

JSB

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

* * * * *

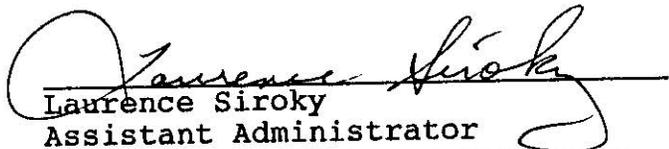
IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 60073-s76L BY M. G. MOSS)

* * * * *

The Application in the above-entitled matter has been denied. Neither the United States of America nor the Confederated Salish and Kootenai Tribes are adversely affected by the final decision reached in this case. It does not serve administrative economy to reach the jurisdictional issues raised in this case as a determination of the issues would not alter the disposition in this matter.

THEREFORE, IT IS ORDERED that the exceptions be noted in the record, the request for oral argument is denied, and the final order in this matter is issued denying Application No. 60073-s76L by M. G. Moss.

Dated this 12 day of January, 1989.


Laurence Siroky
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CASE # 60073

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 12th day of January, 1989, as follows:

M. G. Moss
P.O. Box 4095
West Sedona, Arizona 86340

Howard McClure
9250 Butler Creek Road
Missoula, Montana 59802

Mike McLane
Missoula Field Manager
P.O. Box 5004
Missoula, Montana 59806

Peggy Elting
Hearing Examiner
Department of Natural
Resource and Conservation
1520 East 6th Avenue
Helena, Montana 59620

U.S. Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, Montana 59107-1394

Frank and B. Zoe Gordon
Route 1, Box 1020
Arlee, Montana 59821

John B. Carter
Daniel F. Decker
Legal Department
Confederated Salish and
Kootenai Tribes
P.O. Box 278
Pablo, Montana 59855


Irene V. LaBare
Legal Secretary

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. 60073-s76L BY M.G. MOSS .)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 25, 1988 in Missoula, Montana.

Applicant M.G. Moss appeared at the hearing in person.

Objector Howard McClure appeared at the hearing in person.

Arnold Tanner appeared as a witness for Howard McClure.

Objector U.S. Department of Interior appeared by and through counsel John C. Chaffin.

Douglas Ollermann, an agricultural engineer with the Billings Area Field Office of the Bureau of Indian Affairs, appeared as a witness for Objector Department of Interior.

The Confederated Salish and Kootenai Tribes made a special appearance at the hearing, by and through counsel John B. Carter, to contest jurisdiction in this matter.

Michael McLane, Field Manager of the Missoula Water Rights Bureau Field Office, appeared at the hearing as staff witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

PRELIMINARY MATTERS

Objector U.S Department of Interior moved to have the present Application dismissed on the basis that the Department of Natural Resources and Conservation does not have authority to administer or regulate waters within the exterior boundaries of the Indian reservation. The Confederated Salish and Kootenai Tribes also contest Department jurisdiction to act in the matter of the present Application, the point of diversion and place of use of which are located within the exterior boundaries of the Flathead Indian Reservation.

Due to the decision proposed in this matter, it is not necessary to reach the jurisdictional issues raised by the Objectors. The Hearing Examiner therefore declines to rule on the motion to dismiss which was made on jurisdictional grounds.

EXHIBITS

The Applicant did not offer any exhibits for inclusion in the record in this matter.

The Objectors offered three exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1, offered by Howard McClure, is a photocopy of a map of "private canals and irrigated lands" compiled by the U.S. Department of Interior, showing secretarial water rights in the general area of the Applicant's proposed project.

Objectors' Exhibit 2, offered by U.S Department of Interior, is a four-page memorandum in support of Department of Interior's motion to dismiss.

Objector's Exhibit 3 is a photocopy of a quad map of the area on Finley Creek, from the Applicant's proposed point of diversion to the confluence of Finley Creek with the Jocko River.

Objectors' Exhibits 1, 2, and 3 were accepted for the record without objection.

The Department file was made available for review by all parties. No party offered an objection to any part of the file. Therefore, the Department file is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-302, MCA states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in § 85-2-306, MCA do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 60073-s76L was duly filed with the Department of Natural Resources and Conservation on September 9, 1985 at 10:00 a.m.

3. The pertinent portions of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on October 23 and October 30, 1985.

4. The source of water for the proposed appropriation is Finley Creek, a tributary of the Jocko River.

5. The Applicant applied for 100 gallons per minute ("gpm") up to 161 acre-feet of water per year, for nonconsumptive use in a .4 acre-foot fish pond located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 16 North, Range 19 West, Missoula County, Montana. The requested point of diversion is the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 16 North, Range 19 West, and the requested period of appropriation is January 1 through December 31 of each year.

