

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
17,881-g40A BY JOHN RUNESTAD, JR.)

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on May 30, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Order.

On June 9, 1980, the Department received exceptions to the above Proposed Order from Objector Kim A. Baker. The following are the Hearing Examiner's responses to Mr. Baker's exceptions:

1. Section 36-2.14J (1)-sl400 (1) (d) of the Montana Water Use Act Rules adopted by the Board of Natural Resources and Conservation defines "spring" as "ground water if its natural flow is increased by some development at its point of extrusion from the ground, such as simple excavation, cement encasement or rock cribbing. An undeveloped spring is surface water."

2. Mr. Baker takes exception with findings listed by Mr. Larry Brown, Hydrologist and Mr. Roger Noble, Geologist in a technical report contained in the file on this matter, however, Mr. Baker does not introduce any evidence to the contrary.

3. Testimony was presented at the hearing that the developed spring's discharge was measured at 256 gallons per minute. Further testimony was presented that the discharge of the spring is fairly constant and since the time of the measurement of the springs's discharge, the discharge of the spring has approximately doubled due to further development of the spring. No evidence was entered by any of the Objectors

to refute the above entered testimony.

2 4. Witnesses for the Applicant testified that the removal of water
3 from the "Jones Pond" by the Highway Department in 1964 and 1965 did not
4 adversely affect the flow of water in Half Breed Creek. None of the
5 Objectors presented any evidence to the contrary.

6 5. Mr. Baker presented no evidence or testimony to show that there
7 was, in fact, a connection between the flow of water from the "Jones
8 Pond" and the flow of Half Breed Creek through his property.

9 6. As stated in the Proposed Order, the Department is not legally
10 responsible for the actions of Permittees. All permits issued by the
11 Department are conditioned subject to existing rights and any final
12 determination of those rights in the source of supply. The granting of
13 a permit by the Department does not relieve the Permittee of the liabilities
caused by the exercise of such permits.

15 FINAL ORDER

16 1. Subject to the conditions and limitations listed below, Provisional
17 Permit No. 17,881-g40A by John Runestad, Jr. is hereby granted to appropriate
18 .57 cubic feet per second or 256 gallons per minute of water and not to
19 exceed 75 acre-feet per annum in Musselshell County, Montana. The water
20 is to be diverted from a developed spring located within the channel of
21 Half Breed Creek at a point in the NEL/4 SWL/4 SWL/4 of Section 33,
22 Township 7 North, Range 26 East, M.P.M. Half Breed Creek will be used
23 as a carrier and the water will be impounded in a new on-stream pit-
24 reservoir at a point in the NWL/4 NWL/4 NWL/4 of said Section 33, and
25 used for new sprinkler irrigation on a total of 25 acres, more or less,
27 in the NWL/4 of said Section 33, from April 15 to November 15, inclusive,
of each year.

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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.) PROPOSAL FOR DECISION
17,881-g40A BY JOHN RUNESTAD, JR.)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on March 11, 1980, in the Courtroom of the Musselshell County Courthouse, Roundup, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 17,881-g40A, David Pengelly, Hearing Examiner presiding.

The Applicant, Mr. John Runestad, Jr., appeared at the hearing and presented testimony in support of the Application. Mr. Runestad was not represented by legal counsel. Five (5) exhibits were introduced supporting the application, to wit:

Applicant's Exhibits:

- A-1 Letter dated February 11, 1980, from J & L Enterprises regarding John Runestad, Jr's. proposed sprinkler irrigation system
- A-2 Price quote from J & L Enterprises for proposed sprinkler irrigation system
- A-3 Brochure describing Ag-Rain Inc. irrigation systems
- A-4 Brochure and price quote on irrigation systems from Agriturf International, Inc.
- A-5 Judgement and Decree, August 15, 1939, in District Court of the Fourteenth Judicial District of the State of Montana, in and for the County of Musselshell

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1 The Applicant's Exhibits were marked accordingly and received into
2 the record without objections.

3 Also appearing at the hearing and testifying in support of the
4 application were Mrs. John Runestad, Jr., Mr. Carl Eliasson, Mr. Francis
5 Jones, Mr. Russell Pitrone and Mr. Gil Majarus.

