

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
80154-S76H BY DAVID K. AND)
SHIRLEY A. KOSTICK)

* * * * *

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 April 14, 1993, 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 a Permit is hereby granted for Application for Beneficial Water Use Permit 80154-S76H by David J. and Shirley A. Kostick to appropriate a total of 20.00 gallons per minute not to exceed 4.06 acre-feet of water from Nelson Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 1 North, Range 22 West, Ravalli County, Montana, for domestic, irrigation, and stock water. Water for domestic use may be appropriated at a rate of 20 gallons per minute not to exceed 1.00 acre-foot of water per year to be used in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of

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said Section 26. The period of appropriation for the domestic use shall be from January 1 to December 31, inclusive of each year. Water for lawn and garden use may be appropriated at a rate of 20 gallons per minute not to exceed 3.00 acre-feet of water per year to be used on 2.00 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 26. The period of appropriation for the lawn and garden use shall be from April 1 to October 31, inclusive of each year. Water for stock may be appropriated at a rate of 20 gallons per minute not to exceed 0.06 acre-foot of water per year to be used in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 26. The period of appropriation for the stock water shall be from January 1 to December 31, inclusive of each year. The means of diversion shall be a headgate and ditch. A secondary means of diversion is to be located in Ross Ditch at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 26. The priority date of this permit shall be January 10, 1992, at 11:00 a.m.

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. As long as the existing secondary diversion box now in place is utilized, it shall be modified so that the steel check plate is not vertical in the throat of the box. The plate shall be installed in such a manner that the top of the plate is angled downstream thus allowing floating debris to pass over the top. Further, the plate shall be raised off the bottom of the box at

least one-half inch to allow the passage of nonfloating debris and to maintain a free flow of water.

C. The Permittees 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 upon demand and by November 30 of each year to the Water Resources Regional Office, 1610 South 3rd Street West, Town and Country Shopping Center, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

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 Permittee 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. 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.

F. The issuance of this permit by the Department shall not

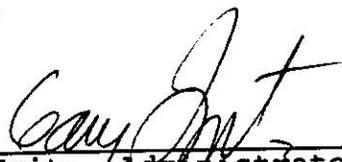
reduce the Permittees' liability for damages caused by Permittees' exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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 20 day of May, 1993.



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

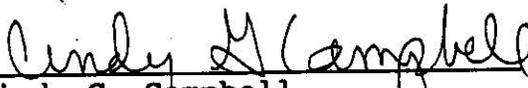
This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 24th day of May, 1993 as follows:

David J. & Shirley A. Kostick
143 Nez Perce Rd.
Darby, MT 59829

Wes McAlpin
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)

T.J. Reynolds, Manager
Helena/Missoula Water
Resources Regional Offices
1520 E. 6th Ave.
Helena, MT 59620-2301

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


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
80154-s76H BY DAVID K. AND)
SHIRLEY A. KOSTICK)

* * * * *

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 April 2, 1993, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to David J. and Shirley A. Kostick under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants David K. and Shirley A. Kostick appeared at the hearing pro se.

Wes McAlpin, Water Resource Specialist III with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

R. H. (Arlo) White, Water Resource Specialist II with the Department's Missoula Water Resources Regional Office, appeared at the hearing.

Cindy G. Campbell, Hearings Unit Legal Secretary, appeared at the hearing.

Objectors Stanley and Tillie Skut did not appear at the hearing. The record shows a properly constituted Notice of Hearing was served upon all parties on February 25, 1993, by

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certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1991). Return receipts were received by the Department, each with a signature indicating receipt. The Hearing Examiner received no communication from Stanley and Tillie Skut prior to the hearing or subsequent thereto. Therefore, in accordance with Mont. Admin. R. 36.12.208 (1991), Stanley and Tillie Skut are in default and no longer retain status as parties in this matter.

EXHIBITS

Applicants offered seven exhibits for inclusion into the record. All were accepted into the record without objection.

Applicants' Exhibit 1 consists of two pages and is a rebuttal to Wes McAlpin's memorandum to the file dated June 30, 1992.

Applicants' Exhibit 2 is a photograph showing the gate on the secondary diversion box.

Applicants' Exhibit 3 is a photograph taken on December 31, 1991, showing a portion of the secondary diversion box.

Applicants' Exhibit 4 is a photograph taken on December 31, 1991, showing the secondary diversion works.

Applicants' Exhibit 5 is a photograph taken on December 31, 1991, showing the secondary diversion box.

Applicants' Exhibit 6 consists of three pages. The first page documents flow measurements taken at several different locations. The second page is a statement describing the conveyance works and plans to improve them in the spring of 1993.

