

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. 50510-s76L BY CHARLES C. AND)
CATHERINE J. MEYER)

* * * * *

The period for filing exceptions, objections or comments to the Proposal for Decision (hereafter, "Proposal") has expired. One timely submission was received from Chuck Brasen of the Kalispell Field Office of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC").

After having given the matter full consideration and being fully advised in the premises, the Department hereby, with the modification specifically discussed below, accepts and adopts the Finding of Facts and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of September 3, 1986 as its Final Order in the above-captioned matter and expressly incorporates the Proposal herein by reference.

Department Response to Comments of Chuck Brasen:

Mr. Brasen suggests that "Condition E" as stated in the proposed order be changed to the standard "IK" condition, utilized in Permits granted for appropriations situated on the Flathead Indian Reservation, in order to more accurately reflect the position of the Confederate Salish and Kootenai Tribes in the matter. The Department agrees.

Therefore, Condition E, page 17, of the September 3, 1986

Proposal for Decision is hereby modified to read:

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This Permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated.

Notice: This is to inform you, the Permittee, that the Confederated Salish and Kootenai Tribes of the Flathead Reservation claim prior reserved water rights and it is their position that economic investment, made in reliance upon this Permit, does not create in the Permittee any equity or vested right against the Tribes.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law as modified hereby and incorporated herein, the Department makes the following:

ORDER

That portion of Application for Beneficial Water Use Permit No. 50510-s76L seeking 25 gpm up to 40 acre-feet per year for a fish pond is hereby denied.

Subject to the terms, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 50510-s76L by Charles C. and Catherine J. Meyer is hereby granted to appropriate 5.00 gpm up to 1.00 acre-foot per year between April 15 and October 15, inclusive, of each year for domestic lawn and garden use in the SE¼NW¼NE¼SW¼ of Section 21, Township 21 North, Range 19 West, Lake County, Montana; and to appropriate 5.00 gpm up to .27 acre-feet between January 1 and December 31, inclusive, of each year for stock use in the SE¼NW¼NE¼SW¼ of Section 21, Township 21 North, Range 19 West, Lake County, Montana; and to appropriate 75.00 gpm up to 15.75 acre-feet per

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year between April 15 and October 15 for sprinkler irrigation of 7.5 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana. The source is North Crow Creek. The point of diversion is NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ in Section 21, Township 21 North, Range 19 West, Lake County, Montana. The means of diversion is a headgate with pipeline. The place of storage is a reservoir of 0.22 acre-foot capacity located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana. The priority date is March 11, 1982 at 1:30 p.m.

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

A. Any rights evidenced herein 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 the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this permit.

D. The Permittee shall proceed with reasonable diligence in completing the appropriation provided for herein by actually applying the water provided for herein to the named beneficial use.

E. This Permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein permitted to be appropriated.

Notice: This is to inform you, the Permittee, that the Confederated Salish and Kootenai Tribes of the Flathead Reservation claim prior reserved water rights and it is their position that economic investment, made in reliance upon this Permit, does not create in the Permittee any equity or vested right against the Tribes.

F. This Permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water so diverted, including the time and dates water is diverted, and shall provide said records to the Department upon request.

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 3 day of December, 1986.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

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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 December 22, 1986, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on the Application by Charles and Catherine Meyer, Application No. 50510-s76L, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Charles C. and Catherine J. Meyer, Rt. 1, Box 48B, Ronan, MT 59864
2. Richard and Beverly Linse, Rt. 1, Box 39, Ronan, MT 59864
3. Catherine W. Schmitz, 3043 Humble Dr., Missoula, MT 59801
4. Phillip A. Schmitz, Rt. 1, Box 40B, Ronan, MT 59864
5. Florence E. Schmitz, Rt. 1, Box 40, Ronan, MT 59864
6. Aaron M. Palmer Estate, c/o Helen L. Cole, Trustee, Rt. 2, Box 73, Ronan, MT 59864
7. Aaron M. Palmer Estate, c/o Helen L. Cole, Trustee, 1710 Defoe, Missoula, MT 59802
8. Clayton Matt, Water Administrator, Confederated Salish and Kootenai Tribes, Box 278, Pablo, MT 59855
9. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
10. Gary Fritz, Administrator, Water Resources Division, DNRC (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

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

On this 22nd day of December, 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.

