

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. 60155-S76LJ BY DALE A. REISCH)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of December 17, 1987, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 60155-s76LJ is hereby granted to Dale A. Reisch to appropriate 7 gpm up to 1.00 acre-feet of water per year from Walker Creek for domestic use. The water is to be diverted by means of a submersible

CASE # 60155

electric pump from a 10' deep well located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22 for use in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, Township 31 North, Range 21 West, Flathead County, Montana. The period of diversion for this Permit shall be January 1 through December 31, inclusive, of each year. The priority date for this Permit is June 17, 1985 at 12:10 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

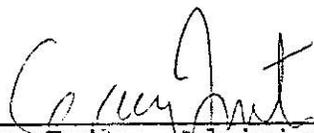
C. The Applicant shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Applicant's Permit uses.

D. The Permittee shall install a flow measurement device on his diversion, and shall take and record flow measurements at the beginning and end of each calendar year, or upon request by the Department. These records shall be made available to the Department upon demand.

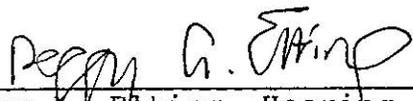
NOTICE

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 thirty (30) days after service of the Final Order.

DONE this 14 day of January, 1988.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the FINAL ORDER was served by mail upon all parties of record at their address or addresses this 14th day of January, 1988, as follows:

Dale A. Reisch
1020 Haskill Basin Road
Whitefish, MT 59937

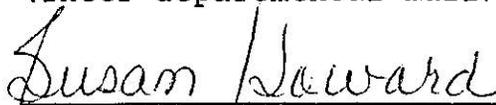
Scott and Barbara Ping
1050 Monegan Road
Whitefish, MT 59937

Dwayne and Marlene Becker
1025 Monegan Road
Whitefish, MT 59937

John H. Garlitz
655 Haskill Basin Road
Whitefish, MT 59937

Jake Voermans
2775 Dillon Road
Whitefish, MT 59937

Chuck Brasen
Kalispell Field Office
Kalispell, MT
(inter-departmental mail)



Susan Howard
Hearings Reporter



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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. 60155-s76LJ BY DALE A. REISCH)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on the above-entitled matter on May 11, 1987 in Kalispell, Montana.

Dale Reisch, the Applicant in this matter, appeared at the hearing in person.

Objector Scott Ping appeared in person, and as representative for Objector Barbara Ping.

Objector Marlene Becker appeared in person, and as representative for Objector Dwayne Becker.

Objector John Garlitz did not appear at the hearing.

Objector Jake Voermans appeared at the hearing in person.

Gary Dalen attended the hearing as an interested party.

Charles Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office, appeared as staff witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

EXHIBITS

The Applicant offered five exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 is a photocopy of a USGS quad map which shows the Walker Creek drainage. The map has been marked to show the drainage area which feeds water into Walker Creek.

Applicant's Exhibit 2 is a photocopy of a precipitation map, prepared by the USDA Soil Conservation Service, which shows the average annual precipitation in inches for the northwest corner of Montana. The general area where the Applicant and the Objectors are located is marked in yellow on the map.

Applicant's Exhibit 3 consists of seven items: a photocopy of a streamflow regions map of Montana; a photocopy of a USDA SCS publication on the average annual precipitation in Montana (based on 1941-1970 base period); a photocopy of an article entitled "Streamflow Regionalization in Western Montana", published by the University of Montana (January, 1983); a photocopy of "regional regression equations" for the Orsborn method; a handwritten calculation for the streamflow of Walker Creek; and a printed sheet showing this calculation and an estimate of the flow rate for which claims have been made or permits have been issued.

Applicant's Exhibit 4 is a photocopy of a plat map, marked in ink with the location of the Applicant's house and water diversion system, and with specifics about the diversion system.

Applicant's Exhibit 5 is a photocopy of a USGS quad map, marked in ink with the locations of the Applicant's proposed diversion and the Objectors' points of diversion.

Applicant's Exhibits 1 through 5 were accepted for the record without objection.

Objector Marlene Becker offered two exhibits for inclusion in the record in this matter:

Objector's Exhibit 1 is a photocopy of a February 21, 1979 Technical Services Bureau memorandum on an Application for a Beneficial Water Use Permit filed by Paul Stafford (No. 13909-s76LJ).

