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

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 43Q-)
107167 BY THE BRIARWOOD)
FINAL
ORDER

* * * * *

The Proposal for Decision (Proposal) recommending granting Beneficial Water Use Permit 43Q-107167 to appropriate 15 cfs up to 100 acre-feet of water per year from Blue Creek in the NE¹/₄SE¹/₄NE¹/₄ of Section 28, Township 01 South, Range 26 East, Yellowstone County, Montana was entered on April 17, 2001. Objector Don and Mary DeJarnett, and Objector Lyle and Toril Knight filed timely exceptions to which Applicant did not respond.

Objectors DeJarnett and Knight argue that previous behavior by the Applicant necessitates that, 1) Objectors or the public have unimpeded access to the staff gauge to be installed at the bridge across Blue Creek, and 2) that Applicant be required to use the most sophisticated measuring devices available to make the required measurements. For this review, the Department must accept the Hearing Examiner's Findings of Fact if they are supported by substantial evidence in the record. Mont. Code Ann. § 2-4-622(3).

Water use permit contested case hearings are conducted only to determine if the criteria in Mont. Code Ann. §85-2-311 are met. These criteria do not include whether or not an Applicant has "misbehaved" regarding previous water diversions. No law allows the Department to condition a permit for the reasons suggested by Objectors. If

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Objectors question the Applicant's appropriation activities, they can contact the Applicant directly, or indirectly through the Department and its complaint process. The Department has authority to enter on land to make inspections the Department considers necessary to determine whether or not persons are complying with the Water Use Act, and to request Applicant's measurement records at any time. Mont. Code Ann. § 85-2-115.

The record provides no justification for more sophistication than requiring the staff gauge be installed under the auspices of a professional engineer, and Department approval of the measuring device to measure flow rate and volume diverted. The reason offered by the Objectors for additional requirements is past Applicant behavior (discussed above) and is not related to the criteria for issuance of a permit. The Department may only use conditions necessary to satisfy the criteria listed in § 85-2-311. Mont. Code Ann. § 85-2-312.

The Department having given the Objectors' Exceptions due consideration adopts the Findings of Fact and Conclusions of Law already presented in the Proposal for Decision. The Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 43Q-107167 is **ISSUED** to The Briarwood to appropriate 15 cfs up to 100 acre-feet of water per year from Blue Creek at a point in the NE~~SE~~NE~~NE~~ of Section 28, Township 01 South, Range 26 East, Yellowstone County, Montana. The means of diversion is multiple pumps. The period of diversion is from October 1 through June 30, inclusive, of each year. The period of use is March 15 through November 15, inclusive, of each year. The use is irrigation. The place of

use is 23 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$, Section 22; 23.5 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$, 41.5 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$, 10.5 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 10.5 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 36 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$, all in Section 27; 28.5 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and 21 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$, all in Section 28; Township 01 South, Range 26 East, Yellowstone County, Montana. The water will be stored in an existing 39.9 acre-foot capacity offstream reservoir in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and an existing 61.4 acre-foot capacity offstream reservoir in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 27, Township 01 South, Range 26 East, Yellowstone County, Montana.

A. A staff gauge must be installed under the supervision of a professional engineer at the bridge across Blue Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 27, Township 01S, Range 26 East with depth at which 10 cfs flows are clearly marked. A rating curve must be developed by a professional engineer to correlate gauge height and streamflow at this site. Only water in excess of 10 cfs at this gauge may be diverted, up to 15 cfs. The appropriator shall keep a daily record of the gauge height while water is being diverted. Records shall be submitted in gauge height and equivalent flow rate by November 30th of each year and upon request at other times during the year. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the staff gauge so it always operates properly and measures flow rate accurately.

B. The appropriator shall install a Department approved water use measuring device at a point approved by the department to measure flow rate diverted and total volume diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written daily record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit

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reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

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 or the oral proceedings to the district court.

