

as provided by Montana Law.

3. The Provisional Permit is further conditioned as follows:

- a. The permit is for the appropriation of flood waters only and the Permittee shall make provision in the diversion structure to by-pass or release all water required for the beneficial use of prior appropriators and shall cooperate with prior appropriators by by-passing or releasing said waters as needed and requested by prior appropriators or upon order of the Department.
- b. The Permittee shall install and maintain a flow meter at the point of delivery to the place of use of the water granted by this permit and shall keep records of the period of use, rate of flow and volume of water appropriated under this permit, and shall submit such records to the Department upon request.
- c. The Permittee shall submit plans and specifications for this project to the Department for review and approval prior to the start of construction, within 180 days after receipt of the Provisional Permit. This time period may be extended upon timely written request for an extension of time to the Department.

4. 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.

5. The issuing of a 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, 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.

6. The above conditions to the granting of this Provisional Permit shall hold in 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.

Inasmuch as the testimony of the Permittee and the Objectors revealed that there are frequent periods of inadequate water supplies to satisfy all prior water rights, and inasmuch as the Permittee will not have a full irrigation supply for the acreage to be irrigated by the permit, the economic feasibility of such a project is very doubtful. It is, therefore, recommended that the Permittee consult a qualified engineer or a governmental agency for an economic evaluation of the proposed project prior to any further financial involvement.

It is further recommended that, since the Permittee will be diverting from the same point of diversion and using the same pump and a portion of the same delivery system to appropriate waters from this source of supply, for which he claims a prior existing right, that in order to avoid controversy or conflict, he install an additional flow meter at the pump and maintain a detailed record of all periods, rates of flow and volumes pumped showing the place of use for all water appropriated from this point of diversion.

Done this 12th day of June, 1978.

Erin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 10307

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE) PROPOSAL FOR DECISION
PERMIT NO. 10,307-s76L)
BY MORLAND AND DORLA NEIMAN)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on November 2, 1977, at Plains, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 10,307-s76L, William F. Throm, Hearing Examiner, presiding.

The Applicant, Morland Neiman, appeared at the hearing and presented testimony in support of the application. Mr. Neiman was not represented by legal counsel. Four exhibits were introduced supporting the application, to wit: Exhibit No. 1, a copy of an aerial photo map of Sections 21 and 22, T. 20 N., R. 24 W. covering the project area; Exhibit No. 2, a copy of a page from Sanders County listing of water rights; Exhibit No. 3, a copy of a page from Sanders County listing of water rights on the Clark Fork of the Columbia River Basin; and Exhibit No. 4, a copy of a Notice of Appropriation by Charles Morland Neiman and Dorla Bee Neiman. The Applicant's exhibits were marked accordingly and received into the record without objections, however, the legal counsel for the Objectors accepted Exhibits 2 and 3 with reservation as to their authenticity. No others appeared at the hearing to testify in support of the application.

Seven Objectors attended the hearing and presented testimony. The Objectors were represented by legal counsel, Mr. Douglas J. Wold, Attorney at Law. The Objectors introduced two exhibits supporting their objection to wit: Exhibit "A" and Exhibit "B", copies of aerial photo maps of

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Objectors' property. The Objectors' exhibits were marked accordingly and received into the record without objections. Objectors present were Mr. James P. Pelley, Mr. Howard S. Webber, Mr. John Malinak, Mr. Delbert Muster, Mr. Howard Webber, Jr., Ms. Mable Webber, and Mr. Lester Webber.

Montana Department of Natural Resources and Conservation personnel present and testifying on behalf of the Department were Mr. Jim Rehbein, Water Rights Bureau Field Office Manager, Kalispell Montana. The Department was not represented by legal counsel. Three exhibits were introduced by the Department to wit: Exhibit No. I, a copy of a page from the Mineral-Sanders County Water Resources Survey showing irrigation use in T. 20 N., R. 24 W; Exhibit No. II, a copy of an aerial photo map showing the point of diversion and project area in Section 21, T. 20 N., R. 24 W; and Exhibit No. III, a series of 9 photos of the project and surrounding area. The Department exhibits were marked accordingly and received into record without objections.

