

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
76LJ-11583100 BY BENJAMIN L. & LAURA)	ORDER
M. WEIDLING)	

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on October 30, 2002. Objector Shoal and Objector Templeman filed timely exceptions to the Proposal and did not request an oral argument hearing. Applicant filed timely responses to the exceptions.

The Proposal recommended granting a Beneficial Water Use Permit to appropriate 12 gallons per minute up to 5.15 acre-feet of water per year from Lerch Creek for irrigation.

Objector Shoal took exception to: the lack of a condition requiring Applicant to meter the water being diverted at the point of diversion; to the lack of a clear statement that it is the Applicant's burden to contact downstream senior appropriators prior to diverting water; lack of a condition granting Objector Shoal inspection access to Applicant's diversion works; lack of a requirement to remove, or make inoperative, the second cistern at the point of diversion; lack of detailed system engineering drawings for the project. Objector Templeman took exception to: the lack of a condition requiring a project compliance inspection by a licensed engineer from the Kalispell Water Resources Regional Office; the lack of a condition requiring a flow meter at the secondary pump point of diversion; lack of a condition requiring the Applicant to keep written records of flows diverted from Lerch Creek; lack of a condition requiring the Applicant to install a measuring device below his point of diversion and above the downstream Objectors' points of diversion, and requiring that Applicant not divert unless 117 gallons per minute (gpm) are flowing in Lerch Creek at that point; and lack of a condition requiring Applicant to acknowledge the water rights of downstream appropriators and to honor a call from any of these rights.

Applicant's response to Objector Shoal's exceptions is: Applicant will provide annual reports of diversion flow rate, dates, and times to the local Water Resources Regional Office; there is no statutory or regulatory basis requiring Applicant to call downstream appropriators prior to diverting water; a suitable measuring device exists where Lerch Creek enters Objector Shoal's property, and unrestricted access to Applicant's point of diversion is unreasonable; removal of the lower cistern is not necessary because the pipe has been capped and the valve is closed; drawings and exhibits in the record meet the request for drawings; and, there is no statutory basis requiring Applicant to officially acknowledge downstream water rights.

Applicant's response to Objector Templeman's exceptions is: they have no objection to the first three exceptions of Objector Templeman; an existing culvert could be used as a measuring device, but the flow at the culvert should be 105 gpm, not 117 gpm; and there is no statutory basis for Objector Templeman's fifth condition to officially acknowledge downstream water rights.

In this review the Department may, pursuant to Mont. Code Ann. § 2-4-621(3)(1999) and Mont. Admin. R. 36.12.229 (1999), adopt the proposal for decision as the Department's Final Order. The Department in its Final Order may reject or modify the conclusions of law and interpretation of administrative rules in the Proposal for Decision, but may not reject or modify the findings of fact unless it first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with essential requirements of law. The Department has considered the exceptions and reviewed the record under these standards.

Generally the exceptions relate to Objectors' desire to have the Applicant meter and record any diversions, monitor the stream flows above Objectors' diversions, have the project inspected by a professional engineer, formally recognize Objectors' rights, and modify a cistern in the vicinity of the diversion works.

The record does not show the need for a measuring device at Applicant's point of diversion. The record shows there are downstream existing rights to which Applicant is legally subject to call, and that Applicant has the ability to control their diversion such that existing legal demands can be met. The record does not show how continuous flow monitoring by Applicant will help satisfy a criteria for issuance of a permit. Applicant has the ability to measure the water being diverted using a bucket and stopwatch, and may want to do so when starting diversion or a call is received. Although Applicant has no objection to measuring all water diverted and water pumped from the secondary point of diversion, the record does not show flow measurement are a necessary condition to show the criteria are satisfied.

Measuring flows downstream of Applicant to show existing downstream needs are met will not accomplish what downstream seniors desire. Junior appropriators need not let go by their point of diversion the maximum extent of downstream rights, but must let go by the amount of water needed to accomplish downstream senior purposes. *Mettler v. Ames Realty Co.*, 201 P. 702, 61 Mont. 152 (1921). The record shows Objector Shoal did not need stock water in January, 2002, and has always had water prior to 2000. Thus, the existing downstream demand varies from time to time. Only the downstream right holders know what their needs are and when their needs are not being met. Monitoring streamflow upstream of Objectors will not tell Applicant what Objectors' needs are, but rather only what is flowing in the stream. If more water is flowing in the stream than is needed or used at that time by downstream appropriators, even though it is less than the *claimed* rights downstream, then that excess water is available for appropriation by Applicant. Thus, the record does not show how stream measurement between Applicant and the downstream existing rights is necessary to show the criteria are met.

