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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 55943-S41S BY HILLTOP ANGUS )  
RANCH )

\* \* \* \* \*

The time period set forth in the May 11, 1988 Order in this matter for filing exceptions, objections, or comments to the Proposal for Decision has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 11, 1988 Proposal for Decision, and incorporates them herein by reference.

Permit Condition F has been amended to require the Permittee to submit his diversion records to the Department by November 30 of each year, as well as upon request, in order to bring the Permit into accordance with current reporting procedures. Since this amendment is for clerical purposes only, no modification of the Findings of Fact or Conclusions of Law is necessary. See MCA §2-4-621(3) (1988).

WHEREFORE, based upon the record herein, the Department makes the following:

**CASE # 55943**

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 55943-s41S is hereby granted to Hilltop Angus Ranch to appropriate 750 gpm up to 24.99 acre-feet of water per year for sprinkler irrigation of 76 acres of land located in Government Lot 3 (11 acres), Government Lot 6 (8 acres), Government Lot 8 (10 acres), Government Lot 9 (4 acres), and Government Lot 12 (5 acres), all located in Section 5, Township 19 North, Range 16 East, Fergus County, Montana; and in Government Lot 001 (7 acres), Government Lot 002 (15 acres), Government Lot 007 (5 acres), and in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 32 (11 acres), all in Section 32, Township 20 North, Range 16 East, Fergus County, Montana.

The water will be diverted from Wolf Creek, a tributary of the Judith River, by means of a gas pump-operated big gun sprinkler system, which will be moved to various points of diversion along Wolf Creek between the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 32, Township 20 North, Range 16 East, and the SE $\frac{1}{4}$  of Section 5, Township 19 North, Range 16 East. The period of use shall be April 1 through June 30, inclusive, of each year. The priority date for this Permit is August 15, 1984 at 1:00 p.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

**CASE #** 55943

A. This Permit is subject to all prior and existing water 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.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit uses.

D. The Permittee shall bypass a minimum of 6 cfs in Wolf Creek at all times he is diverting. This bypass shall be established by placing a staff gauge below all of the Permittee's points of diversion and checking the flow measurement during the times Permittee is diverting or, alternatively, by placing the gauge above the Permittee's points of diversion and only diverting when the flow is 7.67 cfs or greater (6 cfs bypass plus 750 gpm). The gauge shall be checked each day the Applicant diverts, prior to his diverting water from Wolf Creek.

E. Once the Permittee has decided upon the site of the staff gauge, he must obtain the assistance of the Lewistown Water Rights Bureau Field Office in measuring the creek at the site and properly placing and adjusting the gauge to ensure accurate records.

The staff gauge must be left in place at all times the Applicant is diverting. If the gauge is washed out, or the creek bed at the site of the gauge is altered by flood or other event, the Applicant must obtain expert assistance in readjusting the gauge for accurate readings.

F. The Permittee shall record the flow rates, volumes, and times of his diversions, and shall further record the daily flow reading from the staff gauge. These records shall be submitted to the Department by November 30 of each year, and also shall be made available to the Department upon request.

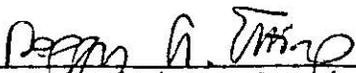
G. After a minimum of two years of diversion and record keeping by the Permittee, any party may request a Department review of the bypass flow requirement. The amount of flow which the Permittee must bypass may be amended if a review of the Permittee's data and the Objectors' water availability during the corresponding time period indicate that the amendment is warranted.

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 22 day of June, 1988.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301

  
\_\_\_\_\_  
Peggy A. Eating, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing ORDER was served upon all parties of record at their address or addresses this 24th day of June, 1988, as follows:

Hilltop Angus Ranch  
Denton, MT 59430

Kenneth and Neil Glass  
Box 958  
Denton, MT 59430

John R. Carter  
Box 933  
Denton, MT 59430

John R. Christensen  
P O Box 556  
Stanford, MT 59479

Merle T. Boyce  
Box 74  
Winifred, MT 59489

William A. Christians  
Route Box 50  
Denton, MT 59430

Vincent and Evelyn Linse  
Denton, MT 59430

Sam Rodriguez  
Lewistown Field Manager  
P O Box 438  
Lewistown, MT 59457

  
Susan Howard  
Hearing Reporter

✓

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. 55943-s41S BY HILLTOP ANGUS )  
RANCH )

\* \* \* \* \*

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 January 11, 1988 in Lewistown, Montana.

