

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  
84577-s76H BY THOMAS AND JANINE )  
STELICK )

\* \* \* \* \*

On October 25, 1993, the Department Hearing Examiner issued a Proposal for Decision in this matter. The Proposal recommended granting Application for Beneficial Water Use Permit 84577-s76H.

A timely written exception and request for oral argument was received from Objectors John E. Notti, Jr. and Jo Ann Notti. A timely written exception was received from Objectors Tracey and Jenny Stewart. Applicant submitted a timely response to the exceptions.

Oral arguments on the exceptions to the Proposal for Decision in this matter were held before John E. Stults, Assistant Administrator of the Water Resources Division on January 25, 1994, in Missoula, Montana. In attendance at the oral arguments were Applicant Tom Stellick, Objector John Notti, and Objector Jenny Stewart. Applicant was accompanied by Lee Yelin, a private consultant.

Objectors Notti submitted a brief at the oral argument hearing. Applicant objected to the submission. The objection was overruled and the brief was accepted. Mont. Code Ann § 2-4-621(1) (1993). Applicant was provided with opportunity to file a response

**CASE # 84577**

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brief, and did so by facsimile transmission on February 25, 1994, followed by originals through surface mail on February 28, 1994.

Additional materials were submitted by each party for consideration in reaching a final decision in this matter. These materials, and the date they were received are: 1) A January 17, 1994, memorandum to Lee Yelin from Fisher & Associates, Consulting Aquatic Biologists, Missoula, MT, received February 28, 1994; 2) Statement of Qualifications, Land & Water Consulting, Inc., Missoula, MT, dated August 1992, received February 28, 1994; 3) Objectors' Motion to File a Response to Applicants' letter of 21 February 1994, received March 16, 1994; 4) Objectors Notti Response to Stellick Letter of 21 February 1994, received March 16, 1994; and, 5) Lee Yelin's business card accompanied by a document on Water Rights, Inc., stationery entitled "Overview" which appears to be an abstract of the company's qualifications. These materials go beyond the limit agreed to by the parties and established by the final decision-maker at the oral argument hearing. They appear to include new materials the parties would like to have had included as evidence. The record in this matter was closed by the hearing examiner prior to issuance of the Proposal for Decision. Therefore, no new evidence may be added to the record. For these reasons, the additional materials listed as items 1, 2, 4, and 5 above are rejected and have not been considered in reaching a final decision in this matter. Furthermore, Objector Nottis' Motion (item 3) is denied.

Applicant is required to prove the criteria for issuance of a permit by a preponderance of evidence. Mont. Code Ann. § 85-2-311 (1993). It is well established that the evidence must be substantial and credible. See Mont. Code Ann. § 85-2-311 (1991); Mont. Code Ann § 2-4-621(3) (1993); In re Application No. 77304-s40C by Roberts (1992). See also In re Application No. 80761-s40A by Pitsch (1993). Proof of beneficial use requires an applicant provide a preponderance of evidence the use of the water will benefit the appropriator, other persons, or the public. Mont. Code Ann. § 85-2-102(2)(a) (1993). Applicants must provide a preponderance of substantial credible evidence that the amount of water to be appropriated is reasonable for the purpose identified, and thus the amount of water is not wasteful. In re Application No. 81855-s41H by Martin and Ewing (1993); In re Application No. 77304-s40C by Roberts (1992); In re Application No. 54694-q410 by Crumpled Horn (1990); In re Application No. 50510-s76L by Meyer (1986); In re Application No. 56738-s76M by Brookside Estates (1986).

Upon thorough review of the entire record of this matter, there is no evidence about the specific amount of water relative to the specific requirements of the purpose. From the record it cannot be determined whether this short, one-time, diversion of a small amount of Sharrott Creek water is a reasonable means of oxygenating the water of the pond such that it provides a benefit to the appropriator, other persons, or the public. This is not a routine issue which can be dispatched with references to "customary practices," or to generally recognized technical or scientific

facts. Some specific information on the proposed purpose and proposed amount of water to be put to that purpose is needed. The only material in the record which approaches the issue of reasonable amount is the reference by Lee Yelin to general comments made to him by a biologist. Nothing of any specificity was stated, even in this most informal of allowable material.<sup>1</sup>

In Conclusion of Law 5 on the criterion of the appropriation being a reasonable amount, the hearing examiner states only that "there is no evidence on the record that Applicants would waste water." Proposal for Decision at 16. The absence of evidence the criterion would be violated does not meet the required standard of proof. Applicants did not establish the amount requested is reasonable and does not constitute waste. Therefore, the Conclusion of Law 5 must be modified to read:

5. The proposed uses, fish and wildlife, are beneficial uses. Mont. Code Ann. § 85-2-102(2) (1993). Applicants must provide a preponderance of substantial credible evidence that the amount of water to be appropriated is reasonable for the purpose identified and thus would not constitute a waste of water. See In re Application No. 81855-s41H by Martin and Ewing (1993); In re Application No. 77304-s40C by Roberts (1992); In re Application No. 54694-g410 by Crumpled Horn (1990); In re Application No. 50510-s76L by Meyer (1986); In re Application No. 56738-s76M by Brookside Estates (1986). There is no substantial, credible evidence in the record that the amount of water requested is reasonable and would not constitute a waste of water. See Findings of Fact 4, 5, 6, and 7.

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<sup>1</sup> There is a significant issue here about whether such uncorroborated and unsubstantiated hearsay rises to the level of evidence in the record of an administrative contested case. Surely it must carry very little weight. As to this final order, however, this hearsay material was only reviewed to determine whether it provides any specificity relative to the question of reasonable amount of water for the purpose. It does not.

