

LANG

7625 109371

FINAL ORDER

APPEALED

TO

DISTRICT COURT

Case # 109371

year from a ground water well at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 22 North, Range 23 West, Lake County, Montana. The means of diversion is a (flowing) well. The period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The uses are 700 gpm up to 470.46 acre-feet for commercial water bottling, and 35 gpm up to 3.26 acre-feet multiple domestic. The place of use is within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ for the commercial purpose, the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ for the multiple domestic purpose, all in said Section 29, Township 22 North, Range 23 West, Lake County, Montana.

A. The appropriator shall install a department approved in-line flow meter at a point in the delivery line approved by the Department to record the flow rate and volume of water diverted for commercial purposes. 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 monthly written records of the flow rate and volume measurements and shall submit the records by November 30th of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of the permit. The records must be submitted to the Kalispell Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. Permittee must meet all applicable water quality, review, and testing requirements found in Administrative Rules of Montana, Title 17 Chapter 38.

C. This right is subject to §85-2-505, MCA, requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

D. This right is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply.

REMARK

This permit shall contain the following paragraph as a remark to be printed on the permit:

The Confederated Salish and Kootenai Tribes interpret CSKT v. Clinch, 1999 MT 342, 297 Mont. 448, 457, 992 P.2d 244 (1999), to apply to ground water permits within the exterior boundaries of the Flathead Indian Reservation irrespective of whether there is a hydrologic connection to the surface water. It is the Tribes' position that the exercise of junior water rights either within or outside of the exterior boundaries of the Flathead Indian Reservation may adversely affect the reserved water rights of the Tribe within the exterior boundaries of the reservation. It is the Tribes' position that economic investments made in reliance upon this right, do not create in the appropriator any equity or vested right against the Tribes. The appropriator is hereby notified that any financial outlay or work invested in a project pursuant to this right is at the appropriator's risk. The issuance of this right does not reduce the appropriator's liability for damage caused by the exercise of the right. It does not make the Department liable for damage caused by the exercise of the right. Nor is the Department liable for any loss to the appropriator caused by

the exercise of senior reserved water rights. The State of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Case no. CV 92-54-M-CCL (United States District Court, District of Montana, Missoula Division-filed May 15, 1992), which is currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

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 7th day of June, 2001.



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

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Final Order was served upon all parties listed below this 8th day of June, 2001, as follows:

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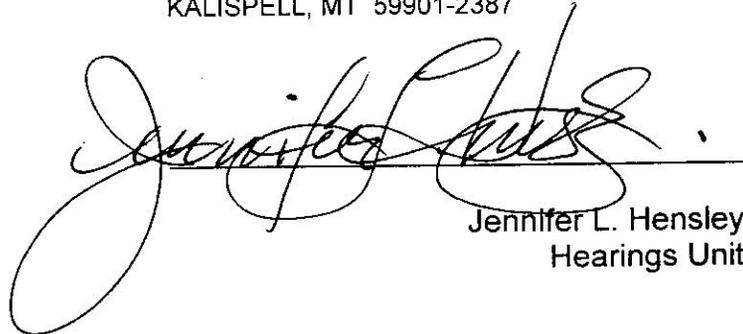
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Jennifer L. Hensley
Hearings Unit

Chase

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

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 76L-)
109371 BY REGINALD C. LANG)

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 September 7, 2000, in Polson, Montana, to determine whether a beneficial water use permit should be issued to Reginald C. Lang 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, and by and through counsel Lloyd Ingraham. Charlie Price, Tina Lang, and Robert Hungerford testified for the Applicant. J. Jay Billmayer, P.E., Billmayer Engineering, testified as a rebuttal witness for the Applicant.

Objector Winchester Creek Partnership appeared by and through counsel Carl Mendenhall. Jamie Larson testified for Winchester Creek Partnership.

Objector Thomas and Carol Tibbles appeared in person at the hearing. Clayton White and Perry Bowerman testified for Objector Tibbles.

Rich Russell, Water Resources Specialist with the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by Objector Winchester Creek Partnership.

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Bill Uthman, Hydrogeologist, Department of Natural Resources and Conservation, was called to testify by the hearings examiner.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record.

Applicant offered four exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1-4.

