

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
91277-s76H BY LEONARD O. AND)
PAMELA J. WALLACE)

* * * * *

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 August 8, 1995, 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 91277-s76H by Leonard O. and Pamela J. Wallace 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 8 day of September, 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 11th day of September, 1995 as follows:

Leonard O. Wallace
Pamela J. Wallace
137 Doehaven Way
Darby, MT 59829

Boyce A. Warren
P.O. Box 132
Conner, MT 59827

Gretchen Reichmuth
Sunstorm Ranch Inc.
P.O. Box 728
Hamilton, MT 59840

Darel A. Graves
223 State Street
Hamilton, MT 59840

Donald C. Raymond, Jr.
6883 N. Stratford Rd.
Moses Lake, WA 98837

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

Olen Elliott
4433 Thorning Loop
Darby, MT 59829

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

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

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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
91277-s76H BY LEONARD O. AND)	DECISION
PAMELA J. WALLACE)	

* * * * *

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 26, 1995, in Hamilton, Montana, to determine whether a permit should be granted to Leonard O. and Pamela J. Wallace for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Leonard O. and Pamela J. Wallace appeared at the hearing by and through Leonard O. Wallace.

Objector Boyce A. Warren appeared at the hearing in person.

Kay Warren appeared at the hearing with Boyce A. Warren and testified on his behalf.

Objector Olen Elliott appeared at the hearing pro se.

Objector Donald C. Raymond, Jr. appeared at the hearing pro se.

Karl Uhlig, Water Resources Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

Objector Gretchen Reichmuth (Sunstorm Ranch Inc.) did not appear. The record shows a properly constituted Notice of

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Hearing was served on all parties on April 25, 1995, by certified mail. See Mont. Admin. R. 36.12.204(1) (1994). The Hearing Examiner received no communication from Objector Reichmuth prior to the hearing or subsequent to the close of the hearing. Therefore, Objector Reichmuth is in default and no longer has status as a party in this matter. Mont. Admin. R. 36.12.208 (1994).

EXHIBITS

Applicants offered no exhibits for the record. Objector Warren offered four exhibits, a series of photographs, for the record. Applicants objected to the acceptance of all four exhibits into the record on the basis that the exhibits are not appropriate and do not address the issue. The Hearing Examiner reserved a ruling on the objection to be addressed in the Proposal for Decision. After reviewing the exhibits, the Hearing Examiner sustains the objection and the exhibits are not accepted into the record. The photographs are merely photographs of areas where problems have occurred. They do not show any of the problems and although the narrative beside each photograph describes the problem, there is no significant evidence in these exhibits.

PRELIMINARY MATTERS

During the hearing it became obvious that Applicants needed to alter their application. After consulting with Karl Uhlig, Mr. Wallace deleted the material concerning pond #1. This resulted in a revision of the amount of water to be diverted.

Applicants reduced the amount of water requested to 40 gallons per minute up to 6.00 acre-feet of the waters of East Fork Bitterroot River. Applicants also amended their period of diversion to be April 1 through June 30, inclusive of each year. The period of use would remain from January 1 through December 31 even though the pond would most likely be dry during the summer and winter months.

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 91277-s76H in the name of Leonard O. and Pamela J. Wallace and signed by Leonard Wallace was filed with the Department on September 19, 1994 at 4:42 p.m. (Department file.)
2. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on January 19, 1995. 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. Four timely objections were received by the Department and Applicants were notified of the objections by a letter from the Department dated March 10, 1995.

The objections included allegations of no unappropriated water, lack of ditch right to use ditch, lack of ditch capacity

to transport additional water for this appropriation, and excess seepage from existing pond causing property damage. (Department file.)

