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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
12,344-s43D BY J. L. PILATI)

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on January 7, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order, except that Condition No. seven (7) of the Proposed Order is entered as Conditions seven (7) and eight (8) in the Final Order, and the term "Applicant" is replaced by "Permittee" in Conditions two (2), three (3), six (6) and seven (7).

FINAL ORDER

1. Application for Beneficial Water Use Permit No. 12,344-s43D by J. L. Pilati is hereby granted subject to conditions stated below: to appropriate 4.45 cubic feet per second or 2000 gallons per minute of water, not to exceed 304.5 acre-feet per annum from Rock Creek, a tributary of the Clarks Fork River in Carbon County, Montana. The water is to be diverted from Rock Creek at a point in the SE1/4 NW1/4 NE1/4 of Section 2, Township 7 South, Range 20 East, M.P.M., and conveyed by means of the Consolidated Ditch and diverted from the Consolidated Ditch at a point in the E1/2 NW1/4 SE1/4 of Section 26, Township 6 South, Range 20 East, M.P.M., and conveyed by means of the Taylor Ditch and diverted from the Taylor Ditch at a point in the SW1/4 SW1/4 SE1/4 of Section 15, Township 6 South, Range 20 East, M.P.M., and conveyed by means of the Pilati Ditch and diverted from the Pilati Ditch at a point in the S1/2 of said Section 15 and stored

1 in a new 25 acre-foot reservoir in the S1/2 of said Section 15 and used
2 for new irrigation on 40 acres in the SW1/4 of Section 22, supplemental
3 water on 122 acres in the SW1/4 of Section 15 all in Township 6 South,
4 Range 20 East, M.P.M., and containing a total of 162 acres, more or less,
5 from March 15 to November 30, and for stock-watering and wildlife purposes
6 from March 15 to November 15, inclusive, of each year.

7 2. As outlined in Section 85-2-402, MCA, this Provisional Permit in
8 no way grants the Permittee the right to store previously decreed water in
9 the reservoir described in Application No. 12, 344-s43D.

10 3. As outlined in Section 85-2-412, MCA, surplus water from the
11 Permittee's reservoir must not be allowed to run down Willow Creek into
12 the Cooney Reservoir and subsequently into Rock Creek, if it is demanded
13 by downstream appropriators on Rock Creek above the confluence of
14 Rock Creek with Willow Creek.

15 4. The Permit is granted subject to all prior existing water rights.

16 5. The Permit is granted subject to any final determination of prior
17 existing water rights as provided by Montana law.

18 6. The granting of Provisional Permit No. 12,344-s43D by the Depart-
19 ment in no way reduces or alters the Permittee's liability for damage caused
20 by the Permittee's exercise of this Permit, nor does the Department in issuing
21 this Permit in any way acknowledge liability for damage caused by the
22 Permittee's exercise of this Permit.

23 7. The granting of this Provisional Permit in no way grants the
24 Permittee any right to violate rights of any other party, nor does it
25 excuse the Permittee from any liability for same, even if such violation
26 is a necessary and unavoidable consequence of exercising this Permit.

27 8. The granting of this Provisional Permit is not an authorization
28 for the use of any ditch rights for the conveyance of the Permittee's
water, as this is outside the jurisdiction of this Department.

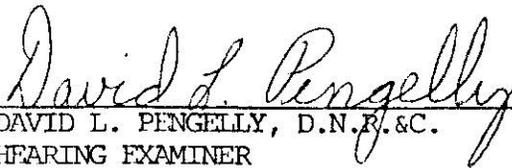
CASE # 12344

NOTICE

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2 The Hearing Examiner's Final Order may be appealed in accordance
3 with the Montana Administrative Procedures Act by filing a petition
4 in the appropriate court within thirty (30) days after service of the
5 Final Order.

6 Since the hearing, Forrest Tevebaugh, Hearing Examiner, has resigned
7 and is no longer available to the Department. The undersigned has read
8 the entire hearing transcript and all evidence available in the file on
9 this matter.

10
11 DATED this 23rd day of January , 1980.

