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JUN 27 1991

MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

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

* * * * *

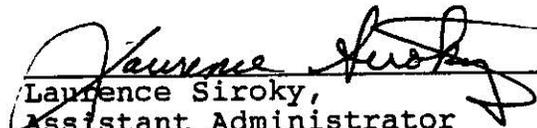
IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) NOTICE OF TERMINATION
NO. 63865-G43B BY GARDINER-PARK)
COUNTY WATER DISTRICT)

* * * * *

A contested case hearing in the above-entitled matter was held on July 21, 1988, and the Proposal for Decision was issued on June 16, 1989. Exceptions to the Proposal for Decision were filed and an oral argument requested. The Oral Argument Hearing was scheduled and continued. On March 21, 1991, the Department of Natural Resources & Conservation received a letter from the Applicant requesting that the application be terminated.

THEREFORE, Application for Beneficial Water Use Permit No. 63865-g43B by Gardiner-Park County Water District is hereby terminated.

Date this 26 day of June, 1991.


Lawrence Siroky,
Assistant Administrator
Department of Natural
Resources and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Termination was duly served upon all parties

CASE # 63865

of record at their address or addresses this 26th day of June,
1991 as follows:

Gardiner-Park Co. Water District
P.O. Box 45
Gardiner, MT 59030

Frank and Mary Holst
Box 431
Gardiner, MT 59030

Robert and Beverly J. Peters
P.O. Box 513
Gardiner, MT 59030

Scott Compton, Manager
Bozeman Water Resources
Regional Office
111 N. Tracy
Bozeman, MT 59715

Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 105
Billings, MT 59102

Matt Williams
Moses, Wittemyer,
Harrison and
Woodruff, P.C.
506 East Babcock
Bozeman, MT 59715

Dave DePuy
Attorney at Law
P.O. Box 487
Livingston, MT 59047



Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 63865

~~PO 675-36-438~~
63865-543B
confirmed correct
with Scott
Compton 3/19/91

GARDINER-PARK COUNTY WATER DISTRICT
P. O. BOX 45 GARDINER, MT 59030

March 19, 1991

RECEIVED

MAR 21 1991

MONTANA D.N.R.C.
BOZEMAN FIELD OFFICE

Mr. Scott Compton, Field Manager
Bozeman Field Office
111 N. Tracy
Bozeman, MT 59715

Dear Mr. Compton;

This letter is to inform you that Gardiner-Park County Water District wishes to terminate their application for water rights.

Thank you for all your help in this matter.

Sincerely,

GARDINER-PARK COUNTY WATER DISTRICT

John F. Squire III
John F. Squire III
President

cmc

CASE # 63865

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 63865-g43B BY GARDINER-PARK)
COUNTY WATER DISTRICT) INTERLOCUTORY ORDER

* * * * *

The time period for filing exceptions and objections to the Proposal for Decision of June 16, 1989, has expired. One objection was received from the Applicant. With the exceptions of the modifications noted in the responses below, after having given the comments full consideration, the Department hereby accepts and adopts the Proposal for Decision as its Final Order herein. The Department's response to the comments are as follows:

Response to Applicant

A. Findings of Facts 11, 12, and 13 show the timing of the lowest measured discharges from this source coincide with the seasons of the highest demands for stock and irrigation water. The Applicant's own study shows the summer months are also its peak water usage months as well. The Objectors' senior diversion requirements exceed the only measured flows in the source during this same period. Therefore, it appears that the Objectors would be required to call on the Applicant virtually every time they wished to exercise their senior water rights during this period.

CASE # 63865

Unappropriated water must be reasonably available in the source in at least some years throughout the period of appropriation. Section 85-2-311(1)(a), MCA. Unappropriated water is more than just a matter of water being physically available at the proposed diversion, and consideration must be given to senior downstream water demands. See In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Hadley.

Unappropriated water is not reasonably available if a senior user must make an unreasonable number of calls for water. Clearly, the Objectors having to call upon the Applicant virtually every time they wish to divert water is not reasonable. Accordingly, unless the Applicant can show how the proposed period of diversion can be limited so that an unreasonable number of calls will not be required of the Objectors, the criterion is not met.

Approval of this plan by the Objectors is not necessary. However, further clarification is necessary, and therefore, condition "A" is revised as such in the Final Order.

