

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  
88962-s41H BY DENNIS R. SCHWEITZER )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the June 20, 1995, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 88962-41H is granted to Dennis R. Schweitzer to appropriate 200.00 gallons per minute up to 322.6 acre-feet of water per year from Churn Creek at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 29, Township 1 South, Range 6 East, Gallatin County for fish and wildlife by means of an onstream dam. The reservoir created by this dam will have a capacity of 0.8 acre-feet. The place of use shall be the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 29 and the period of appropriation and use shall be from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights

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**FILMED**

in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall install an overflow tube as required by the Board of Supervisors of the Gallatin County Conservation Service in lieu of an auxiliary spillway.

C. This right is subject to the permanent installation of an adequate drainage device to satisfy existing water rights.

D. To meet the requirements of the upper Missouri Basin closure, once filled, the outflow from this pond must always be equal to or greater than the flow into the pond.

**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 30 day of August, 1995.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 31<sup>st</sup> day of August, 1995 as follows:

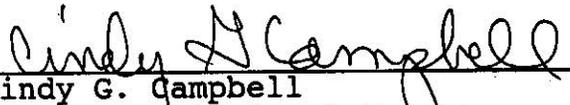
Dennis R. Schweitzer  
3042 Deer Creek Dr.  
Bozeman, MT 59715

Robert L. McIlhattan  
John A. McIlhattan  
403 W. Arthur  
Bozeman, MT 59715

John Bloomquist  
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P.O. Box 1185  
Helena, MT 59624-1185

Scott Compton, Manager  
Bozeman Water Resources  
Regional Office  
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Bozeman, MT 59715  
(via electronic mail)

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

  
\_\_\_\_\_  
Cindy G. Campbell  
Hearings Unit Legal Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION ) PROPOSAL  
FOR BENEFICIAL WATER USE PERMIT ) FOR  
88962-s41H BY DENNIS R. SCHWEITZER ) DECISION

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 23, 1995, in Bozeman, Montana, to determine whether a beneficial water use permit should be granted to Dennis R. Schweitzer for the above-entitled application under the criteria set forth in Mont. Code Ann. §§ 85-2-311(1) and (5) and 85-2-342(3) (1993).

APPEARANCES

Applicant Dennis R. Schweitzer appeared at the hearing in person and by and through counsel, John Bloomquist.

Scott Compton, Manager of the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Objectors Robert L. and John A. McIlhattan failed to appear at the hearing. The record shows a properly constituted Notice of Hearing was served on all parties on September 23, 1994, by certified mail. See Mont. Admin. R. 36.12.204(1) (1994). A continuance was granted on October 31, 1994, and on March 1, 1995, a Notice of Rescheduling Hearing was served on all parties. The Hearing Examiner received no communication from Objectors prior to the hearing or subsequent to the close of the hearing.

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**FILMED**

Therefore, Objectors McIlhattan are in default and no longer have status as parties in this matter. Mont. Admin. R. 36.12.208 (1994).

EXHIBITS

Applicant offered six exhibits for the record. All were accepted without objection.

Applicant's Exhibit 1 is a two-page field investigation report by Scott Compton.

Applicant's Exhibit 2 is a letter dated April 25, 1995, to Candace Torgerson from Scott Compton.

Applicant's Exhibit 3 is a three-page affidavit by Garth Sime dated May 22, 1995.

Applicant's Exhibit 4 is a two-page letter to Robert L. and John A. McIlhattan from Scott Compton.

Applicant's Exhibit 5 consists of three letter-size pages and a computer printout. The first letter-sized page is a listing of certain water rights on Churn Creek. The next two letter-size pages are Certification of Authenticity and affidavit thereof. The computer printout contains descriptions of the water rights listed on the first page of the letter-size document.

Applicant's Exhibit 6 consists of two USGS quadrangle maps, Kelly Springs, Montana and Bozeman, Montana, taped together upon which the outline of Schweitzer property has been defined in green; the beginning of Churn Creek, a spring, is marked by a blue dot; the location of the dam and pond is marked by a pink

dot; and the location of McIlhattan Road where it crosses Churn Creek is shown by a yellow mark.

The Department file was made available for review by all parties who had no objection to the content; therefore the Department file was accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 88962-s41H in the name of and signed by Dennis R. Schweitzer was filed with the Department on February 11, 1994, at 2:29 p.m. (Department file.)

2. Pertinent portions of the application were published in the *Bozeman Daily Chronicle*, a newspaper of general circulation in the area of the source, on April 6, 1994. 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. One timely objection was received by the Department and Applicant was notified of the objection by a letter from the Department dated July 11, 1994.

The objection alleged the water rights of prior users would be adversely affected and although there had been adequate water for the past 80 years, with the subdividing and construction of

numerous dams on the stream, the flow of the stream would be affected. (Department file.)

