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

* * * * *

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 76GJ)
110821 BY SUSAN J & RANDY M PETERSON) FINAL
AND MT DEPARTMENT OF TRANSPORTATION) ORDER

* * * * *

The Hearing Examiner entered the Proposed Terms and Conditions (Proposal) in this matter on April 26, 2001. Objector Carl Nelson Ranch Company filed timely exceptions to the Proposal without a request for oral argument.

The Proposal recommended granting a Beneficial Water Use Permit to appropriate up to 45 acre-feet of groundwater per year for wildlife and waterfowl to mitigate wetland destruction by road construction.

Objector has excepted to the findings of fact in that the Objector believes that all of the prehearing process, amendments to the application, and agreements among the parties should be included in the findings. The Department, however, believes that it is sufficient that everything submitted and determined prehearing is in the record and that it would be unnecessary to include everything as facts of the case. The purpose of the contested case was to determine the relevant factual criteria for issuance of the water use permit. The Department believes that the criteria have been established if the condition concerning augmentation of Flint Creek is followed. Reciting all of the prehearing process would not change the decision.

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) and Mont. Admin. R. 36.12.229. The Department has considered the exceptions 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

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hereby accepts and adopts the Findings of Fact and Conclusions of Law contained in the April 26, 2001, Proposed Terms and Conditions, 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 76GJ 110821 is **ISSUED** to Susan J & Randy M Peterson and Montana Department Of Transportation to appropriate up to 45 acre-feet of water per year of groundwater in the NE¼ of Section 35, Township 10 North, Range 13 West, Granite County, Montana. The permitted means of diversion is six shallow groundwater ponds. The permitted period of appropriation is from January 1 to December 31, inclusive of each year. The permitted use is wildlife and waterfowl to mitigate wetland destruction by road construction. The permitted place of use is six shallow ponds located in the NE¼ of Section 35, Township 10 North, Range 13 West, Granite County, Montana, with capacities of 2.2 acre-feet, 5.2 acre-feet, 2.6 acre-feet, 2.6 acre-feet, 1.8 acre-feet, and 0.9 acre-feet and a total capacity of 15.3 acre-feet. The volume appropriated includes water for evaporation from the wetland.

A. Permittee shall leave 0.12 cubic feet per second of water right 76GJ W-008531-00 in Flint Creek at the Enman-Nelson Ditch headgate to augment Flint Creek flows.

B. Permittee must receive and maintain an Authorization to Change the purpose of 0.12 cubic feet per second of water right 76GJ W-008531-00 prior to and during times the ponds exist under this permit.

REMARK

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

There is an agreement entered into by the parties which has been placed in the file but is not necessarily recognized by this Department.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the

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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 6th day of JULY, 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 that a true and correct copy of the Proposed Terms and Conditions was served upon all parties listed below on this 3rd day of July, 2001.

SUSAN J & RANDY M PETERSON
PO BOX 88
HALL MT 59837

JAMES M DINSMORE
333 LOWER WILLOW CREEK RD
HALL MT 59837

CARL NELSON RANCH CO
ATTN: JAMES P STRUNA
PO BOX 353
DRUMMOND MT 59832

MT DEPARTMENT OF TRANSPORTATION
RESOURCES BUREAU
ATTN: SUZY ALTHOF
PO BOX 201001
HELENA MT 59620-1001

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
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BILL SCHULTZ, MANAGER
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1610 S 3RD WEST, SUITE 103
PO BOX 5004
MISSOULA MT 59806-5004


Jennifer L. Hensley
Hearings Unit
406-444-6615

Clark

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

* * * * *

IN THE MATTER OF APPLICATION TO)
CHANGE APPROPRIATION WATER RIGHT)
76GJ 110821 BY SUSAN J & RANDY M) PROPOSED TERMS
PETERSON AND MT DEPARTMENT OF) AND CONDITIONS
TRANSPORTATION)

* * * * *

PRELIMINARY MATTERS

February 27, 2001, Applicant was ordered to explain how the proposed augmentation plan would replace depletions to senior appropriators in Flint Creek, and provide a timeline for acquisition of a change authorization to protect the waters used in the augmentation plan. Applicant provided a timely response.

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 76GJ 110821 in the name of and signed by Susan J. and Randy M. Peterson and Montana Department of Transportation was filed with the Department on May 10, 2000. (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 up to 45 acre-feet of water per year of groundwater in the NE¼ of Section 35, Township 10 North, Range 13 West, Granite County, Montana. The proposed means of diversion is six shallow groundwater ponds. The proposed period of appropriation is from January 1 to December 31, inclusive of each year. The proposed use is wildlife and waterfowl to mitigate wetland destruction by road construction. The proposed place of use is six shallow ponds located in the NE¼ of Section 35, Township 10 North, Range 13 West, Granite County, Montana, with capacities of 2.2 acre-feet, 5.2 acre-feet, 2.6 acre-feet, 2.6 acre-feet, 1.8 acre-feet, and 0.9 acre-feet

