

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  
24404-s76G BY ALFRED L. & )  
CAROLYN H. CHASE )  
\* \* \* \* \*

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on November 5, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

RESPONSE TO OBJECTORS' COMMENTS

1. Findings Nos. 9, 11 and 13 on page 7 of the Proposal for Decision were based on testimony presented at the hearing. Testimony was presented that Mrs. Cook has a right to use water from Cramer Creek on an "isolated" tract of land north of Interstate 90. The absence of a finding of fact regarding that right by the Hearing Examiner is not meant to be a finding that such a right does not exist, but rather, that that right is not currently being used and therefore, was not considered in determining whether or not there are unappropriated waters available for appropriation in the source of supply. Condition No. 2 on page 13 of the Proposed Order addresses this problem. If Mrs. Cook were to begin using water on that tract, then the Permit granted to the Applicants in the above matter would be junior to that right. However, a person's water right is that amount of water which

is put to beneficial use, not necessarily that amount which is claimed.

2. Finding No. 16 on pages 8 and 9 does ignore the lowest point of diversion claimed by Mrs. Cook for the isolated tract of land north of Interstate 90. See the above response for the reasons for excluding said point of diversion.

Benard Weston's last point of diversion was marked on Objector's Exhibit No. 3 by a red checkmark. The locations of the two (2) U. S. G. S. gaging stations were marked with black dots and labelled "1" and "2" on Department's Exhibit No. 1. A comparison of these variously marked points shows that Station No. 1 is upstream from and Station No. 2 downstream from said point of diversion used by Benard Weston. Station No. 2 was located in the SE1/4 NW1/4 Section 10, Township 11 North, Range 16 West, Missoula County, at the bridge on U. S. Highway 10 and Interstate 90, just west of Beavertail Hill, 2.9 miles northwest of Ravenna.

3. Finding No. 15 on pages 7 and 8 of the Proposal for Decision does ignore the testimony that the West Fork of Cramer Creek is dry above the point of diversion requested by the Applicants in this matter. This does not change the fact that once the West Fork of Cramer Creek goes underground below the Applicants' proposed point of diversion, it does not resurface in the West Fork Channel. Therefore, as Mr.

Wheeler pointed out at the hearing, the water disappears into the valley alluvium and is subject to the forces which govern groundwater movement. The real issue in this matter is not the volume of water sought by the Applicants relative to the total production of the watershed in any given year, but rather, the time period during which that water sought by the Applicants is removed from the source of supply. The waters sought by the Applicants will not be available to the West Fork alluvium which most likely serves to recharge the main Cramer Creek flow. However, prior to the time that said water would become available to prior appropriators on Cramer Creek, the watershed will in most years experience a spring runoff which will resaturate the valley alluvium and replace those waters removed by the Applicants.

#### FINAL ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 24404-s76G by Alfred L. and Carolyn H. Chase is hereby granted to appropriate 10 gallons per minute, not to exceed 2.41 acre-feet per annum from the West Fork of Cramer Creek, a tributary of Cramer Creek, a tributary of the Clark Fork River, in Missoula County, Montana. The water is to be diverted from a point in the SW1/4 NW1/4 NE1/4 of Section 34, Township 12 North, Range 16 West, M.P.M., Missoula County, Montana, by means of a removable box in the stream and transported by a 1 1/2 inch

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diameter, 2,000 foot long pipe to a 1500 gallon storage tank. The water is to be diverted from the storage tank and sprinkle irrigated on approximately one acre of lawn and garden in the SE1/4 of said Section 34. The water is to be diverted and used from May 15 to October 1, inclusive, of each year.

2. Provisional Permit No. 24404-s76G is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. This Provisional Permit is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute to parties using waters in the source of supply, the waters to which they are entitled, including the waters granted in this Provisional Permit. The Permittee shall pay his proportionate share of the fees and compensation expenses, as affixed by the District Court, incurred in the distribution of the waters granted in this Provisional Permit.

4. 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.

5. The issuance of this Provisional Permit by the Department in no way reduces the Permittees' liability for damages caused by the Permittees' exercise of this

Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittees' exercise of the 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 4<sup>th</sup> day of December 1988.