PROPOSED FINDINGS OF FACT

1. On October 29, 1976, the Department received an Application for Beneficial Water Use Permit No. 10,307-s76L by Morland and Dorla Neiman to appropriate 2.42 cubic feet per second or 1,089 gpm of water, not to exceed 183 acre-feet per annum from Camas Creek, a tributary of the Flathead River, in Sanders County, Montana, to be diverted from Camas Creek by means of a pump at points in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ and the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T. 20 N., R. 24 W., M.P.M., and used for new irrigation on a total of 170 acres, more or less, in said Section 21 from April 1 to June 10, inclusive, of each year.

2. On February 17, 24, and March 3, 1977, the Department caused to be duly published in the Plainsman, Plains, Montana, notice of the above Application for Beneficial Water Use Permit No. 10,307-s76L.

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3. The Department received objections to the above application as follows:

February 18, 1977 from Richard Anthony Baenen, general counsel,
Confederated Salish and Kootenai Tribes

March 2, 1977 from E.L. Meredith, Office of the Solicitor, U.S.
Department of the Interior

March 15, 1977 from Webber Ranch, Inc. and Lester Webber

March 15, 1977 from James P. Pelley

March 15, 1977 from Howard S. Webber, Jr. and Alice A. Webber

March 29, 1977 from John Malinak

April 4, 1977 from Delbert Muster

4. Mr. Morland Neiman testified that the water for which he is applying is primarily floodwater from Camas Creek and that in a normal year there is a considerable quantity available which is not used. He stated that he intends to pump from a concrete check dam which will have wood plank stop gates which will raise the water level about 5½ feet. From the point of diversion he will pipe the water for sprinkler irrigation to 90 acres of new irrigation in the NW¼ Section 21 and will sprinkle irrigate 80 acres of old irrigated lands in the NE¼ of Section 21 for which he has prior water rights from the source of supply. He stated that he would like to irrigate at least once, and perhaps twice, during the period of April 1 to June 10 when unappropriated flood waters are available. Mr. Neiman conceded that there are years like last year when there is no flow in the creek. He could not testify as to how often water is available to meet all needs, nor how many days it would be available to satisfy his needs in a normal year, however, he stated that he didn't believe prior appropriators would be adversely affected by the granting of his permit.

5. The Objectors, Howard Webber, Sr., Lester Webber, Howard Webber, Jr. and James P. Pelley, all testified that granting of the permit would unreasonably adversely affect their prior rights by depleting the stream flow

during this period to the extent that they would no longer have sufficient flood flows to operate their water spreading systems which they depend upon for irrigation of hay meadows, which supports their livestock operations.

6. Mr. Howard Webber, Sr. testified that he has a water right for 100 miners inches established in 1955 on Camas Creek and a water right for 40 miners inches established in 1956 which he uses to irrigate 240 acres of pasture from April through June when the water is available. He testified that an excess of water is available for a very short period of time, usually later March and early April.

7. Mr. Lester Webber testified that he has a prior right for irrigation of 80 acres of hay and that he has farmed for the last 20 years on Camas Creek and in only two years of that time has there been a surplus of water, and that some years there is no water.

8. Mr. Howard Webber, Jr. testified that he has farmed on Camas Creek since 1964 and uses the water mostly for stock water and 85 acres of pasture. In addition, he testified that he sprinkle irrigates 15 acres of alfalfa by pump diversion from Camas Creek. He testified that some years there is a lot of water for a week or two and some years none. He testified that he also objects to the length of time the Applicant has applied for the use of the water.

9. Mr. James P. Pelley testified that he has lived on Camas Creek about 55 years and flood irrigates in Sections 26 and 27 by natural overflows. He stated that he has no diversion structures, but puts up anywhere from 500 to 5,000 bales of hay depending upon the year. He testified that his real need for irrigation water is from the 15th April to the early part of June and that he depends upon it for his hay production.

10. There are times in the early spring when unappropriated waters are available, however, the quantity of water available is unreliable and is not available every year.

