

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

* * * * *
IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) AMENDED FINAL ORDER
NO. 16883-s41H BY EARL J. JR.)
AND GERTRUDE F. SMITH)
* * * * *

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on November 5, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Amended Final Order. Condition No. 4 of the original Final Order has been deleted in this Amended Order.

FINAL ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 16883-s41H by Earl J. Jr. and Gertrude F. Smith is hereby granted to appropriate 10 gallons per minute of water not to exceed 11.5 acre-feet per annum from Bear Creek, a tributary of Rocky Canyon Creek in Gallatin County, Montana. The water is to be diverted from Bear Creek through an existing 0.9 acre-foot pond and returned to Bear Creek, all within the SE1/4 NE1/4 SW1/4 of Section 36, Township 2 South, Range 6 East, M.P.M. The water shall be used non-consumptively for recreation, and fish and wildlife purposes from March 1 to November 15, inclusive, of each year.

2. Provisional Permit No. 16883-s41H is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. This Provisional Permit is subject to the authority of the court appointed water commissioner, if and when appointed, to measure and distribute to parties using water in the source of supply, the waters to which they are entitled, including the waters granted in this Provisional Permit. The Permittee shall pay his proportionate share of the fees and compensation expenses, as fixed by the District Court, incurred in the distribution of waters granted in this Provisional Permit.

4. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time and shall submit said records to the Department upon request.

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

NOTICE

The Hearing Examiner's Amended 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.

DATED this 2nd day of December, 1980.

David L. Pengelly

DAVID L. PENGELLY, D.N.R. & C.
HEARING EXAMINER

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

* * * * *
IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 16883-s41H BY EARL J. JR.)
AND GERTRUDE F. SMITH)
* * * * *

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on November 5, 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. 16883-s41H by Earl J. Jr. and Gertrude F. Smith is hereby granted to appropriate 10 gallons per minute of water not to exceed 11.5 acre-feet per annum from Bear Creek, a tributary of Rocky Canyon Creek in Gallatin County, Montana. The water is to be diverted from Bear Creek through an existing 0.9 acre-foot pond and returned to Bear Creek, all within the SE1/4 NE1/4 SW1/4 of Section 36, Township 2 South, Range 6 East, M.P.M. The water shall be used non-consumptively for recreation, and fish and wildlife purposes from March 1 to November 15, inclusive, of each year.

CASE # 16883

2. Provisional Permit No. 16883-s41H is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. This Provisional Permit is subject to the authority of the court appointed water commissioner, if and when appointed, to measure and distribute to parties using water in the source of supply, the waters to which they are entitled, including the waters granted in this Provisional Permit. The Permittee shall pay his proportionate share of the fees and compensation expenses, as fixed by the District Court, incurred in the distribution of waters granted in this Provisional Permit.

4. The Permittee shall install a suitable headgate or diversion structure at the point the water is diverted from the source of supply.

5. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time and shall submit said records to the Department upon request.

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

NOTICE

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.

DATED this 17th day of November 1980.

David L. Plngelly

DAVID L. PLNGELLY, D.N.R. & C
HEARING EXAMINER

CASE # 1688B3

AFFIDAVIT OF SERVICE
FINAL ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by RICHARD WEBEL, Application No. 16696-s41F, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Richard K. Webel, Trustee, Jack Creek Ranch Trust, Yellow Barn, Ennis, MT 59729
2. James Morrow, Security Bank Bldg., P.O. Box 1168, Bozeman, MT 59715
3. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
4. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
5. James Walsh, Montana Power Co., 40 East Broadway, Butte, MT 59701
6. Ronald F. Waterman, Attorney at Law, Box 1715, Helena, MT 59624
7. T.J. Reynolds, Helena Field Office (inter-departmental mail)
8. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 24th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 16883'

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

* * * * *

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) RESPONSE TO OBJECTORS'
NO. 16883-s41H BY EARL J. JR.) COMMENTS AND MOTIONS
AND GERTRUDE F. SMITH)

* * * * *

1. Provisions for the appointment and disqualification of a hearing examiner are found in Section 2-4-611, MCA, 1979. The motion to disqualify the hearing examiner is denied as untimely.

2. Application No. 16883-s41H stated that the diversion pipe to the pond in question is 12 inches in diameter.

3. The Application stated that the inflow to the pond was 10 gallons per minute and the outflow was 14 gallons per minute as measured in July, 1979. Further, testimony was presented that at times when there is no inflow to the pond via the 12-inch CMP, the water level in the pond does not decrease and the pond does not stagnate. Therefore, the overflow from the pond must be greater than or equal to the inflow.

4. The important words in Proposed Conclusions of Law No. 2 are "... to the use proposed by the Applicant..." The proposed use of water was found to be non-consumptive, therefore, any water diverted and put to beneficial use by the Applicant is then returned to the source of supply,

undiminished in quantity, for the use of downstream appropriators.

5. Condition No. 4 of the Proposed Order is a standard condition used by the Department for permits granted on decreed streams. This condition is used assuming that a diversion structure has not already been installed.

6. "Fish and wildlife" is a type of beneficial use specified in Section 85-2-102 (2), MCA, 1979. In this particular case the Applicant's major intended use of the pond is for fish, however, the occasional use of the pond by wildlife, if it should occur, is also being granted. Thus, the Permittee will not be in violation of the law if any wildlife should make use of the pond.

7. See answer to response No. 5 above.

8. Objectors wishing to review the records may obtain such records upon written request to the Department. If such a request is made, the Department shall obtain the records and send copies to the Objectors. If the Permittee so desires, he may send said records directly to the Objectors upon their request.

NOTICE

These responses by the Hearing Examiner are submitted separately from the Final Order in this matter. Although the comments and motion by Counsel for the Objectors were received by the Department within the time limits set forth, they were not delivered to the Hearing Examiner within the time period.

DATED this 18th day of November, 1980.

David L. Pengelly
DAVID L. PENGELLY
HEARING EXAMINER

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

* * * * *
IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 16883-s41H BY EARL J. JR.)
AND GERTRUDE F. SMITH)
* * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on August 12, 1980, at Bozeman, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 16883-s41H, David Pengelly, Hearing Examiner, presiding.

The Applicant, Earl J. Smith, Jr., appeared at the hearing and presented testimony in support of the Application. Mr. Smith was represented by legal counsel, Mr. John Scully, Bozeman, Montana. Two (2) exhibits were introduced in support of the Application, to wit:

Applicant's Exhibits:

- A-1 Letter to Earl J. Smith from Gary F. Berger, SCS, including subject fish pond design and report regarding fish pond design dated June 26, 1980 (7 pages)
- A-2 Letter to George Carlton from Carl R. Wall, ASCS, dated January 22, 1968, with three (3) attached pages regarding subject fish pond.

CASE # 16883

The Applicant's exhibits were introduced into the record with objections raised to both of the exhibits regarding their relevancy and their hearsay nature by counsel for the Objectors, Mr. Michael Coil.

Seven (7) Objectors were present at the hearing: Mr. Frank Coil, Mr. and Mrs. James Kirk, Mr. George Wood, Mrs. Alma Wood, Ms. Nancy Wood, and Mr. Frank Morgan. The Objectors were represented by legal counsel, Mr. Michael Coil, Bozeman, Montana. Two (2) exhibits were introduced on behalf of the objectors, to wit:

Objectors' Exhibits:

- O-1 Certified copy of 1903 Bear Creek Decree (13 pages)
- O-2 Eleven (11) plat maps from the Bear Creek drainage including a map showing the Applicant's property and subject fish pond.

The Objectors' exhibits were introduced into the record with no objections.

Representing the Montana Department of Natural Resources and Conservation at the hearing was Mr. T. J. Reynolds, Helena Area Office Supervisor, Water Rights Bureau. No exhibits were introduced on behalf of the Department; the Department was not represented by legal counsel.

MOTIONS

1. Michael Coil objected to the holding of the hearing since the Administrative Rules governing water right applications had not been sent to the Objectors prior to the hearing. The objection is overruled since Mr. Coil did not request a copy of the rules prior to the hearing, and further since the Administrative Rules adopted by the Board of Natural Resources are part of the Montana Administrative Rules available in every county in Montana (see Section 2-4-313, MCA, 1979).

2. Michael Coil made a motion to dismiss the Application since the Department had exceeded the time limit set forth Section 85-2-309, MCA, 1979. That motion was denied at the hearing.

3. Michael Coil made a motion to dismiss the Application since there was no legal basis for a non-consumptive use of water specified in the Montana Water Use Act. That motion was denied at the hearing.

4. Michael Coil made a motion to dismiss the Application on the grounds that an environmental impact statement was not prepared on this Application pursuant to Section 75-1-201, MCA, 1979. That motion is hereby denied in that the Department in its review of the Application made a

negative declaration regarding the preparation of a Preliminary Environmental Review in this matter.

SUMMARY OF RECORD

1. On April 19, 1978, the Department received Application for Beneficial Water Use Permit No. 16883-s41H by Earl J. Jr. and Gertrude F. Smith to appropriate .44 cubic feet per second or 200 gallons per minute of water, not to exceed 6.76 acre-feet per annum from Bear Creek, a tributary of Rocky Canyon Creek, Gallatin County, Montana. The water is to be diverted by means of an existing culvert at a point in the SE1/4 NE1/4 SW1/4 of Section 36, Township 2 South, Range 6 East, M.P.M., impounded in an existing 3 acre-foot pond and used for new sprinkler irrigation on a total of three (3) acres, more or less, in the SW1/4 of said Section 36 from April 1 to October 31, inclusive of each year, and for fire protection from January 1 to December 31, inclusive, of each year.

2. On October 25, November 1, and 8, 1978, the Department caused to be duly published in the Daily Chronicle, Bozeman, Montana, Notice of Application for Beneficial Water Use Permit No. 16883-s41H.

