

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

**IN THE MATTER OF APPLICATION NO. 41L-)
30025802 TO CHANGE WATER RIGHT NO.)
41L-72578-00 BY CITY OF CUT BANK)**

FINAL ORDER

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by 85-2-307, MCA, a hearing was held on August 18, 2010, in Great Falls, Montana, to determine whether Application to Change a Water Right No. 43D-30002264 by the City of Cut Bank (City) should be approved under the criteria set forth in 85-2-402, MCA.

APPEARANCES

Applicant City of Cut Bank appeared at the hearing by and through counsel Robert A. Smith. Superintendent of City Works, James Suta, testified on behalf of the Applicant.

Objector Blackfeet Tribe (Tribe) appeared at the hearing by and through counsel Sandra Watts. Jeanne Whiteing testified for the Objector.

EXHIBITS

Applicant offered and the Hearing Examiner admitted the following exhibits at the hearing:

Applicant's Exhibit A-1 is a copy of a Notice from the Water Commission for the City of Cut Bank informing all City of Cut Bank water users to curtail irrigation uses and limit use to household use only. Dated September 8, 2007.

Applicant's Exhibit A-2 is a copy of Reservoir Records and Discharge Monitoring Reports from the City of Cut Bank consisting of 4 pages.

Applicant's Exhibit A-3 is an undated letter from the City of Cut Bank regarding discharge to Cut Bank Creek from the city's treatment plant.

Objector offered and the Hearing Examiner admitted the following exhibits at the hearing:

Objector's Exhibit O-1 is a copy of a Blackfeet Tribe Statement of Claim No. 189942 filed in the Montana Water Court purporting to be filed as a protective filing of the Tribe's Federal Reserved Water Right dated April 30, 1982.

Objector's Exhibit O-2 is a copy of a filing made in the Montana Water Court Civil No. WC-91-1 by the United States of America "on its own behalf and for the benefit of the Blackfeet Tribe" described as a "More Definite Statement of Claim for Claim Nos. 189909, 189941, and 189942" dated November 14, 1997.

Objector's Exhibit O-3 is a copy of USGS stream gage records for Station 06099000 Cut Bank Creek at Cut Bank, MT.

Objector's Exhibit O-4 is a copy 9 pages from the Final Order of the Board of Natural Resources and Conservation "Establishing Water Reservations above Fort Peck Dam" dated July 1, 1992 specifically related to the City of Cut Bank.

Objector's Exhibit O-5 is a copy of the "Application for Reservation of Water for the City of Cut Bank" dated August 1988.

Objector's Exhibit O-6 is an unsigned and undated copy of the "Water Rights Compact Entered Into by the Blackfeet Tribe of the Blackfeet Indian Reservation, the State of Montana, and United States of America."

At the Hearing in this matter this Hearing Examiner took official notice of the City of Cutbank's Water Reservation granted by the Board of Natural Resources and Conservation on July 1, 1992. The Board's findings and conclusions regarding the City's Water Reservation are hereby adopted and incorporated by reference in the Final Order.

PRELIMINARY MATTERS

The City of Cut Bank was granted a Water Reservation for 1.42 cubic feet per second (cfs) and 400 acre feet per year (af/year) to be diverted from Cut Bank Creek to an off-stream reservoir with a point of diversion and place of use "as set forth in the reservation application" by Order of the Board of Natural Resources and Conservation dated July 1, 1992. One of the conditions of the Order is that "[a]ny proposed changes of the reservation in point of diversion, place of use, purpose of use, *or place of storage*, . . . shall be made in accordance with the requirements of Mont. Code Ann. § 85-2-402 (1991). Further, the Board shall not approve the change unless provisions of Mont Code Ann. § 85-2-316 (1991) are met." (Exhibit O-4)

As part of its Water Reservation Application, the City conducted a Needs Analysis that identified two storage reservoir alternatives. One alternative was to construct a 190 acre-foot

reservoir that would supply three months of storage volume. The second (and selected) alternative was to construct a 90 acre-foot reservoir that would provide a current average demand flow of approximately 700,000 gallons per day for six weeks. Originally, the storage reservoir was to be located north of the water treatment plant and across Cut Bank Creek in the NE¼ Sec. 2, T33N, R6W. (Exhibit O-4, Department File) Eventually, in 2007, after further analysis and engineering, a storage reservoir with a capacity of 87.3 acre-feet was constructed in the W½SE¼SW¼, Sec. 2, T33N, R6W, to the west of and on the same side of Cut Bank Creek as the water treatment plant. The current location of the reservoir is within the exterior boundaries of the Blackfeet Reservation.

