Chuck

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

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMIT 43C-106059 AND 43C-106060 BY KENNETH J WAHL	))))	NOTICE OF ERRATA FINAL ORDER

* * * * * * *

There are five errata in the FINAL ORDER in this matter. The phrase "(Diversion 20" on page 1 should be "(Diversion 2)", line 4 of condition B on page 2, "flowing" should be "following", and the Township listed on pages 1, 2, and 3 should be Township 5 South instead of Township 4 South. Please insert the enclosed corrected pages 1, 2, and 3 in your copy.

Dated this 22nd day of June, 2001.

Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CASE # 106059

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Errata Final Order was served on all parties listed below on this 25 day of June, 2001, as follows:

KENNETH J WAHL
3650 RIVERVIEW DR
REDDING CA 96001

KENNETH J WAHL
PO BOX 240
REDDING CA 59028

MEL & SUSAN ASKINS
227 WEST ROSEBUD RD
FISHTAIL MT 59028

FENNA KLINGBURG
KLINGBURG FAMILY TRUST
HC 55 BOX 210
FISHTAIL MT 59028

JEFFERY WELDON
MOLTON, BELLINGHAM LONGO
& MATHER
PO BOX 2559
BILLINGS MT 59103-0559

ROSEBUD ANGUS RANCH
HC 55 BOX 255
FISHTAIL MT 59028

CHAD R OSTRUM
HC55 BOX 235
FISHTAIL MT 59028

JIM HALVERSON
1001 S 24TH ST W
BILLINGS MT 59108-0270

RICHARD J HAMMOND
WILLIAM G HAMMOND TRUST
HC 55 BOX 205
FISHTAIL MT 59028

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
PO BOX 201601
HELENA MT 59620-1601

KEITH KERBEL, MANAGER
MARTY VAN CLEAVE, WRS
BILLINGS REGIONAL OFFICE
1371 RIMTOP DR
BILLINGS MT 59105-1978

Jennifer L. Hensley
Hearings Unit
406.444.6615

CASE #106059

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

* * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT 43C-106059 AND 43C-1106060 BY KENNETH J. WAHL	))))	**FINAL ORDER**

* * * * * * * * *

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[1]. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the December 20, 2000, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

43C-106059

Subject to the terms, conditions, restriction, and limitations listed below Beneficial Water Use Permit 43C-10659 is issued to Kenneth J. Wahl to appropriate 60 gallons per minute up to 96.8 acre-feet of water per year from an unnamed tributary of West Rosebud Creek at a point in the SE¼NW¼SW¼ (Diversion 1) and the NE¼NW¼SW¼ (Diversion 2), both in Section 4, Township 5 South, Range 18 East, Stillwater County, Montana. The permitted means of diversion from both points of diversion are pipelines. The permitted period of diversion is from January 1 to December 31, inclusive of each year. The permitted use is a fishery. The permitted place of use from Diversion 1 is a series of five ponds in the E½NW¼SW¼ and from Diversion 2 is a pond in the NE¼NW¼SW¼, all in Section 4, Township 5 South, Range 18 East. The permitted ponds have a total capacity of 9 acre-feet.

1 There were two untimely exceptions received.

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A. Permittee shall install measuring devices approved by the Billings Water Resources Regional Office at each point of diversion and each point of return to the source, a total of four devices, to show water returned to the source equals the water diverted. Water must not be diverted until the required measuring devices are in place and operating. The appropriator shall maintain the measuring devices so they operate properly and measure flow rates accurately.

B. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate of water diverted and returned, including the period of time, and shall submit the records by November 30 of each year for the three complete calendar years following the construction of the complete projects. If the inflow and outflow confirm the ponds do not consume water *i.e.*, outflow is equal to or exceeds inflow at all times, then the diversion may continue and the inflow-outflow measurements can be stopped. Thereafter when the inflow exceeds the outflow, water cannot be diverted under this permit. The Department may also request the measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the permit. The records must be sent to the Billings Water Resources Regional Office. Copies of the water measurement records are required to show project completion, and shall be attached to the permit Notice of Completion (Form 617) when filed.

