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

\*\*\*\*\*

IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. )  
76N-30160346 BY CARTEE, MICHAEL R & ) **FINAL ORDER**  
MARIAN M REVOCABLE TRUST )

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**BACKGROUND AND PROCEDURAL HISTORY**

Michael R. & Marian M. Cartee Revocable Trust (Applicant) applied for a permit to withdraw water from McGregor Lake. The original application included domestic use, but it was eventually amended to provide water for lawn and garden irrigation only. The Department reviewed the Applicant’s evidence, assembled relevant data in a technical report (“Technical Report”), and drafted the Preliminary Determination to Grant Applicants’ water right. The Kalispell Regional Office of the Department of Natural Resources Water Resources Division (DNRC or Department) issued a Preliminary Determination to Grant this permit (hereinafter PDG) on December 5, 2023.

Larry Stollfuss (Objector) holds a water right diverted from McGregor Creek downstream of McGregor Lake, and stores water in McGregor Lake itself. Objector filed an objection to the application, postmarked February 1, 2024. On March 11, 2024, DNRC determined the Objector had filed a valid objection contesting the criteria of physical availability and adverse effect. On March 15, 2024, DNRC assigned me to be the hearing examiner presiding over this contested case. On May 29, 2024, I held a hearing on the objection at the DNRC Kalispell Regional Office in Kalispell, MT. On August 9, 2024, I reopened the record to conduct a limited hearing to allow the parties to address with evidence and argument any factors they feel may be relevant to the question of reasonable means of diversion by the prior appropriator, including the feasibility of

installing a pump to divert water from the lake. On September 25, 2024, I held a limited hearing by videoconference on this specific issue. This ORDER is the result of those hearings.

### **APPEARANCES**

At the hearing on May 29, 2024, Applicant Michael R. and Marion M. Cartee Revocable Trust was represented by counsel Camisha Sawtelle. Michael and Marion Cartee appeared in person, and Michael Cartee testified. Applicant's also called Brad Bennett, consultant with Water and Environmental Technologies, to testify.

Objector Larry Stollfuss appeared *pro se* and called Martin Anderson, longtime operator of Palm Dam, and Jim Ferch, DNRC Kalispell Regional Manager, to testify.

At the hearing on September 25, 2024, Applicant Michael R. and Marion M. Cartee Revocable Trust was represented by counsel Camisha Sawtelle, and Objector Larry Stollfuss appeared *pro se*. No witnesses or department staff were called to testify.

### **EXHIBITS**

Applicants relied on the DNRC's Preliminary Determination and did not offer any further exhibits at hearing. Objectors offered and I admitted into evidence two exhibits which consisted of four pages of photographs of the Palm Dam (Exhibit O-1) and a portion of Martin Anderson's journal (Exhibit O-2). The audio recording of the hearing is referred as "HR" to signify "hearing recording" and noting the track, minute and second of the track at which the relevant evidence is presented. The Preliminary Determination is referred to as "PDG" followed by page number.

### **UNCONTESTED CRITERIA**

Because no valid objections were filed challenging legal availability, beneficial use, the adequacy of means of diversion, or possessory interest in the place of use I find that Applicant has met its burden of proof in regard to those criteria for the reasons set forth in the PDG.

### **THE CONTESTED CRITERIA**

The Department initiated contested case proceedings based on Objector's valid objection to the physical availability and adverse effect criteria. The contested case permits the Objector to produce evidence showing why the Department erred in issuing the Preliminary Determination to Grant in favor of Applicant. Applicant relies on the analysis and conclusions reached by the

Department and may introduce rebuttal evidence. Objector asserts that Department's analysis was incorrect, and the Department should not have issued the Preliminary Determination to Grant.

### **PROPOSED APPROPRIATION**

Applicants propose to pump water from McGregor Lake from April 25<sup>th</sup> to October 5<sup>th</sup> at a flow rate of 18 GPM up to a volume of 0.50 AF/year to seasonally water a lawn and garden. McGregor lake is an approximately 1470-acre lake about 30 miles west of Kalispell. The lake has numerous private cabins, a lodge and RV park, public campgrounds, and a State Park on its shores. McGregor Lake is a natural lake that is seasonally impounded above its natural level by a man-made dam named "Palm Dam". Water that is not impounded by this dam flows out of McGregor Lake and forms McGregor Creek. In periods of high water there is also a spillway where water circumvents Palm Dam to leave the lake and enter McGregor Creek. Palm Dam has a series of metal "boards" which can be added or removed to impound water in McGregor Lake. These boards can raise or lower the level of the lake approximately 24" total before water flows over the spillway.

Palm Dam is located on United States Forest Service Lands, but it is owned and operated by two downstream irrigators: Objector Larry Stollfuss and Thompson River Ranch, (listed in the DNRC Water Rights Records as Bultman Meadow LLC.) This order refers to them together as the "Irrigators". The Irrigators place boards in the dam in late fall raising the level of McGregor Lake over the winter and spring as it fills with spring moisture and snowmelt. During the growing season the Irrigators then remove boards one or two at a time to increase the flow of water in McGregor Creek which allows them to irrigate approximately five miles downstream.

Objector contends that the Applicant's proposed appropriation will reduce the water that is stored in McGregor Lake and reduce the amount of water available for Objector to release for irrigation. Objector contends that this increased burden on the source constitutes an adverse effect to his senior water rights.

### **FINDINGS OF FACT**

#### **PALM DAM**

1. The Palm Dam is small concrete structure that blocks outflow from McGregor Lake. The following photos are from exhibit O-1:



**Palm Dam on May 10, 2024**



**Palm Dam on May 24, 2024**

McGregor Lake is the point of storage and Palm Dam serves as the primary point of diversion for two water rights, No. 76N 133248-00 and No. 76N 39610-00, for Larry and Donna Stollfuss and the Thompson River Ranch (Bultman Meadow LLC). These water rights are irrigation water rights used by the Irrigators. Objector's water right, 76N 133248-00, has a period of use from April 1 through October 31 each year, although testimony indicated that Objector's period of diversion in McGregor Lake exceeds this period.

2. The Irrigators share responsibility and operation of Palm Dam and irrigate in concert. The Irrigators block Palm Dam in the fall and allow water to accumulate in McGregor Lake through the winter and spring. To irrigate they remove one or two boards from Palm Dam. This releases water into McGregor Creek where it flows down until it reaches the Irrigators' property. The water backs up behind one of three check dams the Irrigators have built across McGregor Creek and water is diverted into ditches for irrigation. Depending on stored water availability in McGregor Lake, water is released throughout the late spring and summer to irrigate hay land and pasture. Objector has approximately 100 cow/calf pairs and 25 miscellaneous cattle that rely on hay and pasture irrigated by water stored in McGregor Lake. HR Tr. 2 at 45:13. Objector uses the irrigation to grow hay and to support regrowth that provides pasture during the fall. HR Tr. 2 at 44:48. Without

irrigation Objector's ranch management is problematic due to increased hay consumption in lieu of fall pasture. HR Tr. 2 at 45:00.

3. Martin Anderson works for the Thompson River Ranch and has operated Palm Dam for the benefit of both Objector and Thompson River Ranch for about 20 years. Mr. Anderson explained that removing two boards from Palm Dam increases flow in McGregor Creek sufficient to irrigate downstream for approximately seven to ten days. HR Tr. 2 at 27:31. Without water from McGregor Lake and the Palm Dam, McGregor Creek typically has just a few inches of water in it, which is insufficient flow to irrigate. HR Tr. 2 at 30:20. Without releasing stored water from McGregor Lake there is insufficient water to divert water into the ditches to irrigate. HR Tr. 2 at 28:45.

4. The Irrigators exercise sole control over Palm Dam and outflows from Palm Dam are not regulated or controlled by any needs or concerns other than the Irrigators'. The Preliminary Determination to Grant notes "Neither the Applicants nor the Department could quantify the annual amount and timing of water released from McGregor Lake because a private entity regulates the outflow." PDG at 14. Jim Ferch, Regional Manager of the DNRC Kalispell Water Resources Office, affirmed that DNRC did not reach out to the Irrigators (the aforementioned "private entity") and try to obtain any information about the operation of Palm Dam. The Irrigators' manipulation of the water level can be contentious between the Irrigators and McGregor Lake lakeshore property owners. Objector testified that in the past some unknown persons had been so upset by the Irrigators when the Irrigators removed boards that they filled the Palm Dam outlet structure with concrete to prevent the release of water from McGregor Lake. HR Tr. 2 at 42:10.

5. Mr. Anderson has kept a journal of his work for over 20 years, which was admitted into the record as Exhibit O-2. When Mr. Anderson himself removed or replaced boards he noted it in this daily journal. This record includes dates from 2004, 2009, 2011, 2012, 2013, 2015, 2016, 2017, 2019, 2020, 2021, 2022, and 2023. Most years include the date that Mr. Anderson pulled boards (releasing water) and put boards in (impounding the water). This record is incomplete because it doesn't always note when he directed others to add or remove boards, but it indicates a rough pattern of removing boards in July and replacing them in October. Exhibit O-2.

6. Mr. Anderson testified that over the last 20 years there have been several years where there has been insufficient stored water in McGregor Lake to release and to adequately irrigate. HR Tr. 2 at 18:45. Exhibit O-1 consists of photos taken in May 2024 that show the level of

McGregor Lake has not reached Palm Dam and likely will not provide any irrigation water this season. Objector testified that inflows to McGregor Lake have been insufficient lately to provide sufficient water to impound in McGregor Lake for the Irrigators. HR Tr. 2 at 14:40.

7. Mr. Anderson testified that irrigation is increasingly difficult with the limited amount of water that the Irrigators are able to impound in McGregor Lake. HR Tr. 2 at 18:54. Jim Ferch explained that DNRC considers McGregor Lake at “full pool” when water reaches the level of the spillway. HR Tr. 3 at 14:35. Mr. Anderson recalled that McGregor Lake was last full pool in 2005 but hasn’t been full for approximately 15 years. HR Tr. 2 at 22:37.

8. Mr. Anderson testified that irrigation is ineffective without adding stored water to McGregor Creek from McGregor Lake. HR Tr. 2 at 28:37. Based on Mr. Anderson’s experience and the evidence of Exhibit O-1, Palm Dam will not impound sufficient water for the Irrigators in 2024. HR Tr. 2 at 29:10.

9. Objector testified that he is concerned about the cumulative effect of new withdrawals from McGregor Lake. Objector alleges that each new appropriation reduces the likelihood that Palm Dam will impound water sufficient to satisfy his water rights. Jim Ferch testified that he expects additional water right applications sourced from McGregor Lake and that the DNRC is currently processing two new applications for McGregor Lake. HR Tr. 3 at 10:44.

10. Objector testified that after water is released from McGregor Lake it flows downstream in McGregor Creek and is diverted by a check dam in McGregor Creek. Objector testified that they do not divert all of the water from McGregor Creek but leave some in McGregor Creek for fish and wildlife. HR Tr. 1 at 47:08.

11. The DNRC analysis underlying the Preliminary Determination to Grant relied on a Technical Report which lists 84 water rights from McGregor Lake. Technical Report pages 5-7. All 84 of these rights have a newer (junior) priority date than the Objector’s right. Mr. Stollfuss testified that the Applicant’s proposed permit (the instant case) is the first time that he has been contacted about a proposed permit in the fifteen years he has been operating his ranch, and that he had never heard of DNRC notifying his predecessors about a proposed permit. HR Tr. 3 at 15:08. The Technical Report also lists two water rights which might be subject to adverse effect from the proposed appropriation, Objector’s water right and the Thompson River Ranch (Bultman Meadow LLC) water right.

## CONCLUSIONS OF LAW

### LEGAL BASIS FOR ISSUING A PERMIT – APPLICANT’S BURDEN

12. The applicant for a beneficial water use permit has the burden to establish all the statutory requirements. § 85-2-311, MCA. *Matter of Beneficial Water Use Permits of Ciotti*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079-1080 (1996). Specific to this application, Applicants have the initial burden to prove physical availability of water at the proposed point of diversion and to show lack of adverse effect on all water sources within the area of potential impact. § 85-2-311(1)(a)(i) and § 85-2-311(1)(a)(ii)(B), MCA; Mont. Admin. R. 36.12.1702 (2024),1706.

13. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA by a preponderance of the evidence. § 85-2-311(1), MCA. The applicant retains this burden, however having succeeded in this showing before the DNRC permit issuers does not need to re-prove the factual elements of its case before this hearing examiner. *Montana Environmental Information Center v. Westmoreland Rosebud Mining* (2023) 414 Mont 80 at 95. In this contested case hearing the Objector has the burden of proving by a preponderance of the evidence that DNRC’s issuance of the Preliminary Determination to Grant violated the law. *Id* at 97.

### PHYSICAL AVAILABILITY

#### **Did Applicant prove that water could be considered physically available for the proposed appropriation?**

14. In analyzing physical availability in the proposed issuance of a permit the Department relies on a combination of statutes and rules:

Section 85-2-311(1), MCA provides in relevant part:

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

(a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; ...

15. Montana administrative rules clarify this analysis in reference to physical availability. In pertinent part these provide:

Physical availability for a lake will be determined based on stored volume. (a) If the volume of a lake has been quantified by a qualified entity based on bathymetric data, that volume will be used to quantify physical availability. (b) If the volume of a lake has not been quantified pursuant to (3)(a), volume may be quantified by a qualified professional based on department-approved methodology ARM 36.12.1702.

16. The PDG contains extensive calculations of McGregor Lake's volume that the PDG specifically notes are derived from Montana FWP bathymetric data. These calculations result in a calculated volume which far exceeds the volume of the proposed appropriation. (PDG FOF #14).

17. I find that the Applicant has satisfied the criteria of 85-2-311 for physical availability.

**Can the Objector establish that the DNRC erred when it found that there was water physically available to satisfy the proposed appropriation?**

18. Based on the rule laid out in *Montana Environmental Information Center v. Westmoreland Rosebud Mining*, the Objector in this case must show by a preponderance of the evidence that the agency erred in determining that there was water physically available for Applicant's proposed appropriation.

19. Objector presented no testimony or evidence concerning the physical availability of water for Applicant's proposed appropriation.

20. Objector failed to show that DNRC erred when it determined that the Applicant's had satisfied the physical availability criteria of § 85-2-311, MCA.

**ADVERSE AFFECT**

21. Adverse effect is the situation or condition when the exercise of an older (an *earlier* priority date) water right is impaired by the exercise of a newer (*later* priority date) water right.<sup>1</sup> Montana statute and rule provide that the DNRC shall not issue a water right if it will result in adverse effect

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1. Adverse effect is defined as its constituent words, i.e. a negative result. Many Montana cases discuss the limits or conditions of adverse affect but none define it outright. Applicant's attorney drew attention to the phrase "the Water Use Act does not contemplate a *de minimus* level of adverse effect" as cited in the PDGG and leaned on this phrase to support the proposition that the Water Use Act (§ 85-2-301, MCA et seq.) does not concern itself with *de minimus* levels of adverse effect. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8. This interpretation is incorrect. In context this phrase means that the Water Use Act does not contemplate or propose that there is a level of adverse effect that is so small it is does not matter, i.e. any adverse effect is adverse effect.



to another appropriator unless an applicant provides a plan that will prevent adverse effect to prior appropriators. The Department must determine if the new appropriation is more likely than not to adversely affect a prior appropriator and if it does is the applicant's proposed plan more likely than not to mitigate this adverse effect.

22. Objector alleges that there is often insufficient water stored in McGregor Lake to satisfy his water right and the water right of his neighbor, Bultman Meadows, LLC. While the stored water in McGregor Laken may be sufficient to satisfy Objector's water right alone, Objector and Bultman Meadows, LLC share the point of diversion (Palm Dam) and thus the stored water must satisfy both rights in order to satisfy either. (See description at HR Tr. 2 at 15:46, 17:23, 34:31).

**Did Applicant prove the proposed appropriation would not result in adverse effect?**

23. In analyzing adverse effect in the proposed issuance of the permit, the Department relies on a combination of statutes and rules:

Section 85-2-311(1), MCA provides in relevant part:

... the Department shall issue a permit if the applicant proves by a preponderance of the evidence

(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.