Applicant's Exhibit 1 copy of a 1993 Montana Bureau of Mines and Geology water quality analysis (#93Q0518) on the well in question, Well Number 88.

Applicant's Exhibit 2 is a Driving Horse Trust trustee declaration by Reginald C. Lang clarifying the possessory interest of Applicant. Objector Winchester Creek Partnership objected to the admission of this exhibit. The objection was overruled; the exhibit shows the relationship of applicant to the property.

Applicant's Exhibit 3 is an explanatory sketch of artesian aquifer recharge and discharge drawn by Bill Uthman.

Applicant's Exhibit 4 is an explanatory sketch of typical well drawdown vs time relationship drawn by Bill Uthman.

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

Objector Tibbles' Exhibit 1 is a fax copy of a cover letter and report entitled *An Evaluation Of Water Quality Parameters Related To Human Health, Agriculture, And Fisheries* by Wayne C. Curry. Applicant's objection to admittance of this exhibit was overruled.

Department's Exhibit 1 is large map of the hydrogeology of the Little Bitterroot Valley.

Department's Exhibit 1 is hand drawn sketch of the Rex Lang well.

PRELIMINARY MATTERS

Applicant clarified the projected daily hours of operation of the water bottling plant at ten (10) hours per day. This clarification results in an annual volume for this use of 470.46 acre-feet instead of 1120 acre-feet.

During the hearing, Objector Winchester Creek Partnership alleged that sand appearing in their well was the result of Applicant's well use. Neither party asked Staff Expert Bill Uthman what he believed the reason for the occasional sand in Winchester Creek Partnership's well might be. After the hearing, I posed the question to Mr. Uthman.

He interprets the sand to be quick sand associated with vertical groundwater movement in Winchester Creek Partnership's well and is not related to the Applicant's well.

On January 23, 2001 the record was reopened to allow the Applicant to cross examine and rebut Mr. Uthman's reply to a Hearings Examiner question.

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 76L-109371 in the name of and signed by Reginald C. Lang was filed with the Department on September 21, 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 735 gallons per minute up to 473.72 acre-feet per year from a ground water well at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 22 North, Range 23 West, Lake

County, Montana. The proposed means of diversion is a flowing well. The proposed period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The proposed use is 700 gpm up to 470.46 acre-feet for commercial water bottling, and 35 gpm up to 3.26 acre-feet multiple domestic . The proposed place of use is in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ for the commercial purpose, in the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ for the multiple domestic purpose, all in said Section 29, Township 22 North, Range 23 West, Lake County, Montana. (Department file, Applicant testimony)

4. The Applicant's source, the Lonepine aquifer, is not hydrologically connected to downgradient basin surface water sources.

Recharge to the Lonepine aquifer originates as rainfall or snowfall upgradient of Applicant's well, and recharge rate is affected by the permeability of the fractures in the recharge area, not the level of water or pressure head in the aquifer. The Lonepine aquifer is confined by extensive impermeable lakebed silts. Because of the extensive lakebed deposits throughout the area, most of the ground water in the lower Little Bitterroot River valley exits the basin as underflow through the subsurface, rather than entering streams as baseflow. In the hearing Mr. Uthman stated that the Lonepine aquifer flow direction is to the southeast along the axis of the Little Bitterroot River valley. Mr. Uthman theorized the aquifer may discharge to the alluvium of the Flathead River and perhaps to deeper aquifers further to the south. Mr. Uthman found no evidence of contact between the aquifer and the Flathead River alluvium. Mr. Uthman examined well logs, or whatever he could find, along the Little Bitterroot River and the Flathead River within the exterior boundaries of the Flathead Indian Reservation and found no substantial evidence of a connection between the aquifer and the Flathead River. His

interpretation is that the aquifer and the surface waters are separated at least to the west boundary of the Flathead Indian Reservation along the Flathead River. Mr. Uthman's testimony is well grounded by his background, experience, and use of published articles and information.

In May 2000, Applicant was ordered to "provide hydrologic information substantiating that the proposed appropriation from the identified aquifer is not connected to or will not affect surface water sources." Applicant's engineer reported on July 5, 2000 "The proposed appropriation from the identified aquifer is not connected to or will not affect service [sic] water sources...Nothing was found to indicate that the aquifer is connected to or will affect surface water sources."

