

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 9961-g42C BY)
LEON H. WILLSON) ORDER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Pursuant to a Final Order dated March 3, 1978, as issued by the Administrator of the Water Resources Division, a Temporary Permit was issued to the Permittee, Leon H. Wilson, to appropriate water as granted in said Permit. The Permittee was required to keep records of water used and submit said records to the Department in November of 1978 and 1979. Temporary Permit expired on January 1, 1980 as set forth in Item 3a of the Final Order.

Item 3c of the Final Order requires the Department to evaluate the affects of the appropriation on the Objector's prior water right from the source of supply and, based upon conclusions reached by the Department upon review of the results of the monitoring program, a Provisional Permit would be granted or denied.

The Department has evaluated the information concerning this matter and has found no adverse affects to prior appropriators due to the appropriation of water by the Permittee. It has been determined, however, that approximately 11.5 acre-feet of water was used in 1978 and approximately 10.6 acre-feet in 1979. The Temporary Permit was granted for 400 gallons per minute, not to exceed 178 acre-feet per annum. The Permittee has indicated that the granted amount was not fully used in 1978 because it was a wet year, and in 1979 he experienced reoccurring pump problems.

The facts show that the full amount granted, 178 acre-feet of water per annum, was not appropriated during 1978 or 1979, therefore, the total affect, if any of the appropriation is not known.

The Department in its evaluation of this matter has found no adverse affect to prior water right users and, therefore, recommends that the

1 Provisional Permit be granted to the Permittee with the additional .
2 condition listed below in Item 4.

3 Based upon the above and Application record, it is hereby ordered
4 that a Provisional Permit be issued to Leon H. Willson as follows:

5 1.) Subject to the conditions cited below, Application for Beneficial
6 Water Use permit No. 9961-g42C by Leon H. Willson is hereby granted allowing
7 for the appropriation of a maximum of 0.89 cubic feet per second or 400
8 gallons per minute of water, not to exceed 178 acre-feet per annum from
9 a developed spring, a tributary of Little Pumpkin Creek, in Powder River
10 County, Montana, to be diverted from said spring by means of a pump at a
11 point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 1 South, Range 48 East,
12 M.P.M., and used for new irrigation on 17 acres in Section 18, and 49 acres
13 in Section 19, all in Township 1 South, Range 48 East, M.P.M., containing
14 a total of 66 acres, more or less, from March 15 to October 15, inclusive,
15 of each year.

16 2.) This Provisional Permit is granted subject to all prior existing
17 water rights in the source of supply including, but not necessarily limited
18 to prior decreed water rights, if any, and to the prior water rights of
19 those objecting herein, and subject to any final determination of prior
20 existing water rights as provided by Montana law.

21 3.) The Permittee shall install and maintain a flow meter on the
22 pump and, shall install and maintain in accordance with Department approved
23 plans, a satisfactory measuring device in Little Pumpkin Creek at the
24 Objector's point of diversion or at points specified by the Department,
25 for monitoring purposes, and shall maintain and submit seasonal records
26 to the Department for review. The monitoring records shall consist of
27 the following:

28 (a) Pumping records giving date, clock time, and rate of flow for
29 all periods pumped.

30 (b) Stream flow measurements taken at the Objector's point of
31 diversion daily during all periods of pumping and for seven (7)
32 consecutive days immediately following pumping periods.

1 The Permittee shall give notice to the Objector of the times
2 the measurements are to be taken and shall allow the Objector
3 reasonable access to verify such measurements.

4 4.) Since the Permittee has not appropriated the maximum amount
5 granted under the Temporary Permit, the full affects to prior appropriators
6 have not been evaluated, therefore, the Permittee shall continue to submit
7 monitoring records to the Department by November 1, 1980, 1981, and 1982.
8 The Department shall evaluate the monitoring records submitted by the
9 Permittee after November 1, 1982 and determine if the Provisional Permit
10 should be reduced in the total acre-feet per annum granted. The Department
11 may modify the Provisional Permit if it is found the Permittee is
12 not substantially using the 178 acre-feet granted. The Provisional
13 Permit may be modified down to the maximum acre-feet beneficially used
14 by the Permittee during the monitoring record period of 1978, 1979, 1980,
15 1981, and 1982. The Provisional Permit water right is the amount of water
16 beneficially used and may not necessarily equal the same amount of water
17 granted in said Permit.

18
19 Done this 26 day of February, 1980

20
21 Lawritz
22 Administrator, Water Resources Division
23 DEPARTMENT OF NATURAL RESOURCES
24 AND CONSERVATION
25
26
27
28
29
30
31
32

STATE
PUBLISHING CO
HELENA, MONT

CASE # 9961

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
9961-g42C BY LEON H. WILLSON)

FINDINGS OF FACTS, CONCLUSIONS
OF LAW, AND ORDER

The Amended Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on January 26, 1978, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Application For Beneficial Water Use Permit No. 9961-g42C by Leon H. Willson is hereby granted allowing for the appropriation of a maximum of 0.89 cubic feet per second or 400 gallons per minute of water, not to exceed 178 acre-feet per annum from a developed spring, a tributary of Little Pumpkin Creek, in Powder River County, Montana, to be diverted from said spring by means of a pump at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 1 South, Range 48 East, M.P.M., and used for new irrigation on 17 acres in Section 18, and 49 acres in Section 19, all in Township 1 South, Range 48 East, M.P.M., and containing a total of 66 acres, more or less, from March 15 to October 15, inclusive of each year.

2. This Temporary Permit is granted subject to all existing water rights in the source of supply, including, but not necessarily limited to prior decreed water rights, if any, and to the prior water rights of those objecting herein, and subject to any final determination of prior existing water rights as provided by Montana Law.

3. The Temporary Permit is subject to the following additional conditions:
a. The Temporary Permit shall expire on the first day of January,

CASE # 9961

1980 unless terminated earlier by Department Order.

- b. The Permittee shall install and maintain a flow meter on the pump and shall install and maintain, in accordance with Department approved plans, a satisfactory measuring device in Little Pumpkin Creek at the Objectors point of diversion or at points specified by the Department, for monitoring purposes, and shall maintain and submit seasonal records to the Department for evaluation. Monitoring records are to reach the Department by November 1, 1978 and November 1, 1979 and at such other times as the Department may direct and shall consist of the following as a minimum:
- (1) Pumping records giving date, clock time, and rate of flow for all periods pumped throughout the term of the Temporary Permit.
 - (2) Streamflow measurements taken at the Objector's point of diversion daily during all periods of pumping and for seven (7) consecutive days immediately following pumping periods. The Permittee shall give notice to the Objector of the times the measurements are to be taken and shall allow the Objector reasonable access to verify such measurements.
- c. Prior to termination of this Temporary Permit, the Department shall evaluate the affects of the appropriation on the Objector's prior water rights from the source of supply and, based upon conclusions reached by the Department upon review of the results of the monitoring program, a Provisional Permit shall be granted or denied.

RECOMMENDATION

In view of the testimony of the Applicant and the Objector and the Proposed Findings of Fact in this matter, it is recommended that the parties concerned cooperate in forming a group enterprise providing for a drainage study to be conducted by a qualified consultant or a governmental agency, culminating in the preparation of drainage plans and specifications in which the costs and mutual benefits could be evaluated and if feasible a drainage project be constructed and the waters thus salvaged to be appropriated for beneficial uses.

Done this 3rd day of March, 1978.

Orin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 9961

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

IN THE MATTER OF APPLICATION)	AMENDED
FOR BENEFICIAL WATER USE PERMIT)	<u>PROPOSAL FOR DECISION</u>
NO. 9961-g42C BY)	
LEON H. WILLSON)	

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on September 20, 1977, at Miles City, Montana, for the purpose of hearing objections to the above named Application For Beneficial Water Use Permit No. 9961-g42C, William F. Throm, Hearing Examiner, presiding.

Mr. Leon H. Willson appeared at the Hearing to present testimony supporting his application. He was not represented by legal counsel nor did he introduce exhibits supporting his application. In addition, Mr. Mike Cobbs and Mrs. Leon H. Willson appeared to testify on behalf of the Applicant.