The third page is a Circular Channel Analysis and Design worksheet.

Applicants' Exhibit 7 consists of four pages which are water quality analyses of Nelson Creek. The first page is an analysis of a sample taken May 15, 1973. This page states the flow rate at the time the sample was taken was 15.32 cubic feet per second. The second page is an analysis of a sample taken September 19, 1973. This page states the flow rate at the time the sample was taken was 3.52 cubic feet per second. The third page is an analysis of a sample taken May 27, 1973, with a flow rate of 30.67 cubic feet per second. The fourth page is an analysis of a sample taken May 2, 1973, with a flow rate of 4.03 cubic feet per second.

The Department file was made available for review by all parties. Applicants objected to the memorandum to the file dated June 30, 1992, being included in the record as well as the flow rate calculation sheet dated June 26, 1992.

Objection to the McAlpin memorandum is based upon Applicants' belief that the memorandum does not pertain to the instant application. The Hearing Examiner has reviewed the subject memorandum and finds there are portions of the memorandum that do not pertain to the instant application and appear to target a certain statement of claim. Therefore those portions of the memorandum discussing the statement of claim and historic use that do not pertain to the application will be disregarded by the Hearing Examiner.

Objection to the flow rate calculation sheet is based upon Applicants' belief that there must have been an error either in the measurement or the calculation to arrive at a flow rate of 1,000.8 gallons per minute. Applicants measured the flow rate at their secondary diversion at 1,117.8 gallons per minute. They believe that since there is an approximate 50 percent conveyance loss, one of the measurements must be in error. Mr. McAlpin expressed surprise at the flow rate he had calculated, stating that he thought the measurement was approximately 2000 gallons per minute. Applicants' objection to the flow rate calculation worksheet is sustained.

Except for the materials identified above, the Department file is accepted into the record.

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

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302(1) (1991) 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."

2. David J. and Shirley A. Kostick duly filed the above-entitled application with the Department on January 10, 1992, at 11:00 a.m. (Department file.)

3. Pertinent portions of the file were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source on August 12, 1992. 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. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated September 10, 1992. (Department file.)

4. Applicants seek to appropriate 20.00 gallons per minute not to exceed 4.06 acre-feet of water from Nelson Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 1 North, Range 22 West, Ravalli County, Montana,¹ for domestic, irrigation, and stock water. The proposed place of use for all uses is in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26. Applicants propose to provide water for domestic use by one family, irrigate 2.00 acres of lawn and garden, and water 3.5 animal units. The proposed period of use for the domestic use and stock water is from January 1 to December 31, inclusive of each year. The proposed period of use for the irrigation of the lawn and garden is from April 1 to October 31, inclusive of each year. A proposed secondary point of diversion is located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26.

The Department recommends 1.00 acre-foot of water for domestic use; 15.00 gallons of water per day for 1.00 animal

¹Unless otherwise stated all land descriptions in this Proposal are located in Township 1 North, Range 22 West, Ravalli County, Montana.

unit; and 2.5 acre-feet of water per acre for lawn and garden use. (Department file, Department records and testimony of David Kostick.)

5. After the water is diverted from Nelson Creek, it is conveyed to Applicants' secondary diversion by Upper Ross Ditch. Ross Ditch is badly in need of repair and Applicants propose to rebuild Upper Ross Ditch in the spring of 1993 from the headgate to the John Hammel property, a distance of approximately 1,800 feet. When this ditch is repaired it will be adequate to convey water. (Department file and testimonies of David Kostick and Wes McAlpin.)

6. The diversion on Nelson Creek consists of a dam in Nelson Creek that diverts the water into a channel then through a wooden headgate with a control slide gate. The diversion has been in place for many years and works well. (Testimony of David Kostick.)

7. The secondary diversion is a metal box with a steel check plate tipped to allow floating debris to pass over the top. The plate is raised off the bottom of the box approximately one-half inch. The box is equipped with valves connected to 1.25 inch supply lines, one line to serve the domestic use and one line to serve stock and lawn and garden irrigation.

8. Applicants have measured the flow rate of Nelson Creek at two locations in September of 1992. The flow rate near the headgate was 4,191 gallons per minute. The flow rate at Nez Perce Road was 6,740 gallons per minute. The Nez Perce Road

locale is the point where all other water users have taken their water. Measurements were also taken on the Upper Ross Ditch in September of 1992. The flow rate in the ditch at the Dave Hansen property was 1,382.30 gallons per minute. The flow rate at the Cox and Skut diversion was: the Cox flow rate was 430.46 gallons per minute and the Skut flow rate was 601.32 gallons per minute. The flow rate at the Kelly-Wolf diversion was 600 gallons per minute. The flow rate at Applicants' diversion was 1,117.8 gallons per minute. Applicants also measured Upper Ross Ditch flow on January 5, 1991, at a rate of 480 gallons per minute. In the summer on an unspecified date the flow rate was 1,167 gallons per minute. (Applicants' Exhibit 6 and Department file.)