The City's Change Application seeks to establish the actual location of the storage reservoir. No change in the point of diversion, place of use or purpose of use is contemplated. In addition, the City does not contemplate any change in the diversion rate, total diverted volume or timing of diversion. (Department File)

Initially, the Tribe challenged the Department's jurisdiction to consider and either deny, modify or grant the City's Application because Admin. R. Mont. 35.16.118 provides that the Department shall process an application and if the Department approves of the change, then the Board of Natural Resources and Conservation, after hearing, has ultimate authority to grant or deny the change. That Administrative rule has never been repealed.

The Board of Natural Resources and Conservation was dissolved by the Legislature in 1995 and provided that the Department would succeed to the duties of the Board. (85-2-316(12), MCA; Sec. 449, Ch. 418, L. 1995).

The Tribe also challenged the Department's authority based on the line of cases developed in the Flathead Basin known as *Ciotti* and *Clinch*. *In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-G76L, Starner and Application for Change of Appropriation Right No. G15152-S76I, Pope*, 276 Mont. 50, 923 P.2d 1073 (Mont. 1996) ("*Ciotti*"); *Confederated Salish and Kootenai Tribes v. Clinch*, 297 Mont. 448, 992 P.2d 244 (Mont. 1999) ("*Clinch*") and *Confederated Salish and Kootenai Tribe of the Flathead Reservation v. Stults*, 3312 Mont. 420, 59 P.3d 1093 (Mont. 2002) ("*Stults*"). The Tribe argues under those principles that the Department "lacks jurisdiction to grant new uses of water on an Indian reservation without a quantification of tribal reserved water rights. . ." However, in the matter of the tribal reserved water rights on the Blackfeet Reservation, tribal reserved water rights have been quantified by agreement of the parties to the negotiations on

the Blackfeet Tribe-Montana-United States Compact and codified as a matter of state law at 85-2-1501, MCA (2007). Congressional approval is currently being sought by the parties and a vote by the Blackfeet Tribe will be taken prior to submission to the Water Court for incorporation in the statewide adjudication of water rights. (Audio Record, Track 5 @2:35). Here the Department is not undertaking any quantification of, or review of any tribal water which remains under tribal jurisdiction under the Compact. The Department is exercising its jurisdiction an authority here only to govern state water uses under state law.

This Hearing Examiner, by Order dated February 8, 2010, ruled that the Department did have jurisdiction to consider, grant, modify or deny the instant Application. (See In the Matter of Application No. 41L-30025802 to Change Water Right No. 41L-72578-00 by City of Cut Bank ORDER, February 10, 2010; Department File)

Thereafter the Tribe file a Request to Certify the Issue of Jurisdiction to the Director of DNRC pursuant to ARM 36.12.214(1). This Hearing Examiner granted the Request. NOTICE OF HEARING AND SCHEDULING ORDER FOR BRIEFING was issued from the Director on March 26, 2010, and served on all counsel of record that day. The schedule for briefing by the Tribe as Objector and Movant on the Motion for Certification of Jurisdiction was set for April 15, 2010. No opening brief by the Tribe was filed. On April 28, 2010 the Director filed "DNRC Director's Order on Default and Remand to Hearings Examiner" in which the Director finds "that the Hearing Examiner's determination is supported as a matter of law", "the Hearing Examiner's Order of February 8, 2010 is affirmed" and remanded to the Hearings Examiner for further proceedings.

The Hearing on the substance of Application No. 41L-30025802 was then held on August 18, 2010.

