

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. 18,516-s40J BY DOROTHY WORONIK )  
\*\*\*\*\*

The Proposed Findings of Fact and Conclusions of Law as entered by the Hearing Examiner on February 19, 1980, are hereby adopted as the Findings of Fact and Conclusions of Law. The Proposed Order is hereby adopted as the Final Order with the addition of one (1) condition in response to comments received on behalf of the Objector, Frank Pleskac. The additional condition is entered as point 2(g) in the Final Order.

FINAL ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 18,516-s40J by Dorothy Woronik is hereby granted to appropriate 11 cubic feet per second or 4,937 gallons per minute of water, not to exceed 29 acre-feet per annum from Lodge Creek a tributary of the Milk River for irrigation purposes from February 1 to May 30, inclusive, of each year, in Hill County, Montana, to be diverted by means of a pump at a point in the NE1/4 SE1/4 SW1/4 of Section 21, Township 37 North, Range 16 East, M.P.M., to be used for new flood irrigation on 16 acres in the SW1/4 and 3 acres in the SE1/4 of said Section 21, containing a total of 19 acres, more or less.

2. The conditions to the issuance of this Provisional Permit are as follows:

a. Subject to all prior water rights.

- 1           b. Subject to any final determination of existing water  
2                 rights as provided by Montana law.
- 3           c. The water appropriated pursuant to this Permit shall only  
4                 be diverted during extremely high spring runoff or when  
5                 the Water and Power Resources Service (Bureau of Reclamation)  
6                 is spilling at Vandalia Diversion Dam. During all other  
7                 periods the Permittee shall allow the normal flow to pass  
8                 her diversion to satisfy prior water rights.
- 9           d. The Permittee shall contact the Water and Power Resources  
10                Service (Bureau of Reclamation) at Malta at the start of  
11                each irrigation season to determine the current water  
12                supply conditions and the availability of water for her  
13                use. This contact shall be made by certified mail through  
14                the U.S. Postal Service with return receipt requested.
- 15           e. The conditions contained herein relating to the Vandalia  
16                Diversion Dam under "c" and "d" above may be modified by  
17                the Department upon receipt of further evidence or  
18                determination by the Department pertaining to water  
19                rights of the U.S. Government and said reservoir.
- 20           f. The Permittee shall install and maintain an adequate  
21                measuring device to enable the Permittee to keep a record  
22                of rate and volume of water diverted as well as the  
23                periods of diversion. Such records shall be presented to  
24                the Department of Natural Resources and Conservation upon  
25                demand by the Department.
- 26           g. The Permittee shall contact the U. S. Department of  
27                Interior, Geological Survey Gauging Station at the  
28                International Boundary (398-5532) before diverting

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1 any water under this Permit. The Permittee shall  
2 not divert any water unless the flow in Lodge Creek  
3 at the gauging station exceeds 225 cubic feet per  
4 second. The Permittee shall keep a written record  
5 of flows in Lodge Creek whenever water is appropriated  
6 under this Permit, and said records shall be made  
7 available to the Department upon request.

8 3. The Permittee shall not exercise Provisional Permit Nos. 18,516-  
9 s40J and 18,519-s40J simultaneously.

10 4. The granting of Provisional Permit No. 18,516-s40J by the  
11 Department in no way reduces or alters the Permittee's liability for  
12 damage caused by the Permittee's exercise of said Permit, nor does the  
13 Department in issuing the Permit acknowledge liability for damage caused  
14 by the Permittee's exercise of this Permit.

15 5. The granting of this Provisional Permit in no way grants the  
16 Permittee any right to violate rights of any other party nor does it  
17 excuse the Permittee from any liability for same even if such violation  
18 is a necessary and unavoidable consequence of exercising this Permit.

19 NOTICE

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

22 The Hearing Examiner's Final Order may be appealed in accordance  
23 with the Montana Administrative Procedures Act, by filing a petition in  
24 the appropriate court within thirty (30) days after service of the Final  
25 Order.  
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1 No water shall be appropriated under this Final Order until Provisional  
2 Permit No. 18,516-s40J is issued.

