

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
95828-76D BY JOHN J. AND ALMA L.)
FOSS)

* * * * *

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 October 8, 1996, 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 095828-76D by John J. and Alma L. Foss is denied.

NOTICE

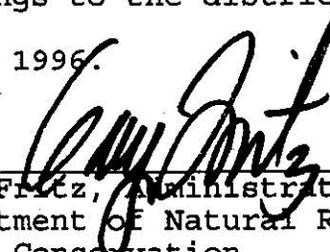
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

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 19 day of November, 1996.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(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 21ST day of November, 1996 as follows:

John J. & Alma L. Foss
P.O. Box 1095
Eureka, MT 59917

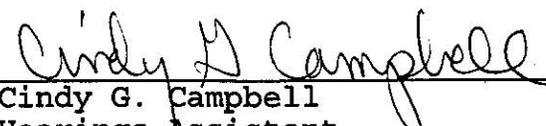
Leland W. Driggs
Quirk Cattle Co.
2547 Burma Rd
Eureka, MT 59917

Dharma Realm Buddhist Assoc.
dba Pine Grove Ranch
P.O. Box 24
Eureka, MT 59917

Debi Parrish
4835 Airport Rd
Eureka, MT 59917

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601

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



Cindy G. Campbell
Hearings Assistant

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
95828-76D BY JOHN J. AND ALMA L.) DECISION
FOSS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on September 10, 1996, in Eureka, Montana, to determine whether a Beneficial Water Use Permit should be granted to Applicants for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicants, John J. and Alma L. Foss, appeared at the hearing pro se.

Objector, Leland Driggs, appeared at the hearing pro se.

Objector, Dharma Realm Buddhist Association dba Pine Grove Ranch (Pine Grove Ranch), appeared at the hearing by and through its manager, Debi Parrish.

Eric Parrish appeared at the hearing as a witness for Objector Pine Grove Ranch.

Charles F. Brasen, Manager, and Ann Glubczynski, WRS, with the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

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EXHIBITS

Applicants offered two exhibits for the record. Both were accepted without objection.

Applicants' Exhibit 1 is a copy of preliminary plans for the proposed fish pond.

Applicants' Exhibit 2 is a copy of a plat map showing Lots 1 through 5. Applicants own Lot 5.

Objectors offered no exhibits for the record.

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. An application for beneficial water use permit in the name of and signed by John J. and Alma L. Foss was received by the Department November 1, 1995. (Department file.)

2. Pertinent portions of the application were published in the *Tobacco Valley News* on April 18, 1996. 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 by the Department. Applicants were notified of the objections by a letter from the Department dated May 31, 1996. (Department file.)

3. Applicants propose to appropriate 50.00 gallons per minute up to 80.65 acre-feet of water per year from Indian Creek for a fish pond at a point in Lot 5 of Lindsay Acres subdivision,

generally described as the SE~~1~~NE~~1~~NE~~1~~ of Section 3, Township 36 North, Range 27 West, Lincoln County, Montana.¹ The proposed means of diversion is a six-inch pipeline with a valve to control the flow of water diverted. The proposed place of use is an off-stream reservoir with a capacity of 0.4 acre-foot located in the SE~~1~~NE~~1~~NE~~1~~ of Section 3. The proposed period of diversion is from January 1 through December 31, inclusive of each year. (Department file.)

4. Applicants have provided a preponderance of evidence the proposed use of water, fishery, is a beneficial use of water. Applicants are avid fishermen; however, due to health problems Mrs. Foss can no longer get around most lake shores in the area. The pond would provide an easily accessible, safe place for them to fish. (Department file and testimony of Alma Foss.)

The Department cannot grant a permit for more water than is necessary for the purpose. According to the application, a flow rate of 11.5 gallons per minute would be sufficient for a 14-day exchange rate, but a flow rate of 50 gallons per minute is needed to prevent freezing in the pipeline. Therefore, during the warmer months, May through October, 11.5 gallons per minute can be beneficially used, then during the cooler months, November through April, 50 gallons per minute can be beneficially used.

¹Unless otherwise stated all land descriptions in this Proposal are located in Township 36 North, Range 27 West, Lincoln County, Montana.

5. Applicants have provided a preponderance of evidence they 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. Applicants own the property where the water would be put to beneficial use. (Department file.)

6. Applicants have not provided 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 the amount requested is reasonably available during the period in which Applicants seek to appropriate. The flow of Indian Creek was measured in November of 1995 at a rate of 4.0 cubic feet per second and again on January 17, 1996, at a rate of 4.5 cubic feet per second. No other measurements were taken since the lowest flow period is usually in January. A person who works with the Natural Resource Conservation Service (NRCS) calculated an estimated flow using the Orsborn method and comparing Indian Creek basin to Flower Creek basin. Using this method, the NRCS person estimated the mean flow rate per month in cubic feet per second as follows:

January	6.3	July	19.9
February	6.4	August	6.9
March	7.6	September	5.8
April	21.3	October	6.3
May	57.8	November	8.9
June	60.5	December	6.9

This flow rate is augmented by Glen Lake Irrigation District (GLID) from July to October. However, none of the GLID flow was included. Water users above Applicants' proposed point of diversion divert approximately 15.34 cubic feet per second of water from Indian Creek per month from April through October. The rest of the year approximately 0.1 cubic foot per second per month is diverted. Therefore, the adjusted mean monthly flow rate, in cubic feet per second, is available at the proposed point of diversion as follows:

January	6.2	July	4.56
February	6.3	August	0.0
March	7.5	September	0.0
April	5.96	October	0.0
May	42.46	November	8.8
June	45.16	December	6.8

During the months of August, September, and October, there are no unappropriated waters. Any waters flowing in Indian Creek during these months most likely are GLID waters to which Applicants have no right. (Department file.)

7. Having made the determination there are no unappropriated waters in the source of supply, it is not necessary to make a finding on adverse effect or whether the proposed use would interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. Nor is it necessary to make a finding of whether the proposed means of diversion, construction, and operation of the appropriation works are adequate.

8. 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.

Based upon the foregoing Findings of Fact and 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. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicants have not met the criteria for issuance of a beneficial water use permit. See Findings of Fact 6 and 7. Mont. Code Ann. § 85-2-311 (1995).

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 095828-76D by John J. and Alma L. Foss is denied.

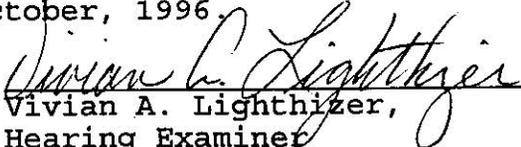
NOTICE

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 October, 1996.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 202301
Helena, Montana 59620
(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 October, 1996 as follows:

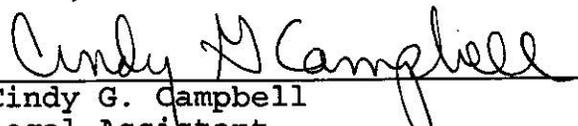
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Dharma Realm Buddhist Assoc.
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Cindy G. Campbell
Legal Assistant