



DA 25-0100

BEFORE THE FLATHEAD RESERVATION WATER MANAGEMENT BOARD

2025 FRWMB 1

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LOON LAKE FAMILY PARTNERSHIP,

Respondent/Appellant

v.

DUANE SMITH

Complainant/Appellee

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APPEAL FROM: Office of the Engineer, Cause No. 2024-FOR-100, Ethan Mace

COUNSEL OF RECORD:

For Appellant: Renee Coppock, Attorney at Law, Billings, Montana

For Appellee: Appearing Pro Se

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Submitted on: February 21, 2025

Decided on: September 29, 2025

The Flathead Reservation Water Management Board unanimously delivered this Opinion.

¶1 Loon Lake Family Partnership (Loon Lake) appeals from the January 30, 2025, Final Decision of the Water Engineer (Engineer) requiring Loon Lake to winterize its wells, cease activities that supplement the natural flow of White Earth Creek in the winter, and cease use of its original well. We affirm in part and remand in part back to the Engineer.

¶2 We restate the issues on appeal as follows:

*1. Whether the Engineer correctly determined that Loon Lake cannot divert water for livestock into White Earth Creek for water right 76L 64918-00.*

*2. Whether the Engineer correctly determined that Loon Lake should cease use of the original well associated with water right claim 76L 141838-00.*

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 Duane Smith (Smith) is the owner of water right claim 76L 17972-00, a filed water right for fish and wildlife use with a priority date of March 21, 1930, and water right claim 76L 17963-00, a filed right for stock use with a priority date of March 21, 1930. Both water rights use surface water from an unnamed tributary of White Earth Creek.

¶4 Loon Lake owns water right 76L 64918-00, a groundwater certificate for stock use with a priority date of October 7, 1986; water right claim 76L 141832-00, a filed water right for stock use from White Earth Creek with a priority date of November 21, 1910; and water right claim 76L 141838-00, a filed groundwater right for irrigation use with a priority date of January 24, 1973.

¶5 Water right 76L 141838-00 underwent a change authorization in 1987. Loon Lake's predecessor, James M. Binger, filed a change authorization with the Department of Natural Resources and Conservation (DNRC) in 1987 to replace the original point of

diversion with a new well. The DNRC listed the new well as located 100 feet from the old well. Binger indicated on the change authorization that the intention was to abandon the old well should the new well produce the full volume under the water right. DNRC noted that the old well had been abandoned, meaning the well had been replaced and the only well available for use under water right 76L 141838-00 was to be the new well.

¶6 On November 14, 2024, Smith filed a formal complaint (Complaint) with the Office of the Water Engineer (Office). The Complaint alleged that the free-flowing nature of Loon Lake's wells affects the recharge of the White Earth Creek aquifer, resulting in reduced flows for Smith's use. Specifically, Smith alleged that Loon Lake's artesian wells are allowed to run at approximately 30 gallons per minute resulting in continuous circumvention of aquifer recharge of the White Earth Creek aquifer.

¶7 The Office conducted a field visit on December 12, 2024, to evaluate issues raised in the Complaint. Representatives of both parties attended.

¶8 On January 9, 2025, the Engineer held a formal hearing. The Engineer issued a Final Decision on January 30, 2025.

¶9 In his Decision, the Engineer found: (1) Loon Lake wasted water and violating the conditions imposed on the water rights; (2) Loon Lake wasted water by failing to properly winterize the wells to prevent freezing and damage to the well heads; (3) Loon Lake wasted water by allowing well water to flow down White Earth Creek from the wells to supplement the natural flow of 76L 141832-00; (4) Loon Lake violated conditions imposed on water right 76L 64918-00 by using three points of diversion to fulfill the water right; (5) Loon Lake violated conditions imposed on claim 76L 141382-00 by using well water from

the three wells to supplement White Earth Creek for stock purposes during the winter months; (6) Loon Lake violated conditions on claim 76L 141838-00 by using two wells to supplement the flow of White Earth Creek for stock purposes, which is limited to irrigation; (7) Loon Lake violated conditions on claim 76L 141838-00 by using the water from the two wells in the winter outside the period of diversion; and (8) Loon Lake violated conditions imposed on claim 76L 141838-00 by utilizing both wells together despite the limitation that only one point of diversion.

¶10 The Engineer specifically ordered: (1) Loon Lake to winterize all three wells to prevent freezing before April 1, 2025, and to update the Office when the work was complete and what measures were taken; (2) Loon Lake to cease activities that supplement the natural flow of White Earth Creek in the winter to fulfill claim 76L 141832-00; (3) Loon Lake to provide information as to whether the two wells associated with 76L 141838-00 are being used to supply stock tanks and, if so, disconnect all stock tanks using these wells; and (4) Loon Lake to cease use of the original well associated with claim 76L 141838-00.

