

Chuck

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
41QJ-111525 BY ROBERT E DUROCHER) **FINAL
ORDER**

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on April 16, 2001. Objector Montana Fish, Wildlife & Parks, (DFWP) filed timely exceptions to the Proposal.

The Proposal recommended granting a Beneficial Water Use Permit to appropriate fifty cubic feet per second up to 386.8 acre-feet from Little Muddy Creek for wildlife and wetland habitat.

Objector DFWP excepted to Finding of Fact 6 and Finding of Fact 8. The exceptions do not relate to the criteria for granting a beneficial water use permit and do not contest the issuance of the permit. The exceptions therefore do not warrant changing the findings.

The Department of Natural Resources and Conservation (DNRC) notes for the record in this Final Order that the DFWP reservation discussed in Finding of Fact 6 in the Missouri River Reach #3 is significantly less than the amount quantified as needed to initiate paddlefish spawning migration. Although the DFWP reservation is protected by this order, the reservation may not be sufficient to provide reliable paddlefish spawning flows.

DNRC also notes DFWP's concerns that the definition of "high spring flows" may sweep too broadly and that other options for defining the term should be considered. The DFWP clarified that it was not advocating a particular definition and that it preferred the definition used in the Proposal over a definition testified to by DNRC staff at the hearing.

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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 (1994). 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 hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 16, 2001, 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 41QJ-111525 is **ISSUED** to Robert E. Durocher to appropriate 50 cubic feet per second up to 386.8 acre-feet from the Little Muddy Creek at a point in the NE¹/₄NE¹/₄SW¹/₄ of Section 30, Township 19 North, Range 01 East, Cascade County, Montana. The means of diversion is a headgate. The period of diversion is March 1 through June 30, inclusive, of each year. The period of use is January, 1 through December 31, inclusive, of each year. The purpose is a wildlife and wetland habitat. The proposed place of use is an off stream 386.8 acre-foot reservoir located in Section 32, Township 19 North, Range 01 East, Cascade County, Montana.

A. Water may not be diverted when the sum of the flow rates at United States Geological Survey (USGS) gauging stations No. 06089000 (Sun River near Vaughn) and No. 06078200 (Missouri River near Ulm) drops below 7,880 cubic feet per second. The flows at these gauging

stations must be checked **DAILY** during periods of diversion to determine availability of water.

B. The diversion structure must be constructed to by-pass at least one (1) cubic foot per second of water to the stream below the point of diversion at all times.

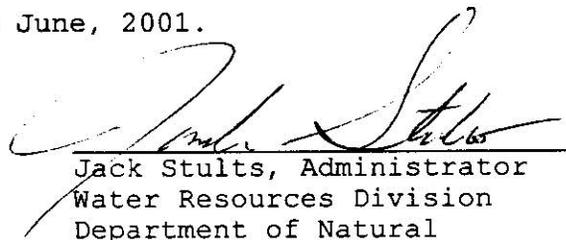
C. To meet the requirements of the Upper Missouri Basin Closure, water can only be diverted during high spring flows. The Permittee must close the gated inlet June 30, or when the pond is full, whichever comes first, and leave it closed until the next March 1.

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 22nd 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 that a true and correct copy of the Final Order was served upon all parties listed below on this 25th day of June, 2001.

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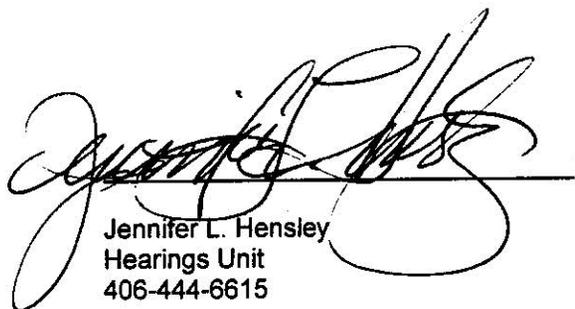
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR) PROPOSAL
BENEFICIAL WATER USE PERMIT 41QJ-) FOR
111525 BY ROBERT E DUROCHER) 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 14, 2001, in Great Falls, Montana, to determine whether a beneficial water use permit should be issued to Robert E. Durocher 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. Robert F. Johnson, Deputy Project Leader, United States Fish and Wildlife Service (hereafter USFWS) appeared as a witness for the Applicant.

Objector Montana Fish, Wildlife & Parks (hereafter DFWP) appeared at the hearing by and through counsel Rebecca J. Engstrom. Kathleen Williams, DFWP Water Resources Program Manager, and Steve Leath, Regional Fisheries Manager, DFWP, were called as witnesses by Objector DFWP.

Objector Robert C. and Sandra J. Nylund appeared at the hearing by and through Robert Nylund. Robert C. Nylund testified for Objector Nylund.

Andy Brummond, Water Resources Specialist with the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (hereafter Department) was called to testify by the Applicant.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. Applicant offered one exhibit for the record. The Hearing Examiner accepted Applicant's Exhibit 1.