3  
4 DATED this 6th day of March, 1980.  
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6  
7 *David L. Pengelly*  
8 DAVID L. PENGELLY, D.N.R.&C.  
9 HEARING EXAMINER  
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1 One Objector attended the hearing and presented testimony or  
2 statements. The Objector, Frank Pleskac, was represented by legal  
3 counsel, Ted Thompson and Bruce Swenson, Havre, Montana. The Objector  
4 introduced twelve (12) exhibits supporting his objection, to wit:

5 OBJECTOR'S EXHIBITS:

- 6 O-1 Photograph of Frank Pleskac's intake pipe in Lodge Creek  
7  
8 O-2 Photograph of Frank Pleskac's pumping site on Lodge Creek  
9  
10 O-3 Photograph of Lodge Creek, approximately 1/4 mile below  
11 Frank Pleskac's pump site  
12  
13 O-4 Photograph of Frank Pleskac's intake pipe on Lodge Creek  
14  
15 O-5 Photograph of Frank Pleskac's sprinkler system  
16  
17 O-6 Photograph of Frank Pleskac's pump  
18  
19 O-7 Photograph of Frank Pleskac's flow meter on pump  
20  
21 O-8 Bar graph of average monthly stream flows for Lodge Creek at  
22 U.S.G.S. gauge below McRae Creek at International Boundary,  
23 1961 to 1977  
24  
25 O-9 Bar graph of maximum recorded daily flow each month during  
26 irrigation season at U.S.G.S. gauging station on Lodge Creek  
27 below McRae Creek at International Boundary  
28  
29 O-10 Map of Applicant's proposed diversion and Objector Pleskac's  
30 existing diversion on a 1:250,000 scale map, Havre, Montana  
31  
32 O-11 Copies of water right appropriations from Hill County Clerk  
33 and Recorder files  
34  
35 O-12 Copies of water right appropriations from Blaine County Clerk  
36 and Recorder files.

37 The Objector's Exhibits O-1 thru O-10 were marked accordingly and  
38 received into the record without objections. Counsel for the Applicant  
39 objected to Exhibits O-11 and O-12 based on the apparent irrelevancy of

1 the Exhibits and also because the chain of title for each water right  
2 would need to be traced to determine if the rights were still valid.

3 Montana Department of Natural Resources and Conservation personnel  
4 present and testifying on behalf of the Department were Arlin Krogstad,  
5 Hearing Representative and Bob Larson, Havre Water Right Bureau Field  
6 Office Manager. Also present was Vicki Woodrow, Hearing Recorder. The  
7 Department was not represented by legal counsel. No exhibits were  
8 introduced by the Department.

9  
10 MOTIONS

11 1. On June 19, 1979, the Department received a motion from Counsel  
12 for the Objector to dismiss the above Application on the grounds that  
13 the Applicant failed to present any evidence or proof that there are  
14 unappropriated waters in the source of supply, at times when the water  
15 can be put to use by the Applicant, in the amount which the Applicant  
16 seeks to appropriate, and throughout the period when the Applicant seeks  
17 to appropriate said waters; that the rights of prior appropriators will  
18 not be adversely affected; or that the proposed means of diversion or  
19 construction are adequate.

20 2. At the hearing on November 13, 1979, Counsel for the Applicant  
21 presented a motion to strike the motion to dismiss presented by Counsel  
22 for the Objector.

23 3. At the hearing, Counsel for the Objector introduced a motion  
24 challenging the dismissal of criteria number six (6) of the Montana  
25 Water Use Act (85-2-311 (6), MCA, 1979) from being considered in this  
26 case. Criteria number six (6) states that "an applicant for an appropriation  
27 of 15 cubic feet per second or more proves by clear and convincing  
28 evidence that the rights of a prior appropriator will not be adversely  
affected."

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1 above Application from the Malta Irrigation District and the Glasgow  
2 Irrigation District.

3 5. On November 24, 1978, the Department received an objection to  
4 the above Application from the Water and Power Resources Service (formerly  
5 the Bureau of Reclamation).

6 6. On December 8, 1978, the Department received an objection to  
7 the above Application from Frank Pleskac.