B. Finding of Fact No. 11 amends the application from a 100,000 gallon storage tank to a 200,000 gallon storage tank with justification for such a request. Condition letter "F" allows for the multiple fills of the storage facility up to the requested annual volume. The Applicant's own testimony and study show 157,200 gallons of water must be in storage to meet certain requirements by the Department of Health and Environmental Sciences. The existence of such a storage system with a descrip-

tion of its operation, would be a good basis for such a plan to meet the specified criteria.

C. It was discovered during the review of the proposal that Finding of Fact No. 16 is misleading and should show that the total irrigation demand will be achieved in 304 hours (12.6 days). The 132 hours referred to in the Proposed Order is for each acre of irrigation times the total number of irrigated acres (2.3 acres).

The foregoing amendment is not a material modification of the Findings of Fact or Conclusions of Law in the Proposed Decision. The modification to the Findings of Fact are solely for purposes of clarification. The Findings and Conclusions are found to have been based on competent substantial evidence and the proceedings on which the Findings were based complied with essential requirements of the law.

WHEREFORE, based upon the foregoing and on the record herein the Department hereby issues the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 63865-g43B is hereby granted to Gardiner-Park County Water District to appropriate 180 gpm up to 125.0 acre-feet of water per year as amended for municipal use provided Condition A below is met.

Water may be diverted between January 1 to December 31, inclusive, each year by means of developing springs in Phelps

Creek and using a pipeline to fill a 200,000 gallon storage reservoir. The diversion will be located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23, Township 9 South, Range 8 East of Park County, Montana, for municipal uses in Section 23, Township 9 South, Range 8 East, Park County, Montana. The priority date is May 15, 1987, at 1:19 p.m.

A. Prior to the issuance of this permit, the Permittee must develop a plan of operation of its water system which will preclude diversion of any water during those periods in which the Objectors require water. The plan should include arrangements for the Objectors that would not require them making an unreasonable number of calls on the Applicant to release water for their benefit. This operation plan must be submitted to the Department and the Objectors for review no later than December 31, 1989. The Objectors will have 30 days from receipt to review and submit comments to the Department on the proposed plan. The Department will then review the plan and the Objector's comments, to determine if the plan adequately addresses the concerns in the criteria, § 85-2-311(1), MCA. If the plan cannot be completed by then, this Application for permit in this matter is denied. (If the Application is denied, it is due to the lack of information, and the denial would be made without prejudice giving the Applicant the opportunity to reapply.)

B. 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.

C. 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.

D. This Permit would be subject to § 85-2-505, MCA, which prohibits groundwater from being wasted. Permittee shall install in the system a shutoff device to insure all waters will be diverted into Phelps Creek or remain in Phelps Creek when the storage facility is not being filled.

E. The Permittee shall install and maintain an adequate flow measuring device in order to allow the flow rate and volume of water diverted to be measured. The Permittee shall keep a written record of the flow rate and volume of all waters diverted and measured, including the period of time, and shall submit said records to the Department upon request.

F. The Permittee shall install a storage reservoir of up to 200,000 gallon capacity unless the Department determines the plan can successfully negotiate this requirement. The Permittee shall not exceed a diversion rate of 180 gallons per minute and an annual volume of 125 acre-feet as amended in the record of this proceedings.

Dated this 3rd day of October, 1989.

Keith Kerbel
Keith Kerbel, Hearing Examiner
Department of Natural Resources
and Conservation
1537 Avenue D, Suite 105
Billings, Montana 59102
(406) 657-2105

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Interlocutory Order was served upon all parties of record at their address or addresses this 3rd day of October, 1989, as follows:

Gardiner-Park Co. Water District
P.O. Box 45
Gardiner, MT 59030

Frank and Mary Holst
P.O. Box 431
Gardiner, MT 59030

Robert and Beverly J. Peters
P.O. Box 513
Gardiner, MT 59030

Scott Compton
Bozeman Field Manager
111 North Tracy
Bozeman, MT 59715

Matt Williams,
Moses, Wittemyer,
Harrison & Woodruff, P.C.
506 East Babcock
Bozeman, MT 59715

Irene V. LaBare
Irene V. LaBare
Legal Secretary

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. 63865-g43B BY GARDINER-PARK)
COUNTY WATER DISTRICT)

* * * * *

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 July 21, 1988, in Gardiner, Montana.

The Applicant appeared through Chris McIntosh, manager for the Gardiner-Park County Water District and was represented by counsel, Matt Williams.

Objectors, Frank Holst and Robert Peters, appeared at the hearing in person and were represented by counsel, David DePuy.

