

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  
77814-s76H BY THOMAS D. AND )  
WENDY S. O'BRYAN )

\* \* \* \* \*

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 July 2, 1996, 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 listed below, Beneficial Water Use Permit 077814-76H is granted to Thomas D. and Wendy S. O'Bryan to divert 187.00 gallons per minute up to 100.82 acre-feet of water from an unnamed tributary of the Bitterroot River (waste water) at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 8 North, Range 20 West, Ravalli County, Montana, for fish and wildlife. The places of use are Pond 5 located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, with a capacity of 1.08 acre-feet, and Pond 6 located in the W $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 18, with a capacity of 12.72 acre-feet. The means of diversion would be a ditch with headgate. The period of use will be from June 1 through

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September 30, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Applicant shall install a headgate on the diversion ditch to control the amount of water entering the ditch and shall keep a written record of all waters diverted by the ditch into the ponds, including the period of time.

C. Water quality, including dissolved oxygen levels, shall be regularly monitored. If dissolved oxygen levels fall so low as to risk fish kill, aerators shall be installed in the fish pond to raise dissolved oxygen levels to a level necessary to maintain healthy fish.

D. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. The Department does not, by issuing this permit, assume liability for damage caused by the appropriator's exercise of this right.

E. This permit does not guarantee that the water use practices on the property to the west which supplies this permit's source will continue. Permittee cannot call waste water from the westerly property.

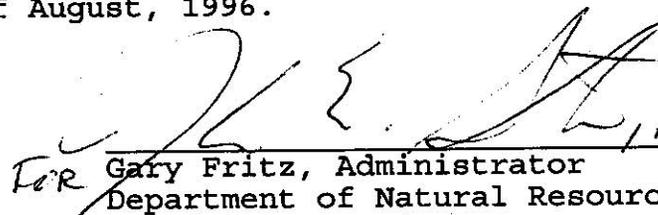
NOTICE

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.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 27<sup>th</sup> day of August, 1996.

  
For Gary Fritz, Administrator, ASST. ADMIN.,  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(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, first class mail, at their address or addresses this 29<sup>th</sup> day of August, 1996 as follows:

Thomas D. & Wendy S. O'Bryan  
1427 Glenwood Ave.  
Glenview, IL 60025

Joyce I. Montgomery  
138 Bell Crossing West  
Victor, MT 59875

Dave L. Pengelly  
Attorney at Law  
P.O. Box 8106  
Missoula, MT 59807-8106

James E. Peirce  
2801 Meridian Rd.  
Victor, MT 59875

Elizabeth W. Hoener  
661 S. Burnt Fork Rd.  
Stevensville, MT 59870

Robert H. Scott  
P.O. Box 7826  
Missoula, MT 59807

Marie Archer  
3324 S. Montana St.  
Butte, MT 59701

Victor Rural Fire Dept.  
P.O. Box 243  
Victor, MT 59875

Curt Martin, Manager,  
Larry Schock, Engineering  
Specialist  
Missoula Water Resources  
Regional Office  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

  
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 ) PROPOSAL  
FOR BENEFICIAL WATER USE PERMIT ) FOR  
77814-S76H BY THOMAS D. AND ) DECISION  
WENDY S. O'BRYAN )

\* \* \* \* \*

Pursuant to the Montana Water Use act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on May 7, 1996, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Applicants for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicants Thomas D. and Wendy S. O'Bryan appeared at the hearing by and through Thomas D. O'Bryan and counsel, Robert H. Scott.

Lee Yelin, Water Rights Inc., appeared at the hearing as a witness for Applicants.

Objector Elizabeth Hoener appeared at the hearing *pro se*. Mr. Harry Hoener appeared as a witness and spokesman for Mrs. Hoener. Elizabeth Hoener withdrew her objection during the hearing.

Objector James E. Peirce appeared at the hearing by and through counsel, David L. Pengelly.

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### EXHIBITS

Applicants offered eight exhibits for the record. All were accepted without objection.

O'Bryans' Exhibit 1 is an aerial photograph measuring 20½ inches by 26½ inches taken in 1975 of Applicants' property, the north end of the Pierce property, and the west side of the Buker property.

O'Bryans' Exhibit 2 is a clear overlay which depicts O'Bryans' intent when the application for permit was filed.

O'Bryans' Exhibit 3 (1 through 11) consists of six pages, each of which has two photographs affixed to it except the last page which has one photograph affixed to it. Each photograph has an explanation below the picture.

O'Bryans' Exhibit 4 is a table of the dates flow measurements were taken, location of each measurement, the method of each measurement, and the flow rate measured. Those that pertain to the instant case are checked in black ink.

