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BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE) PROPOSED ADDENDUM
PERMIT NO. 4686-s40D BY)
LAWRENCE D. ERLENBUSCH)

Since the hearing in the above-described matter it has come to the attention of the Hearing Examiner that the Applicant, Mr. Lawrence G. Erlenbusch may have a small holding reservoir, not formally alluded to at the hearing, such reservoir being located along Taylor Creek below the Applicant's proposed facilities and above the facilities of the Objector, Mr. Sidney D. Bollinger.

It was and remains the intention of the Hearing Examiner in the above-described matter that the language used in the Proposed Order, Paragraph No. 2, Page 14 be interpreted so as to require that the Objector actually receive 60 acre-feet of water per annum from the Taylor Creek drainage and that such 60 acre-feet must annually be available to the Objector in its entirety at the Objector's property before the Applicant may commence his annual appropriation pursuant to the Provisional Permit.

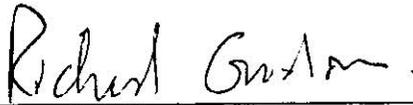
This Addendum, intended for purposes of clarification only and not intended to change the operation of the terms and provisions as originally imposed by the Hearing Examiner, is nevertheless intended to become a formal part of the Proposed Order heretofore issued.

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NOTICE

This is a Proposed Addendum and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Addendum, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 3^d day of JUNE,
1976.



RICHARD GORDON
HEARING EXAMINER

CASE # 4684

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 4686-s40D BY
LAWRENCE G. ERLENBUSCH

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice a hearing on objections to the above-described application was held in the courtroom of the Garfield County Courthouse, in Jordan, Montana, on Tuesday, April 20, 1976, at approximately 3 p.m., Richard Gordon, hearing examiner, presiding.

Lawrence G. Erlenbusch, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant offered into evidence one exhibit: a monthly chart of runoff in Taylor Creek, as estimated by the Applicant, at a point along Taylor Creek approximately a quarter of a mile below the Applicant's dam, covering the period from January 1971 to April 1976. Said exhibit was marked and entered as Applicant's "Exhibit No. 1."

Sidney D. Bollinger appeared on behalf of Bollinger, Inc., the Objector herein, and presented evidence and testimony in support of the Bollinger objection. Mr. Bollinger offered into evidence one exhibit: a certified copy of a filed Notice of Appropriation, claiming 220 acre-feet of water from Taylor Creek, filed on June 19, 1973, and located in Book 2, pages 203 and 204, of the Garfield County Records. Said exhibit was marked and entered as Objector's "Exhibit No. 1."

Robert Decker and Richard Watson appeared personally on behalf of the Department of Natural Resources and Conservation.

On May 27, 1976, the hearing examiner received a letter dated May 26 from counsel for Objector Bollinger, which states in part as follows:

"We do not want to make formal written exceptions, file briefs, or make oral arguments in regard to the proposed order. However, we feel that the Order is ambiguous and should be clarified in the Final Order. The Proposed Order is ambiguous as follows:

It states under number 2 on page 14 that the Applicant must let at least a total of 60 acre-feet flow through his facilities for downstream appropriation by the objector, who is Sidney D. Bollinger. Below the proposed facilities Lawrence G. Erlenbusch has another small holding reservoir. It should be clarified that the water must be let through both

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facilities in such a manner that the objector will receive 60 acre-feet at his reservoir. If the water was let through a spillway on the lower holding reservoir, then it would run through Mr. Erlenbusch's pasture and 60 acre-feet of water would never arrive at Bollinger reservoir but would be greatly depleted. In addition, there would be evaporation and separation so that 60 acre-feet let through at the proposed facilities would not result in Mr. Bollinger receiving 60 acre-feet, and it should be clarified to be very specific that he is to receive 60 acre-feet at his reservoir after seepage and evaporation."

The hearing examiner on June 3, 1976, issued a Proposed Addendum to the Proposal for Decision, which provides as follows:

"Since the hearing in the above-described matter, it has come to the attention of the Hearing Examiner that the Applicant, Lawrence G. Erlenbusch, may have a small holding reservoir, not formally alluded to at the hearing, such reservoir being located along Taylor Creek below the Applicant's proposed facilities and above the facilities of the Objector, Sidney D. Bollinger.

