

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

* * * * *



IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 39887-S76D BY WEST KOOTENAI)
WATER USERS ASSOCIATION)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. No timely exceptions were received from any party of record. The Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the February 13, 1986 Proposal for Decision, and incorporates them by reference. Based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 39887-s76D by West Kootenai Water Users Association hereby is granted in part and denied in part.

That portion of Application for Beneficial Water Use Permit No. 39887-s76D which requests 1,100 gpm up to 1,774.00 acre-feet per year for power generation is denied. That portion of Application No. 39887-s76D which requests .50 acre-feet per year

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for fire protection is denied, except that the Applicant may make a one-time appropriation for this purpose, in order to charge the lines to their fire hydrants.

Application for Beneficial Water Use Permit No. 39887-s76D hereby is granted to the West Kootenai Water Users Association to appropriate 753 gpm up to 314 acre-feet of water per year from Young Creek for new sprinkler irrigation of 125 acres located in portions of Sections 10, 11, 14, and 15, all in Township 37 North, Range 28 West, Lincoln County, Montana. The water will be diverted by means of a pipeline at a point located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, Township 37 North, Range 28 West, Lincoln County, Montana, and gravity-fed to the Permittees' places of use.

The period of appropriation is April 1 to August 15, inclusive, of each year. The priority date for this Permit shall be 4:40 p.m., May 26, 1981.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

- A. No Permit will be issued in this matter until the Applicants submit information to the Department sufficient to establish the legal descriptions of the places of use, and the acreages thereof, included in the 125 acres for which the Permittees have applied. The places of use must fall within the legals given for the places of use on the Applicants' original Application for Beneficial Water Use Permit No. 39887-s76D.

B. The Permittees shall install staff gages or other adequate measuring devices at and just below the point of diversion to ensure that flowby requirements are met. The Permittees shall install a flow meter or other suitable measuring device in the pipeline so that diversions can be recorded, and shall keep a written record of the flow rates, volumes, and periods of diversion of all waters diverted pursuant to this Permit and of the flow of Young Creek during the times of diversion.

C. Until such time as a final determination may be made that the Montana Department of Fish, Wildlife, and Parks' claimed instream flow rights in Young Creek are not valid, the Permittees shall cease diverting water pursuant to this Permit whenever the flow of Young Creek is 25 cfs or less between May 1 and June 30 of any year. The Permittees shall cease diverting water in any instance whenever the flow of Young Creek is 5 cfs or less.

By imposing this Permit Condition, the Department of Natural Resources and Conservation does not purport to quantify the water rights, if any, which the Department of Fish, Wildlife, and Parks may have on Young Creek.

D. The Permittees shall use a screen on their diversion works which is of a sufficiently small mesh size to prevent the entry of fish and their offspring into the diversion system.

- E. The water rights evidenced by this Permit are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.
- F. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this Permit. Nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.
- G. The Permittees shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of the quantity reasonably required for the purposes provided for herein.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 17th day of March 1986.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6605

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

2025 # 29007

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 18th day of March, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy John
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 18, 1986, she deposited in the United States mail, first class mail postage prepaid, a final order, an order by the Department on the Application by Kootenai Water Users Association, Application No. 39887-s76D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. West Kootenai Water Users Association, c/o John Miller, President, Star Route, Rexford, Montana 59917
2. Douglas F. & Stella R. Truman, 265 N.W. Kootenai Rd. Rexford, Montana 59917
3. Solo, Inc. 581 West Kootenai, Rexford, Montana 59917
4. Solo, Inc., Thomas R. Bosrock, Douglas & Bosrock, P.O. Box 795, Libby, Montana 59923
5. Lloyd M. & Lucille Soderstrom, 360 West Kootenai Rd. Rexford, Montana 59917
6. Melvin L. & Ethel A. White, 380 N.W. Kootenai Rd., Rexford, Montana 59917
7. Montana Department of Fish, Wildlife & Parks, Fred Nelson, 8695 Huffine Ln., Bozeman, Montana 59715
8. Kootenai National Forest, Rexford Ranger District, Attn: David E. Poncin, Box 666, Eureka, Montana 59917
9. Montana Department of Fish, Wildlife and Parks, Stan Bradshaw, Attorney, 1420 East 6th Ave., Helena, Montana 59620
10. Kootenai National Forest, Larry Meshaw, P.O. Box AS, Libby, Montana 59923
11. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, Montana (inter-departmental mail)
12. Gary Fritz, Administrator, Water Resources Division, DNRC (hand-deliver)
13. Peggy A. Elting, Hearing Examiner (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

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1. no specific amount granted for fire protection, since appropriators are always entitled to make emergency diversions for such purposes
2. deny hydropower app. because of insufficient evidence that proposed means of diversion, construction, and operation are adequate

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 39887-s76D BY WEST KOOTENAI)
WATER USERS ASSOCIATION)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 27, 1984, in Eureka, Montana.

West Kootenai Water Users Association, the Applicant in this matter, was represented at the hearing by John Miller, president of the Association.

Objector Douglas F. Truman appeared personally at the hearing.

Objectors Lloyd and Lucille Soderstrom appeared personally.

Objector Melvin L. White appeared personally.

Objector Solo, Inc., appeared through Fred Sturdevant, registered agent for Solo, Inc.

Objector Montana Department of Fish, Wildlife, and Parks was represented by counsel Robert N. Lane.

The Kootenai National Forest submitted letters of concern in this matter, but did not participate as an Objector at the hearing. Don Godtel and John W. Lloyd of the Kootenai National Forest attended the hearing as interested parties.

3. instream flow claimed by Fish, Wildlife, and Parks must be protected the matter is determined, since now pending before the court

Larry Meshew, Forest Hydrologist for the Kootenai National Forest, appeared as a witness for Fish, Wildlife, and Parks ("FWP") or ("MDFWP") in this matter.

Bruce May, Fisheries Biologist for FWP, appeared as a witness for Fish, Wildlife, and Parks.

Fred A. Nelson, Fisheries Biologist for FWP, also appeared as a witness for Fish, Wildlife and Parks.