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

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Bob

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. 50510-s76L BY CHARLES C. AND)
CATHERINE J. MEYER)

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985), and the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1985), a hearing in the above-entitled matter was held on March 21, 1986, in Polson, Montana.

Appearances

Charles C. Meyer appeared pro se.

Objector Aaron M. Palmer Estate appeared through Helen L. Cole and Laura G. Cook, trustees for the estate.

Objector Richard Linse appeared pro se.

Objector Phillip A. Schmitz appeared pro se.

Objector Florence E. Schmitz appeared pro se.

Charles F. Brasen, Field Manager, and Jim Rehbein, both of the Kalispell Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "DNRC" or "Department"), appeared as DNRC staff expert witnesses.

Objectors Confederated Salish and Kootenai Tribes, Arvin M. and Edna F. Kleppen, Charles S. Jennison, Flathead Irrigation and Power Project, and Catherine W. Schultz did not appear at the hearing either in person or through representation.

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Statement of the Case

Applicant seeks a permit to appropriate water from North Crow Creek, a tributary of Crow Creek, for domestic lawn and garden use, stock, sprinkler irrigation use, and for a fish pond.

Objector Aaron M. Palmer Estate alleges in its written objection that no unappropriated water exists in North Crow Creek.

Objectors Phillip Schmitz, Florence Schmitz, and Richard Linse allege that the point of diversion requested is not really on North Crow Creek but rather upon a man-made waterway created by an "illegal" diversion of North Crow Creek; said Objectors further allege any state sanctioned use of water diverted from points on the waterway will adversely affect their water rights by creating a situation that will lead to conflict over the respective amounts of water which should flow in the main channel versus the waterway.

Exhibits

The Applicant submitted one exhibit in support of the Application.

Applicants' Exhibit 1 is a photocopy of a hand-drawn map of the area of the proposed diversion.

Applicants' Exhibit 1 was admitted with the stipulation that the mere labeling of a waterway thereon as the south branch of North Crow Creek does not establish as fact that said waterway is a branch of North Crow Creek.

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Objector Phillip Schmitz submitted three exhibits in support of his objection.

Objector Schmitz Exhibit 1 is a photocopy of a letter purportedly written by Catherine W. Schmitz addressed to Mr. Linse and Mr. Phillip Schmitz, dated February 13, 1986.

Objector Schmitz Exhibit 1 was admitted without objection.

Objector Schmitz Exhibit 2 is a photocopy of a Water Resource Survey Map of Township 21 North, Range 19 West, Lake County, Montana.

Objector Schmitz Exhibit 2 was admitted without objection.

Objector Schmitz Exhibit 3 is a photograph taken about March 19, 1986 by Phillip Schmitz looking downstream on North Crow Creek, purportedly showing a point of divergence in North Crow Creek.

Objector Schmitz Exhibit 3 was admitted without objection.

The Department submitted four exhibits for the record.

Department Exhibit 1 is a photocopy of a 1964 USGS quad topographic map marked to show the places of use of Objectors and proposed by Applicant.

Department Exhibit 1 was admitted without objection.

Department Exhibit 2 is a photocopy of a plat map obtained from Lake County Surveyors Office showing land ownership in the area of the proposed place of use.

Department Exhibit 2 was admitted without objection.

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Department Exhibit 3 consists of 5 photographs labeled Nos. 2 through 6 taken August 10, 1984 by Jim Rehbein. Photograph 2 purports to show the Meyer domestic diversion; photographs 3 and 4 purport to show a divergence of North Crow Creek; photographs 5 and 6 purport to show another divergence in North Crow Creek upstream from the divergence purportedly shown in photographs 3 and 4.

