

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. 63575-S76H BY ERNEST R. AND )  
WANDA E. DAKOLIOS )

\* \* \* \* \*

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 May 5, 1988.

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. 63575-S76H is hereby granted to Ernest R. and Wanda E. Dakolios to appropriate 300 gpm up to 3.00 acre-feet of water per year from an unnamed drainage channel tributary to the Bitterroot River for

**CASE # 63575**

fishery purposes. This water will be used to maintain the reservoir levels in the three onstream ponds with a total storage capacity of 1.58 acre-feet. The water is to be diverted by means of three concrete dams. The point of diversion and place of use of the three (3) reservoirs shall lie in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 19, the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 19, and the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 19, all in Township 8 North, Range 20 West, Ravalli County, Montana. The period of appropriation and use is January 1 through December 31, inclusive, of each year. The priority date of this Permit is August 19, 1986 at 2:01 P.M.

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

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 appropriation by the Permittee to the detriment of any senior appropriator.

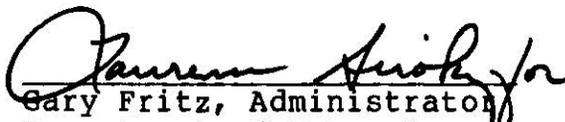
B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable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

C. This Permit is granted subject to the right of the Department to modify or revoke the Permit in accordance with §85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with §85-2-115, MCA.

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 1<sup>st</sup> day of June, 1988.

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

  
Bob Larson, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P. O. Box 1828  
Havre, Montana 59501  
(406) 265 - 5516

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by certified mail upon all parties of record at their address or address this 3 day of June, 1988, as follows:

Ernest R. & Wanda E. Dakolios  
Box 368  
Victor, MT 59875

Ernest R. & Wanda E. Dakolios  
15669 Weld County Road 38  
Platteville, CO 80651

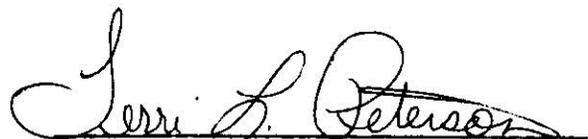
Marie Archer  
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Missoula, MT 59806  
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**CASE # 63574**

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 ) PROPOSAL FOR DECISION  
NO. 63575-s76H BY ERNEST R. AND )  
WANDA E. DAKOLIOS )

\* \* \* \* \*

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 22, 1988 in Hamilton, Montana.

Ernest R. Dakolios, the Applicant in this matter, appeared at the hearing in person and was not represented by counsel.

Dale Burkhart, a neighbor and ranch hand for the Applicant, appeared at the hearing as a witness for the Applicant.

Objector Marie Archer was represented at this hearing by and through counsel Larry Persson.

Objector Harley Hamilton was not present at this hearing but notified the Hearings Examiner by telephone on March 18, 1988 of his unavailability to attend and indicated that his interests would be represented by counsel Larry Persson also.

Mike McLane, Field Manager of the Missoula Water Rights Bureau Field Office, appeared as staff expert witness for the Montana Department of Natural Resources and Conservation (hereafter, the "Department").

**CASE # 63575**

EXHIBITS

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

The Objector, Marie Archer, represented by Larry Persson, offered one exhibit for inclusion in the record in this matter:

Objector's Exhibit No. 1 consists of a photocopied aerial photo, with markings (not to scale) made to show the relative location of the Objector's and Applicant's property and Objector's source and place of use.

Objector's Exhibit No. 1 was accepted for the record without objection.

Objector Marie Archer, through counsel Larry Persson, requested the Hearing Examiner to take judicial notice of her filed water rights, which the Hearing Examiner agreed to do.

Objector Harley Hamilton, through counsel Larry Persson, requested the Hearing Examiner to take judicial notice of his permitted water rights, which the Hearing Examiner agreed to do.

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.

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 Section 85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 63575-s76H was duly filed with the Department of Natural Resources and Conservation on August 19, 1986 at 2:01 P.M.

3. The pertinent portions of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on November 26, and December 3, 1986.

4. The source of water for the proposed appropriation is surface and seepage water from an unnamed drainage channel tributary to the Bitterroot River. The Applicant testified that the source forms a perennial flowing stream within the boundaries of his property. Stream flows within the drainage channel vary in intensity depending on season of year, climatic conditions, and irrigation practices within the area of influence. Flows consistently increase within the channel as it proceeds from the upstream to the downstream portions of the applicant's property. (Testimony of Applicant and ranch hand, Dale Burkhart.)