**CASE # 84577**

**FILED**

Therefore, it is concluded that the criterion contained in Mont. Code Ann. § 85-2-311(1)(d) is not met.

As already stated, an applicant must meet all the statutory criteria in order for a permit to be issued. If any of the criteria are not met, the permit must be denied. Based upon the Findings of Fact and Conclusions of Law, all files and records herein, and the exceptions, the Department of Natural Resources and Conservation modifies the Proposed Order and makes the following:

**ORDER**

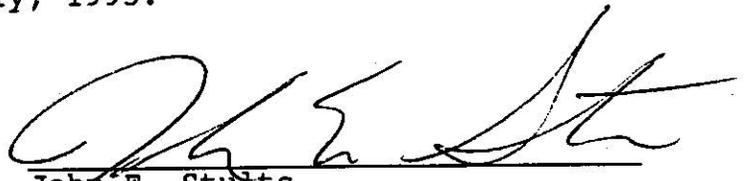
Application for Beneficial Water Use Permit 84577-s76H is denied.

**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 11<sup>th</sup> day of July, 1995.



John E. Stuitt,  
Assistant Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6606

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 12<sup>th</sup> day of July, 1995, as follows:

Thomas & Janine Stellick  
303 S. Kootenai Creek Rd  
Stevensville, MT 59870

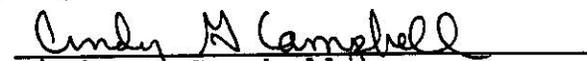
Tracy & Jenny Stewart  
3736 Salish Trail  
Stevensville, MT 59870

John E. & Jo Ann Notti  
121 S. Kootenai Rd  
Stevensville, MT 59870

Fred Robinson  
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Vivian A. Lighthizer,  
Hearing Examiner  
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1520 E. 6th Ave.  
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Curt Martin, Manager  
Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

  
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 ) AMENDED  
84577-s76H BY THOMAS AND JANINE ) PROPOSAL FOR DECISION  
STELICK )

\* \* \* \* \*

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 September 29, 1993, in Hamilton, Montana, to determine whether a permit should be granted to Thomas and Janine Stelick for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Thomas and Janine Stelick (Applicants) appeared at the hearing by and through Thomas Stelick.

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

Tom Gale, Water Commissioner, appeared at the hearing as a witness for Applicants.

William T. Gilleard appeared at the hearing as an interested person and was called by Applicants to testify.

Objectors Jenny Lee and Tracy Stewart appeared at the hearing pro se.

Objectors Jo Ann and John E. Notti appeared at the hearing pro se.

**CASE # 84577**

**FILMED**

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Wes McAlpin and Karl Uhlig, both Water Right Specialists with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Several other interested persons attended the hearing as observers.

#### EXHIBITS

Applicants offered no exhibits for inclusion into the record.

Objectors Notti offered two exhibits for inclusion into the record, both were accepted into the record without objection.

Objectors Notti's Exhibit 1a consists of copies of pages 10 and 11 of the *Sharrott Creek Closure*, a water availability report by Larry Schock, Civil Engineering Specialist in the Department's Missoula Office.

Objectors Notti's Exhibit 1b is a copy of Stellick's flow measurements from the record *In re Application 77283-s76H* by Stellick (1992).

Objectors Stewart introduced four exhibits which were accepted into the record without objection.

Objectors Stewart's Exhibit 1 consists of four pages. There are three photographs attached to one page with an explanation of the photographs written in beside the middle photograph. There are two photographs attached to another single page. The explanation of the photographs is written beside the top photograph on this page. The third page is a copy of a map which

shows the drainages within Townships 9 and 10 North and Ranges 20, 21, and 22 West. The fourth page is a copy of a map of "Cherette Creek and Vicinity" in Ravalli County produced by M.D. Kippen, Engineer, on May 21, 1921.

Objectors Stewart's Exhibit 2 consists of eight pages and is a copy of the Findings of Fact, Conclusions of Law and Decree, in *O'Brien and Couch v. Weicher, etal.* (1922)

Objectors Stewart's Exhibit 3 consists of 3 pages and contains comments of other users of Sharrott Creek waters. This exhibit was presented by Objector Cotton at the hearing *In re Application 77283-s76H by Stellick* (1992).

Objectors Stewart's Exhibit 4 consists of a two-page Notice of Public Hearing *In the matter of the proposed adoption of a new rule to reject, modify or condition permit applications in the Sharrott Creek Basin* and a two-page Notice of Adoption of ARM 36.12.1017 *Sharrott Creek Basin Closure In the matter of new rule to reject, modify, or condition permit applications in the Sharrott Creek Basin* (1993) (the Sharrott Creek Closure).

#### PRELIMINARY MATTERS

At the beginning of the hearing, Mr. Stellick requested the Hearing Examiner take official notice of the entire record of the Sharrott Creek Closure<sup>1</sup> and *In re Application 77283-s76H by*

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<sup>1</sup>Although Applicant said "the Larson Creek Closure" in his request, it is clear to the Hearing Examiner that he meant the Sharrott Creek Closure since Larson Creek nor any other creek or basin in the area has been closed by rule except the Sharrott Creek Basin. Therefore, the Hearing Examiner takes official notice of the Sharrott Creek Closure. Note: There is a Larson Creek Ground Water Closure, but there is no surface water closure

Stellick (1992) which she agreed to do. The Hearing Examiner also takes official notice of the Department's records, specifically the Sharrott Creek water rights and stock water decrees issued by the Water Court.