O'Bryans' Exhibit 5 is a topographic map of O'Bryans' proposed project prepared by Water Rights, Inc.

O'Bryans' Exhibit 6 consists of four pages. The first page is a letter dated December 23, 1993, explaining the amendments made to Application No. 80959-76H in an attempt to settle the objections. The second and third pages contain a stipulation to resolve objections and states the amendments made to that application. The fourth page sets forth conditions to be placed

on the permit issued for that application in exchange for objection withdrawal.

O'Bryans' Exhibit 7 is a detailed layout of the pond berm, the standpipe outlet, and inlet box.

O'Bryans' Exhibit 8 is a plan paper measuring 23.75 inches by 36 inches upon which the site plan, the pond liner detail, and the screened outlet detail are shown.

#### PRELIMINARY MATTERS

David L. Pengelly, Counsel for Objector Peirce, appeared at the hearing and made the statement that his client, James Martin Peirce, could not attend the hearing. Mr. Pengelly and Mr. Peirce were under the impression that, as late as Friday, (the hearing was held on Tuesday) an agreement had been reached with Applicants. Further, Mr. Pengelly pointed out that the original map submitted with the O'Bryan application is inconsistent with the current status of Applicants' proposal. Mr. Peirce filed objections based on his understanding of the application as it was originally submitted. It is Objector Peirce's contention that the subsequent changes in the application per amendments materially alter Applicants' proposal after the public notice. According to Mr. Pengelly, his client's position is the original application as stated specifically and set forth on the map submitted with the application would be fine with Mr. Peirce and he would not object to the issuance of a permit to the O'Bryans under those terms. With that Mr. Pengelly stated he would not participate further in the hearing and departed.

The Department will treat Mr. Pengelly's comments as an objection based on a defective notice.

An application for beneficial water use permit may be amended after public notice of the application if the amendments would not prejudice anyone, party or non-party, that is those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. 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.

Although Mr. Pengelly is correct that the project has been changed, he has not established prejudice. The project as now proposed does not increase the burden on the source. The objection is therefore overruled.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 77814-s76H in the name of and signed by Thomas D. and Wendy S. O'Bryan was filed with the Department on May 30, 1991. (Department file.)
2. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on November 27, 1991. 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. Five objections to this application were received by the Department. Applicants were notified of four objections by a letter from the Department dated December 23, 1991, and of the fifth objection in a letter dated January 6, 1992. (Department file.)

3. Applicants propose to divert 187.00 gallons per minute up to 100.82 acre-feet of water from an unnamed tributary of the Bitterroot River (waste water) at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 8 North, Range 20 West, Ravalli County, Montana.<sup>1</sup> (Preliminary Matters above.) The proposed places of use are Pond 5, with a capacity of 1.08 acre-feet, and Pond 6, with a capacity of 12.72 acre-feet. Pond 5 is located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18. Pond 6 is located in the W $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 18. The proposed means of diversion is a ditch. The proposed period of use is from June 1 through September 30, inclusive of each year. The proposed use is fish and wildlife. (O'Bryans' Exhibit 6, Department file, and testimony of Lee Yelin.)

4. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. The proposed means of conveyance is a ditch which is in place and has been used.<sup>2</sup> The

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<sup>1</sup>Unless otherwise stated, all land descriptions in this Proposal are located in Township 8 North, Range 20 West, Ravalli County, Montana.

<sup>2</sup>The ditch was proposed when the original application was submitted. Under those conditions, an open ditch would be an adequate means of diversion. The ditch is still an adequate

surface area of Pond 5 would be 0.45 acre with a maximum depth of six feet for a capacity of 1.08 acre-feet. The surface area of Pond 6 would be 3.18 acres with a maximum depth of eight feet for a capacity of 12.72 acre-feet. Pond 5 would have a rock-lined spillway two to three feet wide and would be connected to Pond 6 by a ditch. Pond 5 would not be lined since it intercepts groundwater. Pond 6 would be lined with 30 mil polyvinyl chloride material and would have an outlet structure to the new Strange 1 Ditch where the water would be returned to Big Creek. (O'Bryans' Exhibits 7 and 8 and testimony of Lee Yelin and Thomas O'Bryan.)

