

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION        )  
FOR BENEFICIAL WATER USE PERMIT        )        FINAL ORDER  
NO. 30688-s400 BY CECIL J. DYKSTRA    )

\* \* \* \* \*

The Proposal for Decision in this matter was entered on April 7, 1983. An exception to the Proposal for Decision was entered with the Department by Mr. Rick Kinzell. Subsequently, the Applicant, Mr. Cecil Dykstra, and Objectors Kinzell and Miller stipulated to the issuance of Provisional Permit No. 30688-s400 by the Department. The stipulation was received by the Department on September 28, 1983.

There being no further exceptions to the Department's Proposal for Decision in this matter, the following Final Order is hereby entered:

FINAL ORDER

1) Provisional Permit No. 30688-s400 is hereby issued to Cecil J. Dykstra to appropriate ten (10) gallons per minute (gpm) up to two (2) acre-feet (ac-ft) per annum from an unnamed tributary of Spring Creek. The point of diversion shall be Tract 17-B of Cherry Valley Estates, in the NE1/4 SE1/4 SW1/4 Section 17, Township (T) 29 North (N), Range (R) 40 East (E), M.P.M., Valley County. The waters diverted pursuant to this permit shall be used for domestic irrigation purposes, including watering of lawns, gardens, windbreaks and other trees; and for stock

watering purposes, on 2 acres in the W1/2 SE1/4 of said Section 17. The period of appropriation shall be January 1 to December 31, inclusive, of each year.

2) This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana Law. Nothing herein shall be construed to authorize diversion by the permittee to the detriment of any senior appropriator.

3) The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

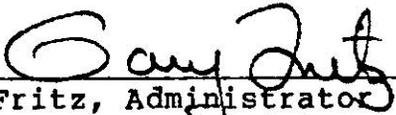
4) The Permittee shall not alter the natural state of Spring Creek or the pond he will pump from, except as necessary to install his pump.

5) If at any time after this permit is issued, a written complaint is received by the Department alleging that the Permittee's diverting of water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be revoked or modified. The Department may revoke or modify the permit to protect existing rights or allow the permit to continue unchanged

if the Hearings Officer determines that no existing water rights are being adversely affected.

6) The priority date of the application shall be July 29, 1980, at 3:15 p.m.

DONE this 7<sup>th</sup> day of October 1983.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 South Ewing, Helena, MT 59620  
(406) 444 - 6605

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on Oct 11, 1983, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Cecil J. Dykstra, Application No. 30688-s400, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Cecil J. and Marilyn Dykstra, 216 First Ave. North, Glasgow, MT 59230
2. Mr. and Mrs. Ray Bruce Campbell, North Star Route, Glasgow, MT 59230
3. Richard S. and Suzette A. Kinzell, Box 625, Glasgow, MT 59230
4. Erwin Miller, P.O. Box 546, Glasgow, MT 59230
5. Gallagher, Archambeault, & Knierim, P.O. Box 512, Glasgow, MT 59230
6. Vivian Lighthizer, Glasgow Area Office Supervisor, DNRC (inter-departmental mail)
7. Walter Rolf, Hearing Examiner, DNRC (inter-departmental mail).

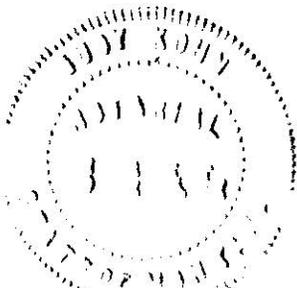
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 11th day of October, 1983, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings 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.



Suey Kohn  
Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 8-1-85

CASE # 30688

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 30688-s400 BY CECIL J DYKSTRA )  
)

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Glasgow, Montana on October 19, 1982. The Applicant, Cecil J. Dykstra, and his wife Marilyn Dykstra presented testimony in behalf of the application. Objectors appearing were Roy Bruce Campbell, Richard S. Kinzell and Erwin Miller. The Department of Natural Resources and Conservation was represented by Vivian Lighthizer, Glasgow Area Office Supervisor, and Paul Lemire, Department Geohydrologist. None of the parties were represented by legal counsel.