Mr. Stellick requested Lee Yelin be designated an expert witness in the field of water rights. Mr. Notti objected to such designation stating that Mr. Yelin has been Applicants' consultant for over two years and that he would be a biased witness. Mr. Notti also contended that Mont. Code Ann. Title 37 requires that anyone involved in the planning of water or the consulting in planning of water must be a licensed engineer. The Hearing Examiner has reviewed Mont. Code Ann. Title 37 (1993) and found no provision that a water rights consultant must be a licensed engineer. Mont. Code Ann. Title 37, Chapter 42 speaks to the qualifications necessary to be a licensed water treatment plant operator. Chapter 43 speaks to the qualifications necessary to be a licensed water well contractor. Chapter 67 speaks to the qualifications necessary to be a licensed engineer and/or surveyor. Mont. Code Ann. § 37-67-101(5) defines the "practice of engineering" as being

" . . . any service or creative work the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, planning the use of water, . . . ."

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on Larson Creek.

Mr. Yelin is not designing diversion works nor ditches, nor is he planning a water system. He is simply assisting Applicants to obtain water rights for their proposed water use. Of course, he has a vested interest in the testimony as would any other paid consultant. It is extremely rare for a paid consultant to testify against his employer at an administrative hearing. Nevertheless, Mr. Yelin, because of his extended knowledge of and experience in water rights and his education, is an expert witness in the field of water rights.

Mr. Notti argued Applicants' existing ground water reservoir is not a legal pond and made a motion that the Department review the Water Right Certificate granted for Applicants' ground water pit. Applicant objected to that motion. According to Mont. Code Ann. § 85-2-306(1) (1993),

Ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works or, if another person has rights in the ground water development works, the written consent of the person with those property rights. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it.

A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refileing a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

Mont. Code Ann. §§ 85-2-102(11) and 85-2-501(3) (1993) define "ground water" as "any water that is beneath the ground surface." Applicants dug into the ground and the water flowed into the pit through the bottom and sides of the pit. So much water flowed in so rapidly that it had to be pumped out in order to complete the pit. Mont. Code Ann. § 85-2-102(24) (1993) defines "well" as "any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn." Mr. Notti's statement that a well is encased is erroneous. Some wells are encased, but not all wells are encased. A ground water pit falls under the definition of a well and upon submission of a complete and correct notice of completion of ground water development for a pit such as Applicants' pit, the Department must, it has no alternative, issue a Certificate of Water Right. For all the reasons and definitions stated above, one must conclude Applicants' pit is not illegal and Objector Notti's motion is **DENIED**.

Mr. Notti's contention that the impoundment falls under Mont. Code Ann. § 85-2-306(3) (1993) is completely unfounded. In order for the reservoir to fall under that part of the statute, the entire source would be surface water to be used only for stock water, neither of which is the case here. The fact that Applicants propose to "top off" the pond with surface water to oxygenate the ground water for fish does not change that.

Mr. Notti mentioned several times that Mont. Code Ann. § 85-2-311 requires an applicant to produce independent hydrologic or other evidence. The 53rd Legislature amended Mont. Code Ann. § 85-2-311 so that an applicant must prove by "a preponderance of evidence" the criteria for issuance of a permit are met. In order to meet the preponderance of evidence standard,

" . . . 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. geologic survey, or the U.S. soil conservation service and other specific field studies."

Mont. Code Ann. § 85-2-311(5) (1993). This amendment was to be applied retroactively to all applications and objections pending on April 16, 1993, which includes the application in the instant case. This information is to be submitted with the application.

There was much consternation on the objectors' part that the Department allowed the instant application to proceed after the Sharrott Creek closure petition was filed. A basin is not closed to applications for beneficial water use permits until the day after the adopted rule is published in the Montana Administrative

Register. Mont. Code Ann. § 2-4-306(4) (1993). The Sharrott Creek Basin was closed on July 16, 1993. The instant application was received by the Department on January 13, 1993. The Department is required by law to process a correct and complete application received before the basin is closed.

Prior to the hearing, a site visit was conducted. Those in attendance were Jenny Lee and Tracy Stewart with their daughter; John and Jo Ann Notti; Lee Yelin; Thomas Stellick; Wes McAlpin; Karl Uhlig; Cindy Campbell; and the Hearing Examiner.

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 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. Thomas and Janine Stellick duly filed Application for Beneficial Water Use Permit 84577-s76H with the Department on January 13, 1993. (Department file.)

3. Pertinent portions of the application were published in the *Ravalli Republic* on April 7, 1993.

Two timely objections to the application were received by the Department. Applicants were notified of the timely objection

by a letter dated May 7, 1993. (Department file.)

4. Applicants seek to appropriate 100.00 gallons per minute up to 1.30 acre-feet of the waters of Sharrott Creek by means of a five horse-power portable pump at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 29, Township 9 North, Range 20 West, Ravalli County, for fish and wildlife. The proposed period of appropriation and use is from March 15 through May 15, inclusive of each year. However, the actual proposed period of appropriation is 72 hours during spring high water runoff within the aforementioned months. The water would be pumped through a four-inch hose into an existing offstream ground water pit to oxygenate the water for the fish that would be stocked in the pond and to "top off" the pond for use by wildlife, mostly water fowl. In all likelihood, the period of appropriation would never be 72 hours. Applicants calculated how long it would take to fill the pit if it were completely dry and concluded it would take 72 hours. However, when the pit filled with ground water as it was being dug, it became evident the pit will most likely never be completely dry. Applicants stated in their application that if a legitimate call for water were received while they were diverting from Sharrott Creek, they would cease appropriating. (Department file and testimony of Lee Yelin and Thomas Stellick.)

5. The deepest point of the existing pit is approximately 16 feet. A trickle tube has been installed in the pond; however, the trickle tube currently protrudes from the surface of the water approximately two feet. In order to make the trickle tube

work, Applicants plan to raise the dam<sup>2</sup> two feet higher than the top of the trickle tube. The trickle tube will route excess water into Sharrott Creek. An emergency spillway is located on the southern end of the dam and water was flowing through the spillway on the day of the hearing. Water that flows through the spillway out of the pond goes into Sharrott Creek. (Testimony of Thomas Stellick and Lee Yelin.)