Chuck Brasen, Field Manager for the Kalispell Water Rights Bureau Field Office, appeared as staff expert for the Department of Natural Resources and Conservation (hereafter, the "Department").

STATEMENT OF THE CASE

On May 26, 1981, the Applicants filed an Application for Beneficial Water Use Permit, seeking to appropriate 1,506 gallons per minute (gpm) up to 627.5 acre-feet per year from Young Creek for sprinkler irrigation of 251 acres from April 1 to September 15 of each year; 1,100 gpm up to 1,774.04 acre-feet per year for power generation from January 1 to December 31 of each year; and an additional .50 acre-feet per year for fire protection from January 1 to December 31 of each year, for a total proposed diversion of 2,606 gpm up to 2,402.04 acre-feet per annum.

The proposed place of use for new sprinkler irrigation is listed on the Application as 5 acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10; 40 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 11; 70 acres in the W $\frac{1}{2}$ and 10 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14; 6 acres in the N $\frac{1}{2}$ N $\frac{1}{2}$ NW $\frac{1}{4}$,

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35 acres in the NE $\frac{1}{4}$, 15 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, and 70 acres in the SW $\frac{1}{4}$ of Section 15, all in Township 37 North, Range 28 West, Lincoln County, Montana.

The proposed place of use listed for power generation is the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 15, Township 37 North, Range 28 West, Lincoln County, Montana.

The proposed place of use listed for fire protection is the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10; N $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, and SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, of Section 14; the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, all in Township 37 North, Range 28 West, Lincoln County, Montana.

The proposed point of diversion for the appropriations is the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, Township 37 North, Range 28 West, Lincoln County, Montana.

The pertinent portions of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on February 25 and March 4 and 11, 1982.

Six timely objections to the Application were filed.

Douglas and Stella Truman submitted an objection alleging that the Applicants could use all the water in the creek during low water periods, and that the Truman diversion would be below the Applicant's proposed point of diversion.

Lloyd and Lucille Soderstrom objected to the Application on the basis that in the summer months there isn't much water by the time it gets down to their property. Mr. and Mrs. Soderstrom's

objection states that they are located last on the creek before the "Fish and Game dam." The Soderstroms voiced an additional concern about what the proposed appropriation might do to the fish spawning.

Melvin and Ethel White objected to the Application on several bases. Their objection alleges that the homes which the proposed project would affect already have water systems in use which are adequate for irrigation and fire protection, that the established power users are located in places where water power generation would not be feasible, and that the land proposed to be irrigated is marginal farm land which is already adequately irrigated. Mr. and Mrs. White further state that Young Creek appears to be lower in the summers presently than it was ten years ago, and that the proposed appropriation could adversely affect the water availability for the four prior water use permits located below the proposed point of diversion. The Whites voiced an additional concern that the proposed diversion would be detrimental to the "ecological balance of Young Creek," and that Young Creek would no longer be a feasible spawning area.

Solo, Inc. filed an objection alleging that the proposed appropriation would adversely affect their prior rights to Young Creek water, which they use for subirrigation.

The Montana Department of Fish, Wildlife, and Parks objected to the Application on the basis that a review of the existing and claimed water rights on Young Creek, and of the availability of water in the creek, indicate that it is doubtful there is sufficient water to fill the proposed appropriation "during most time periods and most years."

Montana Department of Fish, Wildlife, and Parks' objection includes a discussion of the development of Young Creek as a:

spawning and nursery tributary for westslope cutthroat trout residing in Lake Koocanusa to partially mitigate the fishery losses resulting from the Libby Dam project. The Young Creek developments include the construction of a fish trap and barrier dam, the chemical suppression of the resident fish population, the imprint planting of adfluvial (sic) westslope cutthroat trout into the stream, and the removal of log and debris jams which could have blocked the movement of spawning cutthroat trout.

Montana Department of Fish, Wildlife, and Parks suggested that any permit issued should contain conditions restricting the Applicants' appropriation in May and June to times when the Young Creek flow exceeds 25 cfs, and during the rest of the year to times when the flow exceeds 5 cfs. Further suggested conditions include designing the diversion so that juvenile fish will not enter the water system, the installation and monitoring of adequate measuring devices above and below the point of diversion, and the keeping of accurate diversion records by the Applicants.

The Rexford Ranger District of the Kootenai National Forest objected to the Application, alleging that more water had been allocated out of Young Creek as of December 16, 1981 than flows at "low flow during the summer and fall." (April 12, 1982 letter from David Poncin, District Ranger.) The objection stated that Young Creek is one of four key spawning streams for cutthroat and rainbow trout from Lake Koocanusa, and recommended

that no new water rights be granted on Young Creek until the Montana Department of Fish, Wildlife, and Parks is granted their minimum instream flow request.

On February 7, 1984, John Miller revised the Application on behalf of the Applicant. The revised Application requests a reduced flow rate and volume of 753 gpm up to 314 acre-feet per year for irrigation, to be used alternatively (rather than simultaneously) with the requested amount of 1,100 gpm up to 1,774 acre-feet per year for hydropower. Therefore the total requested flow rate on the revised Application is 1,100 gpm, rather than the previously applied-for 2,606 gpm. The total number of acres to be irrigated also was amended downward from 251 to 125 acres, and the period of appropriation for irrigation was amended to April 1 through August 15 of each year. The total volume was amended to 2,088.5 acre-feet per year, including the .50 acre-feet requested for fire protection.

The Water Rights Bureau Field Office notified the Objectors of the revision, and asked them if they felt a contested case hearing still was necessary. Melvin and Ethel White, Solo, Inc., the Kootenai National Forest, and Montana Department of Fish, Wildlife, and Parks requested that a hearing be held.

On July 26, 1984, James F. Rathbun, Forest Supervisor of the Kootenai National Forest, submitted a letter stating that the Kootenai National Forest did not wish to participate at the hearing as an objector, but listing conditions that would be imposed should the Applicant apply to the Forest Service for a special use permit.

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EXHIBITS

The Applicant did not submit any exhibits in support of the Application in this matter.

The Objectors offered six exhibits for admission into the record:

Objectors' Exhibit A is a photocopy of the Statements of Claim for Existing Water Rights (hereafter, "SB76 Claims") which Montana Department of Fish, Wildlife, and Parks has filed claiming Young Creek as the source. The SB76 Claims list the claimed use as "fish and wildlife," and are accompanied by maps.