Department Exhibit 3 was admitted without objection.

Department Exhibit 4 consists of an empty envelope marked "Charles Meyer North Crow Creek" to which is attached (1) a photocopy of a Water Resource Survey Map of Township 21 North, Range 19 West, Lake County, Montana, marked to show the locations at which the photographs admitted in Exhibit 3 were taken; and (2) a photocopy of a topographic map of a portion of Township 21 North, Range 19 West, Lake County, Montana, marked to show the locations at which the photographs admitted as Exhibit 3 were taken.

Department Exhibit 4 was admitted without objection.

The Department moved for the admission of the Department file into the record. The file was admitted without objection.

PROPOSED FINDINGS OF FACT

1. The Application in this matter was regularly filed with the DNRC on March 11, 1982 at 1:30 p.m.
2. The Application in this matter was amended on July 29, 1985. The pertinent facts of said Amended Application were published in the Flathead Courier on October 24 and 31, 1985.

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3. The DNRC has jurisdiction over the parties hereto and over the subject matter herein.

4. The Applicant has a present bona fide intent to appropriate water for domestic lawn and garden use, stock use, sprinkler irrigation, and for maintenance of a fish pond.

5. Applicant seeks to appropriate 105 gallons per minute (hereafter, "gpm") up to 57.02 acre-feet per annum of water from North Crow Creek for use in Township 21 North, Range 19 West, Lake County, Montana, as follows: 5 gpm up to 1.00 acre-feet per year for domestic lawn and garden use; 25 gpm up to 40 acre-feet per year for a fish pond in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, to be used year round; 75 gpm up to 15.75 acre-feet per year for sprinkler irrigation in the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21 on 7.5 acres, between April 15 and October 15, inclusive, each year; and .27 acre-feet per year for stock use year round in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21. (Application.)

6. The proposed point of diversion is NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana. The source is North Crow Creek. (Application.)

7. The proposed point of diversion is on a channel of North Crow Creek which is formed by two small channels which diverge from North Crow Creek on its south bank at two locations in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana. The two divergent channels combine shortly after divergence from the main channel to form the south channel (or south branch) of North Crow Creek. (Testimony of Jim Rehbein.) Said south channel flows past Applicants' proposed

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point of diversion and continues toward the southwest corner of Township 21 North, Range 19 West, Lake County, Montana where it divides into numerous indistinct channels, which finally rejoin the main (or north) channel of North Crow Creek at a point just above the Pablo Feeder Canal. (Testimony of Applicant.)

Although the evidence does indicate that one point of divergence (the upstream divergence) of the south channel had been augmented circa 1960 by the bulldozer work of one Leo Sias (testimony of Richard Linse), the topography in the area shows a marked tendency for North Crow Creek to form channels naturally (site visit), especially during high water. (Testimony of Phil Schmitz.) Indeed, the lower point of divergence appears to be an entirely natural split in the flow of North Crow Creek. (Department Exhibit 3.) Further, the south channel appears to have been extant at least since 1920. (Testimony of Applicant.) There is no evidence that the flow of the south channel was ever regulated by headgate or other method, though a culvert may have been used to augment the natural flow previous to bulldozer work.

Taken as a whole, the evidence indicates that the south channel is not a man-made conveyance, but is rather a natural channel, the flow of which is augmented or diminished from time to time by natural means (main channel blocked by dead trees or natural movement of streambed--see Objector Schmitz Exhibit 3) and artificial means (self-help by shifting of natural obstructions).

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8. Applicant proposes to convey water from the south channel of North Crow Creek to the fish pond, utilizing a buried 4-inch polyvinyl chloride pipe. (Testimony of Applicant.) The proposed fish pond has a capacity of 0.22 acre-feet. (Application.)

9. Applicant would stock the pond with 200-300 fish for personal use. (Testimony of Applicant.) Applicant presented no evidence as to the amounts of water needed to sustain such a fish population.

10. Applicant plans to seal the fish pond with bentonite; however, there will be some seepage loss prior to formation of a complete seal, which may require several years. (Testimony of Applicant.)