Otto Poser, owner and president of Hilltop Angus Ranch, appeared at the hearing for Applicant Hilltop Angus Ranch.

Objectors Kenneth and Neil Glass appeared at the hearing by and through Kenneth Glass and counsel John R. Christensen.

Objector John R. Carter appeared at the hearing in person, and by and through counsel John R. Christensen.

Objector William A. Christians appeared at the hearing in person, and by and through counsel John R. Christensen.

Objectors Vincent and Evelyn Linse appeared at the hearing by and through counsel John R. Christensen.

Objector Merle T. Boyce did not appear at the hearing in person or by representation.

Sterling Sundheim, Engineer with the Lewistown Water Rights Bureau Field Office, appeared as a staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department".)

**CASE # 55943**

EXHIBITS

The Applicant did not offer any exhibits for inclusion in the record in this matter.

The Objectors did not offer any exhibits for inclusion in the record in this matter.

The Department did not offer any exhibits for inclusion in the record in this matter. The Department file, which contains the originals of the Application and the Objections, correspondence between the Department and the parties, Department reports and processing documents, and Sterling Sundheim's November 10, 1987 Field Report, was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

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. MCA Section 85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The

exceptions to permit requirements listed in §85-2-306 do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 55943-41S was duly filed with the Department of Natural Resources and Conservation on August 15, 1984 at 1:00 p.m.

3. The pertinent portions of the Application were published in the Lewistown News-Argus, a newspaper of general circulation in the area of the source, on November 28 and December 5, 1984.

4. The source of water for the proposed appropriation is surface water from Wolf Creek, a tributary of the Judith River.

5. The Applicant has applied for 750 gallons per minute ("gpm") up to 24.99 acre-feet of water per year for new sprinkler irrigation of 76 acres of land located in Government Lot 3 (11 acres), Government Lot 6 (8 acres), Government Lot 8 (10 acres), Government Lot 9 (4 acres), and Government Lot 12 (5 acres), all located in Section 5, Township 19 North, Range 16 East, Fergus County, Montana; and in Government Lot 001 (7 acres), Government Lot 002 (15 acres), Government Lot 007 (5 acres), and in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 32 (11 acres), all located in Section 32, Township 20 North, Range 16 East, Fergus County, Montana.

The proposed source of the water is Wolf Creek, with water to be diverted by means of a pump. The point of diversion would be transitory between the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 32, Township 20 North, Range 16 East, and the SE $\frac{1}{4}$  of Section 5, Township 19 North, Range 16 East, all located in Fergus County, Montana. The Applicant requests a period of appropriation from April 1 through June 30, inclusive, of each year.

6. The Applicant intends to irrigate (hay) grass at the proposed places of use, which are all located next to Wolf Creek, as well as irrigating an area next to the creek which he has cleared and planted in alfalfa.

The Applicant testified that he intends to divert from Wolf Creek only during high water, to avoid affecting other users, and that he will not irrigate if the water is low. He believes that there is usually high water in Wolf Creek in April and May, and sometimes into June. Due to the short time period when high water occurs, the Applicant does not intend to apply a very large volume of water to the proposed places of use, but he feels that even one good watering will help him get a better crop of grass and alfalfa. He testified that he would not attempt to irrigate the entire proposed 76 acres of land if he finds that he is unable to obtain beneficial results with the small volume of water, but will concentrate the water on fewer acres. Sterling Sundheim testified that any water added to a dryland crop will aid production.

7. The Objectors in this matter are objecting on the basis of possible adverse effects to their downstream stockwatering rights.

The Objectors testified that they believe Wolf Creek will dry up much earlier in the season, if high water is captured upstream, than it otherwise would. They believe the high water running in the creek in the spring causes more water to be stored in the creek banks and in the gravels which form the bed of Wolf Creek in most areas. (Testimony of Christians, Carter.) The

Objectors testified that this water is needed to keep the creek bed moist so that any water in the creek during the summer will flow downstream, rather than sinking into the bed, and to provide later flows in the creek and dilute the alkali, so that the water is suitable for stockwatering. None of the Objectors had any estimates as to how much longer they felt the creek might run if the amount the Applicant proposes to appropriate was not diverted, but was left in the stream.