6. The pond was excavated in the latter part of December of 1992 and the early part of January of 1993 leaving an island in the pond to provide a safe area for water fowl. Ground water filled the pond to approximately six feet from the top after completion of the excavation. In the time since the pond was excavated, Applicants have observed a fluctuation of approximately four to five feet in the ground water. The ground water rises during the irrigation season and recedes during the winter. When the pond is completed it will be stocked with trout. (Department file and testimony of Thomas Stellick and Lee Yelin.)

7. Objectors Notti challenged the beneficial use of the water, claiming to have evidence that the water would not stay in the pond but would seep away. However, they presented no evidence to substantiate that claim. It is not likely to seep away through the dam because the dam has been clay-lined. Some of the soil into which the excavation was made is somewhat porous

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<sup>2</sup>The fill material from the pit was placed on the lower side of the slope in which the pond was excavated, creating a dam.

as demonstrated by the ground water rising in the pond. However, Applicants would still benefit from the appropriation as it would oxygenate the ground water for the fish. Applicants consulted a fisheries expert who advised them the addition of Sharrott Creek waters in the spring would bring the oxygen level up after the winter freeze. The water would not be wasted since it would return to Sharrott Creek which is immediately downgradient of the pond. (Department file and records and testimony of John Notti, Lee Yelin, and Thomas Stellick.)

8. There is an irrigation ditch (the O'Brien Ditch) to the south and upgradient of the pond. The pond side of the irrigation ditch currently leaks and the seepage water flows into the pond. Occasionally, water will overtop the ditch when it is filled to capacity and one of the irrigators stops irrigating. Applicants are not seeking to appropriate that seepage water nor do they want the ditch to continue seeping water onto their property. The ditch did not seep until the pond was excavated and some very large rocks were broken. William Gilleard has been attempting to stop the leakage, but has not been successful. Applicant proposes to stop the leakage from the ditch if the owner is not successful in his attempt. (Testimony of William Gilleard, Lee Yelin, and Thomas Stellick.)

9. In April of 1993, the pond overtopped the dam. Water was flowing into the pond so rapidly due to the extremely wet weather, the ditch seepage, and the overtopping of the ditch that Applicants had to dig a ditch to release the excess water. The

excess water washed out Applicants' road depositing silt in Sharrott Creek which was then deposited in the Stewarts' diversion works. Applicants believe there will be no silting problem when the dam is completed because the excess water will flow out through the trickle tube and there will be no leakage from the irrigation ditch. Although water may occasionally overtop the ditch, the excess water will not be silt-ladened as it was with the excess water when Applicants had to dig a release ditch, which in itself would cause some silting, and when it washed out Applicants' road. (Stewart's Exhibit 1 and testimony of Jenny Lee Stewart, Thomas Stellick, and Lee Yelin.)

10. Although no dates designating the period of use were decreed in the Sharrott Creek Decree, the water rights claimants set forth periods of use in their water rights claims. There are, according to the Sharrott Creek Closure record, 27 water users downstream from Applicants' proposed point of diversion. Of those water users, only two claimed year round use: 76H-W105220 by Bruce and Patsy Nelson to water 20 head of cattle or horses and 76H-W015419 by William T. Gilleard to water four head of cattle, two horses, and seven sheep. Of the remaining rights, eight water rights claims list a period of use beginning on April 1, seven for irrigation and one for stock water. The stock water claim is 76H-W012094 by DeWinter to water five head of cattle. The irrigation claims are: 76H-W105222 by Nelson for a flow rate of .25 cubic foot per second or 112.20 gallons per minute, 76H-W010148 by DeWinter for a flow rate of .13 cubic foot or 58.34

gallons per minute, 76H-W111158 by Stewart for a flow rate of .12 cubic foot per second or 53.86 gallons per minute, 76H-W108824 by Stacy for a flow rate of .04 cubic foot per second or 17.95 gallons per minute, 76H-W111159 by Stewart for a flow rate of .04 cubic foot per second or 17.95 gallons per minute, 76H-W105368 by Stacy for a flow rate of .02 cubic foot per second or 8.98 gallons per minute, and 76H-W005753 by Roy for a flow rate of .09 cubic foot per second or 40.39 gallons per minute. These flow rates total 0.69 cubic foot per second or 309.67 gallons per minute. Twelve water rights claims list a period of use beginning April 15. Ten of those are irrigation claims claiming a total flow rate of 5.07 cubic feet per second or 2275.42 gallons per minute and two are stock water. Combined with the early users, the flow rate would be 5.76 cubic feet per second or about 2585.09 gallons per minute. The remaining six water right claims list a period of use beginning May 1. Of the six, four are irrigation claims claiming a total flow rate of .94 cubic foot per second or 421.87 gallons per minute. Combined with the other two groups of users, the flow rate would be 6.7 cubic feet per second or 3006.96 gallons per minute. (Sharrott Creek Closure and Department records.)

11. The Water Court has consistently decreed stock water claims for stock drinking directly from a stream with no flows and no volumes, rather it has decreed 30 gallons per day per animal unit so no stock water flows were included in the above calculations. (Department records.)

12. Mr. Yelin measured Sharrott Creek at a point approximately 50 feet upstream of the proposed point of diversion. There are no diversions within the 50 foot reach of the stream to cause the flow rate to change before it reaches the proposed point of diversion. The flow rate in Sharrott Creek was 520 gallons per minute on March 25, 1991. On April 1, 1991, the flow rate was 842 gallons per minute and on March 16, 1992, the flow rate in Sharrott Creek was 589 gallons per minute. Applicants presented reports, charts, and graphs with their application estimating stream flows that show the peak runoff occurs over May and June; however, no flow measurements taken at or near the point of diversion for the month of May were presented. (Testimony of Lee Yelin, Department file and records, and Notti's Exhibit 1B.)