Once water enters the aquifer it exits at an unknown location outside the exterior boundaries of the Flathead Indian Reservation. (Department file, testimony of Bill Uthman, Jay Billmeyer, Memorandum [below])

5. The Tribes have asserted that the Montana Supreme Courts decision in In the Matter of the Application for Beneficial Water Use Permits Nos.66459-76L Ciotti; 64988-G76L, Starner; and Application for Change of Appropriation Water Right No. G15152- S76L, Pope ("Ciotti"), 278 Mont. 50, 923 P.2d 1073 (1996), reh'g denied (1996), precludes the Department from issuing water use permits under Mont. Code Ann. § 85-2-311 from any source of supply within the Flathead Indian Reservation. The Ciotti case was a statutory construction case. In direct response to the Ciotti decision the Montana Legislature enacted legislation negating the Ciotti case. 1997 Mont. Laws, ch. 497, Statement of Intent ("The legislature intends that the Montana Supreme Court's decision in In the Matter of the Application for Beneficial Water Use Permits Nos.66459-76L Ciotti; 64988-G76L, Starner; and

Application for Change of Appropriation Water Right No. G15152- S76L, Pope, 53 St. Rep. 777 at 784, 923 P.2d 1073, be negated by the passage and approval of this bill"). See generally California v. FERC, 495 U.S. 490 (1990) (in statutory construction cases the legislative body is free to alter what the courts do); Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir., 1998) (the legislative branch is always free to amend laws it believes the court's have misinterpreted). The Montana Legislature has expressly overruled Ciotti.

Following Ciotti the Tribes initiated CSKT v. Clinch, 1999 MT 342, 297 Mont.448, 457, 992 P.2d 244 (1999). The Montana Supreme Court concluded in CSKT v. Clinch that the Department **cannot determine whether water is legally available** on the Flathead Indian Reservation for the purpose of issuing beneficial water use permits pending the quantification of the Tribes' federal reserved water rights. The Court enjoined the Department from issuing beneficial water use permits on the Flathead Indian Reservation pending the quantification of the Tribes' reserved water rights. The Montana Supreme Court did not enjoin the Department from processing beneficial use applications nor did it enjoin the Department from processing and authorizing applications for change in water use authorizations within the exterior boundaries of the Flathead Indian Reservation. Although the dissent in CSKT v. Clinch noted that the majority's holding apparently precludes DNRC from issuing permits for ground water use, the majority holding itself does not address ground water as a source of water subject to a federal reserved right, nor does it address ground water that is not hydrologically connected to the surface water supply.

As noted in the majority opinion of the Montana Supreme Court in CSKT v. Clinch, "[I]n support of their petition the Tribes allege that because they possess reserved water rights which are pervasive, have not been

quantified, and carry a priority date from at least the Treaty of Hellgate dated July 16, 1855, and because the nonconsumptive right includes the right to in-stream flow, the Tribes have the right to prevent other appropriators from depleting the stream's waters below a protected level which has not yet been determined.. ." (emphasis added). Here then, unlike the surface waters, if the ground water source in this case can be shown not to affect the surface flows that form the basis for the Tribes' in-stream flow federal reserved water right claims, then an inquiry into the legal availability of water in the source of supply can be made prior to the quantification of the reserved water right of the Tribe, because regardless of how much water is taken from the ground water resource there will be no depletion of the stream's waters below a protected level, whatever that level may ultimately be determined to be in the quantification.

The application pending before the Department is for a permit to appropriate ground water that is not hydrologically connected to the surface waters of the Flathead Indian Reservation. The Tribes have filed a comprehensive claim that encompasses all water underlying the reservation. However, the Tribes have not established that they have a legal right to the ground water as a matter of law. This is not a question of fact. It is a question of law whether there is a federal Indian reserved water right. Neither the United States Supreme Court nor the Montana Supreme Court has ever determined that the federal Indian reserved water right applies to the ground water, specifically non-tributary ground water, underlying the Flathead Indian Reservation in Montana. The highest state courts in Wyoming and Arizona have addressed the issue concerning Indian reservations within the respective states. See Big Horn River System (Wyo.) 1988) 753 P.2d 76, 99, cert. denied, 488 U.S. 1040, 109 S.Ct. 863, 102 L. Ed. 2d 987 (1989), holding that ground water is not included