STATEMENT OF THE CASE

On July 29, 1982 an Application for Beneficial Water Use Permit was filed with the Department by Cecil J. Dykstra. The application seeks 100 gallons per minute of water up to 10.8 acre-feet per annum for new flood and sprinkler irrigation to be used from March 1 to October 31, inclusive, of each year, and 5 gallons per minute of water up to 1 acre-foot per annum for stock use to be used from January 1 to December 31, inclusive, of each year. The total application is therefor 105 gallons per minute

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up to 11.8 acre-feet per annum. The place of use for the irrigation is to be on four acres in the W1/2 SE1/4 SW1/4 of Section 17, Township 29 North, Range 40 East, in Valley County, Montana. The place of use for the stock is to be in the NE1/4 SE1/4 SW1/4 of Section 17, Township 29 North, Range 40 East in Valley County, Montana. The water is to be diverted from a spring fed pond in the bed of Spring Creek at a point in the NE1/4 SE1/4 SW1/4 of Section 17, Township 29 North, Range 40 East in Valley County, Montana. The places of use and point of diversion are located in Tract 17-8A of Cherry Valley Estates. The water for irrigation purposes is to be diverted by using a five horsepower pump. The stock will be watered from a stock tank, supplied by the pump via a pipeline from the pond.

Pursuant to MCA 85-2-307(1981), notice of this application was published for three consecutive weeks in the Glasgow Courier, a newspaper of general circulation in the area of the water source. The Department also served notice of this application to water right holders interested or affected by this appropriation.

On February 3, 1981, a timely objection to the granting of this Application was filed with the Department by Mr. and Mrs. Roy Bruce Campbell. On February 13, 1981, a timely objection was filed by Erwin Miller. On February 17, 1981, a timely objection was filed by Richard S. and Suzette A. Kinzell.

#### EXHIBITS

The Applicant offered into the record one exhibit with no objections:

A-1: A report entitled "Hearing Information", prepared by the Applicant and an accompanying map showing the proposed development.

Objector Kinzell offered into the record one exhibit with no objections:

O-1: A copy of a report prepared by Don Beckman of Beckman Engineering.

The Hearings Examiner, after considering all submitted evidence, and now being fully advised in the premises, makes the following Findings of Facts, Conclusions of Law and Proposed Order.

#### FINDINGS OF FACT

1. The Applicant would be able to divert water for irrigation at a maximum rate of 40 gallons per minute not at 105 gallons per minute as originally applied for. Forty gallons per minute would be utilized for irrigation and 5 gallons per minute for stock use.

2. Forty gallons per minute up to 10.8 acre-feet per annum for 4 acres of irrigation of garden, lawn and alfalfa is reasonable and would not result in the waste of water.

3. Five gallons per minute up to 1 acre-foot per annum for stock watering purposes is reasonable.

4. The source of supply is a spring fed pond in the bed of Spring Creek and that both surface runoff and spring flow would be utilized.

5. The Applicant intends to use a five horsepower gas

powered centrifugal pump to pump the water through a two inch hose onto an upper bench to irrigate 4 acres of land.

6. There is normally water in Spring Creek during the year with most of the flow during summer months being contributed by springs in and along the stream.

7. Objector Kinzell has filed a SB76 claim (#5129) for fish and wildlife use from Spring Creek for 20 gallons per minute up to 32.25 acre-feet per year, with a priority date of June 7, 1910. The use is instream and involves no actual diversion. Kinzell also has a 30 foot deep domestic well drilled in 1978 covered by Certificate of Water Right #19568-g400.

8. Objector Campbell is upstream from the proposed project. His objections are based on stock use from a spring and domestic use from a 40 foot deep well drilled in 1978 and covered by Certificate of Water Right #19477-g400.

9. Objector Miller's objections are based on stock use directly from Spring Creek and on domestic and stock use from a spring located adjacent to Spring Creek.

10. There is at times unappropriated water available for Applicant's proposed use in the source.

11. There may be an adverse effect to existing rights. Objectors feel affect would be substantial especially during periods of drought or low flows during the summer. The report prepared by Paul Lemire of the Department indicates that the affect will be minimal. The Objectors feel that the proposed pumping will lower the water table affecting their domestic wells and springs. They also expressed concern that the water in

Spring Creek would be seriously depleted affecting stock and fish propogation rights.

12. Testimony was given by the Applicant and Objectors that the Applicant had pumped in 1979 or 1980. There was discrepancy concerning the year that the pumping occurred. Objector Kinzell felt the pumping that occurred before the Applicant was aware of permit requirements caused an adverse effect by depleting stream flow and lowering the water table in his well. It appears that this pumping occurred during a very dry year in the area. Because of this and the problem with what year the pumping actually occurred, it is not clear that the pumping was responsible for the decreased water supply.

