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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. 60567-S76G BY JACK A. AND)
RANDALL E. PERKINS)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter 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 Proposal for Decision of June 3, 1988, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 60567-S76G is hereby granted to Jack A. and Randall E. Perkins to appropriate 2.5 cubic feet per second up to 150 acre-feet of water per year.

CASE # 60567

The use and place of use of the stored water is for irrigation of lands generally located (application and Applicant testimony) within the:

- E2 Section 08, Township 6 North, Range 10 West - 200 acres
- S2 Section 01, Township 6 North, Range 10 West - 180 acres
- NWNE Section 12, Township 6 North, Range 10 West - 40 acres
- E2E2 Section 32, Township 7 North, Range 10 West - 64 acres
- Section 33, Township 7 North, Range 10 West - 335 acres
- W2 Section 04, Township 6 North, Range 10 West - 140 acres
- Total 959 acres

The water will be diverted and stored in an onstream 150 acre-foot reservoir from unnamed tributaries of Dempsey Creek by a dam located in the NWNESE of Section 29, Township 7 North, Range 11 West, Powell County, Montana. The water will be appropriated for storage from November 1 through April 30 inclusive and stored for later release down Dempsey Creek for re-diversion at one or more of the following points: SENWSE of Section 31, Township 7 North, Range 10 West; NWNWNW of Section 4 and NENESW of Section 11, Township 6 North, Range 10 West. When water is diverted from the North Fork of Dempsey Creek at a point in the SESESW of Section 29, Township 7 North, Range 10 West, it will be replaced by stored water released into Dempsey Creek. The priority date for this permit is August 12, 1985, at 4:25 p.m.

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

A. This Permit is 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.

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 issuance of this permit by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons or National Forest System Lands to exercise this permit.

D. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters granted in this provisional permit.

E. Permittee shall at all times permit and allow the normal or natural flow of the source out of the dam and into Dempsey Creek when prior appropriators have need and use for the normal flow.

F. Permittee must not use the dam to deprive or diminish the rights of any Dempsey Creek appropriator with existing rights.

G. Permittee shall not divert from Dempsey Creek and North Dempsey Creek more water than is turned out of the reservoir and further shall also deduct therefrom 10% or other percentage determined by District Court for loss by evaporation and seepage, caused by the flowing of said waters from the reservoir to the point where they are retaken from Dempsey Creek. Such a percentage loss shall at all times coincide with that percentage determined by the District Court.

H. This permit is subject to the permanent installation of an adequate drainage device in the dam to satisfy existing water rights. The Permittee shall construct and maintain the device such that it is operable under all normal weather conditions.

I. The Permittee shall maintain adequate flow measuring devices at all points the water is diverted downstream from the place of storage. The Permittee shall install an adequate water flow measuring device, at a suitable location as near as practicable to the point where the water is released from the place of storage, in order to record the flow rate of water released from the dam. The Permittee shall keep a written record of the released flow rate of all waters released, and of all waters rediverted including the period of time if not recorded by a water commissioner, and shall submit said records to the Department upon request.

J. This permit is issued in conjunction with claimed Water Right Nos. W91359, W91360, W91361, W91362, W91363, W91364, W91365, W91366, W91367, W91368, W91369, W91371, W91372, W91376, W91377, W91378, W91379, W91380. The permitted volume is limited to that amount necessary for irrigation of the lands involved.

SE # 60567

K. The Permittee shall not convey stored waters through #5 Ditch (beginning within the NENESW of Section 11, Township 6 North, Range 10 West) unless it can commingle with waters of other water rights in the ditch.

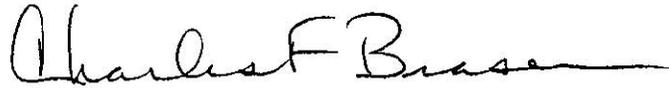
NOTICE

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 21 day of July, 1988.



