

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

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IN THE MATTER OF APPLICATION)	
FOR BENEFICIAL WATER USE)	
PERMIT NO. 40B 30026071 BY DANIEL)	FINAL ORDER
AND RACHEL NEGAARD)	

* * * * *

Pursuant to its authority under Mont. Code Ann. §§ 2-4-601 et seq., and 85-2-310, and Mont. Admin. R. 36.12.201 *et seq.*, and 36.12.501 *et seq.*, and upon the request of Applicants Daniel and Rachel Negaard, the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on August 20, 2008, to allow Mr. & Mrs. Negaard, hereinafter referred to as “Applicants” for the above application, to show cause why the Application For Beneficial Water Use Permit should not be denied based on the Statement of Opinion issued by the Department on May 2, 2008. The show cause hearing provided the Applicants an opportunity to present additional information and evidence. This Final Order must be read in conjunction with the Statement of Opinion.

APPEARANCES

Applicants Daniel and Rachel Negaard appeared and represented themselves at the hearing.

EXHIBITS

Applicants offered one exhibit, A1, for the record. The Hearing Examiner accepted and admitted into evidence Applicant’s Exhibit A1.

A1: Memorandum from Lorna Philp, Lewistown Natural Resources Conservation Service (NRCS), to Rachel Negaard regarding drainage area calculations.

PRELIMINARY MATTERS

All of the evidence and testimony offered by the Applicant was accepted into the record and no evidence was excluded. This Decision must be read in conjunction with the Statement of Opinion as the hearing was held to address the denial of the

Application for the reasons set forth in the Statement of Opinion. This Order considers the new evidence and information presented by the Applicants at the hearing and renders the Final Order on this Application.

Applicants' request for this show cause hearing was untimely. See Finding of Fact No. 7.

The Hearing Examiner, having reviewed the full record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit No. 40B 30026071 in the names of and signed by Daniel and Rachel Negaard was filed with the Department on January 16, 2007. (Application file)
2. Notice of the Application was properly made in the Lewistown News Argus on August 1, 2007. No objections were received to the application. (Application file)
3. The Environmental Assessment (EA), dated June 28, 2007, prepared by the Department for this application was reviewed and is included in the record of this proceeding. (Application file)
4. The application proposes to divert 3.34 cubic feet per second (cfs) up to 49.0 acre-feet (af) of surface water from the South Fork McDonald Creek during the period of October 1 through December 31, annually. The proposed uses of water are irrigation, lawn and garden irrigation, and stock purposes. The point of diversion is located in the SE SE SW Section 21, T15N, R23E, Fergus County, and the means of diversion will be a pump. 106 total acres of irrigation are proposed, 105 acres of which will be supplemental irrigation (44.1 af), and 1 acre for lawn and garden (2.5 af) purposes. The period of use for irrigation and lawn and garden irrigation will be April 15 through October 15 annually. Stock use is proposed to include up to 2.4 af, and the period of use will be from January 1 through December 31. Water is proposed to be stored in an existing, off-stream 49.65 af capacity reservoir. (Application file; public notice)
5. The Application was proposed to be denied in a Statement of Opinion by Lewistown Regional Office Manager Scott Irvin May 2, 2008, the contents of which is hereby incorporated by reference. The proposed denial was based on failure to prove the criteria of Physical Availability, Legal Availability, and Adverse Affect. (Mont. Code Ann.

