

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
16577-s76E BY K. O. MacPHERSON)

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on August 11, 1980 are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

FINAL ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 16577-s76LJ by K. O. McPherson is hereby granted to appropriate 110 gallons per minute up to 162 acre-feet per annum from Brewster Creek, a tributary of Rock Creek to be diverted by means of a pipeline and pump at a point in the SE1/4 NW1/4 NW1/4 of Section 20, Township 10 North, Range 16 West, M.P.M., in Granite County, Montana, to be diverted into an existing 0.2 acre-foot reservoir. The water is to be used for: 10 gallons per minute up to 1 acre-foot for new sprinkler irrigation on a total of 0.5 acres in the NW1/4 NW1/4 of Section 20, Township 10 North, Range 16 West, M.P.M., in Granite County, Montana, from April 15, to October 15, inclusive, of each year; and for 100 gallons per minute up to 161 acre-feet for a fish and wildlife pond in the NW1/4 NW1/4 of Section 20, Township 10 North, Range 16 West, M.P.M., in Granite County, Montana, from January 1 to December 31, inclusive, of each year.

2. Provisional Permit No. 16577-s76E is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana law.

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
16577-s76E BY K. O. MacPHERSON)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on April 8, 1980, at Drummond, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 16577-s76E, David Pengelly, Hearing Examiner, presiding. The hearing in this matter was held in conjunction with the hearing in the matter of Application for Beneficial Water Use Permit No. 16576-s76E.

The Applicant, K. O. MacPherson, appeared at the hearing and presented testimony in support of the Application. Mr. MacPherson was not represented by legal counsel. No exhibits were introduced in support of the Application.

Six objectors presented testimony or statements at the hearing. Those present were: Dennis Workman on behalf of the Montana Department of Fish, Wildlife and Parks, Charles E. Knox, Lewis R. Knox, Mr. and Mrs. Gerald Power, Adam Michnevich, and Billy and Rory Page. Charles E. Knox and Louis R. Knox were represented by counsel, Doug Kelly, Helena, Montana. Eighteen exhibits were introduced on behalf of the Objectors, Charles E. and Lewis R. Knox, to wit:

Objector's Exhibits:

- O-1 Sworn affidavit signed by Helen M. Knox.
- O-2 Sworn affidavit signed by Ed Johnson.
- O-3 Sworn affidavit signed by Charles Lewis Knox.

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- 0-1 Sworn affidavit signed by Douglas S. Johnson.
- 0-5 Aerial photograph of Objectors' properties and Brewster
Creek.
- 0-6 Photograph of Brewster Creek.
- 0-7 Photograph of South Hamm Ditch.
- 0-8 Photograph of South Hamm Ditch.
- 0-9 Photograph of South Hamm Ditch.
- 0-10 Photograph of South Hamm Ditch crossing county road.
- 0-11 Photograph of South Hamm Ditch crossing county road.
- 0-12 Photograph of South Hamm Ditch crossing county road and
Objectors' irrigated lands.
- 0-13 Photograph of Objectors' sprinkler system.
- 0-14 Photograph of Objectors' pump site.
- 0-15 Copy of plat of Objectors' land.
- 0-16 Copy of Roll 3, page 45 of the records of Granite County,
describing Objector's water right.
- 0-17 Copy of Roll 3, page 47, records of Granite County, describing
Objector's water right.
- 0-18 Copy of Roll 3, page 46, records of Granite County, describing
Objector's water right.

The Objectors' exhibits were introduced into the record with one
(1) objection raised by the Applicant regarding the age of Helen M. Knox
who signed Objector's Exhibit 0-1.

Montana Department of Natural Resources and Conservation personnel
present at the hearing were Larry Brown, Hydrologist; Arlin Krogstad,
Hearing Representative; Jan Mack, Missoula Water Rights Bureau Field
Office Manager; and Vicki Woodrow, Hearings Reporter. The Department
introduced one exhibit, to wit:

Department's Exhibits:

D-1 Sketch of Brewster Creek and North and South Hamm Ditches through Applicant's property.

The Department's exhibit was introduced with no objections. The Department was not represented by legal counsel.

SUMMARY OF RECORD

1. On December 1, 1977, the Department received an Application for Beneficial Water Use Permit No. 16577-s76E by K. O. MacPherson to appropriate 110 gallons per minute up to 162 acre-feet per annum from Brewster Creek, a tributary of Rock Creek to be diverted by means of a pipeline and pump at a point in the SE1/4 NW1/4 NW1/4 of Section 20, Township 10 North, Range 16 West, M.P.M., in Granite County, Montana to be diverted into an existing 0.2 acre-foot capacity reservoir. The water is to be used for: 10 gallons per minute up to 1 acre-foot for new sprinkler irrigation on a total of 0.5 acres in the NW1/4 NW1/4 of Section 20, Township 10 North, Range 16 West, M.P.M., in Granite County, Montana from April 15 to October 15, inclusive, of each year; and for 100 gallons per minute up to 161 acre-feet for a fish and wildlife pond in the NW1/4 NW1/4 of Section 20, Township 10 North, Range 16 West, M.P.M., in Granite County, Montana, from January 1 to December 31, inclusive, of each year.

2. On March 2, 9, and 16, 1978, the Department caused to be duly published in the Phillipsburg Mail, Phillipsburg, Montana, notice of Application for Beneficial Water Use Permit No. 16577-g76E by K. O. MacPherson. The Application was re-advertised on November 9, 16, and 23, 1978 and advertised a third time on June 28, and July 5 and 6, 1979.

3. On March 29, 1978, the Department received an objection to the

1 above Application from Allen F. and Juanita A. Brabham.

2 4. On April 18, 1978, the Department received an objection to the
3 above Application from Gordon and Elizabeth Long, and Norman R. Larum.

4 5. On June 16, 1978, the Department received an objection to the
5 above Application from Charles E. Knox. The Department received subsequent
6 objections from Mr. Knox on December 26, 1978 and August 15, 1979.

7 6. On June 28, 1978, the Department received an objection to the
8 above Application from Billy M. Ward.

9 7. On June 30, 1978, the Department received an objection to the
10 above Application from Gerald B. and Verna Lou Power. The Department
11 received a subsequent objection from Mr. and Mrs. Power on December 28,
12 1978.

13 8. On August 15, 1979, the Department received an objection to the
14 above Application from Lewis R. Knox.

15 9. At the hearing held in Drummond on April 8, 1980, Adam Michnevich
16 and Billy and Rory Page were admitted as untimely objectors to the above
17 Application.

18 PROPOSED FINDINGS OF FACT

19 Based on the transcript of the hearing and the information contained
20 in the Department's file in this matter, it is found:

21 1. That there are unappropriated waters in the source of supply at
22 times when the water can be put to the use proposed by the Applicant, in
23 the amount the Applicant seeks to appropriate, and throughout the period
24 during which the Applicant seeks to appropriate the amount requested is
25 available.

26 2. That the rights of prior appropriators would not be adversely
27 affected if the water from the fish pond is returned to the source of
8 supply above the point of diversion of the Hamm Ditches from the source

of supply.

3. That the proposed means of diversion or construction are adequate.

4. That the proposed use of water is a beneficial use.

5. That the Objectors, Charles E. Knox, Lewis R. Knox, Montana Department of Fish, Wildlife and Parks, and Adam Michnevich, have existing rights which are being exercised and which must be protected.

6. That the objectors, Billy and Rory Page, and Mr. and Mrs. Gerald Power, may possess valid existing water rights, however, there was no testimony to show that those rights were being exercised at the present time.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states that "The department shall issue a permit if:

1. there are unappropriated waters in the source of supply:
 - a. at times when the water can be put to the use proposed by the applicant;
 - b. in the amount the applicant seeks to appropriate; and
 - c. throughout the period during which the applicant seeks to appropriate, the amount requested is available;
2. the rights of a prior appropriator will not be adversely affected;
3. the proposed means of diversion or construction are adequate;
4. the proposed use of water is a beneficial use;
5. 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; . . ."

1 and pump at a point in the SE1/4 NW1/4 NW1/4 of Section 20, Township 10
2 North, Range 16 West, M.P.M., in Granite County, Montana, to be diverted
3 into an existing 0.2 acre-foot reservoir. The water is to be used for:
4 10 gallons per minute up to 1 acre-foot for new sprinkler irrigation on
5 a total of 0.5 acres in the NW1/4 NW1/4 of Section 20, Township 10
6 North, Range 16 West, M.P.M., in Granite County, Montana, from April 15,
7 to October 15, inclusive, of each year; and for 100 gallons per minute
8 up to 161 acre-feet for a fish and wildlife pond in the NW1/4 NW1/4 of
9 Section 20, Township 10 North, Range 16 West, M.P.M., in Granite County,
10 Montana, from January 1 to December 31, inclusive, of each year.

11 2. Provisional Permit No. 16577-s76E is granted subject to existing
12 rights in the source of supply and any final determination of those
13 rights as provided by Montana law.

14 3. The Permittee shall return the water passed through the fish
15 pond to the source of supply above the point of diversions of the North
16 and South Hamm Ditches from the source of supply.

17 4. The Permittee shall install an adequate flow metering device on
18 the irrigation pump to allow the flow rate and volume of water diverted
19 to be recorded. The Permittee shall keep a written record of the flow
20 rate and volume of all waters diverted including the period of time and
21 shall submit said records to the Department upon request.

22 5. The issuance of this Provisional Permit by the Department in no
23 way reduces the Permittee's liability for damages caused by the Permittee's
24 exercise of this Provisional Permit, nor does the Department in issuing
25 the Provisional Permit in any way acknowledge liability for damage
26 caused by the Permittee's exercise of the Provisional Permit.

27 NOTICE

28 This Proposed Order is offered for the review and comment of all

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1 parties of record. The review and comment period shall commence with
2 the service of this Proposed Order and shall end ten (10) days thereafter.
3 No extensions of time for comment will be granted.

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

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

9
10 DATED this 11th day of August, 1980.

11
12 
13 DAVID L. PENGELLY, D.N.R.&C.
14 HEARING EXAMINER