Objectors' Exhibit B is a copy of a report by Bruce May, entitled "Instream Flow Evaluation for Selected Streams in the Kootenai National Forest of Montana," dated June, 1982.

(Prepared for U.S. Forest Service.)

Objectors' Exhibit C is a series of three photographs taken by Bruce May, showing a barrier dam, bypass channel, and fish trapping facility which are constructed the full width of Young Creek.

Objectors' Exhibit D is a copy of a report by Frederick A. Nelson, entitled "Guidelines for Using the Wetted Perimeter (WETP) Computer Program of the Montana Department of Fish, Wildlife and Parks" (Revised January, 1983).

Objectors' Exhibit E is a copy of a "research project technical completion report" by Christopher L. Randolph and Robert G. White, Montana Cooperative Fishery Research Unit, Biology Department, Montana State University. The report is

entitled "Validity of the Wetted Perimeter Method for
Recommending Instream Flows for Salmonids in Small Streams."
(Montana Water Resources Research Center, April, 1984).

Objectors' Exhibit F is a photocopy of a July 19, 1984
Memorandum to Larry Meshew from Fred Nelson concerning Water
availability in Young Creek.

Objectors' Exhibits A through F were accepted into the
record without objection.

The Department offered two exhibits for admission into the
record.

Department Exhibit 1 is a photocopy of a July 24, 1984
Memorandum by Chuck Brasen which gives an overview of the
claimed water use rights of the Objectors. The Memorandum
includes tables and appendices of DNRC water rights records and
of recorded discharge and use measurements on Young Creek. A
cover note corrects the caption of Table III, line 1.

Department Exhibit 2 is a July 26, 1984 Memorandum by Chuck
Brasen explaining discharge and use volumes shown in the
attached table (Table 4).

Department Exhibits 1 and 2 were accepted into the record
without objection.

The Hearing Examiner, having reviewed the record in this
matter and being fully advised in the premises, does hereby make
the following proposed Findings of Fact, Conclusions of Law and
Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on May 26, 1981, at 4:40 p.m., and was revised on February 7, 1984.

3. The pertinent portions of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on February 25, and March 4 and 11, 1982.

4. The Applicant intends to use the water for irrigation, fire protection, and the production of power, which uses are of benefit to the Applicants. MCA § 85-2-102(2).

5. The Applicant in this matter is the West Kootenai Water Users Association. The Water Users Association has a fluctuating membership, with fifteen members at the time of the original application (see Attachment B, May 26, 1981 Application for Beneficial Water Use Permit No. 39887-s76D), and six members at the time of the hearing (John Miller, Allen Miller, "three Troyers," and Border Lumber. Testimony of John Miller). In addition, Mr. Miller testified that there may be people building in the area who will want water later on. Mr. Miller is the Association's representative in this matter.

6. John Miller, testifying for the Applicant Water Users Association, stated that the proposed point of diversion is on the Doble Ditch, which starts on Forest Service Land. The diversion would be made through an open ditch for about 600 feet, then into a 10" diameter pipe, which would further be reduced to an 8" diameter pipe which would lead to the place of irrigation or power production. Water would then be returned to the creek. Mr. Miller testified that the pipeline would be "winterized."

The May 26, 1981 Application described the diverting works as a 12" gravity flow pipeline reduced to 10", 8", and 6". The February 7, 1984 revised Application describes the diverting works as "single pipe from point of diversion to turbine in Section 15. The water used for irrigation will be piped beyond turbine." John Miller testified that the irrigation would be sprinkler irrigation with handlines.

The revised Application also notes that the proposed power generation is a non-consumptive use, and that the water diverted for this purpose would be discharged at the confluence of Spring Creek and Young Creek. The water would not be used for power production during the irrigation season.

The Applicants' point of return for water diverted for power production is upstream from the Objectors' points of diversion. No evidence or testimony was introduced on what amount of water, if any, would be returned to Young Creek from irrigation runoff.

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Mr. Miller testified that he would be willing to install measuring devices at and below the point of diversion.

7. John Miller testified that the Water Users Association would like to use water April through July for irrigation, and to use it after July if there is water available. He stated that there's usually a "good flow" during this period, although they might not be able to get the full amount by the middle of July.

The May 26, 1981 (original) Application requested an appropriation period of April 1 to September 15 of each year for irrigation. The February 7, 1984 revised Application requests an appropriation period of April 1 to August 15 of each year for irrigation.

8. The May 26, 1981 Application requested 1,506 gpm up to 627.5 acre-feet of water per year for new sprinkler irrigation of 251 acres of land. The requested amount was reduced to 753 gpm up to 314 acre-feet of water per year in the February 7, 1984 revision. At the time of revision, the acreage of land to which the water is to be applied was cut in half to 125 acres. The revised Application did not specify whether the acreage of each member of the Water Users Association would be cut in half, or whether certain acreages would be eliminated in total. However, the acreages listed for Allan Miller, John Miller, Border Lumber, and four Troyers totals 122 acres. (See Attachment B to the original May 26, 1981 Application.) Nothing in the revised Application or in Mr. Miller's testimony specifies the location of the revised acreage.

9. John Miller testified that the West Kootenai Water Users Association needs water for fire protection. He stated that the members presently have a temporary line out of the irrigation ditch, but that they want to replace this with a system of fire hydrants for everyone, with water and ready pressure available at all times in case of emergency. Lines would be run off the main diversion pipeline to hydrants in each yard. The lines would be winterized so that water will be available year-round.

In response to a question as to whether the people who had "pulled out" of the Water Users Association had also pulled out of the fire protection plan, Mr. Miller stated that he does not believe that anyone would be withdrawing from the fire protection plan.

10. John Miller testified that there is a heavy flow in Young Creek for three to four months a year, when the applied-for appropriation wouldn't affect anyone. He testified that, based on his experience, he would estimate the flow of Young Creek to be about 10 cfs below the irrigation diversions at the time of the hearing (July, 1984). He stated that they would be willing to "shut down" when the creek gets to a low level.

