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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)
43C-112035 BY GARY O & CLARA B)
BORLAND, DBA CROW CHIEF MEADOWS,)
INC.)

FINAL
ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 10, 2001, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 43C 112035 is hereby DENIED.

NOTICE

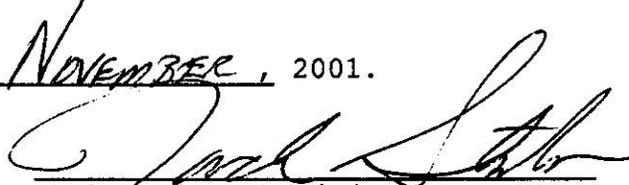
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

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

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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 15th day of NOVEMBER, 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 16th day of November, 2001.

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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)
43C-112035 BY GARY O & CLARA B) PROPOSAL FOR DECISION
BORLAND, DBA CROW CHIEF MEADOWS,)
INC.)

* * * * *

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, a hearing was held on September 25, 2001, in Columbus, 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.

APPEARANCES

Applicant appeared at the hearing in person. Gary O. and Clara B. Borland, testified for the Applicant. Gayle Hayley, biologist, also testified for the Applicant.

Objector J.P. Eggers appeared at the hearing through Kevin M. Chandler, Eggers' son-in-law. Objector Joe Flanagan appeared at the hearing in person. Dora and Joe Flanagan testified for Objector Flanagan. Objector Mary Hamel appeared at the hearing in person.

Marty Van Cleave, Water Resources Specialist with the Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Hearings Examiner.

EXHIBITS

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

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Objector's Exhibit 1 (1-7) consists of color copies of seven photographs in the area:

Photo 1 shows Horse Creek above the proposed pond.

Photo 2 shows Applicant's weir on Horse Creek.

Photo 3 shows the proposed pond site and property boundary between Applicant and Objector Eggers.

Photo 4 shows a close up of Horse Creek stream channel.

Photo 5 shows a close up the Eggers' weir on Horse Creek.

Photo 6 shows a close up the Eggers' weir on Horse Creek.

Photo 7 shows Eggers' pond.

PRELIMINARY MATTERS

Objectors James and Margaret Downs, failed to appear at the hearing and are in default.

Orval C. Nuetzman failed to appear at the hearing and is in default.

Official notice is taken of Objector Eggers' Water Right Number 43C W-208831 and Objector Hamel's Water Right Number 43C P-008279, copies of which reside at the Department's Helena Office.

At the hearing Applicant stated the intent of the proposed pond is to create wildlife habitat that does not include a fishery purpose. The rate and volume of the application were not changed. The Hearing Examiner finds existing water users and parties are not prejudiced by the amendment of the purpose, and re-notice is not required.

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 43C 112035 in the name of Gary O. and Clara B. Borland DBA Crow Chief Meadows, Inc, and signed by Gary O. Borland, was filed with the Department on October 31, 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 20 gallons per minute (gpm) up to 32.26 acre-feet of water per year from Horse Creek at a point in the SE~~SE~~~~NE~~ of Section 15, Township 4 South, Range 18 East, Stillwater County, Montana. The proposed means of diversion is a dam. 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 wildlife habitat in a 3.9 acre-foot pond. The proposed place of use and place of storage is in the SE~~SE~~~~NE~~ of Section 15, Township 4 South, Range 18 East, Stillwater County, Montana. (Department file, Applicant testimony)

4. Applicant has not proven water is physically available. Applicant measured the flows immediately below the point of diversion using a weir from April 12, 2001, through July 15, 2001, and from July 8, 1999, through December 10, 1999. Measurements were recorded in inches. Two and one-half (2.5) inches equals 21.78 gpm. Other weir depth reading flow equivalents are not known. No 2001 measurements equaled or exceeded 2.5 inches. Applicant stated the pond would be filled during the spring when flows are high and other users will not be effected. Applicant explained there are snow drifts in the upper drainage that provide spring runoff necessary to equal 20 gpm in the source at the point of diversion. The recorded measurements do not support this conclusion. No estimating technique or other hydrologic evidence was provided to substantiate Applicant's personal observations since 1992. Applicant measurements between July 8, and September 5, 1999, equaled or exceeded 2.5 inches. Downstream Objector Eggers' weir measurement shows three (3) gpm is flowing in Horse Creek