5. The Applicant has requested 300 gallons per minute (gpm) up to 3.00 acre-feet of water per year from the drainage channel for fishery uses, to be diverted by means of three (3) concrete diversion dams for use in onstream reservoirs with a total capacity of 1.58 acre-feet. The point of diversion and place of use of the three (3) reservoirs lie in the SE1/4 SW1/4 SW1/4 of Section 19, the NW1/4 SE1/4 SW1/4 of Section 19, and the NE1/4 SE1/4 SW1/4 of Section 19, all in Township 8 North, Range 20 West, Ravalli County, Montana. The requested period of appropriation and use is January 1 through December 31, inclusive, of each year.

6. The Applicant testified at the hearing that his intent is only to divert enough water to keep the reservoirs full, that is, that his use of water will be non-consumptive apart from whatever water is lost from the reservoir due to seepage and evaporation.

The Applicant also testified at the hearing that the primary source of water originates on his property from springs and seepage of his subirrigated property and that the flow rate which he seeks (300 gpm) may not be available throughout the entire period during which he seeks to appropriate. However, the Applicant testified that over the past two years enough water was available to fulfill his proposed use. The Applicant further testified that the reservoirs have been filled subsequent to his excavation of sixteen (16) to eighteen (18) feet into the stream bed channel which augmented natural spring seepage into the existing drainage. The Applicant also testified that he dug

drainage ditches at right angles to the existing drainage channel one-quarter (1/4) mile long across his subirrigated property approximately thirty (30) inches deep and twenty-four (24) inches wide which not only improve the Applicant's property but also supply further seepage waters to the existing drainage channel where the three reservoirs were constructed.

7. The reservoirs for which the Applicant has applied for water were constructed in 1986. The dam on each reservoir is a twenty-four (24) foot wide concrete retaining wall which extends three (3) feet below the channel bed and each have a two (2) foot diameter concrete release structure with headgate located on the natural elevation of the stream bed. Gravel was placed around and under the retaining walls such that seepage occurs downstream of each structure. Excess water flows over top of the twenty-four (24) foot retaining wall through three-quarter (3/4) inch gravel mesh screen which extends four (4) inches above each concrete retaining wall. Two of the reservoirs are one hundred fifty (150) feet by thirty (30) feet wide and the third reservoir is two hundred (200) feet by thirty (30) feet wide giving a total surface area of 16,000 square feet equivalent to approximately 0.4 surface acres. The use of the water will be non-consumptive apart from whatever water is lost from the 16,000 square foot surface area of the three (3) reservoirs due to evaporation which would be minimal. (Testimony of Applicant.)

8. Water in the drainage where the reservoirs are located comes from springs in the drainage, waste water seepage from connecting drain ditches, and from natural spring snowmelt runoff which is released or which drains from an upstream reservoir,

located approximately one-eighth (1/8th) mile above the Applicant's upper reservoir. (Testimony of Applicant.) There is no evidence in the record to indicate the percentage of water which the springs or existing drainage channel contribute. The main source of water appears to be drainage waters collected from the Applicant's construction of lateral drain ditches on his subirrigated property which discharge into the existing drainage channel above the first and second reservoirs. (Site visit of project on March 22, 1988.) Surface flow and seepage varies considerably due to rainfall and other weather conditions, and to irrigation uses upstream, but flows generally occur throughout the year. (Testimony of Applicant.) Flows in the existing drainage channel have increased by approximately one-third (1/3) since the construction of the Applicant's drainage laterals to the existing channel. (Testimony of Applicant and ranch hand, Dale Burkhart.)

9. Water is available at the point of diversion for the Applicant's requested appropriation. During spring snow runoff periods and during the irrigation season, water spills over the twenty-four (24) foot concrete weir three (3) to four (4) inches in depth. (Testimony of Applicant and ranch hand, Dale Burkhart.) This depth of water spilling over a 24 foot rectangular weir would be equivalent to approximately fourteen (14) cubic feet per second of water.<sup>1</sup>

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<sup>1</sup> Montana Surface Water Law, Measurement and Structure, Montana Agriculture Experiment Station, Bulletin 620 Montana State University, Bozeman, Mont. April 1968.

Claimed uses of water from the source of supply, based on Department records, indicate all the available water is claimed. (Department File, Objector Marie Archer Claim No. W108919-s76H.) This claim for all the available water in the source will be quantified by the Water Court in future adjudication proceedings and any Provisional Permits issued by the Department would be subject to and junior in right to these existing Court Decreed senior rights.

However, the Applicant testified that his use is non-consumptive except for evaporation losses which are minimal and that the stream flows essentially pass through his structures and continue on downstream to senior appropriators. Therefore, it appears that water is physically available at the Applicant's points of diversion at times for his intended use and in the amount requested for appropriation. (Site visit, March 22, 1988; Testimony of Applicant.)<sup>2</sup>

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<sup>2</sup>The Applicant testified that the reservoirs were constructed two years ago, filled to capacity, and have been spilling or seeping water downstream continuously since construction. Although the Applicant's project has been in place for two years, the Objectors did not submit any testimony or evidence indicating that they were not able to obtain their water rights as a result of the Applicant's project. During the site visit subsequent to the Administrative Water Rights Hearing on March 22, 1988, the three reservoirs were filled to capacity; water was seeping below the upper reservoir although no flow was entering the upstream end of the reservoir; water was seeping under as well as flowing over the second reservoir; and water was seeping under as well as flowing over the third, or most downstream reservoir. The Applicant as well as the ranch hand Dale Burkhart, testified that this period of time prior to the general irrigation season was the low flow period of the source. Both individuals also testified that there was continuous flow in the drainage even though there has not been a major snow runoff recharge to the area over the past two years.

10. The Applicant's intent is to use his reservoirs for fishery purposes, and the record indicates that the reservoirs may feasibly be used for fish propagation.

The Applicant testified that he has acquired a fish pond permit from the Montana Department of Fish, Wildlife, and Parks (DFWP) and has had the DFWP Service inspect the ponds and give approval to their construction design. The Applicant further testified that nearly twelve hundred (1200) fish have been stocked in the ponds and they are currently between three (3) and four (4) pound trout. All three ponds have been serviced with electrical power to provide induced mechanical aeration for fish propagation and prevention of freezing during the winter, and thus may sustain a fishery even without a constant inflow of surface water into the ponds. (Testimony of Applicant, site visit on March 22, 1988.) The Applicant further testified that the reservoirs may be used for emergency fire protection as access permission was given from the Applicant to the Victor Fire Department to use the reservoirs for a source of water in case of fire in the vicinity of Victor, Montana.

11. Objector Marie Archer has claimed prior irrigation water rights downstream from the Applicant's reservoirs. Waste and seepage waters from the source drainage are used to irrigate twelve and one-quarter (12.25) acres of land owned by Marie Archer in the NE1/4 of Section 19, Township 8 North, Range 20 West. (Department File, Objector's Exhibit No. 1.)

Mrs. Archer stated on her objection that "although the Applicant may contend that their use is non-consumptive, the seepage and evaporation of the waters in this small ditch as a result of three ponds would be considerable and adversely affect objector's prior right to the water". (See Department File.) In this regard the Applicant and Objector Mrs. Archer presented conflicting evidence and testimony as to losses due to seepage and evaporation from the three (3) reservoirs. The Applicant testified that seepage waters reenter the source below each dam and flow on downstream to senior appropriators and that evaporation losses from a total of 16,000 square feet of reservoir surface area would be minimal in comparison to the available drainage flow. However, evidence and testimony presented at the hearing indicate that the construction of the three (3) reservoirs in conjunction with the construction of drainage laterals on the Applicant's subirrigated property did not diminish the natural flow of the drainage channel and have increased the stream flow by approximately one-third (1/3). (See Finding of Fact 8 and 9, above.)

12. Objector Harley Hamilton has Provisional Permit No. 49266-s76H issued by the Department for an irrigation water right downstream from the Applicant's reservoirs. Waste and seepage waters from the source drainage are used to irrigate forty-one (41) acres of land owned by Harley Hamilton in the NW1/4 of Section 20, Township 8 North, Range 20 West, Ravalli County, Montana. (See Department File.)

Mr. Hamilton stated on his objection that "I'm only concerned on the basis that after fish ponds are full that the water will continue as before fish ponds were installed." (See Department File.) Again, evidence and testimony presented at the hearing indicate that the construction of the three (3) reservoirs in conjunction with the construction of drainage laterals on the Applicant's subirrigated property did not diminish the natural flow of the drainage channel and have increased the stream flow by approximately one-third (1/3). (See Finding of Fact 8 and 9, above.)

13. Department records indicate that there are other claimed water uses downstream from the Applicant's point of diversion. (See Department File.) However, no other appropriator pursued an objection to the Application, and the record does not indicate any reason why the Applicant's appropriation should cause adverse effect to these other water users.

14. Department records do not disclose other planned uses or developments 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 the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following MCA, Section 85-2-311 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 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. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant, and in the volume the Applicant seeks to appropriate. (See Findings of Fact 8 and 9.) Once the reservoirs are filled

to the constructed capacity of 1.58 acre-feet, annual draws from the source need only compensate for seepage and evaporation losses extant from the previous year, in this instance up to a maximum of 3 acre-feet per year. An appropriator may not fill and refill his storage structure to compensate for seepage and evaporation losses where such practices will result in exceeding the appropriative claim. It is incumbent upon every water user of the state to make allowances for such "carriage losses".

Wheat v. Cameron, 64 Mont. 494, 210 P 761 (1922).

Section 85-2-312(1), MCA states: "The Department may issue a permit for less than the amount of water requested, but in no case may issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the Application." Since the maximum flow rate in the drainage channel may exceed 14 cubic feet per second (See Finding of Fact 9.) based on the only flow data of record, the Applicant's request for 300 gpm from the source can be met at least during some periods of the year. However, it should be noted that such a flow rate, if diverted continuously from the source, would fulfill the requested 3 acre-foot volume in 2.26 days. Therefore, it appears the Applicant's intent is to protect his proposed use of water (fishery) in the instance where possibly only early spring snowmelt runoff waters are available for filling the three reservoirs. The Applicant's installation of mechanical aeration equipment in each of the three reservoirs reinforce this intent. (See Finding of Fact 10.) In this

instance, it was not shown that the requested 300 gpm is excessive or would result in the waste of the water resource.

The maximum consumptive volume to which the Applicant is entitled is less than two fills per year, based on his Application. It appears from the record that the waters applied for are necessary to provide a sufficient depth in the impoundments so as to maintain sufficient oxygen, water temperature, and food levels for a year-round fishery. The parameters used in the beneficial use equation for fishery purposes cannot, of course, be as exacting as that employed for other uses such as agriculture. In the latter case, the quantity of water applied for can, by the use of physical laws, be more precisely tailored to the precise purposes of the particular appropriator. Water use for a fishery must of necessity answer to evidence of more ill-defined parameters. The use of 3.0 acre-feet of water is a reasonable estimate of the quantity of water required for the Applicant's purposes, and it will not result in the waste of the water resource. The annual consumptive use on the source of supply to facilitate this use in regards to evaporation losses may be only a small fraction of the three (3) acre-feet. (See Finding of Fact 7 and 11.)

5. There is substantial credible evidence that the water rights of a prior appropriator will not be adversely affected by the Applicant's appropriation. (See Findings of Fact 6 and 9.) The evidence demonstrates that no water user on the drainage source or connected sources will suffer any deprivation by the Applicant's intended use. (See Findings of Fact 8.) In the

unlikely event that shortages develop, Applicant's reservoirs have adequate means to by-pass the drainage source for the requirements of senior appropriators. (See Finding of Fact 7.)

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 7 and 10.)

7. The proposed use of water, for fishery purposes, is a beneficial use. See MCA Section 85-2-102 (2).

The Applicant's consent to allow the Victor Fire Department to use the stored water in the three reservoirs for emergency fire uses is excluded from Water Use Permit requirements. Department Administrative Rule No. 36.12.105 allows for temporary emergency appropriations of water. The temporary emergency beneficial use of water for the protection of lives and property by reason of fire is included in the definition of emergency appropriation under Rule No. 36.12.101(6).

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 14.)

Therefore, based on 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. 63575-s76H is hereby granted to Ernest R. and Wanda E. Dakolios to appropriate 300 gpm up to 3.00 acre-feet of water per

year from an unnamed drainage channel tributary to the Bitterroot River for fishery purposes. This water will be used to maintain the reservoir levels in the three onstream ponds with a total storage capacity of 1.58 acre-feet. The water is to be diverted by means of three concrete dams. The point of diversion and place of use of the three (3) reservoirs shall lie in the SE1/4 SW1/4 SW1/4 of Section 19, the NW1/4 SE1/4 SW1/4 of Section 19, and the NE1/4 SE1/4 SW1/4 of Section 19, all in Township 8 North, Range 20 West, Ravalli County, Montana. The period of appropriation and use is January 1 through December 31, inclusive, of each year. The priority date of this Permit is August 19, 1986 at 2:01 P.M.

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

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 appropriation 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.

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C. This Permit is granted subject to the right of the Department to modify or revoke the Permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA.

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 1828, Havre, MT 59501); the exceptions must be filed within twenty (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 twenty (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 new 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 5th day of May, 1988.



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Bob L. Larson, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P. O. Box 1828  
Havre, Montana 59501  
(406) 265-5516

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 5 day of May, 1988, as follows:

Ernest R. & Wanda E. Dakolios  
Box 368  
Victor, MT 59875

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Terri L. Peterson

**CASE # 63575**