"It was and remains the intention of the Hearing Examiner in the above-described matter that the language used in the Proposed Order, paragraph 2, page 14, be interpreted so as to require that the Objector actually receive 60 acre-feet of water per annum from the Taylor Creek drainage and that such 60 acre-feet must annually be available to the Objector in its entirety at the Objector's property before the Applicant may commence his annual appropriation pursuant to the Provisional Permit.

"This Addendum, intended for purposes of clarification only and not intended to change the operation of the terms and provisions as originally imposed by the Hearing Examiner, is nevertheless intended to become a formal part of the Proposed Order heretofore issued."

A Proposed Order (Proposal for Decision) dated May 19, 1976, and Proposed Addendum dated June 3, 1976, were issued by the hearing examiner, Richard Gordon.

The Proposed Order and Proposed Addendum as issued provided that the Orders would become final when accepted by the administrator of the Water Resources Division, and that any written exceptions to the Proposed Order and Addendum must be filed with the Administrator within ten (10) days of service of the Orders upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the administrator.

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On June 7, 1976, the Department received from counsel for the Applicant, "Exceptions to Proposed Order," dated June 3, 1976, filed in opposition to the Proposal for Decision issued by the hearing examiner on May 19, 1976.

No other parties to this matter took exception to the Proposal for Decision or Proposed Addendum.

By letter of June 10, 1976, the Department acknowledged receipt of the exceptions and informed counsel for the Applicant of his opportunity to file a brief supporting the exceptions within fifteen (15) days after receipt of the notice. He was further advised of his right to request a hearing in Helena before the Water Resources Division administrator for the purpose of presenting oral argument in support of the exceptions and any briefs filed. He was requested to indicate, if he filed a brief, whether he wished to make such an oral argument.

On June 23, 1976, the Department received "Applicant's Brief in Support of Exceptions to Proposed Order," from counsel for the Applicant as dated June 22, 1976. Counsel's cover letter dated June 21, 1976, stated in part, "Enclosed please find Applicant Lawrence G. Erlenbusch's Brief in Support of his Exceptions to Decision. Also, please be advised that we do not intend to make an oral argument before the Water Resources Administrator unless such request would be made by the Objector."

By letter of June 24, 1976, the Department informed counsel for Objector Bollinger of his opportunity to file a reply brief within fifteen (15) days after receipt of the notice, and if a reply brief was filed, to indicate if in fact he wished to make oral argument before the Water Resources Division administrator.

The Department, also by letter dated June 24, 1976, to counsel for the Applicant, acknowledged receipt of his brief and advised that the Objector would be afforded equal time to file a reply brief.

On July 9, 1976, the Department received from counsel for Objector Bollinger, "Objector's Brief in Support of Proposed Order and Addendum Thereto," dated July 8, 1976.

The Department by letter of July 15, 1976, to counsel for the Objector, acknowledged receipt of the reply brief dated July 8, and requested said counsel to inform the Department if in fact he wished to pursue this matter further to an oral argument hearing before the administrator. Counsel was advised that if oral argument was not requested, the administrator would prepare and issue a Final Order based on the present application file.

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The Department by letter of July 15, 1976, to counsel for the Applicant, requested said counsel to review Objector's reply brief and respond in writing indicating if they wished to proceed to an oral argument hearing.

Counsel for Objector Bollinger by letter of July 16, 1976, responded to the Department's letter of July 15 by stating, "With reference to your letter of July 15, 1976, this is to advise that neither Mr. Krutzfeldt nor myself plan to appear for oral argument on this matter."

Counsel for the Applicant by letter of July 19, 1976, responded to the Department's letter of July 15 by stating, "With reference to your letter of July 15, please be advised that we are not desirous of an oral argument before the administrator in Helena; however, we do reserve all rights to any other proceedings, administrative and judicial."

The Department by letters of July 20 and 30, 1976, to counsel for the Applicant and counsel for Objector Bollinger advised that since they did not wish to appear for oral argument, this matter would be forwarded to the Water Resources Division administrator for preparation and issuance of a Final Order, based on the record at present in the application file.

Since none of the parties in this matter specifically requested an oral argument hearing on the objections, exceptions, and briefs before the administrator of the Water Resources Division, the administrator hereby makes the following Final Order, based on the Proposal for Decision of May 19, 1976, the Proposed Addendum of June 3, 1976, the objections, exceptions, briefs, and all other pertinent information of record.

The Proposed Findings of Fact, Conclusions of Law, and Order, as entered on May 19, 1976, and the Proposed Addendum, as issued on June 3, 1976, by the hearing examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified by adding a second sentence to Item 2 below, and adding a new Item 8.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 10 cubic feet per second of water or 4,500 gallons per minute of water, not to exceed 75 acre-feet per annum of water from Taylor Creek, a tributary of Little Dry Creek in Garfield County, to be diverted from a reservoir in said creek at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, Township 17 North, Range 43 East, and to be used for irrigation on a total of 25 acres, more or less, in the SE $\frac{1}{4}$ of said Section 19, from January 1 to December 31, inclusive, of each year.

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2. Until such time as a court determination necessitates that the Department require otherwise, the Applicant may only appropriate pursuant to the above-described limits in any given year after such time as the Applicant has let at least a total of 60 acre-feet of water flow through his facilities for downstream appropriation by the Objector herein. This provision requires that the Objector actually receive 60 acre-feet of water per annum from the Taylor Creek drainage and that such 60-acre-feet must annually be available to the Objector in its entirety at the Objector's property before the Applicant may commence his annual appropriation pursuant to the Provisional Permit.

3. The Provisional Permit is hereby granted subject to all prior water rights in the source of supply.

4. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices to enable the Applicant to keep a record of all quantities of water diverted, as well as the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

5. The Applicant shall install and maintain an adequate drainage device in the base of the storage facilities so as to enable complete drainage of said storage facilities, both for purposes of safety and as well for purposes of satisfying downstream prior rights.

6. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability caused by the Applicant's exercise of his Provisional Permit.

7. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply provided for by Montana law.

8. The hearing examiner's Proposed Addendum of June 3, 1976, is hereby attached to this Final Order and made a part hereof.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical and keep a log of records of water used for proof of their water rights.

Done this 27th day of June, 1977.

Orvin Ferrin
Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 4686-s40D BY LAWRENCE G.) PROPOSAL FOR DECISION
ERLENBUSCH)

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the courtroom of the Garfield County Courthouse in Jordan, Montana, on Tuesday, April 20, 1976 at approximately 3:00 p.m., Richard Gordon, Hearing Examiner, presiding.

Mr. Lawrence G. Erlenbusch, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant offered into evidence one exhibit: a monthly chart of runoff in Taylor Creek, as estimated by the Applicant, at a point along Taylor Creek approximately one quarter mile below the Applicant's dam, covering the period from January 1971 to April 1976. Said exhibit was marked and entered as Applicant's Exhibit No. 1.

Mr. Sideney D. Bollinger appeared on behalf of Bollinger, Inc., the Objector herein, and presented evidence and testimony in support of the Bollinger objection. Mr. Bollinger offered into evidence one exhibit: a certified copy of a filed

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Notice of Appropriation, claiming 220 acre-feet of water from Taylor Creek filed on June 19, 1973, and located in Book Two, Pages 203 and 204 of the Garfield County Records. Said exhibit was marked and entered as Objector's Exhibit No. 1.

Mr. Robert Decker and Mr. Richard Watson appeared personally on behalf of the Department of Natural Resources and Conservation.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On January 27, 1975 the Applicant, Mr. Lawrence G. Erlenbusch, filed Application No. 4686-s40D with the Department of Natural Resources and Conservation seeking to appropriate 10 cubic feet of water per second, or 4,500 gallons of water per minute, and not to exceed 75 acre-feet of water per annum from Taylor Creek, a tributary of the Little Dry Creek, to be diverted from said Taylor Creek from an existing on-stream reservoir located at a point in the SE1/4 NW1/4 SE1/4 of Section 19, Township 17 North, Range 43 East in Garfield County, Montana, and to be used for irrigation on a total of 25 acres, more or less, in the SE1/4 of said Section 19, from January 1 to December 31, inclusive, of each year.

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2. On August 1, 1975, Mr. Sidney D. Bollinger, on behalf of Bollinger Inc., the Objector herein, filed an objection to the above-described application alleging a prior downstream water right stored in an on-stream reservoir and used for irrigation and stockwater purposes. The Objector further alleged that if the permit is granted and if the Applicant appropriates the water sought for appropriation herein, the Objector will receive insufficient water to satisfy said alleged prior water right.

