

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 8291-s76LJ BY TIMOTHY ANDERSON

**FILMED**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APR 19 1977

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on June 9, 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 is hereby granted allowing the appropriation of no more than 0.05 cubic foot of water per second or 25 gallons of water per minute, not to exceed 1 acre-foot of water per annum for domestic and animal-watering purposes and 0.5 acre-foot of water per annum for irrigation, for a total of 1.5 acre-feet of water per annum from Truman Creek, a tributary of Ashley Creek, in Flathead County, Montana, to be diverted from Truman Creek at a point in the S $\frac{1}{2}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, Township 27 North, Range 22 West, M.P.M.; to be used for new irrigation on a total of 0.5 acre, more or less, in said Section 34, from April 15 to September 30, inclusive, of each year, and for domestic and animal-watering purposes from January 1 to December 31, inclusive, of each year.

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including, but not necessarily limited to, all valid prior existing rights in the source of supply of those objecting herein.

3. The Applicant may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water right in the source of supply.

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4. The Applicant shall install and maintain an adequate measuring device so as to enable the Applicant to keep a record of all quantities of water diverted as well as the periods of diversion. Such record shall be presented to the Department for inspection upon demand by the Department.

5. The granting of a Provisional Permit in no way grants the Applicant any right to violate the property or other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

6. The 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.

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 log of records of water used for their own proof of their water rights and protection.

Done this 12<sup>th</sup> day of July, 1977.

  
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Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE # 8291**

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. )  
8291-s76LJ BY TIMOTHY ANDERSON )      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 for a new water right was held in the City Council Chambers of the Kalispell City Hall on Wednesday, March 30, 1977, commencing at approximately 9:00 a.m., Richard Gordon, Legal Counsel for the Department, and appointed Hearing Examiner herein, presiding.

The Applicant, Mr. Timothy Anderson, appeared personally and presented testimony in support of his Application.

Ms. Leona Stoller appeared personally on behalf of the Objector, Mr. John A. Stoller.

Mr. Charles Larkey, Manager of J. S. B. Limited, appeared personally and presented testimony in support of the J. S. B. objection.

Mr. Clifford M. Jore appeared personally and presented testimony in support of his objection.

Mr. Edmond Walter appeared personally and presented testimony in support of the M. Walter and Company, Inc.

objection. The M. Walter and Company was represented by counsel, John Gordon, Esq., Kalispell, Montana.

Mr. Ray Managhan appeared personally and presented testimony in support of his objection.

Mr. and Mrs. Russell Lukenbill appeared personally and presented testimony in support of their objection.

Mr. and Mrs. Willis March appeared personally and presented testimony in support of their objection.

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

Neither Mr. nor Mrs. John R. Murphy, Mr. Melvin Freeman, Mr. nor Mrs. Norman Feller, Mr. Charles E. Weir, nor Mr. Thomas E. Kliegl, all Objectors herein, appeared personally, through representatives or through counsel.

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 May 13, 1976 the Department received Application for Beneficial Water Use Permit No. 8291-s76LJ by Timonthy Anderson seeking to appropriate 0.05 cubic feet of water per second or 25 gallons of water per minute, not to exceed 3 acre-feet of water per annum for domestic purposes, 0.5 acre feet of water per annum for recreational and stock watering

purposes, and 1 acre-foot of water per annum for irrigation, for a total of 4.5 acre-feet of water per annum from Truman Creek, a tributary of Ashley Creek in Flathead County, Montana, to be impounded in a new 0.5 acre-foot reservoir on Truman Creek, at a point in the S1/2 SE1/4 NW1/4 SW1/4 of Section 34, Township 27 North, Range 22 West, of the Montana Principal Meridian, and used for new irrigation on a total of 0.5 acre, more or less, in said Section 34, from April 15 to September 30, inclusive, of each year, and for domestic, recreational, and stock watering purposes from January 1 to December 31, inclusive, of each year.

2. On September 22, 1976 the Department received an objection to the above-described Application from Ray Managhan alleging that there is presently "hardly enough" water flowing in the source of supply to satisfy existing uses.