C. Permittee shall install three groundwater monitoring wells or monitoring pits at Permittee's north property boundary in the NE¼NE¼NW¼SW¼ and the NE¼NW¼NE¼SW¼ of Section 4, Township 5 South, Range 18 East, Stillwater County, Montana and measure monthly the static water level in each well. On a form, provided by the Department, the appropriator shall keep a written monthly record of the static water level in each well or pit, and shall submit the records by November 30 of each year for three complete calendar years following construction of the complete project. Thereafter, at any time water rises above ground level in these wells or pits, Permittee shall stop diverting from the source. Copies of the static water levels are required to show project completions, and shall be attached to the permit Notice of

Completion (Form 617) when filed.

D. The permittee must acquire a private fish pond license as required by Mont. Code Ann. §87-4-603 (1999). The permittee must stock the pond as allowed in the private license within two years of completion of pond construction. Copies of the pond license and stocking purchase invoices are required to show project completion, and shall be attached to the permit Notice of Completion (Form 617) when filed.

E. Permittee must construct the means of diversion so flows in the source drain ditch are not restricted, or are immediately returned to the source.

F. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

43C-106060

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit43C-106060 is issued to Kenneth J. Wahl to appropriate 90 gallons per minute up to 145.17 acre-feet of water from West Rosebud Creek at a point in the SWNENW of Section 4, Township 5 South, Range 18 East, Stillwater County, Montana. The permitted means of diversion is an existing headgate and ditch. The permitted period of diversion is from January 1 to December 31, inclusive of each year. The permitted use is for commercial fish ponds. The permitted place of use is 1.5 acre-foot pond in the SE¼SE¼NW¼ and a 1.5 acre-foot pond in the NE¼NE¼SW¼ both in Section 4, Township 5 South, Range 18 East, Stillwater County. The total capacity of the ponds is three acre-feet.

A. Permittee must return the overflow from the ponds to an existing meander channel on Permittee's property that is tributary to West Rosebud Creek.

B. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way

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acknowledge liability of damage caused by the exercise of this right.

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 this 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 ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 31ST day of January, 2001.

Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
And Conservation
PO Box 201601
Helena MT 59620-1601

CASE #

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 31st day of January, 2001, as follows:

KENNETH J WAHL
3650 RIVERVIEW DR
REDDING CA 96001

KENNETH J WAHL
PO BOX 240
REDDING CA 59028

MEL & SUSAN ASKINS
227 WEST ROSEBUD RD
FISHTAIL MT 59028

FENNA KLINGBURG
KLINGBURG FAMILY TRUST
HC 55 BOX 210
FISHTAIL MT 59028

JEFFERY WELDON
MOLTON, BELLINGHAM LONGO
& MATHER
PO BOX 2559
BILLINGS MT 59103-0559

ROSEBUD ANGUS RANCH
HC 55 BOX 255
FISHTAIL MT 59028

CHAD R OSTRUM
HC55 BOX 235
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JIM HALVERSON
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WILLIAM G HAMMOND TRUST
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CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
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KEITH KERBEL, MANAGER
MARTY VAN CLEAVE, WRS
BILLINGS REGIONAL OFFICE
1371 RIMTOP DR
BILLINGS MT 59105-1978

Jennifer Hensley
Hearings Unit

CASE #

Chuck

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

* * * * * * *

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMIT 43C-106059 AND 43C-106060 BY KENNETH J WAHL	))))	**Proposal For Decision**

* * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on August 9, 2000, in Columbus, Montana, to determine whether a beneficial water use permit should be issued to Kenneth J. Wahl (Applicant) for the above applications under the criteria set forth in Mont. Code Ann. §85-2-311 (1999). These matters were consolidated prior to the hearing.

APPLICATION FOR BENEFICIAL WATER USE PERMIT 43C-106059

APPEARANCES 43C-106059

Applicant appeared at the hearing in person. Gayle Hayley, Ecological and Environmental Consultant, testified for the Applicant.

Objectors Fenna Klingberg and Chad Ostrum appeared in person. Owner Art Arnold appeared for Rosebud Angus Ranch.

Keith Kerbel, Manager, Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Hearings Examiner.

EXHIBITS 43C-106059

Both Applicant and Objectors offered exhibits for the record.

Applicant offered three exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1-3.

Applicant's Exhibit 1 is a one page summary of Witness Hayley's qualifications and testimony.

Applicant's Exhibit 2 is a one page summary of Applicant Wahl's qualifications and testimony.

Applicant's Exhibit 3 consists of eighteen (18) pages covered with a page entitled *Preface to Exhibits*:

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Page 1 is: A copy of a 1975 aerial photograph upon which project structure are located.

Page 2 is: A copy of a Stillwater County Certificate of Survey Number 279451.