Dated this 17th day of August, 2001.



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

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 21st day of August, 2001.

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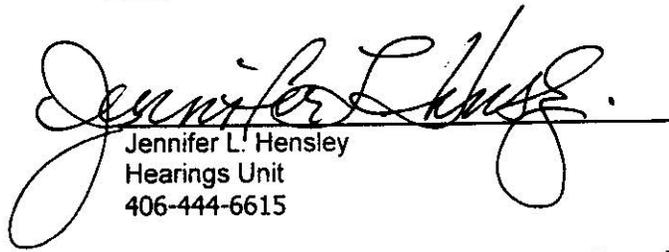
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Jennifer L. Hensley
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Cruck

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

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 43Q-)
107167 BY THE BRIARWOOD)

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 March 28, 2001, in Billings, Montana, to determine whether a beneficial water use permit should be issued to the Applicant for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant appeared at the hearing through Robert W. Maloney, General Manager, The Briarwood. Roger Perkins, P.E., Aquoneering, testified for the Applicant.

George Kenney appeared in person for co-objectors George and Joyce Kenney. Objectors Don and Mary DeJarnett, and Lyle and Toril Knight appeared by and through counsel Kenneth S. Frazier. Don DeJarnett testified for these Objectors. Shirley Turner appeared at the hearing in person. Bobby Purcell appeared in person for co-objectors Bobby Purcell and Grace Brown. Sam Walters, Noreen Restad, and Sherman Diede, all Blue Creek area residents, testified for Objector Purcell. Sherry Danielson appeared at the hearing in person.

Helen Haugan, Blue Creek area resident, testified for Objector Danielson. Objector Atchison, Inc. appeared through Irving Atchison. Objector John Egeland appeared in person.

Marty Van Cleave, Water Resources Specialist, Billings Water Resources Division Regional Office was called to testify by the Applicant. Keith Kerbel, Manager, Billings Water Resources Division Regional Office was called to testify by the Hearings Examiner.

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EXHIBITS

Applicant and Objectors DeJarnett, Turner, and Purcell offered exhibits for the record.

Applicant offered two exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits A1 and A2.

Applicant's Exhibit A1 consists of four pictures of Blue Creek as it flows through Applicant's golf course during a high water event in June, 1997.

Applicant's Exhibit A2 is a one page *Irrigation Water Summary*.

Objector DeJarnett offered 4 exhibits for the record. The Hearing Examiner accepted Objector DeJarnett's Exhibit 1 through 4.

Objector DeJarnett's Exhibit 1 is a two page copy of a document entitled *Supporting Hydrology-The Briarwood Water Right Application*, by Roger Perkins.

Objector DeJarnett's Exhibit 2 is a two page copy of an October 29, 1999 letter from Applicant to "Dear Neighbor".

Objector DeJarnett's Exhibit 3 is a sixteen page copy of a website document with important information bracketed on the first page.

Objector DeJarnett's Exhibit 4 is a ten pages of website documents with important information bracketed on page one of four of the *Life in the Mainstream* article, and bracketed on page one and two of three of the *Living on the Edge* article.

Objector Turner offered two exhibit for the record. The Hearing Examiner accepted Objector Turner's Exhibit 1 and 2.

Objector Turner's Exhibit 1 is a copy of a newspaper article entitled "Yellowstone River flow at record lows".

Objector Turner's Exhibit 2 is four pages containing 7 photographs of various reaches of Blue Creek.

Objector Purcell offered 4 exhibit for the record. The Hearing Examiner accepted Objector Purcell's Exhibit 1 through 4.

Objector Purcell's Exhibit 1 is a copy of a portion of United States Geologic Survey Yegen Quadrangle showing Quanta Subdivision in relation to Applicant property.

Objector Purcell's Exhibit 2 is two page copy of a Quanta Subdivision map and an ownership list.

