

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
82173-s76M BY JACK D. SIMMONS, SR.)
AND LOLA L. SIMMONS)

* * * * *

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 June 2, 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 82173-s76M by Jack D. Simmons, Sr. and Lola L. Simmons to appropriate up to 2.76 acre-feet of water of an unnamed tributary of Petty Creek by means of a .01 acre-foot pit located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 13 North, Range 23 West, Missoula County, Montana, for irrigation of 1.00 acre of lawn and garden. The place of use shall be in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The period of use shall be from April 15 to October 15, inclusive of each year. The

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period of appropriation shall be from January 1 to December 31, 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. 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 Mont. Code Ann. § 85-2-424 (1991).

C. The deadline for completion of this permit, and filing of the Notice of Completion of Permitted Water Development (Form 617) shall be December 31, 1995, verifying that the appropriation of water has been completed as permitted.

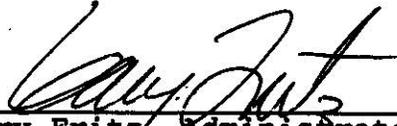
NOTICE

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 25 day of June, 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 25th day of June, 1993 as follows:

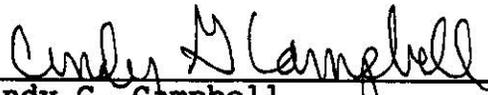
Jack D. Simmons, Sr.
Lola L. Simmons
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Vivian A. Lighthizer,
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Helena, MT 59620-2301



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
82173-s76M BY JACK D. SIMMONS, SR.)
AND LOLA L. SIMMONS)

* * * * *

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 May 11, 1993, to determine whether a Beneficial Water Use Permit should be granted to Jack D. Simmons, Sr. and Lola L. Simmons under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicants Jack D. Simmons, Sr. and Lola L. Simmons appeared at the hearing pro se.

Objector Judith A. Johnson Chilcote appeared at the hearing pro se.

At the beginning of the hearing Ms. Chilcote stated that there was another objector, David A. Lake, but that he could not attend the hearing. A review of the objection form reveals that in Item 1, Names of Objectors, only Ms. Chilcote's name is entered. Mr. Lake did sign the objection form and his permit number is entered in item 4; however, the entire objection deals only with Ms. Chilcote's objection and does not address how the proposed project will adversely affect Mr. Lake's water right. Ms. Chilcote did not state that she was representing Mr. Lake at the hearing. Since only Ms. Chilcote's address was entered on

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the objection form, all hearing materials were sent to her. Ms. Chilcote stated during the hearing that aside from including Mr. Lake's water right number and signature on the objection form, they were not partners in business, did not share a water right, nor were they in any way connected. Mr. Lake did not attain status as an objector nor is he a party to this proceeding.

EXHIBITS

Applicants' Exhibit 1 is a single page upon which three photographs have been affixed. Photograph 1 is a picture of the valley in which Petty Creek flows. Applicants' house can be seen on the left side of the photograph about half way down. The Crittendon residence can be seen on the right side of the picture, about half way down. Photograph 2 is another picture of the valley. Applicants' house can be seen in the foreground. Photograph 3 is another picture of the valley showing the approximate location where the unnamed source goes underground. All photographs were taken by Applicants on May 2, 1993.

Applicants' Exhibit 2 is a single page upon which three photographs have been affixed. Photograph 1 is of the unnamed source as it comes out of the mountain. A soft drink can, circled in red on the photograph, is used for size comparison. Using that comparison, one can see the source is very small as it emerges. Photograph 2 is of the culvert installed by Champion International to allow the stream to flow through instead of over the road to prevent erosion of the road. Again the soft drink can has been used for size comparison and is circled in red on

the photograph. Photograph 3 shows the source as it flows through the forest. The soft drink can is again used for size comparison. All photographs were taken by Applicants on May 2, 1993.

Applicants' Exhibit 3 is a single page upon which three photographs have been affixed. Photographs 1 and 2 have two soft drink cans placed near the source so one can make size comparison. Photograph 1 shows where the spring comes on the Applicants' property from the forest and flows into the pond. Photograph 2 shows the source as it flows across Applicants' property out of the pond. Photograph 3 shows the pond, the inflow and the outflow. All photographs were taken by Applicants on May 2, 1993.