3. On September 24, 1976 the Department received an objection to the above-described Application from Thomas E. Kliegl alleging a prior 1970 use right to drinking water from the source of supply which would allegedly be adversely affected by the issuance of the requested permit.

4. On September 29, 1976 the Department received an objection to the above-described Application from Russell and Martha Lukenbill, alleging a prior 1970 use right to domestic, garden and stock water (for 10 dairy goats, 50 rabbits, 20 chickens, 4 dogs) from the source of supply

which would allegedly be adversely affected by the issuance of the requested permit.

5. On October 14, 1976 the Department received an objection to the above-described Application from John A. Stoller alleging a prior 1974 right to domestic, stock (10-15 head) and garden water from the source of supply which would allegedly be adversely affected by the issuance of the requested permit.

6. On October 21, 1976 the Department received an objection to the above-described Application from Charles E. Weir alleging that the value of his neighboring land may be adversely affected by the construction of the requested reservoir, and further alleging that the requested diversion represents "an unwelcome precedent".

7. On October 5, 1976 the Department received an objection to the above-described Application from Willis and Teresa March alleging a prior 1923 water right which would allegedly be adversely affected by the issuance of the requested permit. The Objectors' right is allegedly for 10 cubic feet of water per second or 400 miners inches, used for domestic, livestock and irrigation (as stream supply permits) on a 516 acre ranch, all but a 16 acre homesite of which is under a contract for sale to Clifford M. and Sandra K. Jore, also objectors herein.

8. On October 8, 1976 the Department received an objection to the above-described Application from Mr. and Mrs. John R. Murphy alleging a water right of undescribed priority date, use, or quantity.

9. On October 8, 1976 the Department received an objection to the above-described Application from Melvin Freeman alleging that there is "not enough water in the creek."

10. On October 12, 1976 the Department received an objection to the above-described Application from Mr. Charles Larkey, Manager of J. S. B. Limited, alleging a prior 1937 filed water right to 2.5 cubic feet of water per second diverted from the source of supply and used on 90 acres of irrigated land from May 1 through September 30, inclusive, of each year; and further used year round for the watering of 450 pairs of cows and calves. The Objector alleged insufficient flow in the source of supply to satisfy existing uses.

11. On October 14, 1976 the Department received an objection to the above-described Application from Norman and Agnes Feller, alleging a possible flooding, debris and pollution problem if the proposed reservoir is constructed.

12. On October 18, 1976 the Department received an objection to the above-described Application from M. Walter and Company, Inc., objecting to a pond or reservoir restricting the flow of the creek, and alleging a 1964 priority

water right to water from the source of supply for the watering of from six to twenty head of livestock used from April through October of each year.

13. On October 18, 1976 the Department received an objection to the above-described Application from Clifford M. Jore and Sandra K. Jore alleging a 1923 priority water right to water from the source of supply as outlined in the March objection (paragraph #7 above), and further alleging insufficient unappropriated water in the source of supply to fill the requested reservoir.

14. At the hearing, the Applicant requested that his Application be modified so as to only seek to appropriate 0.05 cubic feet of water per second or 25 gallons of water per minute not to exceed 1 acre foot of water per annum for domestic and animal watering purposes, and 0.5 acre feet of water per annum for irrigation purposes, for a total of 1.5 acre feet of water per annum from Truman Creek, a tributary of Ashley Creek in Flathead County, Montana; to be diverted from Truman Creek at a point in the S1/2 SE1/4 NW1/4 SW1/4 of Section 34, Township 27 North, Range 22 West, of the Montana Principal Meridian; to be used for new irrigation on a total of 0.5 acre, more or less, in said Section 34, from April 15 to September 30, inclusive, of each year, and for domestic and animal watering purposes from January 1 to December 31, inclusive, of each year. This modification represents a decrease in a total requested annual appropriation and a dropping of the requested reservoir.