Objector Purcell's Exhibit 3 is a map showing the Purcell ownership in Quanta Subdivision.

Objector Purcell's Exhibit 4 is a copy of surface water Permit to Appropriate water number 13532-s43Q.

Objector Purcell's Exhibit 5 is a copy of groundwater Certificate of Water Right number 12366-G43Q.

Objector Purcell's Exhibit 6 is a copy of a December 31, 1982, map showing The Briarwood golf course.

Objector Purcell's Exhibit 7 is a copy of page 23, specifically the highlighted portion, of The Briarwood initial offering circular dated December 31, 1982.

PRELIMINARY MATTERS

Objectors Blue Creek Partnership, Gary and Lee Buchanan, Jack Halverson, Maxine Oliver, GA Robertson, Terry and Theresa Roll, and United States (BIA) failed to appear at the hearing and are in default. Their interests in this proceeding are dismissed.

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 43Q-107167 in the name of The Briarwood and signed by Robert Maloney was filed with the Department on June 22, 1999. (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 15 cubic feet per second (hereafter cfs) up to 100 acre-feet of water per year from Blue Creek at a point in the ~~NE~~^{SE}~~NE~~^{NE} of Section 28, Township 01 South, Range 26 East, Yellowstone County, Montana. The proposed means of diversion is multiple pumps. The proposed period of diversion is from October 1 through June 30, inclusive, of each year. The proposed period of use

is March 15 through November 15, inclusive, of each year. The proposed use is irrigation. The proposed place of use is 23 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$, Section 22; 23.5 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$, 41.5 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$, 10.5 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 10.5 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 36 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$, all in Section 27; 28.5 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and 21 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$, all in Section 28; all in Township 01 South, Range 26 East, Yellowstone County, Montana. The water will be stored in an existing 39.9 acre-foot capacity offstream reservoir in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and an existing 61.4 acre-foot capacity offstream reservoir in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 27, Township 01 South, Range 26 East, Yellowstone County, Montana. (Department file)

4. Applicant has proven water is physically available when only high or flood stage flows are diverted. The Billings Regional Office has measured two cfs (~900 gallons per minute) flows in the lower reach of Blue Creek. Applicant used data from gauged streams in the area to estimate that flows in excess 10 cfs should occur eighteen days per year, and 20.63 cfs flows (sum of downstream rights and requested flow) should occur five to seven days per year. Objectors' observations are that high (unmeasured) flows have occurred only two to three times since the late seventies. Thus, the requested flows are available on an uncertain frequency. (Department file, testimony of Roger Perkins, Don DeJarnett, Shirley Turner, Bobby Purcell, Sherman Diede, Sherry Danielson, Helen Haugan, Keith Kerbel)

5. Applicant has proven water is legally available when only high or flood stage flows are diverted. There are downstream rights of 5.63 cfs, and Blue Creek has periods of flow, albeit limited periods, exceeding the sum of downstream rights and the amount requested. During the 1997 high flow period there was water available for Objectors' use. (Department file, testimony of Roger Perkins, Shirley Turner, Bobby Purcell, Sherman Diede, Sherry Danielson, Helen Haugan)

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 when only high or flood stage flows are diverted. Applicant proposed in prehearing correspondence to limit diversions to times when flows exceed 10 cfs.

This converts Applicant's intent for high flows to a numerical flow rate. This flow is reasonable in that it exceeds the downstream water right demand and leaves lower, longer duration flows to recharge the shallow aquifer which Blue Creek flows over. A reasonable gauge location is at the bridge near the entrance to The Briarwood.

There is a connection between Blue Creek and the shallow aquifer.

High flows maintain the character of the stream channel and provide limited recharge to the aquifer because of the short flow duration. The record only speculates on the degree of connection and amount of recharge Blue Creek provides to the aquifer. By measuring the flow rate and volume of water diverted, and the flow of water in Blue Creek, Applicant can subtract the amount diverted from the amount in the source to assure 10 cfs is flowing by Applicant's pumps.

