

BB.

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. 52793-s76D BY MARTIN J. )  
HOCHSTETLER )

\* \* \* \* \*

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. Written comments were submitted by Chuck Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office; those comments will be discussed in the Memorandum to this Order.

The Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the January 21, 1986 Proposal for Decision, and incorporates them herein 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. 52793-s76D is hereby granted to Martin J. Hochstetler to appropriate up to 75 acre-feet of water per year from Young Creek. This Permit will be used in conjunction with Provisional Permit No. 17620-s76D for a combined flow rate of no greater than 500 gallons per minute.

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The water will be used for new sprinkler irrigation of 30 acres; 25 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 14 and 5 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The water will be diverted by means of a headgate located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana, and gravity-fed through a pipeline to the Permittee's sprinkler system.

The period of use is April 15 to September 30, inclusive, of each year. The priority date for this Permit shall be 4:00 p.m., July 6, 1983.

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

A. The Permittee shall install adequate measuring devices at and just below his point of diversion, and shall use these and his flow meter to 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. He shall make these records available to the Department upon request.

B. In accordance with his expressed intent, the Permittee 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, or is 5 cfs or less at any other time during his authorized period of appropriation.

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

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D. The water rights evidenced by these Permits 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.

E. Nothing herein shall be construed to affect or reduce the Permittee's 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.

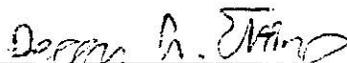
F. The Permittee shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of the quantity reasonably required for the purposes provided for herein.

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 18<sup>th</sup> day of March, 1986.

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

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

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MEMORANDUM

Kalispell Water Rights Bureau Field Manager Chuck Brasen submitted written comments on the Proposal for Decision in this matter, as discussed below.

A. Mr. Brasen noted that the Department had received a water right transfer on July 2, 1985 which included the permit applied for in this matter, and suggested that the Department should send a copy of the Proposal for Decision to the new owner.

Therefore, the Department mailed a copy of the Proposal to the new owner (Dean Keim), and extended the exception period so that Mr. Keim would have a chance to respond to the Proposal. No exceptions or comments were received from Mr. Keim.

B. Mr. Brasen states, "The footnote on page 16 would be more correct if it read as follows": 'The Permits which were granted bearing the 5 cfs flow by condition were issued during the time the Department interpreted MEPA as substantive rather than procedural.' That is the conditions (flowby and fish screen) were placed there to protect the environment, not to protect prior appropriations."

As it now stands, the footnote merely notes that the Permits were issued prior to the current adjudication process, without attempting to explain the reasons for the Permit conditions.

Mr. Brasen's suggested amendment may be a correct statement of the reasons why the 5 cfs flowby condition was placed on the referenced permits. However, in the absence of documentation as to why the condition was imposed, the Department declines to amend the footnote.

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C. Mr. Brasen also expresses concern that the "fish screen" condition appears to protect the environment rather than a prior right. It is not necessary at this time to address the issue of whether or not the Department may condition beneficial water use permits on the basis of environmental needs, however. In the present matter, the fish screen condition was imposed to make the Permit in this matter consistent with Permit No. 17620-s76D, since the two permits will be used in conjunction with each other through the same diversion structure.

D. Mr. Brasen refers to Applicant's Exhibit 1 in pointing out that the Permittee, along with other members of the public, apparently believes that the administrative branch of government can establish an instream flow: Mr. Brasen states that, to his knowledge, there is no procedure other than the reservation system to establish an instream flow.

There is no response which can be made to Mr. Brasen on the basis of what he believes the Permittee believes. Certainly, the Permittee's use of the words "Montana law" does not suggest Mr. Brasen's interpretation. As to the methods available for establishing instream flows, it may be possible to establish such flows through claims for instream uses; that very question presently is in court. (Petition for Writ of Supervisory Control, filed on July 17, 1985 by the Montana Department of Fish, Wildlife, and Parks.)

E. Mr. Brasen takes exception to basing the flowby requirements imposed on the Permittee on an "unquantified existing right." However, the memorandum to which he refers

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discusses federal reserved water rights. Although these rights, which are the basis for the Kootenai National Forest's objection in this matter, indeed are not quantified, the instream flow requirement in this matter is based on the Montana Department of Fish, Wildlife, and Parks' claimed use right rather than on the Federal right.

FWP's right has been quantified, through its claims filed in the adjudication process and through supporting documentation and testimony, even though the quantification (as for all claimed use rights) is subject to change in the adjudication process.

In the present matter, FWP's claimed use rights were not contradicted, nor did the Applicant suggest that the claimed use rights were not valid and/or should not be allowed to prevail over his proposed appropriation. Rather, the evidence indicates that the Applicant willingly agreed to cooperate with the Department of Fish, Wildlife, and Parks, and that he is concerned with maintaining the fishery resource in Young Creek. Restrictions such as the ones imposed on the Permit in this matter are acceptable to the Department where there is a substantial credible basis for them, especially when the conditions have been voluntarily accepted by the party who is most likely to be affected.

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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 19, 1986, she deposited in the United States mail, first class, postage prepaid, a Final Order by the Department on the Application for Beneficial Water Use Permit, by Martin J. Hochstetler, Application No. 52793-s76D, addressed to each of the following persons or agencies:

1. Martin J. Hochstetler, 415 W. Kootenai Rd. Rexford, MT 59930
2. Montana Department of Fish, Wildlife & Parks, Fred Nelson, 8695 Huffine Ln., Bozeman, MT 59715
3. Montana Department of Fish, Wildlife & Parks, Robert Lane, 1420 E. 6th. Ave., Helena, MT 59620
4. Kootenai National Forest, Larry Meshew, P.O. Box AS, Libby, MT 59923
5. Dean Keim, RD2, Davenport, NE 68335
6. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
7. Peggy A. Elting, Hearing Examiner (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 19th 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 Kohn  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 3-7-88

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Bureau

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. 52793-s76D BY MARTIN J.        )  
HOCHSTETLER                            )

\* \* \* \* \*

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

Applicant Martin J. Hochstetler appeared personally.

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.

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.

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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 July 6, 1983, the Applicant filed an Application for Beneficial Water Use Permit, No. 52793-s76D, seeking to appropriate 500 gallons per minute (gpm) up to 75 acre-feet per year for new sprinkler irrigation of 30 acres; 25 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 14 and 5 acres located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The proposed appropriation would be made by means of a pipeline from a headgate located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The proposed period of appropriation is April 15 to September 30, inclusive, of each year.

The Application, if granted, would be used in conjunction with Applicant's Permit No. 17620-s76D. The flow rate for the combined appropriations would not increase, but the volume would be increased by 75 acre-feet per year.

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 October 5 and 12, 1983.

Two timely objections to the Application were filed.

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Kootenai National Forest objected to the Application on the basis that the removal of the proposed flow amount from Young Creek could dewater or seriously reduce flows in Young Creek below the point of diversion, which is located above National Forest lands. The objection in part stated:

A flow reduction in Young Creek will injure National Forest purposes of maintaining favorable conditions of water flows, resident and Lake Koochanusa migratory fisheries, and fish movement. We seek the maintenance of these instream flows in Young Creek to maintain streambank stability, protect the riparian vegetation, maintain the resident fish habitat, and maintain migratory fish passage. Granting of this application will interfere with the Federal Reserved Water Right on this stream.

The Objection stated that these rights require a minimum instream flow of 5 cubic feet per second (hereafter, "cfs"), as determined by the Montana Department of Fish, Wildlife, and Parks, and that a higher minimum flow might be needed to "maintain channel integrity and flush sediment from the channel."

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.

The Montana Department of Fish, Wildlife, and Parks also filed a timely objection to the Application in this matter, alleging a need for instream flows in order to protect the

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fishery resource which has been developed in Young Creek as a mitigation measure following the construction of Libby Dam and the consequent fishery losses. The objection states that MDFWP has determined a minimum instream flow of 25 cfs is needed between May 1 and June 30 of each year, and 5 cfs during the whole of the remaining time, in order to "successfully pass upstream migrating cutthroat trout to their spawning areas and to maintain adequate spawning and nursery habitat."

The Applicant notified the Department (letter dated November 28, 1983 and received by the Kalispell Field Office on November 29, 1983) that he would agree to the Permit conditions which the Forest Service and the MDFWP had requested. On December 19, 1983, the Kalispell Field Office notified the Applicant that the Department would not place the requested instream flow requirements on the Permit because the instream flow right had not been quantified by the Water Courts: The Field Office suggested to the Applicant that an alternative option would be a contractual agreement between the Applicant and the Objectors. Both the Forest Service and MDFWP requested that the matter go to hearing.

The hearing in this matter was held in conjunction with another Application for Beneficial Water Use Permit (No. 39887-s76D by the West Kootenai Water Users Association). Since the Department of Fish, Wildlife and Parks' objections to both Applications were virtually identical, all parties at the present hearing stipulated that MDFWP's statements of position

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and the testimony of its witnesses in the first hearing (West Kootenai Water Users Assoc.) would be deemed admitted into the record in the present matter, excepting any references to the specific characteristics of the proposed appropriation.

#### EXHIBITS

The Applicant submitted one exhibit in support of his Application in the above-entitled matter:

Applicant's Exhibit 1 is a collection of documents, consisting of a photocopy of the public notice in this matter, a map showing the proposed project (point of diversion, place of use); written descriptions of the means of diversion, proposed use, existing water rights, and statement that Applicant will not reduce the instream flow "below the flow rate established by Montana Law"; a photocopy of the Applicant's existing Provisional Permit and its Permit conditions; a photocopy of Authorization to Change the point of diversion of the Provisional Permit; and photocopies of the Applicant's records of diversion.