3. On November 2, 1978, the Department received an objection to the above Application from the Montana Power Company.

4. On November 8, 1978, the Department received an objection to the above Application from James Kurk.
5. On November 22, 1978, the Department received an objection to the above Application from Frank W. Coil.
6. On November 28, 1978, the Department received an objection to the above Application from George R. Wood and Alma C. Wood.
7. On December 6, 1978, the Department received an objection to the above Application from Frank W. Morgan.
8. On December 12, 1978, the Department received an objection to the above Application from Mr. and Mrs. William A. Ogle.
9. On December 13, 1978, the Department received an objection to the above Application from the Mount Ellis Academy.
10. On November 13, 1978, the Department received an objection to the above Application from Roger R. and Diane L. Stenzel.
11. On December 14, 1978, the Department received an objection to the above Application from Frank Hoell, Jr.
12. On July 31, 1979, the Department received an amended Application for Beneficial Water Use Permit No. 16883-s41H. The amended Application is to appropriate 10

gallons per minute up to 11 1/2 acre-feet per annum from March 1 to November 15, inclusive, of each year. The point of diversion and place of use are the same as specified on the original Application. The water is to be used for fish and wildlife purposes and for recreation and is to be a non-consumptive flow through an existing pond.

13. On October 4, 1979, each of the original Objectors to the above Application was notified of the amended Application and was asked to respond within seven (7) days of receipt of the notification whether or not they wished to continue their objections.

14. Objectors Frank Coil, George R. Wood and Alma C. Wood, and James Kurk all responded and requested a hearing in the above matter.

15. On October 18, 1979, the Montana Power Company withdrew its objection to the above Application on the grounds that it was a non-consumptive use and would not adversely affect their rights.

PROPOSED FINDINGS OF FACT

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

1. That the pond was completed in 1968 by Mr. George Carlton, with technical and financial assistance provided by the ASCS.

2. That the area of the existing pond is approximately 9/10 of an acre-foot.

3. That a 12 inch diameter corrugated metal pipe (CMP) diverts water from Bear Creek, the source of the supply, into the pond at a rate of approximately 10 gallons per minute. Further, it is found that the angle of the pipe from Bear Creek to the pond runs uphill.

4. That a 16 to 18-inch CMP trickle tube releases water from the pond to Bear Creek.

5. That the proposed use of the water is for fish and wildlife purposes as well as recreation.

6. That the proposed use of water is a non-consumptive use in that the outflow from the pond to Bear Creek is greater than or equal to the inflow to the pond from Bear Creek.

7. That the diversion structure is so designed that during low flows on Bear Creek no water is diverted from the source of supply into the pond.

8. That Bear Creek was decreed in 1903 and that the Objectors present at the hearing possess valid decreed rights

for irrigation and livestock uses which must be protected under Montana Water Law.

9. That there are no planned uses of developments for which permits have been issued or water reserved that would be adversely affected by the proposed use of water by the Applicant.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states in part 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; . . ."

2. It is concluded that there are unappropriated waters in the source of supply at times when the water can be put to the non-consumptive use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

3. It is concluded that the rights of prior appropriators will not be adversely affected by the proposed non-consumptive use of the Applicant.

4. It is concluded that the proposed means of diversion or construction are adequate.

5. Section 85-2-102 (2) defines beneficial use as "... a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses."

6. It is concluded that the proposed use of water for fish and wildlife purposes and for recreation is a beneficial use of water.

7. It is concluded 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.

8. Section 85-5-101, MCA, 1979, states in part, "The Commissioner shall have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree, the waters to which they are entitled according to their rights as affixed by the decree and by any certificates and permits issued under Chapter 2 of this title."

9. It is concluded that the Permittee shall be under the jurisdiction of the Water Commissioner, if any, in this area.

10. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those herein applied for, to the extent necessary to reach a conclusion herein.

Based on the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 16883-s41H by Earl J. Jr. and Gertrude F. Smith is hereby granted to appropriate 10 gallons per minute of water not to exceed 11.5 acre-feet per annum from Bear Creek, a tributary of Rocky Canyon Creek in Gallatin Courty, Montana. The water is to be diverted from Bear Creek through an existing 0.9 acre-foot pond and returned to Bear Creek, all within the SE1/4 NE1/4 SW1/4 of Section 36, Township 2 South, Range 6 East, M.P.M. The water shall be used non-consumptively for recreation, and fish and wildlife purposes from March 1 to November 15, inclusive, of each year.

2. Provisional Permit No. 16883-s41H is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. This Provisional Permit is subject to the authority of the court appointed water commissioner, if and when appointed, to measure and distribute to parties using water in the source of supply, the waters to which they are entitled, including the waters granted in this Provisional Permit. The Permittee shall pay his proportionate share of the fees and compensation expenses, as fixed by the District Court, incurred in the distribution of waters granted in this Provisional Permit.

4. The Permittee shall install a suitable headgate or diversion structure at the point the water is diverted from the source of supply.

5. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time and shall submit said records to the Department upon request.

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

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order 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 Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty days after service of the Final Order.

DATED this 5th of November, 1980.



DAVID L. PENGELLY, D.N.R.C.
HEARING EXAMINER