

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. 75396-s76LJ BY LOUIS BEITL )

\* \* \* \* \*

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 September 17, 1991, 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. 75396-s76LJ is hereby granted to Louis Beitl to appropriate water from Walker Creek at a flow rate of 7 gallons per minute up to 0.25 acre-feet per year by means of a dam and infiltration gallery in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 22, Township 31 North, Range 21 West, Flathead County, for domestic purposes in said legal land description. The system of appropriation may include an onstream reservoir with a maximum capacity of 0.20 acre-feet. The period of diversion of water from the source and

**CASE # 75396**

**FILMED**  
DEC 06 1991

period of use shall be January 1 through December 31 of each year.

A. Permittee shall install an adequate flow measuring device on the pumping system which conveys water from the infiltration gallery to the place of domestic use in order to allow the flow rate and volume of water to be accurately recorded. Permittee shall keep a written record of the annual volume of water diverted and date each recording was made, and shall submit said records upon demand to the Kalispell Water Resources Regional Office.

B. The reservoir shall be designed according to U.S. Soil Conservation Service specifications or designed by a registered engineer. Prior to beginning reconstruction of the reservoir, Permittee must consult with the Kalispell Water Resources Regional office to confirm that this condition has been met.

C. One set of inflow and outflow measurements shall be taken on the reservoir during both July and August of the first full year of operation. The Permittee shall keep a written record of the flow rate, method of measurement, place of measurement, and date of measurement, and shall submit said records by November 30th of said year to the Kalispell Water Resources Regional Office.

D. Permittee must install a release mechanism on the reservoir capable of allowing the release of all water which enters the reservoir during the period from July 1 through March 31 of each year.

E. The reconstructed pond shall be filled during spring runoff or before June 1 of each year whichever comes first.

F. 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 prior appropriator.

G. Issuance of this permit 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.

H. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

#### 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 17 day of October, 1991.

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

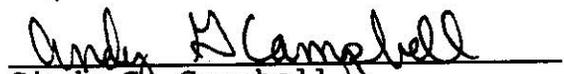
CERTIFICATE OF SERVICE

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 18<sup>th</sup> day of October, 1991 as follows:

Louis Beitel  
P.O. Box 1582  
Whitefish, MT 59937-1582

Wendell B. Dunn  
Attorney at Law  
P.O. Box 1696  
Whitefish, MT 59937

Charles F. Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903

  
Cindy G. Campbell  
Hearings Unit 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. 75396-s76LJ BY LOUIS BEITL )

\* \* \* \* \*

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on August 8, 1991, in Whitefish, Montana, to determine whether the above Application should be granted to Louis Beitl under the criteria in § 85-2-311(1), MCA.

Applicant appeared at the hearing and was represented by Wendell Dunn, attorney. Appearing at the hearing as staff spokesman for the Department of Natural Resources and Conservation ("Department") was Chuck Brasen, Manager of the Department's Kalispell Water Resources Regional Office.

None of the objectors of record appeared at the hearing. The record shows a properly constituted Notice of Hearing was properly served on all parties May 31, 1991, by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1984). Return receipts were received by the Department, each with the signature of the respective objector. The Notice of Hearing set the hearing for Thursday, August 8, 1991, beginning at 10:30 a.m. The Hearing Examiner, Applicant, and Department spokesman were present at the appointed time and place. At 10:55 a.m. the Hearing Examiner opened the hearing on the record. The hearing record was closed at 11:25 a.m. During that time, no

**CASE # 75396**

**FILMED**  
NOV 25 1991

objector appeared at the hearing. The Hearing Examiner received no communication from the objectors prior to the hearing or subsequent to the close of the record.

The Hearing Examiner ruled at the hearing that all objectors were in default and that their objections be stricken. That ruling is hereby confirmed. The objections of the defaulted objectors in this matter are stricken. Mont. Admin. R. 36.12.208 (1984).