The Gallatin National Forest did not file a timely objection in this matter. Larry Sears of the Gardiner Ranger District appeared as a representative for the Gallatin National Forest. The Forest Service's status and participation in this matter is that of an untimely Objector pursuant to Administrative Rules of Montana 36.12.219.

Jan Mack, New Appropriations Specialist with the Bozeman Water Rights Bureau Field Office, appeared as staff expert for the Department of Natural Resources and Conservation (hereafter, the "Department").

CASE # 63865

PRELIMINARY MATTERS

1. The Applicant objected to the line of questioning regarding alternative sources of water existing for the Gardiner Water District to develop for its needs in lieu of Phelps Creek. The Hearings Examiner granted the Applicant's motion to strike this information. The decision does not take into account the existence of other potential sources of supply since that is not an issue in this application, Section 85-2-311(1), MCA.

2. Applicant objected to the presence of the Forest Service as a party to this hearing since no objection was filed in this matter on their behalf. The Forest Service was granted status as an untimely Objector at the hearing based on Administrative Rule 36.12.219. This rule allows the Hearings Examiner to accept exhibits and testimony presented from an untimely Objector. The Forest Service's testimony has been accorded little weight because no evidence presented indicated an adverse effect to their right. In the future if they choose to exercise their right, the prior appropriation system will effectively protect their interests.

3. A motion was made by counsel on behalf of the Applicant for a ruling by the Department as to who has proper jurisdiction to grant an augmentation plan if developed by the Applicant during the construction of this proposed project, if approved. This plan would include developing another source of water to be delivered to the Objectors in lieu of their Phelps Creek water supply, allowing the Applicant to divert water from the Phelps

Creek springs out of priority without fear of call for the same by the Objectors.

This hearing is not the proper forum for deciding this motion--No plan was offered into evidence; nor was an Application made. If such a plan involves developing a different water source, those potential impacts on historic water users need be examined through the administrative process outlined in the Montana Water Use Act before being used in conjunction with this Application.

EXHIBITS

The Applicant offered one exhibit for inclusion in the record.

Applicant's Exhibit 1 was submitted for the record as a photocopy of a single page from an index to the Temporary Preliminary Decree for this basin. The photocopy is actually a page from a water rights index listing by source and by priority date of all Department records for this basin, whereas the index to a Temporary Preliminary Decree is limited to only listing the statements of existing water right claims. This exhibit was accepted for the record without objection.

The Department and the Objectors 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, processing documents, an excerpt from a study by Sanderson/Stewart/Gaston on the Gardiner-Park County Water

District and a report by Jan Mack describing the Applicant's proposed water development and the Objectors' water developments, was made available at the hearing for all parties to examine. No objection was made to the admissibility of any part of the file. Therefore, the Department's 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. Section 85-2-302, MCA, 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. 63865-g43B was duly filed with the Department of Natural Resources and Conservation on May 15, 1987, at 1:19 p.m.

3. The pertinent portions of the Application were published in the Livingston Enterprise, a newspaper of general circulation in the area of the source, on August 19, 1987.

4. A timely objection was filed by Frank D. and Mary E. Holst. These Objectors allege that they have a prior existing water right to the source of supply which may be affected by the granting of this application. Another concern is during the winter months, depletions from the source would create a potential threat to stockwater if the creek freezes from the reduction in flows.

5. A timely objection was filed by Robert and Beverly Peters. These Objectors allege that they have prior existing water rights to the source of supply which may be affected by the granting of this application. On their objection form it was stated that "they have no objection to the use of water from December 1st to April 1st."

6. The Gallatin National Forest did not file a timely objection in this matter. An appearance was made by Larry Sears of the Gardiner Ranger District on its behalf. A request was made by Mr. Sears and Mr. DePuy that the Examiner take notice of the Forest Service's claimed water right on Phelps Creek. The Temporary Preliminary Decree shows Water Right No. 43B-W059779 for the U.S. Department of Agriculture, Forest Service on Phelps Creek but does not quantify the flow or volume.

7. The source of water for the proposed appropriation is to develop springs in Phelps Creek. Phelps Creek is perennial from the springs, proposed to be developed in this Application, downstream to the Biglow-Chapman Ditch.

