

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

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NUMBER) FINAL
41K-11226000 BY HAROLD POULSEN) ORDER

* * * * *

The time period for filing exceptions, and responses to exceptions to the Proposal for Decision in this matter have expired. An exception was received from Objector van der Hagen. Objector van der Hagen took exception to: the lack of reference to erosion control in Finding of Fact No. 3; an incorrect date and lack of a specific finding on Applicant performance in Finding of Fact Nos. 7, 8; lack of a finding in Finding of Fact No. 11 that Applicant has not proven outflows of the project are not equal to inflows; lack of reference in general that Applicant has not shown that three ponds are needed to accomplish the proposed use; Finding of Fact No. 13 should be amended to state the source is a perennial source; Conclusion of Law No. 5 should be amended to state the Applicant has not proven the adverse affect criterion; and lastly, Objector van der Hagen excepts to the Hearing Examiner's denial of their Motion To Reopen The Record. Applicant offered no response to the exceptions.

Any party adversely affected by the Hearing Examiner's Proposal may file exceptions. Mont. Admin. R. 36.12.229(12). Since the Department is denying the Application, there is no need to address the exceptions of Objector van der Hagen whose interests cannot be prejudiced due to the denial of the Application.

Therefore, the Department of Natural Resources and Conservation accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 8, 2002, Proposal for Decision. The

Department ORDERS as follows:

ORDER

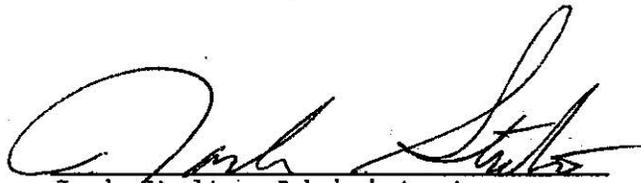
The Application is **DENIED**.

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 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 12th day of December, 2002.



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 13th day of December, 2002 by First Class United States Mail.

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EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered nine exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits 1-4, 6-10.

Applicant's Exhibit A1 is a one page statement of Harold Paulsen.

Applicant's Exhibit A2 is a copy of a one page September 5, 2002 letter. The highlighted portions are admitted into the record.

Applicant's Exhibit A3 is a copy of a one page August 29, 2002 letter. The highlighted portions are admitted into the record.

Applicant's Exhibit A4 is a copy of a two page July 2, 2001 letter. The highlighted portions are admitted into the record.

Applicant's Exhibit A5 was withdrawn.

Applicant's Exhibit A6 is a two page copy of July 15, 2001 Permit Completion and Compliance Certification and map to be submitted to the highlighted portion of the document.

Applicant's Exhibit A7 is a one page copy of an August 24, 2002 letter. The highlighted portions are admitted into the record.

Applicant's Exhibit A8 is a one page copy of an August 23, 2002 letter. The highlighted portions are admitted into the record.

Applicant's Exhibit A9 is a one page map.

Applicant's Exhibit A10 is a twenty-four pages consisting of a one page photo index map and twenty-three digital photographs.

Objectors Neuman and Lahti offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibits A through D.

Objector's Exhibit NA is an August 2000 photograph.

Objector's Exhibit NB is an August 2001 photograph.

Objector's Exhibit NC is an August 2000 photograph.

Objector's Exhibit ND is a September 28, 2001 photograph.

Objector van der Hagen offered seven exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibits A, B, C, E, F, and G. Objector's Exhibit D was not admitted.

Objector's Exhibit VA is a six page copy of a portion of van der Hagen's objection.

Objector's Exhibit VB is a large partial copy of the Sun River United States Geologic Survey map.

Objector's Exhibit VC is a copy of an aerial photograph with section numbers indicated.

Objector's Exhibit VD. An offer of proof was made by Objector van der Hagen of this single page exhibit. The Hearing Examiner ruled the exhibit not relevant and not admitted.

Objector's Exhibit VE is a single photo.

Objector's Exhibit VF is a single photo.

Objector's Exhibit VG is a single photo.

PRELIMINARY MATTERS

Prior to the hearing the Parties stipulated that the Applicant's possessory interest in the place of use of the water was not at issue in this matter.

Objectors Josephine Lahti and Stevie Neuman in prehearing conference consolidated their objections for the purpose of this hearing.

