

Office of Administrative Hearings
Department of Natural Resources and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6615

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO. 43Q-) ORDER DISMISSING CONTESTED CASE
30125287 BY LONGEN, JAN) AND GRANTING APPLICATION

BACKGROUND

On September 30, 2019, the Applicant filed an application for beneficial water use permit for water use from the Yellowstone River for lawn and garden irrigation and livestock water purposes. The Montana Department of Natural Resources and Conservation (DNRC) assigned No. 43Q-30125287 to the application.

On January 10, 2020, DNRC issued a Preliminary Determination to grant application No. 43Q-30125287.

The Montana Department of Fish, Wildlife and Parks (DFWP) filed a timely valid objection to Application No. 43Q-30125287. Said Objection was deemed valid for the § 85-2-311 criteria of legal availability and adverse effect and a contested case hearing was initiated.

On April 22, 2020, the Hearing Examiner received a "Consent Agreement" entered into between the parties. The stated purpose of the Consent Agreement is "to settle all issues raised by the objections of DFWP without the need for a hearing before DNRC."

CONSENT AGREEMENT

The Consent Agreement contains, *inter alia*, the following language:

1. The parties consent to the DNRC's entry of an administrative order approving Application No. 43Q-30125287, provided that the beneficial water use permit contains the following condition:

THIS RIGHT IS SUBJECT TO THE DEPARTMENT OF FISH, WILDLIFE AND PARKS' (DFWP) WATER RESERVATIONS FOR INSTREAM FLOW AS FOUND IN THE YELLOWSTONE RIVER BASIN FINAL ORDER BY THE BOARD OF NATURAL RESOURCES AND CONSERVATION. THE APPROPRIATOR SHALL DIVERT WATER ONLY WHEN THE FLOW RATE AT USGS GAUGING STATION NO. 06214500 (YELLOWSTONE RIVER AT BILLINGS) INDICATES A FLOW RATE IN EXCESS OF THE VALUES ON THE DAYS INDICATED IN THE TABLE BELOW. THESE FLOWS MUST BE CHECKED DAILY WHEN APPROPRIATING WATER. THE CURRENT INTERNET ADDRESS IS [HTTP://WATERDATA.USGS.GOV/NWIS/UV?06214500](http://waterdata.usgs.gov/nwis/uv?06214500)

Period	Flow (CFS)
January	2,483
February	2,484
March	2,883
April	3,580
May 1-20	5,121
May 21-31	12,200
June 1-7	17,236
June 8-30	18,716
July 1-10	10,274
July 11-31	4,000
August	3,500
September	3,107
October	3,573
November	3,478
December	2,781

2. DFWP agrees that for purposes of approval of the Application No. 43Q-30125287 by DNRC, DFWP stipulates and agrees that so long as the above condition is made a part of the beneficial water use permit granted to the Applicant, that all the provisions of §85-2-311, MCA have been satisfied. Further and without limitation on the foregoing, Applicant and DFWP, agree to jointly submit this Consent Agreement to DNRC and request that it be approved according to its terms.

3. The Parties agree that if any material conditions described in Paragraph 1 above cannot be made part of the DNRC's approval of Application No. 43Q-30125287, then DFWP consents to the issuance of the beneficial water use permit and the Applicant agrees to adhere to the conditions of Paragraph 1 above regardless if they are included as a condition of the beneficial water use permit.

CONCLUSIONS

1. The Consent Agreement contains somewhat inconsistent provisions (compare paragraphs 1-2 with paragraph 3), but ultimately it is clear that DFWP consents to the issuance of the permit, based on the Applicant's agreement to adhere to the proposed condition. The Consent Agreement is a third-party agreement between the Applicant and DFWP.

2. Informal disposition of a contested case can be made by stipulation, agreed settlement, consent order, or default and must be documented in writing. § 2-4-603, MCA. In addition, pursuant to § 85-2-310(4), MCA:

If valid objections to an application are received and withdrawn with conditions stipulated with the applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

For water right contested cases, the Department's administrative rules provide:

36.12.207 SETTLEMENT, STIPULATION OR CONSENT

(1) The terms of a settlement, stipulation, or consent entered between parties as a private contractual agreement are not binding on the department.

(2) If the parties propose inclusion of the terms of a settlement, stipulation, or consent as a condition(s) to a permit or change authorization, the parties shall submit a copy of the written settlement, stipulation, or consent along with any proposed condition(s) to the department for consideration. At the department's discretion, the terms of a settlement, stipulation, or consent may be included as a condition(s) to a permit or change authorization upon determination that the terms of the settlement, stipulation, or consent are consistent with and necessary to satisfy the applicable statutory criteria.

(3) A complete copy of any settlement, stipulation, or consent considered by the department must be included in the record.

3. In this case, the Consent Agreement amounts to a settlement between DFWP and the Applicant, and it is not binding on the Department. While the parties agreed to the inclusion of the proposed condition in paragraph 1 of the Consent Agreement as a condition to the permit, the parties have made no showing that the proposed condition is consistent with and necessary to satisfy the § 85-2-311, MCA, criteria. Further, DFWP consents to the issuance of the permit without the proposed condition. There is no evidence in the record for the hearing examiner to determine that the proposed condition is necessary to satisfy the statutory criteria.

ORDER

Application for Beneficial Water Use Permit No. 43Q-30125287 by Jan Longen is hereby **GRANTED** as proposed in the Preliminary Determination to Grant dated January 10, 2020. The Consent Agreement shall be included in the record and the following remark added to the permit:

EXERCISE OF THIS PERMIT IS SUBJECT TO A PRIVATE WATER USE AGREEMENT AS DESCRIBED IN THE "CONSENT AGREEMENT" FILED WITH THE DEPARTEMNT ON APRIL 22, 2020. SAID AGREEMENT IS INCLUDED IN THE FILE FOR APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43Q-30125287 BY JAN LONGEN.

This contested case proceeding is hereby **DISMISSED**.

IT IS SO ORDERED.

Dated this 26th day of May 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 the ORDER DISMISSING CONTESTED CASE AND GRANTING APPLICATION was served upon all parties listed below on this 26th day of May 2020 by first class United States mail and/or by electronic mail (e-mail).

JAN LONGEN
PO BOX 51086
BILLINGS, MT 59105
jlongen57@gmail.com

AIMEE HAWKALUK- ATTORNEY
MT DEPT OF FISH WILDLIFE & PARKS
PO BOX 200701
HELENA, MT 59620 0701
AHawkaluk@mt.gov

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