

B.B.

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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) FINAL ORDER
NO. P065887-s76K BY GROVER LIGON)

* * * * *

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 March 7, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon 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. 65887-s76K is hereby granted to Grover C. Ligon to appropriate 41.6 gallons per minute up to 44.7 acre-feet of water per year for an off stream reservoir to be inhabited by fish.

The point of diversion is to be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, Township 20 North, Range 16 West, Missoula County, and is to be used in an off stream fish pond. The fish pond shall not exceed 19.2 acre-feet in size and shall also be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, Township 20 North, Range 16 West.

CASE #

The source of water is Cooney Creek, a tributary of the Swan River and shall be diverted from January 1 to December 31, inclusive of each year. This permit is to have a priority date of 11:04 A.M. of the 23rd day of July, 1987.

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 Permittees 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. This Permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated. Notice: This is to inform you, the Permittee, that the Confederated Salish and Kootenai Tribes of the Flathead Reservation claim prior reserved water rights and it is their position that the economic investments made in reliance upon this Permit, do not create in the Permittee any equity or vested right against the tribes.

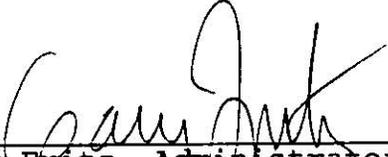
D. If, at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If, during the field investigation, the Department finds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

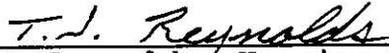
E. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. This condition is being applied to this permit until quantification through permit verification occurs.

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.

Dated this 10th day of April, 1989.


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


T. J. Reynolds, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6695

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 11th day of April, 1989, as follows:

Grover C. Ligon
Silver Star Llama Ranch
Condon, MT 59826

Karl Englund
Cogswell Wehrle
Suite 604, Power Block Bldg.
1 West 6th Avenue
Helena, MT 59601

Clayton Matt
Water Administrator
Confederated Salish
and Kootenai Tribes
P.O. Box 278
Pablo, MT 59855

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

Chester and Edith L. Kaps
704 3rd Avenue East
Kalispell, MT 59901


Sally Martinez
Secretary

CASE #

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
P065887-s76K BY GROVER C. LIGON)

* * * * *

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 July 26, 1988 at 10:00 A.M. in Condon, Montana.

APPEARANCES

Grover C. Ligon, the Applicant in the matter, was represented by counsel, Karl J. Englund of Sherwood & Englund. Appearing as an expert witness on behalf of the Applicant was Berry L. Dutton of Dutton Resources Consulting.

Objectors Chester and Edith Kaps appeared pro se.

Lawrence T. Kain appeared as an untimely objector to this Application.

Michael McLane, Field Manager with the Missoula Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereinafter referred to as Department or DNRC) appeared as DNRC staff witness.

PRELIMINARY MATTERS

During the course of the hearing the Hearing Examiner deferred ruling on two objections. The two objections will be ruled on herein.

The first objection was made by counsel for the Applicant to Mr. Lawrence T. Kain entering the processing of this hearing as a late objector. Mr. Englund (counsel) argued that he has not had any time to prepare for this objection nor does he have any idea what Mr. Kain's alleged objection may be.

Mr. Kain argued that he was away on business at the time when this application was being processed and did not receive a notice of Mr. Ligon's appropriation or he would have filed a timely objection.

The records indicate the DNRC did not send Mr. Kain an individual notice. The application made by Mr. Ligon is for water from Cooney Creek, while Mr. Kain's water right is for groundwater. The application was published in the legal notices of the Missoulian on January 6, 1988.

The application was advertised in accordance with Section 85-2-307, MCA. The objector, Mr. Kain, failed to show the relationship between the groundwater and surface water applications in this case. Thus, the Applicant's objection to Mr. Kain's late objection is sustained and the testimony given by Mr. Kain will not be considered in this matter.

The second objection by counsel for the Applicant was to what has been marked as Kaps's Exhibit Number 1, which is a letter from the Missoula County Conservation District dated October 19, 1987. This letter deals with the Natural Streambed and Land Preservation Act. Mr. Englund, counsel for the Applicant, argued that the letter has no applicable value to these proceedings. Mr. Kaps stated that he believed it did, but did not make any argument as to why.

After reading the letter and reviewing the other memoranda in the file, I agree with counsel for the Applicant that this letter does not have any appreciable value in these proceedings. I, therefore, sustain the Applicant's objection to what has been marked as Kaps's Exhibit Number 1.

EXHIBITS

The Applicant offered one exhibit marked as Applicant's Exhibit Number 1. It is a hand-drawn map prepared by Mr. Dutton of Dutton Resources Consulting. This map depicts the confluence of Swan River and Cooney Creek. It also shows the Kaps' groundwater well and residence. The map has no scale on it and does not appear to be to any scale. This exhibit was offered and received into record with no objection.

The Objectors, Kaps, offered two exhibits.

