

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
26,752-s41Q BY WILLIAM A. ROGERS)
* * * * *

The Proposed Findings of Fact, Proposed Conclusions
of Law and Proposed Order as entered by the Hearing
Examiner on January 2, 1981, 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 Application for Beneficial Water Use Permit
No. 26,752-s41Q by William A. Rogers is hereby granted
to appropriate 250 gallons per minute up to 71.82 acre-
feet per annum from Box Elder Creek at a point in the
SE1/4 SW1/4 NE1/4 of Section 27, Township 20 North,
Range 5 East, M.P.M., Cascade County, Montana. The
water is to be diverted at a rate of 250 gallons per
minute up to .52 acre-feet per annum from January 1 to
December 31 for livestock use and at a rate of 250
gallons per minute up to 71.30 acre-feet per annum from
April 15 to November 1 for new sprinkler irrigation.
The water is to be used on 5 acres for new sprinkler
irrigation in the SE1/4 of the NW1/4 of Section 27; 3
acres in the NE1/4 SW1/4 of Section 27; 14 acres in the

N1/2 of the SE1/4 of Section 27; and 9 acres in the S1/2 of the NE1/4 of Section 27, all in Township 20 North, Range 5 East, M.P.M., Cascade County, Montana. The water is to be used for stockwatering in the SE1/4 of the SW1/4 of the NE1/4 of Section 27; E1/2 of the NE1/4 of the NW1/4 of Section 27, the N1/2 of the NW1/4 of the SE1/4 of Section 27, all in Township 20 North, Range 5 East, Cascade County, Montana.

2. Provisional Permit No. 26,752-s41Q 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 Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of all water diverted to be recorded. 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.

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 Permitte's exercise of this
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 19th day of January,
1981.

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

CASE # 26752

AFFIDAVIT OF SERVICE
(Final Order)

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

Gale Greer, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on _____, 19____, he deposited in the United States mail, a "certified" copy of the Final Order by the Administrator, Water Resources Division, on the application by William A. Rogers, Application No. 26752-s41Q, for a permit to appropriate water, addressed to each of the following persons or agencies:

Certified Nos. 51591 to 51601

1. William A. Rogers; 5100-9th Avenue South; Great Falls, MT 59405
2. Elmer & Violet Vihinen; Highwood Star Route; Great Falls, MT 59401
3. Ann C. Anderson; Highwood Star Route; Great Falls, MT 59401
4. Arthur W. Waltari; Box 104; Great Falls, MT 59403
5. Robert Lassila; P.O. Box 6605; Great Falls, MT 59406
6. Donald & Cherie Johnson; 979 Avenue E NW; Great Falls, MT 59404
7. M.A. & Joe Roos; Karla Roos & Rose & Ray Johnson; Box 6746; Great Falls, MT 59406
8. Elva Zoller; 2102 First Avenue South; Great Falls, MT 59405
9. Clary & Clary; Attn: Robert Clary; Atty. at Law; 315 First National Bank Bldg.; Box 342; Great Falls, MT 59403
10. Carl Mehmke; Highwood Star Route; Great Falls, MT 59401
11. William F. Browning; Atty. at Law; Box 1649; Great Falls, MT 59401
12. Sam Rodriguez; Field Manager; WRB; Box 438; Lewistown, MT 59457 (regular mail)
13. David L. Pengelly; Hearing Examiner; DNRC; Helena, MT 59620 (hand deliver)

by [Signature]

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

On this 19th day of January, 1981, before me, a Notary Public in and for said State, personally appeared Gale Greer, known to me to be the Hearing 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.

[Signature]
Notary Public for the State of Montana

Residing at Helena

My commission expires 6 Oct 1982

Case # 26752

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
26,752-s41Q BY WILLIAM A. ROGERS)
* * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on November 25, 1980, at Great Falls, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 26,752-s41Q, David Pengelly, Hearing Examiner, presiding.

The Applicant, Mr. William A. Rogers, appeared at the hearing and presented testimony in support of his Application. No exhibits were introduced on behalf of the Applicant; the Applicant was not represented by legal counsel.

