

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. 49483-s43Q BY DANIEL R. LANDON )

\* \* \* \* \*

There have been no exceptions or objections to the Proposal for Decision in the above-referenced matter as entered by the Hearing Examiner on March 5, 1984. Therefore, the Proposed Findings of Fact, Conclusions of Law and Order are hereby adopted as Final.

FINAL ORDER

Application for Beneficial Water Use Permit No. 49483-s43Q by Daniel R. Landon is hereby denied and dismissed in its entirety.

NOTICE

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.

DONE this 6th day of April, 1984.

Gary Fritz  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
32 S. Ewing, Helena, MT  
(406) 444 - 6605

David L. Pengelly  
David Pengelly, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 5004, Missoula, MT 59806  
(406) 721 - 4284

**CASE #** 49483

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 April 11, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Daniel R. Landon, Application No. 49483-s43Q, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Daniel R. Landon, 7909 Spear Dr., Shepherd, MT 59079
2. Laurence R. Martin, Felt & Martin, P.O. Box 2558, Billings, MT 59103-2558
3. Clarence Schwahn, Route 1, Shepherd, MT 59079
4. Dennis N. Smith, 7927 Spear Drive, Shepherd, MT 59079
5. Keith Kerbel, Area Office Supervisor, Billings, MT (inter-department mail)
6. David L. Pengelly, Hearing Examiner, (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 11<sup>th</sup> day of April, 1984, 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.

Patricia Lamberson  
Notary Public for the State of Montana  
Residing at Nelson, Montana  
My Commission expires 6 Oct 1985

**CASE # 49483**

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. 49483-S43Q BY DANIEL R. LANDON )  
)

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the Contested Case provisions of the Montana Administrative Procedures Act, the hearing in the above-entitled matter was held in Billings, Montana, on January 12, 1984.

STATEMENT OF CASE

On November 23, 1982, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation (DNRC) by Daniel R. Landon. This Application seeks to divert 10 gallons per minute (gpm) up to 0.85 acre-feet (af) per annum from an unnamed tributary of Crooked Creek at a point in Lot 26, Block 7, Arrow Island Subdivision 2nd filing in the NW¼NE¼ of Section 12, Township 2 North, Range 27 East, Yellowstone County. The Application seeks 10 gpm up to 0.75 af for irrigation of 0.25 acres from May 1 to October 15; and 0.1 af for stock-watering purposes from January 1 to December 31. The water is to be used on Lot 25 Block 7 Arrow Island Subdivision 2nd filing. The water would be diverted from the source by means of a pipeline. (Note: Throughout this Proposal for Decision, any and all lot numbers specified are part of Block 7, Arrow Island Subdivision 2nd Filing, Yellowstone County.)

The pertinent portions of this Application were duly published for three successive weeks in the Billings Gazette, a newspaper of general circulation printed and published in Billings, Montana.

The Applicant, Mr. Daniel R. Landon, appeared at the hearing and represented himself. Also appearing as witnesses on behalf of the Applicant were Ms. Jan Geisick and Mr. Frank Holbrook.

An objection to the granting of this Application was filed with the DNRC by Mr. Clarence Schwahn. Mr. Schwahn generally alleges that there is not sufficient unappropriated water for any new appropriations from the source, and further states that the Applicant does not have a valid easement to appropriate the water requested. Mr. Schwahn appeared at the hearing on his own behalf and was represented by legal counsel, Mr. Lawrence R. Martin of Billings, Montana.

An objection to the granting of this Application was filed with the DNRC by Dennis N. Smith. Mr. Smith generally alleges that there is insufficient water in the source for any new appropriations and further asserts that as owner of the property from which the Applicant seeks to divert water, he has not granted an easement to the Applicant. Mr. Smith appeared at the hearing on his own behalf and was represented by legal counsel, Mr. Lawrence R. Martin.

Keith Kerbel and Don Riddle of the DNRC Billings Water Right Field Office appeared at the hearing on the behalf of the DNRC.

BRIEFS

On February 8, 1984, a brief in support of this Application was submitted to the Hearing Examiner by Mr. Landon.

EXHIBITS

The Applicant offered the following exhibits into evidence, to wit:

- A1: Aerial photo number ZW-4GG-143 taken on June 26, 1966.
- A2: Aerial photo number 30111-679-192R taken on September 15, 1979.
- A3: An affidavit signed by a Mr. Walt Tomascak and sworn on May 31, 1983.
- A4: A mylar overlay to be used in conjunction with Applicant's Exhibts A1 and A2.
- A5: A hand-drawn map of the Applicant's property, proposed diversion point, and subdivision plat.
- A6: A letter to Frank (Holbrook) from Craig (Whitney) dated October 1, 1979 (last names added by Hearing Examiner for clarification).
- A7: Application for Beneficial Water Use Permit by Craig and Virginia Whitney.