No exhibits were offered for acceptance into the record. The Department's file of the above Application was made a part of the record by the Hearing Examiner. No objections to its entry were expressed. The Hearing Examiner takes official notice of the Department's records of water rights on the proposed source, specifically the conditions placed by the Department on the following permits: P060155-s76LJ issued to Dale A. Reisch; P062986-s76LJ issued to Joe Glickman, Jr.; P074033-s76LJ issued to Allen C. Erickson; and P075401-s76LJ issued to Jerry and Kaye Groesbeck.

Beginning at 8:00 a.m. on the day of the hearing, the Hearing Examiner conducted a site visit to the proposed point of diversion and place of use, and also to four points on Walker Creek where stream flow measurements had been taken by staff of the Department's Kalispell Water Resources Regional Office. Also present at the site visit were the Applicant and Chuck Brasen. The purpose of the site visit was to familiarize the Hearing Examiner with locations related to this Application solely to

facilitate his understanding. The offering of evidence or argument was not allowed, and did not occur.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 75396-s76LJ was filed with the Department on July 20, 1990, at 4:15 p.m. (Department's file)

2. Applicant proposed, on the application form, to appropriate water from Walker Creek at a flow rate of 7 gallons per minute (gpm) up to 0.25 acre-feet (AF) per year by means of a pump in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 22, Township 31 North, Range 21 West, Flathead County, for domestic purposes in said legal land description. The proposed system of appropriation includes an onstream reservoir with a capacity of 0.20 AF. The proposed period of diversion of water from the source and proposed period of use is January 1 through December 31 of each year. (Department's file and testimony of Louis Beitl)

3. Pertinent portions of the Application were published in the Daily Inter Lake and the Whitefish Pilot, newspapers of general circulation in the area of the proposed source, on October 17, 1990. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application. (Department's file)

4. The Department received objections filed against this Application. (Department's file) All objections were subsequently stricken. See page two above.

5. The proposed point of diversion and place of use are owned by Applicant. (Department's file and testimony of Louis Beitl)

6. Applicant has been obtaining water for his domestic use from a cistern set three feet in the ground approximately eight feet from Walker Creek. Because the cistern is a perforated concrete culvert with an open bottom set in gravelly soil at very close proximity to a live stream, it is clear that the water collected is surface water from Walker Creek. Applicant has never measured the flows obtained from this diversion system. Applicant does not have a water right for this system.

Applicant has been using this system for a year to supply all water for domestic use for a household of two people and has never had a shortage of water. His domestic use includes the typical domestic functions of drinking, cooking, and bathing but does not include flushing toilets at this time. (Testimony of Louis Beitl)

7. The cistern will continue to be used to provide water to Applicant's domestic system under the proposed permit. The use of the existing cistern as one of the diversion structures in the proposed project was not identified in the notice materials on this Application. The use of this additional diversion method does not, however, change the amount of water proposed to be appropriated. Furthermore, the depictions of the water system in the application materials taken in context with Applicant's testimony on future use of the cistern indicates that the pump

will be the means of lifting water from the cistern to the place of use, and therefore only a single diversion device will actually be taking water from the stream, i.e., the cistern. (Department's file and testimony of Louis Beitl)

8. Applicant plans to rebuild a washed out beaver dam to impound water in a small reservoir which would be essentially the same as the previously existing pond behind the beaver dam. Even though it was identified on the application form, the use of a dam as one of the diversion structures in the proposed project was not explicitly identified in the notice materials on this Application. The use of a beaver pond with a capacity of 0.20 AF as an onstream reservoir was identified in the notice materials, however. A dam is a necessary part of such a pond and is therefore implicit in the description in the notice materials.