Applicants' Exhibit 4 is a single page upon which three photographs have been affixed. The soft drink cans have been used in all three photographs for size comparison. Photograph 1 shows the source as it flows from the pond to the area behind Applicants' house. Photograph 2 shows a small pool formed by the source as it flows back into the forest. Photograph 3 shows the source flowing through the pool into the forest where it disappears from the surface. All photographs were taken by Applicants on May 2, 1993.

Applicants' Exhibit 5 is a single page upon which two photographs have been affixed. Both photographs show the areas to be irrigated, the area in front of the house and the areas at

the sides of the house. These photographs were taken by Applicants on May 2, 1993.

Applicants' Exhibit 6 is a copy of a Certificate of Survey upon which Petty Creek has been drawn first in pencil then in red ink. The unnamed source has also been drawn in red ink showing the subject pond and the place where the source goes underground.

All exhibits were accepted into the record without objection.

PRELIMINARY MATTERS

At the beginning of the hearing Jack D. Simmons, Sr. informed the Hearing Examiner that they had sold the property but that they had a Surface Water Agreement that the Simmons would continue to pursue the pending permit application before the Department and if the permit were granted the water right would then be transferred to the new owners. The record was left open until May 18, 1993, to allow Applicants to send a copy of the Surface Water Agreement to the Hearing Examiner. A copy of said agreement was received by the Hearing Examiner and the record was closed on May 12, 1993.

The Hearing Examiner informed all parties at the hearing that she intended to have the Missoula Water Resources Regional Office send her a copy of a USGS quadrangle map covering Section 13, Township 13 North, Range 23 West¹, and that she would take official notice of the map. The Hearing Examiner also takes

¹Unless otherwise stated all land descriptions in this Proposal are located in Township 13 North, Range 23 West, Missoula County.

official notice of the Department's records, specifically the records concerning water rights in the Petty Creek area.

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. 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. Jack D. Simmons, Sr. and Lola L. Simmons duly filed the above-entitled application with the Department on July 15, 1992, at 12:00 noon. (Department file.)

3. Pertinent portions of the file were published in the *Missoulian*, a newspaper of general circulation in the area of the source on December 16, 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 dated January 11, 1993. (Department file.)

4. Originally, Applicants sought to appropriate up to 9.15 acre-feet of water from an unnamed tributary of Petty Creek at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, for sprinkler irrigation

and fish and wildlife. The proposed means of diversion was a pond with a capacity of .01 acre-feet. The proposed place of use for the irrigation and the fish and wildlife use was the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. Applicants proposed to appropriate 9.00 acre-feet of water for irrigation of three acres and .15 acre-feet of water for fish and wildlife. The proposed period of appropriation was from January 1 through December 31, inclusive of each year. The proposed period of use for the irrigation was from April 15 to October 15, inclusive of each year. The proposed period of use for the fish and wildlife was from January 1 to December 31, inclusive of each year.

During the hearing, Applicants requested the fish and wildlife use be deleted from the Application and the area to be irrigated reduced to one acre rather than the three acres indicated in the application. Reducing the acreage by one-third also requires the amount of water requested for irrigation be reduced by one-third. Thus the application is amended to appropriate up to 3.00 acre-feet of water of an unnamed tributary of Petty Creek by means of a .01 acre-foot pit located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13 for irrigation of 1.00 acre of lawn and garden. The proposed place of use is located in the NE $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The proposed period of use for the lawn and garden irrigation is from April 15 to October 15, inclusive of each year. The proposed period of appropriation is from January 1 to December 31, inclusive of each year. The water would be pumped from the pond by means of a Flo-tech model pump with a 1.5 inch

outlet purported to be rated at 61 gallons per minute. However, Larry Schock, Civil Engineering Specialist with the Department's Missoula Water Resources Regional Office, calculated the flow rate of the pump to be 41.6 gallons per minute, qualifying that amount as "being generous." (Testimony of Applicants and Department file.)

