

EXHIBIT "A"

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

FILMED

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 5266-s41-0 BY FARMERS CO-OP CANAL COMPANY

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APR 9 1990

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 public meeting room of the City of Choteau Public Library, at Choteau, Montana, at approximately 1 p.m., on Wednesday, March 24, 1976, Richard Gordon, Hearing Examiner, presiding.

Herbert E. Styren, Bill Leys, Alvir G. Guse, and Harold Baker all appeared personally on behalf of the Applicant, Farmers Co-op Canal Company (hereinafter referred to as Farmers Co-op), and presented evidence and testimony in support of the application. The Applicant was represented by Counsel Larry Juelfs, Esq., of Choteau, Montana. The Applicant offered into evidence seven exhibits: (1) a hand-drawn map of the area in question showing the Teton River, the Bynum Reservoir, Harvey Lake, Farmers Lake, various diversion facilities between such bodies of water, and parcels of land belonging to Fred Pelzman, Robert Pelzman, the Stott family, and the State of Montana; (2) a certified copy of the Judgment and Decree filed March 31, 1908, in Judgment Records Volume 1, page 425, in the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Teton, in the matter of Fred Perry, et al., plaintiffs, v. George Beattie, et al., defendants, decreeing 4,000 miner's inches of water from the Teton River for use by the Farmers Co-op Canal Company; (3) a certified copy of a Notice of Water Right filed by the Farmers Co-op for 25 cubic feet of water per second from the Ralston Slough and springs, filed on April 14, 1937, and located in Miscellaneous Book No. 7, at page 454, of the Teton County Records; (4) a certified copy of a Notice of Water Right filed by the Farmers Co-op for 5 cubic feet of water per second from a drainage canal in Lot 2, Section 19, Township 25 North, Range 6 West, M.P.M., filed April 20, 1925, in the Teton County Book of Water Rights 9C, at page 398; (5) a certified copy of a Notice of Water Right filed by the Farmers Co-op for 500 miner's inches from the Teton River, filed July 7, 1904, in Teton County Book of Water Rights 9A, at page 404; (6) a certified copy of a Notice of Water Right filed by the Farmers Co-op for 75 cubic feet of water per second from Harvey Lake, filed July 7, 1904, in Teton County Book of Water Rights 9A, at page 405; and (7) U.S. Geological Survey Records for streamflow in

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the Teton River measured at a point near Farmington, Montana, for the years 1947-1954. Said exhibits were duly entered and numbered as Applicant's Exhibits No. 1 through 7, accordingly.

James J. Dellwo, Choteau City Clerk, personally appeared on behalf of the City of Choteau, an Objector herein. Mr. Dellwo left the hearing prior to being called upon to present evidence and testimony in support of the City of Choteau's objection.

Bill Reichelt, Charles Danreuther, Janet Danreuther, and William P. Bandel personally appeared as representatives of the Teton Water Association, an Objector herein, and presented evidence and testimony in support of the Teton Water Association's objection. The Teton Water Association offered into evidence one exhibit: a list of the Teton Water Association members' claimed filed water rights in the Teton River system. Said exhibit was entered and numbered as Teton Water Association Exhibit No. 1. (See Motions paragraph 3.)

Additionally, Charles Danreuther and Janet Danreuther appeared on behalf of their separate objections.

William P. Bandel appeared on behalf of his separate objection.

Fred Pelzman, an Objector herein, personally appeared and presented evidence and testimony in support of his objection. Mr. Pelzman was represented by Counsel John P. Muerthner, Esq., of Great Falls, Montana. Mr. Pelzman offered into evidence one exhibit: a letter outlining the basis of Mr. Pelzman's claimed water rights from the Teton River. Said exhibit was entered and numbered as Pelzman Exhibit No. 1.

Lloyd Stott and Cloyd Stott, Objectors herein, personally appeared and presented evidence and testimony in support of their objection. The Objectors were represented by Counsel Charles M. Joslyn, Esq., of Choteau, Montana. The Objectors offered into evidence one exhibit: a plat of the area in question. Said exhibit was entered and numbered as Stott Exhibit No. 1.

Year Stott and Bruce Stott, representatives of the Stott Ranch, Inc., an Objector herein, appeared personally and presented evidence and testimony in support of the Stott Ranch's objection. The Stott Ranch was represented by Counsel Charles M. Joslyn, Esq., of Choteau, Montana.

Donald C. Rice and Ira Perkins personally appeared as representatives of the Bynum Irrigation District and the Teton Cooperative Reservoir Company, and presented evidence and testimony in support of the Bynum Irrigation District and Teton Cooperative Reservoir Company's objection. The Bynum Irrigation District and Teton Co-op Reservoir Company were represented by Counsel Charles M. Joslyn, Esq., of Choteau, Montana. The Bynum Irrigation District and Teton Cooperative

Reservoir Company offered into evidence three exhibits: (1) a certified copy of an Amended Notice of Appropriation filed by the Teton Co-op Reservoir Company for 3,000 cubic feet per second from the Teton River, filed on December 20, 1915, in the Teton County Miscellaneous Book 5M, at page 354; (2) a certified copy of Amended Notice of Appropriation filed by the Teton Co-op Reservoir Company for 2,500 cubic feet per second from the Teton River, filed on December 20, 1915, in the Teton County Records Miscellaneous Book 5M, at page 355; and (3) a copy of Teton River streamflow records recorded on a monthly basis for the years from 1908 to 1924, showing surplus flows in the Teton River in excess of decreed rights.

Robert Peters appeared personally on behalf of the Department of Natural Resources and Conservation.

