

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

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40B-30070712 BY WILKS RANCH MONTANA LTD))))	ORDER DISMISSING CONTESTED CASE AND GRANTING PERMIT WITH MODIFICATIONS AND REMARK
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BACKGROUND

On September 11, 2014, Wilks Ranch Montana LTD (Applicant) submitted Application for Beneficial Water Use Permit No. 40B 30070712, for irrigation purposes, to the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, MCA, dated October 28, 2014. Applicant responded with information dated December 12, 2014. The Application was deemed correct and complete on February 20, 2015. After the Department issued its Technical Report on February 24, 2015, the Applicant requested a waiver of the 120-day statutory timeline for issuing a Preliminary Determination on March 4, 2015. The waiver was requested in order for the Applicant to collect additional information/evidence to address the statutory criteria for permit issuance. On December 7, 2015 Applicant submitted a report containing additional information. On May 18, 2016 the Department issued a Draft Preliminary Determination to Grant Permit with Modifications (Draft PD) in the matter. Applicant's attorney consulted with the Department via phone conference on June 3, 2016 about the Draft PD, and Applicant's consultant followed with additional information/data via email communication on the same day. Applicant's attorney did not request a hearing in the matter.

On June 9, 2016 the Department issued a final Preliminary Determination to Grant Permit with Modifications. (PDG)

In its PDG, the Department determined that Application for Beneficial Water Use Permit No. 40B 30070712 should be GRANTED WITH MODIFICATIONS. The Applicant may divert and store water from Durfee Creek, by means of a headgate and conveyance facility. The point of diversion is located in the SWNWNW Section 21, T12N, R23E, Fergus County. The storage reservoir is located in the NWNENW Section 21, and places of use are located in Sections 15,

16, 21, 22, 23 and 24 all in T12N, R23E. Water may be diverted from December 1 through March 9, at a flow rate of up to 4.0 CFS and volume of up to 151.4 AF. The period of use is April 15 to October 15, and the purpose for which water can be used is irrigation. The Permit will be subject to the conditions, limitations or restrictions outlined in the Conditions section of the PDG.

On August 4, 2016, John R. Hughes III filed a timely objection to Application No. 40B 30070712 which was deemed valid by the Department on August 31, 2016.

On August 5, 2016, Gene J. Klamert filed a timely objection to Application No. 40B 30070712 which was deemed valid on September 7, 2016. Mr. Klamert's objection was subsequently assumed by Floweree Land and Cattle Co.

Due to the filing of valid objections to Application No. 40B 30070712, pursuant to § 85-2-309(1), MCA, a contested case hearing was initiated.

After protracted attempts to settle the objections over the course of over three years, a contested case hearing was finally scheduled for July 8-9, 2020.

Prior to the scheduled contested case hearing, the parties filed with the Hearing Examiner a "Notice of Filing of Stipulation and Settlement Agreement Resolving Objections" dated June 17, 2020. (Stipulation)

On July 9, 2020 the Hearing Examiner contacted the parties and expressed that he was prepared to accept the "Stipulation and Settlement Agreement Resolving Objections" but with two outstanding issues. First, the Stipulation was expressed in terms of "conditions" to the permit. However, the Hearing Examiner explained that as a separate agreement between the parties, the Department treats those "conditions" as a "remark" or "important information" to be added to the final order, authorization and abstract on the permit. Second, a portion of the Stipulation identified that the parties may request a qualified Department employee to resolve any contested future call on the source. The Hearing Examiner informed the parties that it was likely that the Department would not honor such a request. The Hearing Examiner requested the parties to address these two issues.