Objector's Exhibit 2 consists of five photographs of Walker Creek and the Becker diversion and pond, taken by Marlene Becker. The photographs are marked with the dates they were taken.

Objector's Exhibits 1 and 2 were accepted for the record without objection.

The Department file was made available at the hearing for review by all parties. No party objected to any part of the file. Therefore, the Department file in this matter 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. MCA §85-2-302 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 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 60155-s76LJ was duly filed with the Department of Natural Resources and Conservation on June 17, 1985 at 12:10 p.m.

3. The pertinent portions of the Application were published in the Daily Inter Lake, a newspaper of general circulation in the area of the source, on July 24 and 31, 1985.

4. The Applicant proposes to divert 10 gallons per minute ("gpm") up to 1.00 acre-foot of water per year for domestic uses. His present water requirements are for household uses only: he testified that he does not intend to use water for yard or garden purposes for two to three years, if at all.

5. The water diversion system for which the Applicant wishes to obtain a Permit has been installed and in use for eight years. The system consists of a "well" - a pipe four feet in diameter which has been buried 10 feet down next to the stream - with a 1/3-horsepower submersible pump in the pipe pumping water through a buried pipeline (with approximately a 10-foot lift) to a pressure tank in the Applicant's home. The water system is filtered.

6. The proposed source of water for the Applicant's appropriation is surface water from Walker Creek, a perennial stream. It is likely that the Applicant's diversion system is diverting subsurface water for some part of the diverted amount.

(Testimony of Applicant. See Finding of Fact 6.) However,

unless Walker Creek loses water to the groundwater table in the area of the point of diversion, the Applicant's well most likely is intercepting water which has not yet reached the stream, and which would eventually contribute to the flow. (Generally recognized technical fact.)

7. The Applicant testified that he believes 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 he seeks to appropriate, and that the amount requested is available throughout the period during which he seeks to appropriate.

The Applicant has operated his diversion works for several years, and has obtained sufficient water to meet his domestic requirements. He testified that he normally receives 5 to 7 gpm from his well, and that this is adequate for his household needs.

In addition to being able to physically obtain sufficient water at all times when he requires it, the Applicant testified that a comparison of the average flow rates in Walker Creek with the recorded water uses also indicates that unappropriated waters are available. The Applicant stated that he calculated the area of the Walker Creek drainage, used Soil Conservation Service data to determine the average annual precipitation for the area, and then applied the Orsborn method to predict the average annual flow of Walker Creek at 18.4 cfs. (See Applicant's Exhibits 1, 2, and 3.) He then compared this flow to a list of all known water use claims and permits, which he stated add up to 2.088 cfs, and arrived at an available flow of more than 16 cfs.

The Orsborn method which the Applicant used is a widely accepted method for determining average streamflows (see Applicant's Exhibit 3), but a review of the drainage area indicates that it only covers approximately 7½ square miles, half of the area used by the Applicant in his calculations.

(Testimony of Chuck Brasen. See Applicant's Exhibit 1.) Using the SCS precipitation data and the Orsborn method, calculations indicate that the average annual flow in Walker Creek should be about 9 cfs, rather than 18.4 cfs. Additionally, a review of the permits and claimed water uses on Walker Creek shows that the combined flow rate of the water rights of record adds up to a little over 6 cfs, rather than 2.088 cfs. (The Applicant apparently neglected to include an irrigation and stockwater claim by Russell Warner for 4 cfs. Department records.) However, this recalculation indicates that approximately 3 cfs should be available for appropriation on an average annual basis.

8. The Objectors in this matter testified that Walker Creek is very low in the summer, especially in July and August, and that it is also low in the winter due to freezing. (Testimony of Scott Ping, Jake Voermans, Marlene Becker.) The Objectors are concerned because they utilize Walker Creek water for house and garden uses (Ping) and stockwater (Voermans, Becker), and there are times in recent years when the creek has gone completely dry (testimony of Ping, Voermans, Becker). The Objectors also testified that the flow in Walker Creek has been lower in the last few years (testimony of Becker, Dalen). The Objectors agreed that the Applicant's proposed 10 gpm flow rate probably would not make much difference in water availability, except

perhaps in July and August, but stated that they are concerned that the compounding of effects of all of the people who are moving into the area and require domestic water is going to have a serious effect, especially since it is difficult to enforce the priority system as against domestic water uses.

