

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
80959-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 August 8, 1995, 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 80959-s76H is granted to Thomas D. and Wendy S. O'Bryan to construct six fish and wildlife ponds supplied with water from Big Creek at a rate of two cubic feet per second up to 87.8 acre-feet during the non-irrigation season from October 1 to November 15 and two cubic feet per second up to 232.8 acre-feet from March 15 to July 15, inclusive of each year. Water from Big Creek will be appropriated at a rate of 4.88 cubic feet per second up to 116.00 acre-feet of water for irrigation during high water periods from May 1 through July 1, inclusive of each year. The points of diversion shall be:

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#1 from the Strange #1 Ditch, located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and #2 from the Parkhill Ditch, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 08 North, Range 21 West, Ravalli County, Montana. The means of diversions are headgates with ditches. The places of use for supplemental irrigation are: 32 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 29 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 24 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 60 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18; and 10 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, both in Township 08 North, Range 20 West, Ravalli County, Montana, for a total of 195 acres. The places of use for fish and wildlife are located in S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 18.

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. Permittees shall install an adequate measuring device at each of the two diversion points that can be easily read by a water commissioner or any decreed water user on the drainage to determine the amount of water that may be diverted by permittees under their existing decreed water rights and to distinguish their decreed water from any water that is diverted pursuant to this permit. Permittees shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records by November 30 of each year and/or upon request to the Missoula Water Resources Regional Office at Town & Country Shopping Center, 1610 South 3rd Street West, P.O. Box 5004,

Missoula, Montana 59806-5004.

C. This right is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay his proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

D. 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 ponds to raise dissolved oxygen levels to a level necessary to maintain healthy fish.

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 21 day of September, 1995.

Gary Fritz, *asst. admin.*,
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, first class mail, at their address or addresses this ~~23rd~~ ^{25th} day of September, 1995 as follows:

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

Charles & Marie Lindahl
599 E. Millcreek Way
Salt Lake City, UT 84106

Joyce I. Montgomery
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Victor, MT 59875

John C. & Dorothy M. Buker
753 Indian Prairie Loop
Victor, MT 59875

James E. & Mildred Peirce
2772 Meridian Rd.
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Kyle Brinkerhoff Inc.
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Martin Peirce
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Jeffrey H. Langton
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Big Creek Lakes Reservoir
Association
& Louise Mittower Langton
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Janet Wood Farley
Laurie J. Wood-Gundlach
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Mittower Landowners Assoc.
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Montana Dept. of Fish,
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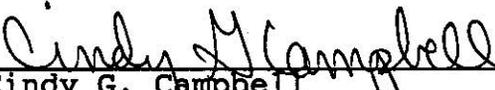
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(via electronic mail)

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)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
80959-s76H BY THOMAS D. AND)	DECISION
WENDY S. O'BRYAN)	

* * * * *

Applicants and Objectors have reached an agreement and all Objectors have withdrawn their objections. However, Applicants are not relieved of the duty to present evidence to satisfy their substantive burden of proof when all parties withdraw their objections.

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 80959-s76H in the name of and signed by Thomas D. and Wendy S. O'Bryan was received by the Department on February 21, 1992, at 4:50 p.m. (Department file.)
2. Pertinent portions of the application were published in *Ravalli Republic*, a newspaper of general circulation in the area of the source, on November 4, 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 proposed appropriation. Fifteen timely objections were received and Applicants were notified of those

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objections by a letter from the Department dated December 21, 1992. (Department file.)

3. Applicants propose to construct six fish and wildlife ponds supplied with water from Big Creek at a rate of two cubic feet per second up to 87.8 acre-feet during the non-irrigation season from October 1 to November 15 and two cubic feet per second up to 232.8 acre-feet from March 15 to July 15, inclusive of each year. Applicants also propose to appropriate 4.88 cubic feet per second up to 116.00 acre-feet of water from Big Creek for irrigation during high water periods from May 1 through July 1, inclusive of each year. The proposed points of diversion are: #1 from the Strange #1 Ditch, located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and #2 from the Parkhill Ditch, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 08 North, Range 21 West, Ravalli County, Montana. The proposed means of diversions are headgates with ditches. The proposed places of use for supplemental irrigation are 32 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 29 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 24 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 60 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18 and 10 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, both in Township 08 North, Range 20 West, Ravalli County, Montana, for a total of 195 acres. The proposed places of use for fish and wildlife are located in S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 18. (Department file.)

4. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. This application is, in

part, to supply water for six ponds with water from Big Creek during the non-irrigation season. Pond #1 would be located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$; pond #2 would be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$; pond #3 would be located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$; pond #4 would be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$; pond #5 would be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$; and pond #6 would be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, all in Section 18, Township 08 North, Range 20 West. The surface area of pond #1 would be 0.43 acre with a maximum depth of six feet for a capacity of 1.03 acre-feet. The surface area of pond #2 would be 0.15 acre with a maximum depth of six feet for a capacity of 0.36 acre-foot. The surface area of pond #3 would be 0.38 acre with a maximum depth of six feet for a capacity of 0.91 acre-foot. The surface area of pond #4 would be 0.22 acre with a maximum depth of six feet for a capacity of 0.53 acre-foot. The 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. Ponds #1 through #5 would have rock-lined spillways two to three feet wide, each connected to the nearest downstream pond by a ditch. Pond #6 would be lined with 30 mil polyvinyl chloride material. Pond #6 would have an outlet structure to the new Strange #1 Ditch where the water would be returned to Big Creek. Pond levels in ponds #1 through #6 are expected to drop two or three feet during the fall and winter months. Pond #6 is not expected to have large water losses. No fish kills are anticipated due to water quality monitoring. Dissolved oxygen

