



Flathead Reservation Office of the Water Engineer

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

2024-FOR-100	)	
	)	ORDER ON REMAND
IN THE MATTER OF THE FORMAL	)	
COMPLAINT OF D. SMITH	)	

The Flathead Reservation Water Management Board submitted its Opinion on September 29, 2025, in response to an appeal brought by the Appellant. On appeal, the Board determined that additional clarification of the Final Decision of the Engineer was necessary. Accordingly, the matter was remanded to the Office of the Water Engineer for review of specific findings of the case.

BACKGROUND

Appellant Loon Lake Family Limited Partnership (Loon Lake) appealed the Final Decision of the Engineer to the Board, requesting the Board reverse the Engineer's Decision. Specifically, Loon Lake sought to continue to divert water for livestock from the well associated with water right 76L 64918-00 into White Earth Creek, and to reverse the Engineer's Decision that Loon Lake cease all use of the original well associated with claim 76L 141838-00. Both Loon Lake and Appellee Duane Smith (Smith) took part in an oral argument before the Board, specifically arguing issues with water waste and the concurrent use of the replacement and original wells.

The Board held that certain elements listed in the Final Decision needed clarification, and the matter is presently before the Office of the Water Engineer (OE) on remand.

STANDARD OF REVIEW

The OE, in its review of an administrative decision on remand, must comply with the remand order issued by the appellate body, here, the Board.

SCOPE ON REMAND

Upon remand, the following issues are to be reviewed:

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 use of the original well associated with water right 76L 141838-00 was terminated pursuant to the change authorization.
3. The meaning of “or for any other reason” as used in the Final Decision.

ANALYSIS

As an initial matter, the Board required Loon Lake to provide the OE with the evidence necessary to establish when winterization of the well occurred, and any measurements taken from the well following winterization. (Opinion, at ¶ 28, 35, and 44). Loon Lake provided the OE, and Appellee Smith, with a photograph on October 25, 2025 (Figure 1) of apparent winterization of the well associated with water rights 76L 64918-00 and 141838-00. The photograph is insufficient to document well winterization.



Figure 1: Loon Lake Photograph Submittal. Further information and documentation needed to demonstrate winterization.

Loon Lake is to provide the OE with a better description and documentation of the winterization of the wells or provide the OE with a letter from a certified well driller, stating

the wells have been properly winterized. Submittal of sufficient documentation of winterization is required by October 1, 2026. Loon Lake will organize a field visit for the OE and Appellee Smith before November 1, 2026, to verify winterization. Additionally, Loon Lake did not submit any measurements taken from the well following the supposed winterization, as required by the Board's Opinion. Loon Lake is to also provide the OE with such documentation by October 1, 2026.

I. Loon Lake cannot divert water for livestock into White Earth Creek for water right 76L 64918-00.

Water right 76L 64918-00 is purposed for stock water with the means of diversion being a well. This water right and the associated filings from the Montana Department of Natural Resources and Conservation do not contain remarks or any indication that White Earth Creek was to be used to convey water to fulfill this right. 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. Similarly, water right 76L 141832-00 includes no other points of diversion that account for wells to supplement the natural flow of White Earth Creek.

Upon review, Loon Lake shall not divert water for livestock into White Earth Creek under water right 76L 64918-00 due to lack of evidence to support that White Earth Creek was to be a conveyance for water to another parcel. Loon Lake is violating conditions imposed for both 76L 64918-00 and 76L 141832-00 by using well water from three wells to supplement the flow of White Earth Creek for stock purposes during winter months. As stated in the Final Decision of the Engineer, the use of White Earth Creek as a natural conveyance of water is contributing to a waste of water due to natural seepage from the creek bed that results from discharging water from the wells into White Earth Creek (Doc. 10.00, at 9). Ordinance, § 2-1-113 states: "Prevention of Waste and Interference with Lawful Use: Waters within the Reservation may not be wasted, nor may be used unlawfully, nor may a lawful use of water be interfered with." Loon Lake must stop discharging well water into White Earth Creek during winter months. The wells associated with 76L 64918-00 and 76L 141838-00 must be winterized and metered. Records of metered use must be submitted to the OE monthly.