13. Applicant owns the proposed place of use. (Testimony of Thomas Stellick and Department file.)

14. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved in the source of supply with the exception of a permit issued for nonconsumptive hydropower use at a point several miles upstream from Applicants' proposed point of diversion. (Testimony of Lee Yelin and Department 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 Findings of Fact 2 and 3.

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

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 that the criteria in subsections (1)(g) through (1)(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 that the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable, may not be met. For the criterion set forth in subsection (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. No valid objections to this application were filed relative to subsections (1)(g), (1)(h), or (1)(i). Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (1)(h), or (1)(i).

There was testimony concerning silting in Sharrott Creek; however, Applicants presented testimony to explain that occurrence and that it will not recur. See Finding of Fact 9.

5. The proposed uses, fish and wildlife, are beneficial uses. Mont. Code Ann. § 85-2-102(2) (1993). The water would be used beneficially and there is no evidence on the record that Applicants would waste water. See Findings of Fact 4, 5, 6, and

7.

6. Applicants have not 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 during the period in which Applicants seek to appropriate nor that during the period in which they seek to appropriate, water is reasonably available. However, 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 water is reasonably available during the period of March 15 through April 14. After April 14, the significant difference between the measured flows and the record of existing rights, combined with statements about shortages of water experienced by prior appropriators, raise doubts about water availability which are substantial enough that Applicants' evidence is not a clear preponderance. See Findings of Fact 4, 10, 11, and 12.

7. Applicants have proven by a preponderance of evidence the water rights of prior appropriators will not be adversely affected. By limiting their period of diversion to the period when few water users are appropriating and there are sufficient waters to supply Applicants' project and the downstream users, the possibility of an adverse effect is virtually eliminated. See Findings of Fact 4, 10, 11, and 12.

8. Applicants 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 13.

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.

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 to Thomas and Janine Stellick for Application for Beneficial Water Use Permit 84577-s76H to appropriate 100.00 gallons per minute up to 1.30 acre-feet of the waters of Sharrott Creek by means of a five horse-power portable pump at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 29, Township 9 North, Range 20 West, Ravalli County, for fish and wildlife. The place of use shall be an offstream reservoir with a capacity of 1.3 acre-feet located in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 29, Township 9 North, Range 20 West, Ravalli. The period of appropriation and use shall be from March 15 through April 14, 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. The water right granted by this permit is subject to the authority of the 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 Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

C. The Permittee 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 by November 30th and/or upon request to the Water Resources Regional Office, 1610 South 3rd St. West, Town and Country Shopping Center, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

D. This permit is associated with Water Right No. 76H-C083955. They share the place of storage.

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.

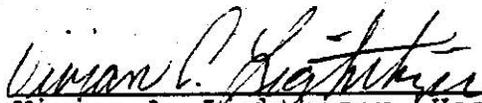
F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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 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 25<sup>th</sup> day of October, 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 25<sup>th</sup> day of October, 1993, as follows:

**CASE # 84577**

**FILMED**

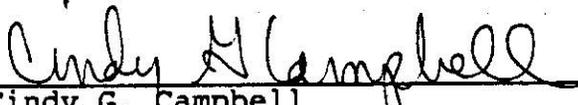
JAN 04 1994

Thomas & Janine Stellick  
303 S. Kootenai Creek Rd  
Stevensville, MT 59870

Tracy & Jenny Stewart  
3736 Salish Trail  
Stevensville, MT 59870

John E. & Jo Ann Notti  
121 S. Kootenai Rd.  
Stevensville, MT 59870

Curt Martin, Manager  
Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

  
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  
84577-s76H BY THOMAS AND JANINE     )  
STELICK     )

\* \* \* \* \*

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 September 29, 1993, in Hamilton, Montana, to determine whether a permit should be granted to Thomas and Janine Stellick for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Thomas and Janine Stellick (Applicants) appeared at the hearing by and through Thomas Stellick.

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

Tom Gale, Water Commissioner, appeared at the hearing as a witness for Applicants.

William T. Gilleard appeared at the hearing as an interested person and was called by Applicants to testify.

Objectors Jenny Lee and Tracy Stewart appeared at the hearing pro se.

Objectors Jo Ann and John E. Notti appeared at the hearing pro se.

Wes McAlpin and Karl Uhlig, both Water Right Specialists

**CASE # 84577**

**FILMED**

JAN 04 1994

with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Several other interested persons attended the hearing as observers.

#### EXHIBITS

Applicants offered no exhibits for inclusion into the record.

Objectors Notti offered two exhibits for inclusion into the record, both were accepted into the record without objection.

Objectors Notti's Exhibit 1a consists of copies of pages 10 and 11 of the *Sharrott Creek Closure*, a water availability report by Larry Schock, Civil Engineering Specialist in the Department's Missoula Office.

Objectors Notti's Exhibit 1b is a copy of Stellick's flow measurements from the record *In re Application 77283-s76H* by Stellick (1992).

Objectors Stewart introduced four exhibits which were accepted into the record without objection.

Objectors Stewart's Exhibit 1 consists of four pages. There are three photographs attached to one page with an explanation of the photographs written in beside the middle photograph. There are two photographs attached to another single page. The explanation of the photographs is written beside the top photograph on this page. The third page is a copy of a map which shows the drainages within Townships 9 and 10 North and Ranges

20, 21, and 22 West. The fourth page is a copy of a map of "Cherette Creek and Vicinity" in Ravalli County produced by M.D. Kippen, Engineer, on May 21, 1921.