Applicant's Exhibits 1, 2, 4 and 5 were introduced into the record with no objections. Counsel for the Objectors objected to the admission of Applicant's Exhibit Nos. 3 and 6 on the grounds that the exhibits had no bearing on the application at hand and further that the persons involved were not available for cross-examination. Due to the informal nature of the hearing and

since the Applicant is seeking to establish an earlier priority date than the date of the instant Application, Applicant's Exhibits 3 and 6 are accepted into the record.

Finally, Mr. Martin objected to the admission of Applicant's Exhibit A-7 on the grounds that it was not relevant to the matter at hand. Since Exhibit A-7 was a terminated Application for Beneficial Water Use Permit by Craig and Virginia Whitney, it appears to have no bearing on Mr. Landon's Application. Therefore Applicant's Exhibit A-7 has not been admitted into evidence.

The following exhibits were introduced into evidence by the Objectors, to wit:

- A: Certificate of Water Right 16274-g43Q issued to Walt Tomascak.
- B: Warranty Deed from John and Patricia Seader to Walter and Vicky Tomascak, dated August 1, 1977.
- C: Notice of Completion of Ground-Water Development No. 16274-g43Q by Walt Tomascak.
- D: Affidavit signed by Kenneth and Mary Sue Wright dated November 13, 1979.
- E: Provisional Permit to Appropriate Water No. 21267-s43Q issued to Clarence Schwahn.
- F: Application for Beneficial Water Use Permit No. 21267-s43Q by Clarence Schwahn.
- G: Rough draft of an Application for Water Use Permit dated September 8, 1978; prepared by Don Riddle.

- H: Acknowledgement of Receipt of Notice of Completion of Ground-Water Development No. 18583-g43Q by Donald Goodell.
- I: Notice of Completion of Ground-Water Development No. 18583-g43Q filed by Donald F. Goodell.
- J.: Notification of Transfer of Appropriation Water Right No. 18583 from Don Goodell to Dennis and Ellen Smith.
- K: Certificate of Water Right No. 18583-g43Q issued to Donald Goodell.
- L: Notice of Receipt of Water Right Transfer sent to Mr. and Mrs. Dennis Smith from DNRC.

The Objector's Exhibits were entered into the records with no objections.

The DNRC offered the following exhibits into evidence, to wit:

- D1: Letter to Clarence Schwahn from Don Riddle dated September 25, 1979.
- D2: Letter to Craig Whitney from Don Riddle dated September 25, 1979.
- D3: Letter to Don Riddle from Craig Whitney dated May 12, 1980.
- D4: Letter to Don Riddle from Craig Whitney sent on February 26, 1980.
- D5: Letter to Craig Whitney from Don Riddle dated June 13, 1980.

D6: Objection by Walter Tomascak to Application for Beneficial Water Use Permit No. 21267 by Clarence Schwahn.

Mr. Martin objected to the introduction of the DNRC's Exhibits on the grounds that they had no bearing on the matter of Mr. Landon's Application. Since Mr. Landon is attempting in this Application to establish a priority date other than that stated on the application and since Mr. Riddle was available for cross-examination, the Department's Exhibits were accepted into the record.

PROPOSED FINDINGS OF FACT

1. The source of water for the proposed application is the overflow of a developed spring located in Lot 26, in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 12, Township 2 North, Range 27 East, Yellowstone County. Lot 26 is currently owned by Dennis and Ellen Smith.

2. The referenced spring surfaces on said Lot 26 and flows downhill on the surface of the ground onto Lot 2. Lot 2 is currently owned by Clarence Schwan.

3. On December 30, 1977, Donald F. Goodell filed on said spring at its source for 32 gpm up to 4.53 af per annum water to be used for domestic and irrigation purposes. Said filing is documented by Certificate of Water Right No. 18583-g43Q.

4. On March 11, 1979, Certificate of Water Right No. 18583-g43Q was transferred from Donald Goodell to Dennis and Ellen Smith.

5. On September 8, 1978, Clarence Schwahn made Application for Beneficial Water Use Permit No. 21267-s43Q to divert 30 gpm up to 9.2 acre-feet per annum for irrigation and stockwater purposes from an unnamed tributary of Crooked Creek.

6. The unnamed tributary of Crooked Creek referenced in Finding of Fact No. 5 is the overflow of the spring developed by Donald Goodell on Lot 26.