II. The original well associated with water right claim 76L 141838-00 must be abandoned.

The change file associated with water right claim 76L 141838-00 requires the original well to be abandoned, and Loon Lake's statements within the change file further support the position that the original well was to be abandoned. The Board indicated that a determination of whether the original well was abandoned may be an issue addressed by the Water Court in the 76L basin adjudication, however, requested the OE on remand to review this particular question as it relates to the change authorization. Pursuant to Mont. Code Ann. § 85-2-215, the Water Court has the exclusive jurisdiction over the final determination of existing water rights (i.e., water right claims with pre-July 1, 1973, priority dates). The enforcement of a post-1973 change authorization of a water right within the exterior boundaries of the Reservation falls within the jurisdiction afforded to the Board under the Compact.

The March 31, 1988, Authorization To Change Appropriation Water Right states "The Department hereby authorizes the change of the water right as follows: To replace the old point of diversion with a new well." Furthermore, on the Application for Change of Appropriation Water Right application received by DNRC on December 11, 1987, Applicant Robert Thoft checked the box stating the "new point of diversion is replacing the old point of diversion," leaving the option "In addition to the old point of diversion" unchecked. In the 1987 DNRC application process, the 606-checklist box stating: "Has the old well been abandoned?", was checked yes. On the Notice of Completion of Change of Appropriation Water Right form signed by Robert and Susie Thoft on November 30, 1989, the Thofts attested that the change has been completed in accordance with the terms and conditions of the authorization. The Thofts additionally did not state that the water right was completed other than authorized. On the Authorization to Change Water Use Questionnaire in 1999 James Binger wrote ". . . the well is . . ." indicating use of a single well. On the Point of Diversion Change that James Binger filled out on October 28, 1999, he indicated that the old well was still in use, however, on the associated map only one well is identified. On the acknowledgement of water right ownership update form that

was sent to both the seller and buyer on April 3, 2003, there is a remark that notes that the replacement well is 100 feet north of the old well.

Throughout the change process, there were multiple opportunities to clarify use and identify that the old and new wells were manifolded together. The change authorization checklist supported the position that the old well was abandoned, the Thofts attested that the change had been completed in accordance with the terms and conditions of the authorization, the Thofts did not provide any further information that the change was completed other than authorized, and the map and discussion of the change in the point of diversion referenced a singular well. The record is clear that only one well can be associated with water right claim 76L 141838-00. Therefore, the original well must be abandoned.

III. The use of “or for any other reason” as used in the Final Decision shall be struck from the Final Decision.

The phrase “*Or for any other reason,*” as used in the Final Decision of the Engineer (Doc. 10.00, at 11), serves as a catchall that does not add any substantive requirement and shall be considered struck from the Final Decision.

FINAL ORDER

1) Loon Lake is required to meter the wells associated with 76L 64918-00 and 76L 141838-00 and report meter readings to the OE during the period of use. The OE requires Loon Lake to complete Form 623F: Water Measurement Device Review, along with the annual completion of Form 222F: Water Measurement Report which is due at the first of each year. Until such other time as specified, Loon Lake must provide monthly metering reports to the OE by the 10th of each month during the period of use.

2) Loon Lake is required to provide the OE with a better description and photographs of well winterization or provide the OE with a letter from a certified well driller, along with photographs, stating the wells have been properly winterized by October 10, 2026. Loon Lake shall organize a site visit with the OE and Appellee Smith in October of 2026 to verify winterization.

3) Loon Lake shall not divert water for livestock into White Earth Creek under water right 76L 64918-00. Loon Lake shall not allow the free-flowing well water from the wells associated with 76L 141838-00 to supplement the flow of White Earth Creek.

4) Loon Lake is to provide the OE with an abandoned well log from a licensed well driller showing the abandonment of the original well associated with 76L 141838-00.

5) If Loon Lake fails to comply with this Order, the Engineer, or any Staff who is so directed by the Engineer, may enter upon lands on the Reservation with reasonable notice of 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.

6) If Loon Lake fails to comply with this Order, the Engineer may cause the Board to exercise its powers pursuant to Ordinance, §§ 3-1-112 and -113.

NOTICE

This *Order on Remand* is the final decision in this matter. The decision may be appealed by a party who has exhausted all administrative remedies before the Board in accordance with Ordinance, § 3-1-103(4) by filing an appeal to the Board within 30 days of the issuance of a final Board decision.

SO ORDERED.

DATED this 8th day of September 2026.



Elena Evans, Engineer
Office of the Engineer, FRWMB

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the ORDER ON REMAND was served upon all parties listed below on this 8th day of September 2026 by electronic mail (e-mail). A hard copy will be mailed within four days of this email communication.

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A handwritten signature in cursive script, reading "Cristy Brooks", is written over a horizontal line.

Office of the Engineer