Objectors Stewart's Exhibit 2 consists of eight pages and is a copy of the Findings of Fact, Conclusions of Law and Decree, in *O'Brien and Couch v. Weicher, et al.* (1922)

Objectors Stewart's Exhibit 3 consists of 3 pages and contains comments of other users of Sharrott Creek waters. This exhibit was presented by Objector Cotton at the hearing *In re Application 77283-s76H by Stellick* (1992).

Objectors Stewart's Exhibit 4 consists of a two-page Notice of Public Hearing *In the matter of the proposed adoption of a new rule to reject, modify or condition permit applications in the Sharrott Creek Basin* and a two-page Notice of Adoption of ARM 36.12.1017 Sharrott Creek Basin Closure *In the matter of new rule to reject, modify, or condition permit applications in the Sharrott Creek Basin* (1993) (the Sharrott Creek Closure).

#### PRELIMINARY MATTERS

At the beginning of the hearing, Mr. Stellick requested the Hearing Examiner take official notice of the entire record of the Sharrott Creek Closure<sup>1</sup> and *In re Application 77283-s76H by*

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<sup>1</sup>Although Applicant said "the Larson Creek Closure" in his request, it is clear to the Hearing Examiner that he meant the Sharrott Creek Closure since Larson Creek nor any other creek or basin in the area has been closed by rule except the Sharrott Creek Basin. Therefore, the Hearing Examiner takes official notice of the Sharrott Creek Closure. Note: There is a Larson Creek Ground Water Closure, but there is no surface water closure on Larson Creek.

Stellick (1992) which she agreed to do. The Hearing Examiner also takes official notice of the Department's records, specifically the Sharrott Creek water rights and stock water decrees issued by the Water Court.

Mr. Stellick requested Lee Yelin be designated an expert witness in the field of water rights. Mr. Notti objected to such designation stating that Mr. Yelin has been Applicants' consultant for over two years and that he would be a biased witness. Mr. Notti also contended that Mont. Code Ann. Title 37 requires that anyone involved in the planning of water or the consulting in planning of water must be a licensed engineer. The Hearing Examiner has reviewed Mont. Code Ann. Title 37 (1993) and found no provision that a water rights consultant must be a licensed engineer. Mont. Code Ann. Title 37, Chapter 42 speaks to the qualifications necessary to be a licensed water treatment plant operator. Chapter 43 speaks to the qualifications necessary to be a licensed water well contractor. Chapter 67 speaks to the qualifications necessary to be a licensed engineer and/or surveyor. Mont. Code Ann. § 37-67-101(5) defines the "practice of engineering" as being

". . . any service or creative work the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, planning the use of water, . . . ."

Mr. Yelin is not designing diversion works nor ditches, nor is he planning a water system. He is simply assisting Applicants to

obtain water rights for their proposed water use. Of course, he has a vested interest in the testimony as would any other paid consultant. It is extremely rare for a paid consultant to testify against his employer at an administrative hearing. Nevertheless, Mr. Yelin, because of his extended knowledge of and experience in water rights and his education, is an expert witness in the field of water rights.

Mr. Notti argued Applicants' existing ground water reservoir is not a legal pond and made a motion that the Department review the Water Right Certificate granted for Applicants' ground water pit. Applicant objected to that motion. According to Mont. Code Ann. § 85-2-306(1) (1993),

Ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works or, if another person has rights in the ground water development works, the written consent of the person with those property rights. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed.

A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refileing a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

Mont. Code Ann. §§ 85-2-102(11) and 85-2-501(3) (1993) define "ground water" as "any water that is beneath the ground surface." Applicants dug into the ground and the water flowed into the pit through the bottom and sides of the pit. So much water flowed in so rapidly that it had to be pumped out in order to complete the pit. Mont. Code Ann. § 85-2-102(24) (1993) defines "well" as "any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn." Mr. Notti's statement that a well is encased is erroneous. Some wells are encased, but not all wells are encased. A ground water pit falls under the definition of a well and upon submission of a complete and correct notice of completion of ground water development for a pit such as Applicants' pit, the Department must, it has no alternative, issue a Certificate of Water Right. For all the reasons and definitions stated above, one must conclude Applicants' pit is not illegal and Objector Notti's motion is DENIED.

order for the reservoir to fall under that part of the statute, the entire source would be surface water to be used only for stock water, neither of which is the case here. The fact that Applicants propose to "top off" the pond with surface water to oxygenate the ground water for fish does not change that.

Mr. Notti mentioned several times that Mont. Code Ann. § 85-2-311 requires an applicant to produce independent hydrologic or other evidence. The 53rd Legislature amended Mont. Code Ann. § 85-2-311 so that an applicant must prove by "a preponderance of evidence" the criteria for issuance of a permit are met. In order to meet the preponderance of evidence standard,

" . . . 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. geologic survey, or the U.S. soil conservation service and other specific field studies."

Mont. Code Ann. § 85-2-311(5) (1993). This amendment was to be applied retroactively to all applications and objections pending on April 16, 1993, which includes the application in the instant case. This information is to be submitted with the application.

There was much consternation on the objectors' part that the Department allowed the instant application to proceed after the Sharrott Creek closure petition was filed. A basin is not closed to applications for beneficial water use permits until the day after the adopted rule is published in the Montana Administrative Register. Mont. Code Ann. § 2-4-306(4) (1993). The Sharrott Creek Basin was closed on July 16, 1993. The instant application

was received by the Department on January 13, 1993. The Department is required by law to process a correct and complete application received before the basin is closed.