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



Charles F. Brasen, Hearing Examiner
Department of Natural Resources
and Conservation
P O Box 860
Kalispell, Montana 59903
(406) 752 - 2288

CASE # 60567

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 21st day of July, 1988, as follows:

Jack A. and Randall E Perkins
1472 Perkins Road
Deer Lodge, MT 59722

Lewis F. Johnson
951 Dempsey Lake Road
Deer Lodge, MT 59722

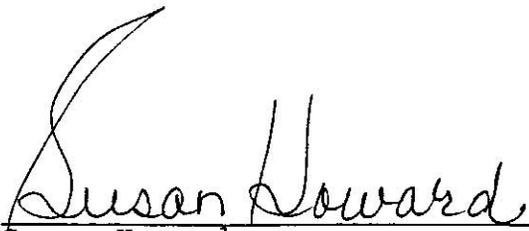
Joie Kramer
722 Greenhouse Road
Deer Lodge, MT 59722

T. J. Reynolds
Helena Field Manager
1520 East Sixth Avenue
Helena, MT 59620-2301
(inter-departmental mail)

Donald Tamcke
Tamcke Bros.
1231 Dempsey Lake Road
Deer Lodge, MT 59722

Carmen E. Kramer
724 Greenhouse Road
Deer Lodge, MT 59722

Thomas A. Beck
651 Greenhouse Road
Deer Lodge, MT 59722


Susan Howard
Susan Howard
Hearing Reporter

1313

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. 60567-s76G BY JACK A. AND)
RANDALL E. PERKINS)

* * * * *

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 March 17, 1988, in Deer Lodge, Montana.

Jack A. Perkins, one of the Applicants in this matter, appeared at the hearing in person, and as a representative for his son and Co-applicant, Randall E. Perkins. (Randall Perkins arrived during the course of the hearing, but did not testify.)

Objector Tamcke Brothers was represented at the hearing by Donald Tamcke and Doug Tamcke.

Objectors Carmen E. Kramer and Joie Kramer were represented at the hearing by Joie Kramer.

Objector Thomas A. Beck appeared at the hearing in person.

Stan (Phillip) Fries, Water Commissioner for Dempsey Creek, appeared as a witness for Joie Kramer and Tom Beck.

Objector Lewis F. Johnson appeared at the hearing in person.

Ted Johnson was present at the hearing as a potential witness for Lewis Johnson; but did not testify at the hearing.

Untimely Objector Ken Fleming appeared at the hearing in person.

Untimely Objector Montana State Prison Ranch was represented at the hearing by Ron Paige.

Jim Beck, Agricultural Specialist for the Helena Water Rights Bureau Field Office, appeared at the hearing as staff witness for the Department of Natural Resources and Conservation (hereafter, "Department").

CASE # 60567

PRELIMINARY MATTERS

1. Mr. Ken Fleming was introduced as a witness for Objector Lewis Johnson, but actually appeared as an untimely objector in this matter. Mr. Fleming was allowed to testify; however, he was not allowed to appear as a party in this matter. (See Administrative Rule of Montana 36.12.219.)

2. Mr. Ron Paige of the State (of Montana) Prison Ranch appeared as an untimely objector in this matter. Mr. Paige was allowed to testify, however, his status as a party in this matter was expressly forbidden.

3. Applicant Jack Perkins objected to testimony of Mr. Stan Fries which compared snowpack and early spring accessibility of other area storage facilities with that of the proposed dam. Ruling on the objection was reserved and testimony was allowed to continue. The Hearings Examiner now overrules the objection since the testimony's purpose was to show that headgate access may be a problem during the spring of the year and this information has relevancy in this matter.

4. Objector Kramer objected to testimony of Mr. Stan Fries which attested to the rise or fall of the flow of Dempsey Creek because Mr. Fries has no measurements detailing the rise or fall. The objection was overruled; however, the testimony was acknowledged by the Hearings Examiner as strictly the opinion of the Water Commissioner and without confirming measurements.

