

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. 67324 BY DEAN B. KEIM AND     )  
MIKE B. KRUEGER                    )

\* \* \* \* \*

On April 13, 1989, the Department Hearing Examiner issued a Proposal for Decision in this matter. The Proposal recommended that the Application for Beneficial Water Use Permit No. 67324-s76D by Dean B. Keim and Mike B. Krueger be denied without prejudice. The Applicant filed exceptions to the Proposal and requested oral argument be held pursuant to Section 2-4-621(1), MCA. An oral argument hearing was held before the Assistant Administrator of the Water Resources Division on July 27, 1989 in Eureka, Montana. Applicant Mike Krueger was present and represented by Attorney S. Charles Sprinkle at the hearing. Also present were Objectors Douglas and Donavan Truman, and Ethel White.

The Applicant takes exception to the Hearing Examiner's Conclusion of Law No.9 that the Applicant has not provided substantial credible evidence of water availability. Applicant argues that there is an ample supply of water for filling the pond during spring runoff and that during the balance of the year the proposed water use is nonconsumptive so water availability is not a problem. The Applicant further argues that even if water is not available, no one would be injured except for the

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Applicant, so he should be allowed to take the risk. Finally, the Applicant argues that junior irrigation permits on Young Creek have been issued subject to conditions to protect senior rights and that his permit could be similarly conditioned.

After reviewing the record and considering the arguments, the Department concurs with the Hearing Examiner that the permit must be denied.

This decision hinges on the fact that any permit would require that the diversion be shut off whenever the flow in Young Creek is 25 cfs or less between May 1 and June 30 and 5 cfs or less during the rest of the year. (See Finding of Fact No. 12 and Preliminary Matters in Proposal for Decision). The Applicant does not dispute this requirement and has agreed to its implementation if a permit were issued. Unfortunately, there is insufficient information in the record to support a conclusion that the proposed fish pond could be successfully operated if this restriction on diversion is met.

The Applicant applied to divert water from Young Creek, run it through a fish pond and return it to the same stream at a point downstream from the diversion. (Finding of Fact No. 5 in Proposal for Decision). The Applicant argues that water is available because after the initial fill of the pond during spring runoff when water is abundant, all water diverted from the stream would be returned so that other users would not be affected.

Applicant's argument does not consider the section of stream

between the diversion and the point of return. Under the agreed to conditions, the flow in this section of the stream must exceed 5 cfs (25 cfs in May and June) or Applicants diversion must cease. The Applicant has not shown that flows in excess of 5 cfs occur in Young Creek a sufficient amount for Applicant to divert his water and sustain the fish pond. Therefore, the Department cannot conclude that water is available for the proposed use.

A permit cannot be issued without a showing that water is both legally and physically available. See Mont. Code Ann. § 85-2-311(1989). Here, the Applicant by agreeing to conditions to protect prior rights has met the criteria of showing legal availability. See Mont. Code Ann. § 85-2-311(1)(b)(1989). However, the Applicant has not met his burden of establishing that water is physically available in Young Creek to supply the project. See Mont. Code Ann. § 85-2-311(1)(a)(1989).

The Applicant debates the Hearing Examiner's interpretation of the record by stating that "if the water supply to the fish pond is stopped, there is no evidence it will have a detrimental effect to the fish pond." The Department finds this argument unpersuasive. The Applicant testified that the very purpose of his flow request is to keep fish alive and that the 100 gpm flow through was originally recommended to him by the Montana Department of Fish, Wildlife and Parks ("DFWP") to keep fish alive. (Hearing Transcript, page 4 and Proposed Finding of Fact No. 12.) Moreover, it was the Applicant's burden to prove the project's viability. Mont. Code Ann. § 85-2-311(1989).

The Applicant testified that fish could survive "for a limited time" if flows were shut down. (Finding of Fact No. 12 in Proposal for Decision). However, there is no testimony anywhere in the record to indicate how long "a limited time" is and also no testimony or documentation to show that water would ever be available during the winter months. In fact the record indicates that water availability will also be a problem during late summer. (Finding of Fact No. 13 in Proposal for Decision.) Given this record, the Hearing Examiner could only conclude as it did that the Applicants failed to show "that the amount of water which they propose to divert for use for a fish pond is available, throughout the period during which the Applicants seek to appropriate." (Conclusion of Law No. 10 in Proposal for Decision).

The Applicants argue that DFWP flow records on Young Creek show that water is available for this project. However, the Objectors argue that DFWP flow records show just the opposite, that water is not available. If such records exist, no party chose to introduce them during these proceedings. As a result the Hearing Examiner was left with unsubstantiated claims supporting and opposing availability. Where applicant presents unsubstantiated testimony that there is unappropriated water in the source, and that testimony has been contradicted by objector's equally unsubstantiated testimony, applicant has not met his burden of proof regarding the criterion. See, Application for Water Use Permit No. 58432-43A by Fredrick,

November 14, 1986 Final Order.

