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STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION APR 5 1990

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
NO. 107-s41-1, DIEHL DEVELOPMENT  
CORPORATION

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Pursuant to the Montana Water Use Act, Section 89-865, at seq., R.C.M. 1947, and after due notice, a hearing was held on June 10 and June 11, 1974, in Helena, Montana, for the purpose of hearing objections to the above-named Application. The hearing was also held to receive comments on the Draft Environmental Impact Statement (hereinafter called EIS), compiled by the Department of Natural Resources and Conservation (hereinafter called Department) on the Application. The following Findings of Fact, Conclusions of Law and Order are hereby approved by the Administrator, Division of Water Resources of the Department, as a result of the hearing.

FINDINGS OF FACT

(1) On August 15, 1973, at 9:20 a.m., an Application for Beneficial Water Use Permit (hereinafter called Application) was received by the Department from Diehl Development Corporation (hereinafter called Applicant) to appropriate 75 cubic feet per second of water from Prickly Pear Creek, a tributary of the Missouri River, for irrigation, domestic, and livestock purposes. An amended Application was subsequently filed by Applicant to appropriate 20 cubic feet per second of water from Prickly Pear Creek for irrigation and livestock purposes "to be used approximately from September 16 to April 1, inclusive (nonirrigation season)." Subsequent communications between the Applicant and Department personnel revealed that Applicant actually intended to apply for 20 cubic feet per second for irrigation purposes to be used during the irrigation season (approximately April 1 to November 15), and for stock-water purposes to be used from January 1 to December 31, inclusive. Corrective notations were made to this effect on the Application by the Department.

(2) The proposed point of diversion is the NW $\frac{1}{4}$  NE $\frac{1}{4}$  Section 23, Township 9 North, Range 3 West, in Jefferson County. The means of diversion would be by a pump and pipeline which would deliver the water to two proposed reservoirs; one of 21,000-acre-foot capacity located on Clark Gulch in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  Section 16, Township 9 North, Range 3 West, and the other of 250-acre-foot capacity located on Holmes Gulch in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 10, Township 9 North, Range 3 West. Applicant has made no application to appropriate water from either Clark Gulch or Holmes Gulch, nor has Applicant submitted engineering drawings and specifications on the diversion and storage facilities. Water would be diverted from September 16 to April 14, inclusive, and stored to be used during the periods and for the purposes indicated above.

(3) Applicant proposes to irrigate 3,000 acres, located at the legal descriptions indicated on the Application. Soils survey data of the Department

CASE # 107

show that only 1,200 acres are potentially irrigable. Through the Application, correspondence received from Applicant by the Department, and testimony by Applicant at the hearing, Applicant intends to initially apply any water appropriated under this Application to agricultural (irrigation and livestock) uses, and then progressively convert the above land to developed land for residential purposes, and change the purpose of use of the appropriated water from agricultural to commercial/municipal (domestic) for use by the residential development.

(4) After publication of the Notice of Application as required by law, timely objections to the Application were received by the Department on its Form No. 611 from the following Objectors:

1. Victor Vincent;
2. City of East Helena;
3. Kaiser Cement and Gypsum Corporation;
4. Prickly Pear Water Users Association;
5. Eleanor Miles;
6. Buford Miles;
7. Jack L. Williams;
8. Montana Department of Fish and Game;
9. American Smelting and Refining Company; and
10. Stephen F. Weber.

In addition, timely objections were received by the Department by letter, and accepted by the Department as properly filed objections, from the following objectors:

1. Last Chance Audubon Society;
2. Prickly Pear Sportsman's Association; and
3. Sierra Club, Upper Missouri Group.

No formally filed objection was ever received by the Department from the Helena Outdoor Club, although the club's representative, Mr. Rick Graetz, stated at the hearing that it had filed an objection on Form 611.

(5) The Hearing on Objections was originally set for May 23, 1974, but with the written consent of Applicant was reset for June 10, 1974. All Objectors except Eleanor and Buford Miles and Jack L. Williams appeared at the hearing. Objectors City of East Helena, Department of Fish and Game, and American Smelting and Refining Company were represented by counsel. In addition to the Objectors, several individuals or groups appeared to comment on the application and the EIS, and were denominated "Commentors" by the Hearing Examiner. The hearing was taped but not transcribed, and several Exhibits were introduced.