3. At the hearing the Applicant testified that on or about June 2, 1971, the Applicant began marking dikes for the presently proposed project. The Applicant testified that he "let the project slide for awhile" and did not proceed any further with the project for several years. The Applicant testified that the reservoir from which the Applicant intends to divert the requested appropriation is presently in existence and lies directly on Taylor Creek behind a dam constructed across the creek. The Applicant testified that the reservoir was constructed in 1951 and is composed of earth. The Applicant testified that the dam is 40 feet wide at the base, approximately 10 feet wide at the top, and approximately 60 or 70 feet long. The Applicant testified that there is presently no separate spillway structure, but that water in excess of the total capacity of the reservoir does spill over the dam, through a "haybottom" below the dam, and into the downstream channel of Taylor Creek. The Applicant

testified that there is presently no drainage device in the dam, although the Applicant testified that he does intend to install an adequate drainage culvert. The Applicant testified that he is uncertain as to the capacity of the reservoir, but estimated it at approximately 5 acre-feet. The Applicant testified that the reservoir has been used for the stockwatering of between 60 and 100 head of stock every year in the winter since its construction and has been further used for flood irrigation through the using of spreader dikes of approximately 10 acres of hayland. The Applicant testified that such flood irrigation occurs during the spring runoff from February through March. The Applicant testified that he is uncertain as to the actual amount of water previously used for such flood irrigation. The Applicant testified that he plans to flood irrigate approximately 25 additional acres pursuant to the present application, by pumping from the reservoir into dikes from April through May or June, depending on the length of time sufficient water is available. The Applicant testified that he plans to cultivate small grain crops on the 25 acres to be so irrigated. The Applicant testified that his irrigation season roughly corresponds to that of the Objector herein. The Applicant testified that presently the dam floods over during spring runoff, and after two or three inches of continuous rain as well. The Applicant further testified that Taylor Creek is spring fed and flows roughly on a year-round basis. The Applicant testified that springs keep the creek running during the winter. The Applicant testified that a high ground water level tends to

aid in refilling the reservoir. The Applicant testified that he plans to enlarge the reservoir only to the point of removing the silt that has accumulated in the reservoir since its construction. The Applicant testified that presently the reservoir is full, and that some water is presently spilling over the top of the dam and is continuing to flow into the Taylor Creek Channel below the dam. The Applicant testified that he plans to pump the reservoir dry after the creek ceases to flow in the summertime and will wait until the following spring for the reservoir to refill. The Applicant introduced into evidence a chart depicting "eyeball estimates" of the monthly flow in Taylor Creek from January 1971 to April 1976. Such eyeball estimates were based upon the depth of the flow through an 8 inch culvert pipe, located one quarter mile downstream from the Applicant's dam, or were based upon the depth of the water backed up behind said culvert pipe. The chart does not depict flow in terms of miners inches, cubic feet per second, acre feet or any other standard water measurement. However, the chart depicts that in all years since 1971, there has been at least an 8 inch depth of water flowing through the culvert pipe during the spring months. The chart further depicts that on eight specific months since January 1971 the flow in or behind the pipe has been observed as reaching or exceeding a depth of two feet; that there has been a flow depth of 8 inches or more observed as early in

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the season as December and January; and that there has been a flow depth of 8 inches observed as late in the season as September. The Applicant testified that the 8 inch culvert generally runs full from the first thaw until mid-June. The Applicant testified that this year the spring runoff came and ended early, and that as a result although there is presently water in the culvert such flow is approximately only one inch deep. The Applicant testified that certain springs located below the Applicant's facilities run into Taylor Creek so as to augment the flow into the Objector's downstream facilities. The Applicant testified that he believes that there is sufficient water flowing in Taylor Creek for sufficient periods of time to satisfy the Applicant's present and proposed uses, as well as to satisfy the Objector's present uses.