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14 DAVID L. PENGELLY, D.N.B. & C.
15 HEARING EXAMINER
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1 BEFORE THE DEPARTMENT
2 OF
3 NATURAL RESOURCES AND CONSERVATION
4 OF THE STATE OF MONTANA

4 * * * * *
5 IN THE MATTER OF APPLICATION)
6 FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
7 NO. 12,344-s43D BY J. L. PILATI)
8 * * * * *

7 Pursuant to the Montana Water Use Act and the Montana Administrative
8 Procedures Act, after due notice, a Hearing was held on July 11, 1978, at
9 Red Lodge, Montana, for the purpose of hearing objections to the above
10 named Application for Beneficial Water Use Permit No. 12,344-s43D, Forrest
11 Tevebaugh, Hearing Examiner, presiding.

12 The Applicant, J. L. Pilati, appeared at the Hearing and presented
13 testimony in support of the application. Mr. Pilati was not represented
14 by legal counsel. No exhibits were introduced supporting the application.

15 Four Objectors attended the Hearing and presented testimony or
16 statements. The Objectors present were W. A. Schwend, Curtis Schwend, Oliver
17 Wilson and Fred Cole. The Objectors were not represented by legal counsel.
18 The Objectors introduced one (1) exhibit supporting their objection, to wit:

19 OBJECTORS' EXHIBIT:

20 O-1 1953 - 1977 Water Records of Rock Creek (19 pages)

21 The Objectors' Exhibit was marked accordingly and received into the record
22 without objection.

23 Present and testifying on behalf of the Department was Stan Jones,
24 Hearing Representative. Also present were Janice M. Fishburn, Hearing
25 Recorder; and Rick Burger, Department Pilot. The Department was not
26 represented by legal counsel. Five Exhibits were introduced by the
27 Department, to wit:
28

DEPARTMENT'S EXHIBITS:

D-1 Field Investigation Memorandum by Stan Jones, Conducted
March 29, 1978

D-2 Field Investigation Memorandum by Stan Jones, Conducted
April 11, 1978

D-3 Soil Survey of Carbon County, Montana (18 pages)

D-4 Photographs of Proposed Irrigation Project and Proposed Dam
Site (4 photos)

D-5 Copy of Aerial Photographs of Project Area

The Department's Exhibits were marked accordingly and received into the record without objections. The Department's file was also received into the record.

PROPOSED FINDINGS OF FACT

1. On March 30, 1977, the Department received an Application for Beneficial Water Use Permit No. 12,344-s34D by J. L. Pilati to appropriate 4.45 cubic feet per second or 2000 gallons per minute of water, not to exceed 484.5 acre-feet per annum from Rock Creek, a tributary of the Clarks Fork River in Carbon County, Montana, to be diverted from Rock Creek at a point in the SE1/4 NW1/4 NE1/4 of Section 2, Township 7 South, Range 20 East, M.P.M., and conveyed by means of the Consolidated Ditch and diverted from the Consolidated Ditch at a point in the E1/2 NW1/4 SE1/4 of Section 26, Township 6 South, Range 20 East, M.P.M., and conveyed by means of the Taylor Ditch and diverted from the Taylor Ditch at a point in the SW1/4 SW1/4 SE1/4 of Section 15, Township 6 South, Range 20 East, M.P.M., and conveyed by means of the Pilati Ditch and diverted from the Pialti Ditch at a point in the S1/2 of said Section 15 and stored in a new 25 acre-foot reservoir in the S1/2 of said Section 15, and used for new irrigation on 40 acres in the NW1/4 of Section 22, supplemental water on 122 acres in

1 the SW1/4 of Section 15 all in Township 6 South, Range 20 East, M.P.M.,
2 and containing a total of 162 acres, more or less, from March 15 to
3 November 30, and for stock-watering and wildlife purposes from March 15
4 to November 15, inclusive, of each year.

5 2. On October 6, 13 and 20, 1977, the Department caused to be duly
6 published in the Carbon County News, Red Lodge, Montana, notice of the
7 above Application for Beneficial Water Use Permit No. 12,344-s43D.

8 3. On October 28, 1977, the Department received an objection to
9 Application for Beneficial Water Use Permit No. 12,344-s43D from
10 Mr. W. A. Schwend.

11 4. On November 7, 1977, the Department received an objection to
12 Application for Beneficial Water Use Permit No. 12,344-s43D from Rocky
13 Fork Decreed Water Users, Inc., represented by Oliver Wilson, President.

14 5. On November 9, 1977, the Department received an objection to
15 Application for Beneficial Water Use Permit No. 12,344-s43D from Curtis
16 Schwend.