9. Applicants have examined the Department's records and have determined there is a surplus after all water rights of record have been satisfied. (Department file and testimony of David Kostick.)

10. Applicants own the proposed place of use. (Department file.)

11. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved with which the proposed project could interfere. (Department file and records.)

Based upon the foregoing Findings of Fact and upon 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 relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 2.

3. The Department must issue a Beneficial Water Use Permit if an applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4), (1991) 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 this section, the applicant

shall 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.

4. The proposed uses of the water, domestic, irrigation and stock water, are beneficial uses. See Mont. Code Ann. § 85-2-102(2)(a) (1991). The volumes requested for the uses are within the Department guidelines for such uses; therefore, the proposed uses are not excessive and there would be no waste. See Finding of Fact 4.

5. Applicants have provided substantial credible evidence there are unappropriated water in the source of supply at the proposed point of diversion in the amount requested at times the water can be put to the use proposed and that the water is reasonably available during the period in which the Applicants seek to appropriate. See Findings of Fact 4, 8, and 9.

6. Applicants have provided substantial credible evidence the water rights of prior appropriators would not be adversely affected. See Finding of Fact 9.

7. Applicants have provided substantial credible evidence that after the Upper Ross Ditch is rebuilt, the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5, 6, and 7.

8. 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 11.

9. Applicants have provided substantial credible evidence they have 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. See Finding of Fact 10.

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 a Permit is hereby granted for Application for Beneficial Water Use Permit 80154-S76H by David J. and Shirley A. Kostick to appropriate a total of 20.00 gallons per minute not to exceed 4.06 acre-feet of water from Nelson Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 1 North, Range 22 West, Ravalli County, Montana, for domestic, irrigation, and stock water. Water for domestic use may be appropriated at a rate of 20 gallons per minute not to exceed 1.00 acre-foot of water per year to be used in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 26. The period of appropriation for the domestic use shall be from January 1 to December 31, inclusive of each year. Water for lawn and garden use may be appropriated at a rate of 20 gallons per minute not to exceed 3.00 acre-feet of water per year to be used on 2.00 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 26. The period of appropriation for the lawn and garden use shall be from April 1 to October 31, inclusive of each year.

Water for stock may be appropriated at a rate of 20 gallons per minute not to exceed 0.06 acre-foot of water per year to be used in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 26. The period of appropriation for the stock water shall be from January 1 to December 31, inclusive of each year. The means of diversion shall be a headgate and ditch. A secondary means of diversion is to be located in Ross Ditch at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 26. The priority date of this permit shall be January 10, 1992, at 11:00 a.m.

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. As long as the existing secondary diversion box now in place is utilized, it shall be modified so that the steel check plate is not vertical in the throat of the box. The plate shall be installed in such a manner that the top of the plate is angled downstream thus allowing floating debris to pass over the top. Further, the plate shall be raised off the bottom of the box at least one-half inch to allow the passage of nonfloating debris and to maintain a free flow of water.

C. The Permittees 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 upon demand and by November 30 of each year to the Water Resources Regional Office,

1610 South 3rd Street West, Town and Country Shopping Center,
P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

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 Permittee 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. 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.

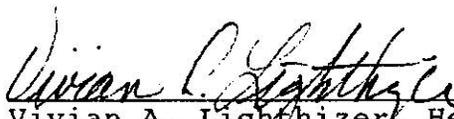
F. The issuance of this permit by the Department shall not reduce the Permittees' liability for damages caused by Permittees' exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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 objector is restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objector on other substantive issues. 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 14th day of April, 1993.



Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

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

CASE # 80154

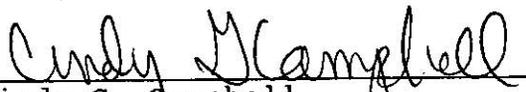
of record at their address or addresses this 14th day of April,
1993, as follows:

David J. & Shirley A. Kostick
143 Nez Perce Rd.
Darby, MT 59829

Stanley & Tillie Skut
Nez Perce Rd.
Darby, MT 59829

Wes McAlpin
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)

T.J. Reynolds, Manager
Helena/Missoula Water
Resources Regional Offices
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary