

March 10, 2008
P.O. Box 37
Hinsdale, MT 59241

Honorable legislators:

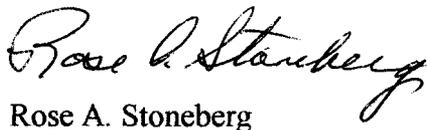
I have become very frustrated with the Department of Natural Resources and Conservation regarding water rights. Montana is a prior appropriation state with a constitution requiring water to be put to beneficial use for a water right to be valid. Current Montana Water Law specifically states that, "it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose." We, as beneficial users, are discouraged from filing water rights (specifically, told, "You don't want to do that. It's too expensive.") or we are told we are "exempt" from filing. If you file with an exempt form, you essentially own a piece of paper, not a right, and may have signed away your vested right.

Meanwhile, on this ranch, the DNRC has allowed the federal government:

- 1) to file without a beneficial use,
- 2) to date a water right considerably before actual filing date,
- 3) to file where no pit or dam actually exists, and
- 4) to retain a water right where no water has been impounded for years.

It has been the ranch policy to properly file on our water sources. We want to do the right thing. We have been doing our best to conform to both Montana and U.S. Law. The excuses the DNRC gives us for not allowing us to file are not well thought out. The word vested was taken out of Montana Law; but existing rights were confirmed and the vested rights were existing rights.

Sincerely,


Rose A. Stoneberg

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
GLASGOW WATER RESOURCES REGIONAL OFFICE



BRIAN SCHWEITZER
GOVERNOR

222 6TH STREET SOUTH
BOX 1269

STATE OF MONTANA

(406) 228-2561
FAX (406) 228-8706

GLASGOW, MONTANA 59230-1269

January 8, 2008

Horse Ranch Inc.
Attn: Rose Stoneberg
PO Box 37
Hinsdale, MT 59241

RE: Application for Provisional Permit for Completed Stockwater Pit or Reservoir (Form 605)
No. 40E-30029221, 40E-30029222, 40E-30029223, 40E-30029224, 40E-30029225,
40E-30029226, 40E-30029227, 40E-30029229, 40E-30029230

Dear Ms. Stoneberg,

The Department of Natural Resources and Conservation received your Applications for Provisional Permit for Completed Stockwater Pit or Reservoir (Form 605).

Montana water law requires "the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant" (85-2-306 (6)(d) MCA). See the enclosed memo dated December 21, 2007 from Tim Hall, Chief Legal Counsel.

The applications you submitted do not meet this statutory requirement and have been terminated. The filing fees you submitted with the applications will be refunded.

If you have any questions, please call.

Best regards,

A handwritten signature in cursive script that reads "Denise Biggar".

Denise Biggar

Water Resources Specialist

Phone number: 406-228-2561

E-mail address: dbiggarr@state.mt.us

Mailing address: P.O. Box 1269, Glasgow, MT 59230

NOTICE OF APPROPRIATION OF WATER

State of Montana }
County of Valley } ss.

TURKEY PIT RESERVOIR
E-1-246

TO ALL WHOM THESE PRESENTS MAY CONCERN:

BE IT KNOWN, that the United States of America does hereby publish and declare, as notice to all parties concerned and the State of Montana, that: In accordance with Chapter 8, of Title 89, Revised Codes of Montana, 1947,

I The United States of America did on the 13th day of May, A.D. 1959 appropriate and now has the legal right to the use, possession, and control of and claims 50 cubic feet per second of time of an unnamed side drainage of Larb Creek, a drainage of the Milk River

(Name or "unnamed" stream, creek, coulee, well, river, ravine, lake, spring, etc.)
The natural source of supply, which has its origin in Section(s) 34. Township 27 N., Range 34 E., M.M., and flows - (direction of flow) _____ across Section(s) 34, Township 27 N., Range 34 E., M.M., located in Valley County, Montana, for stock water and other useful purposes which may be, but not limited to, flood irrigation, flood prevention, watershed protection and water conservation;

II That the purpose for which said water is claimed is for livestock water and other useful purposes;

That the place of intended use is upon and for the following described area of land of 40 acres in extent: Section(s) 34, Township 27 N., Range 34 E., M.M.:

III That the means of diversion will be pit type reservoir and dike (A dam or ditches, dikes, canal, etc.)
(Give size, volume, capacity, etc.) 4000 cu. yds. 110'x150'x15' located in Section(s) 34, Township 27 N., Range 34 E., M.M.;

IV The name of the appropriator is the United States;

V That the United States also claims the right to keep in repair and enlarge said water appropriation at any time;

CLAIMING THE SAME ALL AND SINGULAR, under any and all national and state laws and the rulings and decisions thereunder in the matter of water rights;

TOGETHER WITH ALL AND SINGULAR, the hereditaments and appurtenances thereunto belonging and appertaining or to accrue to the same;

IN TESTIMONY WHEREOF WITNESS, the hand of Albert E. Leonard, District Range Manager, Montana Grazing District No. 1, at Malta, Montana, Bureau of Land Management, Department of the Interior, in and for the United States of America.

Albert E. Leonard
District Range Manager

State of Montana }
County of Billings } ss.

Albert E. Leonard being first duly sworn upon oath deposes and says: That he is of lawful age, invested with authority to act for and on behalf of the United States in the above specified matter of water appropriation;

That the United States is the appropriator and claimant of the order and water right mentioned in the foregoing Notice of Appropriation of Water and claims:

That he is the person whose name is subscribed thereto for and in behalf of the United States as appropriator and claimant; that he knows the contents of the foregoing notice and that the matter and things therein stated are true.

Albert E. Leonard (Signature)

Subscribed and sworn to before me this JUL 15 1959 day of JUL 15 1959, 1959.

Stephen Grunat
Notary Public for the State of Montana
Residing at Malta, Montana
My commission expires December 7, 1961

409775

Filed for record AUGUST 10th, 1959 at 1 P. M. and duly recorded in Book 33 Page 458 records of Valley County, State of Montana.
MARY LOU EIDE, County Recorder By: Mary Lou Eide
Ret: Bureau of Land Management
Malta, Montana

\$2.00

1958-
US V Moul Mexico
can not have right
BLM
NO STOCK WATER
Right



DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



BRIAN SCHWEITZER, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684

PO BOX 201601
HELENA, MONTANA 59620-1601

To: Kim Overcast, New Appropriations Manager
From: Tim D. Hall, Chief Legal Counsel *TDH*
Date: December 21, 2007
Re: Stockwater Pits and Reservoirs – Pre-1973 and Post-1973

The Montana Water Use Act of 1973 established a permit system for new uses of water. Any person planning a new or expanded development for a beneficial use of water from a surface water source must obtain a Permit to Appropriate Water prior to the water being put to use. The permit system is administered by the DNRC. The Water Use Act at Mont. Code Ann. § 85-2-306 (6) & (7) has a special provision for obtaining permits for completed stockwater pits or reservoirs. If the pit or reservoir meets the following criteria, construction can begin immediately. The stockwater pit or reservoir must be located on a non-perennial stream, have a capacity of less than 15 acre-feet of water, and an annual appropriation of less than 30 acre-feet. The pit or reservoir must also be constructed on a parcel of land that is 40 acres or larger which is owned or under the control of the applicant. The proper form to file with the Department for a new water right under the above provisions is a Form 605, application for Provisional Permit for Completed Stockwater Pit or Reservoir.

The Department will not process Form 605 applications for Provisional Permit for Completed Stockwater Pit or Reservoir on federal land when the application is received in the name of the grazing permit holder. The water right must be in the name of the federal agency. The same applies for developments on state land.