8 7. In a letter received by the Department on November 14, 1978,  
9 the Water and Power Resources Services stated that they would not attend  
10 the hearing assuming that the standard Milk River conditions would be  
11 included in any provisional permits granted. The Applicant has agreed  
12 to the standard Milk River conditions as being part of the provisional  
13 permit if granted.

14 8. The Applicant, Dorothy Woronik, testified that she filed the  
15 above Application with the assistance of Bob Larson. The Applicant runs  
16 350 to 400 head of cattle. In the past the Applicant has had to buy hay  
17 to feed her cattle, and because of the price of the hay, wishes to grow  
18 her own hay crop. The Applicant feels that growing her own hay crop is  
19 economically feasible, since she already owns the equipment necessary to  
20 set up the irrigation system described in the above Application.

21 9. Junior Woronik, the Applicant's son, testified that the Applicant  
22 currently raises 400 acres of alfalfa, including alfalfa raised on  
23 leased land. The Applicant intends to use the same pump to exercise both  
24 of the applications for 11 cubic feet per second (Nos. 18,516- and 18,519-  
25 s40J). The Applicant intends to divert water only when the stream banks  
26 are overflowing. The water is to be ponded for 12 to 14 days upon the  
27 Applicant's field while the ground is frozen. At the end of this period,  
28 the excess water will be returned to the stream. The Applicant's pump  
stations are located on the west side of Lodge Creek, while the Applicant  
lives on the east side of Lodge Creek. The Applicant's son,

1 who will actually be running the operation, stated that he has had  
2 previous experience in this type of operation and feels that he has the  
3 necessary equipment to prepare the system with little or no outside  
4 help, beyond possibly hiring extra hands to run some of the earth moving  
5 equipment. The Applicant currently owns the pump which is to be used if  
6 this permit is granted. The pump is a power-take-off from a tractor. The  
7 intake of the pump needs a water depth of approximately four (4) feet to  
8 operate properly. The Applicant plans to use one (1) irrigation when  
9 the water is available and expects to get one (1) to two (2) cuttings of  
10 alfalfa from each irrigation. Junior Woronik stated that the spring  
11 runoff generally lasts one (1) week.

12 10. Waldo Spangelo, Counsel for the Applicant, discussed Exhibit  
13 A-2 which is a summary of the previous 14 years streamflow records from  
14 the U.S.G.S. gauging station on Lodge Creek at the International Boundary.  
15 The data covers the period from 1965 to 1978, inclusive, for the months  
16 of March, April and May. During that period, 11 of the 14 years had  
17 maximum daily flows in excess of 200 cubic feet per second, and nine (9)  
18 of the 14 years had maximum daily flows in excess of 250 cubic feet per  
19 second. Mr. Spangelo stated that 200 cubic feet per second was chosen  
20 as the flow necessary to satisfy prior rights based on information given  
21 in Bob Larson's field report, and also because Creedman Coulee adds to  
22 the flow of Lodge Creek below the U.S.G.S. gauge and the Objector, Frank  
23 Pleskac, but above several other prior appropriators on Lodge Creek.  
24 Ted Thompson, Counsel for the Objector, objected to the fact that Waldo  
25 Spangelo, Counsel for the Applicant, had stated that some water must  
26 enter Lodge Creek from Creedman Coulee without actually proving such.

27 (NOTE: However, the map which was entered by the Objector as Exhibit O-  
28 10 displays Creedman Coulee as a perennial stream.)

11. Arlin Krogstad, Department Hearing Representative, stated that

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1 it would take 1.33 days of pumping at 11 cubic feet per second to  
2 appropriate 29 acre-feet of water.

3 12. Bob Larson, Havre Water Right Bureau Field Office Manager,  
4 made several clarifications for the record. First, at the time of  
5 Dorothy Woronik's Application, Bob worked for the Soil Conservation  
6 Service, not the Department of Natural Resources and Conservation.  
7 Second, in his report regarding appropriations on Lodge Creek, he stated  
8 that 200 to 225 cubic feet per second should be sufficient to satisfy  
9 existing and working appropriations on Lodge Creek. Mr. Larson defined  
10 working appropriations as those which are currently being put to the  
11 beneficial use and also are pertinent to the time period when the Applicant  
12 seeks to appropriate water. Mr. Larson discussed several large recorded  
13 appropriations from Lodge Creek which are not currently being put to  
14 beneficial use as examples of appropriations which were not considered  
15 to be working appropriations.