11. Applicant would direct all diverted water into the pond. Applicant proposes diversion of 25 gpm up to 40 acre-feet per year, year round, to be used non-consumptively for maintenance of water quality for fish stock. In addition, Applicant would, at times when necessary and permitted, divert the flows to be used for domestic, irrigation, or stock water and direct such flows through the pond in addition to the maintenance flow, thence directing such waters to their respective places of use. (Testimony of Applicant, Application.)

Applicant also intends to utilize water stored in the pond for emergencies such as fire or loss of well water. (Testimony of Applicant.)

12. The domestic use is irrigation of lawn and garden (including trees) around Applicants' residence, not household use. The water will not be diverted using the dry well presently

in place in the bed of the south channel of North Crow Creek. Applicant intends to remove the dry well and pipeline which presently leads to the residence. The domestic water would instead be diverted through the four-inch polyvinyl pipe to the pond and from there directed to the place of use. (Testimony of Applicant.)

13. Applicant intends to pump 75 gpm up to 15.75 acre-feet per year from the pond to the proposed place of use for sprinkler irrigation. (Department file.) Applicant intends to allow water which has been used for fish pond maintenance (25 gpm reduced by pond seepage and evaporation losses), to gravity flow from the fish pond outlet, thence to irrigate unspecified pasture lands below his fish pond. (Testimony of Applicant.) Applicant apparently intends to divert the .27 acre-feet per year requested for stock use into the fish pond at the 25 gpm flow rate required for pond maintenance and to allow same to gravity flow at an unspecified rate from the fish pond at times when it is required. (Testimony of Applicant.) It is not apparent from the record how Applicant intends to remove water from the pond for domestic lawn and garden use or what irrigation method will be used.

14. All Objectors who appeared at the hearing have claimed existing water rights in North Crow Creek. (Department Records, testimony of Phil Schmitz.)

15. Of the Objectors who appeared at the hearing, only Objector Aaron Palmer Estate could ultimately put south channel (of North Crow Creek) water to beneficial use. This is because

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Aaron Palmer Estate is the only Objector that appropriates water from below the confluence of the north and south branches of North Crow Creek.

16. Objector Aaron Palmer Estate claims a water right which is one of the furthest downstream rights on North Crow Creek. It has never completely run out of water and does not believe the amount of water Applicant requests will deprive it of its claimed amount. (Testimony of Helen Cole, Laura G. Cook.)

17. Objectors Phillip Schmitz, Florence Schmitz and Richard Linse do not believe that diversion of the amount of water Applicant has applied for would in itself deprive them of water they have claimed. Rather, it is their fear that official recognition of any appropriation from the south branch of North Crow Creek will cause a battle for regulation of the proportional flow in each branch between those who have rights diverted from the north branch and those who have rights diverted from the south branch. (Testimony of Phillip Schmitz, Florence Schmitz, Richard Linse.)

18. There is throughout the summer at least one cubic foot per second (448.8 gpm) of water flowing past Applicants' proposed point of diversion on the south channel of North Crow Creek. (Testimony of Applicant.)

19. The amounts of water requested for irrigation were calculated using Soil Conservation Service guidelines for the

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uses proposed. The amount of water requested for domestic use is standard for the use proposed.¹ (Testimony of Chuck Brasen.) The general water requirement for Applicants' stock (10 horses, 6 goats) is .27 acre-feet per year. (Generally recognized technical fact.)

20. There is no evidence which indicates Applicant would operate his diversion in bad faith or fail to respond to a call upon North Crow Creek by Objectors. Further, Applicant repeatedly stated he would cooperate with Objectors.

21. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved apparent from the face of the record.

Based upon the foregoing Proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Title 85, Chapter 2, Part 3, MCA (1985).

¹ Department guidelines specify 1.25 acre-feet per season, per .5 acre of lawn and garden as a general water requirement. Although there is nothing in the record establishing the size of Applicant's lawn and garden, Mr. Brasen, an expert familiar with the project, having heard all testimony as to the particular domestic use proposed, presented uncontradicted testimony that the amount of water requested is "standard".