When questioned about the Applicants' plans for diverting water during the low flow months in the winter, Mr. Miller stated that the approximately one-mile long section of Young Creek between the proposed point of diversion and the proposed

place of use is in an area of slow, deep water, that probably wouldn't be affected. He stated that the fish seem to congregate in the deeper pools, especially in the wintertime.

11. Mr. Miller further testified that the power which would be generated by the proposed project is not for the use of the Applicants, but that he has not made arrangements to sell it to Lincoln Electric or to private consumers. He did not offer any engineering or efficiency studies on the project, and testified that no work had been done on plan designs and specifications.

Mr. Miller stated that he has obtained written permission to go through the state land, and that he talked to someone at the Forest Service who did not seem to feel that any type of special use permit would be needed. He stated that he had not checked out what other permits might be needed.

12. Objector Melvin White testified that the creek sometimes is exceptionally low; down to a flow he estimated to be "not more than 5 cfs" in the last week of July, 1984.

Mr. White testified that the creek widens and flattens out below Mr. Miller's property, and becomes very shallow west of the White property and down to the fish trap.

Mr. White stated that he only uses Young Creek water for lawn and garden irrigation, and that he does not feel he would be affected by the proposed project. He testified that his concern is for Young Creek as a fishery, since money was put into making the creek a habitat for cutthroat trout and into studies and tagging by biologists, making Young Creek into a blue-ribbon trout stream.

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13. Objector Lucille Soderstrom testified that she and her husband are the last water users on Young Creek above the Fish and Game barrier dam. She stated that they seem to be getting less water than they used to.

Mrs. Soderstrom testified that from mid-July on, Young Creek is down "really low," requiring them to dig down to lower their irrigation pipe diversion. She stated that their main concern with the proposed project, however, is the effect it might have on the fish.

The Soderstroms have a Beneficial Water Use Permit (No. 22225-s76D), granted in 1979, which is conditioned upon the Soderstroms diverting water only when the flow of Young Creek is greater than 5 cfs.

14. Objector Douglas Truman testified that he and his wife are located "third from the bottom" of the stream. He stated that his diversion is made by means of a dry well: he has dug two feet below the level of the creek, rip-rapped the opening with large rocks, and the water filters through into a dry well and is piped from there. He stated that the system was designed by the Soil Conservation Service.

Mr. Truman testified that his irrigation probably would not be affected during high water, which occurs in May, June, and once in a while in July, but that he would not get enough head and pressure to operate his system if the flow in Young Creek falls below 5 cubic feet per second.

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15. Fred Sturdevant, testifying for Objector Solo, Inc., stated that Solo has claimed existing use rights for 1.5 cfs, for irrigation, through the adjudication process. He stated that the Objector does not have an actual diversion structure, but uses Young Creek water and water from a creek on the other side of its field to subirrigate the field. Mr. Sturdevant testified that they don't know exactly where the water comes from or where it goes, but that they are affected when Young Creek is low, and that the proposed project could dry them up.

16. Robert Lane, counsel for the Montana Department of Fish, Wildlife, and Parks, stated that his department's position as an Objector is based on the need to protect the instream flow right which is necessary to protect mitigation measures taken to counter the effects of the Libby Dam. It is MDFWP's position that an instream flow of 5 cfs is needed between July 1 and April 30, and of 25 cfs between May 1 and June 30, to "successfully pass upstream migrating cutthroat trout to their spawning areas and to maintain adequate spawning and nursery habitat." (Objection submitted by FWP.)

Mr. Lane stated that over \$200,000 has been spent to develop Young Creek as a habitat for westslope cutthroat trout through such measures as the construction of a barrier dam and fish trap near the mouth of Young Creek, removal of other species by chemical means, removal of logs and debris from the creek, and imprint planting. Mr. Lane stated that these measures were taken as a cooperative effort by the U.S. Army Corp of engineers, the U.S. Forest Service, and MDFWP.

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17. Mr. Lane stated that FWP takes the position that an agency which has instream uses can have an instream right even without an actual diversion, but that, if there is a diversion requirement for an agency which administers fish and wildlife, the diversion structure present in Young Creek is equivalent to a "run of the river" hydropower diversion; that is, it qualifies under any reasonable interpretation of what constitutes a diversion.

Mr. Lane additionally stated that in this case, the federal involvement in the attempts to mitigate the harm caused by a federal action (Libby Dam, authorized by Congress), has created a federal right which should be recognized.

The Montana Department of Fish, Wildlife, and Parks submitted a post-hearing brief in this matter, entitled "Memorandum on Legal Foundation of Instream Flow Right of DFWP" (received by the Department on October 31, 1984). The brief argues that an instream flow use for fisheries is a "legally cognizable use right," and that the public trust doctrine should be applied to Montana's water use permit process when required to protect such uses.

18. Bruce May, fisheries biologist for FWP, testified that he has worked on Libby Dam studies from 1969 to 1983, and helped prepare FWP's Statements of Claim for Existing Water Rights on Young Creek. He stated that United States agencies worked together in the early 1960's to address the issue of mitigation of effects at Libby Dam. A 1965 report suggested barrier dams and fish-sorting facilities on tributary streams as mitigatory

measures, and in 1967 and 1968, fishery population studies were made to determine which streams would be suitable for spawning enhancement. Young Creek was one of the streams selected.

In 1968, a more specific plan was drawn up for developing Young Creek as a spawning site, and a timetable was set up. In 1969, the Army Corps of Engineers built a barrier dam and installed concrete structures. In 1970 MDFWP personnel, working under contract with the Corps, installed fish traps and screens and a trough (fish-holding facility), removed logs, chemically removed the resident fish population, and stocked Young Creek with westslope cutthroat trout. (Testimony of Bruce May, Objectors' Exhibit B, p. 73.)

19. Bruce May testified that westslope cutthroat trout were chosen for stocking because at the time (1970) it was a threatened species, and because FWP had already had good success with the species in Hungry Horse Reservoir, which is similar to Lake Koochanusa as a fisheries environment.

Cutthroat trout adults go up tributaries to spawn when they are four to six years old, then return to the reservoir or lake. The fry (young fish) live in the tributary for two or three years, until they are large enough to compete, then migrate to the reservoir. When they are mature they return to their natal stream ("imprint" stream) to spawn.