16 13. Ted Thompson, Counsel for the Objector, discussed Objector's  
17 Exhibits O-8 and O-9. These Exhibits are bar graphs of U.S.G.S. streamflow  
18 records at the International Boundary. Based on the information displayed  
19 in these Exhibits the Objector claims that there are no unappropriated  
20 waters available for the Applicant during the time periods when the  
21 Applicant wishes to appropriate such water. A rate of 247.9 cubic feet  
22 per second at the U.S.G.S. gauging station was chosen by the Objector as  
23 the flow necessary to satisfy prior appropriators before the Applicant  
24 should be allowed to appropriate any water. Counsel for the Objector  
25 also pointed out that in the Water Resources Surveys for Blaine and Hill  
26 Counties, appropriations of more than 1,500 cubic feet per second are  
27 listed for Lodge Creek.

28 14. The Objector, Frank Pleskac, testified that he farms south of  
the Applicant and has appropriated water since 1947 using a 1938 water

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1 right. The right is for 19 cubic feet per second, however, the Objector  
2 has never used the full volume claiming that the water is never available  
3 during the irrigation season. Since 1977, the Objector has irrigated  
4 45 acres with a sprinkler system. The Objector applies approximately  
5 600 to 625 gallons per minute with a sprinkler system. The Objector  
6 stated that in 1977, the year he put the sprinkler system in, he was not  
7 able to actually run the system because of a shortage of water. The  
8 Objector claimed the junior appropriators north of him on Lodge Creek  
9 were taking his water. The Objector stated that during spring runoff it  
10 is difficult for him to take water out of the creek using his current  
11 system. The Objector also stated that if other permit holders followed  
12 the stipulations on their permits, he would have sufficient water. The  
13 Objector generally begins pumping at the end of April each year, if  
14 water is available. To run his existing system efficiently, the Objector  
15 appropriates 650 gallons per minute or 1.45 cubic feet per second. The  
16 Objector stated that he needed a water depth of 2 1/2 to 3 feet in the  
17 creek or a minimum flow of five (5) cubic feet per second for his system  
18 to work. Prior to 1977, the Objector irrigated 55 to 60 acres with a  
19 flood irrigation system. The maximum diversion ever used by the Objector  
20 was approximately 7.1 cubic feet per second. Mr. Pleskac claimed that  
21 his pumping system is more efficient when a small volume of water is  
22 available than the system proposed by the Applicant. Mr. Pleskac also  
23 stated that a large volume of water passes his point of diversion in  
24 the months of March and April. He stated that large volumes of water  
25 are seldom available in May and occasionally such volumes of water are  
26 available in February.

27 15. Bob Larson stood on his report present in the file on this  
28 matter, with a special note that he used 27 years of record rather than

1 17 years of record as was used by the Objector in determining water  
2 availability. Mr. Larson testified that from 1952 to 1961, flows in  
3 Lodge Creek exceeded 247.9 cubic feet per second during the February  
4 through May period in seven (7) of those nine (9) years. Mr. Larson  
5 also disagreed with the Objector regarding the availability of water in  
6 the month of May, stating that during the month of May there are several  
7 peak flows available which the Applicant could put to beneficial use.  
8 Mr. Larson stated that he feels that excess water is available during  
9 periods when the Applicant has proposed to use this water and that the  
10 Applicant should be allowed to use this water with the standard Milk  
11 River conditions applied. Regarding the excessive appropriations on  
12 Lodge Creek, Mr. Larson pointed out that on the Powder River 70 to 90  
13 percent of the listed appropriations bear no relation to what actually  
14 exists in the field. Mr. Larson also pointed out that Lodge Creek is  
15 not an adjudicated stream.

