

Applicant objects on the ground that the limitation imposed by the May 1 through June 30 dates in Condition No. 2 would render his proposed use (irrigation) of no value because late season irrigation is needed to support his crops and that Condition No. 3 is not needed in its entirety.

BACKGROUND INFORMATION

Application for Beneficial Water Use Permit No. 41K-30045713 is an application to appropriate surface water from an unnamed tributary of Muddy Creek during the period April 15 through October 15, annually. The purpose of use is for direct flow irrigation of 25 acres in the SWSE Section 34, T23N, R2W, Teton County at the rate of 157.6 gallons per minute (gpm) up to 50 acre-feet (AF) by means of a pump. The point of diversion is in the SESWSE Sec. 34, T23N, R2W. The proposed project is located within the legislatively created Upper Missouri River Basin Closure Area, however the source is a tributary of the Muddy Creek drainage. Applications for a permit to use water from the Muddy Creek drainage are a statutory exception under the closure “if the proposed use of water will help control erosion in the Muddy Creek drainage.” 85-2-343, MCA.

The Statement of Opinion issued by the Department found that water was physically available at the proposed diversion point in the amount the applicant seeks to appropriate; that water was legally available during the period of May 1 – June 30, in the amount requested, based on two conditions to appropriate water only when flows in Muddy Creek exceed 150 CFS, and when flows in the Missouri River exceed 7,880 CFS, as indicated by the sum of USGS gauges in the Missouri and Sun Rivers (“PPL Condition”); that the applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator will not be adversely affected based on the conditions; that the proposed means of diversion, construction, and operation of the appropriation works are adequate; that the proposed use is a beneficial use; and that the applicant had proven a possessory interest in the property where the water is to be put to beneficial use.

APPEARANCES

Applicant appeared at the hearing *pro se*. Michael Konen and Alan Rollo, executive director of the Sun River Watershed Group, testified for the Applicant.

EXHIBITS/PREFILED TESTIMONY

Michael Konen provided prefiled testimony for the hearing.

Alan Rollo provided a powerpoint presentation regarding the Sun River Watershed Group and testimony regarding the “150 cfs trigger” on Muddy Creek. (**Exhibit A-1**)

The Hearing Examiner left the record open for two weeks after the close of the hearing in order for the Applicant to provide additional information from PPL Montana (PPL).

On January 21, 2011 the Hearing Examiner received a letter from counsel for PPL which has been included in the file. (**Exhibit A-2**)

APPLICANT ARGUMENT

The Applicant argued that an agreement entered into between land owners in the Muddy Creek drainage, the Bureau of Reclamation, PPL, the Montana Department of Natural Resources and Conservation, the Montana Department of Fish, Wildlife and Parks, the Natural Resources and Conservation Service, and others, collectively known as the Sun River Watershed Group (SRWG), provides that flows in Muddy Creek need to be kept at or below 150 cfs in order to reduce erosion in the Muddy Creek drainage and subsequent sedimentation downstream. Applicant further argues that the Department has previously issued permits on Muddy Creek based solely on the 150 cfs Muddy Creek trigger. Applicant argued that the Department’s previous precedent and the agreement reached by the SRWG provides that the only requirement or condition that should be placed on the instant application is the 150 cfs trigger flow.

FINDINGS OF FACT

1. Muddy Creek is in the Upper Missouri Basin Closure which provides that the Department may not grant an application for a permit to appropriate water in Upper Basin until the final decrees for all basins within the Upper Basin have been issued, subject to certain exceptions. Muddy Creek has a specific exception applying to it. That exception states that the closure does not apply to “an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage.” (85-2-434, MCA)

2. Flows in Muddy Creek are artificially high due to waste flows and return flows from the Greenfields Irrigation District. Historically (1934 – 1950), average monthly mean flows in Muddy Creek would range from around 25 cfs in mid-winter to as high as almost 200 cfs in August – September. Most times the flow was below 150 cfs. After development of the Greenfields Irrigation District average monthly mean flows in Muddy Creek would range from around 25 cfs in the winter to 300 – 350 cfs from June through September. Flows would be above 150 cfs from mid May through as late as mid October. (Exhibit A-1; Testimony of Alan Rollo)
3. Muddy Creek has experienced extensive erosion since the development of the Greenfields Irrigation District due in large part to the increase in flows from the waste-ways and return flows in the District’s system. Current mean monthly flows in Muddy Creek near Vaughn remain above 150 cfs from May through August ranging from 175.4 cfs in May to a high of 309.6 cfs in July. (Exhibit A-1; Testimony of Alan Rollo; SOP)
4. The extensive erosion in the Muddy Creek drainage has caused measured annual sediment yields in Muddy Creek near Vaughn to be as high as 60,000 tons per year. In more recent years (1997 – 2003) sediment production near Vaughn has been in the 30,000 to 40,000 tons per year range. The sediment production from Muddy Creek has been trending lower during this period. Sedimentation problems extend into the Sun River and downstream on the Missouri River. (Exhibit A-1; Testimony of Alan Rollo)
5. The SRWG was formed around 1993 to address the issue of erosion and sediment production from Muddy Creek. The SRWG includes many partners including landowners, the Bureau of Reclamation, DNRC, U.S. Fish and Wildlife Service, Montana Department of Fish, Wildlife and Parks, and PPL. The SRWG developed a multi-faceted approach to the erosion problem including stream bank rock work, riparian improvements, irrigation water management, and flow reduction. Flow reduction is a critical component of the reduction strategy. (Exhibit A-1; Testimony of Michael Konen; Testimony of Alan Rollo)
6. An agreement was made by the members of the SRWG that keeping flows in Muddy Creek at Vaughn at or below 150 cfs was the appropriate “flow trigger” to prevent further adverse erosion in Muddy Creek and subsequent sediment production downstream. (Testimony of Alan Rollo)