A report was submitted by Objector Kinzell that was prepared by Don Beckman of Beckman Engineering but the report only addresses what he felt was wrong with the figures used in Mr. Lemire's report. It does not provide any alternative facts, figures or conclusions. Mr. Beckman was not available at the hearing for questioning.

#### CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and has jurisdiction over the persons that are parties to this matter whether they have appeared or not. See MCA 85-2-301 et seq.(1981).

2. The Hearing Examiner finds and concludes that the Department of Natural Resources and Conservation must, pursuant

to MCA 85-2-311(1981), issue the permit requested herein 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, construction, and operation of the appropriation works 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;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5)."

3. The Applicant is not seeking an appropriation in excess of 10,000 acre-feet per year and therefor need only prove by substantial credible evidence the criteria listed in (2) above.

4. There is substantial credible evidence that unappropriated waters exist in the source of supply at times when the water can be put to the use proposed by the Applicant. There is water available in the amount sought by the Applicant and throughout the period the Applicant seeks to appropriate the water. There may, however, be times during the year when no water is available for the Applicant's proposed use, but no specific dates can be applied to these times.

5. The proposed means of diversion is adequate to provide up to 40 gallons per minute for the project involved.

6. The proposed use of water for irrigation and stock use is a beneficial use.

7. The proposed use will not interfere with any planned uses for which a permit has been issued or for which water has been reserved. No evidence was submitted showing that there have been any permits or reservations granted which could be affected.

#### PROPOSED ORDER

WHEREFORE, based on the Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued.

1. Application for Beneficial Water Use Permit No. 30688-s400 is hereby granted to Cecil J. Dykstra to appropriate up to 40 gallons per minute up to 10.8 acre-feet per annum for new irrigation, and 5 gallons per minute up to 1 acre-foot per annum for stock use. The total use shall not exceed 45 gallons per minute up to 11.8 acre-feet per annum. The source of supply shall be a natural spring fed pond in Spring Creek with the water being diverted in the NE1/4 SE1/4 SW1/4 of Section 17, Township 29 North, Range 40 East, in Valley County, Montana.

The place of use for irrigation shall be on 4 acres in the W1/2 SE1/4 of Section 17, Township 29 North, Range 40 East and the place of use for the stock shall be the NE1/4 SE1/4 SW1/4

of Section 17, Township 29 North, Range 40 East, all in Valley County, Montana.

The places of use and point of diversion are located in Tract 17-8A of Cherry Valley Estates in Valley County. The water shall be used for irrigation only from March 1 to October 31, inclusive, of each year while the water for stock may be utilized from January 1 to December 31, inclusive, of each year.

The priority date for this permit shall be July 29, 1980 at 3:15 p.m..

2. The permit is issued subject to the following express conditions, limitations, or restrictions:

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana Law. Nothing herein shall be construed to authorize diversion by the Permittee to the detriment of any senior appropriator.

B. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

C. The Permittee shall not alter the natural state of Spring Creek or the pond he will pump from, except as necessary to install his pump.

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D. If at any time after this permit is issued, a written complaint is received by the Department alleging that the Permittee's diverting of water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show-cause why the permit should not be revoked. The Department may revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before

April 27 \_\_\_\_\_, 1983.

DONE this 7<sup>th</sup> day of April \_\_\_\_\_, 1983.

Walter L. Rolf  
Walter Rolf, Hearing Examiner  
Department of Natural Resources  
and Conservation  
25 E. Wisconsin, P.O. Box 50000  
Denver, Colorado 80250  
(303) 733-3000

**CASE # 30688**

AFFIDAVIT OF SERVICE  
PROPOSAL FOR DECISION

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 7, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Cecil J. Dykstra, Application No. 30688-s400, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Cecil J. & Marilyn Dykstra, 216 First Ave. No., Glasgow, MT 59230
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3. Richard S. & Suzette A. Kinzell, Box 625, Glasgow, MT 59230
4. Erwin Miller, P.O. Box 546, Glasgow, MT 59230
5. Gallagher, Archambeault & Knierim, P.O. Box 512, Glasgow, MT 59230
6. Vivian Lighthizer, Glasgow Field Office (inter-department mail)
7. Walter Rolf, Hearing Examiner, DNRC (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Cheryl L. Wallace

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

On this 7th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings 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.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

*Suey Lohm*

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Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 3/1/85

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