5. The proposed use of water, fish and wildlife, are beneficial uses of water. Water would be impounded to promote waterfowl production by providing nesting and brood habitat and spawning and rearing areas for fish. The pond area would also provide a resting place for migrating waterfowl. Wildlife use is currently occurring on Applicants' property. These ponds would enhance that use. The amount of water requested for the fish ponds is necessary to provide Pond 5 with an exchange rate of one fill per week and Pond 6 with a exchange rate of one fill per month. These exchange rates are necessary to dilute the ammonia levels in the water, flush sediments from the gravel spawning area, and meet evaporative losses. When used at the proposed rates, water will not be wasted. These uses will benefit

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means of diversion, but with the reduction in the flow rate and the period of use, Applicants now need some method of control to ensure the terms of the permit are not violated.

Applicants by providing recreational fishing and viewing of wildlife.

6. Applicants have proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate and that the amount requested is reasonably available during the period in which Applicants seek to appropriate. Measurements of the water flowing in the borrow pit were conducted by Applicants' consultant on June 10, 1992, June 13, 1992, July 4, 1992, July 28, 1992, October 18, 1992, and November 17, 1992. The borrow pit was frozen when the November measurement was taken.

(Testimony of Lee Yelin and O'Bryans' Exhibit 4.)

7. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected by the proposed appropriation. The source is waste water from the property west of Applicants' property. The water would flow through the ponds, into a ditch, then into Big Creek. Any seepage loss from the ponds would remain in the area and would be collected by one of the many ditches. Evaporative losses from the ponds are not significantly different than evapotranspiration from the plants that now occupy the pond sites. Although Objector Peirce has used the water for many years, he failed to file a statement of claim for that water and his current application has a later priority date than

Applicants' application. (Department file and testimony of Lee Yelin and Thomas O'Bryan.)

8. Applicants have proven by a preponderance of evidence 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. There are no pending projects on this source for which permits have been issued or for which water has been reserved. (Department file.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

10. Applicants have proven by a preponderance of evidence they have 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. Applicants own the proposed places of use. (Department file and testimony of Thomas O'Bryan.)

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

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicants have met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 10. Mont. Code Ann. § 85-2-311 (1995).

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 listed below, Beneficial Water Use Permit 077814-76H is granted to Thomas D. and Wendy S. O'Bryan to divert 187.00 gallons per minute up to 100.82 acre-feet of water from an unnamed tributary of the Bitterroot River (waste water) at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, Township 8 North, Range 20 West, Ravalli County, Montana, for fish and wildlife. The places of use are Pond 5 located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 18, with a capacity of 1.08 acre-feet, and Pond 6 located in the W $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 18, with a capacity of 12.72 acre-feet. The means of diversion will be a ditch with headgate. The period of use will be from June 1 through September 30, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Applicant shall install a headgate on the diversion ditch to control the amount of water entering the ditch and shall keep a written record of all waters diverted by the ditch into the ponds, including the period of time. Said records shall be

submitted by November 30th of each year and upon request to the Missoula Water Resources Regional Office, Town & Country Shopping Center, 1610 S. 3rd St. W., Suite 103, P.O. Box 5004, Missoula, MT 59806-5004.

C. Water quality, including dissolved oxygen levels, shall be regularly monitored. If dissolved oxygen levels fall so low as to risk fish kill, aerators shall be installed in the fish pond to raise dissolved oxygen levels to a level necessary to maintain healthy fish.

D. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. The Department does not, by issuing this permit, assume liability for damage caused by the appropriator's exercise of this right.

E. This permit does not guarantee that the water use practices on the property to the west which supplies this permit's source will continue. Permittee cannot call waste water from the westerly property.

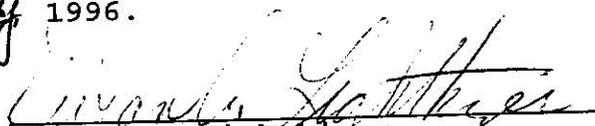
#### NOTICE

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 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. The responses must be filed within 20

days after service of the exception and copies must be sent to all parties. 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 2<sup>nd</sup> day of July, 1996.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6615

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, first class mail, at their address or addresses this 2<sup>nd</sup> day of July, 1996, as follows:

*gm*  
*g*  
*WAA*  
Thomas D. & Wendy S. O'Bryan  
1427 Glenwood Ave.  
Glenview, IL 60025

Marie Archer  
3324 S. Montana St.  
Butte, MT 59701

Joyce I. Montgomery  
138 Bell Crossing West  
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P.O. Box 243  
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James E. Peirce  
2801 Meridian Rd.  
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Dave L. Pengelly  
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Elizabeth W. Hoener  
661 S. Burnt Fork Rd.  
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Robert H. Scott  
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Curt Martin, Manager,  
Larry Schock, CES  
Missoula Water Resources  
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Missoula, MT 59806  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Unit Legal Assistant