

Applicant's proposed point of diversion. Any surface water which flows onto Applicant's property can be collected in the infiltration gallery without affecting downstream appropriators whether the spring is flowing one gallon per minute or three gallons per minute. Thus, the water is legally available. Applicant testified, under oath, he has measured the flow rate of the stream for ten years with the maximum flow rate at three gallons per minute. The water is physically available.

Objector excepted to Finding of Fact 6 arguing the Hearing Examiner found the proposed means of diversion, construction, and operation are not adequate, but then re-engineered Applicant's system and declared it adequate.

The Department may require modification of the plans and specifications for the appropriation or related diversion or construction. The Department may also issue a permit subject to terms, conditions, restrictions and limitations it considers necessary to satisfy the criteria for issuance of a permit. Mont. Code Ann. § 85-2-312 (1999). The Hearing Examiner determined an infiltration gallery buried four feet deep may develop or attract underground flows now arising on Objector's property. The Examiner then correctly proposed modification of the diversion to ensure no groundwater would be diverted and proposed a condition on the permit limiting the depth of the perforations on the infiltration gallery to one foot or less below the surface of the ground.

Objector excepted to Finding of Fact 9 arguing Applicant has not proved he has a possessory interest in the place of use. Applicant proposes to use the water in Lot 21 of the Double M Ranch subdivision. Applicant owns Lots 21 and 19 of the Double M Ranch subdivision and produced deeds at the evidentiary hearing as proof. This reviewer believes Objector fears the diversion might be on his property not the place of use. Applicant testified at the evidentiary hearing the property line had been located and marked by surveyors. Further, it is

not likely Applicant would spend the time and resources to install an infiltration gallery on some other person's property.

For this review, the Department must accept the Proposal's Findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3)(1999) and Mont. Admin. R. 36.12.229 (1999). The Department has considered the exceptions and oral arguments and reviewed the record under these standards. The Department finds the Proposal is supported by the record and the facts were properly applied to the law.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the June 27, 2000, Proposal for Decision, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41F-107597 is issued to Timothy A. Beardsley to appropriate 3 gallons per minute up to 3.76 acre-feet of water per year from an unnamed tributary of Jack Creek at a point in Lot 18 of the Double M Ranch subdivision, in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 06 South, Range 01 East, Madison County, Montana. The permitted means of diversion is a surface water infiltration gallery. The permitted period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The permitted use is for multiple domestic and stock. The permitted place of use is in Lot 21 of the Double M Ranch subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 06 South, Range 01 East, Madison County, Montana.

A. The infiltration gallery perforations cannot exceed depths of one foot below existing ground level. The infiltration gallery may be installed at deeper levels.

B. This permit is associated to water right numbers 41F-E089733 and 41F-C088988. They have the same place of use and place of storage for the domestic uses. The combined domestic volumes shall not exceed 3 acre-feet.

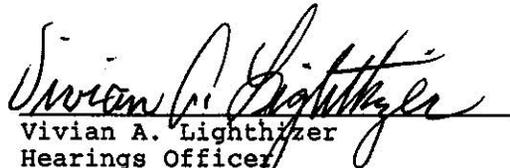
C. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

NOTICE

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 3rd day of ~~September~~, 2000.

October


Vivian A. Lighthizer
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena MT 59620

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served upon all parties listed below this ^{3rd} day of October, 2000.

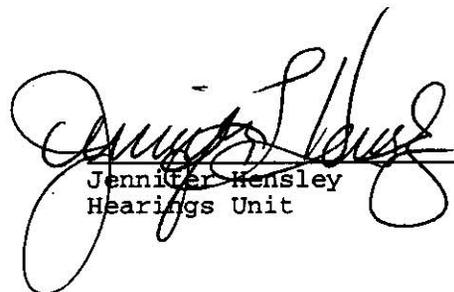
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR) Proposal
BENEFICIAL WATER USE PERMIT 41F-) For
107597 BY TIMOTHY A BEARDSLEY) 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 February 24, 2000, in Ennis, Montana, to determine whether a beneficial water use permit should be issued to Timothy A. Beardsley for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant appeared at the hearing in person.

Objector Nick Mallas appeared at the hearing in person. David M. Schmidt, Senior Water Rights Specialist, Water Right Solutions, appeared as a witness for Mr. Mallas.

Jan Mack, Water Resources Specialist with the Bozeman Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record.

Applicant offered ten exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1-10.

Applicant's Exhibit 1 is a two picture panorama of Applicant's existing spring which is in the vicinity of the proposed development.

Applicant's Exhibit 2 is a picture of Applicant's existing spring.

Applicant's Exhibit 3 is a picture of the buildings at the place of use.

Applicant's Exhibit 4 is a picture of water flowing from the spring point of origin, looking south.

Applicant's Exhibit 5 is a picture of the spring point of origin, looking south.

Applicant's Exhibit 6 is a picture of the spring point of origin, looking north.

Applicant's Exhibit 7 is a picture of the spring point of origin and outflow, looking east on to Tim Beardsley property. The boundary line between Beardsley and Mallas is marked by a dashed line on the photo.

Applicant's Exhibit 8 is a copy of a map showing contour lines, subdivision lot boundaries and numbers, Beardsley existing spring, application source and place of use.

Applicant's Exhibit 9 consists of 8 pages of copies of deeds for lots in Double M Ranch subdivision.

Applicant's Exhibit 10 is a sketch of Applicant's proposed infiltration gallery.