5. Objector Beck objected to Objector Doug Tamcke's question of Mr. Stan Fries of whether stored waters help the creeks on the basis that any answer would be purely conjecture. Mr. Tamcke withdrew the question and the objection was overruled for that reason.

6. Objector Tamcke Brothers (Doug Tamcke) objected to Objector Kramer's question of Tom Beck (as former Water Commissioner) of "what happens to the creek flow after the initial flush from startup of use of stored water?" Ruling on the objection was reserved and the question was allowed. The Hearings Examiner now overrules the objection. The testimony has relevancy in this matter although the answer may be only an opinion.

7. The Notice of Application erroneously (in part) described the place of use as the W 1/2 Section 8, Township 6 North, Range 10 West instead of E 1/2 of Section 8, Township 6 North, Range 10 West. The Hearings Examiner now concludes that the error is not material and republication is not mandatory.

EXHIBITS

The Applicant offered three exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 consists of a "Forest Visitor's Map" for the Deer Lodge National Forest, marked in blue ink to show entire Dempsey Creek drainage, the proposed dam location, and irrigation use. Applicant's Exhibit 1 was accepted for the record without objection.

Applicant's Exhibit 2 consists of a certified copy of Page 4 of Case #1182 of Third Judicial District of the State of Montana, introduced to show that the court decree mandates that stored water released to natural channels are subject to a 10% seepage and evaporation loss. Applicant's Exhibit 2 was accepted for the record without objection.

Applicant's Exhibit 3 consists of a deposition of a Glenn Launderville as a Water Commissioner on both Dempsey and Racetrack Creeks, stating that "at all times the creeks got 10% of the stored water from the lakes for shrinkage". Applicant's Exhibit 3 was accepted for the record without objection.

The Objectors offered three exhibits for inclusion in the record of this matter:

Objectors' Exhibit 1 (Donald Tamcke) consists of a 28 page document purported to be a complete copy of Case #1182 obtained from the Third Judicial District of the State of Montana introduced to show lakes in upper Dempsey Creek area have been regulated by the local District Court in the past.

Objector Beck objected to the exhibit on the grounds that the document was too long to read and pass judgement on at the hearing.

Objector Kramer objected to Objectors' Exhibit 1 on the grounds that the existing decreed shrinkage values (in Cause #1182) should not be applied to any new storage facilities.

Ruling on the objections was reserved. Objectors' Exhibit 1 (Donald Tamcke) is hereby admitted, since it does possess probative value and it is not irrelevant, immaterial, or unduly repetitious; and, it has been a public record of the District Court of the Third Judicial District since August 3, 1920.

Objectors' Exhibit 2 (Joie Kramer) consists of a hand written copy (5 pages) of Dempsey Creek water commissioner records for the years 1983-1987. Objectors' exhibit 2 was accepted for the record without objection.

Objectors' Exhibit 3 (Ken Fleming) consists of copies of aerial photos (taped together) generally showing the place of use of all objectors. Objectors' Exhibit 3 was accepted into the record without objection.

The Department offered two exhibits for inclusion in the record in this matter:

Department Exhibit 1 consists of copies (taped together) of USGS topographical maps showing the headwaters of Dempsey Creek to its confluence with the Clark Fork River. No objections to the exhibit were received; therefore Department Exhibit 1 was accepted for the record.

Department Exhibit 2 consists of seven groups of photos showing the general area of the proposed reservoir. Department Exhibit 2 was accepted for the record without objections.

The Department file 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.

Notice by the Hearing Examiner of intent to utilize Department water right records as deemed necessary, was received without objection.

The record in this matter was closed at the end of the hearing.

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 therefore 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 this matter.

2. Application for Beneficial Water Use Permit No. 60567-s76G was duly filed with the Department of Natural Resources and Conservation on August 12, 1985 at 4:25 p.m.

3. The pertinent portions of the Application were published in The Silver State Post, a newspaper of general circulation in the area of the source, on October 24 and 31, 1985.

As noted in Preliminary Matters, the legal description for the place of use in Section 8 is the E 1/2 rather than the W 1/2.