Five (5) of the seven (7) timely Objectors to the above Application were represented at the hearing. Those present were: Ann Anderson, Elmer Vihinen, M. A. Joe Roos, Arthur Waltari, and Dan Huestis on behalf of Objector Elva Zoller. Those Objectors not present were Carl Mehmke and Donald R. and Cherie R. Johnson. None of the Objectors were represented by legal counsel. Seven (7) exhibits were introduced on behalf of the Objectors, to wit:

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Objector's Exhibits:

O-1 Notice of Appropriation for 200 miner's inches out of Box Elder Creek (filed on behalf of Arthur Waltari).

O-2 Statement of water use by the Waltari family from Box Elder Creek.

O-3 Letter sent to the Department of Natural Resources and Conservation from the Waltari's regarding water use by Mr. Rogers from Box Elder Creek dated July 19, 1980.

O-4 Map of the Waltari lands along Box Elder Creek with locations of wells and springs used by the Waltaris.

O-5 Statement of water use by the Lassilas from Box Elder Creek.

O-6 Copy of abstract of title including a claim of use of 200 inches of water filed on behalf of Elmer Vihinen.

O-7 Certificate of water right number 19070-g41Q issued to M. A. Joe Roos and Raymond Johnson.

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

Montana Department of Natural Resources and Conservation personnel present at the hearing were Sam Rodriguez, Lewistown Water Rights Bureau Area Office Supervisor; Sterling Sundheim, Lewistown Water Rights Bureau Office Engineer; and Gale Greer, Hearings Reporter. The Department was not represented by legal counsel. Two (2) exhibits were introduced on behalf of the Department, to wit:

Department's Exhibits:

D-1 Copy of letter to farmers and ranchers from the County Extension Agent in Broadus, Montana, Powder River County dated February 28, 1974.

D-2 Memo to file number 26,752-s41Q concerning a meeting between the Applicant and the Objectors filed by Sam Rodriguez.

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

SUMMARY OF RECORD

1. On February 19, 1980, the Department received Application for Beneficial Water Use Permit No. 26752-s41Q by William A. Rogers to appropriate 250 gallons per minute of water up to 71.82 acre-feet per annum from Box Elder at a point in the SE1/4 SW1/4 NE1/4 of Section 27,

3
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Township 20 North, Range 5 East, M.P.M., Cascade County, Montana. The water is to be diverted from January 1 to December 31 at a rate of 250 gallons per minute up to 0.52 acre-feet for livestock watering and from April 15 to November 1, up to 71.30 acre-feet for sprinkler irrigation of 31 acres. The water is to be used at a rate of 250 gallons per minute on 5 acres in the SE1/4 NW1/4 of Section 27, on 3 acres in the NE1/4 of the SW1/4 of Section 27, 14 acres in the N1/2 of the SE1/4 of Section 27, and on 9 acres in the S1/2 of the NE1/4 of Section 27, all in Township 20 North, Range 5 East, Cascade County, Montana. The water is to be used at a rate of 250 gallons per minute up to .52 acre-feet per annum for livestock watering in the SE1/4 SW1/4 NE1/4 of Section 27, in the E1/2 NE1/4 NW1/4 of Section 27, and in the N1/2 NW1/4 SE1/4 of Section 27. The water is to be diverted by means of a pump.

2. On April 2, 9, and 16, 1980, the Department caused to be duly published in the Great Falls Tribune Notice of Application for Beneficial Water Use Permit No. 26,752-s41Q.

3. On April 21, 1980, the Department received an objection to the above Application from Ann C. Anderson.

4. On May 6, 1980, the Department received an objection to the above Application from Carl Mehmke; the

Objection was prepared by counsel William F. Browning of Great Falls.

5. On May 12, 1980, the Department received an objection to the above Application from Elmer and Violet Vihinen.

6. On May 16, 1980, the Department received an objection to the above Application from M. A. Joe and Karla M. Roos, and Rose and Ray Johnson.

7. On May 20, 1980, the Department received an objection to the above Application from Arthur W. Waltari.

8. On May 20, 1980, the Department received an objection to the above Application from Donald R. and Cherie R. Johnson.

9. On May 20, 1980, the Department received an objection to the above Application from Elva Zoller; the objection was prepared by counsel Robert Clary of Great Falls, Montana.

10. On September 11, 1980, the Department received an untimely letter of objection to the above Application from Robert Lassila.

PROPOSED FINDINGS OF FACT

1. That the Applicant intends to use the water appropriated under this permit to irrigate land along Box Elder Creek to raise alfalfa, hay and possibly some irrigated pasture.