GENERAL INFORMATION

Findings of Fact

1. The City of Cut Bank filed Application to Change a Water Right (Application) with the Department of Natural Resources and Conservation Havre Regional Office on December 27, 2006. This Application is to change the recorded location (place of storage) of the City's water storage reservoir from where it was originally planned to be constructed in the NE $\frac{1}{4}$ Sec. 2, T33N, R6W to where it was actually constructed in the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 2, T33N, R6W. The site originally planned for the construction of the storage reservoir was part of the City's Water Reservation Application (Water Right No. 41L-72578-00, granted by the Board of Natural Resources and Conservation on July 1, 1992). Upon further analysis, engineering, and as a

result of Department of Environmental Quality regulations, the City eventually built an 87.3 acre-foot storage reservoir in the current location in 2007. No other changes to the Water Reservation are being considered. (Department File, testimony of James Suta).

2. Notice of Application No. 41L-30042357 was published in *The Cut Bank Pioneer Press*, a newspaper of general circulation, on April 25, 2007. The notice included information about the proposed change and the procedure for filing objections. Notice was also mailed to persons listed in the Department file on April 20, 2007. (Department File)

3. An Environmental Assessment was prepared by the Department for Application 41L-30042357 and has been reviewed and is included in the record of this proceeding. (Department File)

4. Application No. 41L-30042357 seeks to change the location (place of storage) of the City's water storage reservoir authorized by the Board of Natural Resources and Conservation Water Reservation (Water Right No. 41L-72578-00) to the location where it was actually constructed. The original plan was to construct a 90 acre-foot reservoir in the NE¼ Sec. 2, T33N, R6W. Subsequent to the Board of Natural Resources and Conservation grant of the Water Reservation the City conducted further site analysis, engineering analysis, economic analysis, and based on requirements of the Department of Environmental Quality, the City constructed a water storage reservoir with a capacity of 87.3 acre-feet in the W½SE¼SW¼, Sec. 2, T33N, R6W. There will be no further physical change in the place of storage as a result of this Application and there is no anticipated change in the point of diversion, place of use or purpose of use of the Water Reservation and there is no change in the diversion rate, total diverted volume or timing of diversion as a result of this Change Application. (Department File; testimony of James Suta)

5. The Application received one valid objection per 85-2-308, MCA from the Blackfeet Tribe. The Objection complains that the City has not shown that the water rights of the Blackfeet Tribe will not be adversely affected; the means of diversion, construction and operation of the reservoir and associated works may be inadequate; the quality of Tribal water may be adversely affected; the City should be required to first fully utilize its existing water rights before developing the water reservation; a cultural resources study must still be completed; and the City has failed to comply with Tribal law governing construction requirements and environmental permits. (Department File)

Conclusions of Law

1. The Department has jurisdiction to approve a change in Water Reservation if the Applicant proves the criteria in 85-2-402, and 85-2-316(4), MCA, by a preponderance of the evidence. (85-2-316(12), MCA)

2. Section 85-2-402(2), MCA, requires that the Applicant prove the following criteria by a preponderance of the evidence:

(a) the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued.

(b) the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) the proposed use of water is a beneficial use.

(d) 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.

....

(f) the water quality of an appropriator will not be adversely affected.

Section 85-2-316(4), MCA, requires that the Applicant prove the following criteria by a preponderance of the evidence:

(i) the purpose of the reservation.

(ii) the need for the reservation.

(iii) the amount of water necessary for the purpose of the reservation

(iv) that the reservation is in the public interest.

3. Under 85-2-307, MCA, a public notice containing the facts pertinent to the change application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. This requirement has been met. Publication under 85-2-307, MCA, also fulfills the notice requirement under 85-2-316(12), MCA. (Finding of Fact No. 2)

4. The Department has authority to address only those requirements under the Water Use Act in Title 85 MCA. The Department does not have authority to address construction issues with the reservoir such as compliance with Tribal law, preparation of cultural resources study, compliance with permits of other entities, etc. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 (an administrative agency has only those powers specifically conferred upon it by the legislature).