Mr. May testified that Young Creek is one of the three most important spawning and nursery tributaries for the cutthroat trout population in Lake Koochanusa, and is the only tributary which is maintaining stock integrity.

20. Mr. May testified that MDFWP's requested instream flow figures were developed through applying the wetted perimeter method to Young Creek. Put simplistically, the wetted perimeter method involves taking cross-sections of riffle areas, that is, shallow areas of the stream where the water flow is broken down into velocities of one to two feet per second, and determining what quantity of water is needed to maintain a required depth over the riffle area. The riffle areas are used as a gage because the trout's main food source, aquatic insects, is mainly produced in riffle areas: "the wetted perimeter/inflection point method assumes that a stream's trout carrying capacity is proportional to its food production area, which is in turn proportional to the riffle wetted perimeter...." (Objectors' Exhibit E, page 11.)

Mr. May testified that reductions in the flow in Young Creek do not cause much "riffle" loss until the flow is reduced to 7 cfs. Between 7 and 3 cfs, the riffle area drops significantly, and it drops even faster if the flow is lower than 3 cfs. (See Objectors' Exhibit B, page 75, figure 16.) Mr. May stated that 7 cfs would maintain aquatic productivity near its maximum level, and that 3 cfs would dewater large parts of the riffle area and constitutes a "minimum maintenance" level; the 5 cfs figure which FWP is requesting is based on professional judgment and had previously been used as the basis of FWP objections to water use applications.

Mr. May stated that winter is a critical time for fish survival, and the period of highest mortality for juvenile fish due to anchor ice forming on the bottom of the stream and reducing the open water, to frazzle ice which moves through the water and clogs fish gills, and to ice jams. Mr. May stated that reducing flows below 5 cfs in the winter would aggravate these problems, and adversely affect the fish population.

21. Bruce May further testified that the area of Young Creek below the Applicant's proposed point of diversion is critical spawning habitat. Spawning and egg-laying occur mid-May to mid-June, and hatching takes place about a month later. The eggs incubate until the end of July, then the fry or albions (yolk-sac fry) stay in the gravel for approximately another two weeks.

Mr. May stated that the 25 cfs flow which FWP has requested for the period of May 1 to June 30 was arrived at by determining how much flow is necessary to achieve a sufficient depth at the riffle areas for trout to be able to migrate to and from the spawning areas. The approximate minimum depth required to ensure fish passage of 14 inch to 16 inch cutthroat trout is six inches of water, based on a Colorado study. (Testimony of Bruce May; Objectors' Exhibit B, page 76.)

Mr. May also noted that there is a severe impact on the survival rate of eggs and fry if the flow rate drops below 5 cfs. He testified that the 5 cfs and 25 cfs flow amounts were based on habitat needs to support the present population and maintain the same population level. He also stated that a

screening device was needed on any diversion which the Applicant might make, in order to keep young fish out of the irrigation system.

22. Fredrick A. Nelson, fisheries biologist for MDFWP, discussed use and accuracy of the wetted perimeter method for measuring instream flows. (See Objectors' Exhibits D and E.) He testified that studies have shown that the wetted perimeter method is accurate and doesn't overstate instream flow needs.

Mr. Nelson stated that a flow of 7 cfs in Young Creek would provide good protection for the fishery, while 5 cfs would provide adequate protection. He stated that the instream flow was important during the winter as well as the spawning season because of natural low flows and harsh conditions from November through March.

In response to a question concerning Young Creek's value as a fishing area, Mr. Nelson stated that the creek probably is a "class 1" stream.

23. Larry Meshew, forest hydrologist for Kootenai National Forest since 1980, testified on behalf of MDFWP. (The U.S. Forest Service filed an objection in this matter, but did not participate at the hearing as an Objector. See Statement of the Case.)

Mr. Meshew discussed the flow of Young Creek as based on the United States Geologic Survey gaging reports for 1973-1975. (See Objectors' Exhibit F, and Chuck Brasen's December 22, 1983 Preliminary Water Availability Review.) The USGS measurements were taken approximately 600 feet upstream from the mouth of Young Creek.

Mr. Meshew noted that, statistically, three years of flow data is not enough on which to base any premises of long-range water availability. He further noted that in the three years of record, flows in Young Creek were insufficient to meet permit, claim, and instream flow needs in six months of 1973 and in four months of 1975.

24. John W. Lloyd, Fisheries Biologist for the Kootenai National Forest, appeared at the hearing as an interested party. He stated that his concern with the Applicant's proposed project is based on potential adverse effects to the fishery resource caused by possible dewatering, fish being sucked into the intake or swimming up the outlet, sedimentation from construction, operation difficulties, or blow-out of the pipe from pressure buildup.

25. Chuck Brasen, Field Manager for the Water Rights Bureau Kalispell Field Office, stated that the described purpose of FWP's fish trap and barrier dam on Young Creek appears to be the trapping and sorting of fish, not the diversion of water. He stated that FWP's SB76 Claim is based on an agreement with the federal government concerning the replacement of lost aquatic habitat, rather than on a "use." Mr. Brasen noted that FWP had not been granted any right in the Temporary Preliminary Decree which the Water Court has issued in the adjudication of this basin, and that no SB76 Claim had been submitted by the U.S. Forest Service.

Mr. Brasen testified that some Beneficial Water Use Permits have been issued with an instream flow condition requiring that a minimum flow of 5 cfs remain in Young Creek, and that the Applicant in this matter had agreed to such a condition, but that present Department policy will not allow a condition which is based on an unquantified federal reserved water right.¹ (See Department Exhibit 1.)

26. Mr. Brasen compiled all known recorded discharge measurements of Young Creek, including the 1973-1975 USGS gaging station measurements, miscellaneous measurements, and measurements taken in 1982 and 1983 "to enable the USGS to compare predicted stream flow characteristics with measured discharge." (Department Exhibit 1, page 2.)