Applicant Poulsen made a brief statement at hearing, introduced Applicant's exhibit A1, and left the hearing not to return. Mr. Volkmar, his ranch manager, was present for the remainder of the hearing.

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

General

1. Three Applications For Provisional Permit For Completed Stockwater Pit or Reservoir were received by the Department July 24, 2000. These applications are the incorrect form and were replaced by Application for Beneficial Water Use Permit 41J-11226000 in the name of Harold Poulsen and signed by Harold Poulsen was filed with the Department on August 16, 2001. The priority date of the July 24, 2000 is applied to the pending application. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate up to 16.05 acre-feet of water per year from an unnamed tributary of the Sun River. The points of diversion, means of diversion, places of use, and places of storage, for this application is three on stream ponds. A 3.4 acre-foot dam and pond is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$; a 2.2 acre-foot dam and pond is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$; a 1.4 acre-foot dam and pond is located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 18, Township 21 North, Range 01 East, Cascade County, Montana. The proposed use is 2.55 acre-feet for stockwater for 150 animal units. In addition 7.0 acre-feet is needed to fill the ponds, and 6.5 acre-feet for mean annual pond surface evaporation. (Department file)
4. The source of water is an unnamed tributary of the Sun River. Historically the water has been diverted at the lower end of the drainage by a ditch company ditch that carries the water to Muddy Creek. Therefore, water from the tributary no longer flows to the Sun River. (Department file, testimony of Pat Volkmar, Alan Rollo, Don van der Hagen, Andy Brummond)

Physical Availability

5. Applicant did not measure flows in the unnamed tributary of the Sun River. At the time Applicant first applied he believed the source was non-perennial and *Application For Provisional Permit For Completed Stockwater Pit Or Reservoir* on a non-perennial stream was the appropriate procedure to acquire a water right. That procedure allows construction of a stockwater reservoir prior to receipt of a provisional permit as opposed to other situations where the permit is required before pond construction. Applicant began impounding water and filled the three ponds in the summer of 2001 and filled the ponds. (Department file)

Legal Availability

6. Applicant admits downstream rights were adversely affected when the ponds were first filled. The downstream appropriators are the objectors. Applicant drilled holes in the overflow standpipe which goes through the bottom of the dam to the pond water surface in the downstream reservoir to allow the top forty inches of the pond to flow downstream through the holes to mitigate the effects on downstream users. The flow rate is controlled by the size of the holes. It is unknown if the Sun River Valley Ditch Company is an appropriator from this source and can make legal demands on the water. (Department file, testimony of Pat Volkmar, Andy Brummond)

7. Applicant agreed to conditions stated in a December 11, 2002 *Notice of Statement and Opinion* to install permanent drainage devices in each pond sufficient to pass the full flow of the source when water cannot be legally stored from the source. Currently, the ponds cannot be drained. In addition, Applicant agreed to install Department approved measuring devices above and below the ponds, and record the flows into and out of the pond system on a weekly basis. (Department file)

8. Applicant agreed to conditions stated in a December 11, 2002 *Notice of Statement and Opinion* to not appropriate water when the flow rate sum at United States Geologic Survey (USGS) Gauging station Nos.

06089000 and 06078200 drops below 7880 cfs. When flows drop below 7880 cfs downstream hydropower appropriations are adversely affected. When the gauged flows are below 7880 cfs, flow out of Applicant's ponds must equal flow into the ponds. Applicant agreed to check the flows daily. (Department file)

9. As currently constructed none of the ponds can be drained. One of the overflow standpipes in the lower pond is broken off at the base which lets water flow downstream from the bottom of the pond. It is unknown how the standpipe broke off. As currently constructed the two upper ponds cannot be drained or convey water downstream unless the ponds are full and overflowing into the standpipes. (testimony of Pat Volkmar)

10. Applicant's plan to assure downstream appropriators rights are satisfied is to install measuring devices immediately above the upstream pond and immediately below the downstream pond. In addition, the standpipe in the lower dam has half inch holes drilled in it to allow the top forty inches of water to drain to the stream channel. (Department file, testimony of Pat Volkmar)

Adverse Effect

11. Water diverted into the ponds after construction caused the stream to dry up below the ponds. Downstream appropriators had to call Applicant to have water released for their instream stock needs. After an August 2001 call to Applicant to release water from the ponds, it took four days for the water to arrive at Objectors' place of use. (Testimony of Stevie Neuman, Don van der Hagen)