Marked as Kaps's Exhibit Number 1 is a letter dated October 19, 1987 from the Missoula County Conservation District and written

to Mr. Dwayne Forder and Mr. Grover Ligon from Ms. Peggy L. Haaglund. This letter deals with the Natural Streambed and Land Preservation Act. Mr. Englund, counsel for the Applicant, objected to this letter. The objection was based on relevance. The Hearing Examiner sustained this objection (see Preliminary matters) and the Exhibit is not admitted.

Marked as Kaps's Exhibit Number 2 is the same map as Applicant's Exhibit Number 1, only modified by Mr. Kaps to show his impression of the direction in which the Swan River flows at the bank of the confluence of Cooney Creek and the Swan River. Mr. Kaps feels the Swan River would cause the bank of his property to erode away. This exhibit was offered and received into record without objection.

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

PROPOSED 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 Section 85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 65887-s76K was duly filed with the Department of Natural Resources and Conservation on July 23, 1987 at 11:04 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 January 6, 1988. Timely objections were received from Chester and Edith L. Kaps and from Clayton Matt, Water Administrator for the Confederated Salish and Kootenai Tribes. A notice of the Hearing was duly served on all parties on June 21, 1988.

4. It should be noted that the Confederated Salish and Kootenai Tribes did not appear and were not represented at the hearing. Clayton Matt, Water Administrator for the Confederated Salish and Kootenai Tribes, waived any factual hearing based as follows:

The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana, have paramount rights to all the waters arising upon, flowing through, lying under, or in any other way appearing upon the Flathead Reservation. These paramount rights arise under tribal and federal law, not state law, from the Tribes' aboriginal ownership of said Reservation, which was reserved to them and guaranteed to them by the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, by the United States government, prior to entry of Montana into the Union.

The Tribes' objection to this subject application, therefore, is based upon the fact that the State of Montana and its Department of Natural Resources and Conservation have no jurisdiction or authority to permit use or diversion of any waters from within the Flathead Indian Reservation. United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939). The authority to permit such uses and diversions resides only in the Confederated Salish and Kootenai Tribes and it is to the Tribes that the applicant must submit application for those purposes.

Since the State of Montana does not have the authority to issue such a permit, the subject application must be denied.

In view of the Tribes' objection on the basis of jurisdiction, the Tribes have never agreed that making any permits issued by the Department subject to all prior Indian reserved water rights in the source of supply was an adequate response to the objection. Furthermore, the Tribes object to provisional and final permit language making the permit subject to any final determination of such prior existing water rights as provided by Montana law on the grounds that this ambiguous phrasing suggests that the Tribes' rights can be established under Montana law, when in fact those rights are based on and continue to be determined by tribal and federal law exclusively.

Citizens of Montana must be made aware of the Tribes' paramount rights to the waters involved in this application. The Supreme Court has made explicit that no balancing-of-equities test can operate to defeat or diminish these paramount water rights. In Cappaert v. United States, 426 U.S. 128, 139 (1976), the Court held that even though extensive investments have been made by persons claiming water rights under State law, reserved rights, as the Tribes have here, yield in no way to the state rights.

Because the Tribes' objection is a legal one, the Tribes waive any factual hearing and request the objection be made a part of the record.

5. The source of water for the proposed appropriation is Cooney Creek, a tributary of the Swan River. In reviewing the

Condon Quad map published in 1965 and compiled by the U. S. Geological Survey, it appears the lower section of Cooney Creek is perennial. The area in question is a part of the perennial section of the stream.

6. By this Application, Applicant seeks to divert 41.60 gallons per minute (GPM) up to 44.70 acre-feet per annum from Cooney Creek, a tributary of the Swan River, between January 1 and December 31, inclusive each year, by means of three pumps (hydraulic rams) to be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, Township 20 North, Range 16 West, Missoula County, Montana, for a fish pond at the same location.

7. The Applicant testified that the pond now in existence was once a beaver pond that he has enlarged. Mr. Ligon said the pond was widened and deepened. The pond now ranges up to depths of 18 to 20 feet. Mr. Ligon testified that the optimum temperature for the raising of fish is 58 degrees, but that his pond temperatures in June of 1988 ranged from 69 degrees at the bottom to 73 degrees at the top when the air temperature was around 100 degrees outside and Cooney Creek had a temperature of 54 degrees. Mr. Ligon stated that if he could lower the temperature even a few degrees, it would help support healthier fish, and lessen the weed and algae problems in the pond.

8. The project is described as having a cistern under the creek bed with piping running to a holding tank which then releases

water to three pumps (rams heads) which pump 40% of that water to the reservoir and releases 60% back to the creek.

9. The total flow diversion required to run the rams head pumps is approximately 104 gpm. Approximately 60% of the flow or 62.4 gpm is used to develop the energy to pump the remaining 40% or 41.6 gpm to the reservoir.

10. The water requested is 41.60 GPM and 44.70 acre-feet and is that 40% which is diverted into the reservoir by the three pumps. Mr. Ligon stated that there are no return flows to the creek and no provisions have been made to return any flow to the creek other than through seepage from the pond.