Objector Carter testified that he does not believe there would be a problem if the Applicant is required to bypass enough water to provide stockwater all the way to the mouth of Wolf Creek. However, none of the Objectors could specify what flow is needed in the creek to maintain adequate stockwater all the way to the mouth of the creek, apart from Mr. Carter's suggestion that there would not be adequate stockwater if the Applicant diverts when creek flow is "normal" or below normal. Sterling Sundheim stated that the necessary flow could range anywhere from 1 to 5 cfs; that it would not be possible to tell without taking measurements for one or two seasons.

8. Testimony in this matter indicates that the flow of Wolf Creek is unpredictable, both in terms of amounts and in the timing of high water. The Applicant testified that high water may occur in April or later, and that it occasionally lasts past the first part of June. The Objectors testified that they have had water shortage problems as early as May (Glass), with the creek drying up in June in 1986, and by July in other years (Carter, Christians). The limited flow data on this part of Wolf

Creek, taken in 1986, substantiates the parties' testimony that flow amounts in the creek are unpredictable: flow measurements fluctuate from nearly 23 cfs in March down to less than 7 cfs during the second week of April, up to more than 17 cfs by the end of April, then down to less than 1 cfs by the end of June.<sup>1</sup> (November 10, 1987 Field Report by Sterling Sundheim, Figure 3.) Mr. Sundheim testified that he did not know if 1986 was a wet, dry, or average year on Wolf Creek.

There does not appear to be such a thing as a "normal" flow in Wolf Creek, based on the testimony and available evidence.<sup>2</sup> However, the mean flow above the Applicant's point of diversion (see Field Report, page 2), based on flow measurements taken in 1986 during the March to November time period, is slightly more than 6 cfs.

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<sup>1</sup>The flow measurements were taken six miles upstream. However, no testimony or evidence indicates that the length of creek between the measuring point and the Applicant's point of diversion is a losing stream. The only intervening diversion consists of a pump diverting approximately 200 gpm. (Testimony of Sterling Sundheim.)

USGS flow measurements taken on Wolf Creek at a gaging station near Stanford also show the unpredictability of flows in that part of the creek. During the 23 years of flow measurements taken between 1920 and 1971, the yearly mean discharge ranged from 1.55 cfs (1961) to 27.3 cfs (1970). (November 10, 1987 Field Report, Figure 4.) However, this data also shows that in most years stream flow noticeably increases for a period of time early in the year, before tapering off. (Testimony of Sterling Sundheim.)

<sup>2</sup> Sterling Sundheim testified that normally accepted flow prediction methods, such as the Orsborn method, have not proved to be accurate when applied to Wolf Creek. The methods which Mr. Sundheim tried all produced predicted flows higher than the flows which actually occur in Wolf Creek.

9. The record in this matter indicates that, more likely than not, the Applicant's proposed appropriation will not discernibly affect the length of time that Wolf Creek flows during the summer.

The Objectors allege that diverting water from Wolf Creek even during high water will result in a shortened period of water availability during the summer, due to loss of water storage in the bed and banks. However, the Applicant testified that he has observed Wolf Creek all of his life, and that it is his belief that the "tremendous flow" of the initial flood stage fills the gravels in the creek bed, with no extra storage gained later during high water. Furthermore, Sterling Sundheim testified that it probably would not be possible to tell a difference in water availability later in the season if water is taken out during flood or high water stages, even if the stream was watched and measurements taken.

10. A review of Department records does not disclose other planned uses or developments on Wolf Creek for which a permit has been issued or for which water has been reserved.

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

PROPOSED CONCLUSIONS OF LAW

1. 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.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use 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. The proposed use of water, irrigation, is a beneficial use of water. See MCA §85-2-102(2). See also Finding of Fact 6.

5. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has

been granted or for which water has been reserved. See Finding of Fact 10.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 5 and 6.

7. There are unappropriated waters in the source of supply, in the amount the Applicant is seeking to appropriate, at times when the water can be put to the use proposed by the Applicant.

"Unappropriated waters" are those waters which have not been diverted, impounded, withdrawn, or reserved for future use by a public agency. See generally MCA §85-2-102(1). Whether unappropriated waters are available in the source of supply may be determined on the basis of (a) whether there is water physically available at the Applicant's proposed point of diversion throughout the period of diversion, in at least some years (water is not unavailable due to being diverted, impounded, or withdrawn by upstream water users), and (b) whether the water which is physically available to the Applicant is legally available (not needed downstream to fulfill senior water users), and the Applicant therefore can utilize the requested amount of water throughout the period of appropriation in some years without being called by a senior user. See In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley (March 21, 1988 Proposal for Decision).

