

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO. 6894-s76K BY HENRY C. OTTEN }
F I L E M } FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on January 26, 1977, 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, the Applicant's Provisional Permit No. 6894-s76K is hereby granted allowing for the appropriation of 0.05 cubic foot per second or 25 gallons per minute of water, not to exceed 5 acre-feet per year from Echo Lake, in Flathead County, Montana, to be diverted from Echo Lake at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, Township 27 North, Range 19 West, M.P.M., and used for irrigation on a total of 10 acres, more or less, in said Section 9 from June 1 to September 15, 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 land 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 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. This Provisional Permit is granted with the provision that the Applicant will not withdraw any waters from Echo Lake at any time when the water level of

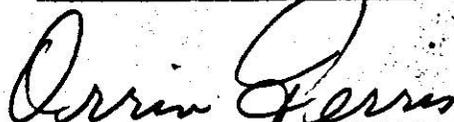
CASE # 6894

Echo Lake is at or below the 3-foot mark below the concrete floor of the remains of the Powell Cabin, or at a level at or below the 1.2-foot reading on the Fish and Game staff gage located at the bridge on the causeway of the northeast corner of Echo Lake.

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 and protection.

Done this 24th day of March, 1977.


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 # 6894

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 6894-s76K BY HENRY C. OTTEN)

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 Community Room of the First National Bank of Kalispell, Montana, on Monday, June 14, 1976, Gary L. Spaeth, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

Mr. Henry Otten, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. Dr. W. A. Blood, a Geology Professor at Flathead Valley Community College, appeared and gave expert testimony on behalf of the Application.

A second hearing was held on July 28, 1976 in the Community Room of the First National Bank Building, Kalispell, Montana for further evidence and testimony in the above application. This hearing was held as a result of the Hearing Examiner's request to the Echo Lake Area Improvement Association, an objector, to discuss this matter at their June 26, 1976 meeting with their members and recommendations and submit further testimony and evidence.

There were 45 objections duly filed against the application with the Department. The names of the objectors, all of whom are cabin owners or renters on Echo Lake, are listed and attached hereto as Exhibit A and incorporated herein. The first objectors name on the list, Mr. Chester M. Mahugh, President, Echo Lake Area Improvement Association, filed an objection with the Department and represents over 100 Echo Lake residents and were represented at the hearing by their President, Mr. Chester M. Mahugh and Mr. Cecil Ahelby. Many objectors

CASE #10894

appeared at both hearings, but none were represented by counsel. In addition to the objectors of record, there were others with land in the Echo Lake area that also appeared at the hearings and their testimony was duly received.

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

It was hoped by the Hearing Examiner that additional data and a further study could have been made of the Echo Lake area before this order was issued. While I feel there is sufficient information and evidence presented in the record to make a decision at this time, more information may have been helpful before reaching a conclusion. Also such data might have been able to point to a better measuring system for Echo Lake than that which already exists. I feel that this is probably the most critical consideration in reaching a conclusion, but in examining the evidence and data, I feel that there are no problems in issuing this order and that if a different measuring gauge is installed at a future date, that this order can be correspondingly changed to use the measuring gauge in determining levels of the lake.

The complete record in the matter of the Application for Beneficial Use Permit No. 206-s76K by Joe E. and Lois M. Brann was entered and incorporated into the hearing record of this Application. As a result, the Hearing Examiner examined the objections and all the proposals that were submitted in that particular application and also the Proposed Findings of Fact, Conclusions of Law and Order as entered by Mr. Ted J. Doney, Hearing Examiner dated October 18, 1974. The application presented by Joe E. and Lois M. Brann was later withdrawn by the Applicants.

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.

CASE # 6894

PROPOSED FINDINGS OF FACT

1. On November 17, 1975 the Department received an Application for Beneficial Water Use Permit, No. 6894-s76K. The Application is for an appropriation of 0.05 cubic feet per second or 25 gallons per minute of water, not to exceed 5 acre-feet per year from Echo Lake, in Flathead County, Montana, to be diverted from Echo Lake at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, Township 27 North, Range 19 West, Montana Principal Meridian, and used for irrigation on a total of 10 acres, more or less, in said Section 9, from June 1 to September 15, inclusive, of each year.

2. Echo Lake is a "pothole" lake that is mainly fed by underground sources of water and it has no surface outlet. Over the years, the average level of the Lake has fluctuated greatly; in the last few years the level has been higher than average. The lake also has an average annual rise and fall of 4 $\frac{1}{2}$ feet. It rises to its maximum elevation in July or August and falls to its minimum level in April or May. The lake reached its maximum recorded level in 1974, inundating several boat houses, cabin floors, docks, and other riparian man-made structures.

3. Echo Lake is and for many years has been used extensively by local residents and the general public for recreational purposes, including boating, fishing, and water skiing. There are over 115 cabins built around the lake shore and the residents of these cabin sites also utilize lake waters for domestic purposes. Moreover, many cabin owners have domestic wells near the lakes which depend upon the lake level to maintain an adequate groundwater withdrawal. The objectors essentially contend that the Applicant's withdrawal of water from Echo Lake may lower the lake level, thereby adversely affecting existing domestic and recreational uses, and further that any withdrawals below 1 $\frac{1}{2}$ feet from the Powell Cabin could create a hazard for boating and

CASE # 6894

water skiing on the lake by creating islands and other obstructions which would be a hazard for boat travel on the lake.

