

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

\*\*\*\*\*  
IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE )  
PERMIT NO. 20,769-s76K BY ) FINAL ORDER  
KENNETH J. ROGERS )  
\*\*\*\*\*

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on January 23, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

FINAL ORDER

1. Subject to the provisions and conditions imposed below, the Application for Beneficial Water Use Permit No. 20,769-s76K by Kenneth J. Rogers is hereby granted to appropriate ten (10) gallons per minute of water, not to exceed .75 acre-foot per annum from an unnamed tributary of Groom Creek in Lake County, Montana. The water is to be diverted from said unnamed tributary by means of a pump at a point in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 14, Township 25 North, Range 18 West, M.P.M., and used for domestic purposes for one (1) family in the NE $\frac{1}{4}$  of said Section 14 from January 1 to June 30 and October 1 to December 31, inclusive, of each year.

2. The Permit is granted subject to all prior water rights.

3. The Permit is granted subject to any final determination of existing water rights as provided by Montana law.

4. The Permittee shall install and maintain an adequate flow meter to accurately measure the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and

1 volume of all waters diverted including the period of time and shall  
2 submit said records to the Department upon request.

3 5. The granting of Provisional Permit No. 20,769-s76K by the  
4 Department in no way reduces or alters the Permittee's liability for  
5 damage caused by the Permittee's exercise of this Permit, nor does  
6 the Department in issuing this Permit in any way acknowledge liability  
7 for damage caused by the Permittee's exercise of this Permit.

8 6. The granting of this Provisional Permit in no way grants the  
9 Permittee any right to violate any right of any other party, nor does  
10 it excuse the Permittee from any liability for same, even if such  
11 violation is a necessary and unavoidable consequence of exercising  
12 this Permit.

13 NOTICE

14 The Proposed Order is offered for the review and comment of all  
15 parties of record. The review and comment period shall commence with  
16 the mailing of this Proposed Order and shall end fifteen (15) days there-  
17 after. No extensions of time for comment will be granted.

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

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

24 Since the Hearing, Forrest Tevebaugh, Hearing Examiner, has resigned  
25 and is no longer available to the Department. The undersigned has  
26  
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28

2 listened to the entire hearing transcript and read all the material in  
3 the Department's file on this matter.

4 DATED this 8th day of February, 1980.

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6  
7 David L. Pengelly  
8 DAVID L. PENGELLY, D.W.R.&C.  
9 HEARING EXAMINER  
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**CASE # 20769**

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

\*\*\*\*\*

IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE )  
PERMIT NO. 20,769-s76K BY ) PROPOSAL FOR DECISION  
KENNETH J. ROGERS )

\*\*\*\*\*

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on September 5, 1979, in the Flathead County Courthouse, East Conference Room, at Kalispell, Montana, for the purpose of hearing objections to the above named Application for Beneficial Water Use Permit No. 20,769-s76K, Forrest Tevebaugh, Hearing Examiner presiding.

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

One Objector attended the hearing and presented testimony or statements. The Objector, Mrs. Martha I. Martin was represented by legal counsel, Mr. James Oleson, Kalispell, Montana. Also testifying for the Objector as an expert witness was Allen Tudor of Morrison-Maierle Inc., Kalispell, Montana. The Objector introduced five (5) exhibits supporting her objection, to wit:

OBJECTOR'S EXHIBITS:

0-1 Photograph of unnamed tributary to Groom Creek, flowing through an 18-inch culvert below Applicant's property (August 9, 1979).

0-2 Photograph of Al Tudor measuring 18-inch culvert on unnamed tributary of Groom Creek (August 9, 1979).

1 0-3 Photograph of Al Tudor measuring depth of flow in culvert on  
2 unnamed tributary of Groom Creek (August 9, 1979).

3 0-4 As Estimated and Measured Flows in Unnamed Tributary of  
4 Groom Creek, by Allen Tudor (2 pages).

5 0-5 Photocopies of recorded water rights on unnamed tributary  
6 of Groom Creek (5 pages).

7 The Objector's Exhibits were marked accordingly and received into the  
8 record without objection.

9 Montana Department of Natural Resources and Conservation personnel  
10 present and testifying on behalf of the Department were Arlin Krogstad,  
11 Department Hearing Representative, and Jim Rehbein, Kalispell Water Rights  
12 Bureau Field Office Manager. Also present was Vicki Woodrow, Department  
13 Hearing Recorder. The Department was not represented by legal counsel.  
14 No exhibits were introduced by the Department.

