclay buildings.

The Department of Natural Resources and Conservation, through testimony of James Rehbein, Area Supervisor of the Kalispell Office, introduced into the record two exhibits which were denoted as Department's Exhibit No. 1 and Department's Exhibit No. 2. Each exhibit was a reprint of a page from the County Water Resources Survey of Missoula County completed in 1959. Department's Exhibit No. 1 was a reprint

showing Sections 27 and 28, Department's Exhibit No. 2 was a reprint showing Sections 33 and 34, both in Township 13 North, Range 20 West, Montana Principal Meridian.

Mr. Waltermire testified that his 20.1 acre parcel of land was located in the SW1/4 of Section 28, Township 13 North, Range 20 West. According to the 1905 decree, 50 acres of the 160 acre parcel of land had been irrigated as of June, 1884. Thus, as a result of the 1905 decree, Mr. Waltermire felt that he may have a water right with a June, 1884 priority date to the waters of O'Brien Creek to irrigate that portion of his 20.1 acres that had been irrigated as of June, 1884.

Mr. James Rehbein of the Department testified from his field inspection, that at least 8.5 acres on the north side of the creek on the Waltermire property had been irrigated by S. V. Kenton under the 1905 decree. Under cross examination by Mr. Lohn Dale, Mr. Rehbein went on to point out that he felt it was very improbable that the 8.6 acres on the southeast side of the creek had been irrigated previously by S. V. Kenton under the 1905 decree. Mr. Rehbein further felt that this parcel of property could have been irrigated by a flume even though this was unlikely. There appears to be no question that the remaining acreage on the Waltermire property, because of its close proximity to the creek and timber located upon it, had not been irrigated in the past.

Mr. Waltermire testified that he plans to construct a dam and install a pump. He would then use a pipe line with

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laterals and would try to irrigate as much of his property as possible. At this time he was unable to give the exact acreage that would be put under irrigation.

Mr. Waltermire testified that in 1975, O'Brien Creek did not go dry at the lower end and that water ran from O'Brien Creek into the Bitterroot River throughout the whole year. Mr. Delos Robbins testified that there have been years when water does reach the river during the entire year, but usually the water will start to drop in the middle of July and will finally dry up in the middle of August. Thus, during the last part of the summer, there is usually not enough water to irrigate the land already being irrigated as per the 1905 decree.

From the testimony of Delos Robbins on behalf of the objection of the Estate of W. C. Maclay, it appears that under the 1905 decree the Estate of Fleta Maclay is entitled to an 1871 priority right to 160 inches of the waters of O'Brien Creek. That further, the Estate of Fleta L. Maclay is entitled under the 1905 decree to 132 inches of the waters of O'Brien Creek with an 1891 priority date.

Mr. Rehbein pointed out that the O'Brien Creek drainage was approximately 30 square miles in size. That based upon the stream flows in nearby Rattlesnake Creek there should be an annual flow of 1,000 acre-feet per square mile in the drainage, thus giving a total flow of 30,000 acre-feet per year.

Two questions which remained unresolved at the conclusion of the hearing were: 1. the quantity and extent of the Waltermire water right under the 1905 decree; and 2. the interpretation of the 7th Conclusion of Law in the 1905 decree. The parties hereto were given the opportunity to brief the question and briefs were submitted by both parties. It is questionable as to whether the Hearing Examiner has the authority to answer either of the questions, but in any case, there is insufficient evidence submitted to reach a conclusion. As to the water right claimed by Mr. Waltermire, essentially all that is in the record is that 50 acres were irrigated as of the time of the decree. That Mr. Waltermire has a 20.1 acre tract located in the same 1/4 section as the 50 acre tract. There is very little evidence to show what portion of the Waltermire land had been irrigated except for the 8.5 acres mentioned above. As to the question of the ditch use per Conclusion of Law No. 7 again there is insufficient evidence to show exactly what the usage of the ditch was at the time of the final decree in 1905.

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 of the Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On January 20, 1975, the Applicants, James D. and Coy L. Waltermire, filed Application No. 4636-s76H with the

Department of Natural Resources and Conservation seeking to appropriate a total of 84.25 acre-feet of water per year for irrigation, stockwatering, domestic and garden purposes from O'Brien Creek, a tributary of the Bitterroot River in Missoula County, Montana to be impounded in a 0.25 acre-foot reservoir in said creek, at a point in the NW1/4 SE1/4 SW1/4 of Section 28, Township 13 North, Range 20 West, M.P.M., and used for stockwatering from January 1 to December 31, inclusive, of each year; for domestic and garden purposes from April 1 to November 1, inclusive, of each year; and for irrigation on a total of 20 acres, more or less, in Section 28 from April 15 to October 15, inclusive of each year.

2. The Objector, the estate of W. C. Maclay, has an apparent prior water right as per the 1905 decree to 160 miners inches of water of O'Brien Creek with an 1871 priority and 132 miners inches of water of O'Brien Creek with an 1891 priority.

3. The Applicants, James D. and Coy L. Waltermire, have an apparent prior water right to irrigate 8.6 acres of land located in the SW1/4 of Section 28, Township 13 North, Range 20 West as per the 1905 Decree which decreed S. V. Kenton 50 miners inches of water of O'Brien Creek with an 1884 priority date.

4. There are years (1975) that there are unappropriated water in O'Brien Creek. During a normal year there are generally unappropriated waters during the early half of the

summer. From the middle of July on, the waters in O'Brien Creek generally drop until the stream dries up by the first part of August.

5. The proposed means of diversion are adequate.
6. The proposed use of water constitutes a beneficial use.
7. The proposed use will not interfere unreasonably with the prior uses or developments, for which a permit has been issued or for which water has been reserved. 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 in O'Brien Creek.
2. Pursuant to 89-886(1), R.C.M. 1947, prior appropriators must be protected prior to issuance of a Beneficial Water Use Permit.
3. The issuing of a Beneficial Water Use Permit, in no way reduces the Applicants' liability for damages caused by the appropriation nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damages caused by the Applicants' exercise of its Provisional Permit.
4. 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.

5. Nothing decided herein has bearing upon the status of water rights claimed by the Applicants 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 applied for, to the extent necessary to reach a conclusion herein.

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

PROPOSED ORDER

1. Subject to the provisions cited below, James D. and Coy L. Waltermire's Provisional Permit No. 4636-s76H is hereby granted allowing the appropriation of 0.26 cfs or 120 gpm of water not to exceed 80 acre-feet per annum for irrigation; 0.002 cfs or 1 gpm of water, not to exceed 2.25 acre-feet per annum for stockwater; and 0.01 cfs or 5 gpm of water, not to exceed 2 acre-feet per annum for domestic and garden purposes for a total not to exceed 84.25 acre-feet of water per year for irrigation, stockwatering, domestic and garden purposes, from O'Brien Creek, a tributary of the Bitterroot River in Missoula County, Montana, to be impounded in a 0.25 acre-foot reservoir on said creek, at a point in the NW1/4 SE1/4 SW1/4 of Section 28, Township 13 North, Range 20 West, M.P.M., and used for stockwatering from January 1 to December 31, inclusive, of each year; for domestic and garden purposes from April 1 to November 1, inclusive, of each year; and for irrigation purposes on a

total of 20 acres, more or less, in said Section 28 from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply. The Provisional Permit is granted with the stipulation that when a determination is reached as to the nature and extent of the Applicants' water rights under the 1905 decree for S. V. Kenton, that this Provisional Permit shall be accordingly amended to reflect such prior water rights.

3. The issuing of a Provisional Permit by the Department in any way reduces the Applicants' liability for damage caused by the Applicants' exercise of its Provisional Permit.

4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as 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 of Natural Resources and Conservation. 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 written exceptions, opportunity will be granted to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 16th day of September, 1976.


GARY L. SPAETH, HEARING EXAMINER