

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
19,569-s43B BY WALTER PAPEZ)

The Proposed Findings of Fact, Proposed Conclusions of Law,
and Proposed Order as entered by the Hearing Examiner on September
16, 1980, are hereby adopted as the Findings of Fact, Conclusions
of Law and Final Order.

FINAL ORDER

An exception to the Proposal for Decision was entered by the
Applicant, Walter Papez, on September 19, 1980. The Applicant stated
that the gated tube in the bottom of the reservoir was to be used for
draining the pond, not to provide for downstream rights. The gated tube
is to be used to provide for prior rights only at such times when the
Applicant is making a consumptive use of water, i.e. filling the
reservoir, and prior downstream rights are not being satisfied. At
such times, the Applicant must allow water to pass through the res-
ervoir to satisfy those rights. Once the reservoir is filled, the
Applicant would not be required to release water at some later date
to satisfy prior rights. This condition is primarily meant to protect
prior downstream rights for stockwater that might be adversely affected
if the Applicant were to fill the reservoir during a low flow period in
the source of supply.

1. Subject to the conditions and limitations listed below, Provisional
Permit No. 19569-s43B by Walter Papez is hereby granted to appropriate
0.5 cubic foot per second, or 225 gallons per minute of water, not to
exceed 361 acre-feet per annum from Ten Mile Creek, a tributary of Otter
Creek, for fish and wildlife purposes. The water is to be impounded in

1 a new 15 acre-foot on-stream reservoir, at a point in the NW1/4 SW1/4
2 NE1/4 of Section 27, Township 3 North, Range 14 East, M.P.M., Sweet
3 Grass County, Montana. The initial appropriation of 15 acre-feet per
4 annum is a consumptive use and shall be made between January 1 and April
5 30, inclusive, of each year. The remaining appropriation of 346 acre-
6 feet is a non-consumptive use and shall be made from January 1 to December
7 31, inclusive, of each year.

8 2. Provisional Permit No. 19569-s43B is granted subject to existing
9 rights in the source of supply and any final determination of those
10 rights as provided by Montana law.

11 3. The reservoir impoundment shall be built according to SCS
12 specifications, and shall include an adequate spillway, a trickle tube
13 from the top of the dam to allow water to flow through the dam once the
14 reservoir is filled, and a gated tube in the bottom of the reservoir to
15 allow water to be passed through the reservoir and downstream to provide
16 for prior rights when there is not sufficient water available to fill
17 the reservoir and satisfy prior rights.

18 4. The issuance of this Provisional Permit by the Department in no
19 way reduces the Permittee's liability for damages caused by the Permittee's
20 exercise of this Provisional Permit, nor does the Department in issuing
21 the Provisional Permit in any way acknowledge liability for damage
22 caused by the Permittee's exercise of the Provisional Permit.
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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 30th day of September, 1980.

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

CASE # 19569

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
19569-s43B BY WALTER PAPEZ)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on June 18, 1980, at Big Timber, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 19569-s43B, David Pengelly, Hearing Examiner, presiding. The hearing in the above matter was held in conjunction with the hearing in the matter of Application for Beneficial Water Use Permit No. 19570-s43B.

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

Six (6) Objectors attended the hearing and presented testimony. Those present were Mrs. Opal Cunningham, Dr. Charlie Bray, Mr. Ivar Stenberg, Mr. Harry Boeh, Mr. Frank Cosgriff, and Mr. Paul Gilbert. Mrs. Cunningham was represented by legal counsel, Mr. Dick Heard, Columbus, Montana. One (1) exhibit was introduced by Mr. Frank Cosgriff, to wit:

Objector's Exhibit:

O-1 Petition signed by several individuals opposing the construction of dams on Ten Mile Creek.

The Objector's exhibit was introduced into the record with no objections.

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Montana Department of Natural Resources and Conservation personnel present at the hearing were Arlin Krogstad, Hearing Representative; Don Riddle, Billings Water Rights Bureau Field Office Manager; and Vicki Woodrow, Hearings Reporter. No exhibits were introduced on behalf of the Department. The Department was not represented by legal counsel.

