

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  
83761-s76L BY FRANK M. & RAE K. )  
MCMASTER )

\* \* \* \* \*

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 20, 1994, 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, Beneficial Water Use Permit 83761-s76L is hereby granted to Frank M. and Rae K. McMaster to appropriate 20.00 gallons per minute up to 1.00 acre-foot per year of the waters of Little Bitterroot Lake at a point in Lot 1C of Little Bitterroot Lots located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 18, Township 27 North, Range 24 West, for domestic use in Lot 1C of Little Bitterroot Lots located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 18, Township 27 North, Range 24 West, Flathead County. The means of diversion will be a three-quarter horsepower pump with a one and

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one-half inch pipeline in the lake. The period of diversion and use shall be from January 1 through December 31, inclusive of each year. The priority date shall be September 21, 1992, at 2:40 p.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. This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this permit, do not create in the Permittees any equity or vested right against the Tribes. The Permittees are hereby notified that any financial outlay or work invested in a project pursuant to this permit is at the Permittees' risk.

Issuance of this permit by the Department shall not reduce Permittees' liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that Permittees may experience should they be unable to exercise this permit due to the future exercise of reserved water rights.

C. The State of Montana's jurisdiction to issue water

rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. ADV-92-745 (Montana First Judicial District Court, Lewis and Clark County, Helena, filed May 15, 1992) and in Cause No. CV-92-54-M-CCL (United States District Court, District of Montana, Missoula Division, filed May 15, 1992) which cases are currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

D. 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.

E. 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 Permittees' exercise of this permit.

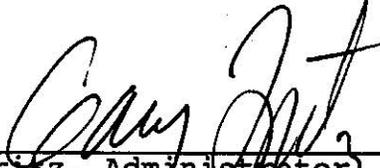
**NOTICE**

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 17 day of May, 1994.

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

CERTIFICATE OF SERVICE

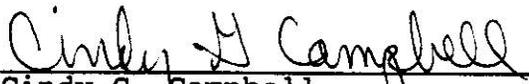
This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 18<sup>th</sup> day of May, 1994 as follows:

Frank M. & Rae K. McMaster  
P.O. Box 401  
Columbia Falls, MT 59912

Chuck Brasen, Manager  
Kalispell Water Resources  
Regional Office  
3220 Highway 93 South  
P.O. Box 860  
Kalispell, MT 59903-0860  
(via electronic mail)

John C. Chaffin  
Office of the Solicitor  
U.S. Department of Interior  
P.O. Box 31394  
Billings, MT 59107-1394

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

**CASE # 83761**

**FILMED**

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION ) ORDER VACATING HEARING  
FOR BENEFICIAL WATER USE PERMIT ) AND  
83761-s76L BY FRANK M. & RAE K. ) PROPOSAL FOR DECISION  
MCMASTER )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was scheduled to be held in the above-entitled matter on April 12, 1994, in Kalispell, Montana, to determine whether a Beneficial Water Use Permit should be granted to Frank M. and Rae K. McMaster for the above Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

On April 6, 1994, the Hearing Examiner received a Notice of Withdrawal from the Department of Interior, Bureau of Indian Affairs (BIA), the only objector of record, eliminating the need to hold a hearing in this matter. Therefore, the hearing scheduled to be held on April 12, 1994, is hereby vacated.

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. Montana Code Ann. § 85-2-302 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

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**FILMED**

therefor except by applying for and receiving a permit from the department."

2. Frank M. and Rae K. McMaster duly filed the above-entitled application with the Department on September 21, 1992, at 2:40 p.m. (Department file.)

3. Pertinent portions of the file were published in the *Daily Inter Lake*, a newspaper of general circulation in the area of the source on April 14, 1993. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department of Natural Resources and Conservation (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 May 13, 1993. (Department file.)

4. Applicants seek to appropriate 20.00 gallons per minute up to 1.00 acre-foot per year of the waters of Little Bitterroot Lake at a point in Lot 1C of Little Bitterroot Lots located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 18, Township 27 North, Range 24 West, for domestic use in Lot 1C of Little Bitterroot Lots located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 18, Township 27 North, Range 24 West, Flathead County. The means of diversion would be a three-quarter horsepower pump with a one and one-half inch pipeline in the lake. The pump house, approximately five feet square, would be located at a point at least 40 feet above the high water line. The period of diversion and use would be from January 1 through

December 31, inclusive of each year. (Department file.)

5. Applicants have possessory interest in the proposed place of use. (Department file.)

6. Applicants have reviewed the Department records of water users on Little Bitterroot Lake and concluded that because of the size of the lake, their proposed one acre-foot diversion would have no recognizable impact on the prior water users or on the water level of the lake. (Department file.)

7. Applicants' general observation of lake levels during all seasons of the year indicate that water is available for appropriation throughout the year. (Department file.)

8. Applicants' property is being developed for year round residence and the domestic use of the water would benefit them. (Department file.)