4. Records of the lake level have been obtained by a one, Mr. Powell, an Engineer, and by the Echo Lake Area Improvement Association. Mr. Powell owned a cabin which has been removed or dismantled; however, the concrete slab floor remains. The floor line has been used as a datum point in recording lake levels. The Department of Fish and Game currently maintains a staff gauge at the bridge on the causeway at the NE corner of the lake.

5. The Department of Fish and Game recommended in the Joe E. and Lois Brann application hearing that irrigation not be allowed to lower the level of Echo Lake below a point which is 3 feet below the level of the Powell Cabin floor or 1.2 feet on the staff gauge currently maintained by the Department of Fish and Game.

6. From the Exhibits in both the Brann and Otten hearings, it appears that the problem in Echo Lake is not a low water problem but rather a high water problem at the present time. Proposals have even been made to drain the high waters out of the lake into Mud Creek and the Swan River. The water level has risen to a point that has killed out several large trees which have been standing near the shores of Echo Lake for 150 years or more.

Based on the above Proposed Findings of Fact, the Hearing Examiner hereby makes the following Proposed Conclusions of Law:

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 6894-s76K 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 the prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.

CASE # 6894

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 upon the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have any 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 on the above Proposed Findings of Fact, 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. 6894-s76K is hereby granted allowing for the appropriation of 0.05 cubic feet per second or 25 gallons per minute of water, not to exceed 5 acre-feet per year from Echo Lake, in Flathead County, Montana, to be diverted from Echo Lake at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, Township 27 North, Range 19 West, Montana Principal Meridian, and used for irrigation on a total of 10 acres, more or less, in said Section 9 from June 1 to September 15, 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 land owned by the objectors herein.

CASE # 6894

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 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. This Provisional Permit is granted with the provision that the Applicant will not withdraw any waters from Echo Lake at any time when the water level of Echo Lake is at or below the 3 foot mark below the Powell Cabin, or at a level at or below the 1.2 foot reading on the Fish and Game staff gauge located at the bridge on the causeway of the northeast corner of Echo Lake.

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 26th day of January, 1977.


GARY L. SPAETH
HEARING EXAMINER

CASE # 6894

EXHIBIT A

OBJECTORS TO APPLICATION NO. 6894-s76K

Mr. Chester M. Mahugh, Kalispell, Montana 59901
Mr. and Mrs. Robert G. Cole, Vancouver, WA 98665
Mr. Orlyn D. Knutson, Kalispell, Montana 59901
Messrs. Don Severtson, Eugene Marble, and Onno Wieringa, Conrad, MT
Mr. Milfred C. Strand, Bigfork, MT 59911
Mr. and Mrs. Leo E. Renfrow, Columbia Falls, MT
Mr. and Mrs. Donald Trankle, Kalispell, MT
Mr. and Mrs. Karl C. Johnson, Kennewick, WA
Mr. and Mrs. Edward L. Marks, Kalispell, MT
Mr. M. G. Haugen, Lakeside, MT
Mr. and Mrs. Billie D. Mende, Kalispell, MT
Mr. George M. Robertson, Vancouver, WA
Mr. Peter A. Carson, Bigfork, MT
Mr. and Mrs. Robert J. Owens, Kalispell, MT
Mr. and Mrs. Floyd McElroy, Bigfork, MT
Mr. Robert Snow, Missoula, MT
Mr. Steven W. Schwartz, Kalispell, MT
Mr. and Mrs. William N. Chilton, Kalispell, MT
Mrs. Helen Grilley, Bigfork, MT
Mr. W. Ralph Popelka, Acton, MT
Mr. and Mrs. Bill C. Roper, Cut Bank, MT
Mr. Franklyn A. Lenon, Kalispell, MT
Mr. Gordon T. Pirrie, Kalispell, MT
Mr. Larry O. Lee, Kalispell, MT
Mr. and Mrs. Charles E. Branson, Bigfork, MT
Mr. Wayne Moothart, Kalispell, MT
Mr. and Mrs. Marion McClurg, Bigfork, MT
Mrs. Arnt Olson, Columbia Falls, MT
Mr. and Mrs. Roman J. Losleben, Malta, MT
Mr. and Mrs. Louis Crohn, Bigfork, MT
Mr. Floyd Christopher, Kalispell, MT
Mr. and Mrs. Wilbur E. Purdy, Missoula, MT
Mr. and Mrs. A.J. Fopp, Kalispell, MT
Dr. and Mrs. John Heine, Kalispell, MT
Ms. Marjorie Peoples, Cut Bank, MT
Mr. Fred O. Broeder, Jr., Kalispell, MT
Mr. and Mrs. Lawrence Roedel, Bigfork, MT
Mr. and Mrs. Leslie G. Mastolier, Susanville, CA
Mr. and Mrs. Chet Mahugh, Kalispell, MT
Mr. John H. Dalby, Bigfork, MT
Mr. Bud Johnson, Kalispell, MT
Mr. Richard K. Radabalt, Kalispell, MT
Ms. Nina D. Fletcher, Bigfork, MT
Mr. F. Jack Triepke, Kalispell, MT
Mr. Roger E. Weller, Kalispell, MT

CASE # 6894