Prior to the hearing, a site visit was conducted. Those in attendance were Jenny Lee and Tracy Stewart with their daughter; John and Jo Ann Notti; Lee Yelin; Thomas Stellick; Wes McAlpin; Karl Uhlig; Cindy Campbell; and the Hearing Examiner.

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 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. Thomas and Janine Stellick duly filed Application for Beneficial Water Use Permit 84577-s76H with the Department on January 13, 1993. (Department file.)

3. Pertinent portions of the application were published in the *Ravalli Republic* on April 7, 1993.

Two timely objections to the application were received by the Department. Applicants were notified of the timely objection by a letter dated May 7, 1993. (Department file.)

4. Applicants seek to appropriate 100.00 gallons per minute

up to 1.30 acre-feet of the waters of Sharrott Creek by means of a five horse-power portable pump at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 29, Township 9 North, Range 20 West, Ravalli County, for fish and wildlife. The proposed period of appropriation and use is from March 15 through May 15, inclusive of each year.

However, the actual proposed period of appropriation is 72 hours during spring high water runoff within the aforementioned months. The water would be pumped through a four-inch hose into an existing offstream ground water pit to oxygenate the water for the fish that would be stocked in the pond and to "top off" the pond for use by wildlife, mostly water fowl. In all likelihood, the period of appropriation would never be 72 hours. Applicants calculated how long it would take to fill the pit if it were completely dry and concluded it would take 72 hours. However, when the pit filled with ground water as it was being dug, it became evident the pit will most likely never be completely dry. Applicants stated in their application that if a legitimate call for water were received while they were diverting from Sharrott Creek, they would cease appropriating. (Department file and testimony of Lee Yelin and Thomas Stellick.)

5. The deepest point of the existing pit is approximately 16 feet. A trickle tube has been installed in the pond; however, the trickle tube currently protrudes from the surface of the water approximately two feet. In order to make the trickle tube

work, Applicants plan to raise the dam' two feet higher than the top of the trickle tube. The trickle tube will route excess water into Sharrott Creek. An emergency spillway is located on the southern end of the dam and water was flowing through the spillway on the day of the hearing. Water that flows through the spillway out of the pond goes into Sharrott Creek. (Testimony of Thomas Stellick and Lee Yelin.)

6. The pond was excavated in the latter part of December of 1992 and the early part of January of 1993 leaving an island in the pond to provide a safe area for water fowl. Ground water filled the pond to approximately six feet from the top after completion of the excavation. In the time since the pond was excavated, Applicants have observed a fluctuation of approximately four to five feet in the ground water. The ground water rises during the irrigation season and recedes during the winter. When the pond is completed it will be stocked with trout. (Department file and testimony of Thomas Stellick and Lee Yelin.)

7. Objectors Notti challenged the beneficial use of the water, claiming to have evidence that the water would not stay in the pond but would seep away. However, they presented no evidence to substantiate that claim. It is not likely to seep away through the dam because the dam has been clay-lined. Some of the soil into which the excavation was made is somewhat porous

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<sup>1</sup>The fill material from the pit was placed on the lower side of the slope in which the pond was excavated, creating a dam.

as demonstrated by the ground water rising in the pond. However, Applicants would still benefit from the appropriation as it would oxygenate the ground water for the fish. Applicants consulted a fisheries expert who advised them the addition of Sharrott Creek waters in the spring would bring the oxygen level up after the winter freeze. The water would not be wasted since it would return to Sharrott Creek which is immediately downgradient of the pond. (Department file and records and testimony of John Notti, Lee Yelin, and Thomas Stellick.)

8. There is an irrigation ditch (the O'Brien Ditch) to the south and upgradient of the pond. The pond side of the irrigation ditch currently leaks and the seepage water flows into the pond. Occasionally, water will overtop the ditch when it is filled to capacity and one of the irrigators stops irrigating. Applicants are not seeking to appropriate that seepage water nor do they want the ditch to continue seeping water onto their property. The ditch did not seep until the pond was excavated and some very large rocks were broken. William Gilleard has been attempting to stop the leakage, but has not been successful. Applicant proposes to stop the leakage from the ditch if the owner is not successful in his attempt. (Testimony of William Gilleard, Lee Yelin, and Thomas Stellick.)

9. In April of 1993, the pond overtopped the dam. Water was flowing into the pond so rapidly due to the extremely wet weather, the ditch seepage, and the overtopping of the ditch that Applicants had to dig a ditch to release the excess water. The

excess water washed out Applicants' road depositing silt in Sharrott Creek which was then deposited in the Stewarts' diversion works. Applicants believe there will be no silting problem when the dam is completed because the excess water will flow out through the trickle tube and there will be no leakage from the irrigation ditch. Although water may occasionally overtop the ditch, the excess water will not be silt-ladened as it was with the excess water when Applicants had to dig a release ditch, which in itself would cause some silting, and when it washed out Applicants' road. (Stewart's Exhibit 1 and testimony of Jenny Lee Stewart, Thomas Stellick, and Lee Yelin.)