(6) Objector American Smelting and Refining Company appears to have decreed rights to water from Prickly Pear Creek for industrial purposes to 492.5 miner's inches (12.3 cfs). Objector Kaiser Cement appears to have a decreed right for industrial purposes to 14 miner's inches (0.35 cfs). Objector City of East Helena appears to have a decreed right for municipal purposes to 45 miner's inches (1.125 cfs). All of these apparent rights either are being or could be used during the period of diversion applied for by Applicant (September 16 through April 14), their points of diversion are or would be located downstream

(2)

**CASE # 107**

from Applicant's proposed point of diversion, and they all date prior to Applicant's date of priority.

(7) Several water users, including members of Objector Prickly Pear Water Users Association, have apparent decreed, filed, or use rights for irrigation and stock-water purposes for use during the period September 16 through April 14. The evidence is insufficient to establish with any certainty the exact quantity of water entitled to under these apparent rights. However, the evidence does support a finding that water from Prickly Pear Creek is used throughout the entire year for stock-water purposes, and that a sufficient quantity of water must be allowed to flow in the subject stream to prevent freezeups during the winter months for this purpose. Furthermore, the evidence shows that water has been appropriated in previous years during the months of September, October, March, and April for irrigation purposes, with a larger quantity being appropriated in April during the spring runoff period than during the other aforementioned months. Testimony was also given at the hearing that the Department estimate of 5 cubic feet per second for irrigation use during the four aforementioned months was inadequate. Therefore, taking into consideration all the available evidence, including streamflow records, it seems reasonable to find that there are apparent prior irrigation and stock-water rights below Applicant's proposed point of diversion in estimated amounts as follows: September, 10.0 cfs; October, 9.0 cfs; November, 7.0 cfs; December, 7.0 cfs; January, 7.0 cfs; February, 7.0 cfs; March, 9.0 cfs; and April, 15.0 cfs.

(8) McClellan Creek is the only tributary to Prickly Pear Creek which consistently contributes to the total streamflow of Prickly Pear Creek below Applicant's proposed point of diversion. Streamflow data on McClellan Creek are lacking. However, the Department's 1974 measurements of the flow of said stream at its mouth indicate that its flow at that point is approximately 15 percent of the flow of Prickly Pear Creek measured at gaging stations No. 1 or 2 (located at the points shown in the EIS on Fig. F).

(9) Streamflow records on Prickly Pear Creek, extrapolation of streamflow records on McClellan Creek, and evidence of apparent existing rights show that there are unappropriated waters in the source of supply which may be diverted at Applicant's proposed point of diversion, all as indicated on Appendix A, attached hereto and made a part hereof.

(10) Requiring Applicant to allow a sufficient flow of water to pass the proposed point of diversion for the protection of existing water rights would, in effect, provide a sufficient minimum flow for the protection of aquatic life and instream integrity, as requested by Objector Department of Fish and Game.

#### CONCLUSIONS OF LAW

(1) There are unappropriated waters in the source of supply (Prickly Pear Creek) at Applicant's proposed point of diversion.

(2) There appears to be existing water rights in Prickly Pear Creek.

(3)

**CASE # 107**

(3) The rights of prior appropriators should not be adversely affected if Applicant is required to allow a flow of water to pass the proposed point of diversion for the protection of existing rights.

(4) Since sufficient quantities of water will be maintained in the stream for the protection of aquatic life and instream integrity between Applicant's proposed point of diversion and East Helena as a result of this Order, it is unnecessary to determine whether the public has an existing water right in Prickly Pear Creek for recreational use, as asserted by Objector Department of Fish and Game, nor is it necessary to determine whether, under the Montana Environmental Policy Act, a water permit may be modified or conditioned by the Department of Natural Resources and Conservation for the sole purpose of protecting or preserving environmental qualities.

#### ORDER

The Applicant is granted a permit to appropriate water from Prickly Pear Creek at the proposed point of diversion in quantities not exceeding 20 cubic feet per second, subject, however, to the following conditions:

(1) Applicant must allow a flow of water to pass the point of diversion for the protection of existing rights. (Estimated flows to satisfy existing rights are indicated on Appendix A, attached hereto and made a part hereof.)

(2) Water may be diverted only from September 16 through April 14 of each year;

(3) Water appropriated under the permit may be used only for irrigation and stock-water purposes;

(4) Applicant shall install a suitable measuring device approved by the Department and submit periodic measuring reports to the Department to insure that waters for the protection of existing rights are allowed to pass as required in the Order.

(5) In order to determine whether the proposed means of diversion and construction are adequate, as required by Section 89-885, R.C.M. 1947, Applicant shall submit engineering drawings and specifications of the proposed diversion and storage facilities and facility site studies within one year from the date of issuance of the permit, for the Department's approval before construction may begin.

(6) Applicant shall also submit at the same time detailed site studies and topographic maps of the land Applicant intends to irrigate, so that the number of irrigable acres may be accurately determined.

(7) After submission of the above information, the Department shall limit the total volume of water in acre-feet per year that Applicant is entitled to under the permit.

(8) The Applicant shall complete construction of the proposed facilities and put the water to beneficial use within two years after the engineering drawings and specifications are approved by the Department.

(4)

**CASE # 107**

(9) The permit is issued subject to existing rights.

(10) The Department shall monitor the effects of diversion of water under the permit to streamflows and existing rights, including ground-water rights, and adjust the permit accordingly if it determines that either more or less water may be appropriated by Applicant.

Dated this 14th day of August, 1974.

Witnessed by Richard T. Munger,  
Chief, Water Rights Bureau

Orrin A. Ferris, Administrator  
Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

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IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
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PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Pursuant to the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, and after due notice, a hearing was held on June 10 and June 11, 1974, in Helena, Montana, for the purpose of hearing objections to the above-named Application. The hearing was also held to receive comments on the Draft Environmental Impact Statement, (hereinafter called "EIS") compiled by the Department of Natural Resources and Conservation (hereinafter called "Department") on the Application. The following Proposed Findings of Fact, Conclusions of Law, and Order are this Hearing Examiner's recommendations to the Administrator, Division of Water Resources of the Department, as a result of the hearing.

PROPOSED FINDINGS OF FACT

(1) On August 15, 1973, at 9:20 a.m., an Application for Beneficial Water Use Permit (hereinafter called "Application") was received by the Department from Diehl Development Corporation (hereinafter called "Applicant") to appropriate 75 c.f.s. of water from Prickly Pear Creek, a tributary of the Missouri River, for irrigation, domestic, and livestock purposes. An amended Application was subsequently filed by Applicant to appropriate 20 c.f.s. of water from Prickly Pear Creek for irrigation and livestock purposes "to be used approximately from September 16 to April 1, inclusive, (non-irrigation season)". Subsequent communications between the Applicant and Department personnel revealed that Applicant actually intended to apply for 20 c.f.s. for irrigation purposes to be used during the irrigation season (approximately April 1 to November 15), and for stockwater purposes to be used from January 1 to December 31, inclusive. Corrective notations were made to this effect on the Application by the Department.

**CASE # 107**

(2) The proposed point of diversion is the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 23, T9N, R3W, in Jefferson County. The means of diversion would be by a pump and pipeline which would deliver the water to two proposed reservoirs one of 21,000 a.f. capacity located on Clark Gulch at NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 16, T9N, R3W, and the other of 250 a.f. capacity located on Holmes Gulch at NE $\frac{1}{4}$  SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 10, T9N, R3W. Applicant has made no application to appropriate water from either Clark Gulch or Holmes Gulch, nor has Applicant submitted engineering drawings and specifications on the diversion and storage facilities. Water would be diverted from September 16 to April 14, inclusive and stored to be used during the periods and for the purposes indicated above.

(3) Applicant proposes to irrigate 3000 acres located at the legal descriptions indicated on the Application. Soils survey data of the Department shows that only 1,200 acres are potentially irrigable. Through the Application, correspondence received from Applicant by the Department, and testimony by Applicant at the hearing, Applicant intends to initially apply any water appropriated under this Application to agricultural (irrigation and livestock) uses, and then progressively convert the above land to developed land for residential purposes, and change the purpose of use of the appropriated water from agricultural to commercial/municipal (domestic) for use by the residential development.