¶11 Loon Lake appealed the Final Decision of the Engineer on February 21, 2025, requesting the Board reverse the Engineer's Decision. Specifically, Loon Lake sought to continue to divert water from the well associated with claim 76L 64918-00, to reverse the Decision that Loon Lake is violating conditions imposed on claim 76L 141838-00, and to reverse the Engineer's Decision that Loon Lake cease use of the original well associated with claim 76L 141838-00.

¶12 The Board requested briefing from both parties to clarify the issues on appeal and the specific relief sought. Loon Lake restated the issues on appeal as: (1) did the Engineer correctly determined that Loon Lake cannot divert water for livestock into White Earth Creek for claim 76L 64918-00 and (2) did the Engineer correctly determined that Loon Lake violated conditions imposed on claim 76L 141838-00 and that Loon Lake must cease use of the original well associated with claim 76L 141838-00. Smith did not submit briefing.

¶13 The Board held an oral argument on June 29, 2025. Renee Coppick of Crowley Fleck, PLLP, argued on behalf of Appellant Loon Lake and Duane Smith argued on behalf of himself.

### **STANDARD OF REVIEW**

¶14 The Board has the exclusive regulatory authority for the administration and enforcement of all Appropriation Rights and Existing Uses on the Flathead Indian Reservation. Compact<sup>1</sup>, IV.I.1.

¶15 The Montana Water Court has the distinct authority to adjudicate pre-1973 water right claims within Montana. The Water Court issued its preliminary decree for basin 76L, Flathead River, Below Flathead Lake, on May 2, 2025.

¶16 An appeal under Ordinance<sup>2</sup>, § 3-1-104 may be brought by a complainant or respondent dissatisfied with the final decision of the Engineer in the enforcement process.

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<sup>1</sup> “Compact” refers to the Confederated Salish and Kootenai Tribes-Montana Compact contained in Mont. Code Ann. § 85-20-1901.

<sup>2</sup> “Ordinance” refers to the Unitary Administrative Management Ordinance contained in Mont. Code Ann. § 85-20-1902.

¶17 On appeal from a party dissatisfied with the final decision of the Engineer, we review findings of fact to determine whether they are supported by substantial credible evidence and conclusions of law for correctness. A decision is supported by substantial evidence when there is enough relevant evidence in the record to justify the conclusion reached by the Engineer.

## **DISCUSSION**

¶18 *1. Whether the Engineer correctly determined that Loon Lake cannot divert water for livestock into White Earth Creek for water right 76L 64918-00.*

¶19 Loon Lake argues that the Engineer's Decision broadened the scope of the Complaint in determining that Loon Lake must cease activities that supplement the flow of White Earth Creek in the winter. Appellant's Brief on Appeal, at 8.

¶20 The Engineer has the authority to conduct independent investigations, including researching and collecting public records that are relevant and material to the issues raised in a complaint. Ordinance, § 3-1-103(1).

¶21 The Engineer properly researched and considered available public documents and records, including all available water rights records associated with the parties. Water rights records are readily available to all members of the public and contain facts that are generally known. The water right records associated with the parties' water rights are relevant for the purposes of assessing the issue of free-flowing water.

¶22 Loon Lake further argues that although the Engineer is correct to state 76L 64918-00 has a single point of diversion, the Engineer ignored the relevant fact that there are two places of use for the water right—Section 35, Township 33, Range 22 West and Section 2, Township 22 North, Range 22 West. Appellant's Brief on Appeal, at 9.

¶23 Loon Lake suggests the Final Decision be clarified to state “that although Loon Lake has no water right that allows it to supplement the natural flow of White Earth Creek in the winter with well water, Loon Lake does have the right under . . . 76L 64918-00 to divert up to 3.82 acre feet of water a year from the well located in the NE1/4SW1/4SW1/4 of Section 35, Township 23 North, Range 22 West, at the rate of 15 gallons per minute and use White Earth Creek as a natural carrier to deliver part of that water to livestock located in the E1/2NW1/4 of Section 2, Township 22 North, Range 22 West, despite the fact that this use may supplement the natural flow of White Earth Creek during such times of diversion.” Appellant’s Brief on Appeal, at 10.

¶24 The Engineer correctly determined that water right 76L 64918-00 is limited to 3.82 acre-feet per year. The Engineer also correctly determined that Loon Lake does not have a water right that allows for the supplementation of the natural flow of White Earth Creek in the winter with well water from 76L 64918-00, which Loon Lake admitted was correct. Final Decision, at 10; Appellant’s Brief on Appeal, at 10.

¶25 The Engineer additionally determined there was evidence of unmeasured free flowing use of water from Loon Lake’s well associated with water right 76L 64918-00. Final Decision, at 11. The Engineer correctly required Loon Lake to winterize the well—cap and seal—and required Loon Lake to update the OE when the work was completed and any measurements taken from the well following the winterization.