David L. Finchelly

DAVID L. FINCHELLEY, D.N.E.&C.  
HEARING EXAMINER

CASE # 24404

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  
24404-s76G BY ALFRED L. & )  
CAROLYN H. CHASE )  
\* \* \* \* \*

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on September 15, 1980, at Missoula, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 24404-s76G, David Pengelly, Hearing Examiner, presiding.

The Applicants, Mr. & Mrs. Chase, appeared at the hearing and presented testimony in support of the Application. The Chases were represented by legal counsel, Helena Maclay, Missoula, Montana. The Applicants introduced four (4) exhibits in support of the Application, to wit:

Applicant's Exhibits:

- A-1 Copy of U. S. G. S. Topo Map showing Kramer Creek and the West Fork of Kramer Creek, including location of point of diversion and Applicant's property.
  
- A-2 Letter to Mr. Al Chase from Mr. Tim Beebe of Champion Timberlands stating that Champion will

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issue a special use permit on Champion land for the Applicants' proposed point of diversion.

A-3 Copy of Application by the Applicants for a permit under the Natural Streambed and Land Preservation Act and attached copy of an approval of said Application by the Missoula County Conservation District Board dated 9-20-79.

A-4 Copy of well log of domestic well on Applicants' property.

The Applicant's exhibits were entered into the record with no objections.

Two Objectors were represented at the hearing: Wanda Alsaker presented testimony on behalf of her mother, Objector Myrtle S. Cook; and Lola Mae Roper presented testimony on behalf of herself and John J. Roper. Myrtle S. Cook and Lola Mae Roper were represented by legal counsel, Victor Valgenti, Missoula, Montana. Other witnesses testifying on behalf of the Objectors were Benard Weston, and Bob Wheeler, a hydrogeologist. The Objectors introduced six (6) exhibits in support of their objections, to wit:

Objectors' Exhibits

O-1 Copy of 1912 Cramer Creek Decree Number 3959 in the District Court of the 4th Judicial District of the

State of Montana, in and for the County of  
Missoula.

- O-2 Notice of Appropriation filed by W. A. Cook for 200  
miner's inches from Cramer Creek dated February 26,  
1912.
- O-3 Aerial photograph of Myrtle S. Cook's properties  
along Cramer Creek taken by Burlington Northern,  
Inc.
- O-4 Aerial photograph of the Ropers' property along  
Cramer Creek, taken by Burlington Northern, Inc.
- O-5 Notarized appointment of special power of attorney  
upon Wanda Alsaker by Myrtle S. Cook for the  
purpose of the hearing.
- O-6 Copy of Page 267 Surface Water Records of the  
State of Montana for the Water Year, 1972.

The Objectors' Exhibits were introduced into the record  
with no objections except that Helena Maclay, counsel for the  
Applicant, made the note that Wanda Alsaker would not be  
empowered to give testimony on behalf of Myrtle S. Cook other  
than testimony that was personally known by Wanda Alsaker.

Montana Department of Natural Resources and Conservation  
Personnel present at the hearing were Jan Mack, Missoula Area  
Water Rights Bureau Field Office Manager and Gale Greer,

Hearing Reporter. The Department introduced one (1) exhibit,  
to wit:

Department's Exhibit

D-1 Photocopy of the U. S. G. S. Ravenna Quadrangle showing the Applicants' and Objectors' properties and the locations of Cramer Creek where it enters the Clark Fork River. Also, located on Cramer Creek are sites 1 and 2 which correspond to the discharge data taken from Objectors' Exhibit O-6.

The Department's Exhibit was introduced into the record with no objections. The Department was not represented by legal counsel.

SUMMARY OF RECORD

1. On August 31, 1979, the Department received Application For Beneficial Water Use Permit No. 24404-s76G by Alfred L. & Carolyn H. Chase to appropriate 10 gallons per minute of water up to 4.82 acre-feet per annum from the West Fork of Cramer Creek for lawn and garden use, in the SW1/4 NW1/4 NE1/4 of Section 34, Township 12 North, Range 16 West, Missoula County, Montana, from May 15 to October 1, inclusive, of each year. The water is to be used in the SE1/4 of said Section 34 on approximately two (2) acres. The water is to be diverted by means of a pipeline to a 1500 gallon storage tank.