7. The Smith diversion point is upstream from the proposed diversion point of the Applicant in the present application.

8. The Schwahn diversion point is downstream from the proposed diversion point of the Applicant in the present application.

9. The flow of the referenced spring ranges from no-flow to an approximate maximum flow of 10 gpm, depending on the time of the year when the flow is measured. The flow is generally greatest during the summer irrigation season or immediately following a heavy rain. The flow of the spring has generally declined in the past several years.

10. Objectors Smith and Schwahn currently rotate the use of the available water from the referenced spring to make the greatest possible use of said water since there is generally not sufficient water available to satisfy both of their needs simultaneously.

11. Walt Tomascak filed a Notice of Completion of Groundwater Development on November 18, 1977, claiming a developed spring located on Lot 25. Mr. Tomascak was issued Certificate of Water Right No. 16274-g43Q.

12. Craig and Virginia Whitney purchased Lot 25 from Walter Tomascak.

13. On October 16, 1979, the Whitneys filed Application for Beneficial Water Use Permit No. 39124-s43Q with DNRC. In June, 1980, said application was returned to them along with their filing fee and said Application was subsequently terminated by DNRC on December 7, 1981.

14. Daniel R. Landon purchased Lot 25 from the Whitneys.

15. The deed conveying Lot 25 from John and Patricia Seader to Walter and Vicki Tomascak contains a restriction from bringing irrigation water onto Lot 25 from any sources across adjacent land in ditches or by other means.

16. The Applicant, Daniel Landon, proposes to irrigate a garden by means of drip irrigation and to water livestock through a stock-tank if the pending application is granted.

17. The Applicant, Daniel R. Landon, has no easement arranged to obtain water from the proposed source.

#### PROPOSED CONCLUSIONS OF LAW

1. A spring developed at its source is groundwater (ARM 36.12.101(4)).

2. The waters of a developed spring, once flowing on the surface of the ground, are considered to be surface waters. (ARM 36.12.101(3)).

3. Since July 1, 1973, groundwater, including developed springs, has been subject to appropriation by filing a Notice of Completion of Groundwater Development with the DNRC if the maximum diversion rate is less than 100 gpm (MCA, 85-2-306(1)).

4. Since July 1, 1973, surface water has been subject to appropriation by filing an Application for Beneficial Water Use Permit with the DNRC (MCA, 85-2-302).

5. The Notice of Completion filed by Walt Tomascak on November 18, 1977 claiming the development of a spring on Lot 25 cannot be relied upon to gain an earlier priority date by a person now seeking to gain a surface water right by means of an Application for Beneficial Water Use Permit.

6. A Beneficial Water Use Permit Application may not be denied by the DNRC for lack of possession of an easement by an Applicant, nor does a restriction in a deed as referred to in Finding of Fact No. 15, have any force of law in preventing an Applicant from bringing water to his property if there is unappropriated water available (MCA, 85-2-414).

7. There are no unappropriated waters available for appropriation by the Applicant from the requested unnamed tributary of Crooked Creek (MCA, 85-2-311(1.a.)).

8. The existing rights of prior appropriators would be adversely affected if this application were granted (MCA, 85-2-311(1.b.)).

9. The Applicant's proposed means of diversion, construction and operation of the appropriation works are adequate. (MCA, 85-2-311(1.c.)).

10. The Applicant's proposed uses of water for irrigation and stock-watering purposes are beneficial uses. (MCA, 85-2-311(1d)).

11. The Application if granted would not unreasonably interfere with any pending permits or water reservations in the source of supply (MCA, 85-2-311(1e)).

THEREFORE, based on these proposed Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 49483-s43Q by Daniel R. Landon is hereby denied and dismissed in its entirety.

DONE this 5th day of March, 1984.

*David L. Pengelly*

David Pengelly, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 5004, Missoula, MT 59801  
(406) 721 - 4284

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 March 26, 1984.

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 March 7, 1983, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Daniel R. Landon, Application No. 49483-s43Q, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Daniel R. Landon, 7909 Spear Dr., Shepherd, MT 59079
2. Laurence R. Martin, Felt & Martin, P.O. Box 2558, Billings, MT 59103-2558
3. Clarence Schwahn, Route 1, Shepherd, MT 59079
4. Dennis N. Smith, 7927 Spear Drive, Shepherd, MT 59079
5. Keith Kerbel, Area Office Supervisor, Billings, MT (inter-department mail)
6. David L. Pengelly, Hearing Examiner, (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 7<sup>th</sup> day of March, 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.

Judy Lohr  
Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 5-1-85

CASE # 49483