Water is physically available at the Applicant's proposed point of diversion in the amount the Applicant is requesting, in at least some years, as evidenced by the flow data from 1986. (Field Report, Figure 3.)

However, the record does not provide substantial credible evidence that there will be any year that the Applicant could divert the requested amount of water throughout the proposed period of diversion without being called by a senior water user. The only flow data available indicates that the flow of Wolf Creek was too low after the middle of June in 1986 to supply the Objectors' water requirements. Testimony indicates that the point in time at which the flow of Wolf Creek is too low to allow the Applicant to divert without triggering calls from the downstream stockwater users may vary from as early as May to as late as July depending on when runoff and the resultant flood and high water levels occur during any given year, the years when water is available through June resulting from late high water.

8. Although the record in this matter indicates that the amount of water the Applicant is requesting is not available throughout the period during which the Applicant seeks to appropriate, the Department may issue a permit subject to terms, conditions, restrictions, and limitations which are necessary to satisfy the criteria of §85-2-311. See MCA §85-2-312(1). Therefore, a permit may be granted if it can be conditioned so as to limit the Applicant's period of diversion to those times when there are unappropriated waters in the source of supply in the amount the Applicant is seeking to appropriate, providing the Applicant can put the water to the proposed use under the conditions which have been imposed.

In order to ensure that the Applicant will divert water only during those times when unappropriated water is both physically and legally available, it is necessary to limit the Applicant's appropriation to times when the flow of Wolf Creek is sufficient to meet the Applicant's requested amount of diversion over and above downstream senior uses. (As noted above in Conclusion of Law 7, water is physically available in the requested amount at the proposed point of diversion throughout the period of appropriation, in at least some years.) As further noted above, the time period when water is available for appropriation varies from year to year, even though the period of unappropriated water availability does fall within the Applicant's proposed April 1 through June 30 period of appropriation. Therefore, conditioning a permit by limiting the period of diversion would not be helpful in this case, since it would not achieve the desired result of limiting the Applicant's diversion to times when there are unappropriated waters available.<sup>3</sup>

However, conditioning the Applicant's permit by allowing water to be diverted only at those times when the flow of Wolf Creek is sufficient to fulfill the Applicant's proposed diversion and still make it down the entire length of the creek (thereby assuring the Objectors of adequate stockwater in the stream) will ensure that the statutory criteria are met.

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<sup>3</sup> For example, limiting the Applicant's period of diversion to April 1 through June 15 on the basis of the 1986 flow data would not provide adequate protection to downstream uses in years when high water begins later than April 1.

9. The obvious problem in this matter is deciding what flow rate cutoff to impose. As the record indicates, neither the parties nor the Department witness were able to specify how much flow would be required in order to keep Wolf Creek running down past the Objectors. The only estimates were Sterling Sundheim's, that the necessary flow could be anything from 1 to 5 cfs, and Objector Carter's, that the cutoff should be "normal" flow in the creek.

As discussed in Finding of Fact 8, the flow in Wolf Creek varies widely enough that there does not appear to be any norm; however, the mean (average) flow, as determined on the basis of the limited flow data available, is approximately 6 cfs. Therefore, if the Applicant is allowed to divert only when he can bypass a flow of 6 cfs (an amount which exceeds Mr. Sundheim's estimate), the Objectors' stockwater requirements should be adequately protected.

Even with this limitation imposed on the Applicant's appropriation, the record indicates that the Applicant will be able to divert the full requested amount of water within his period of diversion. At the proposed pumping rate of 750 gpm, the Applicant will divert his full volume in 181 hours (7½ days). As the 1986 data clearly indicates, there are years when the April-June flow of Wolf Creek is adequate to fulfill both the Applicant's requested flow and the bypass flow for longer than 181 hours.

10. Since it is possible that imposing a bypass flow of 6 cfs will restrict the Applicant's appropriation unnecessarily if less flow is required to meet downstream needs, any permit issued

in this matter will be conditioned so as to allow the bypass flow to be amended in the event that the Applicant so requests and can provide data sufficient to show that the downstream uses may be filled by a smaller flow. In the event that the 6 cfs bypass flow proves inadequate to protect the downstream stockwater uses, the Objectors will also be entitled to request an amendment.