A federal grazing permit does not constitute control of the land. The grazing permit holder does not control other individuals from entering the land for other purposes nor do they control any resources on the land. The federal agency has control of the land, including control of the grazing. The grazing permit dictates how many animal units will occupy a pasture, when the animals will be allowed to enter the pasture, and how long they will be allowed to stay. Grazing permit holders can also be told to remove the animals at other times, such as when the condition of the pasture is severely degraded due to drought. The grazing permit holder agrees to these terms by signing the grazing permit. Failure to adhere to the terms of the grazing permit can result in cancellation of the permit and trespass charges filed against the permit holder.

CENTRALIZED SERVICES
DIVISION
(406) 444-2074

CONSERVATION & RESOURCE
DIVISION
(406) 444-6667

RESERVED WATER RIGHTS
COMPACT COMMISSION
(406) 444-6841

OIL & GAS
DIVISION
(406) 444-6675

TRUST LAND MANAGEMENT
DIVISION
(406) 444-2074

Because of the variety of private leases with varying levels of "control of the land," the Department requires written permission from the landowner when a Form 605 is filed for a water right in the name of the private lessee.

There has been some confusion of late between Form 605 filings, Form 627 filings, and issues of how certain unclaimed water rights get adjudicated. The Department has been receiving numerous improper Form 627 "Notice of Water Right" filings and copies of papers filed at the courthouse attempting to "claim" stockwater pits and reservoirs. Unlike a Form 605, which is for a new water right, a Form 627, which has been discontinued as of Jan. 1, 2008, was merely a notice form provided by the Department for the filing of some sort of claim to a pre-1973 water right that was exempt from the filing requirements of the statewide general stream adjudication ("Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources...." Mont. Code Ann. § 85-2-222. All existing pre-July 1, 1973, water rights not meeting the exempt definition were to be filed with the Department during the claim filing period of 1979-1982. Stockwater pits and reservoirs were not exempt from adjudication filing requirements. The Montana State Supreme Court early on in the adjudication issued a water rights order stating that "failure to file a claim as required by law will result in a conclusive presumption that the water right or claimed water right has been abandoned" MCA 85-2-212. Existing water rights that were not filed as statements of claim during the claim filing period, or were not exempt from filing, were later deemed by the Supreme Court to have been forfeited. *Matter of Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992).

Therefore, a Form 605 is for filing for new surface water rights for stockwater pits and reservoirs. Pre-July 1, 1973, stockwater pits and reservoirs needed to be claimed in the adjudication or were forfeited. For water rights exempt from the filing requirements of the adjudication, claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources, a Form 627 could formerly be filed with the Department to give notice that the filer claimed such a right. A Form 627 does not constitute a claim that the Water Court will adjudicate. The legislature has not yet made clear where or when someone who did not voluntarily file a water right exempt from the filing requirements of the adjudication can file their claim and have it adjudicated. It is clear, however, that anyone who filed a Form 627 has not placed their water right before the Water Court for adjudication and no such water rights claimed on that form will be included in water right decrees.

Water users should contact attorneys of their choice for advice on the handling of their water rights.

March 8, 2008
Horse Ranch
PO Box 37
Hinsdale, MT 59241

Honorable Legislators:

In 2007, Rose Stoneberg, McKee Anderson and Mary Anderson, known collectively as Horse Ranch, built nine stockwater pits on fee lands. Four were constructed using the portion of the ranch grazing tax set aside for that purpose (see 1947 amendment to the Taylor Grazing Act¹ and Federal Land Management Policy Act²) and five were constructed using private out-of-pocket funds. The pits were filed upon in a timely fashion using Department of Natural Resources and Conservation forms.

January 8, 2008, Horse Ranch received a letter stating that, "The applications you submitted do not meet this statutory requirement (the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant) and have been terminated." This ruling on the interpretation of Montana statutes was handed down not by Chief Water Judge C. Bruce Lobel, but by Tim Hall, Chief Legal Counsel of the DNRC. The merits of this application will not be permitted a hearing in court.