(Department's file and testimony of Louis Beitl)

9. Materials in the Department's file that analyze the stream flows in Walker Creek indicate the amount of flow varies widely from season to season and from year to year. Estimated mean flows vary from 14.1 cubic feet per second in May and June to 1.1 cubic feet per second in September. The creek has been dry twice since 1973. The proposed reservoir would be upstream from the cistern and would stabilize and ensure an amount of water available for diversion by the cistern to the domestic use, even if flows in Walker Creek were drastically reduced. (Department's file and testimony of Chuck Brasen)

10. Applicant will employ the assistance of a professional engineer or the USDA Soil Conservation Service in designing the reconstruction of the dam and pond in order to ensure that all requirements of the permit are incorporated in the project.

(Testimony of Louis Beitz)

11. Applicant's attorney represented that Applicant had contacted the objectors to his Application and had substantial discussion with them to the result that all difficulties were resolved between them regarding this proposed appropriation.

12. The following permits have been issued by the Department for appropriations from Walker Creek on which the Department has not yet been notified that the planned project has been completed and put to use: P062986-s76LJ issued to Joe Glickman, Jr.; and P065631-s76LJ issued to Gregory A. and Mary T. Beck. Neither of these permittees filed an objection to this Application. (Department's water rights records)

13. There are no planned uses or developments for which Walker Creek water has been reserved. (Department's water rights records and Department's file)

14. The following permits have been issued for appropriations from Walker Creek which include reservoirs: P062986-s76LJ issued to Joe Glickman, Jr.; P074033-s76LJ issued to Allen C. Erickson; and P075401-s76LJ issued to Jerry and Kaye Groesbeck. They all have had conditions placed on them to ensure their construction and operation is in accordance with the statutory criteria for issuance of a permit. Applicant is familiar with

these permit conditions and is willing to comply with them if he is permitted to develop the proposed appropriation. (Department's file and testimony of Chuck Brasen and Louis Beitel)

15. The Walker Creek drainage basin, in which the proposed appropriation is located, has been closed to new appropriations of surface water from July 1 through March 31 inclusive of each year. The effective date of the closure was September 28, 1990. Mont. Admin. R. 36.12.1014 (1990).

16. Beneficial Water Use Permit No. P075401-s76LJ was issued March 28, 1991, which is after the effective date of the closure rule. It is based on an application filed July 24, 1990, which is prior to the effective date of the closure rule. The present Application was filed July 20, 1990, which is also prior to the effective date of the closure rule. (Department's water rights records and Department's file)

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1989).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 2, 3, and 4.

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 at the proposed point of diversion:

(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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. To meet the substantial credible evidence standard in § 85-2-311(1), MCA, the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1989).

5. The proposed use of water, for domestic purposes, is a beneficial use. Mont Code Ann. § 85-2-102(2)(a) (1989); see Findings of Fact 6 and 9.

6. Applicant proved by substantial credible evidence that Applicant has possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 5.

7. After July 1, 1973, a person may not appropriate water except by applying for and receiving a permit from the Department. Mont. Code Ann. §§ 85-2-301(1) and 302 (1989). Applicant diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. See Finding of Fact 6. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application No. 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application No. 61978-s76LJ by Town.

8. Applicant proved by substantial credible evidence that unappropriated waters are reasonably available in the source of supply at the proposed point of diversion in the amount and during the period Applicant seeks to appropriate. See Findings of Fact 6, 9, and 11.

9. Applicant proved by substantial credible evidence that the water rights of prior appropriators will not be adversely affected. See Findings of Fact 6 and 11.

10. The statutes controlling this Application are those in effect at the time of filing. See Mont. Code Ann. § 1-2-109 (1947); General Agricultural Corporation v. Moore, 166, Mont. 510, 534 P.2d 859; In re Application Nos. 49632-s41H, G120401-41H, and G120403-41H by Estate of Lena Ryen; In re Application No. 24550-s410J by Anderson Ranch. Under the laws governing this Application, the Application correctly identifies the source to be surface waters of Walker Creek because the water being collected by the cistern is water beneath the land surface which is part of that surface water, i.e., Walker Creek. See Mont. Code Ann. § 85-2-102(10) (1989); Finding of Fact 6. Therefore, the cistern adjacent to the stream that Applicant has been and will be using to divert water is an infiltration gallery diverting surface water rather than a well diverting groundwater. See Mont. Code Ann. § 85-2-102(18) (1989); Finding of Fact 6. See also Mont. Admin. R. 36.12.1010(4) (1990) (a definition of "infiltration gallery" in rule which took effect after this Application was filed).