MOTIONS

1. At the hearing the Applicant sought to introduce evidence and testimony with regard to a possible alternative storage plan which would entail enlarging Farmers Lake to hold the requested appropriation instead of enlarging Harvey Lake to hold the same. As the formal Application sought only the enlargement of Harvey Lake and not the enlargement of Harvey Lake or Farmers Lake in the alternative; as the published notice gave parties notice of only the enlargement of Harvey Lake and not an enlargement of Harvey Lake or Farmers Lake in the alternative; as several of the potential issues raised by the Farmers Lake proposal appear to differ from the issues raised by the Harvey Lake proposal; as certain parties might possibly seek to object to the Farmers Lake proposal who did not object or appear herein; as several objectors appearing herein were not previously aware of or prepared to deal with the Farmers Lake proposal; and as it would consequently appear to violate the due process rights of those potentially affected by the Farmers Lake proposal if such proposal were considered herein, the Hearing Examiner ruled at the hearing that no evidence or testimony on the Farmers Lake proposal would be considered, and no decision on the Farmers Lake proposal would be made by the Hearing Examiner pursuant to the present application, notice procedure, or hearing. The Applicant, however, is not precluded from reapplying with the Department for future consideration of the Farmers Lake proposal.

2. Prior to commencement of the evidentiary portion of the hearing, Mr. Joslyn requested that the Applicant be held to the burden of proof delineated at 89-885(6), R.C.M. 1947, requiring that the Applicant prove by clear and convincing evidence that the rights of the prior appropriators will not be adversely affected. Section 89-885(6), R.C.M. 1947, requires that such a showing be made for appropriations of 15 cubic feet per second or more. As the application then stood, no maximum cubic-foot-per-second figure was given or requested. However,

it was apparent from the application that the total number of acre-feet sought to be appropriated, when evenly appropriated over the entire time period sought for appropriation, would not equal or not exceed 15 cubic feet per second. Thus, the Hearing Examiner at that time ruled that Section 89-885(6), R.C.M. 1947, did not apply, to the extent that the appropriation would be below 15 cubic feet per second. The evidentiary portion of the hearing was conducted upon such an understanding. During the hearing, however, it became apparent that the Applicant does not intend to appropriate "evenly" throughout the requested period of appropriation, but rather intends to appropriate as much of the requested annual acre-foot limitation as quickly as possible. Thus, the Applicant's proposed maximum rate of appropriation is somewhat uncertain. Based upon the existing hearing record, the Hearing Examiner is precluded from granting the Applicant an appropriation rate equal to or in excess of 15 cubic feet per second for any appropriation granted herein. The Applicant is not, however, necessarily precluded from seeking an increased appropriation rate equal to or in excess of 15 cubic feet per second for the amount of appropriated water granted herein at some future date.

3. On April 15, 1976, Larry Juelfs, on behalf of the Applicant herein, filed an objection to the introduction of certain documents into evidence herein submitted by the Teton Water Association. On April 20, 1976, Charles H. Joslyn, on behalf of the objectors herein, Teton Cooperative Reservoir Company, Bynum Irrigation District, Lloyd Stott, Cloyd Stott, and the Stott Ranch, Inc., filed an objection to the introduction of certain documents into evidence herein submitted by the Teton Water Association. Such documents consisted principally of book and page locations of claimed filed water rights. At the hearing, representatives of the Teton Water Association offered cumulative and representative testimony as to actual alleged use of such water rights. Consequently, the objections rise only to the level of challenges to the weight to be accorded to the evidence submitted, rather than to the admissibility of the evidence itself. The objections are hereby overruled and the evidence ordered admitted as Teton Water Association Exhibit No. 1.

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.

A Proposed Order (Proposal for Decision) dated May 5, 1976, was issued by the Hearing Examiner, Richard Gordon.

The Proposed Order as issued on May 5, 1976, provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order 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.

On May 19, 1976, the Department received from Charles M. Joslyn, attorney for the Objectors, Lloyd Stott, Cloyd Stott, Stott Ranch, Inc., Bynum Irrigation District, and the Teton Cooperative Reservoir Company, their "Exceptions to Proposal for Decision" dated May 18, 1976, and filed in opposition to the Proposal for Decision entered on May 5, 1976, by the Hearing Examiner in the matter of Application No. 5266-s41-0 by Farmers Co-op Canal Company to appropriate certain waters from the Teton River in Teton County for supplemental irrigation purposes.

On May 24, 1976, the Department received from Charles and Janet Danreuther their written letter of Exception dated May 21, 1976, in opposition to the Proposal for Decision issued by the Hearing Examiner.

On May 26, 1976, the Department received from Larry Juelfs, attorney for the Applicant, a document titled, "Response to Objectors' Exceptions and Applicant's Objections to Proposal for Decision," dated May 25, 1976, in the matter of the Proposal for Decision concerning its Application No. 5266-s41-0.

Mr. and Mrs. Charles Danreuther by letter of June 16, 1976, notified the Department that they would not file a Brief supporting their letter of Exception dated May 21, 1976; however, they did request an opportunity to present oral arguments in support of their exception before the Water Resources Division Administrator.

Charles M. Joslyn by letter of July 22, 1976, informed the Department that he would not file a Brief on behalf of his clients in support of their Exception of May 18, 1976.

Larry Juelfs, attorney for the Applicant, by letter of July 27, 1976, informed the Department that they would not file a brief in support of its exception dated May 25, 1976.

The Department by letter of August 3, 1976, to Larry Juelfs, with copies to Mr. and Mrs. Charles Danreuther, Charles Joslyn, and Herbert Styren, stated, "Please be advised that since oral argument has been requested by Mr. and Mrs. Charles Danreuther, objectors and exceptors to this matter, by their letter of June 16, 1976, this application will be forwarded to the Administrator of the Water Resources Division for scheduling of said requested oral argument hearing.

All parties will be notified well in advance by certified mail of the hearing date, place, and time here in Helena."

The Administrator of the Water Resources Division issued on November 16, 1976, a Notice of Oral Argument Hearing on Exceptions to Proposal for Decision in the matter of Application No. 5266-s41-0 by the Farmers Co-op Canal Company, stating that on Wednesday, December 1, 1976, at 1:30 p.m., an oral argument hearing would be held before the Administrator of the Water Resources Division, in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing was to hear oral arguments in support of the written exceptions and briefs. If certain parties did not wish to make oral argument, they were requested to so advise in writing before the hearing of their wish to waive this right. In such case, the briefs would stand as filed. This Notice was mailed by certified mail to all parties in this matter, including the original objectors and their attorneys.

The oral argument hearing before the Administrator was held in Helena, Montana, on December 1, 1976, in the Department Conference Room for the purpose of hearing oral arguments in support of the objections, exceptions, and briefs filed in this matter.