September 25, 2001. (Department file, testimony of Gary O. Borland, Kevin Chandler)

5. Applicant has not proven water is legally available. There are downstream stock users whose sole source of stock water is Horse Creek from October through April when the proposed pond is being filled (a period of forty-four days [44] at 20 gpm). During the time the proposed pond is filled in the spring, there will be no flows to downstream appropriators through the proposed dam. Downstream appropriators have instream stock rights first used prior to July 1, 1973. Filing a claim for this type of right was voluntary. Thus, the Department records may not include any non-filed voluntary rights. Department records show Objector Eggers' water right 43C W-208831 is a 'water spreading' irrigation right for zero flow rate up to 612.51 acre-feet as modified by the Water Court after issuance of the Temporary Preliminary Decree. Objector Hamel's downstream right is for 120 gpm up to 13 acre-feet. Horse Creek below the proposed pond has never dried up; however, it is not clear that any seepage and evaporation from the proposed pond would not be destined for these downstream rights. In addition, the record does not show downstream flow would be adequate for existing uses if the inflow to the proposed pond were used to fill the pond for up to forty-four days. (Department file, Department records [43C W-208831 & 43C P-008279], testimony of Gary O. Borland, Kevin Chandler, Joe Flanagan, Mary Hamel, Marty Van Cleave)

6. Applicant has not 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. Applicant argued the proposed pond will be non-consumptive after the initial fill period; that evaporation from the .5 acre pond would be 1-2 acre-feet and

described that as minimal. This equates to a loss of 1 gpm over the course of a year. Objectors measured the current flow downstream of the proposed pond at 3 gpm using a weir. The effect of the loss of one-third ($\frac{1}{3}$) of the flow to evaporation on existing downstream stock and irrigation rights, whether considered non-consumptive or not, is not in the record. In addition, the record does not show downstream stockwater rights will not be adversely affected during the time the proposed pond is filled. (Department file and records, testimony of Gary O. Borland, Gayle Hayley, Kevin Chandler)

7. Applicant has not proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. The proposed dam has a vertical pipe with an unknown number of "stop planks" which can release water from the pond. How the pond would release water to honor a valid call by a downstream senior when the water level is below the stop planks is not evident. Applicant argues the pond occurs in a tight clay type soil that holds the water to prevent or reduce seepage. Contradicting that is Applicant's statement that the geology in the area causes a lot of Horse Creek flows to go underground. There is no plan to prevent increased seepage by construction and operation of the dam, or explain the above contradiction. (Department file, testimony of Gary O. Borland, Gayle Hayley)

8. Applicant has not proven the proposed use of water for wildlife habitat is beneficial. The wildlife habitat would be for naturally occurring wildlife and the pond is intended to be a part of a 38 acre area park. Applicant has not established the benefit of this use of water. And, the requested flow rate is an average of that measured in the source. The volume of the pond is based on the location of the pond and has no connection to the needs of the naturally occurring

wildlife. The record does not show why this location or volume is required for the intended wildlife habitat. There was testimony that the water in the pond would be available for temporary emergency appropriation for fire suppression, making the volume stored beneficial. The record does not show that Applicant's intent was to allot, or justify, a portion of the volume based on a fire suppression purpose. (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. This Hearing Examiner will make no finding pertaining to the water quality criteria. Objector Eggers filed an objection relative to water quality alleging the water temperature would be increased by the proposed pond. In response, Applicant hypothesized that the Objector's pond of seven (7) foot depth would cool the water after it was warmed in the proposed eighteen (18) foot deep pond. The record does not establish how Objector Eggers would not be able to exercise their right under the increased temperatures and Applicant's hypothesis is contradictory to how depth affects water temperature. (Department file, testimony of Kevin Chandler, Gayle Hayley)

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.
2. Applicant has not met the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 8. Mont. Code Ann. §85-2-311.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit 43C 112035 is hereby **DENIED**.

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 9th day of October, 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 10th day of October, 2001.

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