HISTORIC USE

Findings of Fact

6. Water Right No. 41L-72578-00 (the City's Water Reservation) is a relatively recently granted (July 1, 1992) Water Reservation and as such does not have a "historic use" as the Department utilizes that term. The Department has not by rule established a criteria (date) from which to evaluate historic use for water reservations as it has for statements of claim, provisional permits, certificates of water right or exempt and non-filed water rights. In addition, as a Water Reservation the utilization of the water is for existing or future uses and the City of Cut Bank has not as yet fully developed the water reservation. (Department File; ARM 36.12.1902; 85-2-316(1))
7. Water Right No. 41L-72578 provides for a flow rate of 1.42 cfs up to an annual volume of 400 acre-feet. The Board of Natural Resources and Conservation granted the requested flow rate and volume based upon the City's Application for Reservation specifically finding that "[i]t is important that the City of Cut Bank have a water reservation to meet future municipal and industrial water demands . . ." and ordering that ". . . the City of Cut Bank is granted for the following amount and flow of water: 1.42 cfs and 400 af/year." (Department File; General Abstract for 41L-72578; Exhibit O-4)
8. No change in the point of diversion, place of use, purpose of use, diversion rate, total diverted volume or timing of diversion will result from this Change Application. In fact, even the physical location of the place of storage will remain the same – only the description of that place of storage in the record will be changed. (Department File)

Conclusions of Law

5. An applicant can change only that to which it has a right. E.g., McDonald v. State, (1986) 220 Mont. 519, 722 P.2d 598; see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo.,2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible "change" of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271 (issues of waste and historic use, as well as misuse . . . properly be considered by the administrative official or water court when acting on a reallocation application," (citations omitted). The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, even if the water right was decreed in Montana's adjudication. See McDonald (beneficial use is the basis, the measure and the limit, irrespective of greater

quantity attempted to be appropriated). As a point of clarification, a claim filed for an existing water right in accordance with § 85-2-221, MCA, constitutes *prima facie* proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. (See In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation, Final Order, (2008)) The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, Final Order, (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order, (1992).

6. Historic beneficial use is used to evaluate potential adverse effect to other appropriators, senior and junior. Other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; Robert E. Beck, 2 Waters and Water Rights, § 14.04(c)(1) (1991 ed.); W. Hutchins, Selected Problems in the Law of Water Rights in the West, p. 378 (1942); In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); McDonald, supra (existing right is the pattern of historic use).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use*. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

(Emphasis added).

See also, Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, p. 624 (1971) (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point

of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, § 5:78 (2007) (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”).

7. The right proposed to be changed in this matter is a Water Reservation for existing and future uses and as such does not have a full perfected historic beneficial use. Instead, the Water Reservation is based upon proof that the flow rate and volume is necessary for the City’s future needs pursuant to 85-2-316(4), MCA. Based on the unique nature of the City’s Water Reservation, I conclude that the requirement for full historic use evidence does not apply to analysis of this proposed change. Accordingly, I conclude that the Applicant has proven by a preponderance of the evidence that they are entitled to a water reservation with a flow rate of 1.42 cfs with a total annual volume of 400 acre-feet subject to the conditions and limitations set forth in 85-2-316, MCA and the Board’s Order “Establishing Water Reservations above Fort Peck Dam.” (Findings of Fact 6, 7, 8)

ADVERSE EFFECT

Findings of Fact

9. No change in the point of diversion, place of use, purpose of use, diversion rate, total diverted volume or timing of diversion will result from this Change Application. Only the location of that place of storage in the record will be changed from where the reservoir was originally planned to be constructed in the NE¼ Sec. 2, T33N, R6W to where the reservoir was actually constructed in the W½SE¼SW¼, Sec. 2, T33N, R6W. (Department File)

10. The Blackfeet Tribe is primarily concerned with their federal reserved Indian water right and the fact that it is not yet fully quantified. (Department File Objection Letter; testimony of Jeanne Whiteing)

11. The Applicant has a Water Reservation as reflected by Water Right No. 41L-72578 with a flow rate of 1.42 cfs and an annual volume of 400 acre-feet. The Board of Natural Resources and Conservation specifically found that “[a]s conditioned, the City of Cut Bank’s water reservation will not adversely affect any senior water rights.” As granted, the Water Reservation is subject to all prior existing water rights in the source of supply and specifically subject to all

prior Federal and Indian reserved rights. The City may only use the reserved water when such use will not adversely affect prior water rights. (Exhibit O-4)

12. I find the information provided by the Applicant addressing potential for adverse effects to other water users to be credible and there is nothing in the record to warrant this Hearing Examiner to disturb the findings, conclusions and order of the Board of Natural Resources and Conservation granting the City's Water Reservation.