3. Applicant seeks to appropriate 200.00 gallons per minute up to 322.6 acre-feet of water per year from Churn Creek at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 29, Township 1 South, Range 6 East, Gallatin County for fish and wildlife. The means of diversion would be an onstream dam. The reservoir created by this dam would have a capacity of 0.8 acre-feet. The place of use would be the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 29 and the period of use would be from January 1 through December 31, inclusive of each year. After the initial reservoir filling, the water would flow through the pond and return to the stream, less the amount of water lost to deep percolation and evaporation. (Department file.)

4. The dam was constructed as a vehicle crossing equipped with a flow-through pipe structure in 1992 by Garth Sime, owner of Sime Construction. The flow-through pipe was placed at the bottom of the fill on a bed of bentonite-amended soil so that any water coming into the pond would be allowed to flow out of the pond. A concrete anti-seep collar was placed on the pipe through the road. Adjoining the horizontal pipe is a ten-foot vertical pipe. At the bottom of the vertical pipe is a valve that allows the pond to be drained, if needed. A "fairly substantial" concrete structure was placed where the two pipes are joined. There is no auxiliary spillway so an overflow pipe will be a

requirement of the 310 permit issued by the Board of Supervisors of the Gallatin County Conservation District.

Mr. Sime has been in the construction business for more than 25 years and specializes in excavation and road building. He has, over this period of time, constructed numerous fish ponds and other water impoundments. (Department file, Applicant's Exhibit 3, and testimony of Dennis Schweitzer and Scott Compton.)

5. Applicant owns the property where the water is to be put to beneficial use. (Department file.)

6. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

7. A pond for fish and wildlife increases the value of the property and provides recreation for the land owner. (Common knowledge.)

8. The Schweitzer family has lived along Churn Creek since 1955. They have observed water flowing continuously in Churn Creek during this time. Various measurements of outflow at the dam indicate a minimum of 200 gallons per minute available constantly. Scott Compton measured the inflow and outflow of water at the reservoir on February 16, 1994, and found the inflow was 195 gallons per minute and the outflow was 200 gallons per minute. Mr. Compton measured the flow rate on April 24, 1995, and found the inflow to the reservoir at 556 gallons per minute. It was impossible to measure the outflow using a bucket and stop

watch because the flow was too great. (Applicant's Exhibits 2 and 4 and testimony of Dennis Schweitzer and Scott Compton.)

9. Most of the flow of Churn Creek begins on the Schweitzer property at a point in the SW $\frac{1}{2}$ NE $\frac{1}{2}$ SW $\frac{1}{2}$  of Section 21, Township 1 North, Range 6 East, where a spring contributes to the flow. (Testimony of Dennis Schweitzer.)

10. There are no other water users on Churn Creek other than Objectors McIlhattan with the exception of a claimed right for stock drinking directly from the stream by Sylvia Osterman. There are no other planned uses of water for which a permit has been issued or for which water has been reserved. (Testimony of Scott Compton and Department file.)

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 substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. The proposed use of water, fish and wildlife, is a beneficial use of water. See Finding of Fact 7.

3. Applicant has 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 Applicant seeks to appropriate and that the amount requested is reasonably available during the

period in which Applicant seeks to appropriate. See Findings of Fact 3 and 8.

4. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected by the proposed appropriation. See Findings of Fact 4, 8, 9, and 10.

5. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. See Findings of Fact 3 and 4.

6. Applicant has proven by a preponderance of evidence the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. See Finding of Fact 10.

7. Applicant is not required to prove no adverse effect to water quality or the ability of a discharge permit holder to satisfy effluent limitations. See Finding of Fact 6.

8. Applicant has proven by a preponderance of evidence he has a possessory interest, or the written consent of the person with the a possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 5.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 88962-41H is granted to Dennis R. Schweitzer to appropriate 200.00 gallons per

minute up to 322.6 acre-feet of water per year from Churn Creek at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 29, Township 1 South, Range 6 East, Gallatin County for fish and wildlife by means of an onstream dam. The reservoir created by this dam will have a capacity of 0.8 acre-feet. The place of use shall be the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of said Section 29 and the period of appropriation and use shall be from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall install an overflow tube as required by the Board of Supervisors of the Gallatin County Conservation Service in lieu of an auxiliary spillway.

C. This right is subject to the permanent installation of an adequate drainage device to satisfy existing water rights.

D. To meet the requirements of the upper Missouri Basin closure, once filled, the outflow from this pond must always be equal to or greater than the flow into the pond.

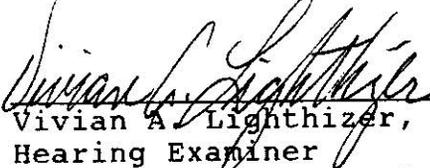
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the

proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 20<sup>th</sup> day of June, 1995.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6615

CERTIFICATE OF SERVICE

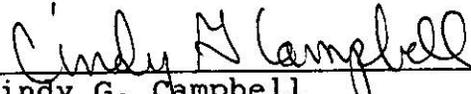
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 20<sup>th</sup> day of June, 1995, as follows:

Dennis R. Schweitzer  
3042 Deer Creek Dr.  
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Cindy G. Campbell  
Hearings Unit Legal Secretary