10. Although no dates designating the period of use were decreed in the Sharrott Creek Decree, the water rights claimants set forth periods of use in their water rights claims. There are, according to the Sharrott Creek Closure record, 27 water users downstream from Applicants' proposed point of diversion. Of those water users, only two claimed year round use: 76H-W105220 by Bruce and Patsy Nelson to water 20 head of cattle or horses and 76H-W015419 by William T. Gillear to water four head of cattle, two horses, and seven sheep. Of the remaining rights, eight water rights claims list a period of use beginning on April 1, seven for irrigation and one for stock water. The stock water claim is 76H-W012094 by DeWinter to water five head of cattle. The irrigation claims are: 76H-W105222 by Nelson for a flow rate of .25 cubic foot per second or 112.20 gallons per minute, 76H-W010148 by DeWinter for a flow rate of .13 cubic foot or 58.34

gallons per minute, 76H-W111158 by Stewart for a flow rate of .12 cubic foot per second or 53.86 gallons per minute, 76H-W108824 by Stacy for a flow rate of .04 cubic foot per second or 17.95 gallons per minute, 76H-W111159 by Stewart for a flow rate of .04 cubic foot per second or 17.95 gallons per minute, 76H-W105368 by Stacy for a flow rate of .02 cubic foot per second or 8.98 gallons per minute, and 76H-W005753 by Roy for a flow rate of .09 cubic foot per second or 40.39 gallons per minute. These flow rates total 0.69 cubic foot per second or 309.67 gallons per minute. Twelve water rights claims list a period of use beginning April 15. Ten of those are irrigation claims claiming a total flow rate of 5.07 cubic feet per second or 2275.42 gallons per minute and two are stock water. Combined with the early users, the flow rate would be 5.76 cubic feet per second or about 2585.09 gallons per minute. The remaining six water right claims list a period of use beginning May 1. Of the six, four are irrigation claims claiming a total flow rate of .94 cubic foot per second or 421.87 gallons per minute. Combined with the other two groups of users, the flow rate would be 6.7 cubic feet per second or 3006.96 gallons per minute. (Sharrott Creek Closure and Department records.)

11. The Water Court has consistently decreed stock water claims for stock drinking directly from a stream with no flows and no volumes, rather it has decreed 30 gallons per day per animal unit so no stock water flows were included in the above calculations. (Department records.)

12. Mr. Yelin measured Sharrott Creek at a point approximately 50 feet upstream of the proposed point of diversion. There are no diversions within the 50 foot reach of the stream to cause the flow rate to change before it reaches the proposed point of diversion. The flow rate in Sharrott Creek was 520 gallons per minute on March 25, 1991. On April 1, 1991, the flow rate was 842 gallons per minute and on March 16, 1992, the flow rate in Sharrott Creek was 589 gallons per minute. Applicants presented reports, charts, and graphs with their application estimating stream flows that show the peak runoff occurs over May and June; however, no flow measurements taken at or near the point of diversion for the month of May were presented. (Testimony of Lee Yelin, Department file and records, and Notti's Exhibit 1B.)

13. Applicant owns the proposed place of use. (Testimony of Thomas Stellick and Department file.)

14. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved in the source of supply with the exception of a permit issued for nonconsumptive hydropower use at a point several miles upstream from Applicants' proposed point of diversion. (Testimony of Lee Yelin and Department 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 Findings of Fact 2 and 3.

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

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 that the criteria in subsections (1)(g) through (1)(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 that the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable, may not be met. For the criterion set forth in subsection (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. No valid objections to this application were filed relative to subsections (1)(g), (1)(h), or (1)(i). Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (1)(h), or (1)(i).

There was testimony concerning silting in Sharrott Creek; however, Applicants presented testimony to explain that occurrence and that it will not recur. See Finding of Fact 9.

5. The proposed uses, fish and wildlife, are beneficial uses. Mont. Code Ann. § 85-2-102(2) (1993). The water would be used beneficially and there is no evidence on the record that Applicants would waste water. See Findings of Fact 4, 5, 6, and

7.

6. Applicants have not 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 during the period in which Applicants seek to appropriate nor that during the period in which they seek to appropriate, water is reasonably available. However, 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 water is reasonably available during the period of March 15 through April 14. After April 14, the significant difference between the measured flows and the record of existing rights, combined with statements about shortages of water experienced by prior appropriators, raise doubts about water availability which are substantial enough that Applicants' evidence is not a clear preponderance. See Findings of Fact 4, 10, 11, and 12.

7. Applicants have proven by a preponderance of evidence the water rights of prior appropriators will not be adversely affected. By limiting their period of diversion to the period when few water users are appropriating and there are sufficient waters to supply Applicants' project and the downstream users, the possibility of an adverse effect is virtually eliminated. See Findings of Fact 4, 10, 11, and 12.

8. Applicants 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 13.

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.

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 to Thomas and Janine Stellick for Application for Beneficial Water Use Permit 84577-s76H to appropriate 100.00 gallons per minute up to 1.30 acre-feet of the waters of Sharrott Creek by means of a five horse-power portable pump at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 29, Township 9 North, Range 20 West, Ravalli County, for fish and wildlife. The place of use shall be an offstream reservoir with a capacity of 1.3 acre-feet located in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 29, Township 9 North, Range 20 West, Ravalli. The period of appropriation and use shall be from March 15 through April 14, 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. The water right granted by this permit is subject to the authority of the 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 Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

C. The Permittee 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 by November 30th and/or upon request to the Water Resources Regional Office, 1610 South 3rd St. West, Town and Country Shopping Center, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

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 Section 85-2-424, MCA.

E. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's 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.

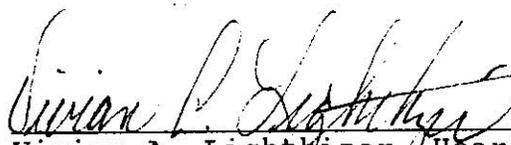
NOTICE

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 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 21<sup>ST</sup> day of October, 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 21<sup>ST</sup> day of October, 1993, as follows:

Thomas & Janine Stellick  
303 S. Kootenai Creek Rd  
Stevensville, MT 59870

Tracy & Jenny Stewart  
3736 Salish Trail  
Stevensville, MT 59870

Curt Martin, Manager  
Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

John E. & Jo Ann Notti  
121 S. Kootenai Rd.  
Stevensville, MT 59870

  
Cindy G. Campbell  
Hearings Unit Legal Secretary