12. Objector van der Hagen has no stockwater storage and relies upon streamflow of this source for livestock water. (Testimony of Don van der Hagen)

13. It is not known if in September 2001 there was water flowing into Applicant's upper pond when there was not water flowing downstream to Objectors who were out of water. (Testimony of Don van der Hagen, Bridgett Cook)

Adequacy of Appropriation Works

14. Applicant has used expertise of Sun River Watershed Project, Natural Resources Conservation Service (NRCS), and the Cascade County Conservation District to design and construct the ponds so agency concerns are addressed. Basic pond construction has been completed and the ponds are holding water as requested in the application.

(Department file, testimony of Pat Volkmar)

15. Although the ponds each have two pipes through each dam that are either eight or ten inches (8", 10") in diameter installed to carry water through the dam to the downstream channel, currently they can not drain the ponds or be adjusted to allow water out at times evaporation may exceed pond inflows, or at times a legitimate call is received from a downstream appropriator. (Department file, testimony of Pat Volkmar)

16. At an unknown time in the future Applicant intends to install valved one inch (1") pipes in the existing pond overflow standpipes to carry stored pond water to fifty gallon stock tanks which will be located outside future fences installed to keep cattle from the streambed and ponds. Additional information on the one inch pipes and stock tanks is not known. (Testimony of Pat Volkmar)

17. Applicant hopes the three ponds will fill with stream sediment and become wetlands. Cattails have been planted around the ponds to filter sediment out of the water as it flows through the ponds. It is not known and was not proven how the drainage devices and one inch pipes in the overflow standpipes for stock use will be operational when the ponds are filled with sediment. (Testimony of Pat Volkmar)

Beneficial Use

18. Applicant's intended purpose includes watering stock and controlling erosion in the stream as it flows through Applicant's property. (Department file, testimony of Pat Volkmar)

19. Applicant hopes the three ponds will fill with stream sediment and become wetlands, thus reducing erosion in this stream channel. Cattails have been planted around the ponds to filter sediment out of

the water as it flows through the ponds. It is claimed that the Applicant will benefit from the erosion control because streambank erosion will be reduced because the stream flow velocity will be reduced by the ponds and cattails. It is claimed that when velocity is reduced channel erosion will be reduced and will not remove soil along the stream channel. No expert testimony on these claims was offered by the Applicant. The Department does not view erosion control as proposed here as a beneficial use of water. (Testimony of Pat Volkmar, Andy Brummond)

20. Applicant intends to water 150 animal units with 2.55 acre-feet of water per year. This volume comes from Department standards and is a reasonable amount for this purpose. (Department file)

21. Applicant's stock water needs can be met with the flow capacity of up to three one inch pipes. The flow capacity of these one inch pipes is not known. (Testimony of Pat Volkmar)

Possessory Interest

22. Applicant is the owner of the property which has been designated in the Application as the place of use. (Department file)

Water Quality Issues

23. Objectors' water quality concerns were deemed by the Hearing Examiner to not be issues that could be explored in the hearing. Prior to the hearing the Department determined there were no valid objections relative to water quality against this application, nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. At Hearing Objectors van der Hagen and Neuman learned the Department had ruled their objections not valid for water quality concerns. The file correspondence regarding objections informs the Objectors their objections are correct and complete; but, does not mention the validity of any water quality objections. The Department file does contain "CORRECT COMPLETE "PERMIT" OBJECTION DETERMINATION" forms for each objection. Each form indicates the objector did not raise a water quality issue and provide substantial credible

information establishing one of the water quality criteria may not be met. Objector van der Hagen made an offer of proof for water quality testimony and an exhibit. (Department file, testimony of Don van der Hagen, Stevie Neuman)

Basin Closure

24. This source historically flowed into the Sun River which is subject to the Upper Missouri River basin closure. At the lower end of the source's drainage a Sun River Valley Ditch Company ditch intercepts all water from this source and carries it to Muddy Creek. (Department file, testimony of Andy Brummond, Don van der Hagen, Stevie Neuman, Alan Rollo)

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 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely

affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the volume requested with photographs of full ponds. Applicant provided no water measurements for use in the legal availability analysis. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact No. 5.

4. The Applicant has not proven that water can reasonably be considered legally available. The only rights acknowledged by Applicant are those of the Objectors. The Sun River Valley Ditch Company ditch rights, if any, were not discussed by the Applicant, nor was there an analysis or comparison of water physically available with the existing legal demands for the source. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 6, 7, 9, 10.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Applicant did not offer a concrete plan to assure Applicant's use of water can be controlled so water rights of prior appropriators will be satisfied. When water flow into and out of the ponds is known and the three ponds have drainage devices to release water to valid downstream calls, water can be released for downstream stock needs. Applicant's agreement to these conditions becomes an implied plan which can work to show prior rights will be satisfied. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 7, 9, 10, 11, 12, 13.

6. The Applicant has not proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant has shown that the dams are capable of diverting and holding the water requested. Applicant states the ponds are expected to fill with sediment to serve one of the intended purposes.

It is not known and was not proven how the drainage devices and one inch pipes in the overflow standpipes for stock use will be operational when the ponds are filled with sediment. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact Nos. 14, 15, 16, 17.

7. The Applicant has not proven the erosion control purpose is a beneficial use of water for which Applicant can establish a water right under a permit. Alleged benefits to be gained by the Applicant are slowing the stream velocity so the sediment can deposit in the ponds and stream bank erosion is reduced. Not every use of water, even if claimed by an appropriator to be of benefit to them, amounts to a legal beneficial use of water. See, e.g., Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972 (1935). The Department does not view sediment control as a beneficial use of water. Mont. Code Ann. § 85-2-311(1)(d). See Finding of Fact No. 19.

8. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used for stock purposes is a reasonable amount necessary for the proposed beneficial use. Applicant here has two purposes, stock use and erosion control. The stock purpose does not appear to have anything to do with the ponds other than the overflow pipes in the dams serve as a place to attach one inch pipes to divert water to a nearby stock tank. The volume, 2.55 acre-feet, stated in the application for stock purposes is a reasonable amount. It is the volume of water 150 animal units require according to Department standards. However, since the erosion control purpose using the ponds is not a beneficial use of water, and no flow rate is known for the stock purpose, no flow rate can be assigned to the stock purpose. Mont. Code Ann. § 85-2-311(1)(d). See Conclusion of Law No. 7 above, and Finding of Fact No. 21.

9. The Applicant has a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact No. 22.

10. Objectors believed objections were raised as to the issue of water quality of a prior appropriator being adversely affected. No

objection was raised to the issue of the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. The Department had not ruled any water quality objection valid prior to the hearing. Therefore, the Applicant is not required to address the water quality criteria. Mont. Code Ann. §§ 85-2-311(1)(f), (g), (h), and (2). See, Finding of Fact No. 23.

11. The Upper Missouri River basin closure applies to the application. The basin closure exception for stock water applies to this application. The exception for water from the Muddy Creek drainage that will help control erosion in the Muddy Creek drainage does not apply because the water is tributary to the Sun River unless it is diverted by the ditch company canal. This drainage is tributary to Muddy Creek only because the ditch company canal carries this source to Muddy Creek. Without the ditch company canal it would flow to the Sun River. Mont. Code Ann. § 85-2-343. See, Finding of Fact Nos. 4, 24.

12. The Department cannot grant a permit to appropriate water unless the Applicant proves all of the 85-2-311 criteria by a preponderance of the evidence. Since Applicant has not shown water is legally available; has not shown the means of diversion and operation of the pond is reasonable and adequate to divert water for stock water; has not proven that erosion control is a beneficial use to which Applicant can put the water; and not shown a flow rate needed for stock purposes, as proposed at hearing, that can be beneficially used without waste by a preponderance of the evidence; a permit may not be granted. Mont. Code Ann. § 85-2-312. See Conclusion of Law Nos. 4, 6, 7, 8 above.

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

PROPOSED ORDER

The Application is **DENIED**.

NOTICE

This Proposal for Decision 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 and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by October 28, 2002, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by November 18, 2002, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 8th day of October, 2002.



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 by first class United States Mail on this 8th day of October, 2002.

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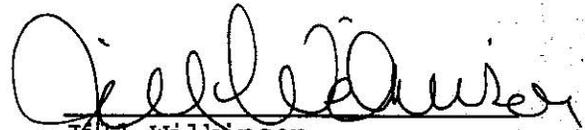
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