4. The source of water for the proposed appropriation is an unnamed tributary of Dempsey Creek, a tributary of the Clark Fork River. The unnamed tributary is comprised of a stream that heads near Martin Lake and flows at least 100 Miners Inches (2.5 cfs), Applicant testimony, in winter and a stream that is the outflow of Elliot Lakes of unknown flow.

5. The Applicant has applied for 2.5 cfs (100 Miners Inches) up to 150 acre-feet of water per year for supplemental and new irrigation water. The water will be impounded by a new 150 acre-foot onstream reservoir generally located within the NWNESE of Section 29, Township 7 North, Range 11 West, Powell County, Montana (application and Applicant testimony).

6. The proposed period of impoundment is November 1 through April 30 of each year. (Applicant testimony).

7. The period of use from the reservoir is May 1 through September 1 of each year.

8. The ultimate place of use of the stored water is on lands generally located (application and Applicant testimony) within the:

E2 Section 08, Township 6 North, Range 10 West	- 200 acres
S2 Section 01, Township 6 North, Range 10 West	- 180 acres
NWNE Section 12, Township 6 North, Range 10 West	- 40 acres
E2E2 Section 32, Township 7 North, Range 10 West	- 64 acres
Section 33, Township 7 North, Range 10 West	- 335 acres
W2 Section 04, Township 6 North, Range 10 West	- <u>140</u> acres
Total	959 acres

The new irrigated acreage is more specifically identified as 23 acres in the NENE of Section 8, Township 6 North, Range 10 West and 40 acres in the NESW of Section 4, Township 6 North, Range 10 West (application and attachments).

9. The Applicant intends to ultimately irrigate utilizing the existing systems and ditches. The supplemented rights are W91359, W91360, W91361, W91362, W91363, W91364, W91365, W91366, W91367, W91368, W91369, W91371, W91372, W91376, W91377, W91378, W91379, W91380 (Application attachments). The stored water will be released into the natural channel of Dempsey Creek. Dempsey Creek will convey the water to downstream diversion points the Applicant now controls.

10. The Applicant intends to withdraw irrigation water from the North Fork of Dempsey Creek in the SESESW of Section 29, Township 7 North, Range 10 West (by means of Existing Ditch #1 - local terminology) and replace it with water impounded in the proposed reservoir. The North Fork of Dempsey Creek is the tributary to Dempsey Creek downstream of the proposed reservoir.

11. Applicant has parshall flume measuring devices on all his ditch diversions and has been using water from Dempsey Creek since childhood (Applicant testimony).

12. The Applicant has the only other of season storage rights (for irrigation water) from Dempsey Creek located downstream of the proposed dam (Applicant testimony).

13. The Applicant anticipates other regulatory agency permit requirements will be required. The proposed place of storage is on land owned by the US Forest Service. Especially anticipated is a minimum reservoir level to mitigate any impacts to the aquatic habitat. The Applicant stated the final design of the facility has not been done; but a hazard classification of "not high hazard" has been issued (by the Department) for the intended 150 acre foot capacity (Applicant testimony).

14. The Applicant concedes that when the "#5 Ditch" (local vernacular) is shut off by the Water Commissioner, they will not convey stored water to their place of use served by "#5 Ditch". The referenced "#5 Ditch" starts within the NENESW of Section 11, Township 6 North, Range 10 West (application).

15. Applicant testified that he intends to convey Objector Tamcke Brothers stored water from (upstream) Elliot Lakes around the proposed dam. In the alternative, adequate measuring devices or alternate appropriation timing (from releases of upstream stored water) will avoid infringement upon upstream stored waters being conveyed through the proposed reservoir.