Regarding these disputed flow records for Young Creek, it would be inappropriate for the Department to take administrative notice of the records. Consideration of the evidence now would deprive the parties of their right to examine the evidence and argue their respective interpretations. Administrative notice of clearly undisputed or simple facts by the Hearing Examiner is appropriate. ARM 36.12.221. However, where the interpretation of the facts are subject to the opinion or judgement of others, they must be debated at the hearing. In re Don Brown, Cause 50612, First Judicial District, Lewis and Clark County, Montana, June 15, 1987.

The Applicant also argues that if the water supply proves insufficient to supply his project, only he will be hurt. He believes that even if flow records are currently insufficient to show that his project could be sustained, he should be granted a permit to try the project. The Department appreciates the Applicants desire to experiment but is unable to grant a beneficial use permit on that basis. Applicants must show physical availability and there are no exceptions. Mont. Code Ann. § 85-2-311(1)(a) (1989). This "physical availability" criteria helps insure that permits on record are not merely "paper rights" but reflect actual appropriations. See, Application for Water Use Permit No. 63796-s41G by Gerald and Glenda Ohs, page 3 of Final Order issued Dec. 15, 1988.

Finally, the Applicant points out that permits junior to the

Applicant's have been issued on Young Creek subject to conditions. The Applicant questions why his permit cannot be similarly conditioned. However, Applicant has requested a permit to divert water over an entire year. The referred to junior permits are for irrigation projects that only divert water during the spring and early summer when water is plentiful. The junior permits prohibit diversion during August and September. Here, the Applicant has not established that this project can be successfully operated if it is without flow in August and September. Moreover, unlike with the junior irrigation permits, the Applicant here requires winter flows. As discussed above, there is no flow information in the record to establish that any water is available for diversion from Young Creek during the winter.

The Applicant's Exceptions to Proposal for Decision also makes specific reference to a possible agreement with DFWP that Applicant believes could help solve the availability problem. Under the agreement, Applicants would retire their senior right if DFWP would allow Applicants to continue using their junior right for the fish pond. While this agreement may be possible, there is nothing in the record to indicate that DFWP is contemplating the agreement. Moreover, few details are provided about the agreement to allow the Department to speculate about how availability would be affected. However, it does appear that the senior right is an irrigation right. (See Finding of Fact No. 12 in Proposal for Decision). Irrigation rights are

typically only for summer use. Retiring a summer right is unlikely to solve winter availability problems.

The Hearing Examiner recognized that with more information on flows and fish pond requirements, that it may be possible to design this project so that water would be available.

(Conclusion of Law No. 11 in the Proposal for Decision).

However, it is not up to the Department to gather the information or design the project. The Applicant may apply again if he can gather information or enter agreements with DFWP that solve the availability problem.

Upon review of the evidence herein, consideration of the exceptions, response to those exceptions, and oral argument by the parties, the Proposed Finding of Fact and Proposed Conclusions of Law as proposed by the Hearing Examiner are hereby adopted.

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

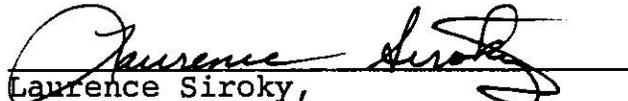
ORDER

Application for Beneficial Water Use Permit No. 67324-s76D is denied without prejudice.

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 30 days after service of the Final Order.

Dated this 27 day of June, 1990.

  
Laurence 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 Final Order was duly served upon all parties of record at their address or addresses this 28 day of June, 1990, as follows:

Dean B. Keim  
Mike B. Krueger  
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Rexford, MT 59930

Charles Sprinkle  
Douglas & Sprinkle  
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Douglas F. & Stella R. Truman  
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Montana Department of Fish,  
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Liter Spence  
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Lloyd M. & Lucille Soderstrom  
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Melvin & Ethel White  
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Larry Beardsley  
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1873.



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. 67324-s76D BY DEAN B. KEIM )  
AND MIKE B. KRUEGER )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing in the above-entitled matter was held on February 27, 1989 in Eureka, Montana.

Applicants Dean Keim and Mike Krueger appeared at the hearing by and through Mike Krueger and counsel Charles Sprinkle.

Jay Billmeyer, consulting engineer, appeared as a witness for the Applicants.

Objector Douglas Truman appeared at the hearing in person. Objector Stella Truman attended the hearing, but appeared by and through her son, Donavan Truman.