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(2)  
**CASE # 107**

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(7) Several water users, including members of Objector Prickly Pear Water Users Association, have apparent decreed, filed, or use rights for irrigation and stockwater purposes for use during the period September 1 through April 14. The evidence is insufficient to establish with any certainty the exact quantity of water entitled to under these apparent rights. However, the evidence does support a finding that

water from Prickly Pear Creek is used throughout the entire year for stockwater purposes, and that a sufficient quantity of water must be allowed to flow in the subject stream to prevent freeze ups during the winter months for this purpose. Furthermore, the evidence shows that water has been appropriated in previous years during the months of September, October, March, and April for irrigation purposes, with a larger quantity being appropriated in April during the spring runoff period than during the other aforementioned months. Testimony was also given at the hearing that the Department estimate of 5 c.f.s. for irrigation use during the four aforementioned months was inadequate. Therefore, taking into consideration all the available evidence, including stream flow records, it seems reasonable to find that there are apparent prior irrigation and stockwater rights below Applicant's proposed point of diversion in estimated amounts as follows: September, 10.0 c.f.s.; October, 9.0 c.f.s.; November, 7.0 c.f.s.; December, 7.0 c.f.s.; February, 7.0 c.f.s.; March, 9.0 c.f.s.; April, 15.0 c.f.s.

(8) McClellan Creek is the only tributary to Prickly Pear Creek which consistently contributes to the total stream flow of Prickly Pear Creek below Applicant's proposed point of diversion. Stream flow data on McClellan Creek is lacking. However, the Department's 1974 measurements of the flow of said stream at its mouth indicate that its flow at that point is approximately 15% of the flow of Prickly Pear Creek measured at gaging stations #1 or 2 (located at the points shown in the EIS on Figure F).

(9) Stream flow records on Prickly Pear Creek, extrapolation of stream flow records on McClellan Creek, and evidence of apparent existing rights show that there are unappropriated waters in the source of supply which may be diverted at Applicant's proposed point of diversion, all as indicated on Appendix A attached hereto and made a part hereof.

(10) Requiring Applicant to allow a sufficient flow of water to pass the proposed point of diversion for the protection of existing water rights would, in effect, provide a sufficient minimum flow for the protection of aquatic life and instream integrity, as requested by Objector Department of Fish and Game.

PROPOSED CONCLUSIONS OF LAW

(1) There are unappropriated waters in the source of supply (Prickly Pear Creek) at Applicant's proposed point of diversion.

(2) There appears to be existing water rights in Prickly Pear Creek in the amounts and for use during the periods indicated in Appendix A attached hereto.

(3) The rights of prior appropriators should not be adversely affected if Applicant is required to allow a flow of water to pass the proposed point of diversion for the protection of existing rights in the amounts indicated in Appendix A and in the Proposed Order, infra.

(4) Since sufficient quantities of water will be maintained in the stream for the protection of aquatic life and instream integrity between Applicant's proposed point of diversion and East Helena as a result of this Proposed Order, it is unnecessary to determine whether the public has an existing water right in Prickly Pear Creek for recreational use, as asserted by Objector Department of Fish and Game, nor is it necessary to determine whether, under the Montana Environmental Policy Act, a water permit may be modified or conditioned by the Department of Natural Resources and Conservation for the sole purpose of protecting or preserving environmental qualities.

PROPOSED ORDER

The Applicant is granted a permit to appropriate water from Prickly Pear Creek at the proposed point of diversion in quantities not exceeding 20 c.f.s., subject, however, to the following conditions:

(1) Applicant must allow a flow of water to pass the point of diversion for the protection of existing rights in the amount and during the periods indicated on Appendix A attached hereto and made of part hereof;

(2) Water may be diverted only from September 1 through April 14 of each year;

(3) Water appropriated under the permit may be used only for irrigation and stockwater purposes;

(4) Applicant shall install a suitable measuring device approved by the Department and submit periodic measuring reports to

the Department to insure that waters for the protection of existing rights are allowed to pass as required in the Order;

(5) In order to determine whether the proposed means of diversion and construction are adequate, as required by Section 89-885, R.C.M. 1947, Applicant shall submit engineering drawings and specifications of the proposed diversion and storage facilities, and facility site studies, within one year from the date of issuance of the permit, for the Department's approval before construction may begin;

(6) Applicant shall also submit at the same time detailed site studies, and topographic maps of the land Applicant intends to irrigate so that the number of irrigable acres may be accurately determined;