in the federal reserved water rights doctrine, and In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Ariz. 1999) 195 Ariz. 411, 989 P.2d 739 (1999), holding that in Arizona a federal reserved right to ground water may be found only where other waters are inadequate to accomplish the purpose of a reservation. Montana, like Wyoming, is a headwater state and unlike Arizona, Montana may be classified as a water-rich state with water physically available to meet current needs, and ample supplies to meet future requirements. See generally Montana Department of Natural Resources and Conservation, Montana Water Use In 1980 (March 1986).

This case involves a factual situation where the ground water is not hydrologically connected to the surface flows on the Flathead Indian Reservation. The ground water from the source of supply at issue would have to be obtained through artificial mechanisms, e.g., pumping, to support surface flows. At the time of the treaty creating the Flathead Indian Reservation the means did not exist to use this source of supply to accomplish the purposes for which the reservation was created. Since the time of the Treaty the purpose of the reservation has not depended on such a resource since historically the waters of the unconnected resource were never available for use on the Reservation.

Consequently, for purposes of this finding, even though the Tribes have not established a federal Indian reserved right in the ground water resource, in this case I can accept, without deciding, that there is a federal reserved right in ground water to the extent that the water is need to accomplish the purposes of the Reservation.¹ Unlike Ciotti and Clinch where the quantification of instream flows was found to be necessary for

1. Should a court of competent jurisdiction determine on appeal of this matter or in a separate action that there is no federal Indian reserved water right in the subject matter ground water then this finding is by this reference hereby reformed to reflect such a holding.

the legal availability test under 85-2-311 to be met ², here I determine factually the waters subject to appropriation in this matter do not connect to the surface waters for which the instream flows are requested. For purpose of this matter, then, the waters are surplus waters to any reserved right for instream flows or other reserved rights that may exist because they do not serve, nor have they ever served, the purpose for which the Tribes have made claims for the federal Indian reserved water rights.

The Clinch case did not enjoin the Department from processing permits. The Department has processed the above-styled application through hearing and finds that there is no hydrologic connection between the ground water source from which the appropriation is sought and the unquantified instream reserved rights of the Tribes.³

Nothing in this finding should be interpreted to say that even though not hydrologically connected to the surface supply the State cannot compact in relation to the ground water underlying the Reservation. The State may agree to allow a Tribe to acquire a right in the ground water resource under a compacted settlement in exchange for other consideration, such as subordination to junior water rights in the surface water resources.

2. In Clinch the Tribes argued as a purpose the need for the protection of instream flows which were yet unquantified. Indeed the claim filed on behalf of the Tribes by the United States Department of Interior, Bureau of Indian Affairs, states in Attachment A that: "The Confederated Salish and Kootenai Tribes claim instream flows in all those waters in the State of Montana necessary for the protection of those aboriginal rights recognized and guaranteed pursuant to the Treaty of Hellgate, Montana, ..." No other purpose, other than "for any and all purpose" is defined in any of the four claims filed by the Tribes or by the United States on behalf of the Tribes. Taken literally the claims that have been filed are for all ground water, including aquifers, and surface waters which are under or arise upon, border or flow through the Flathead Reservation. This would include all waters flowing on to and off of the Reservation. The Montana Supreme Court has not enjoined permitting off of the Reservation, whether the subject waters are flowing on to or off of the Reservation, even though such waters are directly connected to the surface waters on the Reservation. As such the Montana Supreme Court has evidently or apparently not recognized the expansive nature of the claimed reserved water right. The only purpose asserted by the Tribes that the Montana Supreme Court has apparently felt a need to protect so far is the instream flows. As established in these findings, there is no impact on the instream flows asserted by the Tribes in Clinch. So unlike the surface flows off of the Reservation, which arguably directly impact instream flows, but are not subject to the injunction in Clinch there is no physical way that the unconnected ground water under consideration in this matter can impact those flows that gave rise to the injunctive relief.