Page 3 is: A copy of pictures of the project area.

Page 4 is: A copy of three photos along Applicant's north property boundary.

Page 5 is: A copy of three photos along Applicant's north property boundary.

Page 6 is: A copy of four photos of Applicant's measuring device.

Page 7 is: A copy of four photos of Applicant's second measuring device.

Page 8 is: A description of the system for Application 43C-106059.

Page 9 is: A copy of a *Water Measurement Manual* page showing head and discharge relationships for a 90° V-notch weir.

Page 10 is: A copy of three photos regarding pond number 1.

Page 11 is: A copy of three photos showing the area of ponds 2 through 6.

Page 12 is: A sketch of drop pipe outlets and pond profile for ponds 1 through 6 of 43C 106059.

Page 13 is: A copy of two photos of West Rosebud Creek.

Page 14 is: A copy of two photos of West Rosebud Creek.

Page 15 is: A copy of three photos of "Pond B" area.

Page 16 is: A sketch of drop pipe outlets and pond profile for ponds A and B of 43C 106060.

Page 17 is: The plan view of Pond A of 43C 106060.

Page 18 is: The plan view of Pond B of 43C 106060.

Objector Rosebud Ranch offered 1 exhibit for the record. The Hearing Examiner accepted Objector Rosebud Angus Ranch's Exhibit 1

Objector's Exhibit 1 is the bottom portion of a paper with a hand drawn sketch of Mr. Arnold's understanding of groundwater in the area of the proposed ponds and his downstream ownership.

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PRELIMINARY MATTERS 43C-106059

Objector Mel and Susan Askins did not appear at the hearing. They are in default and their interest in this matter is hereby dismissed.

There was an objection of inadequate notice of the project in that the notice listed only one point of diversion. The objection is overruled. The two points of diversion were discussed at the earlier site visit and the two points of diversion do not change any aspect of the project's effect on the source.

At the hearing the Applicant reduced the amount of water requested to 60 gallons per minute (hereafter gpm), or 30 gpm from each of two points of diversion. The volume resulting from this amendment is 49.4 acre-feet at each diversion or 96.8 acre-feet for both diversions. Applicant also amended the proposed use for this application to commercial trout ponds from wildlife and waterfowl ponds. These amendments change the label but not the substance of the noticed purpose. Thus, they do not prejudice the parties' positions and do not increase the notice area. Re-notice of the application is not necessary.

Administrative notice was taken of *A GUIDE FOR BUILDING AND MANAGING PRIVATE FISH PONDS IN MONTANA*, January 1994, by Montana Department of Fish, Wildlife & Parks, a copy of which resides at the Department's Helena Office.

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 43C-106059

1. Application for Beneficial Water Use Permit 43C-106059 in the name of and signed by Kenneth J. Wahl was filed with the Department on February 18, 1999 at 12:45 PM. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 60 gpm up to 96.8 acre-feet of water per year from an existing drainage ditch which is an unnamed

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tributary of West Rosebud Creek at point one (1) in the SE¼NW¼SW¼ and at point two (2) in NE¼NW¼SW¼, both in Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The proposed means of diversion at point one (1) is a pipeline; the proposed means of diversion at point two (2) is a pipeline. The proposed period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The proposed use is for commercial fish ponds. The proposed place of use from point of diversion 1 is a series of 5 ponds (ponds #2-6) in the E½NW¼SW¼, and from point of diversion 2 (pond #1) is a pond in the NE¼NW¼SW¼, all in Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The total capacity of the six ponds is 9 acre-feet. (Department file, Applicant testimony)

4. Applicant has proven water is physically available. Applicant measured the flows in the source (drain ditch) at the proposed points of diversions. The measurement at point of diversion one (1) was 36 gpm and 71 gpm at point of diversion two. The measurements were made in the second week of July, 2000. July 24, 2000, the measurement at point of diversion one (1) was 122 gpm and 156 gpm at point of diversion two. Applicant did not measure the flows in the winter months, but has observed the flows during the winter. They are similar to the conditions of the second week of July, 2000.

5. Legally availability was proven by Applicant's agreement to measure the flow into and out of the proposed ponds to show the source will not be depleted by this project. Applicant will place a return ditch below the series of ponds on the east side of the source that will return all water diverted back to the source. This ditch will have its bottom two feet (2') below the bottom of the natural channel at a point below the lowest in the series of ponds. Applicant agreed to install and monitor groundwater levels below this return ditch at his downstream property boundary. This will show water diverted is returning to the source or flowing to groundwater downgradient of the place of use. Measurements of inflow and outflow continuing for 3 years after the project is complete and in use is reasonable to show ~~the as~~ that much water is returned as is diverted. If inflow equals

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outflow so that no downstream users are denied their call, water is legally available. (Department file, Applicant testimony, Keith Kerbel)

6. Applicant has proven there would be no adverse affect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. The proposed ponds are off stream and the diversions to them can be stopped at any time. There are year round residents at the ranch who can shut down the diversions if needed. Applicant agrees to measure the flow into and out of the proposed ponds to show there will be no effect on downstream appropriators. When water diverted equals water returned to the source, there is no adverse affect to prior appropriators.

Objections on the basis of raised groundwater levels is outside the scope of this review; regardless, the Objectors provided no evidence of a confining layer above the groundwater table that would confine the groundwater to subsequently rise above the ground on Objectors' downstream property.

Objector Klingberg is concerned that the proposed appropriation, located more than 4000 feet upstream of her appropriation works, may adversely affect her water use. Objector Klingberg offered no factual evidence to show how she would be affected at this distance. (Department file, testimony of Art Arnold, Fenna Klingberg, Chad Ostrum, and Applicant)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate when the capacity of the source drain ditch is maintained. The diversion works at point of diversion two (2)for the pond on the west side of the source may restrict the source thereby diminishing the original purpose of the drain ditch. Applicant has constructed a high-flow by pass around diversion point two (2) so high flows can pass without restriction.

The ponds will have dam heights of two to three feet (2'-3') and total depths less than six feet, will be constructed off stream, and will not be in the direct path of high runoff in the source. Any high runoff will continue down the source as it always has. Applicant has

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experience constructing ponds in Montana and California. (Department file, testimony of Applicant, Chad Ostrum, Fenna Klingberg)

8. Applicant has proven the proposed commercial trout production in six ponds is beneficial when a private pond license is acquired from Montana Department of Fish, Wildlife, and Parks. Applicant is building the ponds according to *A GUIDE FOR BUILDING AND MANAGING PRIVATE FISH PONDS IN MONTANA*, January 1994, by Montana Department of Fish, Wildlife & Parks. The water in the source is cooler than the water in the existing ponds and is needed to cool the ponds and oxygenate the water in the ponds. The requested flow rate will exchange the pond volumes every 14 to 22 days. This is less than ideal, but is reasonable for ponds of this size. The available flow will cool the pond water 5°F, more or less, to provide habitat which will sustain a fishery. Fish may be stressed at the resulting pond temperatures, and exchange rates, but will survive. Applicant will apply for a private pond license from Montana Department of Fish, Wildlife, and Parks. The stocking rate for the ponds will come from recommendations of the Montana Fish, Wildlife, and Parks. (Department file, testimony of Applicant, Gayle Hayley, Department *Policy #20, Fish, Wildlife, and Recreation Ponds*)

9. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. (Department file, Applicant testimony)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW 43C-106059

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Mont. Code Ann. § 85-2-312 (1999).

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3. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of a beneficial water use permit. *See* Findings of Fact 4 through 9. Mont. Code Ann. §85-2-311 (1999).

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

PROPOSED ORDER 43C-106059

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 43C 106059 is issued to Kenneth J. Wahl to appropriate 60 gallons per minute up to 96.8 acre-feet of water per year from an existing drainage ditch which is an unnamed tributary of West Rosebud Creek at point one (1) in the SE¼NW¼SW¼ and at point two (2) in NE¼NW¼SW¼, both in Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The means of diversion at point one (1) is a pipeline; the means of diversion at point two (2) is a pipeline. The period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The use is for a fishery. The place of use from point of diversion one (1) is a series of 5 ponds in the E½NW¼SW¼, and from point of diversion two (2) is a pond in the NE¼NW¼SW¼, all in Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The total capacity of the six ponds is 9 acre-feet.

A. Permittee shall install measuring devices approved by the Billings Water Resources Regional Office at each point of diversion and at each point of return to the source, a total of four devices, to show water returned to the source equals water diverted. Water must not be diverted until the required measuring devices are in place and operating. The appropriator shall maintain the measuring devices so they operate properly and measure the flow rates accurately.

B. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate of water diverted and returned, including the period of time, and shall submit the records by November 30 of each year for three complete calendar years following construction of the complete project. If the inflow-outflow measurements confirm the ponds do not consume water, ie, outflow exceeds inflow at all times, then the diversion may continue and the

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inflow-outflow measurements can be stopped. Thereafter, when the inflow exceeds the outflow, water cannot be diverted under this permit. The Department may also request the measurement records at other times of the year. Failure to submit reports may be cause for revocation or modification of the permit. The records must be sent to the Billings Water Resources Regional Office. Copies of the water measurement records are required to show project completion, and shall be attached to the permit Notice of Completion (Form 617) when filed.

C. Permittee shall install three groundwater monitoring wells or monitoring pits at Permittee's north property boundary in the NE¼NE¼NW¼SW¼ and the NE¼NW¼NE¼SW¼ of Section 4, Township 5 South, Range 18 East, Stillwater County, Montana and measure monthly the static water level in each well. On a form provided by the Department, the appropriator shall keep a written monthly record of the static water level in each well or pit, and shall submit the records by November 30 of each year for three complete calendar years following construction of the complete project. Thereafter, at any time water rises above ground level in these wells or pits, Permittee shall stop diverting from the source. Copies of the static water levels are required to show project completion, and shall be attached to the permit Notice of Completion (Form 617) when filed.

D. The permittee must acquire a private fish pond license as required by Mont. Code Ann. §87-4-603 (1999). The permittee must stock the pond as allowed in the private fish pond license within two years of completion of pond construction. Copies of the pond license and stocking purchase invoices are required to show project completion, and shall be attached to the permit Notice of Completion (Form 617) when filed.

E. Permittee must construct the means of diversion so flows in the source drain ditch are not restricted, or are immediately returned to the source.

F. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right

CASE #

in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

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APPLICATION FOR BENEFICIAL WATER USE PERMIT 43C-106060

APPEARANCES 43C-106060

Applicant appeared at the hearing in person. Gayle Hayley, Ecological and Environmental Consultant, whose testimony in the matter of 43C-106059 is referenced as it applies here.

Objector Chad Ostrum appeared in person.

Keith Kerbel, Manager, Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Hearings Examiner.

EXHIBITS-106060

Applicant offered three exhibits for the record.. The Hearing Examiner accepted Applicant's Exhibits 1-3.

Applicant's Exhibit 1 is a one page summary of Witness Hayley's qualifications and testimony.

Applicant's Exhibit 2 is a one page summary of Applicant Wahl's qualifications and testimony.

Applicant's Exhibit 3 consists of eighteen (18) pages covered with a page entitled *Preface to Exhibits*:

Page 1 is: A copy of a 1975 aerial photograph upon which project structure are located.

Page 2 is: A copy of a Stillwater County Certificate of Survey Number 279451.

Page 3 is: A copy of pictures of the project area.

Page 4 is: A copy of three photos along Applicant's north property boundary.

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Page 8 is: A description of the system for Application 43C-106059.

CASE #

Page 9 is: A copy of a *Water Measurement Manual* page showing head and discharge relationships for a 90° V-notch weir.

Page 10 is: A copy of three photos regarding pond number 1.

Page 11 is: A copy of three photos showing the area of ponds 2 through 6.

Page 12 is: A sketch of drop pipe outlets and pond profile for ponds 1 through 6 of 43C 106059.

Page 13 is: A copy of two photos of West Rosebud Creek.

Page 14 is: A copy of two photos of West Rosebud Creek.

Page 15 is: A copy of three photos of "Pond B" area.

Page 16 is: A sketch of drop pipe outlets and pond profile for ponds A and B of 43C 106060.

Page 17 is: The plan view of Pond A of 43C 106060.

Page 18 is: The plan view of Pond B of 43C 106060.

PRELIMINARY MATTERS 43C-106060

Prior to the hearing Objector Hammond withdrew his objection in a private agreement with the Applicant. The agreement merely confirms the source of water is not the Nels Thomas Ditch and need not be addressed further in this order.

Applicant modified the outlet of the ponds so they do not return water onto Objector Ostrum's property. Objector Ostrum stated that if this modification is maintained, he has no further objection to the application.

Applicant amended the proposed use for this application to commercial trout ponds from wildlife and waterfowl ponds at the hearing. These amendments change the label but not the substance of what was noticed. Thus, they do not prejudice the parties' positions and do not increase the notice area. Re-notice of the application is not necessary.

Administrative notice was taken of *A GUIDE FOR BUILDING AND MANAGING PRIVATE FISH PONDS IN MONTANA*, January 1994, by Montana Department of Fish, Wildlife & Parks, a copy of which resides at the Department's Helena Office.

This application point of diversion was noticed in the NW¼NE¼NW¼ of Section 4, Township 4 South, Range 18 East. File maps indicate the

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point is in the SW¼NE¼NW¼ of Section 4, Township 4 South, Range 18 East.

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 43C-106060

1. Application for Beneficial Water Use Permit 43C 106060 in the name of and signed by Kenneth J. Wahl was filed with the Department on February 18, 1999 at 12:45 PM. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 90 gallons per minute (hereafter gpm) up to 145.17 acre-feet of water per year from West Rosebud Creek at a point in the SW¼NE¼NW¼ of Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The proposed means of diversion is an existing headgate and ditch. The proposed period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The proposed use is for commercial fish ponds. The proposed place of use is a 1.5 acre-foot pond in the SE¼SE¼NW¼ and a 1.5 acre-foot pond in the NE¼NE¼SW¼ both in Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The total capacity of the two (2) ponds is 3 acre-feet. (Department file, Applicant testimony)

4. Applicant has proven water is physically available. West Rosebud Creek is downstream of Mystic Lake which has a hydropower generating facility at its outlet. This generation maintains the flow of the creek year round with stored water. During high runoff, the flow is adequate to refill storage and maintain the creek flow. Water short years are rare. Applicant has not measured West Rosebud Creek, but has other ponds from this source, and has found the source reliable for their use. Applicant provided summer and winter photos of West Rosebud Creek which clearly show the flow exceeds 90 gpm. (Department file, Applicant testimony)

5. Applicant has proven water is legally available if pond outflow is returned to an existing meander channel tributary to the source.

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The ponds will fill with groundwater and are non consumptive. Applicant will return waters diverted to the existing meander channel at a point on his property immediately below the downstream pond. (Department file, Applicant testimony)

6. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. The means of diversion can be closed if a downstream call is received. Applicant will return water diverted to the ponds back to the source after use in the ponds. (Department file, Applicant testimony)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate if the overflow from the pond is returned to an existing meander channel on applicant's property that is tributary to West Rosebud Creek. The water is diverted into an existing ditch which has adequate capacity for the additional 90 gpm of this proposal. Objector Ostrum objected to the outflow from the ponds discharging to his property. Prior to the hearing Applicant changed the point of return to an existing meander channel on Applicant's property; this makes the means of operation adequate. (Department file, testimony of Applicant and Chad Ostrum)

8. Applicant has proven the proposed commercial trout production in two (2) ponds is beneficial when a private pond license is acquired from Montana Department of Fish, Wildlife, and Parks. Applicant is building the ponds according to *A GUIDE FOR BUILDING AND MANAGING PRIVATE FISH PONDS IN MONTANA*, January 1994, by Montana Department of Fish, Wildlife & Parks. The 58°F water in the source will cool the 66°F and 70°F water in the ponds and oxygenate the water in the ponds and improve the fishery habitat. Fish may be stressed at the resulting pond temperatures, but will survive. Applicant will apply for a private pond license from Montana Department of Fish, Wildlife, and Parks. The stocking rate for the ponds will come from recommendations of the Montana Fish, Wildlife, and Parks. (Department file, testimony of Applicant, Gayle Hayley in Application 43C-106059)

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9. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. (Department file, Applicant testimony)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW 43C-106060

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Mont. Code Ann. § 85-2-312 (1999).

3. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of a beneficial water use permit. *See* Findings of Fact 4 through 9. Mont. Code Ann. §85-2-311 (1999).

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

PROPOSED ORDER 43C-106060

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 43C-106060 is issued to Kenneth J Wahl to appropriate 90 gallons per minute up to 145.17 acre-feet from West Rosebud Creek at a point in the SW¼NE¼NW¼ of Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The means of diversion is an existing headgate and ditch. The period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The use is for commercial fish ponds. The place of use is a 1.5 acre-foot pond in the SE¼SE¼NW¼ and a 1.5 acre-foot pond in the NE¼NE¼SW¼ both in Section 4, Township 4 South, Range 18 East, Stillwater County, Montana. The total capacity of the two (2) ponds is 3 acre-feet.

A. Applicant must return the overflow from the ponds to an existing meander channel on Applicant's property that is tributary to West Rosebud Creek.

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B. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

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 service of the proposal. 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 19TH day of December, 2000.

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 20th day of December, 2000.

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