2. On October 24, 31, and November 7, 1979, the Department caused to be duly published in the Missoulian, Missoula, Montana, Notice of Application for Beneficial Water Use Permit No. 24404-s76G.

3. On December 12, 1979, the Department received objections to the above Application from Myrtle S. Cook and John J. and Lola Mae Roper.

4. On March 13, 1980, the Application was revised downwards by Carolyn H. Chase; the volume of water requested was decreased from 4.82 to 2.41 acre-feet to be used on one (1) acre instead of the originally intended two (2) acres. Further, the purpose of use of the water was changed from yard and garden and fire protection to domestic and lawn and garden use.

#### PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file in this matter, it is found:

1. That in most years the West Fork of Cramer Creek only flows to the confluence of Cramer Creek through the spring runoff period and that by mid-June the West Fork of Cramer Creek is dry at that confluence with Kramer Creek and by mid-July the West Fork of Cramer Creek is dry to approximately 1/4 of a mile above the Applicants' house.

2. That Cramer Creek was decreed in 1912.

3. That the Applicant's intend to divert water from the West Fork of Cramer Creek by a removable box placed in the stream used to gravity feed a 1 1/2 inch pipeline approximately 2,000 feet long to be diverted into a 1500 gallon storage tank on the Applicants' property. From the storage tank water would be sprinkled on the Applicants' lawn and garden.

4. That if water is not diverted into the storage tank, the water will remain in the West Fork of Cramer Creek.

5. That the Applicant has received a 310 permit from the Soil Conservation Service (Natural Streambed & Land Preservation Act Permit), and has received written assurance from Champion Timberlands that they would receive a use permit to place the point of diversion on Champion Timberlands property.

6. That the spring runoff in Cramer Creek comes later than the runoff in the West Fork of Cramer Creek, with the general period of spring runoff running from mid-May to mid-June.

7. That Objector, Myrtle S. Cook, has decreed rights to 528 miner's inches and a Notice of Appropriation filed for 200 miner's inches from Cramer Creek.

8. That the Objector, Lola Mae Roper, has a decreed right for 40 miner's inches from Cramer Creek.

9. That at the present approximately 70 to 75 acres of the Cook property are being irrigated and 20 acres of the Roper property are being irrigated.

10. That Benard Weston leases the Cook property south of Interstate 90 on Cramer Creek and irrigates approximately 55 acres of that property.

11. That Benard Weston normally has enough water to irrigate said 55 acres adequately through mid-July.

12. That Benard Weston has the last point of diversion that is currently being used on Cramer Creek (located on Objectors' Exhibit O-3 by a red checkmark). The location of this point of diversion is in Section 10, Township 11 North, Range 16 West.

13. That at least a trickle of water generally passes the last point of diversion used by Benard Weston throughout the summer.

14. That the Applicants' point of diversion is approximately one mile above the confluence of Cramer Creek and the West Fork of Cramer Creek.

15. That the waters of the West Fork of Cramer Creek become part of the alluvium of the West Fork of Cramer Creek

once they disappear into the ground after the spring runoff. There was no testimony presented at the hearing regarding the length of time it would take the alluvial waters of the West Fork of Cramer Creek to reach Cramer Creek, therefore, Administrative Notice is taken of a normal range of groundwater velocities from a standard groundwater hydrology text titled Groundwater Hydrology by David Keith Todd, 1959, John Wiley and Sons, Inc. According to Todd, a normal range of groundwater velocities is from 5 feet per year to 5 feet per day (page 53, Todd). Therefore, assuming that the West Fork of Cramer Creek disappears into the alluvium approximately one mile above the confluence with Cramer Creek, and further assuming a maximum velocity of groundwater movement of 5 feet per day, it would take in excess of 1,000 days for that water in the alluvium to reach Cramer Creek. Therefore, it is found that water taken from the West Fork of Cramer Creek during the irrigation season would not be available in Cramer Creek during that same irrigation season except during spring runoff when it flows in the stream channel.