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and a total capacity of 15.3 acre-feet. The volume appropriated includes water for evaporation from the wetland. (Department file)

4. Objectors Carl Nelson Ranch Co. and James M. Dinsmore have withdrawn their objections to this application. The Objectors agreed that if: (1) 0.12 cubic feet per second (hereafter cfs) of the existing Peterson water right number 476GJ W-008431 is left in the Enman-Nelson Ditch instead of diverted to the historic place of use, and (2) an amended Wetland Preservation / Conservation Agreement, and an Amended Wetland Preservation Easement addressing Objectors' right to continued flow of water and ditch access for maintenance is filed, their objections may be dismissed. (Department file)

5. The project lies in the Upper Clark Fork River Basin Closure Area. Groundwater permits may be issued within the closure area if an augmentation plan is provided which provides sufficient augmentation water in amount, time and location to replace depletions to senior rights on the affected source. Applicant provided an augmentation plan. (Department file)

6. The groundwater intended for appropriation would flow underground to Flint Creek in a northeasterly direction from the place of use if it were not evaporating from the proposed ponds. The volume of water projected to evaporate from the proposed ponds is equal to 0.12 cfs. (Department file)

7. Applicant's augmentation plan is to continue diverting flows from Flint Creek into the Enman-Nelson Ditch under existing water right 76GJ-W008431, and reduce the diversion from the Enman-Nelson Ditch by 0.12 cfs to augment the flows in Flint Creek. The groundwater required to be replaced by the augmentation plan is that which has historically flowed in a northeasterly direction from the proposed ponds. The augmentation plan augments flows downstream of the point in the Enman-Nelson Ditch where water was historically diverted onto the irrigated parcel. The augmentation plan does not show how the water left in the Enman-Nelson Ditch would replace depletions to the Flint Creek water right in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, Township 10 North, Range 13 West. If water were not diverted into the Enman-

Nelson Ditch, that is, left in Flint Creek in the amount of 0.12 cfs, it would replace water to senior rights on Flint Creek in the NW¹/₄NW¹/₄ of Section 36, Township 10 North, Range 13 West. (Department file, Department records)

8. Applicant has provided evidence that an application to change the purpose of use for 0.12 cfs to protect the amount needed in the augmentation plan has been filed. Authorization of the change in purpose is required to protect the augmentation water. (Department file)

9. Applicants have met the criteria for issuance of a permit as required by Mont. Code Ann. §85-2-337 (3) (1999). (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. The Department may issue a permit to appropriate groundwater in the Upper Clark Fork River Basin Closure Area if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of §85-2-311, that the augmentation plan provides sufficient augmentation water in amount, time, and location to replace depletions to senior water rights. Mont. Code Ann. §85-2-337 (3) (1999).

4. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 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 TERMS AND CONDITIONS

THEREFORE, the Department of Natural Resources and Conservation proposes to issue the permit as follows:

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76GJ 110821 is **ISSUED** to Susan J & Randy M Peterson and Montana Department Of Transportation to appropriate up to 45 acre-feet of water per year of groundwater in the NE¼ of Section 35, Township 10 North, Range 13 West, Granite County, Montana. The permitted means of diversion is six shallow groundwater ponds. The permitted period of appropriation is from January 1 to December 31, inclusive of each year. The permitted use is wildlife and waterfowl to mitigate wetland destruction by road construction. The permitted place of use is six shallow ponds located in the NE¼ of Section 35, Township 10 North, Range 13 West, Granite County, Montana, with capacities of 2.2 acre-feet, 5.2 acre-feet, 2.6 acre-feet, 2.6 acre-feet, 1.8 acre-feet, and 0.9 acre-feet and a total capacity of 15.3 acre-feet. The volume appropriated includes water for evaporation from the wetland.

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MEMORANDUM

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

There is an agreement entered into by the parties which has been placed in the file but is not necessarily recognized by this Department.

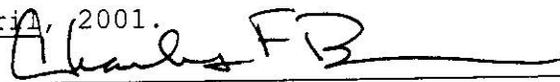
NOTICE

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 25th 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 Proposed Terms and Conditions was served upon all parties listed below on this 26th day of April, 2001.

SUSAN J & RANDY M PETERSON
PO BOX 88
HALL MT 59837

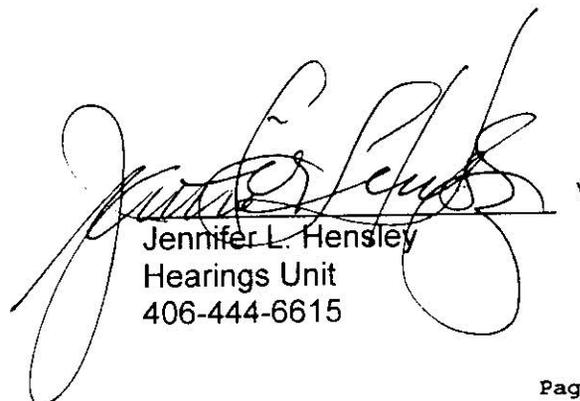
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