16. Applicant testified that there are sufficient headwater tributaries to Dempsey Creek to assure stockwater flows along the lower reaches of Dempsey Creek without the application source.
17. Applicant testified that the proposed dam will be accessible at all times. However, winter and late spring access may be by snowmobile.
18. Objector Tamcke Brothers testified that they use Dempsey Creek for irrigation and that these rights were duly filed as mandated by 85-2-221, MCA.
19. Objector Tamcke Brothers store water in Elliot Lakes upstream of the proposed dam. The stored waters are released for use generally beginning in June; however, the date is dependent upon water supply conditions and needs of each individual year. The headgates in the lakes are set to begin storing water about November 1, of each year.
20. Tamcke Brothers have claimed a right to divert waters from the North Fork of Dempsey Creek at a point downstream of the Applicant's intended point of withdrawal from the North Fork of Dempsey Creek. Water is not now being used from the North Fork of Dempsey Creek; but future use is still contemplated.
21. Objector Kramer diverts Dempsey Creek water for irrigation use downstream from the proposed dam. These uses were claimed according to 85-2-221, MCA. Objector Kramer does not object to building of the dam if storage in the reservoir is timed to not affect direct diversion rights.
22. Objector Beck diverts Dempsey Creek water for irrigation use downstream from the proposed dam. These uses were claimed according to 85-2-221, MCA. Objector Beck does not object to building of the dam if storage in the reservoir is timed to not affect direct diversion rights.
23. Objector Beck claims a (downstream) livestock use for stock drinking direct from Dempsey Creek predating July 1, 1973 and said to date back to the days of the "Quinlan Ranch".

24. Objectors Kramer and Beck claimed periods of use for Dempsey Creek irrigation which were in error. Those periods of use were corrected from shorter, early season periods to April 1 through October 31, by objection to their own claims in the Water Court decree process (Objector Kramer and Beck testimony).

25. The stored water in the existing area storage facilities (upstream, downstream, tributaries and nearby streams) is currently released and measured by a court appointed water commissioner at the request and expense of the owner of the stored water.

One of the first duties of the water commissioner is to the lake overflow device so that the level of water in the storage facility cannot increase (i.e. "strike the boards to the lake level"). The devices are normally set in June; but in 1987 they were set in May. To set the release from storage, the water commissioner measures the overflow of the structure. Then the release structure is set to release the measured overflow and any requested amount. The initial release settings include two times the overflow amounts to assure that the headgate is open enough to continue the overflow amount after the lake level drops below the full level. The initial overflow measurement is used until the "end of the lake" (testimony of Stan Fries).

26. Tom Beck testified, as former water commissioner, that he thought direct diversion rights suffered when only 10% of the stored water was allocated for conveyance seepage and evaporation; however, he had no measurements to confirm his opinion.

27. Snowpack in the area of the proposed dam often lasts into June of each year (testimony of Stan Fries).

28. All existing upper drainage lakes except Lower Elliot have a "new style" headgate which allows regulation at any time under the normal area climatic (snowpack) conditions (testimony Doug Tamcke).

29. Objector Johnson irrigates from Dempsey Creek through what is commonly called #5 Ditch. The claimed periods of use are:

<u>Water Right</u>	<u>Period of Use</u>
#9	5/15 - 8/4
#8	5/1 - 8/19
#5	5/1 - 9/4
#4	5/1 - 9/4
#1	5/1 - 9/4

and not April 1 through November 1 of each year as claimed. They have been corrected in the post temporary preliminary decree issuance activity with the water court. (Objector Johnson testimony.)

30. There are no other planned uses or developments for which a permit has been issued or for which a right has been reserved (testimony of Jim Beck).

31. The Soil Conservation Service has been involved in the preliminary design work done to date on the proposed structure (testimony of Applicant and Jim Beck).

32. The amount of time needed to complete the development is three years from issuance of any water use permit. The Applicant intends to construct the proposed dam himself at an estimated cost of \$40,000. The Applicant has acquired some construction experience by rebuilding a dam at nearby Martin Lake (application and Applicant testimony).

33. Ken Fleming (untimely Objector) testified that he is a user of Dempsey Creek water for irrigation purposes during the irrigation season downstream from the proposed dam.