17 6. On November 14, 1977, the Department received an objection to
18 the Application for Beneficial Water Use Permit No. 12,344-s43D from the
19 Consolidated Ditch Company, by Gary Sironen, President.

20 7. Mr. Pilati testified that all Objectors were aware of the situation
21 and had no valid grounds for protest. He testified that he intends to exercise
22 his right only in the early spring and late fall and occasionally during
23 the summer. Mr. Pilati also testified that he plans to put into the dam
24 79 inches of his 1896 decreed water right that isn't currently used because
25 of the land being too steep to irrigate. Whenever he doesn't need water
26 for irrigation he will just run it into the dam. Once the dam is full, excess
27 water will pass over the spillway into Willow Creek, into the Cooney Reservoir,
28 and eventually back into Rock Creek. The Soil Conservation Service will do
all of the engineering for the project, whenever a permit is granted.

1 8. Stan Jones testifying for the Department, gave a brief discussion
2 of Department Exhibits 1 through 5. Department Exhibit D-1 is a description
3 of a discussion with Mr. Pilati in which the application was reduced from
4 484.5 acre-feet per annum to 304.5 acre-feet per annum. Mr. Jones also
5 testified that due to the type of soils present and the steepness of the
6 ground that the irrigation and management practices used would be very critical.
7 The proposed sprinkler irrigation system and sound management would alleviate
8 these hazards. No adverse affects to other appropriators were foreseen by
9 Mr. Jones outside of the question of use of ditches.

10 9. Mr. W. A. Schwend testified that downstream appropriators would be
11 injured if water is diverted through the Applicant's dam and down Willow
12 Creek. The Consolidated Ditch Company would be adversely affected if the
13 Applicant's water were placed in the Consolidated Ditch.

14 10. Curtis Schwend testified that he would suffer an adverse affect if
15 boards were put in the self-dividing Consolidated Ditch by the Applicant or
16 any other party. He testified that he would have no objection to boards
17 being placed after the irrigation season. During the irrigation season,
18 Consolidated Ditch is full to capacity according to Mr. Schwend.

19 11. Mr. Wilson testified that the Applicant is applying for new water
20 from Rock Creek rather than for flood water. Mr. Pilati testified that he
21 really intends to appropriate only flood waters from Rock Creek and excess
22 water from the Consolidated and Taylor Ditches. Mr. Wilson also testified that
23 decreed water which is not used for irrigation directly should be returned
24 to Rock Creek at the headgate, not stored in the reservoir.

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26 12. Mr. Cole testified to his concern over the policing policy for
27 protection of adjudicated water rights.
28

1 13. All Objectors testified that there are times each year when there
2 are unappropriated waters in Rock Creek.

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4 PROPOSED CONCLUSIONS OF LAW

5 1. Section 85-2-311, MCA, 1976, states that "the Department shall
6 issue a permit if:

- 7 1. there are unappropriated waters in the source of supply:
 - 8 a. at times when the water can be put to the use proposed
 - 9 by the applicant;
 - 10 b. in the amount the applicant seeks to appropriate; and
 - 11 c. throughout the period during which the applicant seeks
 - 12 to appropriate, the amount requested is available;
- 13 2. the rights of a prior appropriator will not be adversely
- 14 affected;
- 15 3. the proposed means of diversion or construction are adequate;
- 16 4. the proposed use of water is a beneficial use;
- 17 5. the proposed use will not interfere unreasonably with other
- 18 planned uses or developments for which a permit has been
- 19 issued or for which water has been reserved; . . ."

20 2. Based upon testimony given at the Hearing, it is concluded that
21 Rock Creek water is available, which could be put to beneficial use as
22 requested in Application for Beneficial Water Use Permit No. 12,344-s43D,
23 by the Applicant, J. L. Pilati.

24 3. Under the provisions of Section 85-2-412, MCA, "In all cases where,
25 by virtue of prior appropriation, any person may have diverted all the water
26 of any stream or to such an extent that there shall not be an amount sufficient
27 left therein for those having a subsequent right to the waters of such stream
28 and there shall, at any time, be a surplus of water so diverted, over and

1 above what is actually and necessarily used by the prior appropriator, such
 2 person shall be required to turn and cause to flow back into the stream such
 3 surplus water. Upon failure to do so within 24 hours after demand being made
 4 upon him in writing, to him in person or at his place of abode, by any person
 5 having a right to the use of such surplus water, the person so diverting the
 6 same shall be liable to the person aggrieved for the damage resulting there-
 7 from, in such sum as may be determined by court."