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15. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant intends to pump the requested irrigation water from the creek by means of a 1/3 horse power electric pump with a 3 inch pipe. The water will be used for the sprinkler irrigation of a small garden located approximately 100 feet from the point of diversion.

16. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant proposes no change in either the stream bed or channel.

17. For purposes herein, based upon testimony given at the hearing, it is found that 1 acre foot of water per annum is adequate to supply the domestic needs of a family of five, that 2.5 acre of water per acre per year is recommended for irrigation in the area in question, and that the amount of water requested to be appropriated annually herein is not excessive.

18. For purposes herein, based upon testimony given at the hearing, it is found that the Truman Creek drainage annually produces an average of 1,900 acre feet of water.

19. For purposes herein, based upon testimony given at the hearing, it is found that there is unappropriated water in the source of supply only at such times when there is water flowing in the creek in excess of all prior water rights in the source of supply, and when the withdrawal of water by the Applicant will not adversely affect any such prior existing water rights in the source of supply.

20. For purposes herein, based upon testimony given at the hearing, it is found that if any Provisional Permit granted herein is conditioned to allow the appropriation of water only at such times when there is unappropriated water available in the source of supply, the rights of prior appropriators will not be adversely affected.

21. For purposes herein, based upon testimony given at the hearing, it is found that each of the objectors herein alleging a pre-July 1, 1973 priority water right appears to possess a valid water right in an amount not to exceed the amount appropriated to a beneficial use.

22. For purposes herein, based upon testimony given at the hearing, it is found that the proposed means of diversion are adequate.

23. For purposes herein, based upon testimony given at the hearing, it is found that the proposed use of water constitutes a beneficial use.

24. For purposes herein, based upon testimony given at the hearing, it is found that 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.

25. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant does not propose to appropriate in excess of 15 cubic feet of water per second.

Based upon the Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to 89-880, R.C.M. 1947 a Beneficial Water Use Provisional Permit is required to appropriate the waters sought to be appropriated by the Applicant herein.

2. If granted, the Provisional Permit No. 8291-s76LJ must be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

3. Based upon the above Proposed Findings of Fact and any conditions and limitations appearing therein, it is concluded that the criteria for the issuance of a Provisional Permit as delineated at 89-885, R.C.M. 1947 have been met.

4. 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 Provisional Permit. It is concluded that the rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

5. It is concluded that the issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit.

6. It is concluded that nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything decided herein have bearing on the status of

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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 is hereby granted allowing the appropriation of no more than 0.05 cubic feet of water per second or 25 gallons of water per minute, not to exceed 1 acre foot of water per annum for domestic and animal watering purposes and 0.5 acre feet of water per annum for irrigation, for a total of 1.5 acre feet of water per annum from Truman Creek, a tributary of Ashley Creek, in Flathead County, Montana; to be diverted from Truman Creek at a point in the S1/2 SE1/4 NW1/4 SW1/4 of Section 34, Township 27 North, Range 22 West, of the Montana Principal Meridian; to be used for new irrigation on a total of 0.5 acre, more or less, in said Section 34, from April 15 to September 30, inclusive, of each year, and for domestic and animal watering purposes from January 1 to December 31, inclusive, of each year.

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including but not necessarily limited to all valid prior existing rights in the source of supply of those objecting herein.

3. The Applicant may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water right in the source of supply.

4. The Applicant shall install and maintain an adequate measuring device so as to enable the Applicant to keep a record of all quantities of water diverted as well as the periods of diversion. Such record shall be presented to the Department for inspection upon demand by the Department.

5. The granting of a Provisional Permit in no way grants the Applicant any right to violate the property or other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

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

NOTICE

This is a Proposal for Decision and will not be final until accepted by the Administrator of the Water Resources Division, Department of Natural Resources and Conservation. Written exceptions to the Proposal, if any, should be filed with the Department within ten (10) days of service herein. Upon receipt of any written exception, opportunity will be provided to the exceptor and all adversely affected parties

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

DATED this 9<sup>th</sup> day of JUN, 1977.

*Richard Gordon*

RICHARD GORDON  
HEARING EXAMINER