2. The Department gave proper notice of the hearing and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. MCA § 85-2-311 directs the Department to issue a Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (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. Those parties who failed to appear at the hearing in this matter, in person or by representation, are in default.

Administrative Rule of Montana 36.12.208.

5. The proposed uses, irrigation, stock water, and domestic lawn and garden use, are beneficial uses. § 85-2-102(2) MCA (1985), Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905). The volumes requested for each above-stated use are reasonably needed for the use stated. (Finding of Fact 19.)

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6. Although use of water for a fish pond is expressly recognized as a beneficial use under § 85-2-102(2)(a) MCA (1985), the law also requires that the right not be greater than the amount needed to serve the use. See In the Matter of the Application for Beneficial water Use Permit No. 55362-s76LJ by Wendell Kenney, Proposal for Decision, March 26, 1986, pp. 9 and 10 (Final Order, July 7, 1986). Accordingly, the Department may not issue a permit for more water than can be beneficially used without waste for the purpose stated in the Application § 85-2-312(1) MCA (1985).

Applicant failed to present any evidence demonstrating that the amount of water requested is reasonably related to the proposed use. (Finding of Fact 9.) Therefore, that portion of the Application requesting appropriation for a fish pond should be denied for failure to demonstrate that 25 gpm up to 40 acre-feet per year is reasonably necessary for the support of several hundred fish.

However, the facts do indicate that a holding pond is necessary for the control and allocation of waters diverted for domestic, irrigation and stock use. (Finding of Fact 11, 12, 13.) Therefore, Applicant's request for a 0.22 acre-feet reservoir shall be considered a necessary incident of the means of operation of the appropriation, and not as a use in itself.

7. The proposed means of diversion, construction and operation of the appropriation works are adequate for the provision of irrigation, stock, and domestic lawn and garden water. (Findings of Fact 8, 10, 11, 12, 13.)

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8. The proposed use will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved. (Finding of Fact 21.)

9. There are unappropriated waters in the source of supply in the amount Applicant seeks to appropriate throughout the period that the water can be put to the use proposed by the Applicant. (Findings of Fact 16, 17, 18.)

10. Objectors Phillip Schmitz and Richard Linse raise the specter of adverse effect to their water rights created by bad faith of Applicant, his assigns or other future appropriators on the south channel of North Crow Creek. They allege that the granting of a Permit here will increase the odds that self-help skirmishes would erupt between users of the south branch and the north branch over the issue of what proportion of water should flow in either branch.

This issue boils down to an understandable fear on the part of Objectors, that any junior appropriator might fail to respond to a call on the creek by the senior appropriators. However, the Applicant is not required to prove that other or future junior users will act in good faith. Further, there is no evidence which indicates Applicant will act in bad faith (Finding of Fact 20). In fact, Applicant repeatedly stated that he will do everything he can to cooperate. The mere possibility that the Applicant will not cooperate with a call on North Crow Creek by the senior appropriators is not a sufficient basis on which the Department will presume bad faith on the part of the Applicant.

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If Objectors as senior appropriators are not receiving their full appropriation, they have simply to call any junior appropriator on the creek (north or south channel), advise him of such, and he must cease to appropriate until the seniors' needs are fully met. He may not interfere with efforts of the seniors to direct more water toward their diversion points.

The mere possibility that a prospective appropriator might not cooperate with a call on the source does not warrant the conclusion that issuance of a permit would adversely affect senior appropriators. See generally, McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972).

In summary, there is no evidence on the record which indicates the granting of this Permit would adversely affect the water rights of prior appropriators.