6 Three (3) Objectors attended the hearing and presented testimony or
7 statements. The Objectors were Mr. Kim A. Baker, Mr. Alan D. Evans and
8 Mr. Joseph K. Kuzara. Mr. Evans also testified on behalf of his mother,
9 Mrs. Willa Dale Wyatt. The Objectors were not represented by legal
10 counsel. The Objectors introduced four (4) exhibits supporting their
11 objections, to wit:

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13 Objectors' Exhibits:

- 14 O-1 Map of Half Breed Creek with locations and descriptions of
15 water right appropriations (entered by Mr. Kuzara)
16 O-2 Water Right Location Record, E-1, page 322, Records of
17 Musselshell County (entered by Mr. Baker)
18 O-3 Water Right, C-1, page 622, Records of Musselshell County
19 (entered by Mr. Baker)
20 O-4 Copy of aerial photo showing Mr. Baker's property on Half
21 Breed Creek.

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23 The Objector's Exhibits were marked accordingly and received into
24 the record without objections.

25 Montana Department of Natural Resources and Conservation personnel
26 present and testifying on behalf of the Department were Larry Brown,
27 Hydrologist; Roger Noble, Geologist; Arlin Krogstad, Hearing Representative;
28 and Silvio Rodriguez, Lewistown Water Rights Bureau Field Office Manager.

Also present was Vicki Woodrow, Hearing Recorder. The Department was

1 not represented by legal counsel. No exhibits were introduced by the
2 Department.

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4 SUMMARY OF RECORD

5 1. On March 7, 1978, the Department received Application for
6 Beneficial Water Use Permit No. 17,881-g40A by John Runestad, Jr. to
7 appropriate 1.00 cubic feet per second or 450 gallons per minute of
8 water and not to exceed 75 acre-feet per annum in Musselshell County,
9 Montana. The water is to be diverted from a developed spring located
10 within the channel of Half Breek Creek at a point in the NE1/4 SW1/4
11 SW1/4 of Section 33, Township 7 North, Range 26 East, M.P.M. Half Breed
12 Creek will be used as a carrier and the water will be impounded in a new
13 2.58 acre-foot on-stream pit-reservoir at a point in the NW1/4 NW1/4
14 NW1/4 of said Section 33, and used for new sprinkler irrigation on a
15 total of 25 acres, more or less, in the NW1/4 of said Section 33, from
16 April 15 to November 15, inclusive, of each year.

17 2. On August 16, 23 and 30, 1978, the Department caused to be duly
18 published in the Roundup Record-Tribune, Roundup, Montana, notice of
19 Application for Beneficial Water Use Permit No. 17,881-g40A.

20 3. On September 5, 1978, the Department received an objection to
21 the above Application from Kim A. Baker.

22 4. On September 14, 1978, the Department received objections to
23 the above Application from Willa Dale Wyatt and Alan D. Evans.

24 5. On October 2, 1978, the Department received objections to the
25 above Application from Joseph K. Kuzara and Paul Thayer.

26 6. Following a field investigation by the Department in April,
27 1979, at which time the discharge of the developed spring was measured
28 at 256 gallons per minute, the amount of water requested was reduced

1 from 450 gallons per minute, not to exceed 75 acre-feet per annum, to
2 256 gallons per minute, not to exceed 75 acre-feet per annum.

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4 PROPOSED FINDINGS OF FACT

5 1. That the source of supply for Application No. 17,881-g40A is a
6 developed spring, and shall be considered to be ground water.

7 2. That this developed spring discharges at a relatively constant
8 rate in excess of 256 gallons per minute.

9 3. That the diversion of water from this spring in 1964 and 1965
10 did not adversely affect prior water rights on Half Breed Creek.

11 4. That the flow of water in Half Breed Creek below the Applicant's
12 proposed point of diversion is fed by other springs in the channel of
13 Half Breed Creek.

14 5. That Objector Kim Baker has two (2) existing water rights of
15 300 miner's inches and 100 miner's inches respectively. He currently
16 irrigates approximately 25 acres with these appropriations.

17 6. That Objectors Alan D. Evans and Joseph K. Kuzara appear to be
18 claiming the same right, a filed appropriation for 160 miner's inches
19 with a priority date of 1930. The only use of this water is for livestock
20 and small gardens.

21 7. That Objector Alan D. Evans claims an existing right of 300
22 miner's inches with a priority date of 1909. Applicant's Exhibit A-5
23 indicates that the above appropriation was not valid. The only claimed
24 use of the above appropriation is for livestock and a small garden.