8. The Applicant has applied for 280.5 gallons per minute (gpm) up to 452.44 acre-feet of water per year for municipal purposes in Section 23, Township 09S, Range 08E Park County, Montana. (The service area is Gardiner, Montana and some facilities located in Yellowstone National Park.) The proposed diversion would be developed springs in Phelps Creek in the SE NE NE of Section 23, Township 09S, Range 08E Park County, Montana. A pipeline would be used to fill a 100,000 gallon storage tank from the diversion structure. The requested period of appropriation is from January 1 through December 31, inclusive, of each year. (Department File)

9. The proposed diversion would consist of vertical and horizontal borings into the streambed of Phelps Creek to develop spring water. Water would then be collected by perforated pipes or by an open channel and then by gravity flow into a water disinfection treatment plant. The diversion system and/or conveyance system could be controlled through valving installed in the pipeline to allow water to be returned or remain in the natural channel of Phelps Creek for continued use by senior appropriators when they have a call on the water and/or the reservoir is full. After the water is treated, it would then be piped to a storage tank. Testimony shows the Applicant is willing to construct, regulate and operate the water system to insure the water requirements of the Objectors are met. The Applicant showed a willingness to provide the Objectors with stock tanks and heaters in order to help them meet their

stockwatering needs all year round. Approval of the municipal water treatment system is also required from the Department of Health and Environmental Sciences. (Testimony of McIntosh.)

10. During the hearing, through counsel, the Applicant verbally amended the Application. The diversion rate was amended from 280.5 gpm to 180 gpm and the total volume requested was likewise amended from 452.44 acre-feet per annum to 125 acre-feet per annum. (By request of counsel for the Applicant.)

11. The size of the storage reservoir was amended upward to 200,000 gallons. (The Application specified a 100,000 gallon storage facility.) This change was not opposed at the hearing. The purpose of the increase is to meet the instantaneous demand of the water users, which will exceed the production of the springs and make a more reliable supply of water, if or when the Applicant would be without water due to senior demands downstream.

A study was performed on the water demands for the Gardiner Water District. In designing a municipal water system, the plan must anticipate the greatest reasonable demand to be put on the system. The study determined 157,200 gallons of water in storage is the required volume necessary to meet the 90,000 gallons of water required to fight a two-hour fire at 750 gallons per minute and meet the average daily demand for the maximum month (ADDMM) requirement of 67,200 gallons of water. The maximum month is the month with the greatest use of water for a period of record. This study shows the summer months are high usage months and the

years of 1984, 1985, and 1986 were used as the study's baseline data. The Department of Health and Environmental Sciences requires the system to be designed to meet this ADDMM value. (Testimony of McIntosh and Department File.)

12. Further testimony reveals during normal stream flow conditions, if one Objector was diverting water from Phelps Creek, there would be water available for the Applicant. If both Objectors were diverting simultaneously, the probability of having enough water available in the source of supply for the Applicant is diminished. Flows of Phelps Creek below the origin of the springs were monitored. Measurements show Phelps Creek flows are lowest in the late spring and summer months when demands for water are highest. Higher flows were observed and measured in the late summer and early fall months of the year. Existing irrigation practices of upstream water users are the primary reasons for the increase in flows this time of year. (Testimony of Robert Peters and Chris McIntosh.)

13. The ADDMM value determined for the Applicant's designed daily maximum water requirements is 67,200 gallon per day. The highest flow measured was 180 gallons per minute. This rate of diversion would appropriate the amount of water required to meet the ADDMM value in 6.2 hours. The lowest flow measured was 100 gallons per minute and at this diversion rate the ADDMM value can be achieved in 11.2 hours. (Testimony of McIntosh and Department Record.)

14. There are no planned uses or developments, for this source, for which water has been reserved or a permit has been issued, other than Mr. Peters' provisional permit. Mr. Peters is an Objector to this matter.

15. Holst filed three Statements of Existing Water Right Claims for Phelps Creek (43B-W194583, W194584, and W194585) in the adjudication process. Claim 43B-W194583 claims 112 gallons per minute (10 MI) for 1 acre-foot per annum for year round stockwater use with a priority date of May 15, 1960. Claim 43B-W194584 claims 112 gallons per minute (10 MI) for 14.7 acre-feet per annum on 2.1 acres of pasture with high/waste water runoff from May 1 to August 31 of each year with a priority date of May 15, 1960. Claim 43B-W194585 claims 112 gallons per minute (10 MI) for 14 acre-feet per annum for sprinkler irrigation on 2.0 acres of pasture from April 1st to October 31st of each year with a priority date of May 15, 1960. (Department File.)