Based on these measurements, the lowest recorded flow for the month of January is 6.23 cfs; February, 5.74 cfs; March, 6.7 cfs; April, 9.3 cfs; May, 38.7 cfs; June, 20.2 cfs; July, 7.4 cfs; August, 5.2 cfs; September, 4.7 cfs; October, 5.7 cfs; November, 6.11 cfs; and December, 7.73 cfs.

The USGS's predicted mean monthly discharge for Young Creek is 5.3 cfs for January, 5.5 cfs in February, 7.1 cfs in March, 22.1 cfs in April, 48.4 cfs in May, 41.7 cfs in June, 17.4 cfs in July, 6.8 cfs in August, 6.4 cfs in September, 6.7 cfs in October, 6.6 cfs in November, and 6.4 cfs in December. (Department Exhibit 1, Table 1.)

¹ The Permits which were granted bearing the 5 cfs flowby condition were issued prior to the commencement of the adjudication process.

If MDFWP's claimed instream flow rights and Objector Solo, Inc.'s subirrigation rights are not taken into account, there are SB76 Claim rights and Permits which total to the following amounts of flow from Young Creek: 2.492 cfs in January, 2.492 cfs in February, 2.492 cfs in March, 7.718 cfs in April, 8.088 cfs in May, 8.088 cfs in June, 8.088 cfs in July, 8.088 cfs in August, 8.928 cfs in September, 7.718 cfs in October, 3.422 cfs in November, and 2.492 cfs in December. (Department Exhibit 1, Table II.)

Based on the low flow figures, the flow available for appropriation ranges from a high of 32.222 cfs in May to a low of -1.778 in September. Based on USGS's predicted flows, water availability ranges from a high of 35.222 cfs in June to a low of -0.078 in September. (Department Exhibit 1, Table III.)

27. The Applicants propose to irrigate from April 1 to August 15, at a rate of 753 gallons per minute (1.678 cfs) up to 314 acre-feet per year. The available flow data indicates that, based on the lowest recorded monthly mean flows, this amount would be available April, May, and June, not taking into account any flow amount for claimed instream flow rights. Using the USGS predicted mean, the 1.678 cfs flow would be available April through July, but not in August. (See Finding of Fact 26; July 24, 1984 Memorandum by Chuck Brasen, Table III.)

If the 5 cfs instream flow amount which previously was imposed on some Young Creek Permits is taken into account, the applied-for irrigation amount would be available in May and June only, under the lowest recorded monthly mean flows, and in April through July under the figures of USGS's predicted monthly mean.

28. During the September through March time period during which the Applicants propose to divert water for hydropower, the flow data indicates that the flow in Young Creek is much lower than during the irrigation season. Taking the total decreed and permit water rights into account, the total 1,100 gpm (2.45 cfs) which the Applicant is requesting would be available November through March under both the lowest recorded monthly mean flows and the USGS predicted monthly means. (See Brasen report, Table III.)

If FWP's claimed instream flow right is taken into account, the full amount of Applicants' proposed diversion for hydropower would be available only in December under the lowest recorded monthly mean flows, and not ever during the year under the USGS predicted monthly mean discharge. (Table III, supra.) With the 5 cfs instream flow accounted for, flows which would be available over and above decreed and Permit rights are 1.188 cfs (lowest recorded monthly mean for January) / .28 cfs (USGS predicted mean flow for January); .698 cfs / .458 cfs in February; 1.658 cfs / 2.058 in March; (irrigation uses April through August, no flow available in September, and less than .5 cfs in October even if instream uses are discounted); .138 cfs / .628 cfs in November; and 2.688 cfs / 1.358 cfs in December.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CASE # 39887

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto.
2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.
3. The Department must issue a permit if the Applicant proves by substantial credible evidence that:
 - (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
 - (b) the water rights of a prior appropriator will not be adversely affected;
 - (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
 - (d) the proposed use of water is a beneficial use;
 - (e) 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.
4. The irrigation, power generation, and fire protection uses proposed by the Applicant are beneficial uses of water.
MCA § 85-2-102(2).
5. The proposed means of diversion, construction, and operation of the appropriation works for fire protection are adequate. See Finding of Fact 9.

6. No specific Permit amount needs to be granted for use of water for fire protection. An emergency situation, such as a fire, clearly enables an appropriator to make a temporary appropriation above and beyond his Permit amount. Administrative Rule of Montana 36.12.105 states:

- (1) A temporary emergency appropriation may be made without prior approval from the department, but the use must cease immediately when the water is no longer required to meet the emergency....
- (3) The appropriator shall within 10 days of the day he begins a temporary emergency appropriation, file with the Department notification...of the use, to which the water was put, the dates of use, the amount of water used, and such other information as the department may require.

The Water Users Association's proposal to have water readily available in case of a fire does not rise to the level of a consumptive use. The Water Users are entitled to make an initial diversion of water into the lines serving the fire hydrants, in order to have pressure available, but any further diversions for fire protection must be made only in emergency situations. In the absence of an ongoing emergency situation, there is no reason to grant the Applicants the right to appropriate a yearly volume on a permanent basis.

7. The Applicants in this matter did not provide substantial credible evidence showing that the proposed means of diversion, construction and operation of the appropriation works for the hydropower portion of the Application are adequate.

The Applicants' testimony on the subject of the proposed hydropower portion of the project consisted of little more than a general assertion that they thought they might as well make some money by hydropower since they were going to the expense of putting in the pipeline for irrigation and fire protection.

(Testimony of John Miller.) Mr. Miller stated that the water from the hydropower project would be put back into the creek "close to the Miller place," and that the creek in between the point of diversion and place of return (about 1 mile) was generally slow, deep water that probably wouldn't be affected.

The only additional information in the record is a letter received at the Kalispell Field Office on August 22, 1981, from John Miller. The letter states that Freeman Troyer plans to install a locker plant and would like to run it with water power. "This would be done by having the turbine water wheel turning the refridgerator (sic) compressor directly, instead of runing (sic) a generator then run the compressor with electricity."

The information contained in the letter suggests that the Applicants are considering running water through the pipeline to a point where it would engage a turbine. However, there is no information in the record which indicates that any specific plans have been made for the hydropower portion of the Application in this matter. Indeed, Mr. Miller testified at the hearing that no work had been done on plans, designs, or specifications for the hydropower works, nor had he checked on what types of authorization might be needed from federal, state, and county agencies. (See Finding of Fact 11.)