11. The record provides substantial credible evidence that the water rights of prior appropriators will not be adversely affected.

The only adverse effect which the Objectors have alleged is the possibility that Wolf Creek may dry up sooner in the summer if the Applicant is allowed to divert during high water in the spring. However, the Objectors provided no evidence or argument to counter the Applicant's rebuttal testimony that the creek gravels saturate during the initial flood stage. Furthermore, there is no information to suggest why, if enough water is left in the creek during Applicant's diversion to keep the creek running along its length (keeping the bed saturated), there should be any effect on the timing of water availability.\*

12. 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. See Finding of Fact 10.

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\* Sterling Sundheim stated that, in his opinion, it probably would not be possible to tell if taking water out of Wolf Creek during flood or high water stages affected water availability later, even if someone watched the stream and made records.

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 55943-s41S is hereby granted to Hilltop Angus Ranch to appropriate 750 gpm up to 24.99 acre-feet of water per year for sprinkler irrigation of 76 acres of land located in Government Lot 3 (11 acres), Government Lot 6 (8 acres), Government Lot 8 (10 acres), Government Lot 9 (4 acres), and Government Lot 12 (5 acres), all located in Section 5, Township 19 North, Range 16 East, Fergus County, Montana; and in Government Lot 001 (7 acres), Government Lot 002 (15 acres), Government Lot 007 (5 acres), and in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 32 (11 acres), all in Section 32, Township 20 North, Range 16 East, Fergus County, Montana.

The water will be diverted from Wolf Creek, a tributary of the Judith River, by means of a gas pump-operated big gun sprinkler system, which will be moved to various points of diversion along Wolf Creek between the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 32, Township 20 North, Range 16 East and the SE $\frac{1}{4}$  of Section 5, Township 19 North, Range 16 East. The period of use shall be April 1 through June 30, inclusive, of each year. The priority date for this Permit is August 15, 1984 at 1:00 p.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

**CASE # 55943**

A. This Permit is subject to all prior and existing water 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.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit uses.

D. The Permittee shall bypass a minimum of 6 cfs in Wolf Creek at all times he is diverting. This bypass shall be established by placing a staff gauge below all of the Permittee's points of diversion and checking the flow measurement during the times Permittee is diverting or, alternatively, by placing the gauge above the Permittee's points of diversion and only diverting when the flow is 7.67 cfs or greater (6 cfs bypass plus 750 gpm). The gauge shall be checked each day the Applicant diverts, prior to his diverting water from Wolf Creek.

E. Once the Permittee has decided upon the site of the staff gauge, he must obtain the assistance of the Lewistown Water Rights Bureau Field Office in measuring the creek at the site and properly placing and adjusting the gauge to ensure accurate records.

The staff gauge must be left in place at all times the Applicant is diverting. If the gauge is washed out, or the creek bed at the site of the gauge is altered by flood or other event, the Applicant must obtain expert assistance in readjusting the gauge for accurate readings.

F. The Permittee shall record the flow rates, volumes, and times of his diversions, and shall further record the daily flow reading from the staff gauge. These records shall be made available to the Department upon request.

G. After a minimum of two years of diversion and record keeping by the Permittee, any party may request a Department review of the bypass flow requirement. The amount of flow which the Permittee must bypass may be amended if a review of the Permittee's data and the Objectors' water availability during the corresponding time period indicate that the amendment is warranted.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, 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 59620-2301); 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 pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 11<sup>th</sup> day of April, 1988.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

**CASE # 55943**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 11th day of April, 1988, as follows:

Hilltop Angus Ranch  
Denton, MT 59430

Kenneth and Neil Glass  
Box 958  
Denton, MT 59430

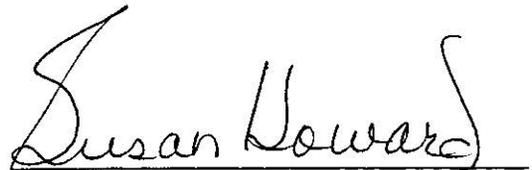
John R. Carter  
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Sam Rodriguez  
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Merle T. Boyce  
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Winifred, MT 59489

William A. Christians  
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Vincent and Evelyn Linse  
Denton, MT 59430



Susan Howard  
Hearing Reporter