

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
87074-s76H BY LEE C. JUSTICE AND)
ROBERT J. POPE)

* * * * *

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 September 28, 1994, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 87074-s76H by Lee C. Justice and Robert J. Pope 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.

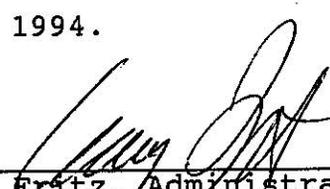
If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make

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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 28 day of October, 1994.



Gary Eritz, 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 31ST day of October, 1994 as follows:

Lee C. Justice
Robert J. Pope
2133 Lost Horse Trail
Hamilton, MT 59840

Randall S. Say
16788 Butternut Circle
Fountain Valley, CA 92708

Charlos Heights Irrigation
District
& Margaret Tavenner
Hayes Creek Rd.
Hamilton, MT 59840

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)

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



Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
87074-s76H BY LEE C. JUSTICE AND)
ROBERT J. POPE)

* * * * *

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 8, 1994, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Lee C. Justice and Robert J. Pope for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Lee C. Justice and Robert J. Pope appeared at the hearing by and through Robert J. Pope.

Objector Charlos Heights Irrigation District (Charlos) appeared at the hearing by and through its commissioners, Leonard Lindquist, James Ruark, and Robert Banner.

Objector Randall S. Say appeared at the hearing by and through Joe Schofield.

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

EXHIBITS

Applicants offered no exhibits for inclusion in the record.

Objector Charlos offered five exhibits for inclusion in the

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record. All were accepted without objection.

Objector Charlos' Exhibit 1 consists of seven pages of measurements of Lost Horse Creek water turned into Charlos' ditches in 1988.

Objector Charlos' Exhibit 2 consists of seven pages of water measurements of Lost Horse Creek water turned into Charlos' ditches in 1989.

Objector Charlos' Exhibit 3 consists of four pages of water measurements of Lost Horse Creek water turned into Charlos' ditches in an unknown year.

Objector Charlos' Exhibit 4 consists of four pages of water measurements of Lost Horse Creek water turned into Charlos' ditches in 1981.

Objector Charlos' Exhibit 5 is a clipping from the *Ravalli Republic* published on August 30, 1994.

Objector Say offered two exhibits for inclusion in the record. Mr. Pope objected to the acceptance of these exhibits on the basis he could not be certain the photographs represented what Mr. Schofield said they did. The Hearing Examiner reserved the decision of whether to accept these exhibits until after a site visit. The site visit confirmed the photographs were of the pond; however, they did not represent what Mr. Schofield purported they represented. Mr. Pope's objection to the inclusion of these exhibits is overruled and Objector Say's Exhibits 1 and 2 are accepted into the record.

Objector Say's Exhibit 1 is a photograph of Applicants' pond

taken in March of 1994. The actual pond area is beneath the snow. Some water is visible in the lower right corner of the photograph.

Objector Say's Exhibit 2 is a photograph of Applicants' pond taken in March of 1994. The actual pond area is beneath the snow on the left side and center bottom of the photograph. Water is visible in the right corner of the photograph.

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 (1993) 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. Applicants duly filed Application 87074-s76H with the Department on August 11, 1993, at 11:33 a.m. (Department file.)

3. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on November 24, 1993. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Two timely objections were received and Applicants were notified of

the objections by a letter from the Department dated January 24, 1994. (Department file.)

4. Applicants seek to appropriate 35 gallons per minute up to 9.38 acre-feet per year of the waters of Lost Horse Creek by means of a one-horsepower pump and a one-inch poly pipe 100 feet long to the pond for fish and wildlife. The proposed point of diversion and place of use is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17, Township 4 North, Range 21 West, in Ravalli County, Montana. The proposed period of use is from January 1 through December 31, inclusive of each year. The capacity of the off-stream pond is .7 acre-foot.

5. The pond was constructed approximately four years ago when the previous landowner constructed a road across a small drainage in the floodplain of Lost Horse Creek creating a dam. There is a drain pipe through the road. The depth of the pond is approximately eight feet. Fish have survived in the pond over the winters, some reaching a length of 24 inches.

The pond intercepts ground water although the exact depth of the ground water is unknown. The ground water is higher during the spring and summer months and is fed by Lost Horse Creek. In late summer and early fall, Applicants need to replenish the water in the pond which, in the past, has been accomplished by pumping water from Lost Horse Creek with the above-described pump and pipeline. (Testimony of Robert J. Pope and Department file.)