levels will be tested regularly. Ponds #1 through #5 will require a turnover rate of one fill per week during the period of appropriation and pond #6 will need a turnover rate of one fill per month during the period of appropriation. Aerators will be used in the ponds if necessary. Fixed level control structures with stoplogs (flash boards) will permit lowering or raising of water levels for control of aquatic vegetation, rejuvenation or reduction as necessary for proper management. The excavated ponds, outlet structures, and improvements to headgates or ditches will be designed by either the Soil Conservation Service or a certified engineer in combination with fish and wildlife biologists review.

The remaining part of this application is for "high water"¹ irrigation. The flood irrigation design is a system of contour ditches. Two main ditches deliver water to the O'Bryan property. Lateral or contour ditches convey water from the main supply ditches to the intended place of use. (Department file.)

5. The proposed use of water, irrigation and fish and wildlife, are beneficial uses of water. Water will be impounded to promote waterfowl production by providing nesting and brood habitat and spawning and rearing areas for fish. The pond area will also provide a resting place for migrating waterfowl.

¹"High water" periods, for the purpose of this application, are limited to those time periods when there is water available in excess of the amount necessary to satisfy all existing decreed rights on Big Creek. Additionally, any time water is being released from Big Creek Lakes for use by Association members, it will be presumed there is no "high water" available.

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Wildlife use is currently occurring on Applicants' property. These ponds will enhance that use. The amount of water requested for the fish ponds is necessary to provide ponds #1 through #5 with a turnover of one fill per week and pond #6 with a turnover of one fill per month. These turnover 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 Applicants by providing recreational fishing and viewing of wildlife.

The irrigation use will be for supplemental irrigation of a small orchard, pasture grass, grains, trees, and other shrubs, all of which benefit Applicants monetarily and/or recreationally. The amount of water requested for irrigation is 116.00 acre-feet per year which is .60 acre-feet per acre, well within the recommended amount of water for supplemental irrigation. Water would not be wasted when used as proposed. (Department file.)

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. Flow measurements were conducted by Applicants' consultant in 1992. The data closely resembles USGS data records for the 1938 to 1982 base period. In addition, the flow of Big Creek exceeds 14 cubic feet

per second 90 percent of the time. This application is to appropriate no more than 6.88 cubic feet per second. (Department file.)

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. After the initial fillings of these ponds, the use would be virtually nonconsumptive. The water would flow through the ponds and return to the stream, less the amount of water lost to seepage and evaporation. 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. The supplemental irrigation would occur only during high water periods when there is excess water. (Department file.)

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. Applicants are not required to prove no adverse effect to water quality or the ability of a discharge permit holder to satisfy effluent limitations. 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.)

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 (1993).

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 (1993).

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 80959-s76H is granted to Thomas D. and Wendy S. O'Bryan to construct six fish and wildlife ponds supplied with water from Big Creek at a rate of two cubic feet per second up to 87.8 acre-feet during the non-

irrigation season from October 1 to November 15 and two cubic feet per second up to 232.8 acre-feet from March 15 to July 15, inclusive of each year. Water from Big Creek will be appropriated at a rate of 4.88 cubic feet per second up to 116.00 acre-feet of water for irrigation during high water periods from May 1 through July 1, inclusive of each year. The points of diversion shall be: #1 from the Strange #1 Ditch, located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ and #2 from the Parkhill Ditch, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 08 North, Range 21 West, Ravalli County, Montana. The means of diversions are headgates with ditches. The places of use for supplemental irrigation are: 32 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 29 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 24 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 60 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18; and 10 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, both in Township 08 North, Range 20 West, Ravalli County, Montana, for a total of 195 acres. The places of use for fish and wildlife are located in S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, and N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 18.

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. Permittees shall install an adequate measuring device at the diversion point that can be easily read by a water commissioner or any decreed water user on the drainage to determine the amount of water that may be diverted by permittees under their existing decreed water rights and to distinguish their decreed

water from any water that is diverted pursuant to this permit. Permittees shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records by November 30 of each year and/or upon request to the Missoula Water Resources Regional Office at Town & Country Shopping Center, 1610 South 3rd Street West, P.O. Box 5004, Missoula, Montana 59806-5004.

C. This right is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay his proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

D. 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 ponds to raise dissolved oxygen levels to a level necessary to maintain healthy fish.

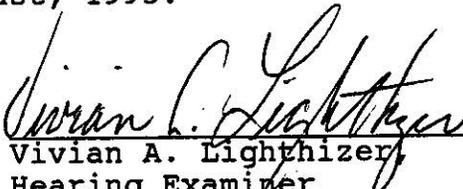
NOTICE

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 8th day of August, 1995.


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 8th day of August, 1995, as follows:

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

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

James E. & Mildred Peirce
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Martin Peirce
2801 Meridian Rd.
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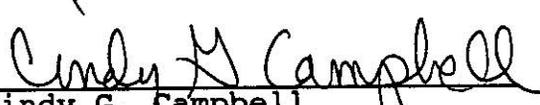
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