



**BEFORE THE OFFICE OF THE ENGINEER
FOR THE FLATHEAD RESERVATION WATER MANAGEMENT BOARD**

2024-FOR-100)
)
IN THE MATTER OF THE FORMAL) **FINAL DECISION OF THE**
COMPLAINT OF D. SMITH) **ENGINEER**

Duane Smith (Complainant) submitted a Formal Water Use Complaint (Complaint) to the Office of the Water Engineer (OE) on November 14, 2024. The OE has fully reviewed and considered the evidence submitted in this Complaint Proceeding and issues its Final Decision.

BACKGROUND AND PROCEDURAL HISTORY

Complainant filed the Complaint against Loon Lake Family Limited Partnership (Respondent). On December 10, 2024, Respondent provided notice to the OE that it is represented by Renée L. Coppock, Crowley Fleck PLLP. Additional notice was provided to the OE on January 3, 2025 providing that Respondent is also represented by Selena Sauer and Madeline Clarke, Crowley Fleck PLLP.

On December 12, 2024, the OE performed a field visit to evaluate the wells and details regarding their operation as the details relate to the Complaint. Water Engineer. Ethan Mace (Engineer) and Hydrologist, James Frakes attended on behalf of the OE. Wacey Cathey and Greg Gardner, representatives for Respondent, and Complainant also attended.

On December 27, 2024, Complainant submitted documents such as historic water right records, photographs, and a handwritten letter. On January 3, 2025, Respondent

submitted Witness Lists, Exhibits, and Testimony Summary. An additional exhibit was filed on January 7, 2025.

On January 9, 2025, the OE held a hearing at the Office of the Engineer in Ronan, Montana (Hearing). Complainant acted as a pro se litigant and represented himself. Respondent was represented by Selena Sauer and Madeline Clarke, Crowley Fleck PLLP. The Engineer heard testimony from Complainant. Respondent presented Mac Binger, Greg Gardner, and Wacey Cathey to testify.

Following the hearing, Complainant filed a handwritten Proposed Order that was received by the OE on January 21, 2025. Respondents provided Proposed Findings of Fact and Conclusions of Law and a Proposed Order.

LEGAL STANDARD

Montana Code Annotated 85-20-1901. Article II. 45. Defines the Ordinance: "Law of Administration" or "Unitary Administration and Management Ordinance" means the body of laws enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater within the Reservation, that are both materially consistent with the substantive provisions of Appendix 4."

Ordinance, § 1-1-104(65) defines waste or wasting of water as "the unreasonable loss of water resulting from the design, construction, operation or maintenance of a water diversion, storage or distribution facility, Well, Developed Spring, or the application of water to anything but a beneficial use." (Emphasis added)

Ordinance, § 2-1-113 states: "Prevention of Waste and Interference with Lawful Use.

1. Waters within the Reservation may not be wasted, nor may water be used unlawfully, nor may a lawful use of water be interfered with.
2. All facilities, Works and equipment associated with the withdrawal, impoundment, pumping, diversion, drainage, or transmission of waters on the Reservation shall be so constructed, installed, and maintained as to prevent the Waste, contamination, or pollution of surface and Groundwater and to avoid injury

to the lands and property of others. All wells, producing and non-producing, which may contaminate other surface or Groundwater must be properly abandoned or upgraded with a sanitary seal, in accordance with the water well criteria incorporated by reference in Section 1-1-111 of this Ordinance. All flowing wells shall be capped or equipped with valves so that the flow of water can be stopped when the water is not being put to beneficial use.” (Emphasis added)

Ordinance, § 3-1-102(1) contains the criteria for a formal complaint to be filed and states that any Appropriator aggrieved “by any Person the Complainant believes is Wasting water to the detriment of a right to use water the Complainant possesses, may file a Complaint with the Engineer.” (Emphasis added).

Ordinance, 3-1-103(3): “The decision of the Engineer or Designee may include an award of declaratory relief, and/or the imposition of conditions on the use or exercise of a water right. Such conditions may include, but are not limited to, instructions regarding the proper delivery of water, the installation of measuring devices, the construction of suitable ditches to carry the return waters from any ditch or lands to the main stream or proper waste way, or the mandate of structural changes to diversion structures.”

Ordinance § 3-1-103(4) describes the process for appeal to the Board and states: “Any Complainant or Respondent dissatisfied with the final decision of the Engineer or Designee may appeal to the Board (and become an Appellant) and obtain review of the Engineer’s or Designee’s decision. A notice of appeal to the Board must be received by the Board within 30 days of the issuance of the Engineer’s or Designee’s written decision. The decision of the Engineer or Designee shall not be stayed during the pendency of the appeal unless the Board expressly orders such a stay upon motion of the Complainant or Respondent.” (Emphasis added).

Ordinance § 3-1-110(1) states: “The Engineer, or any Staff who is so directed by the Engineer, ... may enter upon lands on the Reservation with reasonable notice to the owner or occupant, to investigate and inspect methods of diversion, withdrawal, and other

activities affecting water quantity, to install measuring devices at the expense of the water user on surface and Groundwater diversions for the purpose of enforcing and administering this Ordinance, to monitor water use, water quality, and diversion structures.”

Ordinance § 3-1-110(2) states: “The Engineer, or any Staff who is so directed by the Engineer, ... may take action to prevent the Illegal use of water, including, but not limited to the temporary decommissioning of head gates or other diversion Works.”

Ordinance § 3-1-110(3) states: “The Engineer may issue written notices of violation to Appropriators and to Illegal users of water for violations of this Ordinance or of the terms and conditions of any Appropriation Right or Existing Use or of any lawful order of the Engineer or the Board ...”

Ordinance § 3-1-110(2) states: “Any notice issued pursuant to subsection (3) of this Section shall specify the particular violation or violations, the step(s) to be taken to come into compliance and identify a reasonable time frame within which such steps are to be taken.”

Ordinance § 3-1-110(2) states: “In the event of non-compliance with any written notice issued pursuant to subsection (3) of this Section within the specified time frame, the Engineer may move the Board to exercise its powers pursuant to Sections 3-1-112 and 3-1-113 of this Ordinance.

Ordinance § 3-1-112 states: “Additional Enforcement Powers of the Board. Upon motion by the Engineer, and after notice to any affected Appropriator and the opportunity for all parties to be heard, the Board may:

1. Impose fines, as set forth in Section 3-1-113 of this Ordinance.
2. Impose conditions on the future use of any Appropriation Right to prevent further violation, but only upon a finding that the holder of any such Appropriation Right is

violating or has violated any provision of that Appropriation Right, or is violating or has violated any order issued by the Engineer...

3. Revoke or suspend any Appropriation Right, but only upon a finding that the holder of any such Appropriation Right is willfully violating or has willfully violated any provision of that Appropriation Right, or is willfully violating or has willfully violated any order issued by the Engineer concerning the use of that Appropriation Right... “

Ordinance § 3-1-113 states: “Fines

1. The Board, pursuant to the provisions of this Section, may impose a fine not to exceed \$1,000 per violation on any Person who fails to comply with the provisions of this Ordinance, including any written order of the Board or Engineer ...

4. Each day of violation constitutes a separate violation. “

WP&P 11-111: “Groundwater Diversion Standards 1) Flowing Artesian Wells. Flowing artesian wells must be capped and or sealed in a way that prevents the free flow of water from the well and/or annulus around the well, to avoid Waste or Wasting of water as defined by Ordinance, § 1-1-104(65).

WP&P § 31-103 contain the criteria for the OE to resolve a formal complaint submitted before the OE which states that “the Engineer or Designee shall hold a hearing on the formal complaint no later than fifteen (15) days after providing notice of the complaint to the Respondent. The Engineer or Designee may take an additional (10) days before holding the hearing to perform such independent investigation into the formal complaint as the Engineer or Designee deems appropriate. Ordinance, § 3-1-103.” (Emphasis added).

WP&P § 31-103(15) refers to Settlement and Stipulations between parties and states: “The terms of a settlement, stipulation, or consent entered between private parties as a private contractual agreement are not binding on the OE.” (emphasis added).

WP&P § 41-301(2) references the form of a final decision in response to a complaint and states: “The final decision of the Engineer or Designee shall be in the form of a final order.” (Emphasis added).

DISCUSSION

Complainant’s complaint pertains to Respondent’s artesian wells that are allowed to free flow during winter months to prevent freezing, and therefore to prevent freezing and subsequent freeze damage to the well heads. Complainant alleges that the flowing wells are a waste of water that negatively impacts Complainant’s ability to use his water rights.

Complainant owns property in the S1/2 of Section 26, Township 23N, Range 22W and appurtenant surface water rights, all of which have a March 21, 1930, priority date, are as follows: 76L 17963-00; 76L 17964-00; 76L 17966-00; 76L 17967-00; 76L 17971-00; and 76L 17972-00. Each of these rights is either from a spring or an unnamed tributary of White Earth Creek.

There is also a Groundwater Certificate, 76L 109698 appurtenant to Complainant’s property that is associated with a well on Complainant’s property.

Complainant’s springs that supplement the flow of White Earth Creek are not producing as they did historically and are impacted by both Respondent’s artesian wells and reduced natural water supply.

Respondent owns property in the NW1/4 and S1/2 of Section 35, Township 23N, Range 22W. Respondent’s property is located downstream of Complainant’s property on White Earth Creek. Near the creek, there are three artesian wells located on this property that are the topic of the complaint.

The water rights appurtenant to Respondent’s property are as follows: 76L 64918-00; 76L 141832-00; and 76L 141838-00.

76L 64918-00 is a groundwater certificate with a priority date of October 7, 1986, that diverts water from a free flowing well for stock purpose at a rate of 15 gallons per minute

for a maximum volume of 3.82 acre-feet per year. The period of diversion is January 1 to December 31.

76L 141832-00 is a statement of claim with a priority date of November 21, 1910, that provides for direct from source stock water from White Earth Creek. The flow rate and volume are as follows:

Maximum Flow Rate:	A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.
Maximum Volume:	THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

The period of diversion on claim 76L 141832-00 is January 1 to December 31.

76L 141833-00 is a statement of claim with a priority date of January 24, 1973, that diverts water from a free flowing well for irrigation at a rate of 500 gallons per minute for a maximum volume of 400 acre-feet per year. The period of diversion is April 15 to September 20.

The Complainant alleges that the water rights appurtenant to Respondent's property are insufficient to allot for the wells to run year round and that in failing to turn the wells off, Respondent is wasting water, to the detriment of Complainant and Complainant's water rights.

The artesian wells on Respondent's property are not insulated and are not otherwise winterized.

Respondent allows water to flow from the wells in the winter to prevent the valves and well heads from freezing, which would potentially damage the wells in a way that would prevent Respondent's control of the flow of water.

Respondent's means of diversion from the wells are insufficient because they are not properly insulated to prevent freezing in the winter.

Respondent is also not in compliance with the limitations to point of diversion, volume, and flow rate associated with water right 76L 64918-00.

76L 64918-00 is limited to a single point of diversion, a free flowing well. Respondent allows all three wells on the property to flow freely in the winter months. Although water diversion from the well associated with 76L 64918-00 is allowed year-round, this water right allows for only one well to flow year-round.

76L 64918-00 is also limited to 3.82 acre-feet per year. According to Wacey Cathey's calculations (Respondent's exhibit 7) done on December 11, 2025, the total well flow rate into White Earth Creek was 7.22 gallons per minute. This flow rate equates to 10,396.8 gallons per day flowing from the wells. Should Respondent allow this flow rate through the winter from November 30 to April 1 (123 days) this equates to 3.92 acre-feet. In winter flow alone with the 7.22 gallon per minute flow rate calculated by Respondent, Respondent is exceeding its allotted water right volume.

Complainant also provided evidence that the flow rate in 2023 exceeded Respondent's calculated flow rate. When Complainant measured the flow rate in White Earth Creek he calculated 30 gallons per minute. This equates to 43,200 gallons per day flowing through White Earth Creek, which equates to 16.3 acre-feet total flowing in White Earth Creek between November 30 to April 1.

Although Wacey Cathey's calculations shown in Respondent's exhibit 7 show additional water is present in White Earth Creek that is not coming from the wells, that volume is equivalent to only 0.28 gallons per minute. Using Complainant's calculated flow rate and considering the approximate 0.28 gallons per minute of groundwater flow, Respondent is exceeding the volume allotted on water right 76L 64918-00.

Respondent was also exceeding the flow rate allotted on water right 76L 64918-00 at the time that Complainant performed his measurements in 2023. Even considering the potential additional groundwater flow indicates that Respondent was exceeding the flow rate limitations on 76L 64918-00 regardless of groundwater flow into White Earth Creek.

The use of White Earth Creek as a natural conveyance of water is also contributing to a waste of water due to natural seepage from the creek bed that results from discharging water from the well into White Earth Creek.

Respondent is not complying with the point of diversion limitations associated with claim 76L 141832-00. Claim 76L 141832-00 is for livestock direct from source, meaning that water is diverted from the flow of White Earth Creek by the livestock directly. 76L 141832-00 includes no other points of diversion that account for allowing the wells to supplement the natural flow of White Earth Creek.

Respondent also is not complying with the purpose of use limitations or period of diversion associated with claim 76L 141838-00.

Claim 76L 141838-00 is limited to use for irrigation between April 15 to September 20. Any use of water for stock from the wells in the winter months, as Respondent's witnesses indicated is common practice, is not in compliance with the water right limitations imposed on claim 76L 141838-00.

Claim 76L 141838-00 had a change authorization completed in 1987 that moved the point of diversion from the original well to a new well 100 feet to the north of the original well. The reason provided on the application for the replacement well is as follows:

8. **REMARKS**
Use this space for further describing the **past** use of your Water Right or for providing any information which will help explain how you propose to change your water right.

The old well is deteriorating and is not producing what it use too. My intentions are to abandoned the old well if the new well produces the full 500 gal per minute that the old one use too.

There is no evidence in the change authorization file that the original well was ever abandoned (abandoned as defined by Administrative Rules of Montana 36.21.634.1). The field visit on December 12, 2024, revealed that the two wells are manifolded together. A Point of Diversion Verification Form signed by James M. Binger on October 28, 1999, indicates that the "old point of diversion" was still in use at that time. However, an

Authorization to Change Water Use Questionnaire also indicates that only one well is in use:

5. PLEASE DESCRIBE THE CHANGES YOU MADE TO THIS WATER RIGHT.

NO CHANGES MADE - PURCHASED PROPERTY FROM ROBERT A. TRUETT OCTOBER, 1998 AND EVERYTHING IS THE SAME AS APPEARS ON OWNER DATA SHEET.
THE WATER FROM THE WELL IS ACTUALLY PIPED TO A CENTER POINT THAT IS LOCATED ON NE 1/4 SEC 2 T22N R22W

This form was submitted by James M. Binger rather than the original applicant that was making the changes to the point of diversion.

Respondent's use of the original well to fulfill the irrigation right appears to be in violation of the change authorization because the change was intended to move the point of diversion from the original well to the new well, not to allow a secondary point of diversion to be added to the water right.

CONCLUSION

Respondent is wasting water and violating the conditions imposed on the water rights.

Respondent is wasting water by failing to properly winterize the wells to prevent freezing and potential damage to the well heads, which would increase the risk of waste water.

Respondent is wasting water by allowing well water to flow down White Earth Creek from the wells to supplement the natural flow and to fulfill claim 76L 141832-00.

Respondent is violating conditions imposed on water right 76L 64918-00 by exceeding volume of the water right as demonstrated by the flow rate calculations provided by both Complainant and Respondent.

Respondent is violating conditions imposed on water right 76L 64918-00 by using three points of diversion to fulfill the water right when only one point of diversion was applied for and authorized for use on the water right.

Respondent is violating conditions imposed on claim 76L 141832-00 by using well water from the three wells to supplement the flow of White Earth Creek for stock purposes during the winter months.

Respondent is violating conditions imposed on claim 76L 141838-00 by using the water from the two wells to supplement the flow of White Earth Creek for stock purposes. This claim is limited to irrigation only.

Respondent is violating conditions imposed on claim 76L 141838-00 by using the water from the two wells in the winter outside the period of diversion listed on the claim.

Respondent is violating conditions imposed on claim 76L 141838-00 by utilizing both wells and manifolding the wells together despite the limitation on the water right that only one point of diversion shall be used to fulfill this water right.

FINAL ORDER

The Final Decision of the Engineer for Complaint 2024-FOR-100 is hereby issued on this thirtieth day of January, 2025, imposing the following:

- 1) Respondent shall winterize all three wells to prevent freezing and the continued waste of water before April 1, 2025 and update the OE with correspondence when the work is completed and what measures were taken to winterize all three wells.
- 2) Respondent shall cease activities that supplement the natural flow of White Earth Creek in the winter with well water to fulfill claim 76L 141832-00 or for any other reason.
- 3) Respondent shall provide clear information as to whether or not the two wells associated with 76L 141838-00 are being used to supply stock tanks and if the answer is, "yes," the Respondent shall either 1) disconnect all stock tanks and cease using these wells for and unauthorized use or 2) come into compliance by attaining appropriate stock purposed water rights by April 1, 2025.
- 4) Respondent shall cease use of the original well associated with claim 76L 141838-00 until either 1) a new change authorization is completed with the OE to account

for this additional point of diversion, 2) the claim is modified by the Montana Water Court to add the additional point of diversion, or 3) the Respondent provides the OE with compelling information that may amend the DNRC change authorization's current status.

- 5) The Respondent is hereby noticed that the Engineer, or any Staff who is so directed by the Engineer, may perform additional site visits at any given time, without additional notice, to ensure compliance with this order. Upon the Engineer's determination that compliance with this order has been achieved, this notice of ongoing site access will be rescinded by the Engineer in writing.
- 6) The Engineer may consider Respondent timeline extension requests for the above compliance deadlines, which should be limited to extenuating circumstances outside the control of the Respondent and only approved at the discretion of the Engineer as reviewed at a timeline set by the Engineer.
- 7) If the Respondent fails to comply with this order the Engineer may move the Board to exercise its powers pursuant to Sections 3-1-112 and 3-1-113 of the Ordinance.

NOTICE

This Final Decision is the Office's final decision in this matter. A Final Decision may be appealed to the Board by a party who has exhausted all administrative remedies before the OE in accordance with the Ordinance by filing a Notice of Appeal with the Office within 30 days of the Final Decision.

Dated this 30th day of January, 2025.

Ethan Mace /s/

_____, Engineer
Office of the Engineer, FRWMB

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL DECISION was served upon all parties listed below on this 30th day of January, 2025 by electronic mail (e-mail). A hard copy will be mailed within four days of this email communication.

Complainant

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Office of the Engineer