SUMMARY OF RECORD

1. On July 20, 1978, the Department received an Application for Beneficial Water Use Permit No. 19569-s43B by Walter Papez to appropriate 0.5 cubic feet per second, or 225 gallons per minute, not to exceed 361 acre-feet per annum from Ten Mile Creek, a tributary of Otter Creek. The water is to be impounded in a new 15 acre-foot on-stream reservoir, at a point in the NW1/4 SW1/4 NE1/4 of Section 27, Township 3 North, Range 14 East, M.P.M., Sweet Grass County, Montana. The initial appropriation of 15 acre-feet per annum will be a consumptive use with the remaining volume of water appropriated being a non-consumptive use and returned to the stream. The water is to be diverted from January 1 to December 31, inclusive, of each year, for fish and wildlife purposes.

2. On November 8, 15, and 22, 1978, the Department caused to be duly published in the Big Timber Pioneer, Big Timber, Montana, notice of Application for Beneficial Water Use Permit No. 19569-s43B.

3. On December 13, 1978, the Department received an objection to the above Application from Opal Cunningham.

4. On December 19, 1978, the Department received an objection to the above Application from Harry Boeh.

5. On December 26, 1978, the Department received objections to the above Application from Kaia Cosgriff, and Robert A. Bray.

6. On December 27, 1978, the Department received an objection to the above Application from Ivar S. and Peggy Jo Stenberg.

7. At the hearing, Paul Gilbert was allowed to make an untimely objection to the above Application.

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 sufficient water is available during spring runoff, primarily during the months of March and April, to provide water to fill the Applicant's dam. Further, there is sufficient water during the irrigation season to provide the non-consumptive flow through figure requested by the Applicant.

2. That the Objectors, Opal Cunningham, Dr. Charlie Bray, Harry Boeh, Frank Cosgriff, and Paul Gilbert have valid existing water rights from the source of supply.

3. That the Applicant's proposed use of water would not adversely affect prior appropriators on the source of supply if the reservoir is so constructed that water is allowed to pass through the reservoir when required for use by downstream appropriators.

4. That the Applicant proposes to construct a trickle tube for non-consumptive flow through the resevoir, and a spillway to prevent flood waters from overtopping the resevoir. The Applicant further proposes to install a gated tube in the bottom of the dam to allow water to flow through to protect prior appropriators.

5. That the proposed means of diversion or construction are adequate;

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

7. That there are no other planned uses or developments for which permits have been issued or for which water has been reserved that would be unreasonably interfered with by the granting of this permit.

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; . . ."

2. Section 85-2-312, MCA, 1979, states in part that the Department "May issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators."

3. Section 85-2-102 (2), MCA, 1979, states that "Beneficial use, unless otherwise provided, means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stockwater), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses."

4. It is concluded that there are unappropriated waters in the source of supply at times when the water can be put to the 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.

5. It is concluded that the rights of prior appropriators will not be adversely affected by the granting of this permit, subject to certain conditions in the Proposed Order.

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

7. It is concluded that the Department cannot deny a water right application due to concerns regarding dam safety if it is found that the proposed means of diversion or construction are adequate.

8. It is concluded that the proposed use of water is a beneficial use.

9. 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.

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 rights 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. 19569-s43B by Walter Papez is hereby granted to appropriate

0.5 cubic foot per second, or 225 gallons per minute of water, not to exceed 361 acre-feet per annum from Ten Mile Creek, a tributary of Otter Creek, for fish and wildlife purposes. The water is to be impounded in a new 15 acre-foot on-stream reservoir, at a point in the NW1/4 SW1/4 NE1/4 of Section 27, Township 3 North, Range 14 East, M.P.M., Sweet Grass County, Montana. The initial appropriation of 15 acre-feet per annum is a consumptive use and shall be made between January 1 and April 30, inclusive, of each year. The remaining appropriation of 346 acre-feet is a non-consumptive use and shall be made from January 1 to December 31, inclusive, of each year.

2. Provisional Permit No. 19569-s43B is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana law.

3. The reservoir impoundment shall be built according to SCS specifications, and shall include an adequate spillway, a trickle tube from the top of the dam to allow water to flow through the dam once the reservoir is filled, and a gated tube in the bottom of the reservoir to allow water to be passed through the reservoir and downstream to provide for prior rights when there is not sufficient water available to fill the reservoir and satisfy prior rights.

4. 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

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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 (30) days after service of the Final Order.

DATED this 16th day of September, 1980.



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