3. The United States Supreme Court has not found a federal reserved water right in ground water. In Cappaert v. United States, 426 U.S. 128, 96 S.Ct. 2062 (1976), the Court recognized that it has never applied the doctrine of implied reservation of water rights to ground water. Having made this acknowledgement the Court then stated that the United States could protect the surface water in the Devil's Hole Monument from subsequent diversion, whether the diversion is of surface water or ground water. The holding herein is consistent with Cappaert in that even if there is no federal reserved right in the ground water, the Department can protect the claimed in-stream surface rights of the Tribes' from diversions of ground water so long as it can be established that there is a hydrologic connection between the ground water source and the surface flows. No such showing was made in this matter.

6. Applicant has proven water is physically available using well logs for his well and neighboring wells. (Department file, testimony of Rex Lang, Bill Uthman)

7. Applicant has shown water is legally available. Applicant's well is hydrologically connected to the same aquifer used by the Objectors.

Wells in the area continue to flow under artesian pressure. The record shows area artesian well flow and pressures vary seasonally and annually depending upon use and recharge. The trend in pressure and flow from local wells is downward. If the flowing wells in the area were pumped, appropriated flows could be obtained. The record lacks testimony of calls on the source by senior appropriators, or a history of insufficient water in the aquifer. At the point of diversion and downgradient of the point of diversion, the aquifer is not tributary to surface waters within the Flathead Indian Reservation. (Department file, testimony of Rex Lang, Tom Tibbles, Clayton White, Jay Billmeyer, Bill Uthman, Finding of Fact 4)

8. Applicant has proven there is no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. Pressure and flows in area artesian wells fluctuate on a seasonal and annual basis. However, wells in the aquifer continue to flow, suggesting water is reasonably available to those who seek it. Montana statutes do not protect the level of water or pressure in a well beyond assurance that the senior right will be able to reasonably exercise the right.

Objector Winchester Creek Partnership alleged adverse affect from sand entering their well when applicant's well was turned on. Applicant well has not been turned on at the times of alleged sand problems. Sand in the Winchester Creek Partnership well is interpreted by Expert Uthman to be "quick" sand from the Lonepine

aquifer as a result of the upward vertical ground water gradient, and that it is impossible that turbulence from Lang's unperforated well casing would disrupt sediments to an extent that would produce sand in any of the Winchester Creek Partnership wells. (Testimony of Rex and Tina Lang, Jamie Larson, Bill Uthman discussion)

9. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. The aquifer test information shows the well capable of flowing the requested flow rate. The flowing well has a valve to control use and prevent waste when the well is not in use. (Department file, Department records, testimony of Applicant, Bill Uthman)

10. Applicant has proven the proposed use of water for multiple domestic is beneficial. The rate and volume are reasonable for the two domestic uses. (Department file, Department records)

11. Applicant has proven the proposed use of water for commercial water bottling is beneficial if the water quality continues to meet Montana water supply standards for bottled water. Applicant's intent is to diligently increase the appropriation over five (5) years. Measurement of flow rate and volume is required to establish the quantity of water finally appropriated for this use. Applicant agreed to measure the flow rate and volume of all water diverted and used, and report such measurements to the Department annually. (Department file, Department records, Admin. R. Mont. 17.38 (1993-1999))

12. 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

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. CSKT v. Clinch, 1999 MT 342, 297 Mont.448, 457, 992 P.2d 244 (1999), enjoins the Department from issuing "further water use permits on the Flathead Reservation until the Tribes' rights have been quantified." The physical diversion of the ground water is within the exterior boundaries of the reservation. Although physically diverted within the exterior boundaries of the Flathead Reservation where the purpose of the reserved water right, i.e., protection of the in-stream flows on the reservation is claimed, such purpose is not frustrated by the issuance of the permit, i.e., a ground water source that is not hydrologically connected to the surface source in which the in-stream flow is claimed. Nevertheless, the Department will not enter a final order in this matter until such time as the Montana Supreme Court dissolves or modifies its injunction upon proper application of the applicant and/or the Department.

3. 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).