8. The Department recognizes that an applicant may not wish to incur the expense of engineering designs, feasibility studies, and other costly advance planning without some assurance, in the form of a water use permit, that he will be able to proceed with the project. However, the Department is required to make a finding that the applicant has proved by substantial, credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate before it can issue a permit to the Applicant. MCA § 85-2-311(b). It is not possible to make such a finding if the Applicant cannot give any specific information.

In the present case, there is no testimony or documentation which shows anything specific about the proposed hydropower use. Presumably the water would be diverted through the pipeline and the graduated pipe size and slope of the pipe could create sufficient head to run a turbine. However, this is not specifically stated in the record; there is a paucity of any kind of evidence as to exactly how the Applicants intend to convert water into power, how the water will be returned to the stream, and if the proposed hydropower use is nonconsumptive or actually will result in some loss of water or a delay in the return of the water to the stream.

In example, the Applicants have not given any evidence to show whether the means of producing energy will consist of an enclosed turbine or an open water wheel (which would result in an undetermined amount of loss through evaporation), whether the water would be returned to Young Creek by pipe or by open ditch (which would result in ditch losses), and whether or not the

re-entry of the water into Young Creek can be done in a manner which will minimize turbulence and erosion. There is no information concerning the potential of a water surge ("hammer") within the Applicants' diversion system, nor concerning possible aeration, nitrogenation, or heat gain in Young Creek due to the hydropower system. There also is no evidence to explain the multiple places of use listed on the Application for power generation.

Without at least some of this information it is not only impossible to make a finding that there is substantial credible evidence proving the proposed means of diversion, construction, and operation are adequate, it is difficult to determine whether or not the water rights of a prior appropriator will be adversely affected, by undue water loss through the hydropower operation or by excessive sedimentation caused by turbulence and erosion, for example.

9. Objector Solo, Inc. has filed an SB76 Claim for subirrigation. Although the ongoing adjudication may result in the decree of a water right to Solo, Solo does not have a right to demand continued use of the water by this means of diversion. (See, e.g., In the Matter of the Application for Change of Appropriation Water Right Nos. 36294-c41A through 36301-c41A by Beaverhead Partnership, Proposal for Decision, February 11, 1985; In the Matter of the Application for Beneficial Water Use Permit No. 18845-s76LJ and No. 18846-s76LJ by Everett G. and Anna C. Orem, Proposal for Decision, August 8, 1984). Therefore, even if Solo, Inc.'s claimed subirrigation right might be affected by the Applicants' proposed appropriation, (see Finding of Fact 15),

Solo does not have the legal right to demand continued availability of any specific amount of flow, and therefore it does not have a defensible right which could bar the proposed appropriation.²

10. The proposed means of diversion, construction, and operation of the appropriation works for irrigation are adequate, see Finding of Fact 6, but the Applicants must install adequate screening on the diversion to prevent fish and fry from entering the Applicants' system. See Findings of Fact 21, 24.

11. In order to prevent adverse affect to prior appropriators, the Applicants must leave 5 cfs in Young Creek during the period of April 15 through November 15, over and above the actual flow required by the downstream prior appropriations.

Objectors Lloyd and Lucille Soderstrom are located downstream from the Applicants' proposed point of diversion. The Soderstroms' Provisional Permit, which has a priority date of March 6, 1979, is expressly subject to a Permit condition that "the waters appropriated pursuant to this Permit shall only be appropriated when the flow of Young Creek is greater than 5 cubic feet per second." (Provisional Permit No. 22225-s76D.)

In order for the Soderstroms to be able to make their appropriation, there must be a flow of more than 5 cfs in Young Creek. If the Applicants were allowed to divert water when the

² The Department's records indicate that Solo, Inc. also has filed an SB76 Claim for stockwater. However, the claimed flow rate is only 6.38 gpm.

flow in Young Creek falls close to or below 5 cfs during the Soderstroms' April 15 to October 15 appropriation period, the Soderstroms would be legally foreclosed from making their appropriation, and thereby would be adversely affected.

In addition, Objector Douglas Truman, a prior appropriator located downstream from the Applicants' proposed point of diversion and point of return flow, testified that he needs a minimum of 5 cfs in order to have sufficient head and pressure to operate his irrigation system. (See Finding of Fact 14.) Mr. Truman's period of appropriation is April 15 to November 15 of each year.

12. The Montana Department of Fish, Wildlife, and Parks filed claims for instream flows in Young Creek in the ongoing adjudication process. These claims were not recognized as valid by the Water Court in the Temporary Preliminary Decree in the basin. However, a claim of existing right constitutes prima facie proof of its content until the issuance of a final decree. See MCA § 85-2-227 (1985), In the Matter of the Application for Beneficial Water Use Permit No. 28306-s41D by Ken Campbell, Proposal for Decision, August 25, 1985.

In the present matter, the FWP claims on Young Creek were not questioned nor rebutted by the Applicants or any other party to the Department proceeding. Rather, testimony indicated that the parties support, and are concerned about, FWP's maintenance of Young Creek as a fishery. Through testimony and documentation, FWP established that Young Creek has been, and is being, used as a fishery to mitigate the loss of fish habitat which resulted from the federal dam project which created Lake Koocanusa.

The Water Court's disposition of Fish, Wildlife, and Parks' claimed instream flow rights has been challenged, and the status of the claimed rights presently is in court.³ In the interim before a decision is made on these rights, the Department should not grant the Applicants a water right which would likely cause irreparable harm to Fish, Wildlife, and Parks' claimed rights on Young Creek.

This is not a situation where infringement upon another's water use will cause only temporary inconvenience or, at the most, some economic damage due to crop loss. In the present matter, it is conceivable that diversions by the Applicants, if unconstrained by flowby requirements, could have severe effects on spawning in Young Creek, thereby threatening the stability of the Creek's cutthroat trout population and endangering federal and state efforts to develop and maintain Young Creek as a valuable fishery resource..