The Applicant testified that there will be native fish in the pond, and that ducks and other water-oriented fowl and wildlife could use the pond. The Applicant constructed a pond prior to March, 1986 (see March 21, 1986 Site Investigation Report by John Westenberg). After review by several federal and local agencies, Mr. Moss was required to restore the site. (See correspondence in Department file.)

6. The Applicant testified at the hearing that his proposed pond has been reinstalled offstream according to Soil Conservation Service design specifications. A review of the cut and fill plans provided by the SCS indicates that the pond as

installed now has a capacity of approximately .21 acre-feet, half of the pond capacity proposed in the Application. (Testimony of Mike McLane, based on SCS cut/fill specifications. See Department file.) The Applicant testified that, based on the reduced size of the pond, he believes less water might be needed and that he is willing to amend the applied for flow and volume accordingly, but that he does not know how much water would be necessary to fill the pond and keep it full.

The Applicant stated that the pond is eight feet deep at the deepest point, and that he thinks he would like to keep the water at least six feet in depth. The Applicant testified that he could fill the pond in the spring, when there is "lots of water" in the stream. He stated that he did not know how long it would take to fill the pond, but that he does not believe anyone needs water from the creek for irrigation before July.

7. The record in this matter does not contain specific information on the Applicant's proposed means of diversion, construction, and operation of the appropriation works. The Soil Conservation Service notified the Applicant that they would provide him with a project design including pump installation information, if he would provide them with certain information. (See October 23, 1987 letter from Kit Sutherland, District Conservationist in Missoula, to Martin Moss, copy received by the Department on November 4, 1987.) There is no record as to whether Mr. Moss responded to the request for information.

The record indicates that Mr. Moss informed the Missoula Field Office that he was going to work with the SCS on intake and outflow structure designs in the fall of 1987, and deliver the plans to the Missoula Field Office. Michael McLane informed Mr. Moss on December 16, 1987, that the Department could not proceed with settlement or issue a permit without that information. (Letter to Applicant from Michael McLane.) The Department did not receive that information from Mr. Moss.

At the hearing, the Applicant testified that he does not yet have a firm plan on the proposed means of diversion, construction, and operation of the appropriation works. He stated that his preference would be to fill the pond by "siphon", rather than pumping from the creek.

The Applicant stated that he is considering diverting water from the creek at a point on the upper edge of his property, and running it through a 4-inch pipe down to his pond by gravity, a distance of approximately 150 yards. There would be a headgate and control system on the pipe. The Applicant testified that he believes there would be sufficient drop in elevation to allow the pond to fill. He requested Mike McLane to specify how much water runs through a 4-inch pipe; however, Mr. McLane testified that the amount would depend on the pressure/head gradient, which could not be determined without knowing the elevation drop. The Applicant testified that he did not know what the elevation drop is between the upper edge of his property and the pond site.

The Applicant testified that he would propose installing an outlet pipe in the pond of the same size as the inlet pipe at a place in the pond which would allow water to flow out of the pond when an "adequate" water level is reached in the pond. The water would be returned to Finley Creek, which is approximately 20 feet from the pond.

The Applicant did not provide any information as to the amount of water which will be necessary to maintain the pond as a habitat for fish, which is the proposed use of the pond.

With regard to the absence of specific information about several aspects of his proposed project, the Applicant stated that he presented enough information to allow a "tiny project" such as his to be granted, and did not feel further information was necessary.

8. The record in this matter does not indicate how much water might be lost to the stream due to seepage from the pond.

The Applicant testified that there is clay in the soil at the pond site, and that he believes this will result in very little seepage from the pond. However, Howard McClure testified that the Applicant's pond is sitting on a "gravel bar", and that he believes there will be a lot of seepage out of the pond.

The Soil Conservation Service informed the Applicant that there was no way to determine the amount of leakage from the pond until the Applicant tried to fill it. (Department file letter from Kit Sutherland to Applicant.) The Applicant testified that he had a small hole dug (by backhoe) deeper than the rest of the

pond's floor during construction of the pond, to see if the pond would fill with groundwater, but that he has not otherwise tried to fill the pond.

The Applicant testified that he believes any water lost from the pond due to seepage will go right back into the stream. Howard McClure testified that water drains away from the area where the pond is located, and he believes it does not return to the creek, if at all, until much further downstream. Bureau of Indian Affairs witness Doug Ollermann testified that, due to the general geology of the area, odds are probably better than 50 percent that seepage from the pond would "eventually" get back into the creek.

9. Objector Howard McClure testified that there is already a shortage of water in the area. His witness, Arnold Tanner, who has been operating Mr. McClure's "place" for 31 years, testified that they have been water-short nearly every year, with problems from July to the end of the irrigation season. When questioned about the effect any seepage from the Applicant's pond might have on his own water right, Mr. McClure testified that "later in the season" when water is low, any reduction in flow, even a small one, will shut down his pumps. Mr. McClure diverts from the Lumpry Ditch approximately one mile downstream from the Applicant's pond.

Doug Ollermann, witness for Objector Bureau of Indian Affairs, testified that the Bureau diverts water from Finley Creek for a variety of purposes, including providing irrigation

water through the Flathead Irrigation Project ("FIP"), and maintenance of a fishery in Finley Creek. He testified that, based on research of water delivery records and diversions, there is not always sufficient water in Finley Creek (or the Jocko River, of which Finley Creek is a tributary) to meet all diversion requirements. He stated that the Applicant's proposed project would have an adverse effect on water availability to fulfill the uses of senior appropriators if any seepage from the Applicant's pond did not resurface in Finley Creek above E Canal, which is located approximately one-half mile downstream from the Applicant's proposed place of use. (See Water Resources Survey for Missoula County, page 34.) The Bureau of Indian Affairs and the Confederated Salish and Kootenai Tribes also entered procedural objections to the Application. See Preliminary Matters.)

10. There is no evidence in the record concerning the flow rates which occur in Finley Creek. From the testimony of Doug Ollermann concerning the large diversion capacities and rates of various FIP Canals, it may be inferred that Finley Creek has a fairly sizeable flow rate during the April-October irrigation period, although Mr. Ollermann's testimony also indicated that not all of the diversion capacities are met. However, there is no evidence to indicate even generally the amount of water which flows in Finley Creek during the rest of the year.

11. The Bureau of Indian Affairs and the Confederated Salish and Kootenai Tribes allege that there are planned uses and

developments of Finley Creek water for which water has been reserved pursuant to treaty rights. (See generally, Objectors' Exhibit 2 and the October 19, 1988 Entry of Special Appearance to Contest Jurisdiction filed by John B. Carter on behalf of the Confederated Salish and Kootenai Tribes.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.
3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-311(1), MCA, are met:
 - (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
 - (b) the water rights of a prior appropriator will not be adversely affected;
 - (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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.

4. The proposed use of water, for a fish pond, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The Applicant has not provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

If the Applicant's project truly was nonconsumptive, it is unlikely that the water rights of any water users downstream would be adversely affected. However, it is not possible to tell from the record what amount of water will be lost to Finley Creek if the Applicant diverts 100 gpm through his pond.

If the Applicant's assertion--that there is very little seepage from the pond and that any that does occur will return immediately to the stream--is correct, the project is likely to be nonconsumptive except for a "de minimus" evaporation loss. However, if the Objectors' contentions are correct, and a great deal of seepage from the pond will occur and will drain away from the pond, perhaps not rejoining Finley Creek or not rejoining it until downstream of diversions such as E Canal and the Lumpury Ditch, then water which otherwise would be available to meet the water requirements of senior appropriators (such as Howard McClure) will be lost to them. Since the loss of even a small amount of water may result in such appropriators being unable to obtain their full right or having their pumps shut down (see

Finding of Fact 9), "consumptive" use by the Applicant as a result of seepage would result in adverse effects to the water rights of prior appropriators.

The Objectors have met their burden of production by producing information on how the proposed use may change the conditions of water occurrence in the source and why such changes will adversely affect senior water rights. See generally, In the Matter of the Application for Beneficial Water Use Permit No. 60117-g76L by William C. Houston, April 27, 1987 Proposal for Decision, pp. 19-21. The testimony of water users such as Howard McClure and Arnold Tanner, who have many years of experience on the creek, is entitled to be given much weight. See Worden v. Alexander, 108 Mont. 208 (1939). The Applicant, however, has not proved that the Objectors' water rights will not be adversely affected as claimed by the Objectors.

6. The Applicant has failed to provide substantial credible evidence that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, and that throughout the period during which the Applicant seeks to appropriate the amount requested is available.

"Unappropriated waters" are those waters which have not been diverted, impounded, withdrawn, or reserved for future use by a public agency. See generally § 85-2-102(1), MCA. Whether unappropriated waters are available in the source of supply can be determined on the basis of (a) whether there is water

physically available at the Applicant's proposed point of diversion throughout the period of diversion, in at least some years (water is not unavailable due to its being diverted, impounded, or withdrawn by upstream water users), and (b) whether the water which is physically available to the Applicant is legally available (not needed downstream to fulfill senior water uses), and the Applicant therefore can utilize the requested amount of water throughout the period of appropriation in some years without being called by a senior user. See In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley (March 21, 1988 Proposal for Decision).

In the present matter, there is no indication, not even a general allegation by the Applicant, that 100 gpm is physically available at his proposed point of diversion throughout the year. Even assuming arguendo that water is physically available, the Applicant cannot show that the use is nonconsumptive as to the Objectors and other of the downstream users, and therefore cannot show that he can utilize his requested amount of water throughout the requested period of appropriation in some years without being called for water by a senior user.

7. The Applicant has not provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

The Applicant is not yet sure what means of diversion he will use, nor does he have any designs for the intake and outflow structures. Rather, he indicates that he will install whatever

control system is suggested by the other parties and/or the Department. However, it is not the obligation of the other parties or of the Department to do the Applicant's design work. The Applicant is, or should be, in a much better position to determine what means of diversion, construction, and operation will achieve the results he is attempting to achieve. The "duty" of other users is to inform the Department via objections as to how the proposed use as set forth by the Applicant may change the conditions of water occurrence and why such changes will adversely affect their water rights. It is the Department's statutory obligation to review the information provided by both parties, and determine whether in the balance the statutory criteria are met.

In the present matter, it is not possible to determine whether the diversion system which the Applicant presently is contemplating is adequate to get water down to his pond, or in what quantity. It also is not possible to determine whether the construction of the pond is adequate (e.g., to prevent excessive seepage, or to maintain a sufficient water depth in relation to pond size to create a viable fish habitat), or whether the proposed project could be operated in such a manner as to be nonconsumptive and avoid adverse effect to other users.

The Applicant cannot argue that he was unaware that these questions would be at issue, or that he was unable to obtain specific information on means of diversion, construction, and operation. The SCS specifically offered to assist the Applicant

with designs (see October 23, 1987 letter to Applicant from Kit Sutherland referred to in Finding of Fact 8, supra), and the Missoula Water Rights Bureau Field Office specifically notified the Applicant that a permit could not be issued without specific information on intake and outflow structure designs, since the adequacy of the diversion device was in question (see December 16, 1987 letter from Michael McLane to Applicant), all more than ten months prior to the contested case hearing in this matter.

8. The Applicant alleged at the hearing that he had presented enough information to allow granting a permit for a "tiny project" like his own. This argument implies that the amount of information needed is directly proportional to the size of the proposed project.

An applicant must prove that his or her project is viable, that there is sufficient water available to maintain a viable project, and that no senior water user will be adversely affected by the applicant's proposed use. The amount of information which must be presented by an applicant to meet his burden of proof on these issues may or may not depend on the size of the project. For example, the amount of information which must be provided by an applicant to meet his burden of proof on the issue of adverse effect is greater when the applicant is on a highly appropriated source of water than when the applicant proposes to appropriate from a fairly undeveloped source, even if the project in both instances is a small one.

The applicable statute (§ 85-2-311, MCA), does distinguish between projects based on size (compare subsection (1) with subsection (2)); however, all appropriations of less than 4,000 or more acre-feet of water a year and 5.5 cubic-feet per second must meet the same criteria. A small project, if it is of less complexity, may not require presentation of as much information to meet these criteria as might a larger project, but in all cases enough information must be presented that the Department can determine that each and every one of the permit criteria is met. This is a minimum threshold which must be met on every application, no matter how small its size.

In the present matter, the Applicant did not present enough information that the Department can find that the permit criteria are met, despite the relatively small size and lack of complexity of the project. There simply is not enough specific information to allow for an adequate evaluation. The Application was notified concerning the necessity of much of this information (see correspondence in Department file, criteria, and hearings information which accompanies the Notice of Hearing), but failed to obtain it or provide it for the record in this matter.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 60073-s76L
by M.G. Moss is hereby denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party.

Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 12th day of December, 1988.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was duly served upon all parties of record at their address or addresses this 12th day of December, 1988, as follows:

M. G. Moss
P.O. Box 4095
West Sedona, Arizona 86340

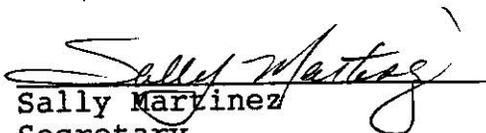
Howard McClure
9250 Butler Creek Road
Missoula, Montana 59802

Mike McLane
Missoula Field Manager
P.O. Box 5004
Missoula, Montana 59806
(inter-departmental mail)

U.S. Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, Montana 59107-1394

Frank and B. Zoe Gordon
Route 1, Box 1020
Arlee, Montana 59821

John B. Carter
Daniel F. Decker
Legal Department
Confederated Salish &
Kootenai Tribes
PO Box 278
Pablo, MT 59855


Sally Martinez
Secretary