The water in question was first demonstrably put to beneficial use for stockwater by private parties on November 16, 1886. It has been in continuous beneficial use as stockwater since that time. The water was first put to beneficial use by direct Horse Ranch predecessors-in-interest on July 15, 1918. In 1959 and 1966, the direct successors-in-interest of the oldest stockwater rights (1886 and 1888) publicly and officially ceded those oldest rights existing upon the Horse Ranch range to the Horse Ranch predecessors-in-interest as part of the Taylor Grazing Act range adjudication process in return for the right to exercise exclusive stockwatering and range rights within the boundaries of their respective adjudicated ranges. The existence of stockwater rights on federal lands has been recognized by the U.S. Congress (see ex. Mining Act of 1866³) and the Montana Water Court (see ex. Powder River Preliminary Decree of 1983⁴, Case No. 40E-A of 2005⁵, Case No. 41G-190 of 2005⁶). Horse Ranch's vested water rights predate both current Montana statutory water law (1973) and the Bureau of Land Management (1934).

The pits are instream and run-off filled. They do not change the place of diversion or amount of water available for diversion, but merely extend the time period during which the water is available. They impound water that was first put to beneficial use by private predecessors-in-interest of Horse Ranch to water stock. Therefore, the right to use this water to water stock, before it was impounded, belonged to Horse Ranch, as stated in Section 85-2-101, subsection 4 of the Montana Code Annotated, "Pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this state and a

purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose."

The pits were funded by Horse Ranch, either directly out-of-pocket or out of the federal tax collected and administered for that purpose. The right of Horse Ranch to own interest in private improvements upon federal lands was protected by the U.S. Congress under the Taylor Grazing Act, 1934⁷, and again under the Federal Land Policy and Management Act, 1976⁸.

The land on which the pits are sited is fee land appurtenant to Horse Ranch patented land as part of Horse Ranch customary range, which is protected by Montana law. If this ranch were to be subject to estate tax, the Internal Revenue Service would include the value of the fee in the assessment. If this ranch was in Modoc County, California, the possessory interest (the present and future right to control property [customary range rights], including the right to exclude others, by a person who is not necessarily the owner), in the fee would be subject to county property tax.

Requiring ownership of the land where water is to be put to beneficial use is in contradiction to Montana's established prior appropriation doctrine. In 1921, the Montana Supreme Court ruled in *Mettler v. Ames Realty* that the Doctrine of Prior Appropriation is the valid Montana water right law. The court found, "Our conclusion is that the common law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865 and that it is unsuited to the conditions here..." Riparian doctrine, which is used in the high-rainfall Eastern states, assigns water rights to land owners without regard for need, established use, or intent and ability to put the water to beneficial use. Prior appropriation doctrine, which is used in low-rainfall Western states, assigns water rights on the basis of actual beneficial use and the date beneficial use was first established, without regard for land ownership.

The water right applicant recommended by Mr. Hall's memorandum, the federal agency, is not able to fulfill Montana statutory requirements for owning a stockwater right. That is, they own no livestock and are therefore unable to put a stockwater right to beneficial use (see U.S. Supreme Court decision *U.S. v. New Mexico*⁹).

In conclusion, Horse Ranch built stockwater pits with its own funds and with federal knowledge and input upon Horse Ranch's acknowledged customary range and retained water to which Horse Ranch had a vested stockwater right by virtue of over 100 years of beneficial use. They feel that this gives them a reasonable claim to a stockwater right on these pits. However, the DNRC refuses to allow them to present their case to the Montana Water Court. Instead, the only entity that will be allowed a hearing in court is one that under federal and state criteria has neither the intent nor the means to put the water to beneficial use as stockwater.

Note that the memorandum from Mr. Hall mentions that Form 627 "has been discontinued as of Jan. 1, 2008". Regarding forms, the Montana Code clearly states in Section 3-7-103, "As soon as practicable the Montana supreme court may promulgate

special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water judge and the department of natural resources and conservation." Does this imply that the Department of Natural Resources and Conservation can subsequently choose to discontinue those forms without consulting either the Montana Supreme Court or the Water Judge?

