STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 10,298-s76LJ BY THOMAS RUSSELL PRENTICE	))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 25, 1977 by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law and the Final Order.

FINAL ORDER

1. The Application of Thomas Russell Prentice for Beneficial Water Use Permit No. 10,298-s76LJ is hereby granted to appropriate 0.01 cubic feet per second of water or 5 gallons of water per minute, not to exceed 0.75 acre-feet per annum from Walker (First) Creek, a tributary of the Whitefish River, in Flathead County, Montana, to be diverted from Walker (First) Creek by means of a dry well with a gravity flow system at a point in the NE¼ SE¼ NW¼ of Section 22, Township 31 North, Range 21 West, M.P.M., and used for domestic purposes from January 1, to December 31, inclusive, of each year.

2. The above permit is provisional and is granted subject to all prior water rights in the source of supply and 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.

CASE # 10298

Done this 20th day of December, 1977.

Irvin Terrell

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 10298

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT)
NO. [redacted] BY ROBERT C. LOVE) PROPOSAL FOR DECISION
and ALLAN LEVERSON and NO. 10,298-)
s76LJ BY THOMAS RUSSELL PRENTICE)

Pursuant to the Montana Water Use and Administrative Procedures Act, after due notice, a hearing was held August 9, 1977 at Kalispell, Montana, for the purpose of hearing objections to the above-named applications, William F. Throm, Hearing Examiner, presiding.

The Applicants, Robert C. Love, Allan Leverson and Thomas Russell Prentice appeared at the hearing to present testimony in support of their applications. None were represented by legal counsel nor did they introduce into evidence any exhibits in support of their applications. Mr. Larry Fonner, the former landowner, appeared as an interested witness on behalf of the applicants.

Objectors who appeared at the hearing were: Mrs. John Garlitz, Mr. & Mrs. David J. Doyle, Mr. & Mrs. Jacob Voermans, Mr. & Mrs. Dwayne Becker, Mr. Edgar Nelson, Mr. Russell Warner and LeRoy Nelson. No Objector was represented by legal counsel and no Objector introduced exhibits in support of their objections.

Mr. Jim Rehbein, Kalispell Field Office Manager for the Water Rights Bureau attended to represent the Department of Natural Resources and Conservation.

CASE # [redacted]

PROPOSED FINDINGS OF FACT

1. On July 21, 1976, the Department received from Robert C. Love and Allan Leverson, Application for Beneficial Water Use Permit No. 8989-s76LJ to appropriate 0.04 cubic feet per second or 20 gallons of water per minute and not to exceed 3 acre-feet per annum from Walker (First) Creek, a tributary of the Whitefish River, in Flathead County, Montana, to be diverted from Walker (First) Creek by means of a sand point at a point in Tract 4, located in the SE1/4 NW1/4 NE1/4 SW1/4 of Section 22, Township 31 North, Range 21 West, M.P.M., and used for domestic purposes from January 1 to December 31, inclusive, of each year.

2. On September 24, 1976, the Department received from Thomas Russell Prentice Application No. 10,298-s76LJ to appropriate 0.02 cubic feet per second or 10 gallons of water per minute and not to exceed 1.5 acre-feet per annum from Walker (First) Creek, a tributary of the Whitefish River, Flathead County, Montana, to be diverted from Walker (First) Creek by means of a dry well with a gravity-flow system at a point in the NE1/4 SE1/4 NW1/4 of Section 22, Township 31 North, Range 21 West, M.P.M., and used for domestic purposes from January 1 to December 31, inclusive, of each year.

3. On October 28 and November 4 and 11, 1976, the Department caused to be duly published in the Whitefish Pilot, Whitefish, Montana, Notice of Application No. 8989-s76LJ and on February 24 and March 3 and 10, 1977, the Department caused to be duly

CASE # [redacted]

published in the same newspaper, Notice of Application No. 10, 298-s76LJ.