(7) After submission of the above information, the Department shall limit the total volume of water in acre-feet per year that Applicant is entitled to under the permit;

(8) The Applicant shall complete construction of the proposed facilities and put the water to beneficial use within two years after the engineering drawings and specifications are approved by the Department;

(9) The permit is issued subject to existing rights;

(10) The Department shall monitor the effects of diversion of water under the permit to stream flows and existing rights including groundwater rights, and adjust the permit accordingly if it determines that either more or less water may be appropriated by Applicant.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation. Pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2)-P6190, written exceptions to this Proposed Order shall be filed with the Administrator within five (5) days of service of this Proposed Order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

Dated this 30<sup>th</sup> day of July, 1974.

Ted J. Doney  
Ted J. Doney, Hearing/Examiner

**CASE #** <sup>107</sup> (6)

APPENDIX A

(Figures shown in c.f.s.)

Month	Monthly Stream Flow at Prickley Pear Station #1 (Point of Diversion)			McClellan Creek Input (15% of #1)			Total Stream Flow Available for Existing Rights and Appropriation			Existing Water Rights			Flow That Must Pass Point of Diversion to Satisfy Existing Water Rights (Assume Average Year on McClellan Creek)	** Flow Available for Appropriation at Point of Diversion		
	Low Mean	High Mean	Avg.	Low Mean	High Mean	Avg.	Low Mean	High Mean	Avg.	Industrial Decead Rights	Stock & Irrigation Rights	Total Rights		Low Mean	High Mean	Avg.
September	9.32	71.4	29.0	1.4	10.7	4.4	10.72	82.1	33.4	13.8	10.0	23.8	19.4	0	52.0	9.6
October	14.5	70.0	31.6	2.2	10.5	4.7	16.7	80.5	36.3	13.8	9.0	22.8	18.1	0	51.9	13.5
November	14.8	60.0	29.9	2.2	9.0	4.5	17.0	69.0	34.4	13.8	7.0	20.8	16.3	0	43.7	13.6
December	12.0	40.0	24.1	1.8	6.0	3.6	13.8	46.0	27.7	13.8	7.0	20.8	17.2	0	22.8	6.9
January	9.9	30.0	21.1	1.5	4.5	3.2	11.44	34.5	24.3	13.8	7.0	20.8	17.6	0	12.4	3.5
February	12.0	57.3	24.1	1.8	8.6	3.8	13.8	65.9	27.9	13.8	7.0	20.8	17.0	0	40.3	7.1
March	16.6	80.0	31.9	2.5	12.0	4.8	19.1	92.0	36.7	13.8	9.0	22.8	18.0	0	62.0	13.9
* April	22.9	131.0	52.6	3.4	19.7	7.9	26.3	150.7	60.5	13.8	15.0	28.8	20.9	2	110.1	31.7

\*Application states period of diversion will be from September 1 through April 14, inclusive

\*\* Maximum that may be granted under permit application is 20 c.f.s.

CASE # 107

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 107-s41-I, DIEHL DEVELOPMENT )  
CORPORATION )

RULING ON OBJECTIONS

Pursuant to the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, a hearing was held on June 10 and June 11, 1974, in Helena, Montana, for the purpose of hearing objections to the above-named Application. Following said hearing, and pursuant to rules established by this Hearing Examiner, Applicant Diehl Development Corporation filed written objections to Objectors' Exhibits No. 2, 5, 7, 8, and 9 which were offered into evidence at the hearing. Applicant also filed a written objection to Objectors' Exhibit No. 10 which was submitted by Objector Department of Fish and Game subsequent to the hearing.

Although this Hearing Examiner agrees with Applicant that in a technical sense several of its objections may be valid, it was agreed without objection by any party at the beginning of said hearing that the usual rules of evidence would not be followed during the course of the proceeding, so that those parties who were not represented by counsel could participate as much as possible.

Therefore, for the above reasons, all of Applicant's objections to Exhibits 2, 5, 7, 8, 9, and 10 are hereby overruled, and said Exhibits are hereby admitted.

Dated this 30<sup>th</sup> day of July, 1974.

Ted J. Doney  
Ted. J. Doney  
Hearing Examiner

**CASE # 107**