2. That the base flow of Box Elder Creek is less than 2.0 cubic feet per second and occurs for approximately seven (7) months out of each year.

3. That on August 29, 1980, the flow of Box Elder Creek at the Applicant's property was 1.61 cubic feet per second; upstream from the Arthur Waltari Ranch the flow was 1.30 cubic feet per second; and downstream from the Waltari Ranch the flow was 0.82 cubic feet per second (flows were measured by the Department of Natural Resources and Conservation personnel).

3. That Box Elder Creek goes dry approximately once in every five years.

4. That horses and beef cattle consume approximately 12 to 15 gallons of water per day.

5. That Objector, Arthur Waltari, irrigates approximately 1 acre of lawn and garden and waters up to 98 head of livestock from Box Elder Creek. Mr. Waltari also has a filed right for 200 miner's inches of water,

however, does not appear to be using the water at this time.

6. Robert Lassila waters up to 120 cow/calf pairs from Box Elder Creek. Mr. Lassila also claims to have an irrigation water right but does not know what that water right is.

7. Elmer Vihinen waters approximately 80 head of cattle from Box Elder Creek and also irrigates approximately 3 acres from Box Elder Creek. Mr. Vihinen claims a 200 miner's inch right from Box Elder Creek. Mr. Vihinen also claims to have a right to fill a reservoir but it appears that the reservoir has only been filled once and that was in either 1974 or 1975 at which time it was not possible to establish a use right to appropriate water under Montana Water Law. Since 1973 a water right can only be obtained by receiving a permit from the Department of Natural Resources and Conservation.

8. That M. A. Joe Roos and Ray Johnson have a certificate of a water right for a well located next to Box Elder Creek that allows them to appropriate up to 25 gallons per minute for domestic use. Mr. Roos also claims to receive some benefit of sub-irrigation of approximately 8 acres of land along Box Elder Creek.

Mr. Roos feels that the water in his well is connected to Box Elder Creek.

9. That Objector Elva Zoller lives upstream from the Applicant and there was no testimony presented on her behalf that withdrawing surface waters downstream from her claimed groundwater right would adversely affect her water right.

10. That several individuals objecting to the above Application expressed a desire to see the stream remain flowing past their properties. However, there are no provisions under Montana Water Law for private individuals to obtain a water right for instream flow.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, M.C.A., 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 prior appropriators 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 use proposed by the Applicant and in the amount the Applicant seeks to appropriate.

3. It is concluded that in some years there are unappropriated waters in the source of supply throughout the period during which the Applicant seeks to appropriate and in the amount the Applicant seeks to appropriate.

4. It is concluded that the rights of prior appropriators would not be adversely affected by the

granting of this permit subject to certain conditions in the Proposed Order.

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

6. It is concluded that the proposed use of water for irrigation and livestock watering is a beneficial use.

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. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything 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 Application for Beneficial Water Use Permit No. 26,752-s41Q by William A. Rogers is hereby granted to appropriate 250 gallons per minute up to 71.82 acre-feet per annum from Box Elder Creek at a point in the SE1/4 SW1/4 NE1/4 of Section 27, Township 20 North, Range 5 East, M.P.M., Cascade County, Montana. The water is to be diverted at a rate of 250 gallons per minute up to .52 acre-feet per annum from January 1 to December 31 for livestock use and at a rate of 250 gallons per minute up to 71.30 acre-feet per annum from April 15 to November 1 for new sprinkler irrigation. The water is to be used on 5 acres for new sprinkler irrigation in the SE1/4 of the NW1/4 of Section 27; 3 acres in the NE1/4 SW1/4 of Section 27; 14 acres in the N1/2 of the SE1/4 of Section 27; and 9 acres in the S1/2 of the NE1/4 of Section 27, all in Township 20 North, Range 5 East, M.P.M., Cascade County, Montana. The water is to be used for stockwatering in the SE1/4 of the SW1/4 of the NE1/4 of Section 27; E1/2 of the NE1/4 of the NW1/4 of Section 27, the N1/2 of the NW1/4 of the SE1/4 of Section 27, all in Township 20 North, Range 5 East, Cascade County, Montana.

2. Provisional Permit No. 26,752-s41Q 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 Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of all water diverted to be recorded. 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.

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 this 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 National 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 January, 1981.


DAVID L. MITCHELL, D.N.P.
SEWING EXAMINER

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