15 MOTIONS

16 1. On July 19, 1979, at the Pre-hearing Conference, Counsel for  
17 the Objector introduced a motion to quash and dismiss the Application  
18 because the Department lacked the jurisdiction to hear this matter.  
19 This motion was denied by the Hearing Examiner.

20 2. At the hearing, Counsel for the Objector introduced a motion  
21 to dismiss the Application because the Applicant had not met the six (6)  
22 criteria listed under Section 85-2-311, MCA, 1979. This motion was  
23 also denied by the Hearing Examiner.

24 PROPOSED FINDINGS OF FACT

25 1. On July 28, 1978, the Department received a.. Application for  
26 Beneficial Water Use Permit No. 20,769-s76K by Kenneth J. Rogers, to  
27

1 appropriate 10 gallons per minute of water, not to exceed one (1) acre-  
2 foot per annum from an unnamed tributary of Groom Creek in Lake County,  
3 Montana. The water is to be diverted from said unnamed tributary by  
4 means of a pump at a point in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 14, Township 25  
5 North, Range 18 West, M.P.M., and used for domestic purposes for one (1)  
6 family in the NE $\frac{1}{4}$  of said Section 14 from January 1 to December 31,  
7 inclusive, of each year.

8 2. On January 11, 18, and 25, 1979, the Department caused to be  
9 duly published in the Hungry Horse News, Columbia Falls, Montana, notice  
10 of the above Application for Beneficial Water Use Permit No. 20,769-s76K.

11 3. On February 26, 1979, the Department received an objection to the  
12 above Application from Mrs. Martha I. Martin.

13 4. On February 28, 1979, the Department received an objection to the  
4 above Application from Mrs. Mayme D. Ober.

15 5. The Applicant testified that he felt water was available for  
16 appropriation without adversely affecting other appropriators on the stream,  
17 since none of the appropriators downstream from Mrs. Martin had any  
18 objections to his Application. Under cross-examination by Mr. Oleson,  
19 the Applicant testified that the unnamed tributary of Groom Creek flows  
20 year round, however, the Applicant did not know the actual discharge of  
21 the stream, nor did the Applicant know the total amount of other  
22 appropriations on this stream. The Applicant further testified that it was  
23 approximately 35 yards along the stream from a culvert on his property  
24 near his point of diversion to a second culvert under the county road below  
25 his property. There is one small diversion for a garden plot between  
26 these two culverts. The Applicant testified that he intended to divert  
27 water from the creek via a pump which would pump water through a one (1)  
28 inch pipe to a cabin.

1           6. Mr. Allen Tudor, an employee of Morrison-Maerle, Inc., Kalispell,  
2 Montana, inspected and gauged the unnamed tributary to Groom Creek in the  
3 company of Mr. Oleson and Mrs. Martin on August 9, and also measured the  
4 stream discharge on August 16 and 30, 1979, at the culvert under the  
5 county road. On August 9, 1979, Mr. Tudor measured the flow of water in  
6 the culvert and determined the discharge to be approximately 110 gallons  
7 per minute. On August 16 and August 30, 1979, Mr. Tudor used a 90 degree  
8 V-notch weir to measure the flow of the water in the culvert. On these  
9 two dates, the measured discharge was 61.3 gallons per minute and 90.3  
10 gallons per minute, respectively, with leakage around the V-notch weir  
11 estimated at less than or equal to 10 gallons per minute.\* Mr. Tudor  
12 further testified that the maximum flow through an 18-inch corrugated  
13 metal culvert such as the one through which these measurements were made  
14 would be approximately 700 gallons per minute before water would back-up  
15 behind the culvert.

16           7. Mrs. Martin, the Objector, testified that she obtained copies of  
17 all the recorded water rights on the unnamed tributary from the County  
18 Courthouse in Polson. These rights were presented as Exhibit 0-5. There  
19 are five (5) water rights involved with a total appropriation of 10  
20 cubic feet per second which is approximately 4,500 gallons per minute.  
21 Mrs. Martin testified that she has 28 acres of land of which 15 to 18  
22 acres are irrigable, but she has only irrigated 8 acres in the past. The  
23 irrigated acreage has consisted of a pasture, a truck farm and fruit trees.  
24 According to Mrs. Martin's testimony, she diverts almost all of the water  
25 in the unnamed tributary for irrigation during the summer, and at times  
26 this causes the gravity flow system for her domestic water supply to go  
27 dry. Therefore, she has to restrict her irrigation due to the lack of the  
28 water. Under cross-examination by the Hearing Examiner, Mr. Rehbein, and

1 Mr. Krogstad, Mrs. Martin testified that she did not have any idea of  
2 her actual rate of diversion, and she does not know whether she is allowing  
3 sufficient water to pass by her point of diversion to satisfy prior rights.  
4 She did testify that the flow in the unnamed tributary of Groom Creek  
5 is lowest in July and August with the major runoff occurring in May and  
6 June and lasting approximately three (3) weeks. Mrs. Martin waters her  
7 trees through October and she irrigates her pasture constantly. Excess water  
8 runs off of Mrs. Martin's pasture and back into the creek.