11. An Application for Beneficial Water Use Permit may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source

beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an onstream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application No. 50272-g42M by Joseph F. Crisafulli.

Altering the proposal at this point to explicitly identify the dam and to change the identified means of diversion from a pump to an infiltration gallery, all at essentially the same point of diversion identified in the notice of application, and without increasing the amount of water proposed for diversion, does not suggest an increase in the burden on the source. Therefore, a permit could be issued based on this Application for the use of a dam and infiltration gallery as the means of diversion. See Findings of Fact 6, 7, and 8.

12. Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 6, 7, 8, 10, and 14.

13. Applicant proved by substantial credible evidence that the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued or for which

water has been reserved. See Conclusion of Law 9; Findings of Fact 6, 11, 12, 13, and 14.

14. Issuing a permit based on this Application would not violate the basin closure that has been imposed by rule and is now in effect because the Application was received prior to the effective date of the closure rule. See Findings of Fact 1, 15, and 16.

15. The Department has the authority to place conditions on permits. Mont. Codes Ann. § 85-2-312(1) (1989); see also Finding of Fact 14.

#### PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 75396-s76LJ is hereby granted to Louis Beitel to appropriate water from Walker Creek at a flow rate of 7 gallons per minute up to 0.25 acre-feet per year by means of a dam and infiltration gallery in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 22, Township 31 North, Range 21 West, Flathead County, for domestic purposes in said legal land description. The system of appropriation may include an onstream reservoir with a maximum capacity of 0.20 acre-feet. The period of diversion of water from the source and period of use shall be January 1 through December 31 of each year.

A. Permittee shall install an adequate flow measuring device on the pumping system which conveys water from the infiltration gallery to the place of domestic use in order to allow

the flow rate and volume of water to be accurately recorded. Permittee shall keep a written record of the annual volume of water diverted and date each recording was made, and shall submit said records upon demand to the Kalispell Water Resources Regional Office.

B. The reservoir shall be designed according to U.S. Soil Conservation Service specifications or designed by a registered engineer. Prior to beginning reconstruction of the reservoir, Permittee must consult with the Kalispell Water Resources Regional office to confirm that this condition has been met.

C. One set of inflow and outflow measurements shall be taken on the reservoir during both July and August of the first full year of operation. The Permittee shall keep a written record of the flow rate, method of measurement, place of measurement, and date of measurement, and shall submit said records by November 30th of said year to the Kalispell Water Resources Regional Office.

D. Permittee must install a release mechanism on the reservoir capable of allowing the release of all water which enters the reservoir during the period from July 1 through March 31 of each year.

E. The reconstructed pond shall be filled during spring runoff or before June 1 of each year whichever comes first.

F. 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 prior appropriator.

G. Issuance of this permit 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.

H. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues.

Any exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 17<sup>th</sup> day of September, 1991.



John E. Stults, 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 17<sup>th</sup> day of September, 1991, as follows:

Louis Beitel  
P.O. Box 1582  
Whitefish, MT 59937-1582

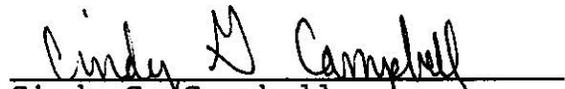
Scott C. Ping  
Barbara Ping  
1050 Monegan Rd.  
Whitefish, MT 59937

Wendell B. Dunn  
Attorney at Law  
P.O. Box 1696  
Whitefish, MT 59937

Dr. & Mrs. Gary L. Dalen  
1120 Monegan Rd.  
Whitefish, MT 59937

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

Charles F. Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903



Cindy G. Campbell  
Hearings Unit Legal Secretary