Diverting only flows in excess of 10 cfs will prevent adverse effect to prior appropriators. Applicant can turn pumps off to stop diverting when water is no longer available. (Department file and records, testimony of Roger Perkins, Robert Maloney, Shirley Turner, Bobby Purcell, Sherman Diede, Sherry Danielson, Helen Haugan)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate when a staff gage is installed at the bridge near the entrance to The Briarwood and rating curves developed to correlate gauge height to stream flow. Applicant will use multiple low head-high volume pumps that can divert the requested volume in three to four days when the requested flow rate is available. Multiple pumps allow matching pumping rate to the excess over 10 cfs. (Department file, testimony of Roger Perkins, Robert Maloney)

8. Applicant has proven the proposed use of water for golf course irrigation is beneficial. The golf course is existing and the water requested will reduce the volume currently purchased from other sources to irrigate the golf course. (Department file, Department records)

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

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

CONCLUSIONS OF LAW

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

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 43Q-107167 is **ISSUED** to The Briarwood to appropriate 15 cfs up to 100 acre-feet of water per year from Blue Creek at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, Township 01 South, Range 26 East, Yellowstone County, Montana. The means of diversion is multiple pumps. The period of diversion is from October 1 through June 30, inclusive, of each year. The period of use is March 15 through November 15, inclusive, of each year. The use is irrigation. The place of use is 23 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$, Section 22; 23.5 acres in the N $\frac{1}{2}$ NW $\frac{1}{4}$, 41.5 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$, 10.5 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 10.5 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 36 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$, all in Section 27; 28.5 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and 21 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$, all in Section 28; Township 01 South, Range 26 East, Yellowstone County, Montana. The water will be stored in an existing 39.9 acre-foot capacity offstream reservoir in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and an existing 61.4 acre-

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foot capacity offstream reservoir in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 27, Township 01 South, Range 26 East, Yellowstone County, Montana.

A. A staff gauge must be installed under the supervision of a professional engineer at the bridge across Blue Creek in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 27, Township 01S, Range 26 East with depth at which 10 cfs flows clearly marked. A rating curve must be developed by a professional engineer to correlate gauge height and streamflow at this site. Only water in excess of 10 cfs at this gauge may be diverted, up to 15 cfs. The appropriator shall keep a daily record of the gauge height while water is being diverted. Records shall be submitted in gauge height and equivalent flow rate by November 30th of each year and upon request at other times during the year. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the staff gauge so it always operates properly and measures flow rate accurately.

B. The appropriator shall install a Department approved water use measuring device at a point approved by the department to measure flow rate diverted and total volume diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written daily record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

NOTICE

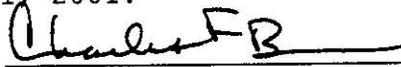
This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after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

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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 16th day of April, 2001.



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

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 17th day of April, 2001.

THE BRIARWOOD
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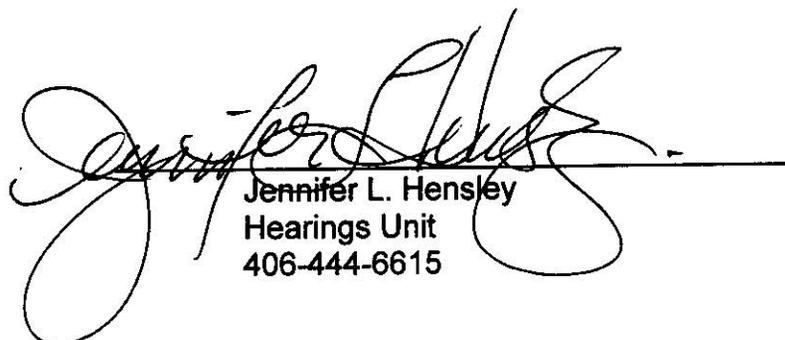
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