On August 10, 2020 the parties filed with the Hearing Examiner a "First Amendment to Stipulation and Settlement Agreement Resolving Objections" (First Amendment) in which the parties do not oppose the Stipulation being treated by the Department as a remark being placed

on the final order, authorization and abstract for Permit No. 40B 30070712 and said stipulation will be preserved in the Department's file for this permit. The First Amendment adds the following sentences to the Stipulation:

If the Department refuses, or cannot undertake to resolve the dispute and be the final arbiter of a call, then any disinterested third-party may make such determination, so long as the person has an adequate knowledge of hydrology and Montana water rights, and is mutually agreed upon between the parties. The parties agree they will, in good faith, not withhold their agreements for the selection of a disinterested third party, and will timely act to select such a person, if such person is needed. For purposes of this agreement, the Parties further agree that the following parties are satisfactory to act as the disinterested third party:

- i. Mr. Peter Fritsch
- ii. The current (or most current) water commissioner on Flatwillow Creek (regardless of whether such water commissioner is officially employed by the court during the winter months when these diversions are taking place).

Satisfied that the Parties are aware of how the Department views the Stipulation and First Amendment, the Hearing Examiner accepts the Stipulation and First Amendment.

Pursuant to the Stipulation and First Amendment, the objections of Objectors John R. Hughes III and Floweree Land and Cattle Co. are hereby deemed **WITHDRAWN** and this contested case is **DISMISSED**.

Pursuant to § 85-2-310(b)(4), MCA, Application for Beneficial Water Use Permit No. 40B 30070712 by Wilks Ranch Montana LTD is **GRANTED** as proposed in the Preliminary Determination to Grant with Modifications dated June 9, 2016. The Authorization and General Abstract for Permit No. 40B-30070712 shall include the following conditions and remark:

THE APPROPRIATOR SHALL COMPLY WITH ALL THE FOLLOWING CONDITIONS TO EXERCISE THIS PERMIT:

WATER MEASUREMENT RECORDS REQUIRED, WATER MONITORING REQUIRED, AND A WATER MEASURING/MONITORING PLAN REQUIRED.

A. INSTALL A MEASURING/MONITORING DEVICE IN FLATWILLOW CREEK UPSTREAM AND AS NEAR AS PRACTICAL TO PETROLIA RESERVOIR, AND MONITOR STREAM FLOWS. THE TYPE AND LOCATION OF THE DEVICE MUST BE APPROVED BY THE DEPARTMENT. THE APPROPRIATOR SHALL KEEP A DAILY WRITTEN RECORD OF THE FLOW RATE IN FLATWILLOW CREEK WHEN APPROPRIATIONS ARE OCCURRING FROM DURFEE CREEK. THE APPROPRIATOR SHALL DIVERT WATER ONLY DURING THE PERIOD OF APPROPRIATION WHEN STREAMFLOWS IN FLATWILLOW CREEK AT THE MEASURING STATION EXCEED THE MONTANA FISH, WILDLIFE & PARKS INSTREAM FLOW WATER RESERVAION OF 15 CUBIC FEET PER SECOND, PLUS THE FLOW RATE OF ANY EXISTING RIGHTS BETWEEN THE GAGE LOCATION AND PETROLIA RESERVOIR, INCLUDING THOSE OF THE PETROLIA IRRIGATION DISTRICT. APPROPRIATOR MUST CEASE DIVERSION ON DURFEE CREEK WHEN FLOWS AT THE MEASURING STATION ON FLATWILLOW CREEK DROP BELOW THE REQUIRED TRIGGER FLOW AND WHEN THE WATER RIGHTS HELD BY THE PETROLIA IRRIGATION DISTRICT OR OTHERS ARE NOT SATISFIED.

B. INSTALL A MEASURING DEVICE IN THE CONVEYANCE FACITLITY FROM DURFEE CREEK, AS NEAR AS PRACTICAL TO THE HEADGATE ON THE SOURCE, IN ORDER TO MEASURE APPROPRIATIONS. FOR EACH DAY OF DIVERSION UNDER THIS PERMIT, THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF WATER DIVERTED, INCLUDING THE PERIOD OF TIME OF DIVERSION. RECORDS MUST ACCOUNT SEPARATELY FOR ANY APPROPRIATIONS UNDER THIS PERMIT FROM APPROPRIATIONS UNDER ANY OTHER WATER RIGHT USING THE SAME DIVERSION WORKS AND CONVEYANCE FACILITY, IF APPLICABLE.