11. The amount of water applied for does not appear to be reasonable for the intended use of both supplying energy for the pump and supplying water to the reservoir.

12. Mr. Dutton of Dutton Resources Consulting testified that the flow of Cooney Creek averages somewhere between 5 cubic feet per second (cfs) minimum to 15 cfs maximum. Mr. Dutton also stated that the rams Mr. Ligon would be using will only consumptively use about 0.1 cfs (44.8 gpm) of water.

13. The Objectors (Kaps) question if there is enough water in the source of supply from August to spring runoff.

14. The Objectors (Kaps) also question the possibility of the Swan River eroding the bank of his property at the confluence

of the Swan River and Cooney Creek due to the reduction of water in Cooney Creek.

15. The Applicant proposes to use the water to raise fish.

16. The record does not reflect any other planned uses or developments 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 fish is a beneficial use of water. See Section 85-2-102(2), MCA.

5. Section 85-2-311(1)(c) -- The Applicant has shown by substantial credible evidence that the means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 6 and 7.) Pursuant to 85-2-312 MCA, the Department may issue a permit for less than the amount requested, but in no case may it issue a permit for more water than is requested. Even though 104 gpm is needed to operate the rams head pumps and supply 41.6 gpm to the reservoir, only 41.6 gpm flow rate can be granted herein. The applicant only applied for the water to be supplied to the reservoir and did not include the 62.4 gpm necessary to operate the rams head pumps. (See Finding of Facts 8, 9, and 10.) This means that if rams head pumps are used, the 62.4 gpm necessary to operate the rams head pumps will have to be applied for, or a conventional pump will have to be used.

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 12.)

7. Section 85-2-311(1)(a), MCA, requires that there be unappropriated waters available for the Applicant's proposed use in the amount the Applicant seeks to appropriate throughout those periods proposed for use of the water. Evidence presented in the form of direct testimony by the Applicant and his consultant indicates there is appropriable water in the source of supply during the time and in the amount the Applicant seeks to appropriate it. The Objectors (Kaps) questioned water availability, but did not present any evidence to contradict that of the Applicant. (See Findings of Fact 9 and 12.) The Applicant did prove the criteria set forth in Section 85-2-311(1)(a) MCA. (See Findings of Fact 6 and 8.)

8. The Objectors (Kaps) also questioned possible property damage from erosion, but there are no provisions under Section 85-2-311, MCA, that would allow this Department to deny or modify a permit on these grounds.

9. Section 85-2-311(1)(b), MCA, requires that "the water rights of a prior appropriator will not be adversely affected".

Objector (Kaps) alleges that if the permit is granted it will affect his ability to exercise his right. However, evidence given

by the Objector and his witness had no substance. Thus, Objector did not fulfill his burden of production. Therefore, applicant's proof of the existence of unappropriated water in the source is sufficient to prove that Objector's rights will not be adversely affected.

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. 65887-s76K is hereby granted to Grover C. Ligon to appropriate 41.6 gallons per minute up to 44.7 acre-feet of water per year for an off stream reservoir to be inhabited by fish.

The point of diversion is to be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, Township 20 North, Range 16 West, Missoula County, and is to be used in an off stream fish pond. The fish pond shall not exceed 19.2 acre-feet in size and shall also be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, Township 20 North, Range 16 West. The source of water is Cooney Creek, a tributary of the Swan River and shall be diverted from January 1 to December 31, inclusive of each year. This permit is to have a priority date of 11:04 A.M. of the 23rd day of July, 1987.

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. This Permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated. Notice: This is to inform you, the Permittee, that the Confederated Salish and Kootenai Tribes of the Flathead Reservation claim prior reserved water rights and it is their position that the economic investments made in reliance upon this Permit, do not create in the Permittee any equity or vested right against the tribes.

D. If, at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting

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 Applicant to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing water rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

E. 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. This condition is being applied to this permit until quantification through permit verification occurs.

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 within 20 days after the proposal is served upon the party. Section 2-4-623, MCA.

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 request 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 7 day of March, 1989.

T. J. Reynolds
T. J. Reynolds, Hearing Examiner
Department of Natural Resources and
Conservation
1520 East 6th Avenue
Helena MT 59620-2301
(406) 444-6695

CASE #

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served by certified mail upon all parties of record at their address or addresses this 7th day of March, 1989, as follows:

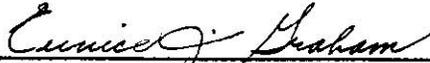
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Michael McLane, Field Manager
DNRC - Water Rights Field Office
P. O. Box 5004
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Clayton Matt
Water Administrator
Confederated Salish and Kootenai Tribes
Box 278
Pablo MT 59855

Chester and Edith L. Kaps
704 3rd Avenue E
Kalispell MT 59901



Eunice J. Graham, Program Assistant I
Department of Natural Resources and
Conservation
1520 East Sixth Avenue
Helena MT 59620-2301

CASE #