§85-2-311; Application file)

6. Criteria related to Adequacy of Diversion, Beneficial Use, Possessory Interest and Water Quality were addressed in the Statement of Opinion and were not part of this hearing. Mont. Code Ann. §85-2-311(1)(c-h). (Mont. Code Ann. §85-2-311; Statement of Opinion)
7. Applicant's request for a show cause hearing was received by the Department on June 9, 2008, and the postmark date of the request was June 6, 2008. The Department's May 2, 2008 Statement of Opinion and cover letter set a deadline of 30 days from the date of its opinion for the Applicants to request a hearing, and stated that unless a hearing was requested, it would take the action proposed in the opinion. Thirty days from May 2, 2008 was June 1, 2008. Since June 1 fell on a Sunday, the Applicants' deadline for requesting notice was June 2, 2008. Mont. Admin. R. 36.12.209(1). The Applicants' request for hearing, including with a postmark date of June 6, 2008, did not meet the 30-day deadline set out in statute, and therefore is an untimely request. §85-2-310(3); Mont. Admin. R. 36.12.209 (1) and (2). (Application file)

Physical Availability

9. The Applicants testified that physical water availability in the South Fork McDonald Creek is dependent upon runoff conditions. At times there is "a lot of extra" water (Daniel Negaard). Water is not physically available on a consistent basis during the proposed period of appropriation. The Applicants additionally testified that there may be sufficient flows every other year, for a few years in succession, or there may be insufficient flows for three or four years in succession. The Applicant is unaware of any person or entity that has measured or monitored stream flows in the source. In a previous water right permit proceeding in 1998 the Applicants provided estimated annual runoff calculations at the proposed point of diversion. The calculations were performed by the NRCS. In the present permit application process, the Applicants provided a copy of the same runoff calculations performed by the NRCS as part of their justification of physical water availability. The calculations are general, estimating annual runoff and drainage area in total acres and square miles. The total annual estimated runoff at the point of diversion is 1,920 acre-feet, with a drainage area of 48 square miles. No breakdown of runoff by month was provided. (Testimony of Daniel Negaard; Application file)

10. Applicant's Exhibit A-1 is a memorandum from the NRCS that explains their stream flow estimations from the previous permitting process noted in Finding of Fact No. 9, and references a lack of stream gauging data on the South Fork McDonald Creek. The memo states, "*In a prior inquiry with NRCS, information provided was an estimate of the drainage area, in addition to an estimate of yearly run-off for the drainage area. NRCS does not provide the detailed information requested for this permit as we have no gauging systems in place to provide this information.*" (Applicant's Exhibit A-1)
11. The application file contains monthly stream flow statistics, compiled by the U.S. Geological Survey (USGS), for the receiving downstream tributary, McDonald Creek, for the years 1930-1956. According to USGS records, the McDonald Creek gauge is located at Winnett, Montana, in excess of 20 miles below the proposed point of diversion. The USGS records reflect a drainage area at the USGS gauge site of 421 square miles, compared to the NRCS estimation of 48 square miles at the proposed point of diversion. (Application file)
12. The Applicants stated they would be agreeable to a condition of water measurement to help prove physical availability, if the Department would consider withholding decision on the application until such measurements could take place. (Testimony of Daniel and Rachel Negaard)
13. I find the data to be inconclusive in relation to estimated stream flows or runoff during the period which the Applicants seek to appropriate water. The USGS gauge on McDonald Creek at Winnett, Montana is not reflective of stream flows at the proposed point of diversion on the South Fork McDonald Creek. The drainage area at the USGS gauge is approximately 9 times the drainage area at the proposed point of diversion. The Applicants testimony of personal observations of stream flows and an inconsistent water supply at the point of diversion is too general to be deemed sufficient evidence that water is physically available in the amount the Applicants have requested, during the proposed period they seek to appropriate. In addition, statutory framework does not allow the Department to indefinitely withhold a decision to issue or deny a permit application, as an applicant waits for stream flow conditions sufficient to measure water in the amount he seeks. (§85-2-310, MCA)

Legal Availability

14. The Applicants testified that most of the water utilized downstream, during the proposed period of appropriation, is for stock watering purposes. They were personally unaware of irrigation taking place by existing water users on the proposed source or McDonald Creek during the proposed period, other than potentially in October. The Applicants further stated their diversions would likely take place during “flood” flows, therefore water should be legally available for other appropriators. They reviewed the Department’s water right records for a distance of 3 miles downstream, but did not qualify the extent of water rights further downstream on McDonald Creek. (Testimony of Daniel and Rachel Negaard)
15. I find that the Applicants have not shown that water is reasonably legally available in the amount they seek during the proposed period of appropriation. Without further analysis of water rights downstream on McDonald Creek, it is unknown if water is legally available for further appropriation.