25 8. That Objector Alan D. Evans' claim of 10 acres of flood irrigation
26 by a beaver dam is not a valid water right. It appears that Mr. Evans
27 is claiming a use right developed since 1977, however, the single
28 method of obtaining a water right since July 1, 1973, is by receiving a

1 permit from the Department of Natural Resources and Conservation.

2 9. That the diversion of 256 gallons per minute up to 75 acre-feet
3 per annum of water by the Applicant will not adversely affect the rights
4 of prior appropriators on Half Breed Creek.

5 10. That the Applicant's proposed means of diversion or construction
6 have not been clearly described. The actual size of the on-stream pit-
7 reservoir is not known and the total volume of water to be diverted per
8 annum is not known.

9 11. That the proposed use of water is a beneficial use.

10 12. That the proposed use will not interfere unreasonably with
11 other planned uses or developments for which water has been reserved or
12 for which a permit has been issued.

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14 PROPOSED CONCLUSIONS OF LAW

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

- 17 1. there are unappropriated waters in the source of supply:
18 a. at times when the water can be put to the use
19 proposed by the applicant;
20 b. in the amount the applicant seeks to appropriate; and
21 c. throughout the period during which the applicant
22 seeks to appropriate, the amount requested is
23 available;
- 24 2. the rights of a prior appropriator will not be adversely
25 affected;
- 26 3. the proposed means of diversion or construction are adequate;
- 27 4. the proposed use of water is a beneficial use;
- 28 5. the proposed use will not interfere unreasonably with

1 other planned uses or developments for which a permit
2 has been issued or for which water has been reserved; . . ."

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

8 3. It is concluded that the rights of prior appropriators will not
9 be adversely affected.

10 4. It is concluded that the proposed use is a beneficial use.

11 5. Section 85-2-312, MCA, 1979, states in part that, "The department
12 may require modification of plans and specifications for the appropriation
13 or related diversion or construction. It may issue a permit subject to
14 terms, conditions, restrictions, and limitations it considers necessary
15 to protect the rights of other appropriators . . ."

16 6. It is concluded that the proposed means of diversion or construction
17 are adequate subject to certain conditions in the Proposed Order.

18 7. It is concluded that the proposed use will not interfere unreasonably
19 with other planned uses or developments for which a permit has been
20 issued or for which water has been reserved.

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

23 PROPOSED ORDER

24 1. Subject to the conditions and limitations listed below, Provisional
25 Permit No. 17,881-g40A by John Runestad, Jr. is hereby granted to appropriate
26 .57 cubic feet per second or 256 gallons per minute of water and not to
27 exceed 75 acre-feet per annum in Musselshell County, Montana. The water
28 is to be diverted from a developed spring located within the channel of

1 Half Breed Creek at a point in the NE1/4 SW1/4 SW1/4 of Section 33,
2 Township 7 North, Range 26 East, M.P.M. Half Breed Creek will be used
3 as a carrier and the water will be impounded in a new on-stream pit-
4 reservoir at a point in the NW1/4 NW1/4 NW1/4 of said Section 33, and
5 used for new sprinkler irrigation on a total of 25 acres, more or less,
6 in the NW1/4 of said Section 33, from April 15 to November 15, inclusive,
7 of each year.

8 2. Provisional Permit No. 17,881-g40A is granted subject to any
9 final determination of existing water rights in the source of supply as
10 provided by Montana law.

11 3. Provisional Permit No. 17,881-g40A is granted subject to prior
12 water rights, if any, in the source of supply.

13 4. The Permittee shall submit plans and specifications of the
14 proposed project to the Department for approval prior to appropriation
15 of the water granted herein.

16 5. The Permittee shall install an adequate flow measuring device
17 in order to allow the flow rate and volume of water diverted to be
18 recorded. The Permittee shall keep a written record of the flow rate
19 and volume of all waters diverted including the period of time and shall
20 submit said records to the Department upon request.

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

26 NOTICE

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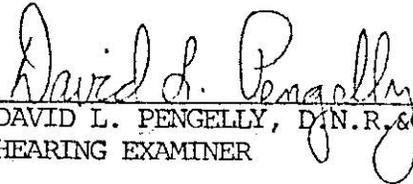
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1 parties of record. The review and comment period shall commence with
2 the receipt of this Proposed Order and shall end ten (10) days thereafter.
3 No extensions of time for comment will be granted.

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

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

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11 DATED this 30th day of May, 1980.

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