11. Applicant has requested a year-round domestic appropriation for lawn and garden use, yet has wholly failed to demonstrate to what beneficial use such waters would be put during the winter months. Logically, for lawn and garden, the period of appropriation in which the water could be put to beneficial use is the growing season, April 15 to October 15, (season parameters are implicit in the period of appropriation requested for irrigation). The Permit should be limited to the period that the water can be beneficially used: § 85-2-312 MCA (1985) allows the Department discretion to make such modification

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if necessary. Therefore, the proposed order will reflect this conclusion.²

12. Applicant has not specified a diversionary flow rate for stock use, apparently relying on the requested pond maintenance appropriation for provision of a flow rate. (Finding of Fact 13.) As it is herein proposed that the fish pond appropriation be denied, it now also is proposed that that portion of the flow rate originally requested for fish pond use, which is necessary for provision of stock water should be granted. Five gpm would allow 293 hours of diversion per year to supply stock while maintaining a flow rate great enough to be measurable. Therefore, the Permit should be modified accordingly. See § 85-2-312 MCA (1985).

Wherefore, based on the foregoing Proposed Findings of Fact and Proposed Conclusions of Law the Hearing Examiner makes the following:

PROPOSED ORDER

That portion of Application for Beneficial Water Use Permit No. 50510-s76L seeking 25 gpm up to 40 acre-feet per year for a fish pond is denied.

² The proposed use was known to Mr. Brasen to be lawn and garden use, a seasonal use. Accordingly, his statement that the amount of water requested is standard must be interpreted as meaning that the amount was standard for a growing season. Therefore, the volume requested will not be reduced proportional to the reduction in period of use.

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Subject to the terms, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 50510-s76L by Charles C. and Catherine J. Meyer is hereby granted to appropriate 5.00 gpm up to 1.00 acre-foot per year between April 15 and October 15, inclusive, of each year for domestic lawn and garden use in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana; and to appropriate 5.00 gpm up to .27 acre-feet between January 1 and December 31, inclusive, of each year for stock use in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana; and to appropriate 75.00 gpm up to 15.75 acre-feet per year between April 15 and October 15 for sprinkler irrigation of 7.5 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana. The source is North Crow Creek. The point of diversion is NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ in Section 21, Township 21 North, Range 19 West, Lake County, Montana. The means of diversion is a headgate with pipeline. The place of storage is a reservoir of 0.22 acre-foot capacity located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 21 North, Range 19 West, Lake County, Montana. The priority date is March 11, 1982 at 1:30 p.m.

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

A. Any rights evidenced herein 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 the Permittee to divert water to the detriment of any senior appropriator.

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B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this permit.

D. The Permittee shall proceed with reasonable diligence in completing the appropriation provided for herein by actually applying the water provided for herein to the named beneficial use.

E. This Permit is subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes, if any, in the source of supply of the water herein.

F. This Permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water so diverted, including the time and dates water is diverted, and shall provide said records to the Department upon request.

NOTICE

This proposal is a recommendation, not a final decision. **ALL** parties are urged to review carefully the terms of the proposal.

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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. MCA § 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 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 Division Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 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.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 3 day of September, 1986.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6625

CASE # 50510

AFFIDAVIT OF SERVICE
MAILING

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

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 11, 1986, she deposited in the United States mail, First Class postage prepaid, a Proposal for Decision by the Department on the Application by Charles and Catherine Meyer, Application No. 50510-s76L, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Charles C. and Catherine J. Meyer, Rt. 1, Box 48B, Ronan, MT 59864
2. Richard and Beverly Linse, Rt. 1, Box 39, Ronan, MT 59864
3. Catherine W. Schmitz, 3043 Humble Dr., Missoula, MT 59801
4. Phillip A. Schmitz, Rt. 1, Box 40B, Ronan, MT 59864
5. Florence E. Schmitz, Rt. 1, Box 40, Ronan, MT 59864
6. Aaron M. Palmer Estate, c/o Helen L. Cole, Trustee, Rt. 2, Box 73, Ronan, MT 59864
7. Clayton Matt, Water Administrator, Confederated Salish and Kootenai Tribes, Box 278, Pablo, MT 59855
8. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources Division, DNRC (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

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

On this 11th day of September, 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.

CASE # 50510

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

Ledy John
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-58

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