9 8. Jim Rehbein testified for the Department that he observed the  
10 unnamed tributary to Groom Creek at the highway approximately five times  
11 from the period of July 17, 1979 through September 4, 1979, and the flow  
12 during this period was relatively constant. Mr. Rehbein estimated that the  
13 flow was greater than 50 gallons per minute.

4  
15 PROPOSED CONSLUSIONS OF LAW

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

- 18 1. there are unappropriated waters in the source of supply;  
19 a. at times when the water can be put to the use proposed  
20 by the applicant;  
21 b. in the amount the applicant seeks to appropriate; and  
22 c. throughout the period during which the applicant seeks  
23 to appropriate, the amount requested is 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 other

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

3           2. Based upon testimony presented at the hearing, and information  
4           available from the Department's file on this matter, it is concluded  
5           that there are no unappropriated waters in the source of supply during  
6           the months of July, August and September.

7           3. Based upon testimony presented at the hearing, and information  
8           present in the Department's file on this matter, it is concluded that the  
9           Applicant could not withdraw water during the period from July through  
10          September without adversely affecting prior appropriators on the unnamed  
11          tributary to Groom Creek.

12          4. Based upon testimony presented at the hearing, and information  
13          available in the Department's file on this matter, it is concluded  
14          that the proposed means of diversion or construction are adequate,  
15          that the proposed use of the water is a beneficial use, and the proposed  
16          use will not interfere unreasonably with other planned uses or developments  
17          for which a permit has been issued or for which water has been reserved.

18          5. Based upon testimony presented at the hearing, and information  
19          available in the Department's file on this matter, it is concluded that  
20          there are unappropriated waters in the source of supply that may be  
21          appropriated without affecting prior rights in the source of supply,  
22          subject to the conditions listed below.

23          6. It is concluded that granting Application for Beneficial Water  
24          Use Permit No. 20,769-s76K, subject to the conditions listed below, in  
25          no way reduces the Applicant's liability for damage caused by the  
26          Applicant's exercise of said Permit.

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

**CASE # 20769**

PROPOSED ORDER

1  
2 1. Subject to the provisions and conditions imposed below, the  
3 Application for Beneficial Water Use Permit No. 20,769-s76K by Kenneth  
4 J. Rogers is hereby granted to appropriate ten (10) gallons per minute  
5 of water, not to exceed .75 acre-foot per annum from an unnamed tributary  
6 of Groom Creek in Lake County, Montana. The water is to be diverted from  
7 said unnamed tributary by means of a pump at a point in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NE $\frac{1}{4}$   
8 of Section 14, Township 25 North, Range 18 West, M.P.M., and used for  
9 domestic purposes for one (1) family in the NE $\frac{1}{4}$  of said Section 14  
10 from January 1 to June 30 and October 1 to December 31, inclusive, of  
11 each year.

12 2. The Permit is granted subject to all prior water rights.

13 3. The Permit is granted subject to any final determination of  
14 existing water rights as provided by Montana law.

15 4. The Permittee shall install and maintain an adequate flow meter  
16 to accurately measure the flow rate and volume of water diverted to be  
17 recorded. The Permittee shall keep a written record of the flow rate and  
18 volume of all waters diverted including the period of time and shall submit  
19 said records to the Department upon request.

20 5. The granting of Provisional Permit No. 20,769-s76K by the  
21 Department in no way reduces or alters the Permittee's liability for  
22 damage caused by the Permittee's exercise of this Permit, nor does  
23 the Department in issuing this Permit in any way acknowledge liability for  
24 damage caused by the Permittee's exercise of this Permit.

25 6. The granting of this Provisional Permit in no way grants the  
26 Permittee any right to violate any right of any other party, nor does  
27 it excuse the Permittee from any liability for same, even if such  
28 violation is a necessary and unavoidable consequence of exercising  
this Permit. 20769

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 mailing of this Proposed Order and shall end fifteen (15) 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 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.

Since the Hearing, Forrest Tevebaugh, Hearing Examiner, has resigned and is no longer available to the Department. The undersigned has listened to the entire hearing transcript and read all the material in the Department's file on this matter.

DONE this 23rd day of January, 1980

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