The Objector, L.J. Green and Sons, was represented at the hearing by Mr. L.J. Green, Clifford Green, and Gary Green. The Objector was also represented by legal counsel, Mr. Bruce M. Brown, Attorney at Law. The Objector introduced eighteen exhibits in support of the objection to granting of the permit to wit: Exhibit No. 1, Photo map DWZ-2N-174 of the project area and the Objector's irrigated lands from the source of supply; Exhibit No. 1-A, a copy of an ASCS photo map showing the location of the Applicant's project and the acreages included; Exhibit No. 2, a copy of an ASCS photo map showing acreages of the Objector's lands irrigated from this source of supply; Exhibit No. 3, a copy of a November 18, 1885 filing of Notice of Water Right Claim on Little Pumpkin Creek in Custer County, Montana; Exhibits No. 6 and 7, photos showing the Applicant's sump and the bottom of Little

CASE # 9961

Pumpkin Creek on the Applicant's property; Exhibits 9 and 10, photos of Little Pumpkin Creek near the point of diversion of the Objector's Ditch No. 1; Exhibit No. 12, photo of the Objector's Ditch No. 1; Exhibits No's. 13, 14, 15, and 16, photos of the Objector's irrigated fields; Exhibit No. 17, photo of the Objector's point of diversion for Ditch No. 2; Exhibits No. 19 and 20, photos of the Objector's reservoirs No's. 1 and 2; Exhibit No. 21, photo of the Objector's elevated ditch; and Exhibit No. 22, photo of the Objector's reservoir No. 3. With the exception of Exhibit No. 7, all of the Objector's exhibits were received into the record without objection. The Applicant objected to Exhibit No. 2 on the grounds that it did not depict the bottom of Little Pumpkin Creek. Exhibit No. 7 was received into the record with the objection noted.

Mr. Don Riddle, Office Manager of the Billings Water Rights Bureau Field Office, appeared at the hearing to represent the Department. A copy of portions of the United States Geological Survey Foster Creek and Elk Ridge Quadrangles assembled as a composite showing topography of the area was introduced as the Department's Exhibit No. 1, and was received into evidence without objection.

PROPOSED FINDINGS OF FACT

1. On October 14, 1976 the Department received Application For Beneficial Water Use Permit No. 9961-g42C, from Leon H. Willson, to appropriate 0.89 cubic feet per second or 400 gallons of water per minute and not to exceed 178 acre-feet per annum from a developed spring, a tributary of Little Pumpkin Creek, in Powder River County, Montana, to be diverted from said spring by means of a pump at a point in the SE1/4 SE1/4 SW1/4 of Section 18, Township 1 South, Range 48 East, M.P.M., and used for new irrigation on 17 acres in Section 18, and 49 acres in Section 19, all in Township 1 South, Range 48 East, M.P.M., and containing a total of 66 acres, more or less, from March 15 to October 15,

inclusive, of each year.

2. On January 20 and 27 and February 3, 1977, the Department caused to have duly published in the Powder River Examiner, Broadus, Montana, Public Notice of Application No. 9961-g42C.

3. On March 8, 1977 the Department received an Objection to Application for the permit from L.J. Green and Sons, Inc. signed by L.J. Green, President, and submitted by Bruce M. Brown, Attorney for the Objector.

4. The Applicant, Mr. Leon H. Willson, testified on his own behalf that the developed spring consists of an excavated sump approximately 20 feet by 60 feet in size from which he pumped at the rate of 100 gallons per minute last summer for the primary purpose of drainage with a secondary purpose of using the water for irrigation of cropland; that earlier in the summer he pumped for 4 hours and the sump recharged in 20-24 hours but later in the season he could pump for only 3 hours and 30-36 hours were required for recharge. For this reason he intends to enlarge the sump to approximately 30 feet by 90 feet by 9 feet deep thereby providing better drainage by withdrawal of a larger volume of water of 400 gallons per minute and providing a more adequate supply for sprinkler irrigation of approximately 66 acres of cropland as an additional benefit. Mr. Willson testified that there are several springs and seeps on his land and over the years these springs and seeps have contributed to the increase in boggy and wet areas adjacent to Little Pumpkin Creek; that these areas are an increasing hazard to human life and livestock and constitute an ever increasing cost of operation; that through drainage he could dry up the bogs and marshy areas and improve the agricultural productivity and at the same time reduce his costs of operation by eliminating livestock losses and labor costs associated with the protection required. He testified that there is a vast supply of unappropriated ground water in the area; that he recognizes the prior rights of the Objector to surface water from the source of supply

CASE # 9961

but questioned the Objector's right to ground water or the flow from springs. Mr. Willson stated that the Objector's ditch easements across his land do not permit the Objector to develop a ground water source on this land, however, Mr. Willson stated that if the Objector would construct a cement collection box and pipe the water to his place of use, he would have a more reliable supply than he has ever had before. Mr. Willson testified that he does not intend to interfere or adversely affect the Objector's prior surface water rights in any way, but he did not believe that anyone had the right to all of the water from the Yellowstone River, the Tongue River or from Little Pumpkin Creek, and that he desired very much to improve the productivity of his own land, eliminate the expense and hazard of the bogs, and apply the water salvaged by the proposed project to a beneficial use. Mr. Willson stated that he did not believe he should be expected to bare the expense of the drainage project and pumping costs and deliver water thus obtained free to the Objector. Neither did he feel that it is his responsibility to improve the Objector's diversion or method of conveyance to satisfy the Objector's prior rights.

The witnesses for the Applicant, Mr. Mike Cobbs and Mrs. Leon H. Willson, gave testimony verifying the Applicant's testimony relating to the hazards, loss of livestock, and increasing loss of agricultural productivity suffered by the Applicant or his predecessors over the years.

5. Mr. Clifford Green presented testimony explaining L.J. Green and Sons irrigation system, which consists of two gravity flow diversion ditches from Little Pumpkin Creek and three reservoirs from which water is pumped. He identified the gravity flow ditch across the Applicant's land as Ditch No. 1 and the second ditch, entirely on the Green's property, as Ditch No. 2. Mr. Green testified that they do not divert water by means of Ditch No. 2 except during periods of high runoff, but that flow from Little Pumpkin Creek, and springs feeding it, provides water throughout the irrigation season that

flows continuously in Ditch No. 1 and is conveyed to a sub-irrigated alfalfa field on their property in the NW1/4 of Section 17 where the water, because of the porous condition of the soil, seeps out of the ditch without any type of turnout structures and provides sub-irrigation to the alfalfa field of 50-60 acres more or less. Mr. Green testified that there is no diversion structure in Little Pumpkin Creek for either Ditch No. 1 or Ditch No. 2 but, that in each case, the diversion ditch takes right out of the bottom of Little Pumpkin Creek channel.

Mr. Gary Green testified that in July last summer they started to have problems with the flow from Little Pumpkin Creek at their point of diversion. Gary Green said that he had observed that the Applicant's sprinkler system had been operated 3 or 4 hours at a time (whenever it could be), so he called Leon Willson and asked him if Little Pumpkin Creek was dried up and that Mr. Willson said he didn't know, but would check on it. A few days later, Mike Cobbs (Willson's employee) checked with Gary to see if he was getting water. Gary said he wasn't and Mike Cobbs said they weren't getting much either. Gary Green further testified that the Applicant quit pumping and in a matter of 5 or 6 days, Little Pumpkin Creek started to flow again to provide water at their point of diversion. Mr. Green testified that this had happened before occasionally in August, but never to his knowledge in July. He further testified that he did not consider that last July was unusually dry in that area.

The Greens presented testimony and evidence showing that they have a prior water right to the surface waters of Little Pumpkin Creek; that they have been putting this water to a beneficial use and that they have been beneficially using all of the normal flow during the irrigation season, and further, that they have an easement for their Ditch No. 1 across the Applicant's property.

CASE # 9961

6. Based upon the testimony of the Objector's representatives, it is found to be a fact that:

- a. The Objector has diverted and used most of, if not all, of the normal surface flow of the Little Pumpkin Creek during the irrigation season by means of Ditch No. 1,
- b. The Objector normally has diverted and used water from Little Pumpkin Creek by means of Ditch No. 2 only during periods of surface runoff from snowmelt and rainfall.
- c. The Objector has impounded water from Little Pumpkin Creek in reservoirs identified as No. 1, 2, and 3 during periods of surface runoff from snowmelt or runoff, and
- d. The Objector has not developed and used ground water sources from Little Pumpkin Creek to supply any of the above.

7. Based upon the testimony of the Applicant and others it is found to be a fact that:

- a. The existence of springs and seeps in the area compounded by aquatic growth and vegetation and other blockages in Little Pumpkin Creek channel, has contributed to reduced productivity of the Applicant's land by creating wetlands consisting of bogs and marshy areas and creating hazardous conditions to human life, livestock, and farming and ranching operations,
- b. The existence of the wetlands is indicative of an excess of ground water not presently being appropriated and put to beneficial uses, and
- c. The quantification of the amount of ground water available for appropriation and its relationship to the Objector's prior surface water rights cannot be made without further ground water or drainage studies and development of reclamation plans.

PROPOSED CONCLUSIONS OF LAW

1. It is concluded that the Objector has an apparent prior water right for the natural flow of the waters of Little Pumpkin Creek and that such flow consists of the surface runoff as well as waters from undeveloped springs and seeps contributing to the flow of Little Pumpkin Creek above the Objector's point of diversion, the two being inseparable and together forming the source of supply of Little Pumpkin Creek; further, that the Objector has a recognized and apparently valid diversion and ditch easement, on lands owned or under the control of the Applicant, to convey the diverted water to the Objector's place of use; further, that the Objector's prior existing water rights, by law, must be protected.

2. Under the provisions of Section 89-880 R.C.M. 1947, a Beneficial Water Use Permit is required by the Applicant to appropriate water from the proposed source of supply.

3. There are unappropriated ground waters in the source of supply and in accordance with Section 89-866(3) of the Montana Water Use Act, the Department must encourage the development of facilities which would conserve such waters for beneficial use and for the maximization of the use of those waters in the State of Montana, however, without ground water or drainage studies, it cannot be determined whether or not the unappropriated waters are available in the amount the Applicant seeks to appropriate, and whether or not the amount requested is available throughout the period during which the Applicant seeks to appropriate.

4. The rights of prior appropriators will not be adversely affected if the permit is conditioned so as to protect those rights.

5. The proposed means of diversion or construction are adequate.

6. The proposed use of water is a beneficial use.

7. 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. The Application For Beneficial Water Use Permit No. 9961-g42C may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana, on a temporary basis only, pending further evaluation of the effects of this appropriation on prior water rights.

PROPOSED ORDER

1. Subject to the conditions cited below, the Application For Beneficial Water Use Permit No. 9961-g42C by Leon H. Willson is hereby granted allowing the appropriation of a maximum of 0.89 cubic feet per second or 400 gallons per minute of water and not to exceed 178 acre-feet per annum from a developed spring, a tributary of Little Pumpkin Creek, in Powder River County, Montana, to be diverted from said spring by means of a pump at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 1 South, Range 48 East, M.P.M., and used for new irrigation on 17 acres in Section 18, and 49 acres in Section 19, all in Township 1 South, Range 48 East, M.P.M., and containing a total of 66 acres, more or less, from March 15 to October 15, inclusive of each year.

2. The above permit is temporary and is granted subject to all existing water rights in the source of supply, including, but not necessarily limited to prior decreed water rights, if any, and to the prior water rights of those objecting herein, and subject to any final determination of prior existing water rights as provided by Montana Law.

3. The above Temporary Permit is subject to the following additional conditions:

- a. The Temporary Permit shall expire on the first day of January, 1980 unless terminated earlier by Department Order.
- b. The Permittee shall install and maintain a flow meter on the pump and shall install and maintain, in accordance with Department approved plans, a satisfactory measuring device in Little Pumpkin Creek at the Objectors point of diversion or at points specified by the

Department, for monitoring purposes, and shall maintain and submit seasonal records to the Department for evaluation. Monitoring records are to reach the Department by November 1, 1978 and November 1, 1979 and at such other times as the Department may direct and shall consist of the following as a minimum:

- (1) Pumping records giving date, clock time, and rate of flow for all periods pumped throughout the term of the Temporary Permit.
- (2) Streamflow measurements taken at the Objector's point of diversion daily during all periods of pumping and for seven (7) consecutive days immediately following pumping periods. The Permittee shall give notice to the Objector of the times the measurements are to be taken and shall allow the Objector reasonable access to verify such measurements.

C. Prior to termination of the Temporary Permit, the Department shall evaluate the affects of the appropriation on the Objector's prior water rights from the source of supply and, based upon conclusions reached by the Department upon review of the results of the monitoring program, a Provisional Permit shall be granted or denied.

RECOMMENDATION

In view of the testimony of the Applicant and the Objector and the Proposed Findings of Fact in this matter, it is recommended that the parties concerned cooperate in forming a group enterprise providing for a drainage study to be conducted by a qualified consultant or a governmental agency, culminating in the preparation of drainage plans and specifications in which the costs and mutual benefits could be evaluated and if feasible a drainage project be constructed and the waters thus salvaged be appropriated for beneficial uses.