Sincerely,

A handwritten signature in cursive script that reads "Rose A. Stoneberg v.p." The signature is written in dark ink on a white background.

Rose A. Stoneberg of Horse Ranch

Portions of laws and cases cited above are given below.

¹Such fees shall consist of a grazing fee for the use of the range, and a range-improvement fee which, when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvements.

August 6, 1947 [H.R. 4079], [Public Law 376] 61 Stat. 790, An Act: To amend the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended June 26, 1936 (49 Stat. 1976).

²Congress therefore directs that 50 per centum or \$10,000,000 per annum, whichever is greater [P.L. 95-514, 1978] of all moneys received by the United States as fees for grazing domestic livestock on public lands (other than from ceded Indian lands) under the Taylor Grazing Act (48 Stat. 1269; 43 U.S.C. 315 et seq.) and the Act of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181d), and on lands in National Forests in the sixteen [P.L. 95-514, 1978] contiguous Western States under the provisions of this section shall be credited to a separate account in the Treasury, one-half of which is authorized to be appropriated and made available for use in the district, region, or national forest from which such moneys were derived, as the respective Secretary may direct after consultation with district, regional, or national forest user representatives, for the purpose of on-the-ground range rehabilitation, protection, and improvements on such lands, and the remaining one-half shall be used for on-the-ground range rehabilitation, protection, and improvements as the Secretary concerned directs. Any funds so appropriated shall be in addition to any other appropriations made to the respective Secretary for planning and administration of the range betterment program and for other range management. Such rehabilitation, protection, and improvements shall include all forms of range land betterment including, but not limited to, seeding and reseedling, fence construction, weed control, water development, and fish and wildlife habitat enhancement as the respective Secretary may direct after consultation with user representatives.

Federal Land Policy and Management Act, 1976

³And be it further enacted, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed:

Thirty-ninth Congress, Session I, Ch. 262, Sec. 9, 1866

⁴The Powder River Basin includes substantial portions of lands owned by the State of Montana, U.S. Department of Interior-Bureau of Land Management, and U.S. Department of Agriculture-Forest Service. These lands are not specifically reserved for livestock or irrigation purposes. Most of these lands are leased to individuals for grazing and occasionally irrigation purposes. In many instances the lessee appropriated water for stock or irrigation purposes. In some of these cases both the appropriator or lessee and the owner of the realty filed a declaration. Unless the evidence revealed other pertinent facts, the water right is issued in the name of the appropriator regardless of who holds title to the land.

Powder River Preliminary Decree (1983)

⁵As a result, many private livestock owners appropriated stock rights from water sources on the public domain.

MT Water Court, Case No. 40E-A (2005), Opinion

⁶(1) Montana law prior to July 1, 1973 recognized the right to appropriate direct instream water rights for private livestock use.

(2) Montana law prior to July 1, 1973 did not require the appropriator to exercise exclusive use, dominion, or control over a water source in order to appropriate direct instream water rights for private livestock use on federal public lands.

(3) Montana law prior to July 1, 1973 did not require an appropriator to hold an interest in or the intent to patent the land where the water was appropriated and used in order to appropriate direct instream water rights for private livestock use on federal public lands.

(b) Stockwater claims 41G-W-197162-00 and 41G-W-197167-00 are owned by Hamilton Ranches Partnership and not by the United States.

(c) The private ownership of these stockwater claims do not conflict with federal law.

MT Water Court, Case No. 41G-190 (2005), Order Amending and Adopting Master's Report

⁷No permit shall be issued which shall entitle the permittee to the use of such improvements [fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock] constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.

Taylor Grazing Act (ch. 865, 48 Stat. 1269, Section 315c), 1934

⁸Whenever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the Secretary concerned, of his interest in authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but not to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein.

Federal Land Policy and Management Act, 1976

⁹The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.

UNITED STATES v. NEW MEXICO (1978) Page 438 U.S. 696, 716