16  
17 PROPOSED FINDINGS OF FACT

- 18 1. That during most years there are unappropriated waters in Lodge  
19 Creek during the period from February 1 to May 30.
- 20 2. That unappropriated waters may be appropriated without adversely  
21 affecting prior rights if the Permit is conditioned with the standard  
22 Milk River conditions.
- 23 3. That the Applicant's proposed means of diversion and construction  
24 are adequate.
- 25 4. That the Applicant will be appropriating less than 15 cubic  
26 feet per second of water provided that Provisional Permit Nos. 18,516-  
27 s40J and 18,519-s40J are not exercised simultaneously.

PROPOSED CONCLUSIONS OF LAW

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

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

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

22 3. It is concluded that the rights of prior appropriators will not  
23 be adversely affected by the granting of this Provisional Permit.

24 4. It is concluded that the proposed means of diversion or construction  
25 are adequate; the proposed use of water is a beneficial use; and the  
26 proposed use will not interfere unreasonably with other planned uses or  
27 developments for which water has been reserved.

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

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PROPOSED ORDER

1  
2 1. Subject to the conditions and limitations listed below, Provisional  
3 Permit No. 18,516-s40J by Dorothy Woronik is hereby granted to appropriate  
4 11 cubic feet per second or 4,937 gallons per minute of water, not to  
5 exceed 29 acre-feet per annum from Lodge Creek a tributary of the Milk  
6 River for irrigation purposes from February 1 to May 30, inclusive, of  
7 each year, in Hill County, Montana, to be diverted by means of a pump at  
8 a point in the NE1/4 SE1/4 SW1/4 of Section 21, Township 37 North, Range  
9 16 East, M.P.M., to be used for new flood irrigation on 16 acres in the  
10 SW1/4 and 3 acres in the SE1/4 of said Section 21, containing a total of  
11 19 acres, more or less.

12 2. The conditions to the issuance of this Provisional Permit are  
13 as follows:

- 14 a. Subject to all prior water rights.  
15 b. Subject to any final determination of existing water  
16 rights as provided by Montana law.  
17 c. The water appropriated pursuant to this Permit shall only  
18 be diverted during extremely high spring runoff or when  
19 the Water and Power Resources Service (Bureau of Reclamation)  
20 is spilling at Vandailia Diversion Dam. During all other  
21 periods the Permittee shall allow the normal flow to pass  
22 her diversion to satisfy prior water rights.  
23 d. the Permittee shall contact the Water and Power Resources  
24 Service (Bureau of Reclamation) at Malta at the start of  
25 each irrigation season to determine the current water  
26 supply conditions and the availability of water for her  
27 use. This contact shall be made by certified mail through  
28 the U.S. Postal Service with return receipt requested.

1 e. The conditions contained herein relating to the Vandalia  
2 Diversion Dam under "c" and "d" above may be modified by  
3 the Department upon receipt of further evidence or  
4 determination by the Department pertaining to water  
5 rights of the U.S. Government and said reservoir.

6 f. The Permittee shall install and maintain an adequate  
7 measuring device to enable the Permittee to keep a record  
8 of rate and volume of water diverted as well as the  
9 periods of diversion. Such records shall be presented to  
10 the Department of Natural Resources and Conservation upon  
11 demand by the Department.

12 3. The Permittee shall not exercise Provisional Permit Nos. 18,516-  
13 s40J and 18,519-s40J simultaneously.

14 4. The granting of Provisional Permit No. 18,516-s40J by the  
15 Department in no way reduces or alters the Permittee's liability for  
16 damage caused by the Permittee's exercise of said Permit, nor does the  
17 Department in issuing the Permit acknowledge liability for damage caused  
18 by the Permittee's exercise of this Permit.

19 5. The granting of this Provisional Permit in no way grants the  
20 Permittee any right to violate rights of any other party nor does it  
21 excuse the Permittee from any liability for same even if such violation  
22 is a necessary and unavoidable consequence of exercising this Permit.

23 NOTICE

24 This Proposed Order is offered for the review and comment of all  
25 parties of record. The review and comment period shall commence with  
26 the mailing of this Proposed Order and shall end fifteen (15) days  
27 thereafter. No extensions of time for comment will be granted.

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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.

DATED this 19th day of February, 1980.

*David L. Pengelly*  
\_\_\_\_\_  
DAVID L. PENGELLY, D.N.R. & C.  
HEARING EXAMINER

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