4. The Department received timely objections to the above Application No. 8989-s76LJ as follows:

October 28, 1976 from Davis J. and Edna M. Doyle

October 28, 1976 from Jacob and Alice Voermans

November 8, 1976 from Dwayne and Marlene Becker

November 18, 1976 from John H. and Phyllis M. Garlitz

November 29, 1976 from Edgar Nelson

December 6, 1976 from David R. Hazen and to Application No. 10,298-s76LJ as follows:

March 9, 1977 from Jacob Voermans

March 16, 1977 from Dwayne and Marlene Becker

April 1, 1977 from John H. and Phyllis M. Garlitz

April 7, 1977 from Edgar and Amelia O. Nelson

5. The Applicants testified that they have not been able to reasonably obtain satisfactory domestic water supplies from ground water sources in the area even though serious attempts were made involving considerable personal expenses. They testified that unappropriated waters are available from Walker Creek, the source of supply, and that the means of diversion is adequate. The Applicants further testified that the previous owner of their tracts, Larry Fonner, had used Walker Creek for livestock watering purposes and that the present owners will not use it for that purpose which will make previously appropriated water available for their domestic use as well as for the use of other appropriators. The Applicants testified that they would be willing to accept a permit for a lesser quantity

CASE # [redacted]

of water than requested if necessary. Mr. Fonner testified that from the time the land was homesteaded, anywhere from 40 to 30 head of cattle were watered on the property, and that he had filed on 6.28 cubic feet per second of Walker Creek water prior to July 1, 1973.

6. The Objectors testified that during dry years Walker Creek is already in short supply with insufficient water to provide present requirements; that in 1973 and other dry years Walker Creek completely dried up, and that no additional permits should be granted. The Objectors stated that they have established prior rights for domestic purposes and livestock watering. The Objectors expressed a concern as to how much further subdivision would take place if this permit were granted. They raised considerable objections to the Applicants progressing with home construction without first ascertaining the availability of potable ground water supplies for domestic uses.

7. Jim Rehbein testified that Walker Creek water supply does become very limited during July and August but is usually restored in September as depletions from various uses are reduced. He testified further that the annual supply would be more than adequate to satisfy all uses if some sort of community storage facility were provided through a cooperative effort on the part of the users.

PROPOSED CONCLUSIONS OF LAW

1. The Objectors to this Application have apparent prior appropriation water rights from Walker Creek, the pro-

posed source of supply.

2. The Applicants, as successors in interest, have apparent filed appropriation rights from Walker Creek which was made by Larry Fonner on June 29, 1973 for 6.28 cubic feet per second and to be used for irrigation, domestic, livestock watering and recreation purposes. A copy of said filing is on microfilm record with the Water Rights Bureau in Helena, as taken from Book 556, Page 96 of the Flathead County Clerk & Recorder's records.

3. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the proposed source of supply.

4. There are unappropriated waters in the proposed source of supply, however, said unappropriated waters are not available every year and when they are available, they are not always available throughout the period during which the Applicants seek to appropriate and in the amount requested. The permits should therefore be conditioned to protect all parties, including the Applicants, from overdeveloping the remaining supplies by granting only a marginal supply to each household involved in these applications. Such amount granted by these permits should be inclusive of, not additional to, any existing rights which may be determined at a later date to have passed with the property.

5. The rights of prior appropriators will be protected if the permits are conditioned to protect those rights.

6. The proposed means of diversion are adequate.

CASE # [redacted]

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

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

9. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, has been met.

PROPOSED ORDER

1. The Application of Robert C. Love and Allan Leverson for Beneficial Water Use Permit No. 8989-s76LJ is granted to appropriate 0.02 cubic feet of water per second or 10 gallons of water per minute, not to exceed 1.5 acre-feet per annum from Walker (First) Creek, a tributary of the Whitefish River, in Flathead County, Montana, to be diverted from Walker (First) Creek by means of a sandpoint at a point in Tract 4, located in the SE1/4 NW1/4 NE1/4 SW1/4 of Section 22, Township 31 North, Range 21 West, M.P.M., and used for domestic purposes from January 1 to December 31, inclusive, of each year.

2. The Application of Thomas Russell Prentice for a Beneficial Water Use Permit No. 10,298-s76LJ is granted to appropriate 0.01 cubic feet per second of water or 5 gallons of water per minute, not to exceed 0.75 acre-feet per annum from Walker (First) Creek, a tributary of the Whitefish River, Flathead County, Montana, to be diverted from Walker (First) Creek by means of a dry well with a gravity flow system at a point in the NE1/4 SE1/4 NW1/4 of Section 22, Township 31 North, Range 21 West, M.P.M., and used for domestic purposes from January 1 to December 31, inclusive, of each year.

CASE # [redacted]

3. The above permits are provisional and are granted subject to all prior water rights in the source of supply and 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 provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 25th day of October, 1977.

WILLIAM F. THROM
HEARING EXAMINER

CASE # [redacted]