Charles M. Joslyn, attorney for the Objectors, Lloyd and Cloyd Stott, Stott Ranch, Inc., Bynum Irrigation District, and the Teton Cooperative Reservoir Company, appeared and presented oral argument on behalf of his clients in support of their exception. Bruce Stott was also present.

Mr. and Mrs. Charles Danreuther appeared on their own behalf and presented oral argument in support of their exception.

Bill Reichelt and John Kelly also attended the hearing and represented the Teton Water Association.

Larry Juelfs, attorney for the Applicant in this matter, did not attend said hearing nor was the Applicant represented by any other individual.

The hearing was also attended by several Department personnel, other than the Water Resources Division Administrator.

The Administrator of the Department's Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposed Order of May 5, 1976, the objections, exceptions, briefs, the testimony of the oral argument hearing held on December 1, 1976, and all pertinent information and documents filed by parties to this matter, and made a permanent record of the Application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on May 5, 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, with the addition of Items 11, 12, and 13 as follows:

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than an additional 2,474 acre-feet of water per year (in excess of the 2,000 acre-feet of water per year the Applicant is presently entitled to store) from the Teton River, in Teton County, to be diverted from said Teton River at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 25 North, Range 7 West, M.P.M., at a diversion flow rate below 15 cubic feet of water per second, and to be impounded in an enlarged existing reservoir known as Harvey Lake, with a new total capacity of 4,474 acre-feet of water. Said water would be diverted only between October 1 and May 1, inclusive, of each year, and would be used for supplemental irrigation on existing Farmers Co-op land, containing a total of 7,186 acres, more or less, from May 1 to October 1, inclusive, of each year.

2. All appropriation made within excess of 2,000 acre-feet in Harvey Lake's storage capacity, or made after October 31 of each year, shall bear a priority date of April 16, 1975, and may only be appropriated when there is water in the Teton River system in excess of the amount used by all valid prior appropriators.

3. All appropriation is to be made only when the diversion canal into Harvey Lake is free and clear of all obstruction, including, but not necessarily limited to, ice and snow.

4. Prior to construction, a detailed survey of the project is to be made at the Applicant's expense and is to be presented to the Department of Natural Resources and Conservation for inspection and approval. The Applicant shall follow all engineering recommendations, which shall be made by the Department.

5. Specifically, all possible steps are to be taken to insure that the diversion canal be improved so as to minimize possible future ice and flooding danger.

6. At the option of such parties owning land through which the Applicant's diversion canal from the Teton River to Harvey Lake flows, the Applicant shall construct and maintain adequate fencing along such portion of the diversion canal as is necessary to ensure safety for livestock from danger due to thin ice in the canal. Included in such fencing requirement shall be provisions for stock watering and-or for access, if such provisions previously exist.

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

8. 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.

9. 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 for damage caused by the Applicant's exercise of its Provisional Permit.

10. 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.

11. It shall be the responsibility of the Applicant to immediately cease diverting water pursuant to this Provisional Permit when there is insufficient water in the Teton River to satisfy all prior water-right users.

12. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with 89-898, R.C.M. 1947.

13. The above conditions to granting of this Provisional Permit shall also hold and be in effect for any predecessor in interest to the Applicant herein, in the exercise of said Provisional Permit, granted herein.

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 29th day of March, 1977.

Orion Ferris
Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

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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 PERMIT)	
NO. 5266-S41-0 BY THE FARMERS)	<u>PROPOSAL FOR DECISION</u>
CO-OP CANAL COMPANY.)	

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 public meeting room of the City of Choteau Public Library, at Choteau, Montana, at approximately 1:00 p.m. on Wednesday, March 24, 1976, Richard Gordon, Hearing Examiner, presiding.

Mr. Herbert E. Styren, Mr. Bill Leys, Mr. Alvin G. Guse, and Mr. Harold Baker all appeared personally on behalf of the Applicant, Farmers Co-op Canal Company (hereinafter referred to as "Farmers Co-op") and presented evidence and testimony in support of the application. The Applicant was represented by Counsel, Larry Juelfs, Esq., of Choteau, Montana. The Applicant offered into evidence seven exhibits:

1. a hand-drawn map of the area in question showing the Teton River, the Bynum Reservoir, Harvey Lake, Farmers Lake, various diversion facilities between such bodies of water,

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and parcels of land belonging to Mr. Fred Pelzman, Mr. Robert Pelzman, the Stott family, and the State of Montana;

2. a certified copy of the Judgment and Decree filed March 31, 1908 in Judgment Records Volume 1, Page 425, in the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Teton, in the matter of Fred Perry, et al, Plaintiffs v. George Beattie, et al, Defendants, decreeing 4,000 miners inches of water from the Teton River for use by the Farmers Co-op Canal Company; 3. a certified copy of a Notice of Water Right filed by the Farmers Co-op for 25 cubic feet of water per second from the Ralston Slough and springs filed on April 14, 1937, and located in Miscellaneous Book No. 7 at Page 454 of the Teton County Records; 4. a certified copy of a Notice of Water Right filed by the Farmers Co-op for 5 cubic feet of water per second from a drainage canal in Lot 2, Section 19, Township 25 North, Range 6 West of the Montana Principal Meridian filed April 20, 1925 in the Teton County Book of Water Rights 9C at page 398; 5. a certified copy of a Notice of Water Right filed by the Farmers Co-op for 500 miners inches from the Teton River filed July 7, 1904 in Teton County Book of Water Rights 9A at Page 404; 6. a certified copy of a Notice of Water Right filed by the Farmers Co-op for 75 cubic feet of water per second from Harvey Lake, filed July 7, 1904 in Teton County Book of

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Water Rights 9A at Page 405; 7. United States Geological Survey Records for streamflow in the Teton River measured at a point near Farmington, Montana for the years 1947-1954. Said exhibits were duly entered and numbered as Applicant's Exhibits Nos. 1 through 7 accordingly.

Mr. James J. Dellwo, Choteau City Clerk, personally appeared on behalf of the City of Choteau, an Objector herein. Mr. Dellwo left the hearing prior to being called upon to present evidence and testimony in support of the City of Choteau's objection.

Mr. Bill Reichelt, Mr. Charles Danreuther, Ms. Janet Danreuther and Mr. William P. Bandel personally appeared as representatives of the Teton Water Association, an Objector herein, and presented evidence and testimony in support of the Teton Water Association's objection. The Teton Water Association offered into evidence one exhibit: a list of the Teton Water Assn. members' claimed filed water rights in the Teton River system. Said exhibit was entered and numbered as Teton Water Association Exhibit No. 1. (See Motions paragraph number 3 below.)

Additionally, Mr. Charles Danreuther and Ms. Janet Danreuther appeared on behalf of their separate objection.

Mr. William P. Bandel appeared on behalf of his separate objection.

Mr. Fred Pelzman, an Objector herein, personally appeared

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and presented evidence and testimony in support of his objection. Mr. Pelzman was represented by Counsel, John P. Wuerthner, Esq., of Great Falls, Montana. Mr. Pelzman offered into evidence one exhibit: a letter outlining the basis of Mr. Pelzman's claimed water rights from the Teton River. Said exhibit was entered and numbered as Pelzman Exhibit No. 1.

Mr. Lloyd Stott and Mr. Cloyd Stott, Objectors herein, personally appeared and presented evidence and testimony in support of their objection. The Objectors were represented by Counsel, Charles M. Joslyn, Esq., of Choteau, Montana. The Objectors offered into evidence one exhibit: a plat of the area in question. Said exhibit was entered and numbered as Stott Exhibit No. 1.

Mr. Vear Stott and Mr. Bruce Stott, representatives of the Stott Ranch, Inc., an Objector herein, appeared personally and presented evidence and testimony in support of the Stott Ranch's objection. The Stott Ranch was represented by Counsel, Charles M. Joslyn, Esq., of Choteau, Montana.

Mr. Donald C. Rice and Mr. Ira Perkins personally appeared as representatives of the Bynum Irrigation District and the Teton Cooperative Reservoir Company, and presented evidence and testimony in support of the Bynum Irrigation District and Teton Co-op Reservoir Company's objection. The Bynum Irrigation District and Teton Co-op Reservoir Company were represented by Counsel, Charles M. Joslyn, Esq., of

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Choteau, Montana. The Bynum Irrigation District and Teton Cooperative Reservoir Company offered into evidence three exhibits: 1. a certified copy of an Amended Notice of Appropriation filed by the Teton Co-op Reservoir Company for 3,000 cubic feet per second from the Teton River, filed on December 20, 1915 in the Teton County Miscellaneous Book 5M at Page 354; 2. A certified copy of Amended Notice of Appropriation filed by the Teton Co-op Reservoir Company for 2500 cubic feet per second from the Teton River, filed on December 20, 1915 in the Teton County Records Miscellaneous Book 5M at Page 355; 3. A copy of Teton River Streamflow records recorded on a monthly basis for the years from 1908 to 1924 showing surplus flows in the Teton River in excess of decreed rights.

Mr. Robert Peters appeared personally on behalf of the Department of Natural Resources and Conservation.

MOTIONS

1. At the hearing the Applicants sought to introduce evidence and testimony with regard to a possible alternative storage plan which would entail enlarging Farmers Lake to hold the requested appropriation instead of enlarging Harvey Lake to hold the same. As the formal Application sought only the enlargement of Harvey Lake and not the enlargement of Harvey Lake or Farmers Lake in the alternative; as the published notice gave parties notice of only the enlargement of Harvey Lake and not an enlargement of Harvey Lake or

Farmers Lake in the alternative; as several of the potential issues raised by the Farmers Lake proposal appear to differ from the issues raised by the Harvey Lake proposal; as certain parties might possibly seek to object to the Farmers Lake proposal who did not object or appear herein; as several objectors appearing herein were not previously aware of or prepared to deal with the Farmers Lake proposal; and as it would consequently appear to violate the due process rights of those potentially affected by the Farmers Lake proposal if such proposal was considered herein, the Hearing Examiner ruled at the hearing that no evidence or testimony on the Farmers Lake proposal would be considered, and no decision on the Farmers Lake proposal would be made by the Hearing Examiner pursuant to the present application, notice procedure or hearing. The Applicant, however, is not precluded from re-applying with the Department for future consideration of the Farmers Lake proposal.

2. Prior to commencement of the evidentiary portion of the hearing, Mr. Joslyn requested that the Applicant be held to the burden of proof delineated at 89-885(6) R.C.M. 1947, requiring that the Applicant prove by clear and convincing evidence that the rights of the prior appropriators will not be adversely affected. 89-885(6) R.C.M. 1947 requires that such a showing be made for appropriations of 15 cubic feet per second or more. As the application then stood, no

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maximum cubic foot per second figure was given or requested. However, it was apparent from the application that the total number of acre-feet sought to be appropriated, when evenly appropriated over the entire time period sought for appropriation, would not equal or not exceed 15 cubic feet per second. Thus, the Hearing Examiner at that time ruled that 89-885(6) R.C.M. 1947 did not apply, to the extent that the appropriation would be below 15 cubic feet per second. The evidentiary portion of the hearing was conducted upon such an understanding. During the hearing, however, it became apparent that the Applicant does not intend to appropriate "evenly" throughout the requested period of appropriation, but rather intends to appropriate as much of the requested annual acre-foot limitation as quickly as possible. Thus, the Applicant's proposed maximum rate of appropriation is somewhat uncertain. Based upon the existing hearing record, the Hearing Examiner is precluded from granting the Applicant an appropriation rate equal to or in excess of 15 cubic feet per second for any appropriation granted herein. The Applicant is not, however, necessarily precluded from seeking an increased appropriation rate equal to or in excess of 15 cubic feet per second for the amount of appropriated water granted herein at some future date.

3. On April 15, 1976 Mr. Larry Juelfs, on behalf of the Applicant herein, filed an objection to the introduction of certain documents into evidence herein submitted by the

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Teton Water Association. On April 20, 1976 Mr. Charles M. Joslyn, on behalf of the objectors herein, Teton Cooperative Reservoir Company, Bynum Irrigation District, Mr. Lloyd Stott, Mr. Cloyd Stott, and the Stott Ranch Incorporation, filed an objection to the introduction of certain documents into evidence herein submitted by the Teton Water Association. Such documents consisted principally of book and page locations of claimed filed water rights. At the hearing Representatives of the Teton Water Association offered cumulative and representative testimony as to actual alleged use of such water rights. Consequently, the objections rise only to the level of challenges to the weight to be accorded to the evidence submitted, rather than to the admissibility of the evidence itself. The objections are hereby overruled and the evidence ordered admitted as Teton Water Association Exhibit No. 1.

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 April 16, 1975 the Applicant, Farmers Co-op Canal Company, through Mr. Herbert E. Styren, Mr. C. Albert Carlson, Mr. Alvin G. Guse, and Mr. Harold Baker, filed Application No. 5266-s41-0 with the Department of Natural Resources and Conservation seeking to appropriate 2474 acre-

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feet of water per annum from the Teton River in Teton County, Montana, to be diverted from said Teton River at a point in the SE1/4 NW1/4 NE1/4 of Section 35, Township 25 North, Range 7 West of the Montana Principal Meridian from October 1 through May 1, inclusive, of each year to be used for supplemental irrigation on existing project lands containing a total of 7,186 acres, more or less, from May 1 to October 1, inclusive of each year, and to be impounded in an existing reservoir known as Harvey Lake which would be enlarged to a new capacity of 4,474 acre-feet of water, from its present capacity of approximately 2,000 acre-feet.

2. Notice of the above-described application was duly published on November 27, December 4, and December 11, all of 1975, in the Choteau Acantha. However, such notice was incorrect in that it omitted the proposed period of appropriation (from October 1 through May 1, inclusive, of each year), and as a result the listed period of use (May 1 through October 1, inclusive, of each year) might have been misinterpreted as being the proposed period of appropriation. Consequently, a corrected notice was published on December 18, 1975 in the Choteau Acantha.

3. On December 23, 1975 the City of Choteau, through its City Clerk, Mr. James J. Dellwo, filed an objection to the above-described application. Such objection was based upon the incorrect notice and upon the incorrect period of appropriation. The objector alleged insufficient water in

the Teton River system during the irrigation season between May and October to satisfy the Objector's present municipal water supply use. The Objector objected to the granting of any additional appropriation between May and October. A representative of the Objector appeared at the hearing but left shortly after the commencement of the hearing and prior to being called upon to testify or present evidence in support of the objection.

4. On January 6, 1976 the Bynum Irrigation District and the Teton Co-op Reservoir Company, through Mr. Donald C. Rice, filed an objection to the above-described application alleging a prior filed right to 75,000 to 90,000 acre-feet of water of the Teton River dating from about 1911 for use on 15,023 acres of land, alleging that there is insufficient water in the Teton River to supply the Applicant without adversely affecting the Objector.

5. On January 6, 1976 Mr. Lloyd Stott and Mr. Cloyd Stott filed an objection to the above-described application alleging a use right for stockwatering on a spring located on their property, and further alleging that the enlargement of the reservoir would necessitate the taking of land belonging to the objectors and would destroy the spring presently used for stockwatering.

6. On January 7, 1976 Mr. Charles Danreuther and Ms. Janet Danreuther filed an objection to the above-described application alleging a prior water right to water from the Teton River for the irrigation of 150 acres of hayland, and

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to stockwater from a well connected to the Teton River system used for lawn, garden and stockwater use, alleging that there is insufficient water in the Teton River system to satisfy existing rights, alleging that the Teton River ran dry through Objector's property in July and August of 1973 and 1974, and finally alleging that if granted, the appropriation would adversely affect the objectors.

7. On January 9, 1976 Mr. Fred Pelzman filed an objection to the above-described application alleging a prior right to 500 miners inches of diverted water and to 300 miners inches of waste water appropriated and used from May to October, since October 1944 for irrigation on the NE1/4 NE1/4 of Section 20; the N1/2 and the N1/2 S1/2 all of Section 21; the W1/2 NW1/4, the SE1/4 NW1/4, the SW1/4 NE1/4, the N1/2 SW1/4, and the NW1/4 SE1/4 all of Section 22, all in Township 25 North, Range 6 West of the Montana Principal Meridian, and used for stockwatering as well. The Objector further alleged that if the permit is granted, the appropriation will reduce the water available for the Objector's use, and that as a result, the Objector will be adversely affected.

8. On January 14, 1976 Mr. William P. Bandel filed an objection to the above-described application alleging a prior filed right to 5 cubic feet per second from the Teton River diverted at a point in the SW1/4 of Section 33,

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Township 25 North, Range 4 East of the Montana Principal Meridian from May 1 through October 1, inclusive, of each year since 1957, for use on 60 irrigated acres in the E1/2 of Section 33, Township 25 North, Range 4 East of the Montana Principal Meridian and for the watering of 300 cattle and 3 horses. The objector alleged insufficient water in the source of supply and further alleged that he would be adversely affected by the proposed appropriation if granted.

9. On January 14, 1976 the Teton Water Association, through its Secretary, Mr. Jeremy J. Dietz, filed an objection to the above-described application alleging that there is no unappropriated water in the source of supply, and further alleging that the objectors would be adversely affected if the appropriation is granted.

10. On January 15, 1976 the Stott Ranch Inc. through its President, Mr. Vear Stott, filed an objection to the above-described application alleging that if the permit is granted, the property rights of the objector would be adversely affected by virtue of the taking of objector's land as a result of the enlargement of Harvey Lake, and by virtue of the potential flood danger along the canal from the Teton River to Harvey Lake, as said canal flows through Objector's land. The Objector alleged that said canal has flooded in the past due to water backup when attempts have been made to transport water through the canal when the canal has been full of ice and snow.

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11. On January 15, 1976, the Brady Irrigation Company, through its Secretary, Mr. Gordon E. Schlepp, filed an objection to the above-described application alleging a filed and decreed water right to 6,400 acre-feet of water diverted from the Teton River from April through November at a point in the SW1/4 SW1/4 of Section 36, Township 26 North, Range 4 West of the Montana Principal Meridian, for irrigation use on 345 acres, and with potential irrigation use on 726 acres; for the watering of 1,000 head of livestock; for storage, fish and recreational uses; and for unspecified uses, by missile sites, a missile control center, and the town of Brady, Montana. The Objector alleged a date of first use of June 19, 1909, and further alleged an adverse effect should the appropriation be granted. No representative of the objector appeared at the hearing.

12. On January 16, 1976, the Brady Water Users Association, through its President, Mr. Fred W. Froebel, filed an objection to the above-described application alleging a prior water right to 29,000,000 gallons of water per annum diverted from the Teton River in October and November at a point in the SW1/4 SE1/4 of Section 4, Township 26 North, Range 2 West of the Montana Principal Meridian for year round use by the town of Brady for domestic, drinking and sewer purposes, for domestic use on farms surrounding the town of Brady, as well as for unspecified use by a minute-man missile site. The Objector alleged a date of first use of 1949, and further

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alleged that an adverse effect would result if the permit is granted. No representative of the Objector appeared at the hearing.

13. On January 16, 1976 Mr. John E. Kelly, Mr. William K. Kelly and Ms. Mary E. Kelly filed an objection to the above-described application alleging a prior water right to 400 miners inches of water from the Teton River and/or from a tributary diverted at a point in the SW1/4 SW1/4 of Section 33, Township 25 North, Range 7 East of the Montana Principal Meridian for use from May to October for irrigation on 160 acres in unspecified parts of Section 33 and Section 34 of Township 25 North, Range 7 East of the Montana Principal Meridian and in an unspecified part of Section 3, Township 24 North, Range 7 East of the Montana Principal Meridian, for year round watering of 500 head of cattle and for year round domestic use. The objectors alleged insufficient water in the Teton River during the irrigation season and further alleged that the objectors would be adversely affected should the permit be granted. Neither the objectors nor a designated representative of the objectors appeared at the hearing.

14. At the hearing, representatives of the Applicant testified that they are seeking, pursuant to the above-described application, to increase their off-season storage capacity. The representatives of the applicant testified that the applicant ran out of water from its diversion

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facilities in early July of 1960 or 1961, and again on July 1, 1974. The representatives of the Applicant testified that they planned to fill the increased storage capacity of Harvey Lake by appropriating pursuant to their present decreed and filed rights (which they presently appropriate primarily during the irrigation season) from October 1 through May 1, inclusive, of each year. The representatives of the Applicant introduced into evidence previously described exhibits as proof of said prior water rights. The representatives of the Applicant testified that they were not applying for a water right but were merely seeking to appropriate a prior right in a new way. The representatives of the Applicant testified, however, that water has not previously been appropriated by the Applicant pursuant to those claimed water rights during the winter. Representatives of the Applicant testified that the Applicant's existing storage facilities are presently filled to the winter level by the end of October. Appropriation by the Applicant from the Teton River then ceases until spring, when the storage facilities are filled to capacity. The representatives of the Applicant testified that storage facilities are not filled to their maximum level until after the winter in order to prevent wind damage from occurring and causing damage to the facilities. The representatives of the Applicant further testified that the Applicant plans to continue to

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appropriate its full water rights pursuant to its prior decrees and filings as the Applicant has done in the past. The representatives of the Applicant testified that the Applicant plans to utilize its present point of diversion and present 3,000 to 5,000 miners inch capacity diversion canal from the Teton River to Harvey Lake. Representatives of the Applicant testified that the increased storage capacity of Harvey Lake would be used only for supplemental irrigation on existing Farmers Co-op projects. The representatives of the Applicant testified that the proposed expansion of Harvey Lake would extend principally to the south onto certain lands of Mr. Cloyd Stott and Mr. Lloyd Stott. The representatives of the Applicant testified that the Applicant does not have an agreement with the Stotts regarding use of or compensation for said land. The representatives of the Applicant testified that they are uncertain as to the precise new boundaries of the proposed enlarged Harvey Lake, but testified that they believe that the boundary of the proposed enlarged Harvey Lake would stop short of the stockwater spring on the Stott property. The representatives of the Applicant testified that the dam on Harvey Lake would have to be extended to the South, but that they were uncertain as to the distance the dam would have to be extended. The representatives of the Applicant testified that the level of Harvey Lake would be increased by approximately 10 feet. The representatives of the Applicant testified that the

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Applicant presently fills its existing storage capacity in Harvey Lake of 2,000 acre-feet of water in the autumn (minus the amount of water taken in the spring to fill the facility to capacity and not taken in the autumn to prevent wind damage) and are generally finished appropriating in early October. In 1975 the Applicant did not appropriate water after October. The representatives of the Applicant testified that the diversion canal from the Teton River to Harvey Lake has never been utilized after October. The representatives of the Applicant testified that in the spring of 1972 an attempt was made to run water through the diversion canal in early spring, but that the canal was still clogged with ice and snow, and that consequently the canal overflowed at a point near the bend in the ditch on the Stott Ranch. The representatives of the Applicant testified that they believe that ice will not form in the ditch if the ditch is kept running continuously until the expanded Harvey Lake is full. The representatives of the Applicant testified that they believe that in most years the expanded Harvey Lake can be filled by a steady flow in a period of approximately 6 weeks following termination of irrigation withdrawal from Harvey Lake. The representatives of the Applicants testified that they believe that in a normal year there is sufficient water to fully appropriate pursuant to the proposed application without interfering with any prior rights. The representatives of the Applicant testified that the Bynum Irrigation District

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is able to run water through its upstream diversion facilities throughout the winter without difficulty. Representatives of the Applicant testified that there appeared to be sufficient appropriated water flowing past the Applicant's present point of diversion along the Teton River, even during the period sought herein when the Bynum Irrigation Company is appropriating water from the Teton River at a point upstream, to fully satisfy the requested appropriation.

15. Mr. William E. Reichelt testified on behalf of the Teton Water Association that he and Mr. Charles Danreuther together possess downstream filed water rights for water from the Teton River dating from various times between 1874 and 1916 for irrigation of a total of 350 acres. Mr. Reichelt asked that information regarding the filing of claimed water rights of the other members of the Teton Water Association, totaling 206 cubic feet of water per second, as introduced into evidence in prior hearings, be introduced into evidence herein. Mr. Reichelt testified that in 1973 and 1974 the Teton River ran completely dry at his point of diversion in July, and did not begin to run again until after October. Mr. Reichelt testified that he generally irrigates from May 1 through October, if water is available that late. Mr. Reichelt additionally testified that members of the Teton Water Association water stock with water from the Teton River in November and December. Mr. Reichelt testified that in general, the water rights along the Teton River in Choteau County (such as many of those possessed by members of the Teton Water Association), predate the adjudicated water

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rights in the Teton River in Teton County. Yet Mr. Reichelt testified that such prior downstream rights in a normal year go unsatisfied later in the irrigation season as the downstream level of the Teton River steadily drops until it is dry, while upstream appropriators continue to appropriate. Mr. Reichelt testified that all the members of the Teton Water Association have this basic problem in common.

16. Mr. Fred Pelzman introduced into evidence a letter outlining the basis of Mr. Pelzman's claimed water rights from the Creary Ditch, a part of the Teton River system, appropriated and used downstream from the Applicant's point of diversion. However, Mr. Pelzman testified at the hearing that he does not appropriate or put his appropriation to beneficial use after October 1 or before May 1, inclusive, of each year.

17. Mr. William P. Bandel testified that he irrigates approximately 60 acres beginning in May and occasionally extending into October. Mr. Bandel testified that his land has been irrigated for "many years" but that he has been unable to locate a filing prior to 1957. Mr. Bandel reiterated the testimony of Mr. Reichelt, particularly noting that the flow level of the Teton River in its lower reaches in Choteau County is, during the irrigation season, insufficient to satisfy long established prior filed and use rights.

18. Mr. Lloyd Stott testified that he, in partnership

with his brother, Mr. Cloyd Stott, own all the land surrounding Harvey Lake, with the exception of a small portion of the western perimeter of the lake. Mr. Stott testified that he diverts water from the Applicant's diversion canal through his property pursuant to a working agreement with the Applicant from May through October. Mr. Stott testified that when he is not irrigating, such water continues to flow through the Farmers Co-op diversion canal directly into Harvey Lake. Mr. Stott testified that there used to be a ditch from the Teton River directly to his land, but that such ditch has not been maintained since the agreement with the Applicant was reached "quite some time ago." Mr. Stott testified that he believes that the spring presently located south of Harvey Lake, and presently used for stock watering in the fall and winter from October through January, will be inundated if the proposed extension of Harvey Lake is allowed. Mr. Stott additionally testified that an expanded Harvey Lake would cover approximately 1/2 mile of his best and most valuable pasture and hay land. Mr. Stott testified that he believes that the running of water through the Farmers Co-op canal in the winter time might present a flooding problem, as flooding has occurred in the past, should water in the canal freeze near the bend in the canal. Mr. Stott stated that any such flooding problems would be a result of the quantity and speed of the flow of water in the canal, of the temperature of the surrounding

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land and air, and of the weather in general.

19. Mr. Vear Stott, testified on behalf of the Stott Ranch Inc., that if Harvey Lake is expanded, Stott Ranch, Inc. land will be taken. Mr. Stott testified that at present, when full, approximately 150 feet beyond the western-most boundary of Harvey Lake, is presently flooded. Mr. Stott testified that this amounts to approximately 40-50 acres of Stott Ranch land which is presently inundated by the current level of Harvey Lake. Mr. Stott testified that if Harvey Lake is enlarged, the area of such flooded lands will be substantially increased. Mr. Stott testified that the Farmers Co-op diversion canal from the Teton River to Harvey Lake runs approximately 1.5 miles through the Stott Ranch, Inc., land, and that in early spring of 1972 the Farmers Co-op tried to run water in the canal, the Applicant's only attempt to do so so early, and that snow pack in the canal caused the canal to overflow to within 10 feet of Mr. Stott's house. Mr. Stott testified that last year at Thanksgiving the canal was completely full of snow. Mr. Styren testified in response, on behalf of Applicant, that if water is run through the canal continuously, the canal can be kept open and would not become blocked with ice or snow. Mr. Styren additionally testified in response that if water is run through the canal continuously the canal need only be kept open in a normal year until the end of October, by which

time Harvey Lake will have been filled to its maximum winter level. Mr. Stott additionally testified that should a frozen layer of ice form on the surface of the canal, such a frozen layer will present a danger to cattle, in that cattle will try to cross over the ice at times when the ice is too thin to support the weight. Mr. Stott testified that he has had experience with this type of a problem before, and that when it occurs, cattle are severely injured and generally must be destroyed.

20. Mr. Ira Perkins testified that on behalf of the Teton Co-op Reservoir Company and the Bynum Irrigation District that the Teton Reservoir Company is a Montana Corporation, and that the Bynum Irrigation District is a municipality. Mr. Perkins testified that the Bynum Reservoir (property of the Teton Co-op Reservoir Co) with a diversion canal from the Teton River at a point above the Applicant's point of diversion, can hold 100,000 acre-feet of water, although less than 100,000 acre-feet of water is usually stored to avoid wind damage. Mr. Perkins testified that the canal has a capacity of 1,500 cubic feet of water per second, and that water can be and has been run through the canal in the fall, winter and spring. Mr. Perkins testified that there is an average flow of 600-800 miners inches in the canal during the winter months. Mr. Perkins testified that the reservoir has only been full three years out of approximately fifty years that

it has been used. Mr. Perkins testified that the corporation was started in 1904, ^{and that} the Bynum Reservoir was built starting in 1908, originally for the irrigation of 23,000 acres, although at present only 15,000 acres are under irrigation. Mr. Perkins testified that in 1927 the first water was turned out of the reservoir for irrigation purposes. Mr. Perkins testified that "one year ago last spring" the reservoir was almost empty. Mr. Perkins testified that since its inception, the Bynum Reservoir Company has attempted to appropriate all available unappropriated water in the source of supply, and such right has been established by fifty years of continuous use. Mr. Perkins testified that in recent years, since 1963, a court appointed water commissioner has been responsible for the actual amounts of water appropriated. Mr. Perkins testified that he does not believe there is sufficient water flowing below the Bynum Reservoir point of diversion, subsequent to the Bynum appropriation during the period October to May for the applicant's proposed appropriation from October to May. In response, the representatives of the Applicant disagreed and testified that they believed that sufficient unappropriated water does flow past their downstream point of diversion during the requested period of appropriation.

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 the

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Teton River.

2. The Applicant, having never appropriated water after October of any given year pursuant to claimed prior water rights, may, pursuant to any Provisional Permit granted herein, only appropriate water after October in any given year pursuant to a new water right with a new priority date. The Applicant having never stored water in Harvey Lake in excess of 2,000 acre-feet of water per annum pursuant to its claimed prior water rights may, pursuant to any Provisional Permit granted herein, only appropriate water in excess of 2,000 acre-feet per annum pursuant to a new water right with a new priority date.

3. There are at times during the proposed period of appropriation from October 1 to May 1, inclusive, of each year, no unappropriated waters in the source of supply, such times occurring principally in October when downstream prior appropriators are still appropriating, and when such downstream prior appropriators are unable to obtain sufficient water for their valid prior uses.

4. There are at times during the period of proposed appropriation from October 1 to May 1, inclusive, of each year, unappropriated waters in the source of supply.

5. Pursuant to 89886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

6. The rights of prior appropriators will be protected

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if the permit is conditioned so as to protect those rights.

7. The objectors presenting evidence and testimony at the hearing appear to have valid decreed, filed and use rights along the Teton River, for such portions of the year and in such amounts as such prior rights have been actually beneficially used.

8. Proper scheduling of appropriation from the Teton River by the Applicant will insure that the prior existing water rights of the Objectors will be protected. Proper scheduling should provide that the Applicant may only divert pursuant to its existing early priority appropriation when there is in Harvey Lake no greater stored capacity than 2,000 acre-feet of water, and at no date later than October 31 of each year. Proper scheduling should provide that the Applicant may only appropriate in excess of a stored capacity of 2,000 acre-feet of water, and/or appropriate after October 31 of each year, pursuant to a new priority date which shall be inferior to the priority date of all prior users. And proper scheduling should include provision that the Applicant may only use the diversion canal from the Teton River to Harvey Lake at such times when said canal is free and clear of all obstructions, including but not necessarily limited to ice and snow.

9. If the Applicant intends to appropriate at a rate of 15 cubic feet of water per second or more, such an appropriation rate cannot be granted until such time as the Applicant

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complies with 89-885(6), R.C.M. 1947. Until such time the Applicant must be limited to an appropriation diversion flow rate of less than 15 cubic feet of water per second.

10. The issue of real property rights is not within the discretion of the Hearing Examiner for consideration herein. The granting of a Provisional Permit herein in no way grants the Applicant any right to violate real property rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising a Provisional Permit granted herein. Similarly, testimony that the granting of a Provisional Permit herein would lead to the violation of a real property right is not alone grounds for the denial of a Provisional Permit, even if such violation is a necessary and unavoidable consequence of properly exercising a Provisional Permit granted herein.

11. The proposed means of diversion and storage is adequate, provided that prior to actual construction a detailed survey of the project be made at the Applicant's expense and be presented to the Department of Natural Resources and Conservation for its inspection and approval; provided that the Department's engineering recommendations be followed; provided specifically that all possible steps be taken to insure that the diversion canal, particularly at the point where previous difficulty has been encountered, be improved

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so as to minimize any possible future ice or flood danger; and provided that the Applicant, at the option of such parties owning land through which the Applicant's diversion canal from the Teton River to Harvey Lake flows, adequately fence and maintain fencing upon such portions of the diversion canal as is necessary to insure safety for livestock from danger due to thin ice in the canal. Included in such fencing requirement shall be provisions for stockwatering and for access, if such provisions presently exist.

12. 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.

13. The proposed use of the water constitutes beneficial use.

14. 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.

15. 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 the State of Montana.

16. Nothing decided herein has bearing on 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

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except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

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

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than an additional 2,474 acre-feet of water per year (in excess of the 2,000 acre-feet of water per year the Applicant is presently entitled to store) from the Teton River, in Teton County, to be diverted from said Teton River at a point in the SE1/4 NW1/4 NE1/4 of Section 35, Township 25 North, Range 7 West of the Montana Principal Meridian, at a diversion flow rate below 15 cubic feet of water per second, and to be impounded in an enlarged existing reservoir known as Harvey Lake, with a new total capacity of 4,474 acre-feet of water. Said water would be diverted only between October 1 and May 1, inclusive, of each year, and would be used for supplemental irrigation on existing Farmers Co-op land, containing a total of 7,186 acres more or less, from May 1 to October 1, inclusive, of each year.

2. All appropriation made with in excess of 2,000 acre-feet in Harvey Lake's storage capacity or made after October 31 of each year shall bear a priority date of April 16, 1975 and may only be appropriated when there is water in the Teton River system in excess of the amount used by all

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valid prior appropriators.

3. All appropriation is to be made only when the diversion canal into Harvey Lake is free and clear of all obstruction, including, but not necessarily limited to ice and snow.

4. Prior to construction, a detailed survey of the project is to be made at the Applicant's expense and is to be presented to the Department of Natural Resources and Conservation for inspection and approval. The Applicant shall follow all engineering recommendations which shall be made by the Department.

5. Specifically, all possible steps are to be taken to insure that the diversion canal be improved so as to minimize possible future ice and flooding danger.

6. At the option of such parties owning land through which the Applicant's diversion canal from the Teton River to Harvey Lake flows, the Applicant shall construct and maintain adequate fencing along such portion of the diversion canal as is necessary to ensure safety for livestock from danger due to thin ice in the canal. Included in such fencing requirement shall be provisions for stockwatering and/or for access if such provisions previously exist.

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

8. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices to enable the applicant

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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.

9. 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 for damage caused by the Applicant's exercise of its Provisional Permit.

10. 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 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 15 day of July, 1976.

Richard Gordon
RICHARD GORDON
HEARING EXAMINER

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