The Preliminary Decree issued for Basin 43B reduced the flow rate from 112 gallons per minute to 35.9 gallons per minute on each irrigation water right claimed (43B-W194584 and W194585). Testimony reveals objections were filed with the Montana Water Courts to the reduced flow rates. (Department file and testimony of Holst.)

Testimony by Mack and Holst supports a present diversion rate of 75 gallons per minute for irrigation. Holst testimony describes his present operation as irrigating two to three times each week during wetter years and irrigating three to four times

per week in drier years for his 2.3 acres of pasture. The normal duration for each irrigation is six hours on Sundays, six hours on Saturdays, and two hours on weekday evenings twice per week. Holst's stock water from the Biglow-Chapman Ditch which flows through his corrals. (DNRC report in the file defines the calculated measurements of Holst's system.)

16. The Montana Irrigation Guide computed consumptive water use requirements for a dry year in Climatic Area 4 for pasture grass is 15.3 inches. Therefore the full water supply necessary to meet 2.3 acres of sprinkler irrigation of Holst's pasture is 4.21 acre-feet per annum (70% efficiency calculated). At the computed diversion rate of 75 gpm, the total annual water use requirement will be attained in 132 hours. The claimed flow rate requires 28 days of diversion to meet the claimed volume. (Testimony by Mack and Department File.)

17. Testimony by Objectors substantiates that at times scarcely enough water exists in Phelps Creek for both Objectors to divert water simultaneously. The greatest demand for irrigation water is on weekends, but demand diminishes during late evening and early morning hours on weekends and weekdays, except for constant stock requirements. (Testimony by Objectors and DNRC Report.)

18. Permit No. 61536-s43B issued to Peters has a permitted rate of diversion from Phelps Creek for 168.3 gpm for a volume of 22.6 acre-feet per annum to irrigate 4.7 acres and a tenth of an acre-foot for stockwater from April 1st to December 1st of each

year with a priority date of June 13, 1986. (Application file and Department record.) At this rate of diversion, 30.4 days are required to meet the volume of water permitted each season for irrigation. Peters does not object to the Applicant's using water from this source from December 1 to April 1 of each year as stated on his objection (Form No. 611) to this Application.

19. Testimony shows icing problems from this creek have created hazards on local roads in the past. There is a concern for public safety if the flow levels fluctuate in the creek from the Applicant's diversion.

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 Applicants 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, municipal, is a beneficial use of water. See Section 85-2-102(2), MCA.

5. The proposed means of diversion and construction of the appropriation works are adequate. The Applicant showed a willingness to design and operate their water system to not injure the rights of the Objectors. Increasing the size of the storage tank will extend the time the Applicant can use water from storage to meet their immediate demands for water when both Objectors could potentially be using all the water in Phelps Creek. The diversion, water pressure, amount of storage, water treatment system must all meet the Department of Health and Environmental Sciences requirements for safe public drinking water standards and public safety requirements for fire protection. (See Finding of Fact 9 and 11.)

6. 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.)

7. The Applicant has a bona fide intent to appropriate water and is not attempting to speculate with this resource. Applicant intends to divert water from the source of supply from January 1 to December 31, inclusive, of each year when it is available and store water in a reservoir to meet periods of peak demand for municipal uses and maintain a reliable source of supply if and when the permit could not be exercised because of senior downstream demands for this water. (Findings of Fact 8, 9, 10, and 11.)

8. Holst presently must chop holes in the ice for stockwater during cold spells. If flows were greatly diminished from the springs, water would not be available for his stock during periods of freezing temperatures. Alternative measures were discussed during the hearing in which to mitigate this potential conflict and was met with agreement by both Objectors.

The issue of this diversion creating icing conditions on nearby roadways is not within the Department's jurisdiction as it relates to public safety. There exists other legal avenues in the system to address this issue. (Findings of Fact 9 and 19.)

9. There are unappropriated waters available in the source of supply at times when water can be put to the proposed beneficial use by the Applicant in the amount and throughout the period from January 1st to December 31st, inclusive, of each year. The evidence shows that the flows from the springs fluctuates seasonally, and as the demand for water increases during the irrigation season while the corresponding supply of

water from the springs is the lowest. The flows tend to increase later in the season due to present irrigation practices upstream.

The Applicant realizes the competition for water and there most likely will be periods when existing demand may exceed supply. The Applicant has planned for this event by including a storage reservoir in their system. It also is evident the Objectors do not divert water for irrigation 24 hours a day, every day throughout the irrigation season.

The fundamental rule of western water law is "first in time, is first in right". The mechanics of the prior appropriation doctrine allow senior appropriators to make a call on junior users for water and are entitled to the protection of that prior appropriation from all subsequent appropriators. One role of the permit process is to preclude the appropriation of water where senior appropriators would be over-burdened with having to make an unreasonable number of "calls" on a permitholder to obtain their water. (Findings of Fact 12, 13, 15, 16, 17, and 18.)

Testimony shows water is available for appropriation by the Applicant if one or neither Objector is using water from Phelps Creek. One Objector stated he irrigates two or three times per week and maybe up to four times per week during drier periods. His testimony describes a typical weekly irrigation schedule of sprinkling his pasture six hours on both Saturday and Sunday and two hours in the evenings twice each week. If both Objectors are using water from Phelps Creek simultaneously as described above, an opportunity still exists to fill the Applicant's storage tank

at other times of the day and week. Water in storage would then be available to the Applicant when both Objectors are using the entire supply of water from the springs for irrigation and stockwatering purposes. (Findings of Fact 15 and 17.)

The Applicant can meet their designed ADDMM requirement within six hours when the springs are flowing 180 gallons per minute and 11.2 hours when the flows average 100 gallons per minute. The ADDMM figure was calculated on potential water demands during the summer months which would correspond to the period of maximum water use. For the balance of the year, water requirements by the Applicant would decrease. (Findings of Fact 13.)

In the past the Objectors have enjoyed the freedom to exercise their rightful share of water from Phelps Creek without concerns for competition of the water. This freedom should be protected, but at the same time it should not preclude future appropriations by others.

The Applicant's Application for Beneficial Water Use Permit does not sufficiently describe how their water system will be operated, so as not to burden the Objectors by requiring them to excessively call on the Applicant when they need irrigation and stockwater from the springs. This criterion in the statutes must be met prior to the issuance of a permit. (Findings of Fact 11, 12, 13, 15, 16, and 17.)

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 63865-g43B is hereby granted to Gardiner-Park County Water District to appropriate 180 gpm up to 125.0 acre-feet of water per year as amended for municipal use provided Condition A below is met.

Water may be diverted between January 1 to December 31, inclusive, each year by means of developing springs in Phelps Creek and using a pipeline to fill a 200,000 gallon storage reservoir. The diversion will be located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23, Township 9 South, Range 8 East of Park County, Montana, for municipal uses in Section 23, Township 9 South, Range 8 East, Park County, Montana. The priority date is May 15, 1987, at 1:19 p.m.

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

A. Prior to the issuance of the permit, the Permittee must develop a plan showing how the operation of the water system and its operation will not unreasonably interfere with the Objectors existing irrigation and stockwater requirements, nor place an undue burden on the Objectors to excessively call on the Applicant to release water for the benefit of the Objectors. This operation plan must be finalized with signatures of the Objectors signifying their agreement to the plan by no later than December 31, 1989. If this action cannot be accomplished by

then, the Application for permit in this matter is denied. (If the Application is denied, it is due to the lack of information, and the denial would be made without prejudice giving the Applicant the opportunity to reapply.)

B. This Permit, if issued, would be 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.

C. 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.

D. This Permit would be subject to Section 85-2-505, MCA, which prohibits groundwater from being wasted. Permittee shall install in the system a shutoff device to insure all waters will be diverted back into Phelps Creek or remain in Phelps Creek when the storage facility is not being filled.

E. The Permittee shall install and maintain an adequate flow measuring device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

F. The Permittee shall install a storage reservoir of up to 200,000 gallon capacity. The Permittee may not exceed a diversion rate of 180 gallons per minute and exceed the annual volume of 125 acre-feet as amended in the record of this proceedings.

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 (1537 Avenue D, Suite 105, Billings, MT 59102); the exceptions must be filed within 20 days after the proposal is served upon the party. Section 2-4-623, MCA.

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 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. Section

2-4-621(1), MCA. 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 is already 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 16th day of June, 1989.

Keith Kerbel
Keith Kerbel, Hearing Examiner
Department of Natural Resources
and Conservation
1537 Avenue D, Suite 105
Billings, MT 59102
(406) 657-2105

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by certified mail upon all parties of record at their address or addresses this 16th day of June, 1989, as follows:

Gardiner-Park Co. Water District
P.O. Box 45
Gardiner, MT 59030

Frank and Mary Holst
Box 431
Gardiner, MT 59030

Robert and Beverly J. Peters
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Secretary