11. Mr. Jim Rehbein testified, and the Applicant conceded, that a prior existing water right from the source of supply is claimed by the Applicant for 80 acres of presently irrigated land in the NE¼ of Section 21, T. 20 N., R. 24 W. and that this application should be for 90 acres of new irrigation in the NW¼ of the same section, township and range and not for the entire 170 acres. Mr. Rehbein further testified that since an existing pump of 1,089 gpm capacity is to be used, that the rate of diversion will remain 2.42 cubic feet per second applied for, but that the total volume of water put to beneficial use should be limited to one acre-foot per acre for a total of 90 acre-feet per annum.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a Beneficial Water Use Permit is required by the Applicant to appropriate water from the proposed source of supply.

2. The Objectors have apparent prior existing water rights from the source of supply which, by law, must be protected, however, the quantification and final determination of the validity of such rights must await the adjudication process mandated by Section 89-870 et seq., of the Montana Water Use Act, and any permits issued must be subject to that final determination.

3. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant and at times in the amount the Applicant seeks to appropriate, however, the water is not available in the amount requested throughout the period the Applicant seeks the appropriation.

4. The rights of prior appropriators will not be adversely affected if the permit is conditioned so as to protect those rights.

5. The proposed means of diversion or construction will be adequate if plans and specifications for the same are submitted to the Department

for review and approval prior to the start of construction.

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

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.

8. The Application for Beneficial Water Use Permit No. 10,307-s76L by Morland and Dorla Neiman may be granted in accordance with the provisions of Chapter 8 of Title 89 of the laws of the State of Montana.

PROPOSED ORDER

1. Subject to the conditions cited below, the Application for Beneficial Water Use Permit No. 10,307-s76L by Morland and Dorla Neiman is hereby granted allowing the appropriation of a maximum of 2.42 cubic feet per second or 1,089 gpm of water not to exceed 90 acre-feet per annum from Camas Creek, a tributary of the Flathead River, in Sanders County, Montana, to be diverted from Camas Creek by means of a diversion structure and a pump at points in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ and the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T. 20 N., R. 24 W., M.P.M. and used for new irrigation on 80 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and 10 acres in the E $\frac{1}{2}$ W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 21 same township and range, for a total of 90 acres, more or less, from April 1 to June 1, inclusive, of each year.

2. The permit is provisional and is granted subject to all prior existing water rights in the source of supply, including but not limited to, prior decreed water rights, if any, and not necessarily limited to all existing water rights of those objecting herein, including all prior Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation reserved water rights in the source of supply, and is further subject to any final determination of prior existing water rights as provided by Montana Law.

3. The provisional permit is further conditioned as follows:

- a. The permit is for the appropriation of flood waters only and the Permittee shall make provision in the diversion

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structure to by-pass or release all water required for the beneficial use of prior appropriators and shall cooperate with prior appropriators by by-passing or releasing said waters as needed and requested by prior appropriators or upon order of the Department.

- b. The Permittee shall install and maintain a flow meter at the point of delivery to the place of use of the water granted by this permit and shall keep records of the period of use, rate of flow and volume of water appropriated under this permit, and shall submit such records to the Department upon request.
- c. The Permittee shall submit plans and specifications for this project to the Department for review and approval prior to the start of construction, within 180 days after receipt of the Provisional Permit. This time period may be extended upon timely written request for an extension of time to the Department.

RECOMMENDATION

Inasmuch as the testimony of the Applicant and the Objectors revealed that there are frequent periods of inadequate water supplies to satisfy all prior water rights, and inasmuch as the Applicant will not have a full irrigation supply for the acreage to be irrigated by the permit, the economic feasibility of such a project is very doubtful. It is, therefore, recommended that the Applicant consult a qualified engineer or a governmental agency for an economic evaluation of the proposed project prior to any further financial involvement.

It is further recommended that, since the Applicant will be diverting

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from the same point of diversion and using the same pump and a portion of the same delivery system to appropriate waters from this source of supply, for which he claims a prior existing right, that in order to avoid controversy or conflict, that he install an additional flow meter at the pump and maintain a detailed record of all periods, rates of flow and volumes pumped showing the place of use for all water appropriated from this point of diversion.

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 after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions will be granted. 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 14th day of March, 1978.


WILLIAM F. THROM
HEARING EXAMINER