5. According to the Irrigation Requirements worksheet in the file, the amount of water necessary to irrigate one acre of lawn and garden in that area, on Alberton fine sandy loam soil, is 2.76 acre-feet per acre. (Department file.)

6. Originally the source spread on Applicants' property causing a marshy area with some seepage on the top. The person who performed the excavation for Applicants' home suggested Applicants should, to help contain the marshy area and keep the mosquitos to a minimum, excavate a holding pit to contain the water and dig a ditch for the outflow. Applicants then excavated the pond and dug a shallow ditch out a short distance into the forest where the water goes into the ground. Sometime later, Applicants decided to use the water for irrigation. They knew that if the water was to be used beneficially, they must acquire a permit from the Department. That is the reason the application was filed at the time it was filed and not at the time the pit was excavated. Another factor in the filing of the instant application is Applicants' son sold the property the water crosses after it flows down the mountain and across Champion International land. As long as their son owned the property,

Applicants knew he would not divert the source and deprive them of the water in the pond. However, when their son sold his property, Applicants began to worry that the new owners might divert the stream and they would have no right to the water if the new owners decided to divert the stream. (Testimony of Lola Simmons and Applicants' Exhibits 2, 3, and 4.)

7. The source arises as a natural spring on the mountain in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, Township 13 North, Range 22 West, flows in a southwesterly direction into Section 13 where it crosses the Champion International property, goes underground, surfaces again near the parcel now owned by the Crittendons, flows down through the forest, flows in a northwesterly direction to the pit site in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, then flows in a north, northwesterly direction on Applicants' property and disappears into the ground. Although the USGS map shows the source as an intermittent stream, Applicants stated they have never, since 1980, seen it dry except in those places it goes underground. (Testimony of Applicants; Applicants' Exhibits 4 and 6; Petty Mountain, Montana, USGS Quadrangle map; and Department file.)

8. Applicants measured cross sections and the velocity of the stream on May 11, 1992; June 12, 1992; July 8, 1992; August 15, 1992; September 10, 1992, and October 15, 1992. These measurements were submitted to the Missoula Water Resources Regional Office on October 28, 1992, and Larry Schock calculated the flow of the stream from them. On May 11, 1992, the stream

was flowing at a rate of 258.5 gallons per minute. June 12, 1992, the stream was flowing at a rate of 186.7 gallons per minute. On July 8, 1992, the flow rate was 168.7 gallons per minute. August 15, 1992, the stream was flowing at a rate of 64.6 gallons per minute. On September 10, 1992, the flow rate of the stream was 82.6 gallons per minute and October 15, 1992, the flow rate was 100.5 gallons per minute.

9. Applicants have been told the bedrock in the area lies 60 feet below the surface and that the soil from the land surface to the bedrock is very porous. For that reason they believe water from the source, when it goes underground, never reaches Petty Creek which is located approximately 1,200 feet from the point where the water disappears from the surface. There is no historic channel to indicate that at any time in the past water has flowed into Petty Creek from the source. (Testimony of Applicants; Petty Mountain, Montana, USGS Quadrangle map; and Applicants' Exhibit 4.)

10. The dimensions of the pond are approximately 8.00 feet wide by 20 feet long and approximately 5.00 feet deep. The pond is an irregular shape lined with plastic membrane. (Department file, Applicants' Exhibit 3 and 5, and testimony of Applicants.)

11. Applicants have a Surface Water Agreement with the current owners of the place of use which allows Applicants to pursue a water use permit with the understanding that upon the grant of such a permit, the water right would be transferred to the current owners. (Preliminary Matters, *supra*.)

12. Objector Chilcote has Statement of Claim 76M-W-111195-00 before the Water Court for 38.47 acre-feet of water per year from Petty Creek to irrigate 8.00 acres; however, during the hearing Ms. Chilcote stated she does not irrigate from Petty Creek, that her irrigation source is Eds Creek. Ms. Chilcote further stated that the proposed appropriation would not adversely affect her water right since she does not use Petty Creek water. (Department records and testimony of Objector.)