13. I find the proposed change will not increase the flow rate or volume of water granted by the Board of Natural Resource and Conservation to the City of Cut Bank.

Conclusions of Law

8. Prior to the enactment of the Water Use Act in 1973 and the promulgation of § 85-2-402, MCA, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc. v. Newlan Creek Water Dist. (1979), 185 Mont. 409, 605 P.2d 1060, rehearing denied, (1980) 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

9. The applicant for a change of appropriation right has the burden to prove a lack of adverse impact. Royston, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (change denied in part for failure to prove lack of adverse effect due to lack of analysis of return flow). Section 85-2-402(2), MCA, provides that the Department shall approve a change in appropriation right if the

appropriator proves by a preponderance of evidence that the proposed change will not “adversely affect the use of the existing water rights of other persons.” The phrase “by a preponderance of the evidence” means such evidence, as when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. This means that *if no evidence were given on either side of an issue, your finding would have to be against the party asserting that issue*. In the event that evidence is evenly balanced so that you are unable to say that the evidence of either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it. Ekwoztel v. Parker (1971), 156 Mont. 477, 484-485, 482 P.2d 559, 563 (quoting with approval District Court’s Jury Instruction No. 2) (emphasis added).

10. Applicant has proven by a preponderance of the evidence that the proposed change in the place of storage for Water Right No. 41L-72578-00 as granted and conditioned by the Board of Natural Resources and Conservation will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state reservation has been issued, 85-2-402(2)(a), MCA. (Findings of Fact 6 – 13)

MEANS OF DIVERSION

Findings of Fact

14. All works for delivering reserved water to the storage reservoir (point of diversion, pumps, pipelines) are currently in existence and are being used to supply the existing reservoir. All necessary pipelines, pumps and facilities to move water to the City’s water treatment plant and on to the end user are in existence and are currently being used. The water storage reservoir was designed by the engineering firm Morrison-Maierle and is a lined with a 36 mil, reinforced polypropylene liner. The existing storage structure with a capacity of 87.3 acre-feet (as opposed to the original 90 acre-feet reservoir) is more economic, designed for the City’s needs and complies with Department of Environmental Quality standards. (Department File; Exhibit O-5; testimony of James Suta)

Conclusions of Law

11. The adequate means of diversion statutory criteria is a codification of the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e. must not result in a waste of the resource. *In the Matter of Application for Beneficial Water*

Use Permit No. 33983s41Q by Hoyt (DNRC Final Order 1981); §85-2-312(1)(a), MCA.

12. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works for the City of Cut Bank's water system are adequate. (Findings of Fact 14)

BENEFICIAL USE

Findings of Fact

15. The City's Water Reservation is for municipal and industrial use. The City relies on the Board of Natural Resources and Conservation's findings that: (1) the purpose of the reservation is to provide water for municipal and industrial uses and that those uses are beneficial uses in Montana; (2) the reservation of water is the only means to obtain an early priority date for water that will be needed to meet projected municipal and industrial growth; (3) it is important that the City have a water reservation to meet future municipal and industrial water demands; and (4) competing water users may prevent the City from obtaining or perfecting a water use permit in the future. (Department File; Exhibit O-4)

16. The amount of water necessary for beneficial use was addressed by the Board of Natural Resources and Conservation in the July 1, 1992 Order. I concur in the Board's finding that a water reservation of 1.42 cfs up to 400 acre-feet per year would be a beneficial use of water for the City. (Department File; Exhibit O-4)

17. The design and operation of the City's storage reservoir is consistent with the conditions and limitations set forth in the Board's Order "Establishing Water Reservations above Fort Peck Dam." The City has not proposed any change in circumstances from the date of the Board's Order and the record does not disclose any change in circumstances. (Department File)

Conclusions of Law

13. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g. Bitterroot Protective Association v. Siebel, *Order on petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In the Matter of Application for Beneficial Water use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly*, *Order on Motion for*

Petition for Judicial Review, Cause No. BDV-2003-100, Montana First Judicial District (2004)(fish and wildlife use denied for lack of proof); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11 2008)(change authorization denied – no credible evidence provided on which a determination can be made on whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery). An applicant is not required as part of the change or permit process to prove that it cannot get water from elsewhere. An applicant is required to prove only that the water proposed for appropriation or a change will be beneficially used.