C. THE APPROPRIATOR SHALL DIVERT WATER ONLY IF STATEMENT OF CLAIM NO. 40B 119573, OWNED BY PETROLIA IRRIGATION DISTRICT, IS BEING MET, BASED ON DISCUSSIONS WITH AND AS DETERMINED BY THE PETROLIA IRRIGATION DISTRICT. THE PETROLIA IRRIGATION DISTRICT MUST GRANT PERMISSION TO THE APPROPRIATOR FOR IT TO APPROPRIATE WATER FROM DURFEE CREEK. IT IS THE RESPONSIBILITY OF THE APPROPRIATOR TO CONTACT THE PETROLIA IRRIGATION DISTRICT PRIOR TO DIVERTING, AND AT LEAST WEEKLY THEREAFTER, TO ENSURE THAT SUFFICIENT WATER IS FLOWING IN FLATWILLOW CREEK TO MEET THE DEMANDS OF THE DISTRICT. IF THE DISTRICT'S WATER RIGHT IS NOT BEING MET, THE APPROPRIATOR SHALL CEASE DIVERSIONS, INCLUDING ANY TIME THE DISTRICT MAKES A CALL ON WATER. THE APPROPRIATOR SHALL KEEP A RECORD OF THE DATE, TIME AND NAME OF THE INDIVIDUAL CONTACTED AT THE DISTRICT AND SUBMIT RECORDS UPON REQUEST TO THE DEPARTMENT.

D. THE PERMITTEE SHALL SUBMIT A PLAN INDICATING THE PROPOSED DESIGN OF EACH MEASURING OR MONITORING DEVICE AND A MAP OF THE SPECIFIC LOCATION OF EACH DEVICE. THE PLAN AND DEVICE TYPE AND LOCATION MUST BE

APPROVED BY THE DEPARTMENT BEFORE WATER IS DIVERTED UNDER THIS PERMIT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING/MONITORING DEVICES ARE IN PLACE AND OPERATING.

E. RECORDS SHALL BE SUBMITTED BY MAY 1 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS AS REQUIRED BY THESE CONDITIONS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE LEWISTOWN WATER RESOURCES REGIONAL OFFICE AT THE ADDRESS BELOW. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING/MONITORING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE AND VOLUME ACCURATELY DURING PERIODS OF APPROPRIATION UNDER THIS PERMIT.

SUBMIT RECORDS TO:
LEWISTOWN WATER RESOURCES REGIONAL OFFICE
613 NE MAIN ST SUITE E
LEWISTOWN, MT 59457
PH: (406)538-7459

****IMPORTANT INFORMATION****

BENEFICIAL WATER USE PERMIT NO. 40B-30070712 IS SUBJECT TO A SEPARATE AGREEMENT BETWEEN THE OWNER OF THE RIGHT AND THE OWNERS OF THE RIGHT(S) CURRENTLY HELD BY JOHN R. HUGHES III AND FLOWEREE LAND AND CATTLE CO.

IT IS SO **ORDERED**.

Dated this 28th day of August 2020.

/Original signed by David A. Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of ORDER DISMISSING CONTESTED CASE; GRANTING PERMIT was served upon all parties listed below on this 28th day of August 2020 by first class United States mail and/or by electronic mail (e-mail).

RYAN K MATTICK - ATTORNEY
CUSICK MATTICK & REFLING PC
PO BOX 1288
BOZEMAN, MT 59771-1288
ryan@cmrlawmt.com

RYAN MCLANE - ATTORNEY
HOLLY J FRANZ - ATTORNEY
FRANZ & DRISCOLL, PLLP
PO BOX 1155
HELENA, MT 59624-1155
ryan@franzdriscoll.com

/Original signed by Jamie Price/
Jamie Price, Administrative Assistant
(406) 444-6615; jsprice@mt.gov