7. In 1997, as a result of lobbying by the SRWG and others, the Montana Legislature amended into 85-2-343, MCA. The amendment related to allowing applications for surface water beneficial use permits from Muddy Creek if the appropriation will help control erosion in the Muddy Creek drainage. (83-2-343(2)(e), MCA)
8. PPL is the owner of a water right on the Missouri River at Morony Dam of 8,280 cfs. This water right is met when the sum of two upstream gauges (located on the Missouri River and Sun River exceeds 7,880 cfs and accounting for the contribution of water to the Missouri River from the Giant Springs complex. As a result some water permits have been granted upstream of Morony Dam subject to the “PPL Condition”. (SOP)
9. The Department has issued at least one Provisional Water Use Permit in the Upper Missouri River Basin which includes the condition related to PPL’s Morony Dam water right being met. That permit, referenced in the SOP, was for an offstream wildlife/water fowl reservoir on Little Muddy Creek which enters the Missouri River upstream of the Sun River (to which Muddy Creek is tributary) and thus is not within the Muddy Creek exception to the Upper Missouri River Basin Closure. (SOP; See *In the Matter of the Application for Beneficial Water Use Permit 41QJ-111525 by Robert E. Durocher* (Final Order – June 22, 2001))
10. A review of the legislative history of the Muddy Creek exception shows that the legislative intent was to allow an *application* for the use of surface water from Muddy Creek, but not necessarily the granting of a permit. The legislature clearly intended that the exception was not a change in the water right permitting process and that all of the criteria for issuance of a permit (under 85-2-311, MCA) would need to be met for such issuance.
11. One of the criteria for issuance of a permit under 85-2-311, MCA is a showing that water is legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. (85-2-311(1)(a)(ii), MCA)
12. A 1997 study conducted by the Department shows that stream flows rarely occur above the water right legal demands (including the PPL water rights) above Cochrane Dam 1) during very wet Aprils (one year in ten); 2) during average and above average months in May and June (5 years in ten); and 3) during very wet months of July (one year in ten). The results for Morony Dam are similar to Cochrane Dam except stream flows exceed the Morony Dam water rights in

2 years in ten during March, April and July of wet years. Flows rarely occur above the water right legal demand during the other eight months from August through March. (Statement of Opinion; *Upper Missouri River Water Availability Analysis*, MT Dept. of Natural Resources and Conservation, December 1997)

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a water use permit application subject to modifications or conditions it considers necessary to satisfy the criteria in 85-2-311, MCA. (85-2-312, MCA; *MPC v. Carey*, 211 Mont. 91, 685 P.2d 336 (1984))

2. The Findings of Fact and Conclusions of Law contained in the October 22, 2010 Statement of Opinion, except as herein modified, are incorporated into this Final Order. The Department is only authorized to issue a new water use permit upon proof of the 85-2-311, MCA, criteria by the Applicant by a preponderance of the evidence. 85-2-311(1)(a), MCA, states in pertinent part:

...the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

....

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) 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.

....

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined 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[.]

3. The Applicant has shown that water is physically available, legally available, and that their appropriation will not adversely affect other appropriators as to Muddy Creek itself. The question that remains is has the Applicant shown that water is legally available (and no adverse affect) downstream of Vaughn. The Department is obligated to make a finding and conclusion that water is legally available for all prior appropriators before issuing a new Permit for Beneficial Water Use. The Department acknowledges that prior permits have been granted under the Muddy Creek exception to the Upper Missouri River Closed Basin without the “PPL Condition”, however, subsequent Montana court decisions have made it clear that the Montana Water Use Act was designed primarily to protect all senior water users in all situations. *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company* (DNRC 2006)(permit denied because water legally available above Noxon River Dam only 16-24 days per year) The Department is bound by law to make a determination that an applicant for a new Permit show that water is legally available for appropriation.

As the Montana Supreme Court recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

The Court has likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co. v. Carey (1984), 211 Mont. 91, 97-98, 685 P.2d 336, 340 (water legally available in the Missouri River April 15 to August 1 in 1984); see also Mont. Const. art. IX §3(1).

The instant matter is similar to cases such as *In the Matter of Application for Beneficial Water Use by Permit No. 43B-30041732 by Franklin J. Rigler* (Final Order, 2010). In *Rigler*, the Applicant argued that where the holder of a water right consents to a new use on a source of supply, such consent is evidence that the DNRC should generally accept as establishing legal availability. *Rigler* entered into an agreement with the Department of Fish, Wildlife and Parks (DFWP) that the DFWP would not call the Applicant's junior permit. The Department noted that such an agreement was just that – an agreement not to call that particular proposed permit. It did not establish legal availability or no adverse effect because the DFWP could simply call some other permit junior to their instream flow right but senior to the Applicant. The Department must protect all prior appropriations in its consideration of issuing a Beneficial Water Use Permit. Simply moving the burden of an increase in demand on a source away from a new proposed appropriation and shifting on to another established user will not meet the criteria.

Essentially, the District Court concluded that . . . if the objections were resolved it was required, as a matter of law, to issue the permit. This analysis is incorrect. DNRC is required to grant a permit only if any objections are resolved and if the § 85-2-311, MCA, criteria are proven by a “preponderance of the evidence.”

Rigler at pp. 9 (quoting *Bostwick Properties, Inc. v. DNRC*, 351 Mont. 26, 208 P.3d 868, 2009 MT 181 at ¶21 (emphasis in *Rigler*))

In the instant matter PPL has provided a letter stating that it “believes it is beneficial to allow these diversions [on Muddy Creek] even at times the PPL’s water rights are not otherwise satisfied.” Such a statement, standing alone, does not relieve the Department from determining whether water is legally available for *all* senior water right holders.

4. Applicant has proven by a preponderance of the evidence that water is legally available as to the Muddy Creek drainage during the period of use requested. However, the evidence shows that water is legally available as to the Missouri River water rights only during the period of April through July in some years and that appropriation of such water during the period of April through July will not result in adverse affect to prior downstream appropriators.

5. Applicant has not shown cause why the “PPL Condition” should not be a condition on their appropriation, however, the availability of flows should be expanded to reflect that water is

legally available, at least in some years from April through the end of July. Applicant's period of diversion should be changed to a period of diversion of April 15 through July 30 annually.

FINAL ORDER

Therefore, Application for Beneficial Water Use Permit No.41K-30045713 by Nicholas D. Konen is **GRANTED, with the following conditions:**

1. WATER MEASUREMENT REQUIRED

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN DAILY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE HAVRE WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME ACCURATELY.

SUBMIT RECORDS TO:

DNRC, HAVRE WATER RESOURCES REGIONAL OFFICE
210 SIXTH AVENUE
PO BOX 1828
HAVRE, MT 59501-1828

PHONE: 406-265-5516

FAX: 406-265-2225

2. IMPORTANT INFORMATION

THE APPROPRIATOR SHALL DIVERT WATER DURING THE PERIOD OF APRIL 15 THROUGH JULY 30 ONLY WHEN USGS GAUGING STATION NO. 06088500, MUDDY CREEK AT VAUGHN, INDICATES A FLOW IN EXCESS OF 150 CUBIC FEET PER SECOND. THE APPROPRIATOR MUST USE THE MOST INSTANTANEOUS FLOW RATE RECORDED FOR THE GAUGING STATION IN DETERMINING WHEN DIVERSION MAY OCCUR. THE FLOW MUST BE CHECKED DAILY WHEN APPROPRIATING WATER. THE CURRENT INTERNET ADDRESS IS: mt.waterdata.usgs.gov/nwis/current?type=flow.

3. IMPORTANT INFORMATION

WATER MAY ONLY BE APPROPRIATED DURING THE PERIOD OF APRIL 15 THROUGH JULY 30 WHEN THE SUM OF THE FLOW RATES AT USGS GAUGING STATIONS NO. 06089000 (SUN RIVER NEAR VAUGHN) AND NO. 06078200 (MISSOURI RIVER NEAR ULM) EXCEED 7,880 CFS. THE APPROPRIATOR MUST USE THE MOST INSTANTANEOUS FLOW RATES RECORDED FOR EACH GAUGING STATION IN DETERMINING WHEN DIVERSION MAY OCCUR. DURING SUCH TIMES AS THE SUM OF THE FLOW DROPS BELOW 7,880 CFS, NO APPROPRIATION MAY OCCUR. THE FLOW AT THE AFOREMENTIONED USGS GAUGING STATIONS MUST BE CHECKED DAILY. THE CURRENT INTERNET ADDRESS IS: mt.waterdata.usgs.gov/nwis/current?type=flow.

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 July 2011.

/Original signed by David A Vogler/
David A. Vogler, Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

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 July 2011 by first-class United States mail.

NICHOLAS D KONEN
PO BOX 663
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Cc:
MICHAEL KONEN
550 7TH LANE NE
FAIRFIELD, MT 59436

/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
Hearings Unit, 406-444-6615