

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
6425-s76H BY HARLEY G. SULLIVAN

)
FILMED

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

APR 27 1980

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 courtroom of the Ravalli County Courthouse, Hamilton, Montana, on Thursday, September 23, 1976, beginning at 10:00 a.m., Daniel G. Diemert, Hearing Examiner, presiding.

Mr. and Mrs. Sullivan attended the hearing and presented testimony in support of their application.

Objections were received by the Department from Alfred L. Simonsen, Clifford A. Simonsen and Dorothy S. Grauman. All of the objectors were represented by Mr. David Grauman, an attorney from Ennis. At the hearing Mr. Grauman presented a notarized statement signed by Gerald A. and Dorothea Martin which voiced their objection to the application. Mr. Grauman called Alfred Simonsen, Clifford Simonsen, and Alfred Martinell, a ditch rider on Bear Creek from 1935 to 1938, as witnesses.

Mr. Jim Rehbein attended the hearing on behalf of the Department of Natural Resources and Conservation.

MOTIONS

During the hearing it became evident that the applied for three acre-feet per annum was not calculated correctly. Upon motion by the Hearing Examiner, the Applicant agreed to accept an amount calculated by the formula used by Department personnel. The Hearing Examiner hereby amends the application from three acre-feet per annum to one acre-foot per annum. This amendment is based upon a finding

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that a reservoir one hundred feet by one hundred feet which has a depth of ten feet and sloping sides contains approximately 40,000 cubic feet of water which is nearly one acre-foot of water.

A Proposed Order (Proposal for Decision) dated December 6, 1976 was issued by the Hearing Examiner, Daniel G. Diemert.

The Proposed Order Notice as issued on December 6, 1976 provided that the Proposed Order would 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 mailed to the Department within ten (10) days of service upon the parties herein, and upon receipt of any written exceptions opportunity would be granted to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On December 10, 1976 the Department received an Exception dated December 9, 1976 from David A. Grauman, filed on behalf of his clients, Alfred L. Simonsen, Clifford A. Simonsen and Dorothy S. Grauman, opposing the Proposed Order as issued on December 6, 1976 by the Hearing Examiner in the matter of Application No. 6425-s76H by Harley G. Sullivan.

The Department by letter of December 22, 1976 to David Grauman, acknowledged receipt of his Exception and informed him of the opportunity to file a supporting Brief by January 17, 1977.

On January 14, 1977 the Department received a reply letter from David Grauman to its letter of December 22, 1976. Mr. Grauman stated in part as follows:

"Please be advised that I do not intend to file a brief in support of my Exceptions, because I feel that the Exceptions, Additions, and Amendments speak for themselves on this matter. The purpose for which I filed the Exceptions was to reiterate the legitimate concern of my clients that the Applicant in constructing his pond would break through the fragile surface seal presently existing over the conglomerate rock formation and without

supervision and construction practices as indicated in my Exceptions, the water would not be impounded, but would rather drain out through the bottom of the pond and totally deprive my clients of any water for their agricultural and stock watering use. At this time I am reserving my decision to present Oral Argument before the Water Resources Division Administrator pending the reply to my letter of Exceptions, Additions and Amendments to Proposed Finding of Fact, and Proposed Order by the Applicant in this cause."

By letter of January 21, 1977 the Department replied to David Grauman's letter of January 13, 1977 and in part informed him that the Applicant would be afforded the opportunity to file a written Reply Brief within fifteen days after receipt of the Department's letter in reply to the Exceptions filed. Also by letter of January 21, 1977 the Department informed the Applicant, Harley Sullivan of his opportunity to file a Reply Brief in reply to the Exceptions filed by David Grauman on behalf of his clients:

On May 20, 1977 the Department sent a letter to the Applicant in reference to the Department's letter of January 21, 1977. The Department's letter of May 20, stated in part, "that the Department has not received a written Reply Brief nor a request for oral argument from you, therefore, if your Reply Brief is not received within ten (10) days after receipt of this letter, we will assume you have waived the right and we will proceed to send a letter to Mr. Grauman asking him how he wishes to proceed with his filed Exception. If he requests an oral argument hearing, a hearing will be scheduled for that purpose. If he does not, we will proceed to forward the application to the Administrator of the Water Resources Division for preparation and issuance of a Final Order, based on the record contained at present in the application file."

On May 31, 1977 the Department received the Applicants' Reply Brief as dated May 28, 1977 in reply to the Department's letter of May 20, 1977 and the Exceptions filed by David Grauman.