34. Ken Fleming (untimely Objector) testified that he has no concern if the Applicant does not attempt to convey stored waters down the #5 Ditch when the #5 right has been shut off (See also Findings of Fact #14).

35. Ron Paige (representing untimely Objector Montana State Prison Ranch) testified that the prison ranch is a major user of Dempsey Creek water for irrigation purposes during the normal irrigation season. There is no objection to the stored water right as long as it is not taken while anyone is irrigating or there is a lack of downstream stockwater. There is a concern that the actual conveyance loss is greater than the 10% loss currently in use by the current water commissioner.

36. The proposed dam and source are within the jurisdiction of the District Court of the Third Judicial District of the State of Montana, in Powell County.

37. The Applicant concedes that this dam will come under the same control and jurisdiction as the existing storage facilities of Dempsey Creek and its tributaries. The dam will be subject to the same procedure of "striking" at the season start and subject to 10% use "shrinkage" (current percentage used by the Water Commissioner) for seepage and evaporation loss. (Applicant testimony.)

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 proposed means of appropriation, a reservoir, requires a water use permit. See MCA 85-2-305.

4. A permit to appropriate water does not grant any easement rights; only the right to divert, impound or withdraw a quantity of water. See MCA 85-2-102 (1) & (10).

5. 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 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.

6. 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).) The Department has defined the test for determining whether there are unappropriated waters in the source of supply as twofold: whether there is water physically available at the proposed point of diversion, and whether the water is legally available (the requested amount is available throughout the period of appropriation without being called in some years by a senior user). (See Hadley.)

Water is physically available at the Applicant's proposed point of diversion in the amount requested as evidenced by the Applicant's testimony. (See Finding of Fact 4 & 19.)

It appears that there may be years when the Applicant is called during the month of April by direct diversion senior users. However, the record indicates the Applicant expects the reservoir to be at full pool by April in most years. Testimony of the Objectors was not that they consistently irrigate in April and are short water during that period; but that it has happened in the past and could be expected in the future. (See Findings of Fact 21, 22 & 29.)

7. The proposed use of water, irrigation, is a beneficial use of water. See generally MCA 85-2-102(2). (See Finding of Fact 8, 9, & 10.)

8. 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 31.)

9. The proposed means of diversion is adequate. (See Finding of Fact 31.)

The proposed means and time of construction are adequate. (See Findings of Fact 35.)

The proposed means of operation are adequate to the degree that the facility can be operated to impound water (See Findings of Fact 5, 13, & 31). However, operation of an onstream reservoir includes accountability for upstream stored water and natural flows which must pass through the proposed facility to downstream users.

Passage of upstream stored waters through the reservoir can be assured by a measuring device at the outlet of the proposed dam. What is being measured and released upstream can also be measured and released at the proposed dam under any pool conditions. (See Findings of Fact 15.)

Assurance that natural inflows are passed through the facility can be assured if the outlet control device is "struck" or set at the pool level at the end of the appropriation period. Late season flows can be assured by continuing the current modus operendi of measuring the proposed dam overflow prior to releasing stored water and setting the outlet control device so that the season start measured overflow plus the requested release continue once the literal overflow stops. Seepage and evaporation are accounted for in the record only in the court set shrinkage (now 10%) testimony surrounding introduction of Applicant's Exhibit 2 & 3 and Objector's Exhibit 1 (Donald Tamcke). Applicant's Exhibit 2 states in part "Martin shall not divert from said Dempsey Creek more of such waters so diverted from said lakes and reservoirs than he shall have diverted and turned out of said lakes and reservoirs, and shall also deduct therefrom then percent for loss by evaporation and seepage (emphasis added), which said ten percent shall be deemed the full amount of loss caused by the flowing of said waters from the point where they are so diverted from said lakes and reservoirs to the point whesre they are diverted from said Dempsey Creek..." This discussion of seepage and evaporation only includes water released from storage, not water stored in the storage facility.

Any post appropriation period runoff events will eventually pass to downstream users if the outlet control device is not closed once it has been opened; or it can be "restruck" such that the earlier measured overflow becomes the literal overflow at the time of "restriking".

10. Any person who shall construct a reservoir which is so located that because of natural or other obstacles the water impounded therein cannot be conducted to the lands which he desires to irrigate, may, provided the stored

water can be discharged into the stream in such a manner that it can be used beneficially by prior appropriators, divert the natural flow of the stream for the irrigation of his lands in lieu of an equal amount of stored water; provided, however, that such exchange can be made without injury to said prior appropriators. See MCA 85-2-413.

11. The record indicates that Objector Tamcke Brothers is an appropriator of North Fork Dempsey Creek water downstream of the Applicant's proposed point of diversion from North Fork Dempsey Creek. However, Tamcke Brothers is not now fully using those waters and any adverse affect could only come if in the future they choose to exercise their right. (See Findings of Fact 20.)

The Applicant has acknowledged that any water diverted from the North Fork of Dempsey Creek would be junior in priority date to Tamcke Brothers' right.

12. Any owner of stored waters may petition the court to have such stored waters distributed by the water commissioners appointed by the court. (See MCA 85-5-101(3).)

13. Whenever the rights of persons to use waters of any stream have been determined by a decree or a court of competent jurisdiction it shall be the duty of the judge of the District Court upon application of 15% of water rights affected by the decree, in the exercise of his discretion, to appoint a water commissioner. (See MCA 85-5-101(1).)

14. A person who is dissatisfied with the method of distribution of the waters of the stream and who claims to be entitled to more water than he is receiving may file his written complaint. Thereupon the judge shall set a time for the hearing. Upon determination of the hearing, the judge shall make such findings and order as he considers just and proper. (See MCA 85-5-301.)

The record shows that there has been a water commissioner used to distribute both the natural flows and stored water. The record does not show any evidence of formal action regarding the distribution practices used by the water commissioner in the past. All stored waters (new or old) are subject to the same distribution criteria; "the waters of the stream may not thereby be diminished in quantity". Heretofore 10% loss has not been formally challenged.

15. The water rights of a prior appropriator will not be adversely affected. (See MCA 85-2-311(1)(b).)

The major concern of the Objectors seemed to be over the continued use of the 10% shrinkage (only 90 % of reservoir release may be diverted down stream) ordered in existing decrees. However, the law specifically allows transport of stored water in a natural conveyance thereby separating concerns of acquiring a right from use of a right. (See MCA 85-2-411.)

16. The Objectors requested that the Applicant be required to measure the streamflow so to prove that their rights are not being diminished when the stored water is being used. However, the only evidence indicating the court ordered 10% shrinkage was not adequate was the testimony of former water commissioner Tom Beck (See Findings of Fact 26) and Objector testimony.

It would appear that the Objectors with measuring devices and knowledge of when stored water was being released could have determined if their flow was diminished when stored waters were released and distributed.

17. The storage rights of Objector Tamcke Brothers will not be adversely affected if Tamcke's water is ditched around the proposed dam or a measuring device at or immediately below the proposed dam shows a discharge equal to or exceeding that of Tamcke's release.

18. Objector Beck has an instream stockwater right from Dempsey Creek which was exempt from the filing requirements of Section 85-2-221 (1).

Therefore, based upon the foregoing 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. 60567-s76G is hereby granted to Jack A. and Randall E. Perkins to appropriate 2.5 cubic feet per second up to 150 acre-feet of water per year.

CASE #

60567

The use and place of use of the stored water is for irrigation of lands generally located (application and Applicant testimony) within the:

E2 Section 08, Township 6 North, Range 10 West - 200 acres
S2 Section 01, Township 6 North, Range 10 West - 180 acres
NWNE Section 12, Township 6 North, Range 10 West - 40 acres
E2E2 Section 32, Township 7 North, Range 10 West - 64 acres
Section 33, Township 7 North, Range 10 West - 335 acres
W2 Section 04, Township 6 North, Range 10 West - 140 acres
Total 959 acres

The water will be diverted and stored in an onstream 150 acre-foot reservoir from unnamed tributaries of Dempsey Creek by a dam located in the NWNESE of Section 29, Township 7 North, Range 11 West, Powell County, Montana. The water will be appropriated for storage from November 1 through April 30 inclusive and stored for later release down Dempsey Creek for re-diversion at one or more of the following points: SENWSE of Section 31, Township 7 North, Range 10 West; NWNWNW of Section 4 and NENESW of Section 11, Township 6 North, Range 10 West. When water is diverted from the North Fork of Dempsey Creek at a point in the SESESW of Section 29, Township 7 North, Range 10 West, it will be replaced by stored water released into Dempsey Creek. The priority date for this permit is August 12, 1985, at 4:25 p.m.

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

A. This Permit is 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.

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 issuance of this permit by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons or National Forest System Lands to exercise this permit.

D. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters granted in this provisional permit.

E. Permittee shall at all times permit and allow the normal or natural flow of the source out of the dam and into Dempsey Creek when prior appropriators have need and use for the normal flow.

F. Permittee must not use the dam to deprive or diminish the rights of any Dempsey Creek appropriator with existing rights.

G. Permittee shall not divert from Dempsey Creek and North Dempsey Creek more water than is turned out of the reservoir and further shall also deduct therefrom 10% or other percentage determined by District Court for loss by evaporation and seepage, (caused by the flowing of said waters from the reservoir to the point where they are retaken from Dempsey Creek. Such a percentage loss shall at all times coincide with that percentage determined by the District Court.

H. This permit is subject to the permanent installation of an adequate drainage device in the dam to satisfy existing water rights. The permittee shall construct and maintain the device such that it is operable under all normal weather conditions.

I. The permittee shall maintain an adequate flow measuring devices at all points the water is diverted downstream from the place of storage. The permittee shall install an adequate water flow measuring device, at a suitable location as near as practicable to the point where the water is released from the place of storage, in order to record the flow rate of water released from the dam. The permittee shall keep a written record of the released flow rate of all waters released, and of all waters rediverted including the period of time if not recorded by a water commissioner, and shall submit said records to the Department upon request.

J. This permit is issued in conjunction with claimed Water Right Nos. W91359, W91360, W91361, W91362, W91363, W91364, W91365, W91366, W91367, W91368, W91369, W91371, W91372, W91376, W91377, W91378, W91379, W91380. The permitted volume is limited to that amount necessary for irrigation of the lands involved.

K. The Permittee shall not convey stored waters through #5 Ditch (beginning within the NENESW of Section 11, Township 6 North, Range 10 West) unless it can commingle with waters of other water rights in the ditch.

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 (P.O. Box 860, Kalispell, MT 59903); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA Section 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 Section 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 3rd day of June, 1988.



Charles F. Brasen, Hearing Examiner
Department of Natural Resources
and Conservation
3220 Hwy 93 South
P.O. Box 860
Kalispell, MT 59903
(406) 752-2288

CASE # 60567

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 16th day of June, 1988, as follows:

Jack A. and Randall E. Perkins
1472 Perkins Road
Deer Lodge, MT 59722

Lewis F. Johnson
951 Dempsey Lake Road
Deer Lodge, MT 59722

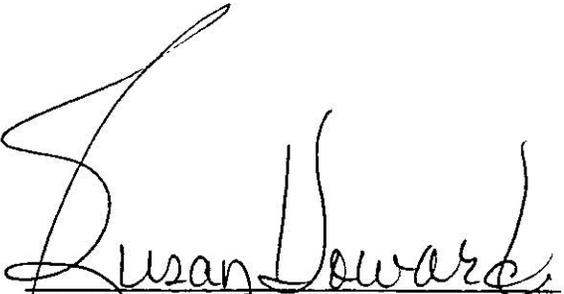
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Deer Lodge, MT 59722

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Thomas A. Beck
651 Greenhouse Road
Deer Lodge, MT 59722


Susan Howard
Hearing Examiner

60567