Applicant's Exhibit 1 was accepted into the record without objection.

The Objectors offered six exhibits into the record in support of their objections to the Application in the above-entitled matter:

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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 3 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 Fredrick 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.

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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 to the Applicant 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.

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2. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on July 6, 1983, at 4:00 p.m.

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 October 5 and 12, 1983.

4. The Applicant intends to use the water for irrigation, which use is of benefit to the Applicant. MCA § 85-2-102(2).

5. The existing diversion structure which would be utilized under the proposed appropriation consists of a concrete headgate structure, with water being diverted into an open ditch leading to a buried main line. The line, which consists of graduated pipe sizes, gravity-feeds water into a sprinkler system of wheel-moves and hand lines. (Testimony of Applicant; Applicant's Exhibit 1, page 2.)

Approximately 30 sprinkler heads would be added to the system to cover the additional acreage. (Testimony of Applicant.)

The existing structure currently has a screen of approximately one-half inch mesh to prevent fish from entering the diversion system. (Testimony of Applicant; Applicant's Exhibit 1, page 2.)

The existing diversion system has a meter installed on the line to record the Applicant's diversions. (Applicant's Exhibit 1, page 3.) The Applicant was also required by the conditions of Provisional Permit No. 17620-s76D to install measuring devices in Young Creek, since the waters can only be appropriated pursuant to that Permit when the flow of Young Creek is greater than 5

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cfs. The Applicant stated that he had not installed such a device as of the time of the hearing in this matter, due to the fact that Bruce May had not been available to assist him, but that he is willing to install a staff gage or other measuring device and intends to do so as soon as possible.

6. The Applicant testified that he wants to divert 75 acre-feet of water in addition to the water for which he has already been granted a Provisional Permit (No. 17620-s76D), in order to irrigate an additional 30 acres of land. He would be irrigating crops consisting of grain and alfalfa (Applicant's Exhibit 1, page 2). A review of the irrigation requirements for these crops, in this irrigation area, indicates that the proposed volume of 75 acre-feet per year for the 30 additional acres is reasonable.

7. The Applicant testified that he does not want any flow in addition to the 500 gpm granted him in his existing Provisional Permit No. 17620-s76D. He stated that currently he does not use the whole flow. The flow which would supply the additional volume for the added acres would be diverted in conjunction with the water which is currently being diverted, up to the 500 gpm limit and by extending the hours of diversion.

8. 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 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.

9. 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.

Additionally, Mr. Lane 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.

10. 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

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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.)

11. 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 4 to 6 years old, then return to the reservoir or lake. The fry (young fish) live in the tributary for 2 or 3 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.

12. 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 does 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

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figure which FWP is requested 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.

13. 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

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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. The mesh size should be no greater than 3/8-inch to 1/2-inch hardware cloth.

14. 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.

15. 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.

16. 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.

17. 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. The 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 the Forest Service and FWP had not been granted any right in the 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 Department policy will not allow a condition which is based on an unquantified federal reserved water right.<sup>1</sup>

(See Department Exhibit 1.)

18. 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.

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

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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.)

If MDFWP's claimed instream flow rights and 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.)

19. The Applicant testified that he is concerned about the fishery resource in Young Creek, and that it is his intent to meet the instream flow conditions proposed by the Department of Fish, Wildlife, and Parks. Prior to the hearing, the Applicant submitted a written statement, signifying his willingness to agree to "the conditions requested by the Fish and Game Department."

PROPOSED CONCLUSIONS OF LAW

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

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 use of water for irrigation is a beneficial use of water. MCA § 85-2-102(2) (1985).

5. The proposed means of construction and diversion of the appropriation works are adequate (See Finding of Fact 5),

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although the Applicant should check with the Department of Fish, Wildlife, and Parks to make sure that the mesh size on the screening of the diversion works is small enough to adequately prevent fish from entering his diversion system. (See Findings of Fact 5 and 13, and Condition No. 5 on Provisional Permit No. 17620-s76D.)

The proposed means of operation of the appropriation works will be adequate if the Applicant installs adequate measuring devices at and below his point of diversion in order to ensure that the minimum instream flow required by downstream users remains in Young Creek.

6. Prior appropriators Lloyd and Lucille Soderstrom, who are located downstream from the Applicant's point of diversion, have a Provisional Permit which imposes an instream flow requirement of 5 cfs on the Soderstroms' water use. In order for the Soderstroms to be able to appropriate water, they must have at least 5 cfs reaching their point of diversion. Therefore, a flowby requirement of 5 cfs imposed on the Applicant in this matter will serve to ensure that the water rights of a prior appropriator will not be adversely affected.<sup>2</sup>

7. The Applicant, in testimony and in writing, has expressed his intent to comply with the Montana Department of Fish, Wildlife, and Parks' suggested instream flows.