Adverse Affect

16. Daniel Negaard testified that no adverse affect would result from the proposed appropriation, because “*we’ll be pumping when there is more than adequate water, otherwise we won’t pump.*” The Applicants reiterated numerous times that they intend to divert during high stream flows. Mr. Negaard also stated that he would rely on other appropriators to make a “call” on his water, if their water rights are not satisfied. The Applicants have had their water rights called in the past, and have complied with those calls by shutting off their diversions. (Testimony of Daniel and Rachel Negaard)
17. I find that the Applicants have not proven that 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 will not be adversely affected by the proposed appropriation. No detailed analysis of physical and legal water availability was undertaken in this process. It is unknown how often “flood” or high water flows occur during October through December on McDonald Creek. As found in my Statement of Opinion, USGS records indicate mean monthly flows on McDonald Creek, at Winnett, in the following amounts: 1.8 cfs in October, 2.6 cfs in November, and 2.5 cfs in December. These gauged flows contrast sharply with the Applicants proposed appropriation of 3.34 cfs during the same period, and the drainage area for the USGS

McDonald Creek site is nearly 9 times the drainage area for the South Fork McDonald Creek at the proposed diversion point. Even in the event that stock water is the primary water use during the diversion period, it is likely that other water users will find it necessary to constantly place calls on the Applicants water right. I find that this likelihood presents an unreasonable burden on senior appropriators.

CONCLUSIONS OF LAW

1. The Applicant's request for this show cause hearing was untimely. Mont. Admin. R. 36.12.209.
2. 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).
3. 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, based on an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; 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 based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; 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 permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).
4. A public notice containing the facts pertinent to the permit application must be published

once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities and such notice was published. Mont. Code Ann. §85-2-307. (See Finding of Fact No. 2)

5. The Applicants have proven the Criteria related to Adequacy of Diversion, Beneficial Use, Possessory Interest and Water Quality. §85-2-311(1)(c-h), MCA. (See Finding of Fact No. 6)
6. The Applicants have not proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate during the period of use. Mont. Code Ann. §85-2-311(1)(a)(i). (See Finding of Fact Nos. 9-11, 13)
7. The Applicants have not proven that water can reasonably be considered legally available during the period which the Applicant seeks to appropriate in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(ii). (See Finding of Fact Nos. 14 and 15)
8. The Applicants have not proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. The Applicants do not have a plan for the exercise of the permit that demonstrates the Applicants use of water can be controlled so the water rights of a prior appropriator will be satisfied. It is likely that a call situation will be frequent in this case, which presents an unreasonable burden on senior appropriators. See *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992)(an applicant must prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator). Mont. Code Ann. 85-2-311(1)(b). (See Findings of Fact Nos. 16 and 17)
9. Applicants' relief requested is denied because their show cause request was untimely; alternatively and additionally, as shown above, even if Applicants' show cause request was timely, Applicants did not substantively show sufficient cause through additional evidence or argument as to why their permit application should not be denied as set forth in the Department's decision in this matter, set out in its Statement of Opinion dated May 2, 2008. (See Finding of Fact No. 7)

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

ORDER

Application For Beneficial Water Use Permit No. 40B 30026071 by Daniel and Rachel Negaard is **DENIED**.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

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 of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 25th day of August, 2008.

Scott Irvin
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
613 NE Main St
Lewistown, MT 59457

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 August, 2008, by first-class United States mail.

Daniel & Rachel Negaard
112441 US Hwy 87
Grass Range, MT 59032

Sherry Silberhorn, Water Right Technician
DNRC-Lewistown, 538-7459