8 4. Section 85-2-402, MCA, requires in part, "(1) An appropriator may
 9 not change the place of diversion, place of use, purpose of use, or place of
 10 storage except as permitted under this section and approved by the department."

11 5. Based upon the Proposed Findings of Fact, it is concluded that the
 12 criteria for the issuance of a Permit is delineated in Section 85-2-311, MCA,
 13 have been met.

14 6. It is concluded that the granting of Application No. 12,344-s43D in
 15 no way reduces the Applicant's liability for damage caused by the Applicant's
 16 exercise of such Permit.

17 Based upon the above Proposed Findings of Fact and Proposed Conclusions
 18 of Law, the following Proposed Order is made.

19
 20 PROPOSED ORDER

21 1. Application for Beneficial Water Use Permit No. 12,344-s43D by
 22 J. L. Pilati is hereby granted subject to conditions stated below: to
 23 appropriate 4.45 cubic feet per second or 2000 gallons per minute of water,
 24 not to exceed 304.5 acre-feet per annum from Rock Creek, a tributary of
 25 the Clarks Fork River in Carbon County, Montana. The water is to be diverted
 26 from Rock Creek at a point in the SE1/4 NW1/4 NE1/4 of Section 2, Township 7
 27 South, Range 20 East, M.P.M., and conveyed by means of the Consolidated
 28 Ditch and diverted from the Consolidated Ditch at a point in the E1/2 NW1/4

1 SE1/4 of Section 26, Township 6 South, Range 20 East, M.P.M., and conveyed
2 by means of the Taylor Ditch and diverted from the Taylor Ditch at a point
3 in the SW1/4 SW1/4 SE1/4 of Section 15, Township 6 South, Range 20 East,
4 M.P.M., and conveyed by means of the Pilati Ditch and diverted from the
5 Pilati Ditch at a point in the S1/2 of said Section 15 and stored in a new
6 25 acre-foot reservoir in the S1/2 of said Section 15 and used for new
7 irrigation on 40 acres in the SW1/4 of Section 22, supplemental water on
8 122 acres in the SW1/4 of Section 15 all in Township 6 South, Range 20 East,
9 M.P.M., and containing a total of 162 acres, more or less, from March 15 to
10 November 30, and for stock-watering and wildlife purposes from March 15 to
11 November 15, inclusive, of each year.

12 2. As outlined in Section 85-2-402, MCA, this Provisional Permit in no
13 way grants the Applicant the right to store previously decreed water in the
14 reservoir described in Application No. 12,344-s43D.

15 3. As outlined in Section 85-2-412, MCA, surplus water from the Applicant's
16 reservoir must not be allowed to run down Willow Creek into the Cooney
17 Reservoir and subsequently into Rock Creek, if it is demanded by downstream
18 appropriators on Rock above the confluence of Rock Creek with Willow Creek.

19 4. The Permit is granted subject to all prior existing water rights.

20 5. The Permit is granted subject to any final determination of prior
21 existing water rights as provided by Montana law.

22 6. The granting of Provisional Permit No. 12,344-s43D by the Department
23 in no way reduces or alters the Applicant's liability for damage caused by
24 the Applicant's exercise of this Permit, nor does the Department in issuing
25 this Permit in any way acknowledge liability for damage caused by the Applicant's
26 exercise of this Permit.

27 7. The granting of this Provisional Permit in no way grants the Applicant
28 any right to violate rights of any other party, nor does it excuse the Applicant

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from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising this permit. The granting of this Provisional Permit is not an authorization for use of ditch rights, as this is outside the jurisdiction of this Department.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. The review and comment period shall commence with the mailing of this Proposal for Decision and shall end ten (10) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by certified mail.

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

Since the Hearing, Forrest Tevebaugh, Hearing Examiner, has resigned and is no longer available to the Department. The undersigned has read the entire Hearing transcript and all evidence available in the file for this Hearing.

DONE this 7th day of JANUARY, 1980.

David L. Pengelly
DAVID L. PENGELLY, D.N.H.&C.
HEARING EXAMINER

CASE # 12344