<sup>2</sup> Of course, the Soderstroms or other downstream prior appropriators are entitled to call upon the Applicant to cease appropriating if they are not receiving enough water to meet their use requirements, over and above any flowby conditions they must meet.

(See Finding of Fact 19.) Therefore, in addition to the 5 cfs instream flow which the Applicant must allow to pass his point of diversion between April 15 to May 1 and July 1 to September 30 of his irrigation period, the Applicant will also forego diverting pursuant to this Permit between May 1 and June 30 whenever the flow of Young Creek falls below 25 cfs.

Since this condition cannot be applied retroactively to a permit already in existence, the Applicant is entitled to continue appropriating pursuant to Provisional Permit No. 17620-s76D any time the flow in Young Creek is above 5 cfs. However, he must cap the sprinkler heads or disengage the hand lines which provide water to the 30 additional acres to which water will be applied pursuant to the Permit in this matter whenever the flow falls below 25 cfs in the May 1 to June 30 period.

As a practical matter, this requirement should not impose a hardship on the Applicant, since the flow data indicates that the flows in May and June are almost always sufficient to allow for the Applicant's proposed appropriation over and above a 25 cfs instream flow and uses by other appropriators.

8. The inclusion of this instream flow condition in the Applicant's Permit in this matter is the result of the Applicant's own decision to meet the instream flow requirements which FWP has testified are crucial for maintenance of the fishery resource in Young Creek (See Finding of Fact 13).

The Department of Natural Resources and Conservation does not purport to quantify the water rights, if any, which Fish,

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Wildlife, and Parks may have on Young Creek; rather, the Permit condition in this particular matter reflects the "meeting of the minds" which exists between the Applicant and the Montana Department of Fish, Wildlife, and Parks and which serves to delineate the Applicant's appropriative intent.

Since the Applicant has voluntarily assumed any restrictions which may be imposed on his irrigation by the instream flow conditions to which he has agreed, it is unnecessary to reach the issue of whether such conditions may be imposed on his Permit by invoking the public trust doctrine, federal preemption, or other of the concepts proposed by Fish, Wildlife, and Parks as bases for decision.

9. The evidence in this matter indicates that there are unappropriated waters in the source of supply, at times when the water can be put to the use proposed by the Applicant.

(See Department Exhibit 1.)

The predicted water availability figures indicate that water more likely than not will be available for the Applicant's use in April, May, and June even after FWP's requested instream flows are accounted for, but that the full amount requested may not be available in July, August, or September. (See Finding of Fact 18.) However, the Applicant can make beneficial use of whatever amount of water is available. (See Findings of Fact 5, 6.)

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

PROPOSED ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 52793-s76D is hereby granted to Martin J. Hochstetler to appropriate up to 75 acre-feet of water per year from Young Creek. This Permit will be used in conjunction with Provisional Permit No. 17620-s76D for a combined flow rate of no greater than 500 gallons per minute.

The water will be used for new sprinkler irrigation of 30 acres; 25 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 14 and 5 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The water will be diverted by means of a headgate located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana, and gravity-fed through a pipeline to the Permittee's sprinkler system.

The period of use is April 15 to September 30, inclusive, of each year. The priority date for this Permit shall be 4:00 p.m., July 6, 1983.

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

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A. The Permittee shall install adequate measuring devices at and just below his point of diversion, and shall use these and his flow meter to 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. He shall make these records available to the Department upon request.

B. In accordance with his expressed intent, the Permittee 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, or is 5 cfs or less at any other time during his authorized period of appropriation.

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

D. The water rights evidenced by these Permits 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.

E. Nothing herein shall be construed to affect or reduce the Permittee's 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.

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F. The Permittee 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 21<sup>st</sup> day of January, 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 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

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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.

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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 January 21, 1986, she deposited in the United States mail, first class, postage prepaid, a Proposal for Decision by the Department on the Application for Beneficial Water Use Permit, by Martin J. Hochstetler, Application No. 52793-s76D, addressed to each of the following persons or agencies:

1. Martin J. Hochstetler, 415 W Kootenai Rd, Rexford, MT 59930
2. Montana Department of Fish, Wildlife & Parks, Fred Nelson, 8695 Huffine Ln, Bozeman, MT 59715
3. Montana Department of Fish, Wildlife & Parks, Robert Lane, 1420 E 6th Ave, Helena, MT 59620
4. Kootenai National Forest, Larry Meshew, P.O. Box AS, Libby, MT 59923
5. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
6. Peggy A. Elting, Hearing Examiner (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 21st day of January, 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.

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

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