4. Applicant has met, or there are conditions that can satisfy, the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 12. 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 76L 109371 shall be **ISSUED** to Reginald C. Lang to appropriate 735 gpm up to 473.72 acre-feet per year from a ground water well at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 22 North, Range 23 West, Lake County, Montana. The means of diversion is a (flowing) well. The period of appropriation and period of use is from January 1 to December 31, inclusive, of each year. The uses are 700 gpm up to 470.46 acre-feet for commercial water bottling, and 35 gpm up to 3.26 acre-feet multiple domestic . The place of use is within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ for the commercial purpose, the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ for the multiple domestic purpose, all in said Section 29, Township 22 North, Range 23 West, Lake County, Montana.

A. The appropriator shall install a department approved in-line flow meter at a point in the delivery line approved by the Department to record the flow rate and volume of water diverted for commercial purposes. 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 monthly written records of the flow rate and volume measurements and shall submit the records by November 30th of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of the permit. The records must be submitted to the Kalispell Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. Permittee must meet all applicable water quality, review, and testing requirements found in Administrative Rules of Montana, Title 17 Chapter 38.

C. This right is subject to §85-2-505, MCA, requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

D. This right is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply.

MEMORANDUM

This permit shall contain the following paragraph as a remark to be printed on the permit to fully inform the permittee of the risks involved:

The Confederated Salish and Kootenai Tribes interpret CSKT v. Clinch, 1999 MT 342, 297 Mont. 448, 457, 992 P.2d 244 (1999), to apply to ground water permits within the exterior boundaries of the Flathead Indian Reservation irrespective of whether there is a hydrologic connection to the surface water. It is the Tribes' position that the exercise of junior water rights either within or outside of the exterior boundaries of the Flathead Indian Reservation may adversely affect the reserved water rights of the Tribe within the exterior boundaries of the reservation. It is the Tribes' position that economic investments made in reliance upon this right, do not create in the appropriator any equity or vested right against the Tribes. The appropriator is hereby notified that any financial outlay or work invested in a project pursuant to this right is at the appropriator's risk. The issuance of this right does not reduce the appropriator's liability for damage caused by the

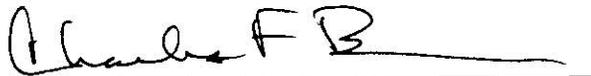
exercise of the right. It does not make the Department liable for damage caused by the exercise of the right. Nor is the Department liable for any loss to the appropriator caused by the exercise of senior reserved water rights. The State of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Case no. CV 92-54-M-CCL (United States District Court, District of Montana, Missoula Division-filed May 15, 1992), which is currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

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 May, 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 a true and correct copy of the Notice of Cross Examination and Rebuttal was served upon all parties listed below this 10th day of May, 2001, as follows:

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INGRAHAM LAW FIRM
10 ADAMS ST EAST
RONAN, MT 59864

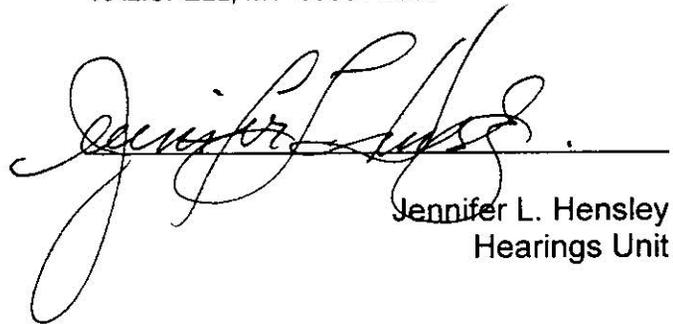
WINCHESTER CREEK LTD PARTNERSHIP
PO BOX 629
HOT SPRINGS, MT 59845

THOMAS & CAROL TIBBLES
PO BOX 8
HOT SPRINGS, MT 59845

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
DEP'T OF NATURAL RESOURCES AND
CONSERVATION
PO BOX 201601
HELENA, MT 59604
(HAND-DELIVERED)

CLAYTON MATT
CONFEDERATED SALISH AND KOOTENAI
TRIBES
PO BOX 278
PABLO, MT 59855

KURT HAFFERMAN, MANAGER
RICH RUSSELL, SPECIALIST
KALISPELL REGIONAL OFFICE
109 COOPERATIVE WAY, SUITE 110
KALISPELL, MT 59901-2387



Jennifer L. Hensley
Hearings Unit