4. Mr. Sidney D. Bollinger, testified that on June 19, 1973 the Objector filed a Notice of Appropriation for 220 acre-feet of water from Taylor Creek. Said Notice of Appropriation was entered into evidence herein as Objector's Exhibit No. 1. The Objector testified that neither construction of the reservoir nor an appropriation of water took place until the spring of 1974. The Objector testified that some stakes were marked during the summer of 1973, but that the Objector was uncertain as to exactly when during the summer such stakes were marked. The Applicant testified that this reservoir was an enlargement of a smaller reservoir built in

1952 and used for stockwatering. The Objector testified that the original reservoir was very small, was not used for irrigation, but was used for stockwatering of approximately 80 head of cattle on a year-round basis. The Objector could give no further details as to the quantity of water previously diverted or used. The Objector testified that the enlarged reservoir was built pursuant to the filing entered herein as Objector's Exhibit No. 1, but that no Beneficial Water Use Permit was sought or obtained from the Department of Natural Resources and Conservation. The Objector testified that the enlarged reservoir, built in 1974, has an earthen dam across Taylor Creek approximately 300 feet long, is 10 to 12 feet in width on the top, and 80 to 90 feet in width on the bottom, and is approximately 14 feet high. The Objector testified that the earthen dam has two spillways and a trickle tube. The Objector testified that the reservoir itself has a length of approximately 3,000 feet, a maximum potential depth of 14 feet, a maximum potential width of 500 feet, and potentially can hold approximately 60 acre-feet. The Objector testified that once in the spring of 1973 some water was pumped from Taylor Creek and was flooded onto 3 or 4 acres of the Objector's land. The Objector testified that the pumping in 1973 was of an indeterminate quantity, was of a one-time nature, was not pumped from either the present site of the enlarged reservoir or from the site of the old reservoir, and was not dropped into any dikes, ditches, canals or any

other spreader facilities, but was merely allowed to flood the land onto which it had been pumped. The Objector was uncertain as to whether said 3 or 4 acres were the same acres upon which he is presently irrigating with water from the enlarged reservoir. The Objector testified that his enlarged reservoir has only been full to the point of running through the spillways once. The Objector testified that such occurrence was the result of a single short heavy rain. The Objector testified that the spring runoff in 1974 was just sufficient to fill the channel of Taylor Creek, but did not fill the reservoir. The Objector testified that he has been able to irrigate from the reservoir from March through June on a 15 acre plot, on a 5 acre plot, and on a 5 or 6 acre plot by using a 12 inch pump. The Objector testified that such use, plus the above-described stockwater use, constitutes the maximum use of water from the reservoir to date. The Objector testified that such use constituted approximately 2/3 of the total 60 acre-foot capacity of the reservoir, or approximately 40 acre-feet. The Objector testified that the claimed 220 acre-feet as it appears in the Notice of Appropriation is based upon the maximum planned future use, and upon the maximum planned future irrigation requirement of Bollinger, Inc., but that 60 acre-feet represents the maximum quantity of water which has thus far actually been appropriated in any given year, and 40 acre-feet constitutes the maximum quantity of water which has actually been beneficially

used in any given year. The Objector testified that springs which the Applicant testified with regard to do not appreciably add to the flow in Taylor Creek between the Applicant's dam and his own facilities, and that any permit, if granted, will adversely affect the ability of the Objector to appropriate pursuant to his claimed prior water right.

5. Mr. Harold Erlenbusch testified on behalf of the Applicant that the springs below the Applicant's dam do tend to fill the Objector's reservoir, and that water in the Objector's reservoir does at times back up onto the property of the Applicant. Testimony of the Objector during other parts of the hearing appears to deny that such backup occurs.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a Permit is required to appropriate water from Taylor Creek.

2. The Applicant, having not complied with the filing requirements for perfecting a water right pursuant to Title 89, Chapter 8, R.C.M. 1947, as it read prior to July 1, 1973, and further having not fulfilled use right requirements as set forth in Murray v. Tingley, 20 Mont. 260, 50 P. 723; and in Bailey v. Tintinger 45 Mont. 154, 122 P. 595, did not obtain a valid water right for the proposed use sought herein by virtue of the staking work performed in 1971. Such use as applied for herein may thus only be accomplished through a Permit issued pursuant to the procedure outlined

in post-July 1, 1973 Montana Water Rights Act. However, it appears that the Applicant already may possess a valid use right to water 100 head of stock in the winter and to flood irrigate approximately 10 acres of hayland by spreader dikes with spring runoff water from February through March pursuant to a prior use right established by the 1951 construction of diversion facilities and subsequent use of such diversion facilities. Such possible use right is not affected by determinations herein.