Objectors Melvin and Ethel White appeared at the hearing by and through Ethel White. (See Preliminary Matters.)

Objector Montana Department of Fish, Wildlife, and Parks did not appear at the hearing as a result of a stipulation by the Applicants as to certain permit conditions. (See Preliminary Matters.)

Objectors Lloyd and Lucille Soderstrom appeared at the hearing in person.

Charles Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office, appeared as staff witness for the Department

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of Natural Resources and Conservation (hereafter, the "Department").

PRELIMINARY MATTERS

A. The hearing record

The hearing in this matter was held in conjunction with the contested case hearing on another application by the Applicants, involving basically the same parties. (See In the Matter of the Application for Change of Appropriation Water Right No. G129039-76D by Dean B. Keim and Mike B. Krueger.) Due to the length of the change proceeding and to the overlapping nature of the testimony between the two hearings, the Hearing Examiner agreed to take administrative notice of all relevant exhibits and testimony presented in the change proceeding which also apply to the application for a new use permit. Any exhibits or testimony which were presented in the change proceeding will be denoted with "change" for purposes of the present matter.

The Hearing Examiner agreed to allow Objector Douglas Truman to submit data concerning his diversion system after the hearing, with a copy mailed to the Applicants, for the purpose of rebutting the testimony of Applicants' witness Jay Billmayer. Mr. Billmayer had "guesstimated" that the Objectors' diversion works diverted more water than allowed by their permit. Mr. Truman did submit such data, but his letter was returned to him in error by the hearings reporter as a forbidden ex parte communication. See March 27, 1989 letter to Douglas Truman.

However, a review of the testimony at the hearing shows that the issue of Mr. Truman's amount of diversion is irrelevant to the decision in this matter; therefore, Mr. Truman's submission would be disregarded in any event, along with Mr. Billmayer's testimony on this subject.

The Hearing Examiner notes the Objector's argument that Mr. Billmayer's calculations are based only on visual estimates rather than derived from measurements, and has weighed his testimony accordingly.

B. Participation by parties

Ethel White was unable to remain through the hearing in this matter. Therefore, the Hearing Examiner agreed to note for the record that her concerns are water quality, an issue which she felt that the other Objectors would adequately cover, and ensuring that the permit conditions proposed by the Department of Fish, Wildlife, and Parks are imposed on any permit which may be issued in this matter.

The Department of Fish, Wildlife, and Parks objected to the application in this matter, but agreed to issuance of the permit if it is made subject to the following conditions:

1. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana Law.
2. This permit is issued subject to the following express terms, conditions, restrictions, and limitations:
  - A. This Permittee shall install adequate measuring devices at and just below his point of diversion, and shall use these to keep a written record of the flow rates, volumes, and periods of diversion

of all waters diverted pursuant to this permit and of the flow of Young Creek during the times of diversion. He shall make these records available to the Department upon request.

- B. The Permittee shall cease diverting water pursuant to this permit whenever the flow of Young Creek is 25 cfs or less between May 1 and June 30 of any year, or is 5 cfs or less at any other time during his authorized period of appropriation.
  - C. The Permittee shall use a screen on his diversion works which is of a sufficiently small mesh size to prevent the entry of fish and their offspring into the diversion system.
3. The initial filling of this pond shall be during a period when the flows in Young Creek exceed 25 cfs.
  4. If necessary, the pond shall be lined to prevent excessive saturation.

The Applicants agreed to these conditions; therefore, the Department of Fish, Wildlife, and Parks did not appear at the hearing in this matter. (See January 6, 1989 letter from Liter Spence, DFWP, to the Hearing Examiner.) Any permit issued in this matter will contain the agreed-upon conditions set forth above.

John Miller and Judith Watson, who appeared at the hearing on the Applicants' change application (see Preliminary Matters, Proposal for Decision In the Matter of the Application for Change of Appropriation Water Right No. G129039-s76D), were given individual notice in the present matter but did not attend the hearing. Larry Beardsley, who also appeared at the change application hearing, was not given individual notice due to the fact that the transfer from his predecessor in interest had not been processed, and the notice went to said predecessor, Unser

Hof, Inc. (See Department File.) However, Mr. Beardsley had constructive notice of the hearing in the present matter, as evidenced by his attendance at the companion hearing. Since Mr. Beardsley (together with the other persons attending the change application hearing which preceded the hearing in the present matter) was informed that testimony at the change proceeding would be applied to the present proceeding where relevant, administrative notice will be taken of his testimony from that proceeding.

#### EXHIBITS

The Applicant offered five exhibits for inclusion in the record of the change proceeding. A review of these exhibits shows only two of the exhibits to be relevant for purposes of the present matter:

Applicants' Exhibit 4 is a photocopy of a drawing of the layout for the Applicants' proposed diversion and impoundment. (One page.)

Applicants' Exhibit 7 is a lab report showing soil test data for a soil sample from the Applicants' property. (One page.)

Applicants' Exhibits 4 and 7 were accepted for the record without objection.

The Objectors offered two exhibits for inclusion in the record of the change proceeding. A review of these exhibits shows only one of the exhibits to be relevant for purposes of the present matter:

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Objectors' Exhibit 2 is a photocopy of a water analysis of a water sample taken from Young Creek by Objector Douglas Truman. (One page.) Objectors' Exhibit 2 was accepted for the record without objection.

The Objectors offered one additional exhibit for inclusion in the record in the present matter:

Objectors' Exhibit 3 is a water analysis report of a water sample taken from Tooley Lake by Objector Douglas Truman. (One page.) Objectors' Exhibit 3 was accepted for the record without objection.

The Department offered one exhibit for inclusion in the record in both matters:

Department Exhibit 1 is a panoramic picture of the Applicants' pond, composed of eight photographs taken by Charles Brasen on August 30, 1988. Department Exhibit 1 was accepted for the record without objection.

The Department file was made available at the hearing for review by all parties. No party objected to the admission of 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. 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 § 85-2-306 do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 67324-s76D was duly filed with the Department of Natural Resources and Conservation on December 10, 1987 at 12:15 p.m.

3. The pertinent portions of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on January 27, 1988.

4. The source for the Applicants' proposed appropriation is surface water from Young Creek, a tributary of the Kootenai River.

5. The Applicants propose to divert 100 gallons per minute ("gpm") up to 160.75 acre-feet of water per year for flow-through nonconsumptive use in a fish pond, with an additional .25 acre-foot of water per year to be used consumptively for stockwatering.

The Applicants propose to divert the water from Young Creek through an existing diversion ditch at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. The water would be run through a pond located in the

NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14 and returned to Young Creek at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14, Township 37 North, Range 28 West, Lincoln County, Montana. (See Department File; Applicants' Exhibit 4.) The stockwatering use would be done from the pond. (Testimony of Applicant Mike Krueger.) The proposed period of diversion for both uses would be January 1 through December 31, inclusive, of each year.

6. The Applicants propose to run water through the approximately 535-foot diversion ditch, then into one of two existing pipelines. (See Applicants' Exhibit 4.) One of the pipelines serves other water users, while the Applicants have exclusive use of the pipeline closest to their proposed pond. (See pipeline marked "D" on Applicants' Exhibit 4.) The Applicants already utilize their pipeline to carry water pursuant to other water rights (testimony of Krueger), and will be using it to carry an additional 160 gpm changed water right in the near future. See Proposal for Decision In the Matter of the Application for Change of Appropriation Water Right No. G129039-s76D.

The Applicants have excavated a pond which runs parallel to their pipeline, with the impoundment structure built at a right angle to the pipeline at the point where the diversion ditch from Young Creek feeds into the pipelines. (See Applicants' Exhibit 4.) The pond is 540 feet long, with a width of 110 feet at the impoundment narrowing to 85 feet at the upper end of the pond. Although the proposed off-stream storage capacity of the pond is

8.7 acre-feet (see Application, Public Notice), the actual storage of the impoundment as constructed is approximately 4.5 acre-feet, with a surface area of approximately one acre. (Testimony of Jay Billmayer in change proceeding.)

The Applicants propose to fill the pond during spring runoff in March and/or April, then maintain the pond level and provide oxygen and water circulation by constantly running a 100 gpm flow through the pond. The Applicants' property would be fenced off from the creek so that stock on the property would drink from the pond rather than from the creek. (Testimony of Krueger.)

7. Testimony indicates that the diversion ditch from Young Creek is of sufficient size to carry 100 gpm, in addition to the other water rights of the ditch users (including the Applicants' own 160 gpm of changed use), if the ditch is cleaned and measures are taken to ensure that the ditch does not overflow.

As noted in the Proposal for Decision in the change proceeding, the ditch used to overflow on occasion, especially in the area at the end of the ditch. (Testimony of Truman, Kauffman at change proceeding.) However, the Applicants have done earthwork to raise the level of the ditch sides, especially in the area of the ditch end, and have installed a berm to brace the area of the ditch that used to wash out. (Testimony of Krueger, Billmayer in change proceeding.) Applicants' witness Jay Billmayer testified that measures can be taken to ensure that the water does not overrun the ditch, by setting the top of the sides

of the ditch at or above the level of the creek bank, or by installing an overflow weir.

Effective use of water through the pipelines also requires that the water in the ditch be kept enough to provide head for the water entering the pipes. A water level at least two feet higher than the top of the pipe inlets must be maintained in order to provide sufficient head. (Testimony of Kauffman at change hearing.) The addition of more flow in the ditch should be useful in incrementing the "carriage water" and water depth. (Testimony of Krueger, Billmayer in change proceeding.)

However, it is possible that the diversion ditch will not be able to divert all of the water rights from Young Creek as the diversion is presently constructed, since presently portions of the ditch are higher than the diversion point, and the diversion point is not low enough at the stream to divert the full water demands of the ditch users at times of low flow. (Testimony of Kauffman, Billmayer, Beardsley in change proceeding.) The Objectors testified that they had attempted to resolve the problem by installing a concrete "abutment", but that the installation did not resolve the problem. Objectors' witness testified that many times in the past the water did not enter the diversion ditch from Young Creek fast enough to supply adequate head for the necessary pipeline pressure, and that it was necessary to pile rocks in the creek to help divert flow into the ditch. (Testimony of Kauffman at change proceeding.)

Applicants' witness Jay Billmeyer testified that the problem could be alleviated by deepening the diversion at the creek or, if necessary, by moving the point of diversion upstream on Young Creek to provide a better approach into the ditch. (Testimony at change proceeding, new use hearing.)

8. Applicant Krueger testified that the Applicants intend to divert any water right they may be granted in this matter through their existing pipeline. Mr. Krueger testified that it was possible for the pipeline to carry the applied-for amount in addition to their other water rights, especially since the Applicants may not irrigate with their 160 gpm right (the change) at the same time as they are irrigating their "big fields" with their other irrigation right.

Water would be diverted into the pond from the main pipeline either through the same pipe used to divert water pursuant to the change authorization, or through a separate pipe. Mr. Krueger testified that the Applicants could install a "T" from the main which would only carry water pursuant to the present permit, or could install a 2-inch pipeline separate from the main line. Under either choice, the diversion pipe would be sized to limit the amount of water diverted to the permitted amount, and would include a flow meter and a valve which could be used to shut off the flow of water through the pipe.

9. Applicant Mike Krueger testified that he had developed the idea of maintaining a fish pond in an effort to keep the fry (young fish) which enter through the screen on Young

Creek from dying. He stated that there are fish in the diversion ditch which die when the water left in the ditch freezes in the winter, and that fish which get into the Applicants' water system will die if the Applicants have to empty their pond at the end of the irrigation season.

The Applicants also have talked to the Department of Fish, Wildlife, and Parks about stocking the pond with native cutthroat trout. Fish, Wildlife, and Parks suggested that a spawning area could be set up in the pond by putting pea gravel down in the area where the water enters the pond. Any fry which are spawned in the pond could help restock Young Creek by escaping back to the creek through the pond outlet. (Testimony of Krueger.)

10. The depth of the Applicants' pond would range from about seven feet at the deepest point to approximately four feet deep at the "tailwater". The Applicants propose to make the initial pond fill in the spring during runoff, when water is plentiful, and when most irrigators have not yet started irrigating. Once the pond is filled (a "consumptive" use of approximately 4.5 acre-feet of water), 100 gpm would be diverted into the pond for maintenance of aeration and circulation for fishery habitat, then returned to Young Creek. (Testimony of Krueger.)

Discharge of water would be through an outlet tube which has not yet been installed, since the Applicants wanted to let the earthwork settle first. Mike Krueger testified that the settling, in conjunction with the fact that the Applicants have

seeded the banks to establish grass, should keep return flow to the creek clean. The outlet will be installed at the top of the embankment, on the east side of the pond, at a level where any water which exceeds the pond's capacity will flow out. The outlet will be sized to act as a spillway for high water. (Testimony of Krueger.) Water flowing through the outlet will flow down an old channel into Young Creek, a distance of approximately 130 feet. (Testimony of Krueger at change proceeding; Applicants' Exhibit 4.)

11. Applicant Krueger testified that the fish pond use should be basically nonconsumptive, once the pond has been filled. He believes that the pond will not seep, since it has been lined with compacted soil. (Testimony in change proceeding.) Water is so close under the bottom of the pond, as evidenced by the springs which the Applicants uncovered during excavation, that any water which might seep will not be lost, but will return to Young Creek. (Testimony of Krueger.) The Applicants do not intend to develop the springs as part of their water source. (Testimony of Krueger.)

There would be some undetermined amount of evaporation from the pond, which the evidence indicates would be minimal. The pond has a surface area of approximately one acre (testimony of Krueger, Billmayer), and is shaded by trees on the east bank. Mike Krueger testified that the pond is in direct sunlight for only a few hours each day, due to being shaded by the trees in the morning, and by the shadow of an adjoining hill in the

afternoon. Witness Jay Billmayer testified that an evaporation should be offset by the amount of precipitation the pond collects. Although some of the collected precipitation would otherwise have made it into Young Creek, Mr. Billmayer testified, the pond will collect water that otherwise would have been lost to soil saturation and evaporation and return it to Young Creek; thereby, the pond should not cause any additional losses.

In response to questioning as to why the Applicants' use of the pond for irrigation purposes (see Change of Appropriation Water Right No. 129039-s76D) will not draw the pond down, thereby making it unsuitable for the proposed use for a fish pond, Applicant Krueger responded that the Applicants will only pump out of the pond at the times when the irrigation water is being diverted into the pond, and that they will not pump at a rate which exceeds the incoming flow. Therefore, the water level in the pond should remain constant.

In response to allegations that the trees which were left on the bank to shade the pond will consume water from the pond, Applicant Krueger replied that the trees are not immediately next to the pond, that they already have a water source in the high water table, and that there are fewer trees next to the pond than in the 200-foot stretch of Young Creek the water would be bypassing in being circulated through the pond.

12. Mike Krueger testified that the Objectors should not be adversely affected by his proposed water use, since any permit granted in this matter will be junior to all other water uses,

and since it will be specifically subject to Fish, Wildlife, and Parks ("FWP"), criteria requiring the diversion to be shut down when certain minimum flows in Young Creek are not being met.

(See Preliminary Matters.) Mr. Krueger stated that fish in the pond should remain all right for a "limited amount of time" if the flow has to be shut off because the proposed use is junior and is subject to FWP criteria. He stated also that he might be willing to use his irrigation water right in an emergency, to save the fish, by diverting it into the pond for flow-through rather than for irrigation pumping.

13. The Objectors testified that most of the water uses on Young Creek are shut down in some years, due to the low flow, and that some junior uses are shut down every year. The Permit issued to Larry Beardsley, with a priority date of March 15, 1988, was conditioned so that the permit may not be exercised past July 31 of any year, since FWP determined the flows of Young Creek to be critically low in August and September. (Testimony of Donavan Truman. See also, Department records on Beneficial Water Use Permit No. 67796-s76D, issued to Larry Beardsley.) As a result, the Objectors believe that Young Creek already is overappropriated. (Testimony of Donavan Truman, Douglas Truman, Lloyd Soderstrom.)

14. In addition to expressing concerns regarding the adequacy of the Applicants' proposed means of diversion, water availability, and potential water losses, the Objectors expressed concern that the Applicants' proposed project might adversely

affect the water quality of Young Creek. (Testimony of Douglas and Donovan Truman, Lloyd Soderstrom, Ethel White.)

Objectors Douglas Truman and Donovan Truman introduced a water sample analysis of Young Creek water in the change proceeding to show that the pH level of Young Creek already is high. (See Objectors' Exhibit 2.) They stated that they are concerned that the Applicants' proposed circulation of water through the pond will exacerbate the water quality problem by running the water through soils disturbed by excavation. They feel that the soil chemistry of the Applicants' property (Applicants' Exhibit 7), together with the excavation work, may cause leaching which will result in heightened pH and saline levels in Young Creek. The Objectors also believe that the Applicants' pond lies in a highly alkaline area, and that chemicals which have settled in the "hole" where the Applicants have constructed their pond will flush into the creek. (Testimony of Donovan Truman, Douglas Truman.)

The Trumans testified that they are starting to develop saline or alkaline areas in some of the low spots on their own property, resulting in the loss from production of a little bit more land each year. In response to questioning by the Applicant concerning the high sodium levels of water from Tooley Lake, in which the Trumans have a water right (see Objectors' Exhibit 3), the Trumans stated that the majority of their irrigation water never enters Tooley Lake for storage, although they occasionally pump water out of the lake to irrigate.

The Objectors stated that they want the Applicants to be required to test the soils in the pond, and in the area between the pond and Young Creek, before they are granted a permit. They stated that they would continue to object to issuance of a permit in this matter if testing by a neutral party showed the pH or salinity levels in the Applicants' soil to be higher than those in the creek. (Testimony of Douglas Truman, Donavan Truman.)

15. Applicant Krueger testified that the proposed use of water in the pond should not cause adverse effect to the water quality of Young Creek. An analysis of soil from the pond area indicates that the soil is slightly lower in pH than Young Creek water (8.0 compared to 8.1). (Compare Applicants' Exhibit 7; Objectors' Exhibit 1.) Furthermore, the pond has been allowed to settle and has been lined, and the banks have been seeded with grass, to prevent sedimentation of the water from occurring.

Applicants' witness Jay Billmeyer testified in the change proceeding that he has worked with a lot of saline soils, and that the setting of the ponding is not one which exhibits high alkalinity. He stated that, given the small size of the project and of the flow involved, especially compared to the overall Young Creek drainage basin, any effect on water quality would be too small to measure.

16. In the change proceeding, the Objectors also expressed their belief that the Applicants may not have the necessary easements in order to do work on the diversion ditch and pipelines. (Testimony of Truman, Watson, Beardsley.) Applicant

Krueger testified that the pipelines are on the Applicants' property, and that he also believes easements are appurtenant to the property.

The Objectors also expressed concern that the Applicants might extend the use of their more senior irrigation right by utilizing it for fish pond use in addition to irrigation. The Objectors alleged that the Applicants would assert this right in order to obtain water to maintain a viable fish pond, since water often would not be available to them pursuant to any permit issued in this matter.

17. A review of Department records indicates that there are no planned uses or developments for which a permit has been issued or water reserved, in addition to the claimed and permitted uses already being utilized on Young Creek.

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. All relevant substantive and procedural requirements of law or rule having been fulfilled, and all requirements of notice having been adequately met (see Preliminary Matters), the matter was properly before the Hearing Examiner.

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

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, 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 uses of water, for stockwater and for a fish pond, are beneficial uses of water. See § 85-2-102(2), MCA.

5. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been granted or for which water has been reserved. See Finding of Fact 17.

6. The Applicants have provided substantial credible evidence that the proposed means of diversion, construction, and operation of their appropriation works are adequate and feasible. See § 85-2-312, MCA, which grants the Department the authority to impose any terms, conditions, restrictions, or limitations which are necessary to ensure that the statutory criteria are met.

The evidence indicates that the capacity of the diversion ditch is adequate to carry the additional flow, and that the Applicants have ensured that the ditch will not overtop or wash out. See Finding of Fact 7. Although the record indicates that the ditch needs to be cleaned out in order to handle the whole flow, this problem can be met by requiring the Applicants to clean the diversion ditch prior to diverting the additional flows through it.

As the diversion into the ditch is presently constructed, not all of the ditch users' water may make it into the diversion ditch during periods of low flow in Young Creek. See Finding of Fact 7. Part of the problem may be alleviated if measures are taken when the Applicants clean the ditch, to remove any portions of the ditch bottom that are higher than the diversion point. Any remaining problems can be solved by requiring the Applicants to deepen the diversion point and/or to install such dike or abutment as may be allowed by the applicable streambed preservation laws, or to change the point of diversion to the extent necessary to maintain an adequate diversion of the water rights on the ditch during times of low flow in Young Creek. See Finding of Fact 7.

The Applicants have provided substantial credible evidence that the rest of their proposed system is adequate. See Findings of Fact 8, 9, 10, and 11.

7. The Applicants have provided substantial credible

evidence that the water rights of prior appropriators will not be adversely affected by the proposed project.

The Objectors have suggested that the proposed diversion into the Applicants' pond will adversely affect their water rights by exceeding the ditch capacity, making it more difficult to maintain a pressure head for their pipeline, or by using additional water from young Creek. However, the evidence in the record indicates that each of these objections either already has been met or can be met through the imposition of permit conditions.

The evidence in the record indicates that the diversion ditch has an adequate carrying capacity to handle the additional flow if the ditch is cleaned, and that the earthwork which the Applicants have done will keep the ditch from overtopping. See Conclusion of Law 6, above. The Objectors should not be adversely affected by the flow of additional waters in the ditch, since the additional water should work to provide added head for the Objectors' pipeline. See Finding of Fact 7. The temporary removal of water from Young Creek should not affect water users downstream on Young Creek, since the water will be returned to Young Creek, and any permit issued can be conditioned to require water measurements to ensure that the full diverted amount is being returned.

The Applicants have provided substantial credible evidence of how their diversion may be operated to physically limit the amount of their diversion. However, the Applicants would have to

be required to utilize a separate diversion pipe from their main pipeline, in addition to the pipe they propose to utilize for their changed appropriation right (see Finding of Fact 8), in order that the rights can be controlled separately. The Applicants cannot be allowed to utilize their irrigation right for fish pond maintenance. See Conclusion of Law 10, below.

With regard to the Objectors' concerns about water quality, there is no evidence to suggest that the Applicants' proposed water use will have any impact on the water quality of Young Creek. Given the small amount of water involved, the short time of contact, and the fact that the Applicants have had a soil analysis done which shows pH and saline levels lower than those in the creek water, there should be no measurable effect. See Finding of Fact 15. The Applicants have taken adequate measures to prevent siltation of the water. See Finding of Fact 10.

8. The concerns expressed by the Objectors as to whether the Applicants have the necessary easements are property issues outside the scope of the Department's jurisdiction.

It appears likely that the Applicants already have easement rights, or can obtain them. (See Finding of Fact 16; § 85-2-414, MCA.) However, it is not necessary or proper for the Department to make a determination on this issue. If the easements cannot be obtained, and as result the proposed project could not be completed, any permit issued in this matter would not be perfected and subsequently could be revoked. See § 85-2-314, MCA.

9. The Applicants have not provided substantial credible evidence that there are unappropriated waters in the source of supply at times when the water can be put to the fish pond use proposed by the Applicants, in the amounts the Applicants seek to appropriate, and that the amount of water requested is available throughout the period during which the Applicants seek to appropriate.

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

Any water which is physically available to the Applicants in this matter (apart from the small consumptive use for stockwater) is legally available, since the water would be returned to the

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source to fulfill senior water uses downstream. However, there is no evidence that the requested amount of water will be physically available to the Applicants throughout their requested period of appropriation. Testimony of the Objectors indicates that in many years most of the water rights which already exist on Young Creek have been shut off. See Finding of Fact 13. Therefore, any permit which might be issued in this matter, as a junior permit, would be shut off in many years, since the Applicants specifically have agreed to permit conditions which require their diversion to be shut off during low flow events in Young Creek. See Preliminary Matters, Finding of Fact 12. Furthermore, there is no flow data to indicate whether or not the Applicants would be able to divert water during winter months.

If the Applicants' diversion was only shut down for a short time, it might be possible for the Applicants to maintain the pond as an adequate habitat. See Finding of Fact 12. However, no evidence was presented which indicates whether water rights are shut off for long or short periods of time, although the permit conditions agreed to by the Department of Fish, Wildlife, and Parks on a permit only three months junior to that of the Applicants bans use of water during the entire months of August and September. (See Finding of Fact 13; Department records on Beneficial Water User Permit No. 67796-s76D issued to Larry Beardsley.)

The Applicants also have not provided substantial credible evidence that their proposed stockwater use is feasible in the

absence of the proposed fish pond use. It is possible that the Applicants could divert the entire .25 acre-foot of water requested for stockwatering purposes during high water in the spring, when water appears to be available. However, there is no evidence that such a small amount of water could be maintained as a viable source of stockwater during the periods of time when the Applicants' water rights would be shut off.

In the absence of information on when water is and is not available for diversion by the Applicants, and how the water could be managed so as to protect the proposed fishery during times when the water could not be diverted, it is not possible to condition a permit to meet the statutory criterion. The Applicants have failed to show that the amount of water which they propose to divert for use for a fish pond is available, throughout the period during which the Applicants seek to appropriate.

10. Applicant Krueger implied that the Applicants could make up for any deficit in water availability by utilizing their irrigation right for the benefit of the fishery. See Finding of Fact 12. However commendable the Applicants' intent may be in foregoing use of their irrigation water, they may not utilize their irrigation right for the fish pond.

The Applicants' existing water rights are for irrigation. Use of these rights for any other purpose constitutes a change in purpose of use, for which the Applicants are statutorily required

to obtain a change authorization from the Department. See § 85-2-402, MCA. The Applicants have not obtained such authorization.

Even setting aside the statutory requirement of obtaining a change authorization, however, the Applicant's suggested use of irrigation water could lead to a finding of adverse effect even though it might mitigate the problem of inadequate water. Exercising a senior water right to enable a junior use could cause adverse effect by making the priority system unadministrable, or by creating an enlarged use of water (in the present matter, due to the need for almost constant circulation) or a different pattern of use. Even though downstream users might not be affected if the water which was diverted was returned to the stream, upstream users and other users on the same ditch could be adversely affected if the Applicants exercised a senior priority date to utilize more water or a different pattern of demand and use than the other users would be subject to if the Applicants used their irrigation water solely for irrigation.

Therefore, the Applicants have not shown that they could utilize their irrigation rights to solve their water availability problem in this matter.

11. The Applicants' Application for a Beneficial Water Use Permit must be denied, due to their failure to provide substantial credible evidence on the permit criterion of water availability. However, since the denial is based on lack of information, the denial will be made without prejudice so that

the Applicants may re-apply. It appears likely that the Applicants may be able to overcome the problem of proving water availability, which in this case was caused by the stipulation with Fish, Wildlife, and Parks that no diversions would be made during specified low flow conditions, by substituting fishery mitigation measures for the enforced shutoff condition.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon all files and records in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water User Permit No. 67324-s76D by Dean B. Keim and Mike B. Krueger is hereby denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

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. 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 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.

Dated this 13<sup>th</sup> day of April, 1989.

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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was duly served upon all parties of record at their address or addresses this 13<sup>th</sup> day of April, 1989, as follows:

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