14. Applicant has proven by a preponderance of the evidence that the proposed use of water is a beneficial use for the City of Cut Bank. (Findings of Fact 15 – 17)

POSSESSORY INTEREST

Findings of Fact

18. Applicant provides municipal and industrial water to the City of Cut Bank, the Blackfeet Nation community of Seville, and the North Glacier County Sewer and Water District. The City is obligated by contract to provide water to Seville and North Glacier. Residents of the City of Cut Bank are provided water through the municipal system. In addition, the Applicant has signed and notarized the affidavit for the Application affirming the possessory interest in the place of use. (Department File)

19. Water Right No. 41L-72578-00 is a municipal and industrial water right in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest. (Department File; Admin. R. Mont. 36.12.1802)

Conclusions of Law

15. Applicant has proven by a preponderance of the evidence that 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. (Finding of Fact 18, 19)

WATER QUALITY

Findings of Fact

20. Prior to construction of the storage reservoir the City had to backwash their filters up to twice daily with the backwash water being discharged under EPA discharge permits. Since construction of the reservoir, due to the settling of solids, the City no longer discharges water from its potable water treatment plant into Cut Bank Creek except in emergencies, but rather collects water from the creek through an infiltration gallery and pipes that water to the storage reservoir which is then piped to the treatment plant to go to the end users. The proposed change will not affect that process. (Department File; testimony of James Suta; Exhibits A-2 and A-3)

21. The Tribe's objection based on water quality issues essentially asserts that the City's pumping of water from Cut Bank Creek and/or a dam or berm in the creek creates increases in temperature, salinity and dissolved solids impacting tribal fisheries, irrigation, recreation and domestic water supplies. (Department File Objection Letter)

22. The proposed change does not affect the point of diversion from the source of supply. (Department File)

Conclusions of Law

16. An Applicant must prove by a preponderance of the evidence that the water quality of an appropriator will not be adversely affected only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department that the water quality criteria may not be met. (85-2-402(3), MCA)

17. Objector asserts essentially that the intake works (point of diversion and diversion structure) is causing water quality problems. While that may be true, the change contemplated here in no way affects how the point of diversion and its structure will be operated. This change is simply to reflect the location where the storage reservoir has actually been constructed. If the Objector perceives that the City's water works are causing impacts to their appropriation(s) this proceeding is not the proper forum. The Objector should pursue an alternative remedy. (Findings of Fact 20 – 22)

85-2-316(4) CRITERIA

Findings of Fact

23. The City asserts that the four criteria of 85-2-316(4), MCA are not affected by this proposed change application. The Water Reservation remains as it was issued by the Board of Natural Resources and Conservation Order of July 1, 1992, to wit, the Board found that the purpose of the reservation was proper, that the need for the reservation was established, that the amount of water (1.42 cfs and 400 acre-feet) was needed, and that the water reservation was in the public interest. (Department File; Exhibit O-4)

24. There is nothing in the record which indicates that any of the original findings of the Board have changed. (Department File)

Conclusions of Law

18. The Board of Natural Resources and Conservation granted a water reservation to the City of Cut Bank under the provisions of 85-2-316, MCA. Without any evidence that the Board erred in granting the reservation, or that circumstance have changed since that grant as to the criteria in 85-2-316(4), there are no grounds to find that the instant change alter the Boards original findings. The Board of Natural Resources and Conservation's findings, conclusions and Final Order "Establishing Water Reservations above Fort Peck Dam" for the City of Cut Bank should be adopted and included by reference in this Final Order. (Findings of Fact 23, 24)

ORDER

Application No. 41L-30025802 to Change Water Right No. 41L-72578-00 by the City of Cut Bank is hereby **GRANTED**.

Water Right No. 41L-72578 should be changed to reflect the reservoir capacity of 87.3 acre-feet and the place of storage as being in the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 2, T33N, R6W.

All findings, conclusions, conditions or limitations in the Board of Natural Resources and Conservation's "Final Order Establishing Water Reservations above Fort Peck Dam" are hereby adopted and included by reference in this Final Order.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 24th day of January 2011.

/Original signed by David A Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 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 24th day of January 2011 by first class United States mail.

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Cc:
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/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
Hearings Unit, (406) 444-6615