3. Pursuant to 89-886(1) R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit.

4. The Objector, having not shown full compliance with 89-810 R.C.M. 1947 and 89-811 R.C.M. 1947 as they read prior to July 1, 1973, in particular having not shown that the start of construction of facilities began within 40 days of the posting of Notice of Appropriation, is not necessarily entitled to protection herein as a valid prior filed or use right appropriator except for the amount of water necessary to support 80 head of cattle on a year-round basis pursuant to the use right established in 1952 and used continuously since such time. The Objector's pre-July 1, 1973 one time pumping of an uncertain quantity of water onto three or four unspecified acres from Taylor Creek at a point other than where water is presently beneficially appropriated and/or used may, if not abandoned, possibly constitute a prior use right from the

point taken, for the land upon which used, in the amount used; but it does not constitute a valid prior right which must cause the Objector's present alleged prior reservoir right to be protected herein.

5. The Objector having not shown any compliance with Title 89, Chapter 8, of the Revised Codes of Montana, as it presently reads, and as it has read since July 1, 1973, and in particular having not applied for, sought, or received a Beneficial Water Use Permit from the Department of Natural Resources and Conservation is not entitled to protection herein as a valid prior permittee.

6. Although it is the position of the Department of Natural Resources and Conservation that the Objector's alleged filed prior water right for 220 acre-feet of water from Taylor Creek for the irrigation of certain lands in the NW1/4, the N1/2 SW1/4 and the N1/2 SE1/4 all of Section 20, Township 17 North, Range 43 East of the Montana Principal Meridian does not constitute a valid filed water right or a valid use right, and thus need not be protected pursuant to 89-886(1) R.C.M. 1947; the Department believes that pending litigation in another matter may shed light upon judicial interpretation of the validity of at least a portion of Objector's alleged filed right. Consequently until such time as the courts determine otherwise, the Department will protect the Objector's alleged prior right to the appropriated amount of 60 acre-feet per annum, such amount constituting the maximum annual appropriation actually made by the Objector

prior to the Applicant's Application for Beneficial Water Use Permit.

7. Prior appropriators will be protected if the permit is conditioned so as to afford protection.

8. There are at times unappropriated waters in the source of supply. Such times occur principally when there is sufficient water in the Taylor Creek system below the Applicant's dam and above the Objector's dam to supply the Objector with a total annual appropriation of 60 acre-feet of water.

9. Proper scheduling of appropriation of water from Taylor Creek will ensure that the Objector will be protected. Specifically, proper scheduling should require that the Applicant let at least a total of 60 acre-feet of water per annum flow through his facilities before the Applicant is allowed to commence his annual appropriation pursuant to any Provisional Permit granted herein.

10. The proposed means of diversion and storage are adequate.

11. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the appropriation nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

12. The proposed use of the water constitutes a beneficial use.

13. The proposed use will not interfere unreasonably with other planned uses or developments for which a Permit has been issued or for which water has been reserved.

14. The Application for Beneficial Water Use Permit should be granted in accordance with the provision of Chapter 8, Title 89 of the Revised Codes of Montana.

15. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party except in relation to those rights herein applied for to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 10 cubic feet of water per second or 4,500 gallons of water per minute, not to exceed 75 acre-feet of water per annum from Taylor Creek, a tributary of Little Dry Creek in Garfield County to be diverted from a reservoir in said creek in a point in the SE1/4 NW1/4 SE1/4 of Section 19, Township 17 North, Range 43 East, and to be used for irrigation on a total of 25 acres, more or less, in the SE1/4 of said Section 19, from January 1 to December 31, inclusive of each year.

2. Until such time as a court determination necessitates that the Department require otherwise, the Applicant may only appropriate pursuant to the above-described limits in any given year after such time as the Applicant has let at least a total of 60 acre feet of water flow through his facilities for downstream appropriation by the Objector herein.

3. The Provisional Permit is hereby granted subject to all prior water rights in the source of supply.

4. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices to enable the Applicant to keep a record of all quantities of water diverted, as well as the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

5. The Applicant shall install and maintain an adequate drainage device in the base of the storage facilities so as to enable complete drainage of said storage facilities, both for purposes of safety and as well for purposes of satisfying downstream prior rights.

6. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit, nor does the Department in issuing a Provisional Permit, in any way acknowledge liability caused by the Applicant's exercise of its Provisional Permit.

7. This Provisional Permit is granted subject to any

final determination of prior existing water rights in the source of supply provided for by Montana Law.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 19th day of May,
1976.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER