

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

FILED  
APR 1976  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT NO.  
6701-s76H BY THOMAS G. GREENWOOD

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 conditions cited below, Thomas G. Greenwood's Provisional Permit No. 6701-s76H is hereby granted allowing the appropriation of 0.02 cubic foot per second or equivalent to 10 gallons per minute of water, not to exceed 10 acre-feet per annum, from O'Brien Creek, a tributary of the Bitterroot River, in Missoula County, Montana, to be diverted from O'Brien Creek at a point in the SW $\frac{1}{4}$  NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 29, Township 13 North, Range 20 West, and used for irrigation on a total of 4 acres, more or less, in said Section 29 from June 1 to August 30, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply.

3. The issuing of the 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 by Montana law.

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 12<sup>th</sup> day of October, 1976.

*Erwin 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 # 6701**

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. 6701-s76H by THOMAS G. GREENWOOD )

---

Pursuant to the Montana Water Use Act and the Administrative Procedure 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, at Missoula, Montana, Gary L. Spaeth, Hearing Examiner, presiding.

Timely objections were filed to the above Application by James D. and Coy L. Waltermire and the Estate of W. C. Maclay and William Richard Maclay, Sr. and Fleta Elizabeth Kenna, as Executors and sole heirs. The Waltermires were represented by Mr. Lon J. Dale of the Missoula Firm of Milodragovich, Dale and Dye. Mr. James D. Waltermire appeared on behalf of his objection and presented testimony. The Estate of W. C. Maclay was represented by Mr. Sherman V. Lohn of the Missoula Firm, 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 in their objections stated that they have a water right under the terms of a decree entered on June 17, 1905, wherein they are the successors in interest of S. V. Kenton. At the time of the filing of the objection and at the hearing the Waltermires were involved in a determination of the amount of water available for

**CASE # 6701**

their existing decreed right and object to the Application only sofar as it may affect a remission of the objectors established rights. The Waltermires also filed on January 20, 1975 an Application for Beneficial Water Use Permit No. 4636-s76H 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. The water was to be used for stockwatering from January 1 to December 31, for domestic and garden uses from April 1 to November 1, and for irrigation on a total 20 acres, more or less, from April 1 to October 15, inclusive of each year.

A hearing on the Waltermire application was held Monday, May 17, 1976, in the Mayor's conference room Missoula city hall, at Missoula, Montana just prior to the Greenwood hearing. The record of the Waltermire application was included by stipulation of all the parties into the record of the Greenwood hearing. Thus, the records of both hearings will be discussed in preparing this order.

Mr. Waltermire through his testimony introduced into the record from the Waltermire hearing exhibits denoted as Applicants Exhibits A through C. Applicants Exhibit A was a Certificate of Survey No. 529 by Ainsworth and Associates as to the location of the Waltermire property on a 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 the 1905 decree on O'Brien Creek entered in the case of Fleta L. Maclay, Plaintiff versus Gilbert Graves, Charles Jennings and S. V. Kenton defendants.

The Objector, the Estate of W. C. Maclay, entered into the record in the Waltermire hearing an exhibit which was labeled as Objector's Maclay Exhibit No. 1. Objectors Maclay Exhibit No. 1 was a sketch of O'Brien Creek showing the county road, the upper and lower Maclay ditch and the Waltermire and Maclay buildings.

During the Waltermire hearing, the Department of Natural Resources through the 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. Both exhibits were a reprint of two pages 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, while Department's Exhibit No. 2 was a reprint showing Sections 33, and 34, both in Township 13 North, Range 20 West, Montana Principal Meridian.

During the Waltermire hearing, 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. That according to the 1905 decree, 50 acres of this 160-acre parcel of land had been irrigated as of June, 1884. Thus, as a result of the 1905 decree, Mr. Waltermire feels 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.

From the testimony of Delos Robbins on behalf of the objection of the Estate of W. C. Maclay, it appears that based on 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.

**CASE # 6701**

Mr. James Rehbein of the Department testified in the Waltermire hearing that from his field inspection, that at least 8.5 acres on the northeast side of the creek on the Waltermire property had been irrigated by S. V. Kenton under the 1905 decree. Under cross-examination by Mr. Lon 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. Yet, it may have been possible that this parcel of property could have been irrigated by a flume even though Mr. Rehbein felt this was unlikely.

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 will start to drop in the middle of July and finally dries up in the middle of August. Thus, during the latter part of the summer there usually is not enough water to irrigate the land already being irrigated as per the 1905 decree.

Mr. Rehbein went on to point out that the O'Brien Creek drainage was approximately 30 square miles in size and that based upon the stream flows in the nearby Rattle Snake 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.

The Applicant, Mr. Greenwood testified that he has a 10-acre parcel of land located in O'Brien Creek and that he desires to irrigate 3 to 4 acres of that. His system would consist of pump in O'Brien Creek with the water being sprinkled on the land. Mr. Rehbein testified as to the irrigation requirements as prepared by the Department.

On the Greenwood property, the soil is found to be a gravely, sandy loam with a total soil moisture holding capacity of 5 inches at a 5 foot depth. Using alfalfa as a baseline crop, the total seasonal consumptive use would be 23.03 inches. During a normal year there is 5.53 inches of effective precipitation, thus leaving a total irrigation requirement of 17.50 inches. Figuring a 56% field efficiency, the need would be 2.2 acre-feet per acre for a total of 9 acre-feet of water for a normal year on the 4 acres. During a dry year where there is no effective precipitation, the total irrigation requirement would be 23.03 inches. Figuring a 65% efficiency, total acre-feet per acre would be 2.9 acre-feet per acre with a total dry year requirement of 12 acre-feet per year.

Toward the conclusion of the Greenwood hearing, the Applicant Mr. Greenwood was somewhat critical of the irrigation methods and water use made by the Estate of W. C. Maclay. He also went on to discuss a proposal to apply for water out of Hagerty Gulch.

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 October 21, 1975, the Applicant, Mr. Thomas G. Greenwood, filed Application No. 6701-s76H with the Department of Natural Resources and Conservation seeking to appropriate 0.02 cubic feet per second or ten gallons per minute of water and not to exceed 10-acre feet per annum from O'Brien Creek, a tributary of the Bitterroot River, in Missoula, County, Montana, to be diverted from O'Brien Creek at a point in the SW1/4 NW1/4 SE1/4 of Section 29, Township 13 North, Range 20 West, and used for

**CASE # 6701**

irrigation on a total of 4 acres, more or less in said Section 29, from June 1 to August 30, 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 Objectors James D. and Coy L. Waltermire have an apparent prior water right to irrigate at least 17.1 acres of land located in the SW1/4 of Section 28, Township 13 North, Range 20 West, either under the 1905 decree granting S. V. Kenton 50 miners inches of water of O'Brien Creek with an 1884 priority date or under the Application for Beneficial Water Use Permit No. 4636-s76H with a January 20, 1975 priority date.

4. There are years (1975) that there are unappropriated waters 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.

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. There are at times unappropriated waters in the source of supply available for appropriation by the Applicant for the purposes herein requested.

3. Pursuant to 89-886(1), R.C.M. 1947, filed water rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.

4. The Objectors, the Estate of W. C. Maclay and James D. and Coy L. Waltermire have apparent prior water rights to the waters of O'Brien Creek as discussed in the Findings of Fact.

5. The proposed means of diversion are adequate.

6. The issuing of a Provisional Permit, in no way reduces the Applicant's 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 Applicant's exercise of its Provisional Permit.

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

8. The proposed use will not interfere unreasonably with other prior uses or developments, for which a permit has been issued or for which water has been reserved.

9. 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.

10. 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 having bearing upon the status of claimed rights of any other party except in relation to those rights 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 conditions cited below, Mr. Thomas G. Greenwood's Provisional Permit No. 6701-s76H is hereby granted allowing the appropriation of 0.02 cubic feet per second, equivalent to ten gallons per minute of water, not to exceed 10 acre-feet per annum from O'Brien Creek, a tributary of the Bitterroot River in Missoula County, Montana, to be

**CASE # 6701**

diverted from O'Brien Creek at a point in the SW1/4 NW1/4 SE1/4 of Section 29, Township 13 North, Range 20 West, and used for irrigation on a total of 4 acres, more or less, in said Section 29 from June 1 to August 30, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply.

3. The issuing of the 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.

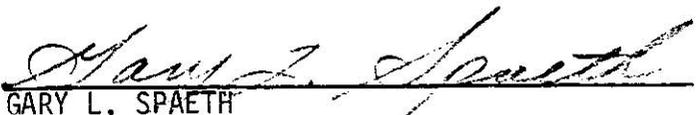
4. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana Law.

#### 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 provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

Dated this 16<sup>th</sup> day of September, 1976.

  
GARY L. SPAETH  
HEARING EXAMINER

**CASE # 6701**