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

Objector's Exhibit 1 is a 21 page report prepared by David M Schmidt for Objector Mallas.

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 41F-107597 in the name of and signed by Timothy A. Beardsley was filed with the Department on July 6, 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 3 gallons per minute (hereafter gpm) up to 3.76 acre-feet of water per year from an unnamed tributary of Jack Creek at a point in Lot 18 of the Double M Ranch subdivision, in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 06 South, Range 01 East, Madison County, Montana. The proposed means of diversion is an infiltration gallery. 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 multiple domestic and stock. The proposed place of use is in Lot 21 of the Double M Ranch subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 06 South, Range 01 East, Madison County, Montana. (Department file, Applicant testimony)

4. Applicant has proven water is physically and legally available. Applicant has measured the flows to be collected at three gpm by placing a pipe in the flow channel to divert the surface flows into a one gallon bucket. Applicant has measured the flows in the spring and fall seasons for ten years. Applicant recorded the measurements, but did not provide them for the record. Three gpm will produce 4.84 acre-feet in a year.

There are no water rights downstream of the proposed project. The spring originates on the Objector's property, flows on the surface from the Objector's property onto Applicant's property, flows a short distance, then soaks into the ground while still on Applicant's land.

The only right to use of the water from the spring surfacing on Objector's land is the exempt livestock right shared by the Applicant and Objector. The Objector's portion of the exempt right is upstream of the Applicant, so the flows to the Applicant are legally available.

(Department file, testimony of Tim Beardsley, Nick Mallas, David Schmidt)

5. 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. There are no surface water rights on the source other than the exempt instream stock uses of the upstream Objector and the Applicant. (Department file and records, testimony of Tim Beardsley)

6. Applicant has not proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant proposes to bury a four foot deep perforated plastic collection and settling basin, or infiltration gallery, to collect the surface flow as it leaves the Objector's property. The flow is from a spring which originates ten feet upstream on Objector's property. The water will be piped from the infiltration gallery to two existing 1000 gallon storage tanks which also receive water from Applicant's other spring (Water Right No.'s 41F-E089733 and 41F-C088988). The Objector contends the excavation and placement of the Applicant's infiltration gallery may divert flows which historically surfaced at the spring on the Objector's property. The Objector uses the spring for livestock on his property and anticipates possible future uses from the spring.

The future uses are not covered by any pending or issued water rights, so they cannot be considered here. An infiltration gallery (collection box) perforated to a depth of four feet may develop or attract underground flows now rising on Objector's property. Since the Applicant seeks only surface water in this application and has only shown surface flows are available, limiting the depth of the water collection to that which is flowing at or near the surface makes the means of diversion adequate.

The record does not show the development will be in the relatively impermeable fault plane barrier that is the likely cause of the spring. The record shows the spring flowing from an area with surface, or elevation, variations of one-half to one foot from tracks and the channel. To allow infiltration from depths up to one foot

seems reasonable to limit the capture of water to that which flows on the surface or has seeped into the streambed. (Department file, Department records, testimony of Applicant, Dave Schmidt)

7. The proposal is in the Upper Missouri basin closure area, which includes Jack Creek. No new consumptive water use permits may be issued in the closure area. Exceptions to the closure include permits for domestic and stock use. (Department file, Department records)

8. Applicant has proven the proposed use of water for multiple domestic and livestock is beneficial. The proposed water will supplement water rights for the same domestic purposes under water rights 41F-E-089733 and 41F-C088988. These rights provide water from a one gallon per minute spring for two domestic uses and one-half acre of lawn and garden. The lawn and garden component of 41F-E-089733 was not included in this application, and a third domestic use is added in this application. The proposed amounts are reasonable for three homes and 30 horses as long as the combined volume of the domestic uses does not exceed the amount proposed. (Department file, Department records)

9. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. He owns the property. The Objector is concerned that the proposed development may occur on his property. Applicant has had his property surveyed and has flagged the boundary near the stream channel to assure the development occurs only on his property. (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

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 1 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 41F-107597 is issued to Timothy A. Beardsley to appropriate 3 gpm up to 3.76 acre-feet of water per year from an unnamed tributary of Jack Creek at a point in Lot 18 of the Double M Ranch subdivision, in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 06 South, Range 01 East, Madison County, Montana. The permitted means of diversion is a surface water infiltration gallery.

The permitted period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The permitted use is for multiple domestic and stock. The permitted place of use is in Lot 21 of the Double M Ranch subdivision, in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, Township 06 South, Range 01 East, Madison County, Montana.

A. The infiltration gallery perforations cannot exceed depths of one foot below existing ground level. The infiltration gallery may be installed at deeper levels.

B. This permit is associated to water right numbers 41F-E089733 and 41F-C088988. They have the same place of use and place of storage for the domestic uses. The combined domestic volumes shall not exceed 3 acre-feet.

C. 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.

Proposal for Decision
Application 41F-107597 by Timothy A Beardsley

CASE # 107597

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 27th day of June, 2000.



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

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served upon all parties listed below this 27th day of June, 2000.

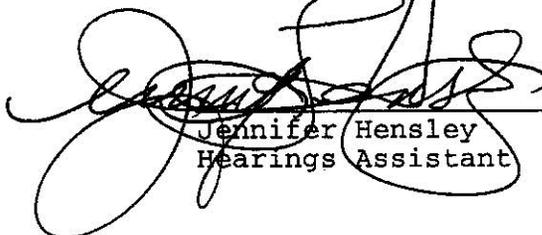
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