9. There are no unperfected permits or reservations granted for the source of supply. (Department file.)

10. In its Notice of Withdrawal, BIA continues its objection to the jurisdiction of the Department to issue permits in an area where the dominant use is for treaty recognized water rights and continues to assert that the Department does not have jurisdiction to adjudicate water rights. BIA contends that its claims for water use in the Little Bitterroot Basin show that all available water is appropriated and that the Department in its determination of actual water availability is in direct conflict with *United States v. DNRC*, No. 50612, 1st Judicial District Court, June 15, 1987. BIA contends this determination amounts to

a *de facto* adjudication of BIA's water rights and that the Department does not have the jurisdiction or authority to examine, quantify, or qualify the claims of the United States or any other party to the Montana General Stream Adjudication. (Notice of Withdrawal.)

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 Findings of Fact 1, 2, and 3.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1993); *In re Applications 66459-76L by Ciotti, 63574-s76L by Flemings, 63023-s76L by Rasmussen, 64988 by Starnier and G15152-s76L by Pope, Director's Order, April 30, 1990.*
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 (5) (1993), 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;

(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;

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

....  
(5) 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.

4. An applicant is required to prove the criteria in subsections 85-2-311(1)(g) through (i) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department these criteria, as applicable, may not be met. For the criterion set forth in subsection 85-2-311(1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13,

part 45, may file a valid objection. Mont. Code Ann. § 85-2-311(2) (1993). No valid objections relative to subsections 85-2-311(1)(g), (h), or (i) were filed. Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (h), or (i).

5. The proposed use of water, domestic, is a beneficial use. Mont. Code Ann. § 85-2-102(2)(a) (1993). See Finding of Fact 8.

6. Applicants have proved 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 during the period in which Applicants seek to appropriate water is reasonably available. See Findings of Fact 6 and 7.

7. Applicants have proved by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected by the proposed appropriation. See Finding of Fact 6.

8. Applicants have proved by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 4.

9. Applicants have proved by a preponderance of evidence 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 9.

10. Applicants have proved 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. See Finding of Fact 5.

11. In making this decision, the Department is not adjudicating the BIA's claims as contended in its Notice of Withdrawal. See Finding of Fact 10. BIA tries to equate this case with the Don Brown case. See *United States v. DNRC*, No. 50612, 1st Judicial District Court, June 15, 1987. Here, however, unlike in Don Brown, Objector has not established, in the adjudication or in these proceedings, the relationship between the extent of its claimed right and the amount of flow in the source. In fact, the flow of the Little Bitterroot River has not been measured. Given this lack of information, Objector is left only with an unsubstantiated argument that all available water in the Little Bitterroot Basin is appropriated. *In re Application 75070-s76L by Leatzow.*

WHEREFORE, 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, Beneficial Water Use Permit 83761-s76L is hereby granted to Frank M. and Rae K. McMaster to appropriate 20.00 gallons per minute up to 1.00 acre-foot per year of the waters of Little Bitterroot Lake at a point in Lot 1C of Little Bitterroot Lots located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 18, Township 27 North, Range 24 West, for domestic use in Lot 1C of Little Bitterroot Lots located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 18,

Township 27 North, Range 24 West, Flathead County. The means of diversion will be a three-quarter horsepower pump with a one and one-half inch pipeline in the lake. The period of diversion and use shall be from January 1 through December 31, inclusive of each year. The priority date shall be September 21, 1992, at 2:40 p.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. This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this permit, do not create in the Permittees any equity or vested right against the Tribes. The Permittees are hereby notified that any financial outlay or work invested in a project pursuant to this permit is at the Permittees' risk.

Issuance of this permit by the Department shall not reduce Permittees' liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that Permittees may experience should they be unable to exercise this permit due to the future exercise

of reserved water rights.

C. The State of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. ADV-92-745 (Montana First Judicial District Court, Lewis and Clark County, Helena, filed May 15, 1992) and in Cause No. CV-92-54-M-CCL (United States District Court, District of Montana, Missoula Division, filed May 15, 1992) which cases are currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

D. 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.

E. 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 Permittees' 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 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 20<sup>th</sup> day of April, 1994.

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

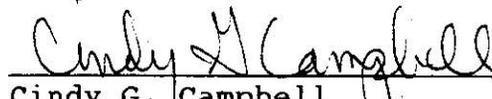
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order Vacating Hearing and Proposal for Decision was duly served upon all parties of record at their address or addresses this 21<sup>st</sup> day of April, 1994, as follows:

Frank M. & Rae K. McMaster  
P.O. Box 401  
Columbia Falls, MT 59912

Charles F. Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903  
(via electronic mail)

John C. Chaffin  
Office of the Solicitor  
U.S. Department of Interior  
P.O. Box 31394  
Billings, MT 59107-1394

  
Cindy G. Campbell  
Hearings Unit Legal Secretary