16. Robert Wheeler testified that effluent seepage from groundwater was a source of water for the flow of Cramer Creek and presented data which was introduced as Objectors' Exhibit O-6 regarding flow figures from two sites on Cramer Creek as evidence of such. Mr. Wheeler testified that the two stations are approximately 2/10 of a mile apart, possibly

a little more, and that during the month of June the upper station had a recorded flow of 14.4 cfs and the lower station a flow of 14.5 cfs, however on July 16, 1972, the upper station had a gaging record of 7.02 cfs and the lower station had a record of 9.23 cfs. Listed below is a table compiled from Objectors' Exhibit O-6. The correct date and figures are July 12, 1972, and 9.11 cfs and 9.23 cfs, respectively.

Discharge (cfs)

<u>Date</u>	<u>Site 1</u>	<u>Site 2</u>
10-13-71	4.69	5.23
03-15-72	17.70	19.40
04-13-72	25.20	26.60
05-16-72	76.20	76.30
06-12-72	14.40	14.50
07-12-72	9.11	9.23
08-16-72	7.02	7.31
09-13-72	6.58	8.38

(Compiled from Objectors' Exhibit O-6.)

It should be noted from this table that the difference in discharge between the two sites from mid-May to mid-August is less than 3/10 of a cfs. In September the difference was 1.8 cfs. Using this data it is found that effluent seepage does not contribute very greatly to the flow of Cramer Creek over the distance between gaging Site 1 and gaging Site 2 during the summer months. It is further found that most of the points of diversions listed by the Objectors on their various exhibits show that those points of diversion are located between the two sites where the discharge measurements were taken. Also, it is found that Site 2 is

below the last point of diversion from Cramer Creek claimed by the Objectors.

16. That the Objectors are concerned about policing water rights on Cramer Creek and that the granting of this Application would lead to further Applications along Kramer Creek and more use of water to the detriment of the Objectors..

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 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 a prior appropriator 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. Section 85-5-101, MCA, 1979, states in part, "The commissioner shall have authority to admeasue and distribute to the parties owning water rights in the source affected by the decree, the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates and permits issued under Chapter 2 of this title."

3. 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 Applicants; in the amount the Applicants seek to appropriate; and throughout the period during which the Applicants seeks to appropriate; the amount requested is available.

4. It is concluded that the Permittees shall be under the jurisdiction of the water commissioner, if any, in this area.

5. It is concluded that the rights of prior appropriators will not be adversely affected by the granting of this permit.

6. It is concluded that the proposed use of water for lawn and garden use and domestic use is a beneficial use.

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

8. 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.

9. Nothing decided herein has bearing on the status of water rights claimed by the Applicants other than those herein applied for, nor does anything decided 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, Provisional Permit No. 24404-s76G by Alfred L. and

Carolyn H. Chase is hereby granted to appropriate 10 gallons per minute, not to exceed 2.41 acre-feet per annum from the West Fork of Cramer Creek, a tributary of Cramer Creek, a tributary of the Clark Fork River, in Missoula County, Montana. The water is to be diverted from a point in the SW1/4 NW1/4 NE1/4 of Section 34, Township 12 North, Range 16 West, M.P.M., Missoula County, Montana, by means of a removable box in the stream and transported by a 1 1/2 inch diameter, 2,000 foot long pipe to a 1500 gallon storage tank. The water is to be diverted from the storage tank and sprinkle irrigated on approximately one acre of lawn and garden in the SE1/4 of said Section 34. The water is to be diverted and used from May 15 to October 1, inclusive, of each year.

2. Provisional Permit No. 24404-s76G is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. This Provisional Permit is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute to parties using waters in the source of supply, the waters to which they are entitled, including the waters granted in this Provisional Permit. The Permittee shall pay his proportionate share of the fees and compensation expenses, as affixed by the District Court, incurred in the distribution of the waters granted in this Provisional Permit.

4. 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.

5. The issuance of this Provisional Permit by the Department in no way reduces the Permittees' liability for damages caused by the Permittees' exercise of this Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittees' exercise of the 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 Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 5th day of November, 1980.

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