3. Applicants propose to appropriate 40.00 gallons per minute up to 6.00 acre-feet of water from the East Fork Bitterroot River at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17, Township 2 North, Range 20 West, Ravalli County. The proposed means of diversion is an existing diversion into an existing ditch (the main ditch). Water would flow in the main ditch for approximately 2.5 miles where it would be diverted from the main ditch into Rye Creek which would be used as a carrier to convey water approximately 400 feet to another headgate and ditch in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31, Township 3 North, Range 20 West, Ravalli County, thence to the subject pond which has a capacity of 2.58 acre-feet. The proposed use is wildlife and the proposed period of use is from January 1 through December 31, inclusive of each year. The period of appropriation would be from April 1 through June 30, inclusive of each year. The place of use would be Government Lot 1 located generally in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ ¹ of said Section 31. (Department file, Department records (GLO maps), and testimony of Leonard Wallace.)

¹Section 31, Township 3 North, Range 20 West, is a correction section. One cannot simply divide a correction section into quarter sections to find the correct legal description. One needs to consult the Government Land Office maps to determine whether there had been government lots designated. It appears in this case, government lots had been designated and the subject pond would be located in Government Lot 1.

4. Applicants propose to create the pond to discourage the deer from crossing the road for water since Leonard Wallace and his mother-in-law have each hit deer with their motor vehicles. The deer would, however, continue to cross the road to feed and after the pond dried up, would continue to cross the road to drink from Rye Creek and the river. (Testimony of Leonard Wallace and Pat Warren.)

5. Applicants have failed to provide by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. Applicants' application has been revised so that it no longer resembles the project described in the original application. Most of the data included as criteria proof with the application is now inapplicable. The application data were presented for two flow-through ponds appropriating water from March 1 through November 1, inclusive of each year. The revised application is to appropriate water from April 1 through June 30 for use in one pond. The revisions did not clarify whether this pond would be a flow-through pond during those few months or if there would be only one filling of the pond for the duration. The revisions suggest one fill of 2.58 acre-feet and the remaining 3.42 acre-feet of water would be lost to ditch loss and evaporation.

There is presently no control at the diversion for the main ditch; however, the decreed water users have been ordered by Judge Langton to install a headgate at the beginning of the main ditch.

There is not sufficient carrying space in the main ditch to handle all the decreed water much less the additional water applicants are requesting. If Applicants attempted to transport water in the ditch before it was filled for irrigation, a flow rate of more than 318 gallons per minute would be needed for the water to reach the pond.

The ditch coming out of Rye Creek on the north bank, although being partially located on Applicants' property, is for the use of Olen Elliott and is large enough to carry only Elliott's decreed water to his property. It would not have the capacity to convey the water intended to fill Applicants' pond.

The pond was constructed by removing and selling the gravel. The pond would not hold water in its present condition.

Applicants would line the pond with top soil if a permit is granted for this application. (Department file and testimony of Leonard Wallace, Donald Raymond, Pat Warren, and Olen Elliott.)

6. Applicants own the property where the water is to be put to use. (Department file and testimony of Leonard Wallace.)

7. 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.)

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. Since an applicant is required to show by a preponderance of evidence that all the criteria for issuance of a permit have been met, and since Applicants in this matter have failed to demonstrate the proposed means of diversion, construction, and operation of the proposed works are adequate, no finding is necessary as to whether there are unappropriated waters in the source of supply; whether the water rights of prior appropriators would be adversely affected; whether the proposed use of water is a beneficial use; whether Applicants have possessory interest or the written consent of the person with the possessory interest in the proposed place of use; or 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.

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 91277-s76H by Leonard O. and Pamela J. Wallace is **DENIED**.

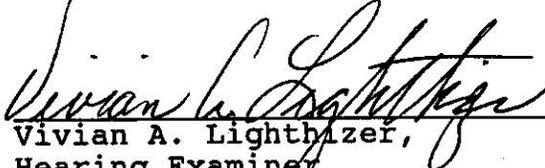
NOTICE

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 8th day of August, 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 8th day of August, 1995, as follows:

Leonard O. Wallace
Pamela J. Wallace
137 Doehaven Way
Darby, MT 59829

Boyce A. Warren
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Olen Elliott
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Gretchen Reichmuth
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Darel A. Graves
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Hearings Unit Legal Secretary