13. Ms. Chilcote's objection was based upon her understanding that the pond was constructed illegally and that the proposed use would have a great effect on the amount of water flowing in Petty Creek. Ms. Chilcote contacted the Montana Department of Fish, Wildlife, and Parks (MDFWP) concerning the pond and it was her understanding that the person she contacted stated Applicants could not legally excavate a pond without a permit from MDFWP. (Testimony of Objector and Department file.)

14. There are no pending permits or reservations of water in the source of supply or Petty Creek. (Department records.)

15. The proposed project can be completed in two years time. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearings 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 the Applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) 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 preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the

U.S. soil conservation service and other specific field studies. 1993 Mont. Laws 370.

4. The proposed use of water, irrigation, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2) (1991). The amount of water requested, 3.00 acre-feet, is over the recommended amount of 2.76 acre-feet; therefore, a permit can be issued for only 2.76 acre-feet per year to assure there is no waste of water. See Finding of Fact 5.

5. 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 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 instream 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 50272-g42M by Joseph F. Crisafulli.* Applicants' amendments reduce the amount of water to be appropriated by eliminating the fish and wildlife use and reducing the acres to

be irrigated. Such amendments cannot cause prejudice and do not require the notice be published again. See Finding of Fact 4.

6. Applicants have provided substantial credible 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 during the period in which Applicants seek to appropriate, the amount requested is reasonably available. See Findings of Fact 4, 5, 7, and 8.

7. The water rights of a prior appropriator will not be adversely affected. See Findings of Fact 9 and 12.

8. Applicants have provided substantial credible evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 6, and 10.

9. 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 14.

10. Applicants 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. See Finding of Fact 11.

11. The Department cannot issue a permit unless the water is to be put to beneficial use. When Applicants dug the pit, the purpose was to confine the water in a small area to eliminate the

marshy area and minimize the mosquito population. See Finding of Fact 6. There was no beneficial use of water contemplated, thus no permit was needed.¹ On that basis the pond was not constructed illegally. However, when Applicants decided to irrigate from the pond, a permit became necessary and Applicants properly applied for a permit at that time.

According to Mont. Code Ann. § 87-4-603 (1991), a permit is needed from MDFWP only when a person who owns or controls an artificial pond wishes to stock the pond with fish procured from any lawful source, not before the person constructs the pond as Objector understood. Thus the pond was not constructed illegally under MDFWP statutes. See Finding of Fact 13.

12. The Department must set a deadline for the submission of a notice of completion of permitted water development to the Department. 1993 Mont. Laws 370. In the instant case a reasonable deadline would be two years. See Finding of Fact 15.

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 82173-s76M by Jack D. Simmons, Sr. and Lola L. Simmons to appropriate up to 2.76 acre-feet of water of an unnamed tributary of Petty Creek by means of

¹Any person impounding water in this manner is liable for any damage caused to another party or water user.

a .01 acre-foot pit located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 13 North, Range 23 West, Missoula County, Montana, for irrigation of 1.00 acre of lawn and garden. The place of use shall be in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The period of use shall be from April 15 to October 15, inclusive of each year. The period of appropriation shall be from January 1 to December 31, 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. 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 Mont. Code Ann. § 85-2-424 (1991).

C. The deadline for completion of this permit, and filing of the Notice of Completion of Permitted Water Development (Form 617) shall be December 31, 1995, verifying that the appropriation of water has been completed as permitted.

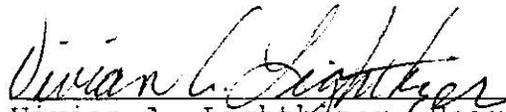
NOTICE

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 2nd day of June, 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

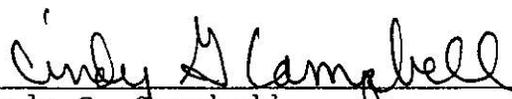
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 2nd day of June, 1993, as follows:

Jack D. Simmons, Sr.
Lola L. Simmons
4060 Petty Creek Rd.
Alberton, MT 59820

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Hearings Unit Legal Secretary