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On June 8, 1977 the Department sent a letter to the Applicant in direct response to his Reply Brief letter of May 28, 1977 and informed him in part as follows:

"Please be advised that you were not given any permission or Provisional Permit in this case to put the pond in. What you are referring to as a letter was the Proposal for Decision as issued on December 6, 1976, by the Hearing Examiner. The Proposed Order as contained in the Proposal for Decision is found on pages 5 and 6. The Proposed Order "proposes" that the Provisional Permit be granted to you with four (4) proposed conditions. The Provisional Permit has not been issued, since Exceptions have been filed by Mr. Grauman on behalf of three objectors. Therefore, until such time as a Final Order is issued by the Administrator of the Water Resources Division, you will not know specifically if the Provisional Permit will be granted, modified, or denied. However, as you know, the Proposed Order has simply "proposed" that the permit be granted in a modified form with specific conditions. Please be further advised that there is no reason for you to request an extension of time to build the proposed reservoir, since the Final Order and, if granted, the Provisional Permit has not been issued. If and when a permit is issued to you, it will specify a date by which you must have it completed, however, if you cannot complete the construction within the time period stated in the permit, you can, for good reason shown, request an extension of time. The Department will now proceed to send a letter to Mr. Grauman asking him how he wishes to proceed with his filed Exception."

On June 8, 1977 the Department sent a letter to David Grauman with a copy of the Applicants Reply Brief and asked Mr. Grauman to advise the Department at his earliest convenience indicating whether he wished to request an oral argument hearing on his Exceptions before the Administrator.

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The Department received a letter dated June 20, 1977 from David Grauman in direct reply to the Department's letter of June 8, 1977. Mr. Grauman stated in part as follows:

"Because of the absence in the Proposed Order of the condition for soil tests and study report by a soil scientist or geologist as recommended by Mr. Rehbein and suggested by the Objectors relating to the possibility of total water loss by seepage through the pond basin, the Objectors respectfully submit that should the Administrator grant the provisional permit to the Applicant the recommendation of Mr. Rehbein and the Objectors that as a condition precedent to a provisional permit, the Applicant consult with and get reports relative to the feasibility of an impoundment site and allow all interested parties access to said report, should be included."

"It is respectfully submitted that the Administrator take into consideration and adopt the conditions recommended by Mr. Rehbein and the Objectors relative to a soil study as a condition precedent to the grant of a permit, more specifically stated in page 2 under Additions to Proposed Order of Objections, Exceptions and Additions and Amendments to Proposed Order which has been filed by the Objectors in this matter."

The Department by letter of July 6, 1977 to David Grauman acknowledged receipt of his letter of June 20, 1977 and once again requested him to advise the Department if he wished an oral argument hearing. On August 18, 1977 the Department sent a second letter to Mr. Grauman requesting a reply to its letter of July 6, 1977.

On August 31, 1977 the Department received Mr. Grauman's letter of August 29, 1977 which stated, "please be advised that I do not wish to make an oral argument before the Administrator of the Water Resources Division, D.N.R.C."

By letter of September 1, 1977 the Department responded to David Grauman's letter of August 29, 1977 by informing him that since he did not desire to argue their Exception before the Administrator of the Water Resources Division, the Application file would be forwarded to the Administrator for preparation and issuance of a Final Order, taking into full consideration the entire application record.

Since none of the parties in this matter specifically requested an oral argument hearing before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of December 6, 1976 and all other information of record in the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on December 6, 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 modified by adding additional conditions.5, 6, 7, 8 and 9.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 6425-s76H is hereby conditionally granted allowing for the appropriation of one (1) acre-foot of water per annum from a slough (known as Cramer Slough) containing waste water, a tributary of the Bitterroot River, in Ravalli County, Montana, to be appropriated by means of a new pit reservoir approximately 100 feet long by 100 feet wide by 10 feet deep which will store approximately one (1) acre-foot of water in said slough at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 31, Township 8 North, Range 20 West, M.P.M., and used for fish and wildlife purposes from January 1 to December 31, inclusive, of each year.

2. The permit is provisional and granted subject to all prior water rights in the source of supply, including, but not limited to those appurtenant to the lands owned by the Objectors herein.

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3. The issuing of this 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 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.

5. The Provisional Permit is granted subject to the right of the Department to revoke the Permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

6. The Permittee shall before commencing any construction of the appropriation granted herein, cause the following to be completed:

A. Technical assistance must be sought from the local Soil Conservation Service, a private consulting firm or other competent source for the purpose of obtaining core tests and core test data to evaluate the soil and geological material makeup of the project area where the pit reservoir will be constructed. This test is necessary to avoid any further unnecessary expenditures on behalf of the Permittee and to determine the soil and geological materials below the surface of the ground in order to determine if in fact seepage or leakage of surface waters to deeper sands and gravels would be expected to occur. The core tests must be conducted to a sufficient depth below the anticipated depth of the pit reservoir to make the core tests useable.

B. Should it be determined that excessive seepage or leakage will occur to deeper sands and gravels, to the detriment of prior downstream users, the Permittee shall cause the pit to be lined to prevent any excessive water loss.

C. Core test data and complete plans and specifications for the pit reservoir, including outlet structure and spillway if necessary, shall be submitted to the Department of Natural Resources and Conservation for approval prior to construction of the project.

7. The Permittee may request in writing assistance from the Department for site evaluation of the soils and geology of the project area.

8. The Permittee shall only fill the pit reservoir, if approved by the Department, during flood or high spring runoff periods, during the non-irrigation season, or during other periods of the year, when the water is not needed by prior water right users downstream.

9. The above conditions to the granting of this Provisional Permit shall hold in full effect for any successor in interest to the Permittee herein named.

RECOMMENDATION

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

Done this 14th day of April, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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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. 6425-s76H BY HARLEY G.)
SULLIVAN)

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 courtroom of the Ravalli County Courthouse, Hamilton, Montana, on Thursday, September 23, 1976, beginning at 10:00 a.m., Daniel G. Diemert, Hearing Examiner, presiding.

Mr. and Mrs. Sullivan attended the hearing and presented testimony in support of their application.

Objections were received by the Department from Alfred L. Simonsen, Clifford A. Simonsen and Dorothy S. Grauman. All of the objectors were represented by Mr. David Grauman, an attorney from Ennis. At the hearing Mr. Grauman presented a notarized statement signed by Gerald A. and Dorothea Martin which voiced their objection to the application. Mr. Grauman called Alfred Simonsen, Clifford Simonsen, and Alfred Martinell, a ditch rider on Bear Creek from 1935 to 1938, as witnesses.

Mr. Jim Rehbein attended the hearing on behalf of the Department of Natural Resources and Conservation.

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MOTIONS

During the hearing it became evident that the applied for three acre-feet per annum was not calculated correctly. Upon motion by the Hearing Examiner, the Applicant agreed to accept an amount calculated by the formula used by Department personnel. The Hearing Examiner hereby amends the application from three acre-feet per annum to one acre-foot per annum. This amendment is based upon a finding that a reservoir one hundred feet by one hundred feet which has a depth of ten feet and sloping sides contains approximately 40,000 cubic feet of water which is nearly one acre-foot of water.

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. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from a slough containing waste water, a tributary of the Bitterroot River, in Ravalli County, Montana.

2. On October 9, 1975, the Department received an Application for Beneficial Water Use Permit No. 6425-s76H from Harley G. Sullivan who sought to appropriate 3 acre-

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feet of water per annum from a slough containing waste water, a tributary of the Bitterroot River, in Ravalli County, Montana, to be impounded in a 3 acre-foot reservoir in said slough at a point in the NW1/4 NE1/4 NW1/4 of Section 31, Township 8 North, Range 20 West, M.P.M., and used for fish and wildlife purposes from January 1 to December 31, inclusive, of each year.

3. The Department received timely filed objections from Alfred L. Simonsen, Clifford A. Simonsen, and Dorothy S. Grauman. All of the objections claimed that an impoundment of water as contemplated by the application would cause a reduction in the available water to irrigate hayland and water livestock.

4. There are times of the year when there are unappropriated waters in the source of supply available for appropriation by the Applicant for the purposes herein applied for.

5. If an adequate drainage device is installed in the proposed impoundment structure, the rights of prior appropriators will not be adversely affected.

6. It appears that the proposed means of diversion or construction are adequate. The proposed use of water for fish and wildlife purposes are beneficial uses.

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.

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9. The Applicant has not asked for an appropriation of 15 cubic feet per second or more. It therefore is not necessary to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

10. The Applicant has and will continue to consult with soil scientists concerning the porosity of the soil at the proposed impoundment site.

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 6425-s76H should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

2. 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.

3. The rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

4. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the appropriation, 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.

5. 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 on 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 Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 6425-s76H is hereby granted allowing for the appropriation of 1 acre-foot of water per annum from a slough containing waste water, a tributary of the Bitterroot River, in Ravalli County, Montana, to be impounded in a new 1 acre-foot reservoir in said slough at a point in the NW1/4 NE1/4 NW1/4 of Section 31, Township 8 North, Range 20 West, M.P.M., and used for fish and wildlife purposes 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, including but not limited to those appurtenant to the lands owned by the Objectors 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.

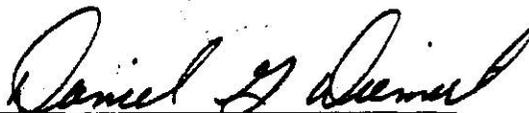
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4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

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 mailed to 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 6 day of December, 1976.


DANIEL G. DIEMERT
HEARING EXAMINER

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