Montana administrative rules clarify this analysis in reference to adverse effect. In pertinent part these provide:

(1) An application must include a plan to address adverse effect. The plan must establish how the applicant will comply with a call and describe how the appropriation can be regulated during times of water shortage so the water rights of prior appropriators will not be adversely affected.

(2) The adverse effect plan may include:

(a) an agreement to measure appropriations and monitor water supplies;

(b) a plan to appropriate only when stream flows exceed certain trigger flow levels;

(c) the use of a mitigation or aquifer recharge plan as a means of offsetting adverse effect; or

(d) other conditions necessary to prevent adverse effects.

ARM 36.12.1706

24. Applicant relied on the information contained in the PDG to prove that the proposed appropriation would not create adverse effect to downstream water users.

25. Department's findings were confined to the following adverse effect findings of fact from the PDG:

"The Applicant provided a plan showing they can regulate their water use during water shortages. To satisfy the water rights of senior appropriators during shortages, the Applicant will:

- i. Initially reduce lawn & garden use by 50 percent; and
- ii. The pump will be turned off when a senior water user makes a valid call and/or has received notification of a call by a senior appropriator.

The Applicant has shown that they can regulate their water use and that they have an implementation plan to protect senior water users. The Department finds that the proposed water use will not adversely affect senior water users."

(PDG FOF 26, 27)

26. Applicant offered no additional testimony or evidence at the hearing explaining why the Applicant's proposed appropriation would not cause adverse effect.

27. Applicant offered argument that the proposed appropriation would be *de minimus* and therefore could not cause adverse effect. As noted in footnote #1, this argument is legally incorrect.

28. Applicant offered no additional testimony at the hearing regarding or explaining the applicant's plan to prevent adverse effect.

29. While the Applicant does not provide an analysis of potential adverse effect in the PDG, they do provide a plan required by § 85-2-311(1) and ARM 36.12.1706.

30. I find that the Applicant has satisfied the criteria of § 85-2-311(1) in regard to adverse effect.

**Can the Objector establish that the DNRC erred when it found that the proposed appropriation would not cause adverse effect?**

31. Based on the rule laid out in *Montana Environmental Information Center v. Westmoreland Rosebud Mining*, the Objector in this case must show by a preponderance of the evidence that

the DNRC erred in determining that the Applicant's proposed appropriation, including its adverse effect plan, would not cause adverse effect to the Objector.

32. Objector presented evidence and testimony that new appropriations from McGregor Lake appropriations (indeed any junior appropriations from McGregor Lake) combined with variable environmental and climatic conditions, may impact the Objector's ability to exercise their water right.

33. Objector testified that they would not get any irrigation water this year (2024), but one year of water shortage does not constitute adverse effect. See *In the Matter of the Application For Beneficial Water Use Permit No. 53498-S41S by Randall P. Ridgeway* (DNRC March 3, 1986).

34. Objector failed to present evidence of when they have been unable to fully exercise their water right, how they would know if their water right was satisfied given the lack of measurement or consistent record-keeping, and what portion of their water right was released from Palm Dam and then subsequently left instream.

35. Objector failed to show that DNRC erred when it determined that the Applicant's had satisfied the adverse effect criteria of § 85-2-311, MCA.

### **CONCLUSION**

The Department correctly determined that the Applicant had met the physical availability criterium of § 85-2-311, MCA. Objector introduced no evidence that refuted or cast doubt on the Department's conclusion. I find that the Applicant satisfied the physical availability criterium of § 85-2-311, MCA.

The Department correctly determined that the Applicant had met the adverse effect criterium of § 85-2-311, MCA. Objector failed to establish that the DNRC's permitting decision was in error. I find that the Applicant satisfied the adverse effect criterium of § 85-2-311, MCA.

### **FINAL ORDER**

Application for Beneficial Water Use Permit No. 76N-30160346 by Cartee, Michael R & Marian M Revocable Trust is hereby GRANTED.

### **NOTICE**

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department 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 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 reviewing court.

Dated this 23<sup>rd</sup> day of January 2025.

/Original signed by Martin Balukas/  
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**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the foregoing was served upon all parties listed below on this 23<sup>rd</sup> day of January 2025 by first class United States mail and/or by electronic mail (e-mail).

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