Maintaining the present status quo of Young Creek until the status of Fish, Wildlife, and Parks' claimed rights is determined will not place an undue burden on the Applicants in this case. The available flow data indicates that the Applicants should always be able to divert the full amount of their proposed appropriation in May, even during low flow years. According to

³ On July 17, 1985, the Montana Department of Fish, Wildlife, and Parks filed a Petition for Writ of Supervisory Control, asking the Montana Supreme Court to exercise supervisory control over the Water Court. Count VI of the complaint, "Improper Denial of Department's Instream Claims," cites the denial of FWP's claimed instream rights on Young Creek. (July 17, 1985 Petition for Writ of Supervisory Control, pp. 19-20.)

the USGS mean monthly predicted discharges, the full appropriation amount should also be available in June of most years. The only time that the Applicants may not be able to divert is during June of low flow years.

Apart from the higher instream flows claimed by FWP in May and June to meet spawning needs, the 5 cfs flowby requirement already imposed upon the Applicants will serve to meet FWP's claimed 5 cfs instream flow for the remaining period of the Applicants' proposed irrigation diversion.

If Fish, Wildlife, and Parks' claimed instream flow rights are determined not to be valid, any condition imposed on the Applicants to protect those rights pending the determination will be void. Under such a circumstance, the Applicants will be subject only to such flowby requirements as may be needed to protect the rights of other appropriators.

13. The water rights of a prior appropriator will not be adversely affected by the Applicants' proposed appropriation since the appropriate permit conditions will protect such rights.

14. 314 acre-feet is a reasonable amount of water for the sprinkler irrigation of 125 acres of land. (See the Irrigation Guide for Montana, 1973, USGS.) However, the Applicants must submit evidence to the Department of the exact legal location of the acres which will be irrigated. (See Finding of Fact 8.)

Therefore, based upon the foregoing proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

CASE # 39887

PROPOSED ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 39887-s76D by West Kootenai Water Users Association hereby is granted in part and denied in part.

That portion of Application for Beneficial Water Use Permit No. 39887-s76D which requests 1,100 gpm up to 1,774.00 acre-feet per year for power generation is denied. That portion of Application No. 39887-s76D which requests .50 acre-feet per year for fire protection is denied, except that the Applicant may make a one-time appropriation for this purpose, in order to charge the lines to their fire hydrants.

Application for Beneficial Water Use Permit No. 39887-s76D hereby is granted to the West Kootenai Water Users Association to appropriate 753 gpm up to 314 acre-feet of water per year from Young Creek for new sprinkler irrigation of 125 acres located in portions of Sections 10, 11, 14, and 15, all in Township 37 North, Range 28 West, Lincoln County, Montana. The water will be diverted by means of a pipeline at a point located in the SE¼NE¼SE¼ of Section 17, Township 37 North, Range 28 West, Lincoln County, Montana, and gravity-fed to the Permittees' places of use.

The period of appropriation is April 1 to August 15, inclusive, of each year. The priority date for this Permit shall be 4:40 p.m., May 26, 1981.

CASE # 39887

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

- A. No Permit will be issued in this matter until the Applicants submit information to the Department sufficient to establish the legal descriptions of the places of use, and the acreages thereof, included in the 125 acres for which the Permittees have applied. The places of use must fall within the legals given for the places of use on the Applicants' original Application for Beneficial Water Use Permit No. 39887-s76D.
- B. The Permittees shall install staff gages or other adequate measuring devices at and just below the point of diversion to ensure that flowby requirements are met. The Permittees shall install a flow meter or other suitable measuring device in the pipeline so that diversions can be recorded, and shall keep a written record of the flow rates, volumes, and periods of diversion of all waters diverted pursuant to this Permit and of the flow of Young Creek during the times of diversion.
- C. Until such time as a final determination may be made that the Montana Department of Fish, Wildlife, and Parks' claimed instream flow rights in Young Creek are not valid, the Permittees shall cease diverting water pursuant to this Permit whenever the flow of Young Creek is 25 cfs or less

between May 1 and June 30 of any year. The Permittees shall cease diverting water in any instance whenever the flow of Young Creek is 5 cfs or less.

By imposing this Permit Condition, the Department of Natural Resources and Conservation does not purport to quantify the water rights, if any, which the Department of Fish, Wildlife, and Parks may have on Young Creek.

- D. The Permittees shall use a screen on their diversion works which is of a sufficiently small mesh size to prevent the entry of fish and their offspring into the diversion system.
- E. The water rights evidenced by this Permit are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.
- F. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this Permit. Nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

G. The Permittees shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of the quantity reasonably required for the purposes provided for herein.

DONE this 13th day of February, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due

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consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

CASE # 39887

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on February 14, 1986, she deposited in the United States First Class mail, postage prepaid, a PROPOSAL FOR DECISION, an order by the Department on the Application by KOOTENAI WATER USERS ASSOCIATION, Application No. 39887-s76D, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. West Kootenai Water Users Association, c/o John Miller, President, Star Route, Rexford, Montana 59917
2. Douglas F. & Stella R. Truman, 265 N.W. Kootenai Road, Rexford, Montana 59917
3. Solo, Inc., 581 West Kootenai, Rexford, Montana 59917
4. Solo, Inc., Thomas R. Bosrock, Douglas & Bosrock, P.O. Box 795, Libby, Montana 59923
5. Lloyd M. & Lucille Soderstrom, 360 West Kootenai Road, Rexford, Montana 59917
6. Melvin L. & Ethel A. White, 380 N.W. Kootenai Road, Rexford, Montana 59917
7. Montana Department of Fish, Wildlife and Parks, Fred Nelson, 8695 Huffine Lane., Bozeman, Montana 59715
8. Kootenai National Forest, Rexford Ranger District, Attn: David E. Poncin, Box 666, Eureka, Montana 59917
9. Montana Department of Fish, Wildlife and Parks, Stan Bradshaw, Attorney, 1420 East 6th Avenue, Helena, Montana 59620
10. Kootenai National Forest, Larry Meshaw, P.O. Box AS, Libby, Montana 59923
11. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, Montana (inter-departmental mail)
12. Gary Fritz, Administrator, Water Resources Division, DNRC (hand deliver)
13. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

CASE # 39887

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 14th day of February, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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