The record does not show why a compliance inspection by a professional engineer is needed. Applicant provided the Department with construction information in their application and testimony at hearing regarding how the project was built. Objector provided no

evidence that the means of diversion, construction, and operation were not adequate unless constructed under the auspices of a professional engineer. All Permittees are required to file a certified statement by a person experienced in design, construction, or operation of appropriation works, which includes but is not limited to engineers. Mont. Code Ann. § 85-2-315. Although Applicant has no objection to compliance inspection by a licensed engineer, the record does not show this is a necessary condition to show the criteria are satisfied.

Regarding recognition of existing rights, between appropriators, first in time is first in right, Mont Code Ann. § 85-2-401(1), and priority of permits issued by the Department is the date of filing an application according to Montana law. Mont Code Ann. § 85-2-401(2). The priority of the Objectors must be determined in accordance with Part 2 of Title 85, Chapter 2. Mont. Code Ann. § 85-2-401 (3). Therefore, all permits issued by the Department are by law issued subject to all prior rights in the source of supply. Further, they are issued subject to final determination of existing water rights, as provided by Montana law. Mont. Code Ann. § 85-2-313. Therefore, additional conditions are not necessary to acknowledge specific prior rights of Objectors.

The exception regarding modification of the second cistern (the one immediately downstream of the cistern used by this Applicant) to make it inoperable is not supported by the record. The record shows the lower cistern is not connected to the pipeline the subject of this application, and Applicant Weidling capped it. The record shows only that a former owner had problems with the lower cistern, so installed the upper cistern, from which Applicant (and Applicant Nessly) applied to divert water. The use and purpose of the lower cistern beyond the problems of the prior owner is not in the record, so requiring that it be physically abandoned is not supported by the record in this matter. However, the findings of fact do not describe which of the two cisterns is the subject of this Application. A review of the complete record shows the cistern used as the means of diversion by this Application is the upstream cistern of the two existing cisterns located at the description of the point of diversion from Lerch Creek.

Thus, Finding of Fact No.3, sentence 3 will be modified to "The water is to be diverted *from the upstream cistern of two cisterns located in the SW¼SE¼SW¼ of Section 14, Township 30 North, Range 20 West, Flathead County, Montana.*"

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law of the Proposal for Decision in this matter with the modification made above, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit is **ISSUED** to Laura M. and Benjamin L. Weidling to appropriate 12 gallons per minute (gpm) up to 5.15 acre-feet of water per year from Lerch Creek. The water is to be diverted from the upstream cistern of two cisterns located in the SW¼SE¼SW¼ of Section 14, Township 30 North, Range 20 West, Flathead County, Montana. The means of diversion is a cistern in the channel of Lerch Creek. The purpose is irrigation. The irrigation volume is 5.15 acre-feet; the irrigation place of use is 3.83 acres in the SE¼SW¼SW¼ of Section 14 and 0.37 acres in the NE¼NW¼NW¼ of Section 23; the proposed irrigation period of use is March 15 to October 14, inclusive, of each year. The place of storage is a 0.08 surface acre pond with a capacity of 0.37 acre-feet in the SE¼SW¼SW¼ of Section 14. All places of use and storage are in Township 30 North, Range 20 West, Flathead County, Montana. The irrigation use will be diverted from the pond by a 12 gpm pump.

- A. Water may only be diverted during the months of May, June, July, August, and October of each year.
- B. Permittee shall line the pond with a plastic or other liner which prevents seepage from the bottom of the pond.
- C. Permittee shall return by pipe any excess water diverted to the pond back to the source above existing downstream users.

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 or the oral proceedings to the district court.

Dated this _____ day of January, 2003.

Jack Stults, Administrator
Water Resources Division
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 21st day of January, 2003 by First Class United States Mail.

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