9. The Applicant testified that he believes his diversion will not adversely affect the water rights of the prior appropriators, due to the small amount of water involved. He testified that the diversion had been operating well prior to the time that the other appropriators had begun experiencing water availability problems not due to weather, indicating that his appropriation was not the cause of present water problems. He testified that flow estimates which indicate that more water should be available, along with personal knowledge, and personal observation that there is a major water loss between the domestic water use just downstream and Voermans' point of diversion, indicate that the effects being experienced by the Objectors are the result of intervening illegal uses of water.

The Applicant's hypothesis that some cause other than the Applicant's diversion is resulting in flow losses was also suggested by Objector Ping, who testified that, if the Applicant's appropriation was already occurring when the Pings first appropriated in 1980-1981, something else is happening on Walker Creek which has changed water availability since 1981.

10. The Department records do not disclose any planned uses or developments on Walker Creek for which a permit has been issued or for which water has been reserved.

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 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 domestic purposes, is a beneficial use of water. See MCA §85-2-102(2).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 5.)

6. 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. (See Finding of Fact 10.)

7. The Applicant has provided 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 the amount requested is available throughout the period during which the Applicant seeks to appropriate. The water is physically available to the Applicant and can be obtained through his diversion; the streamflow estimates which he presented, even when reduced on the basis of more accurate data, indicate that water is available for appropriation on an average annual basis; and the amount which the Applicant proposes to appropriate is very small in comparison to streamflow. (See Findings of Fact 5, 6, and 7.)

8. The Applicant has provided substantial credible evidence that his proposed appropriation will not adversely affect the water rights of prior appropriators.

The record indicates that the water problems which the Objectors have experienced in recent years are not the result of the Applicant's appropriation. (See Findings of Fact 7 and 9.) If the lower flows are the result of illegal diversions by other water users, then the Applicant should not be barred from obtaining a Permit, since streamflow estimates indicate that unappropriated water would be available but for such intervening factor. It is possible that the reduction in flow is the result of weather conditions; however, nothing in the record indicates that the weather has been significantly different in the last few years, apart from the dry conditions of the last two years. In addition, testimony by the Objectors indicates that some less obvious factor is causing water loss. (See Finding of Fact 9.)

These factors, in conjunction with the small amount of water being applied for, indicate that the water rights of prior appropriators will not be adversely affected by the Applicant's proposed appropriation.

9. The Applicant has no present intent to utilize any water in addition to the water he is already using for household purposes. (See Finding of Fact 4.) Therefore, he will be restricted to 7 gpm, the maximum amount he is presently using. (Finding of Fact 7.) If he desires additional water in the future for irrigation purposes, a new application must be filed.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 60155-s76LJ is hereby granted to Dale A. Reisch to appropriate 7 gpm up to 1.00 acre-feet of water per year from Walker Creek for domestic use. The water is to be diverted by means of a submersible electric pump from a 10' deep well located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22 for use in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, Township 31 North, Range 21 West, Flathead County, Montana. The period of diversion for this Permit shall be January 1 through December 31, inclusive, of each year. The priority date for this Permit is June 17, 1985 at 12:10 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit,

acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Applicant shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Applicant's Permit uses.

D. The Permittee shall install a flow measurement device on his diversion, and shall take and record flow measurements at the beginning and end of each calendar year, or upon request by the Department. These records shall be made available to the Department upon demand.

DONE this 17th day of December, 1987.

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

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 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

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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 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. MCA §2-4-621(1). 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 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.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 18th day of December, 1987, as follows:

Dale A. Reisch
1020 Haskill Basin Rd.
Whitefish, MT 59937

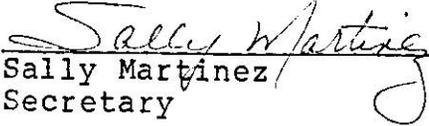
Scott & Barbara Ping
1050 Monegan Rd.
Whitefish, MT 59937

Dwayne & Marlene Becker
1025 Monegan Rd.
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John H. Garlitz
655 Haskill Basin Rd.
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Jake Voermans
2775 Dillon Rd.
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Chuck Brasen
Manager
Water Rights Bureau Field Office
Kalispell, MT
(inter-departmental mail)



Sally Martinez
Secretary

3-AD-11

60155