6. Lost Horse Creek is a decreed stream. The original decree found 12 rights according to their priority dates. There

are times when Lost Horse Creek does not have a large enough flow to serve the fourth right. Charlos holds 320 miner's inches of the first right, 65 miner's inches of the third right, 140 miner's inches of the fourth right, and 320 miner's inches of the sixth right. Objector Say holds a very small portion of the fifth right claimed by Statement of Claim W009051-76H for irrigation and Statement of Claim W009059-76H for stock water and a very small portion of the fourth right claimed by Statement of Claim W009057-76H for irrigation and Statement of Claim W009056-76H for stock water. (Department records and testimony of Robert Banner.)

7. Charlos serves approximately 60 users and irrigates approximately 969 acres. One of its three diversions is located upstream from Applicants' proposed point of diversion. The remaining two are downstream. In addition to its decreed rights, Charlos also has two storage reservoirs at the head of Lost Horse Creek to supply supplemental waters to its members. The rights to use these lakes are not decreed rights but are appropriative rights to which Charlos has exclusive rights. The lake waters are generally turned into Lost Horse Creek in mid-August. Charlos has a ditch rider that regulates the ditches and headgates from May through September. (Testimony of Robert Banner and Objector Charlos' Exhibits 1 through 4.)

8. Mr. Schofield, on Objector Say's behalf, stated Mr. Say would have no problem with Applicants' pond if Applicants would line the pond with an impervious material since the material in

which the pond is dug "leaks like a sieve." However, if Applicants were to line the pond with a poly material, it would float with the inflow of the ground water and any clay lining material would become dislodged as the ground water entered the pond. If it were not for this porous alluvial material, all the water for the pond would need to be pumped from Lost Horse Creek, instead of the majority of water in the pond flowing in as ground water. (Testimony of Joe Schofield and Robert Pope.)

9. Applicants had hired a consultant who did not appear at the hearing, leaving Mr. Pope without any information except that already in the Department file. Mr. Pope presented no flow data from Lost Horse Creek, nor did he present information concerning lack of adverse effect except to state that upon proper call from the senior users, Applicants would cease pumping. There is a photograph in the Department file which was purportedly taken on July 19, 1993 by R. H. (Arlo) White. It appears in this photograph that Lost Horse Creek was flowing in excess of 35 gallons per minute; however, it is not known if the flow in the creek was needed by a senior appropriator at that time.

(Testimony of Robert Pope.)

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.

2. The Department has jurisdiction over the subject matter

herein, and all the parties hereto.

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 for this application. Therefore, Applicants are not required to prove the criteria in subsections (1)(g), (h), or (i).

5. The proposed water uses, fish and wildlife, are beneficial uses. Mont. Code Ann. § 85-2-102(2)(a) (1993).

6. Applicants have not proved by a preponderance of the 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 or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. Applicants provided no measurements, hydrologic studies, water supply data, field reports, or other evidence to document there are unappropriated waters in the source of supply at the point of

diversion at times when the water can be put to the use proposed in the amount Applicants seek to appropriate and that during the period in which Applicants seek to appropriate the water is reasonably available. (See Finding of Fact 9.)

7. Since Applicants are required to show by a preponderance of evidence that all the criteria necessary for the issuance of a permit have been met, and since Applicants in this matter have failed to demonstrate there are unappropriated waters in the source of supply and that there will be no adverse effect to prior appropriators, no finding is necessary as to whether the proposed means of diversion, construction, and operation of the appropriation are adequate, whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved, or whether Applicants have possessory interest in the proposed place of use. *See In re Application 53221 by Carney and In re Application 61333 by Pitsch.* In denying the permit at this point, the Hearing Examiner does not purport to have determined that the proposed appropriation could not be granted, given sufficient evidence of unappropriated waters and no adverse effect to prior appropriators' water rights.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

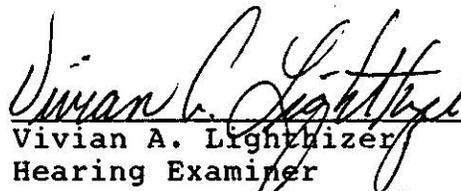
Application for Beneficial Water Use Permit 87074-s76H by Lee C. Justice and Robert J. Pope is denied.

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 28th day of September, 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

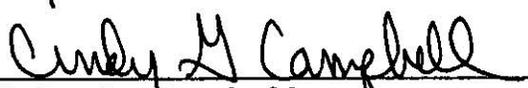
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 28th day of September, 1994, as follows:

Lee C. Justice
Robert J. Pope
2133 Lost Horse Trail
Hamilton, MT 59840

Randall S. Say
16788 Butternut Circle
Fountain Valley, CA 92708

Charlos Heights Irrigation
District
% Margaret Tavenner
Hayes Creek Rd.
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Curt Martin, Manager
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1610 South 3rd St. West,
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(via electronic mail)


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Hearings Unit Legal Secretary