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Applicant's Exhibit A-1 is a 10 page large document consisting of preliminary engineering drawings of the project prepared by Ducks Unlimited.

Objector DFWP offered two exhibits for the record. The Hearing Examiner accepted Objector's Exhibits 1 and 2.

Objector DFWP's Exhibit O-DFWP-1 consists of the portions circled in green on pages 3-17 and 3-26 of the ten pages provided of a portion of the *Application For Reservations of Water in the Missouri River Basin Above Fort Peck Dam*.

Objector DFWP's Exhibit O-DFWP-2 consists of the portions circled in green on page 687 of the eight pages provided of a portion of the *FLOOD DEPENDENCY OF COTTONWOOD ESTABLISHMENT ALONG THE MISSOURI RIVER, MONTANA, USA*.

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

Objector Nylund's Exhibit O-N-1 consists of three pages; a copy of a well log report and a two page water analysis report.

PRELIMINARY MATTERS

Objector Lloyd and Ethyl Maki failed to appear at the hearing and are in default.

Objector Montana Department of Natural Resources and Conservation, Trust Lands Management Division, failed to appear at the hearing and are in default.

The record of the hearing was left open for receipt of Andy Brummond's precipitation data from the Cascade and Simms gauge records. Mr. Brummond copied his eight page precipitation data memo dated March 15, 2001 to all parties.

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 41QJ-111525 in the name of and signed by Robert E. Durocher was filed with the Department on May 2, 2000. (Department file)

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

3. Applicant seeks to appropriate 50 cubic feet per second (hereafter cfs) up to 386.8 acre-feet from the Little Muddy Creek at a point in the NE~~NE~~SW~~SW~~ of Section 30, Township 19 North, Range 01 East, Cascade County, Montana. The proposed means of diversion is a headgate. The proposed period of diversion is March 1 through June 30, inclusive, of each year. The proposed period of use is January, 1 through December 31, inclusive, of each year. The proposed use is a wildlife and wetland habitat. The proposed place of use is an off stream 386.8 acre-foot reservoir located in Section 32, Township 19 North, Range 01 East, Cascade County, Montana. (Department file, Applicant testimony)

4. Applicant has proven water is physically available by using United States Geological Survey Report 86-4027 to estimate flows in the Little Muddy Creek basin. This report provides a technique to estimate flood magnitude and frequency. Two hundred sixty-three cfs (263 cfs) flows are projected to occur at least once every two years.

Objector Nylund's personal observations are that the flows to his downstream pond have filled his pond only three or four years in the decade of the 1990's. Three or four years out of ten is nearly the same as once every two years. Mr. Brummond's memo shows area precipitation in the 1990's was erratic rather than constantly high or low, and there were four years of above average precipitation. Mr. Brummond's memo confirms Applicant and Objector Nylund are reporting nearly the same information. (Department file, testimony of Applicant, Robert Nylund, Andy Brummond March 15, 2001 Memo)

5. Applicant has proven water is legally available when one cfs (448.8 gallons per minute) is allowed to by-pass the diversion at all times, and the period of diversion is limited to times when the downstream hydropower right at Morony dam is met. There are downstream water rights for 50 gallons per minute and unknown flows for stock drinking from Little Muddy Creek. One cfs will reach the downstream appropriators in amounts necessary to meet their

appropriations. Applicant is willing to alter the diversion to by-pass 1 cfs during times he is diverting. Department studies indicate water is available only during May and June of each year; however, storage from the upstream facility on the Missouri River at Canyon Ferry releases water that may exceed the needs of the downstream Morony hydropower right. Applicant is willing to make contacts necessary to determine availability of water using downstream gauging stations on the Sun River and Missouri River. (Department file, testimony of Applicant, Robert Nylund, and Andy Brummond)

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 one cfs is allowed to by-pass the diversion at all times, and the inlet gate is closed when the pond is full or the period of diversion has expired. Objector Nylund asserted there may be increased saline seep on their property from ponding of water from this project. Adverse affect relates to a senior appropriator's ability to reasonably exercise their water right, not other property rights. Even assuming adverse affect related to increased saline seep, Applicant provided information that an increase in salinity in the groundwater or Little Muddy Creek will not occur as a result of the project. Objector DFWP has a state water reservation to protect flows downstream in the Missouri River for paddlefish and other habitat needs. However, the record does not show that DFWP reservation is not being met, or will not be met if this project is approved with conditions protecting the downstream hydropower right at Morony Dam. Nor will there be a significant impact to the habitat protected by the DFWP reservation if flows necessary to protect the downstream hydropower right at Morony Dam are protected. (Department file, testimony of Applicant, Robert Nylund, Andy Brummond, and Steve Leath)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. The sheet pile diversion structure across the creek can be designed to divert only flows exceeding one cfs. The inlet structure is gated so it can be closed to stop diversion into the project when the pond is

full or the period of diversion expires. The outlet structure allows the entire pond to be drained, if necessary. The project will be constructed under the supervision of a professional engineer employed by Ducks Unlimited to work with the Applicant. (Department file, Department records, testimony of Applicant, Robert Johnson)

8. The source, Little Muddy Creek, is in the Upper Missouri basin closure area. Applications to store water during high spring flows are excluded from the closure. Objector DFWP contends that "high spring flows" should be defined as "bankfull", and should remain instream to provide flows to maintain the stream channel of Little Muddy Creek. No statutory definition of "high spring flows" being found, high spring flows for purposes of this order will be defined by the manner of occurrence rather than the effects of occurrence. "High spring flows" then are seasonal, sustained, moderately high flows characteristic of a basin or region affected by runoff from the winter snowpack. This project is to divert waters for storage in a pond when runoff occurs, March through June, which complies with this definition. However, exclusion from the closure does not exclude an appropriator from honoring valid calls during high spring runoff. The means of diversion can be closed when the pond is full, or the June 30th time is reached to prevent diversion outside the excluded period.

(Department file, Department records, testimony of Kathleen Williams)

9. Applicant has proven the proposed use of water for wildlife and waterfowl habitat is beneficial, reasonable for the intended purpose, and is not wasteful. Applicant derives personal satisfaction from wildlife and desires to enhance habitat for area wildlife and waterfowl. Applicant's cooperators in the project are Ducks Unlimited, providing project design and construction supervision, and the USFWS, providing technical assistance and operational guidance. USFWS also provided guidance in the design of the project, and USFWS indicates that the 50 cfs flow rate and 386.8 acre-feet volume are reasonable for the 216 acre shallow wetland. There is a need for more habitat of this type and projects of this type are designed to provide the maximum amount of wildlife habitat possible in order to make the wetland attractive to as many species of migratory birds as possible.

Monetary resources limit the size of artificially created habitats. Here Applicant desires "biggest bang for the buck" within the limits of the source. Project design limits the diversion rate to 50 cfs, and the impounded volume to 386.8 acre-feet. Once full, water will return to the source. (Department file, Department records, testimony of Applicant, Robert Johnson)

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

11. Applicant has proven the water quality of a prior appropriator will not be adversely affected. One valid objection relative to water quality was filed against this application. Objector claimed the soils at the proposed pond site, Absher-Nobe, are alkaline, and construction of a pond over these soils would cause the alkaline salts to leach out and salt out (sic) the soils and vegetation down slope of the pond, and any groundwater entering the creek would likely elevate the total dissolved salts impairing the water quality for stock. A recent soil survey of the impoundment area shows the soil would be better mapped as a Marvan Clay that has a slow permeability. Investigation by a registered engineer reports that when wet, the clay in the impoundment area becomes completely impervious and would restrict any percolation or infiltration of water. In addition, he reports the thickness of the clay, the absence of any permeable strata or water bearing zones, as well as the presence of the bentonitic shale at the base of the clay precludes the impounded water from migrating downgradient. Another objection stated concerns over potential for increased soil and water salinity downgradient of the proposed impoundment, but did not provide substantial credible evidence to validate the objection. Even if Objection had been deemed valid, the lithology at Objector Nylund's well is not what Applicant found at the project site. The Department EA, revised February 14, 2001, finds a low likelihood of impact to surface or groundwater quality. (Department file, testimony of Applicant, Robert Nylund, Andy Brummond)

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 11. 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 41QJ-111525 is **ISSUED** to Robert E. Durocher to appropriate 50 cubic feet per second up to 386.8 acre-feet from the Little Muddy Creek at a point in the ~~NE~~^{NE}~~SW~~^{SW} of Section 30, Township 19 North, Range 01 East, Cascade County, Montana.

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B. The diversion structure must be constructed to by-pass at least one (1) cubic foot per second of water to the stream below the point of diversion at all times.

C. To meet the requirements of the Upper Missouri Basin Closure, water can only be diverted during high spring flows. The Permittee must close the gated inlet June 30, or when the pond is full, whichever comes first, and leave it closed until the next March 1.

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 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 Hearing Notice, Appointment of Hearing Examiner, and Discovery Order was served upon all parties listed below on this 7th day of April 2001.

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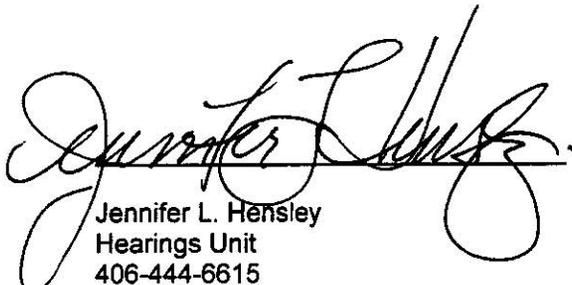
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