¶26 Controlling free-flowing wells is crucial for the conservation of groundwater resources within the boundaries of the Reservation. As such, all free-flowing wells must be properly capped and sealed and equipped with a control valve to completely stop flow

if necessary. Ordinance, § 2-1-113 (referencing the inherent principle that “Waters within the Reservation may not be wasted, nor may water be used unlawfully, nor may a lawful use of water be interfered with.”).

¶27 Loon Lake presented evidence that suggested it had winterized the well associated with water right 76L 64918-00, however, was unsure whether it had provided such evidence or information to the Engineer as required under the Final Decision.

¶28 Upon remand, Loon Lake shall promptly provide the Engineer with the evidence necessary to establish when winterization of the well occurred, and any measurements taken from the well following the winterization. Such evidence shall also be made available to Smith.

¶29 The Board further directs the Engineer to require the well associated with water right 76L 64918-00 to be metered and that Loon Lake report meter readings during the period of use to the OE for a period of time specified by the Engineer.

¶30 *2. Whether the Engineer correctly determined that Loon Lake cease use of the original well associated with water right claim 76L 141838-00.*

¶31 Loon Lake argues that the Engineer expanded the scope of the Complaint in his review of the change authorization associated with water right 76L 141838-00. Appellant’s Brief on Appeal, at 10-11.

¶32 Again, the Engineer may research and evaluate water rights records in their entirety as they are public documents readily available to all members of the public and contain facts that are generally known. The change authorization for claim 76L 141838-00 is part of the water right record and may contain relevant information and facts pertinent to the resolution of the Complaint.

¶33 The Engineer determined there was evidence of unmeasured free flowing use of water from Loon Lake’s well associated with water right 76L 141838-00. Final Decision, at 11. The Engineer correctly required Loon Lake to winterize the well—cap and seal—and required Loon Lake to update the OE when the work was completed and any measurements taken from the well following the winterization.

¶34 Loon Lake presented evidence that suggested it had winterized the well associated with water right 76L 141383-00, however, was unsure whether it had provided such evidence or information to the Engineer as required under the Final Decision.

¶35 Upon remand, Loon Lake shall provide the Engineer with the evidence necessary to establish when winterization of the well occurred, and any measurements taken from the well following the winterization.

¶36 The Board further directs the Engineer to require the well associated with water right 76L 141383-00 to be metered and that Loon Lake report meter readings during the period of use to the OE for a period of time specified by the Engineer.

¶37 Loon Lake expressed concern with the Engineer’s use of “or for any other reason” in his determination that Loon Lake shall cease activities that supplement the natural flow of White Earth Creek in the winter for water right 76L 141383-00.

¶38 The use of “or for any other reason” allows for confusion and does not specify the Engineer’s determination of how Loon Lake is to come into compliance with the terms of water right 76L 141838-00.

¶39 Loon Lake further argues that the Complaint does not object to the use of the two wells for irrigation from the center pivot, but rather that the year-round flow of water from

the wells ceases, and that the Engineer's decision requiring Loon Lake to cease use of or abandon the older well associated with 76L 141838-00 is outside the scope of the Complaint. Appellant's Brief on Appeal, at 13.

¶40 The question regarding whether Loon Lake is using water in compliance with the elements of water right 76L 141838-00 is not entirely clear nor is it supported by substantial evidence.

¶41 The Board is unclear what evidence the Engineer relied upon to determine that Loon Lake should cease using the original well associated with water right 76L 141383-00. The Board, therefore, requires further fact-finding of the Engineer, specifically regarding the nature of the two wells, the functionality of the wells, and the need for the original well if the new well is producing sufficient volume as intended within the Change Authorization.

¶42 The Board cannot properly address the merits of this appeal without further information from the Engineer. Without substantial explanation to support the Engineer's determinations, the Board cannot justifiably sustain or overturn those determinations.

¶43 A determination of whether the original well was abandoned may be an issue addressed by the Water Court in the 76L basin adjudication.

### **ORDER**

¶44 Loon Lake shall promptly provide the Engineer with the evidence necessary to establish when winterization of the well occurred, and any measurements taken from the well following the winterization.

¶45 The Engineer shall order the well associated with water right 76L 141383-00 to be metered and order Loon Lake report meter readings during the period of use to the OE for a period of time specified by the Engineer.

¶46 The Board requests the Engineer provide clarification of the Engineer as to the meaning of “or for any other reason.”

¶47 The Board cannot properly address the merits of this appeal without further information from the Engineer. Without substantial explanation to support the Engineer’s determinations, the Board cannot justifiably sustain or overturn those determinations.

¶48 The Board remands the issue of whether the use of the original well associated with 76L 141838-00 was terminated pursuant to the change authorization.

¶49 The case is remanded for further proceedings consistent with this Opinion.

/S/ CLAYTON MATT \_\_\_\_\_

We Concur:

/S/ ROGER NOBLE

/S/ KENNETH P. PITT

/S/ GEORGIA SMIES

/S/ GEORGE MCLOUD